



By
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City Limits

Insight: Old acts don't trigger new policies.

Different language requires a different result.

Claims often involve injuries that occur over time. As injuries occur, one policy ends and another begins. This begs a question: Which policy applies? This issue of "trigger" has been litigated frequently over the last 30 years.

Generally, discrete or narrow triggers favor insurers. Broad triggers favor policyholders. The cases policyholders like best involve the so-called triple trigger or continuous trigger. Under this trigger, policyholders maintain that all policies apply, from the start of the injury until its discovery.

Triple trigger cases generally involved toxic torts, such as pollution or asbestos. This past June, a policyholder tried to extend the toxic tort approach to a commercial case. But the 9th U.S. Circuit Court of Appeals rejected the policyholder's argument in *City of San Buenaventura v. Insurance Company of the State of Pennsylvania*.

In *San Buenaventura*, a city sold low-income condos. Units were subject to price caps. Owners could not sell above the caps. Some owners claimed that the city didn't disclose the caps. Owners sued the city, demanding that the city drop the caps or pay damages. The city made claims against its insurers.

The insurers said the city wasn't covered because the policies began after the bad act occurred. The city failed to disclose the cap at least a year before the policies started. The owners' claims were based on this bad act, not continuing ones.

The city said that sales caps caused condo owners to suffer continuously. So, they argued that the occurrence was continuous.

The city analogized its claim to toxic torts, specifically *Montrose*

Chemical Corp. v. Admiral Insurance Co. In *Montrose*, pollutants leached into the environment continuously. The California Supreme Court held that property damage occurred continuously, so therefore coverage was triggered continuously.

But in *San Buenaventura*, the Ninth Circuit found that the policyholder "stretches *Montrose Chemical* too far." The court's reasoning makes perfect sense.

First, the court compared the policy language in the two cases. In *Montrose*, coverage was triggered by damage during the policy period. But in *San Buenaventura*, coverage was triggered by an occurrence during the policy period. *San Buenaventura* required the bad act to happen during the policy period.

Different language requires a different result. In fact, the court wrote, "perhaps the underwriters of these two policies had read *Montrose Chemical* and drafted around it to avoid similar exposure."

Second, the Ninth Circuit noted that the policyholder's argument would undermine the most basic notions of insurance:

"The city's argument for extending *Montrose Chemical*... would imply an absurd result. Were the 'continuous exposure' or 'continuous damage' language in *Montrose Chemical* construed to apply to failure to remedy a discrete previous harm, then a 2001 automobile accident resulting in tort liability... would fall within the coverage of a policy sold in 2003. ...Such a construction... would enable the city to delay buying insurance until after it had incurred a tort liability."

You buy insurance to protect against the risk of a bad event in the future. If the policyholder's argument were accepted, policyholders would only purchase insurance after claims arose.

The Ninth Circuit got it right. Continuous trigger shouldn't become endless trigger.

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