

INSURANCE

Basic Insurance Questions

1. **Who** is insured?
2. **What** risks are covered?
3. **Where** – what locations and/or operations?
4. **When** – how long is coverage afforded?
5. **How** much money – cost and payout?

Impact of Litigation on Construction Liability Insurance

- Limited Number of Carriers – Increased Cost
- Loss in Progress and Known Loss Exclusions
- Limitations on Completed Operations Coverage
- Limitations on Additional Insured Coverage
- Increased Deductible or SIR
- Mold and Microbial Exclusions
- Residential Work Exclusions

Strategies for Mitigating Shrinking Liability Insurance Coverage

- Loss Prevention Programs
 - Quality Control
 - Right to Repair / Customer Service
 - Alternative Dispute Resolution

- Contractual Risk Allocation
 - Indemnities
 - Extended Warranties

- Other Forms of Insurance Coverage
 - Project Specific Coverages
 - Wrap Up Policies, OCIPs and CCIPs



INSURANCE

- Liability for property damage for which insured is legally obligated to pay. *Montrose Chem Corp. v. Admiral Ins.*, 10 Cal.4th 645 (1999).
- “Property damage” is physical injury or damage to or destruction of tangible property; post 1973 insurance policies.



INSURANCE

- Incorporation Theory:
- Bad component incorporated in building is property damage. *Geddes & Smith v. St. Paul Mercury Indem. Co.*, 51 Cal.2d 558 (1959); *Economy Lumber v. Ins. Co. NA*, 157 Cal.3d 641 (1984).
- Diminished value can be "property damage".
- Compare to the contrary: *New Hampshire Ins. v. Viera* (9th Cir. 1991) 930 F.2d 696 and *St. Paul Fire v. Coss*, 80 Cal.3d 888 (1978).



INSURANCE

- Incorporation of defective products in building is physical injury to building. *Armstrong World Industries v. Aetna Cas. & Surety Co.*, 45 Cal.4th 1, 92 (1996); builder incorporated hazardous products.



INSURANCE

- Caused by an occurrence; accidental event . . . defective pipe must leak. *San Diego Hous. Comm'n v. Industrial Indemnity*, 95 Cal.4th 669 (2002).
- Coverage requires "accidental" event *Gogerty v. General Acc. Fire & Life Assur. Corp.*, 238 Cal.2d 574 (1964).



INSURANCE

- “Trigger” – continuous *Maryland Casualty v. National Am. Ins.*, 48 Cal.4th 1822 (1996); *Pepperell v. Scottsdale Ins.*, 62 Cal.4th 1045 (1998).
- Test is when damage could potentially occur.
- *Montrose Chem. Corp. v. Admiral Ins.*, 10 Cal.4th 645 (1995).

Continuous or Progressive Loss

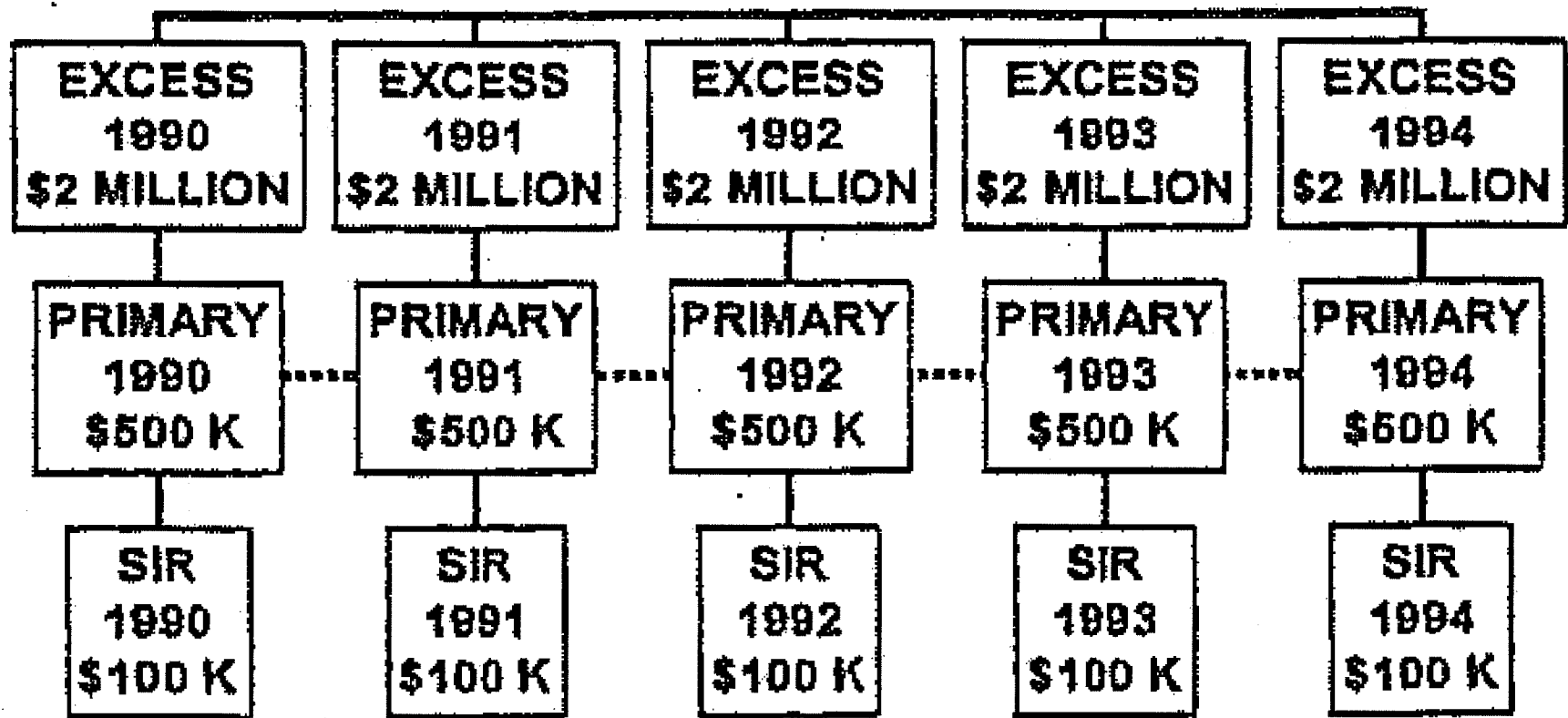
- "Damage that is continuous or progressively deteriorating throughout several policy periods is potentially covered by all policies in effect during those periods."



Montrose Chemical Corp. v. Superior Court
(1995) 10 Cal.4th 645; 11 Cal.4th 219

Impact of Progressive Loss Doctrine on Insurance Coverage

AN EXAMPLE





INSURANCE

- Insured's own work not covered, as to damage to that work. *Diamond Heights HOA v. National American Ins. Co.*, 227 Cal.3d 563, 571 (1991).
- Damage to work of others is covered. *DeWitt Constr. v. Charter Oak Fire Ins.* (9th Cir. 2002) 307 F.3d 1127.



INSURANCE

- Broad form property damage Endorsement covers prime for work by sub on building. *Maryland Cas. Co. v. Reeder*, 221 Cal.3d 961 (1992).



INSURANCE

- Exclusions:
- Impaired property, owned property, your product, premises alienated, pollution, etc.: mostly of limited applicability.
- Coverage for removal of defective work that damages work of others, but exclusion applies when damage unavoidable as a result of putting in omitted work. *St. Paul Fire & Marine v. Sears, Robuck* (9th Cir. 1979) 603 F.2d 780.



INSURANCE

- Duty to defend broader than duty to indemnify. *Buss v. Superior Court* (1997) 16 Cal.4th 35 (1997); *Horace Mann Ins. Co. v. Barbara B.*, 4 Cal.4th 1076 (1993).
- Must be potential for coverage. *Waller v. Truck Ins.*, 11 Cal.4th 44 (1999).
- Pretender fees tougher to get, but possible. *Florito v. Superior Court*, 226 Cal.3d 433 (1990).

Presley Homes, Inc. v. American States Scope of Duty to Defend Additional Insured

In Presley Homes, the Court affirmed an insurance carrier's duty to defend the entire ("mixed") action against an additional insured, developer. A subcontractor's insurance carrier provide a defense to an entire action, including covered and non-covered claims, alleged against an additional insured, general contractor.

Additional insured has the same rights the named insured under additional insured ISO Form 20 10 11 85 endorsement.



