Montrose v. Admiral: Judicial Activism or Judicial Restraint?

By

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About the Author

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Introduction

"Judicial activism" has proven to be a fertile source of controversy, particularly in the current climate of intense political partisanship in this country. A "notoriously slippery term" (Kmiec), consensus on a definition of judicial activism remains elusive. In some instances, judicial activism is associated with political liberalism, and its antithesis, "judicial restraint", with conservatism (as these terms, "liberalism" and "conservatism", are used today). This is not necessarily always accurate, nor is the perception that the striking down of a law always constitutes judicial activism. An activist judge could easily uphold laws that are unconstitutional if the decision is a product of subjective personal and political considerations regardless of a particular political philosophy or party affiliation.

This paper will explore judicial activism by presenting a few popular definitions and descriptions. A working definition will then be presented to facilitate the analysis of a case in which I was personally involved during my career, and whether the Court's ruling was, in my opinion, an example of judicial activism or judicial restraint.

What Is Judicial Activism?

Peter Irons, Ph.D., JD, a respected authority on the U.S. Constitution and the Supreme Court, defines judicial activism as a "legal philosophy that judges should decide cases to protect the rights of minorities and dissenters, striking down laws, if necessary, to accomplish this aim." Judicial restraint, on the other hand, is a "legal philosophy that judges should defer to the decisions of the legislative and executive branches unless their actions clearly violate a constitutional provision." (Irons 168)

Judicial activism encompasses the ignoring of precedent and statutory law in favor of personal or political considerations that advance, at least in a judge's view, desirable political and social policies. (Slattery). Judicially active judges are described as independent policy-makers who usurp the powers of the legislative branch of government by "legislating from the bench" (Kmiec) and, in effect, unbalance the constitutionally-mandated balance of power among the executive, legislative, and judicial branches of government.

Christopher Wolfe, Ph. D offers an interesting analysis of the evolution of judicial philosophy beginning with the Traditional Era, from 1789 to the end of the 19th century, through the Transitional Era, from the end of the 19th century to 1937, and culminating in the Modern Era that we are in today. (Wolfe) During this progression of time, it is Wolfe's view that we have moved from a philosophy of judicial restraint to judicial activism.

The Traditional Era was characterized by a "moderate form of judicial review" that reinforced the separation of powers. A court's ruling would be based on a "fair

reading" of the Constitution, for example, which consisted of an analysis of terms, according to "ordinary popular usage" within the document that was considered to be a "coherent whole" and authoritative. It was recognized that some clauses were susceptible to several "plausible meanings" but moderate judicial review dictated a bias toward limiting these possibilities. "Legislative deference" was the rule unless the statute was unambiguously incompatible with the Constitution. (Wolfe)

The Transitional Era is characterized by an erosion of moderate judicial review and a more activist philosophy that resulted in, among other things, an expanded application of the Due Process Clause in the 14th Amendment that guided both the substantive and procedural aspects of the law. Against the backdrop of World War I and, in particular, the Great Depression, there was a perceived need by some "to protect property rights and economic liberty" that allowed judges "an opportunity to read their own economic philosophy into the Constitution." (Wolfe)

The Modern Era saw continued movement to an activist philosophy and a broader interpretation of the Constitution, statutory law, and common law that attempted to reconcile "apparently permanent constitutional principles" with the "reality of constant change". (Wolfe)

Among specific types of judicial activism are a disregard or erroneous interpretation of precedent, the use of international law to support rulings, and a reliance on a "living Constitution" to make it "comport with their (judges) self-described enlightened sensibilities". (www.heritage.org)

A Working Definition

To facilitate the case analysis later in this paper, the following definitions of judicial restraint and judicial activism will be employed.

Both are legal philosophies that underlie a judge's interpretation of the law. *Judicial restraint* holds that when a judge interprets the law he or she should do so impartially and in the context of a specific set of facts. There should be deference to both legal precedent and statute, and a presumption of legality, unless either the law or precedent is unconstitutional. The judge must be circumspect when it comes to striking down a law, recognizing that the separation of powers is critical to the balance of power and that it is an elected legislature that is charged with making laws. The courts interpret the law only and to encroach on the legislature's duties constitutes an overstepping of constitutional boundaries.

Judicial activism, on the other hand, is the tendency to rule in a way that is partial to the judge's subjective interpretation of the law that furthers his/her own view of the world and makes policy, regardless of precedent or the letter of the law. The lines of separation of powers are blurred when the court becomes a law-maker, but that is appropriate if, in the judge's view, positive social or political policy is advanced.

Montrose v. Admiral

On July 3, 1995, the Supreme Court of California issued its ruling in *Montrose Chemical Corporation v. Admiral Insurance Company*, 10 Cal.4th 645 (modified August 31, 1995), an insurance coverage case the impact of which was, and still is, felt well beyond California's borders in the world of insurance.

Montrose involved environmental contamination claims and insurance coverage. The Montrose Chemical Corporation manufactured DDT, dichloro-diphenyl-trichlorethane, a very effective pesticide, at its plant located in Torrance, CA, from 1947 until 1982. Montrose's operations produced an extensive amount of contamination, both on- and off-site. In retrospect, contamination was inevitable.

In August 1982, two months **prior** to the inception of the Admiral policies in October 1982, Montrose received a "PRP (potentially responsible party) letter" from the United States Environmental Protection Agency with respect to contamination and response costs at the Stringfellow Acid Pits site. Montrose deposited its manufacturing wastes at the site between 1956 and 1972. Toxic wastes were discovered migrating from the site as early as 1970. (*Montrose* 657)

Fortuity

The concept of "fortuity" is the cornerstone of insurance and its operation. "A fortuitous circumstance may sometimes be lucky and sometimes will be disastrous…Insurers will usually be successful only if they are writing coverage for fortuitous events." (Stempel 1-35) An individual event cannot be predicted, but a large number of events can, and this is the basis for the actuarial calculation of rates and premiums.[**]

> If an insurer is providing coverage only for random losses, it can make rough actuarial calculations as to the risk of

[**] Guessing heads or tails when a coin is flipped 10 times will yield a certain percentage of right guesses. Guessing heads or tails when a coin is flipped 1000 times will yield a result that more closely approaches 50%. According to the law of large numbers, the larger the population upon which a prediction is made, the more accurate the prediction is.

> loss based on past claims experience. If it takes advantage of sound underwriting practice through the law of large numbers (the larger the sample, the closer its experience will parallel reality) by writing policies for a large uncorrelated risk pool, the insurer can profit. If the insurer provides coverage for non-fortuitous events, an intended or nonrandom set of losses could ripple through its entire risk pool. (Stempel 1-36)

In other words, unless a loss is fortuitous, it is not insurable. Otherwise, those that knew a loss would occur, or somehow influence the occurrence, would buy insurance and those who knew that a loss would not occur would not buy it. This is the epitome of "adverse selection" that plays havoc with sound actuarial predictions.

The Ruling

Given the dates of Montrose's operations, the termination of which occurred before the first Admiral policy, and the manifestation of the contamination occurring before the Admiral policy (certainly no later than Montrose's receipt of the PRP letter), it seemed reasonable to conclude that at this point the loss became known and was not insurable. The essential element of fortuity was missing. The Court, however, disagreed:

> According to Admiral, Montrose's knowledge of the problems at the Stringfellow site defeats coverage. In particular, Admiral points to the fact of Montrose's receipt of the PRP letter from the EPA on August 31, 1982, prior

> to the inception of the first of Admiral's four successive CGL policies issued to Montrose. Admiral misses the point. The PRP notice is just what its name suggests--notice that the EPA considered Montrose a "potentially" responsible party. **While it may be true that an action to recover cleanup costs was inevitable as of that date, Montrose's liability in that action was not a certainty**. There was still a contingency, and the fact that Montrose knew it was more probable than not that it would be sued (successfully or otherwise) is not enough to defeat the potential of coverage (and, consequently, the duty to defend). (Emphasis added) (*Montrose* 690)

Citing the "loss-in-progress rule as codified in sections 22 and 250", the Court held that the event that must be unknown and contingent in order to be insurable in a liability policy is legal liability for an occurrence, not the occurrence itself, and that known liability is not insurable. When liability is known occurs when liability is "established" with certainty, i.e. verdict. Liability that has not been established is still a contingency.

> We therefore hold that, in the context of continuous or progressively deteriorating property damage or bodily injury insurable under a third party CGL policy, as long as there remains uncertainty about damage or injury that may

occur during the policy period and the imposition of liability upon the insured, and no legal obligation to pay third party claims has been established, there is a potentially insurable risk within the meaning of sections 22 and 250 for which coverage may be sought. Stated differently, the loss-in-progress rule will not defeat coverage for a claimed loss where it had yet to be established, at the time the insurer entered into the contract of insurance with the policyholder, that the insured had a legal obligation to pay damages to a third party in connection with a loss.

Montrose's receipt of the PRP letter prior to its purchase of Admiral's policies did not establish any legal obligation to pay damages or cleanup costs in connection with the contamination at the Stringfellow site, such as would implicate the loss-in-progress rule and preclude Montrose from seeking to obtain the liability coverage sought. The PRP letter did no more than formally place Montrose on notice of the government's asserted position and initiate proceedings that could result in subsequent findings and orders. (*Montrose* 693)

Is *Montrose* An Example of Judicial Activism?

In this writer's opinion, the Supreme Court's ruling in *Montrose* is an example of judicial activism because it rewrites California's insurance codes, amounting to the corruption of a fundamental requirement in insurance that losses must be fortuitous in order to be insurable.

Some in the insurance and legal communities explain the outcome as a "public policy" decision, which is really a euphemism for the underlying judicial activist philosophy that produced the decision. The lack of insurance coverage for environmental contamination losses in California undoubtedly would put a tremendous strain on its taxpayers who would have to shoulder the burden of paying the response costs, absent any outside assistance from others, like the federal government.

The Court concedes that "an action to recover cleanup costs was inevitable" at the time Montrose received the PRP letter, yet defines the contingency underlying the fortuity principle only in the context of legal liability and not the happening of the event, i.e. Montrose's receipt of the PRP letter.

The insurance policy at issue provides coverage for damages the policyholder is **legally obligated to pay**. If the analysis were to stop here, one could understand the Court's depiction of the contingency that underlies fortuity and insurability as the finding of liability. However, the analysis cannot stop here. In addition to coverage for the legal liability of the insured to pay damages, the policy also provides another vital type of coverage, and that is defense costs. The insurer's obligation to defend **does not** depend on a finding of legal liability. Rather, it is "triggered" when there is a **potential** that an

insured can be found liable, and the defense obligation commences when a suit, or its equivalent, is served upon the insured.

So, if an action to recover cleanup costs was inevitable and defense expenses are covered regardless of a finding of liability, shouldn't the contingency requirement apply to defense coverage as well? In other words, Montrose received a PRP letter prior to the inception of the Admiral policy. With respect to defense coverage, there was no longer a contingency. The obligation to defend existed prior to a finding of liability.

CA Ins. Code, § 22, defines "insurance" as a "contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown **event."** CA *Ins. Code, § 250*, provides that "any contingent or unknown **event**, whether past or future, which **may damnify** a person having an insurable interest, or create a liability against him, may be insured against, subject to the provisions of this code." (www.leginfo.ca.gov) (emphasis added)

The *Montrose* Court rewrote the law by restricting, in a liability policy, the contingent or unknown event to a finding of legal liability, despite the fact that insurance defense coverage is triggered long before a finding of liability. The subject of the codes, the event, is the receipt by Montrose of the PRP letter. This is what has to be contingent or unknown on the date of the inception of the policy in order for it to be insurable.

In an arguably inconsistent penultimate paragraph, the Court also commented that "factual questions remain surrounding the circumstance of Montrose's receipt of the PRP letter and its alleged failure to advise Admiral of the same. An insured must make all required disclosures at the time it applies for coverage; the fact that the loss-in-progress rule does not defeat coverage does not itself obviate the possibility of a finding of

fraudulent concealment." (*Montrose* 694) Fraudulent concealment of a potential claim in California can be grounds for rescinding a policy, but does not constitute a known loss because legal liability has not been established, notwithstanding that an event, otherwise triggering a duty to defend, occurred prior to the inception of the policy.

Conclusion

The position in this paper is that a judicially active California Supreme Court, due to the enormous implications as to the availability of funding to remediate contamination that was pervasive throughout California at the time, made policy by rewriting the law.

Making or changing the law is within the purview of the California legislature and not the Supreme Court of California. A "judicial restraint" approach would have held that Stringfellow claim against Montrose was not covered. The loss was not fortuitous at the time of the inception of the Admiral policy, and, therefore, was not insurable.

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