BINDING AUTHORITY
Insurance Coverage Decisions: Issued Today - Impact Tomorrow
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[**Editor's Note** – Today the Eastern District of Virginia issued one of the first decisions to address coverage for **Chinese Drywall** claims (and no doubt the most comprehensive). The court concluded that no coverage was owed under a homeowner's policy on the basis of the following exclusions: latent defect; faulty materials; corrosion and pollution. A copy of the court's 37 page opinion in *Travco Ins. Co. v. Ward* is attached.]

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Cain Casualty Company v. Abel Accident & Indemnity Company

Insurers Fighting Among Themselves Over Montrose and First Manifestation Endorsements

Insurers sometimes confront accusations that they conspired to do some harm against the public or even their own policyholders. For example, insurers were accused of conspiring to settle Katrina claims for less than their true value. In addition, price-fixing by insurers has been alleged under various circumstances. The image that is sometimes portrayed is one of insurance company executives – think Boss Tweed types -- holding secret meetings in cigar smoke filled back rooms, plotting ways to make even more money.

Whenever I hear such allegations I shake my head in disbelief. Those leveling such charges must not be aware of the vast amount of Insurer v. Insurer coverage litigation that takes place. Based on that, it would seem that many insurers do not like each other enough to even be in the same room -- yet alone conspire to do anything together.

The real story is that insurance companies -- and this is the case for all industries – can have both a Coke and Pepsi-type rivalry while at the same time working together on issues about which they share a common interest. With some issues, these lines are easy to draw. When it comes to selling automobile policies, several insurers are competing tooth and nail. But if a tax or regulation were proposed that is equally detrimental to their interests, those same competitors would no doubt cooperate in an effort to defeat it.

But such friend or foe lines are not so easy to draw when it comes to coverage litigation. This is a dynamic that I've been watching play out in the context of litigation over the Montrose and First Manifestation Endorsements.

[The term "First Manifestation Endorsements" is used here to refer to those various endorsements called such things as First Manifestation Endorsements, Claims in Progress

Exclusions, Discovered Injury or Damage Exclusions, Prior Damages Exclusions, and the like. They vary in their language and scope, but are essentially designed to preclude coverage for "bodily injury" or "property damage" that took place before the policy period, *even if the insured did not know that injury or damage had taken place* and even if the injury or damage was continuous or progressive. In essence, coverage is limited to "bodily injury" or "property damage" that first takes place during the policy period.]

The Montrose Endorsement – an ISO creation and designed for the benefit of all insurers – was a response to a weak "known loss" standard that had been adopted by the California Supreme Court. First Manifestation Endorsements were designed by insurers to address the adverse effect of the continuous trigger on their experience for construction defect claims. Although designed by insurers individually, and varying in terms, their purpose was a shared one.

But despite these endorsements being adopted to address common concerns, the response by insurers has been far short of One for All and All for One. Not even close.

Last May I wrote an article for *Mealey's Insurance* that examined what I thought were most of the decisions nationally to have addressed Montrose and First Manifestation Endorsements. I set out to determine if courts were interpreting such endorsements as insurers had intended. But along the way I discovered something else – a lot of the litigation over the interpretation of these endorsements was between insurers. Of the eleven cases examined in the article, four were Insurer v. Insurer.

Then, in March of this year, a California federal court issued a decision addressing a First Manifestation Endorsement and sure enough it was Insurer v. Insurer -- *PMA Capital Ins. Co. v. American Safety Indem. Co*. Jump ahead to ten days ago and a California Appeals Court issued a decision addressing a First Manifestation Endorsement -- would you believe *Mt. Hawley Ins. Co. v. Gemini Ins. Co.* But wait -- Just TODAY a California Appeals Court again issued a decision addressing a First Manifestation Endorsement. Get ready – *Pennsylvania General Ins. Co. v. American Safety Indemnity Co.*

To be sure, there have also been First Manifestation Endorsement decisions of late that are not Insurer v. Insurer. But it is getting difficult not to notice the high percentage of Insurer v. Insurer cases over these issues.

Is all this Insurer v. Insurer litigation over Montrose and First Manifestation Endorsements a good thing? The right thing? Aren't insurers allowed to exercise their rights -- be it against policyholder or fellow insurer? Or should insurers look at a bigger picture and consider the impact of their decisions on endorsements that were designed to address industry-wide concerns? I leave these questions for another day.

Binding Authority is usually written for the purpose of making a certain specific point or two about a coverage issue distilled from a new decision. It is designed to be, and care is taken to ensure that it is, news you can use. Today's issue takes a philosophical detour, simply makes an observation and has no practical value – in fact, kinda like a degree in Philosophy.

Next issue – If a disclaimer letter falls in a forest and nobody is around to read it, is coverage still owed?

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