Commentary

Trigger Of Coverage 2.0: Gun Sounds In New Generation Of Disputes 'Montrose' And 'First Manifestation' Endorsements Come Of Age

By
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The continuous trigger has been the ShamWow of coverage issues — sucking insurers dry of much more than would seem possible. It started out as a nifty trick to significantly increase the limits of liability available for claims for latent injury and damage caused by exposure to asbestos and hazardous waste. Emboldened by its success, the continuous trigger marched on and the same hocus pocus was attempted for claims for injury and damage caused by other means, such as malicious prosecution, ingestion of a pharmaceutical drug, drug administered by injection, damage to an above ground storage tank, defective heart valves, exposure to lead paint, mold, trichloroethylene and dust, as well as claims under builder's risk policies.[1] And, of course, the continuous trigger has been holstered and at the ready in the onslaught of construction defect coverage litigation. While the results in these less-traditional uses of the continuous trigger have been mixed, this much is clear — *All the world's a continuous trigger*-thinking now permeates claims scenarios of all shapes and sizes.

At some point, the insurance industry had to say *no más*. Fool me once, shame on you. Fool me twice, shame on me. Those who cannot remember the past are condemned to repeat it. Once burned, twice shy. Choose your cliché. The point is the same.

In hindsight, the popularity of the continuous trigger is easy to explain. The fundamental requirement of the commercial general liability policy's Insuring Agreement is that *"bodily injury" or "property damage" must occur during the policy period*. Insurers intended by this requirement that "bodily injury" or "property damage" must be discovered or become evident during the policy period. Many courts, however, failed to see that qualification in the policy language. *See Don's Building Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 29 (Tex. 2008) ("The policy in straightforward wording provides coverage if the property damage 'occurs during the policy period[.]' . . . [T]he controlling policy language does not provide that the insurer's duty is triggered only when the injury manifests itself during the policy term, or that coverage is limited to claims where the damage was discovered or discoverable during the policy period. . . . This policy links coverage to damage, not damage detection.")

After being told repeatedly that the requirement that *"bodily injury" or "property damage" must occur*

during the policy period was more open-ended than they had intended, insurers took a different tack. They adopted policy provisions that were designed to qualify and more specifically pin-point when "bodily injury" or "property damage" must take place for it to be covered. In essence, insurers attempted to limit courts' discretion over trigger of coverage and take back control of the issue.

After all, courts for years had been saying that if insurers weren't happy with the decisions that they were getting on trigger of coverage, the solution was to adopt alternative policy language. *See Great Southwest Fire Ins. Co. v. Watt Industries, Inc.*, 229 Cal. App. 3d 594, 601 (1991) ("If the policy had defined 'property damage' to include 'physical injury to . . . tangible property which is *first manifest* during the policy period,' it would be easy to conclude there is no coverage.") (emphasis added).[2]

There may be no clearer pronouncement than *Day Construction Company v. Clarendon America Insurance Company*, 459 F. Supp. 2d 1039 (D. Nev. 2006) that if insurers are unsatisfied with the continuous trigger, they should take steps to nip the problem in the bud:

> Here, the Court need not speculate what trigger theory — the manifestation, continuous exposure, or otherwise — the Nevada Supreme Court might adopt in liability policies or look to local industry practices because it finds that the Policy language unambiguously sets forth the requirements needed to effectuate coverage. Specifically, the Policy requires both the "property damage" and an "occurrence" giving rise to the property damage to occur within the Policy period. In addition, *the Policy explicitly contracts out of the continuous exposure theory* by way of the "deemer" provision, wherein Clarendon avoids liability for property damage arising prior to the inception of, but continuing into, its Policy term.

Day Construction at 1046 (emphasis added).

Insurers have used two principal methods in commercial general liability policies in an attempt to regain control in trigger disputes — ISO's "Montrose Endorsement" and a variety of manuscript endorsements, in one form or another, that are generally referred to by such names as First Manifestation Endorsement, Claims in Progress Exclusion, Discovered Injury or Damage Exclusion or Prior Damages Exclusion.

The fundamental purpose of these policy provisions is the same — tie trigger of coverage to something more specific than the unqualified requirement that "bodily injury" or "property damage" must occur during the policy period. The Montrose Endorsement uses consistent policy language and sets its sights on precluding coverage for "bodily injury" or "property damage" that was known by the insured to exist prior to the inception of the policy.

First Manifestation Endorsements, Claims in Progress Exclusions, Discovered Injury or Damage Exclusions, Prior Damages Exclusions, and the like, 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.

While the Montrose Endorsement similarly precludes coverage for "bodily injury" or "property damage" that took place prior to the policy period, the insured must have been aware of its existence for coverage to be denied. Precluding coverage for "bodily injury" or "property damage" that took place prior to the policy period, but was not known by the insured to exist, was not ISO's principal concern when drafting the Montrose Endorsement.[3] This may be why some insurers were not content with the Montrose Endorsement — seeing it as too limited in scope — and, instead, went out on their own and drafted broader First Manifestation Endorsements. Various examples of First Manifestation Endorsements are set out in the case summaries that follow.

The term "First Manifestation Endorsement" will be used throughout to collectively refer to all of these various endorsements, notwithstanding that they may vary somewhat. Ironically, even the term "manifest," long used by insurers to describe a favored

theory for trigger of coverage, should be used with care, and perhaps not at all. In *Morrow Corporation v. Harleysville Mutual Insurance*, 110 F. Supp. 2d 441 (E.D. Va. 2000), a Virginia federal court was required to interpret, for purposes of an insuring agreement, when "bodily injury" or "property damage" "first manifests itself." The insurer argued that the term "manifest" means "apparent," "revealed" or "known." Since property damage caused by perc contamination did not manifest itself until 1996, when it was first *discovered*, the insurer argued that none of the 1991 through 1995 policies were triggered by the allegations in the underlying complaint. *Morrow* at 451, n.21.

The *Morrow* Court disagreed. Following a very lengthy study of the term "manifest," the court concluded that it has a broader meaning than simply "discovered:"

> "[M]anifest," in all of its forms, connotes the self-revelation of the manifesting phenomenon and its *ability* to be perceived — that is, something manifests itself by becoming sufficiently susceptible to apprehension or comprehension. The term inquires into whether a phenomenon is of a sufficiently external nature as to be "readily perceived," and it is not necessary under any variation of the term's meaning that the manifesting phenomenon *actually be perceived or discovered*. . . . In other words, "manifest," in this sense, means *discoverable* or subject to being discovered by reasonable means, not actually *discovered* or perceived.

Id. at 450 (emphasis in original).

While Montrose and First Manifestation Endorsements have been in use for several years, it is only recently that judicial decisions addressing them have been issued with some regularity. But that is by no means an indication of their lack of significance. Rather, it is not uncommon for a lag to exist between the incorporation of new policy language and judicial decisions addressing it. First, it takes time for the new language to gain wide-spread use by insurers. Then it is necessary for relevant claims to arise, disputes over the new policy language to ensue, efforts to settle be declared unsuccessful, litigation be instituted, reach the motion practice stage and, finally, a judicial opinion issued. Another example of this lag is ISO's additional insured endorsements that underwent a significant revamp in 2004. Even five years later it is hard to find decisions addressing them.

With the first decisions addressing the Montrose Endorsement and First Manifestation Endorsement now in the books, their effectiveness — at least preliminarily — can be assessed. What follows is a summary of several recent decisions addressing Montrose and First Manifestation Endorsements. After that is a discussion of what these early decisions teach and some lessons they provide for insurers going forward.

The Montrose Endorsement

The Montrose Endorsement was the insurance industry's response to its dissatisfaction with the Supreme Court of California's decision in *Montrose Chemical Corp. v. Admiral Ins. Co.*, 913 P.2d 878 (Cal. 1995). What led the industry to make a fundamental change in its commercial general liability policy's insuring agreement was the California high court's decision that, hard to believe as it was, coverage was owed under the following circumstances.

On August 31, 1982, six weeks prior to the commencement of the first of four one-year commercial general liability policies issued by Admiral Insurance Company to Montrose Chemical Company, Montrose was notified by the EPA that is was considered a "potentially responsible party" for money expended for response activities at the Stringfellow waste disposal site. Montrose had deposited manufacturing waste at the site. Montrose was also named as a defendant in a private-party suit, seeking damages for bodily injury and property damage allegedly resulting from the release of contaminants at the site. *Montrose* at 682-83.

Admiral took the position that, based on the loss-in-progress rule — which the *Montrose* court noted is sometimes also referred to as the known loss rule — there was no potential liability coverage, and, thus, no duty to defend Montrose in the *Stringfellow* cases. *Id.* at 904. The California Supreme Court disagreed. The court analyzed the issue under sections 22 and 250 of the California Insurance Code, noting that, under the Code, "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." *Id*.

The *Montrose* court rejected Admiral's argument that Montrose's knowledge of the problems at the Stringfellow site defeated coverage: "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)." *Id.* at 904-5 (emphasis in original).

In a nutshell, *Montrose* permitted a party to purchase a liability insurance policy to cover property damage that the insured knew existed at the time of the purchase, so long as the insured's *liability* for such property damage was still contingent and not a certainty. Indeed, the Supreme Court of California seemed willing to go so far as to permit coverage under a policy purchased even *after* the insured was sued, so long as the insured's liability was in any degree contingent. *Id.* at 906 ("The Hawaii Supreme Court has likewise concluded that even where an injured third party has filed a lawsuit or claim against the insured, 'if the insured's liability is in any degree contingent, there is an insurable risk' within the meaning of the loss-in-progress rule. (*Sentinel Ins. Co. v. First Ins. Co*., *supra*, 875 P.2d at p. 920, fn. omitted.)").

Not content with the *Montrose* Court's finding of coverage for what ISO considered to be known losses, the organization introduced an endorsement in 1999, followed by incorporation of the endorsement's language into the October 2001 edition of its CGL form (CG 00 01), that amended the policy's insuring agreement, in part, as follows [subparagraphs b.(3), c. and d. represented newly added policy provisions]:

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

(2) The "bodily injury" or "property damage" occurs during the policy period; and

(3) Prior to the policy period, no insured listed under Paragraph 1. of Section II — Who is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1 of Section II — Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II — Who Is An Inured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

(1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;

(2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or

(3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

Based on its origin, this policy language came to be known in coverage circles as the Montrose Endorsement. That term will be used throughout to refer to such language, whether it is expressed by an actual endorsement or incorporated into the body of the CGL policy form.

The Montrose Endorsement does not eliminate the fundamental requirement of the Insuring Agreement that "bodily injury" or "property damage" must occur during the policy period. However, it qualifies that requirement by stating that, prior to the policy period, no insured knew that the "bodily injury" or "property damage" had occurred, in whole or in part. Further, if an insured knew, prior to the policy period, that the "bodily injury" or "property damage" had occurred, then any continuation, change or resumption of such "bodily injury" or "property damage," during or after the policy period, will be deemed to have been known prior to the policy period. In essence, by operation of these provisions, the policy on the risk at the time that the insured first obtains knowledge of "bodily injury" or "property damage" becomes the last policy that can be triggered.

ISO offered a very simple explanation of the purpose of the Montrose Endorsement: "These endorsements revise the Insuring Agreement of each of the applicable Coverage Parts to state that the insurance never, under any circumstance, responds to injury or damage that is known by the insured prior to the policy period."[4]

The Montrose Endorsement does not eliminate the continuous trigger by any means. It is still alive and well for all policies on the risk during the period of progressive "bodily injury" or "property damage" so long as the insured was not aware of it. But by addressing "known loss" as it does, the endorsement at least serves to establish an end-date to the continuous trigger for progressive injury or damage.[5]

Decisions Addressing The Montrose Endorsement

***Essex Insurance Co. v. H & H Land Development Corporation*, 525 F. Supp. 2d 1344 (M.D. Ga. 2007)**

In *H & H Land Development*, the Middle District of Georgia addressed the availability of coverage for H & H Land Corporation, the developer of The Orchard, a residential subdivision in Peach County, Georgia. The subdivision was so named in memory of a peach orchard that was "bulldozed to make way for the new houses." *H & H* at 1345.

Construction of The Orchard began in 1999. In 2004, Malone and Blair, owners of property adjacent to the subdivision, sued H & H, alleging that the development resulted in an increase in surface water run-off that allegedly caused damage to their property due to the excess storm water, silt and sediment that accompanied it. *Id.*

H & H was insured under an Essex Insurance Company commercial general liability policy that began on February 28, 2004. A March 9, 2000 letter from the City of Byron to Ron Carter, another complaining homeowner, represented that city officials met with H & H on February 22, 2000 "to discuss off-site drainage concerns from the Orchard subdivision." *Id.* Based upon this documentation, Essex disclaimed coverage to H & H for the Malone and Blair Action, stating: "The policy provides coverage for property damage only when 'prior to the policy period, no insured . . . knew that the . . . 'property damage' had occurred, in whole or in part.' As such, a loss that was known to have occurred prior to the policy period is not covered." *Id.* While the court referred to this policy provision as a "known loss endorsement" and "known loss exclusion," the policy provision at issue was a Montrose Endorsement.

Essex moved for summary judgment. The court first noted that there were no Georgia cases applying or construing a "known loss" provision similar to the one in the Essex policy. But despite the absence of case law, the court concluded that the language of the exclusion was simple and unambiguous. Under the terms of the policy, property damage is deemed to be known when any insured: (1) Reports all, or any part, of the . . . "property damage" to [Essex] or any other insurer; (2) Receives written or verbal demand or claim for damages because of the . . . "property damage"; or (3) Becomes aware by any other means that . . . "property damage" has occurred or begun to occur. *Id.* at 1347.

Noting that the third definition of known loss was the one relevant, the court concluded that Essex must show that there was undisputed evidence that H & H was aware that property damage *to the Malone and Blair properties* had occurred or begun to occur prior to February 28, 2004 (the inception date of the Essex policy). *Id.* The court held that Essex could not meet this burden:

> Essex's evidence that H & H knew of the property damage relates entirely to complaints by a neighboring landowner, Ron Carter, in 2000 and 2001. There is no evidence of any complaints by Malone or Blair.
>
> * * *
>
> The evidence before the Court does not compel the conclusion that H & H was aware that the alleged property damage to the Malone and Blair properties had occurred prior to the policy period. A jury would be entitled to draw its own inferences from this evidence and determine for itself whether the complaints expressed by Ron Carter were sufficient to make H & H aware that property damage *was occurring on the Malone and Blair properties as well*. Given the absence of evidence of complaints after March 2001, the jury would also be authorized to consider whether H & H had reason to believe its remedial measures had eliminated the problem of excess runoff from the Orchard.

Id. at 1347-48 (emphasis added).

While the *H & H* Court's decision was made based on a summary judgment standard, it clearly held the insurer to a high burden — prove that the damage for which coverage was being sought is the *same* damage that was known by the insured prior to the policy period.

***Transportation Insurance Company v. The Regency Roofing Companies, Inc.*, 2007 U.S. Dist. LEXIS 74364 (S.D. Fla.)**

In *Transportation Insurance Company v. The Regency Roofing Companies, Inc.*, the Southern District of Florida denied summary judgment to an insurer that sought to preclude coverage pursuant to its Montrose Endorsement. The court concluded that the insured-roofer's pre-policy knowledge of water intrusion through a roof was not tantamount to knowledge of subsequent mold damage that occurred during the policy period.

> [Transportation — the insurer] asserts that the evidence clearly establishes that Regency knew about Rhoads' claims well before the two Policies effective dates because Regency's employee, Vincent Jett, was repeatedly requested to effect repair work on the roof due to various leaks. Transportation, however, has provided no evidence establishing that Regency had any knowledge of the existence of any mold damage to the Rhoads' home allegedly caused by Regency's defective roof repairs at any time prior to August of 2001. Accordingly, summary judgment premised on the '00 and '01 P Policies' pre-existing condition exclusion provisions is due to be denied.

Regency Roofing at *13.

Despite the fact that mold is simply the next phase of water intrusion under certain circumstances, the *Regency Roofing* Court interpreted the Montrose Endorsement narrowly and, like the *H & H* Court, applied a strict test of sameness between the property damage that existed pre-policy inception date and that which took place during the policy period and for which coverage was being sought.

***Westfield Insurance Co. v. Sheehan Construction Co.*, 580 F. Supp. 2d 701 (S.D. Ind. 2008)**

In *Sheehan*, the Southern District of Indiana addressed a Montrose Endorsement in the context of coverage for a class action filed by homeowners against a developer for construction defects. The relevant facts and timing issues were as follows. In April 2000, the Aligs purchased a home in Indianapolis. Sheehan was the general contractor. In early 2004, the Aligs noticed water entering their house near some windows. An engineering investigation revealed that substandard construction was the cause of the water intrusion and corresponding damage to the Aligs' home. *Sheehan* at 704-5. In June 2004,

counsel for the Aligs' sent letters to Sheehan asserting claims for damage due to defective construction of their home. *Id.* at 716. An Indiana state trial court certified a class of plaintiffs consisting of those homeowners whose homes were constructed by Sheehan and experienced similar damage. *Id.* at 705.

Sheehan sought coverage under a Westfield Insurance Company commercial general liability policy issue to it on October 1, 2004. Westfield disclaimed coverage. A settlement was reached between the class and Sheehan for an amount in excess of $2.7 million. Westfield sought a declaratory judgment that it had no duty to defend or indemnify Sheehan under its policy. *Id. The Sheehan* Court concluded that no coverage was owed because any alleged "property damage" was not caused by an "occurrence." *Id.* at 714.

The *Sheehan* Court could have called it a day, as it acknowledged that, when the insuring agreement does not provide coverage, there is no need to look further. Nonetheless, the court chose to put in some overtime and addressed the applicability of certain exclusions raised by the parties, including the Known Claim Exception (which was the name used by the court to address what was clearly a Montrose Endorsement).

The *Sheehan* Court had no trouble concluding that, had there been "property damage" to the Aligs' home caused by an "occurrence," the Montrose language would have precluded coverage to Sheehan under the Westfield policy. The court explained:

> The Policy's Insuring Agreement states that the Policy only covers "bodily injury" or "property damage" if: "(3) Prior to the policy period, no insured . . . knew that the 'bodily injury' or 'property damage' had occurred, in whole or in part." On June 21 and 25, 2004, the Aligs' counsel sent letters to Sheehan asserting claims for damages due to defective construction of their home. . . . Because Sheehan had knowledge of the damage to the Aligs' home prior to the policy period, the court finds that had there been any "property damage" to the Alig home caused by an "occurrence," that damage would not be covered under the Policy.

Id. at 716.

The court's decision, that the Montrose Endorsement would have precluded coverage to Sheehan under the Westfield policy, seemed obvious. But perhaps less so was the court's observation that, because Westfield had not alleged that Sheehan had any knowledge of damage to other class members' homes prior to the October 1, 2004 inception date of the policy, the Montrose provision would have only served to preclude coverage for the Aligs' claim against Sheehan. *Id.*, n.9.[6]

Once again, just as in *H & H* and *Regency Roofing*, the *Sheehan* Court interpreted the Montrose Endorsement narrowly and applied a strict sameness test between the property damage that existed pre-policy inception date and that which took place during the policy period.

***Atlantic Mutual Insurance Company v. Greater New York Mutual Insurance Company*, 2009 NY Slip Op 30441(U)**

In a recent decision from a New York trial court, a strict sameness test was again the determinative factor for the non-applicability of a Montrose Endorsement. *Atlantic Mutual* addressed the applicability of a Montrose Endorsement to a claim brought by tenants against their Co-Op for property damage caused by water that infiltrated their apartments during several discrete episodes on different dates. The first event occurred in July 2003 and resulted in a severe mold condition that was successfully remediated. However, additional incidents of water damage following rainstorms occurred from September 2004 to December 2004. *Atlantic Mutual* at 2. This again caused mold in tenants' apartments. *Id.* at 6.

Atlantic Mutual undertook the defense of the Co-Op under its policy that was on the risk from January 1, 2003 to January 1, 2004. Atlantic Mutual maintained that Greater New York also had a duty to defend the Co-Op for damages that were allegedly sustained during the Greater New York policy periods, which commenced on January 1, 2004. *Id.* at 3.

Greater New York had disclaimed coverage to the Co-Op for several reasons, including on the basis of its policy's Montrose Endorsement.[7] Specifically, Greater New York maintained that any mold

damage in 2004 (during a Greater New York policy period) was a "continuation, change or resumption" of a "known loss" or a "loss in progress" commencing prior to the Greater New York policy period. *Id.*

The New York trial court disagreed with Greater New York, holding that, based on a strict sameness test, the Montrose Endorsement did not serve as a basis for the insurer to evade its defense obligation:

> It is uncontested that Greater New York has no obligation to defend the insureds for damages occurring to the Tenants before 2004. However, Greater New York cannot claim that the mold damage which allegedly ensued following the 2004 inundations was a "loss in progress" or "known loss" under its policy, because no one disputes the fact that the 2003 mold condition was remediated, and that Tenants returned to a mold-free apartment before the 2004 incidents. Mold produced as a result of the 2004 incidents was not a continuation of the mold condition from 2003, but was a new condition arising from several new and discrete incidents of water infiltration occurring within the policy period. Therefore, Greater New York cannot evade its duty to defend the Insureds for the 2004 incidents by use of an exclusion for "known loss" or "loss in progress."

Id. at 6.

***American States Insurance Co. v. Blair Edgerton*, 2008 U.S. Dist. LEXIS 79866 (D. Ida.)**

In *Blair Edgerton*, the District Court of Idaho denied summary judgment to an insurer that had argued that its Montrose Endorsement precluded coverage for claims made against an insured-plumber for "property damage" allegedly caused by leaking hot water heaters that it had installed. The insurer argued that, more than one year before the effective dates of the policy, the insured was on site repairing the exact defect alleged to be the source of the claims. *Blair Edgerton* at *12.

Applying a summary judgment standard, the court concluded that the Montrose Endorsement did not serve to preclude coverage:

> If Pioneer had knowledge prior to the effective dates of the policy that property damage had occurred or begun to occur, then coverage would be excluded under the terms of the policy. Mr. Edgerton attests that there was not any *property damage* when he repaired *leaks* in 2003. Because Pioneer claims there was no property damage in 2003, there is a factual dispute as to whether Pioneer had knowledge prior to the effective dates of the policy [June 23, 2004] that property damage had, at least, begun to occur. This dispute will preclude summary judgment.

Id. at *13 (emphasis added).

While the court's decision was made on summary judgment, and based on the existence of a fact issue, its implicit rationale was a strict sameness test.

***Trinity Universal Insurance Co. v. Northland Insurance Company*, 2008 U.S. Dist. LEXIS 72196 (W.D. Wash.)**

Not all courts have declined to apply the Montrose Endorsement to preclude coverage. In *Trinity Universal Insurance Co. v. Northland Insurance Company*, the Western District of Washington addressed coverage for an underlying claim between a general contractor (Pryde) and a subcontractor (Jefferson) hired to complete exterior stucco work on a condominium project. After the project was completed in 1999 the general contractor received complaints about water leaks around the windows. *Trinity* at *2. Tests to determine the cause of the damage were conducted by a third party, which were inconclusive. Jefferson later conducted tests which concluded that the water intrusion was most likely caused by the windows — not the stucco that it had installed. *Id.* at *3-4.

The condominium association brought suit in April 2001 against Pryde, the general contractor, for defective construction. Pryde later filed a third-party claim against Jefferson. *Id.* at *5. A contribution action was brought by Trinity Insurance, Jefferson's insurer from 1998 to 2001, against Northland Insurance, from whom Jefferson purchased a policy on May 11, 2001. *Id.* at *6.

Defendant Northland sought summary judgment arguing that its policy did not apply because Jefferson

knew of the damage giving rise to the claim prior to its policy's inception. Trinity Insurance countered that Jefferson was not on "actual subjective notice of the leak issue" because Jefferson's personnel never believed that its work contributed to the problems and therefore never had "real notice" that it would be responsible for the problems. *Id.* at *12.

The *Trinity* Court quoted the relevant language of the Northland policy's Montrose Endorsement, namely, that the policy in question excluded from coverage any "property damage" that was known by the insured to have occurred in whole or in part prior to the policy period. *Id.*

The *Trinity* Court stated that, under the language of the Northland policy, the real issue was not whether Jefferson had notice of whether it was liable, but whether Jefferson had notice of the damage itself. *Id.* The court concluded that the record in the case presented ample evidence that Jefferson knew of the "property damage." The correspondence between the general and sub-contractor complaining of the water intrusion problem, and the fact that Jefferson conducted tests indicated to the court that Jefferson was well aware of the "property damage" prior to the policy period. Therefore, coverage was excluded. *Id.* at *14-5.

On one hand, *Trinity* interpreted the Montrose Endorsement exactly as ISO had intended, namely, the court linked "known loss" to the insured's *knowledge of property damage* prior to the policy period and not the insured's *knowledge of its liability* for property damage prior to the policy period. On the other hand, the court based its decision on Washington's common law "known loss" test [*Overton v. Consolidated Ins. Co.*, 38 P.3d 322 (Wn. 2002)] which was tied to the insured's knowledge of property damage and not knowledge of its liability. In other words, since Washington's "known loss" test was not the displeasured one that led to the adoption of the Montrose Endorsement, it seems likely that the *Trinity* Court would have reached the same decision even without the Montrose Endorsement contained in the Northfield policy. Thus, for purposes of keeping score, it is questionable whether *Trinity* qualifies as a win for insurers on the Montrose Endorsement.

***Quanta Indemnity Co. v. Davis Homes*, LLC, 2009 U.S. Dist. LEXIS 25392 (S.D. Ind.)**

Davis Homes appears to be one of the first decisions to address the Montrose Endorsement in the "bodily injury" context. What's more, the decision also appears to be the first one to specifically identify the Supreme Court of California's decision in *Montrose* as the source for the policy language. *Davis Homes* at *13-5, n.4. While that has no legal significance, it is good coverage trivia nonetheless.

In *Davis Homes*, the Southern District of Indiana interpreted a Montrose Endorsement under the following unique circumstances. In 2003, Robert Nichols filed suit for personal injuries allegedly sustained on September 6, 2002 as a result of an electric shock he received while plugging a dryer into an electrical outlet in a home built and sold by Davis Homes. North American Specialty (NAS) provided a defense to Davis Homes under a commercial general liability policy on the risk at the time of the injury. *Davis Homes* at *3.

In 2005, while the lawsuit was still progressing, Mr. Nichols died from a self-inflicted gunshot wound. Mrs. Nichols, as personal representative of the estate, filed a Second Amended Complaint, which included a claim against Davis Homes for wrongful death, stemming from Mr. Nichols's death. *Id.* at *3-4. A doctor testified that the electrical shock had caused Mr. Nichols to suffer various psychological conditions, including depression. He concluded that Mr. Nichols's death was proximately caused by the electrical shock that he had suffered on September 6, 2002. *Id.* at *4.

Quanta issued a commercial general liability policy to Davis Homes that was on the risk at the time of the suicide. Quanta was requested to defend and indemnify Davis Homes for the Second Amended Complaint but instead denied coverage. *Id.* at *4-5. Quanta filed a complaint seeking a declaratory judgment that the Montrose Endorsement contained in its policy precluded it from having a duty to defend or indemnify Davis Homes. *Id.* at *8.

Quanta argued that "bodily injury" first occurred on September 6, 2002, before the effective date of the Quanta commercial general liability policy. According to Quanta, because Davis Homes knew of at least part of the alleged "bodily injury" before the effective date of Quanta's policy, coverage was excluded.

Id. Co-insurer NAS disagreed, arguing that Mr. Nichols's death constituted "bodily injury" that was distinct from the "bodily injury" he suffered as a result of the electric shock. It was NAS's position that Quanta had a duty to defend Davis Homes from the date of the Second Amended Complaint and would also owe indemnity for any damages awarded for the wrongful death claim. *Id.* at *8-9.

At the core of the dispute between Quanta and NAS was interpretation of the following language contained in the Quanta policy:

> Quanta's CGL Policy excludes coverage in certain circumstances. Of particular relevance here is the requirement that, for coverage to attach, the "bodily injury" must be deemed under the policy to have occurred during Quanta's policy period. Quanta's CGL Policy specifically excludes coverage if, prior to the policy period, Davis Homes knew that the "bodily injury" had occurred, either "in whole or in part." If, prior to the coverage period, Davis Homes had knowledge of the "bodily injury," the policy provides that "any continuation, change, or resumption of such 'bodily injury' . . . during or after the policy period will be deemed to have been known prior to the policy period."

Id. at *12-3 (citations omitted).

NAS argued that, because the wrongful death claim was added to the complaint after Mr. Nichols's death on July 17, 2005, is was an independent, and not a derivative claim, which could not have accrued before July 17. According to NAS, Mr. Nichols's death was not merely a change or continuation of the original bodily injury, as Quanta asserted. *Id.* at *18-9, n.7.

The *Davis Homes* Court rejected NAS's position:

> Following Mr. Nichols's death on July 17, 2005, the complaint was then amended to allege that, as a result of the September 6, 2002, electrical shock allegedly caused by Davis Homes's negligence, Mr. Nichols suffered "numerous injuries, including a brain stem injury and ultimately his death," and that as "a result of [the electrical shock] and the injuries sustained therein, [Mr. Nichols] incurred substantial injuries and subsequently died. On their face, these allegations directly connect Mr. Nichols's eventual death to the electrical shock and resulting injuries that he first sustained during NAS's policy period and of which Davis Homes was aware before Quanta's policy period. As discussed above, Quanta's CGL Policy clearly provides that any "continuation, change, or resumption" of "bodily injury" that takes place within Quanta's policy period, but was known to the insured prior to the policy period, is excluded from coverage. Accordingly . . . Quanta does not have a duty to defend.

Id. at *19-20.

While the *Davis Homes* Court was able to apply the Montrose Endorsement by tracking the allegations in the complaint, the unique facts of the case may preclude its influence on future courts.

Decisions Addressing The First Manifestation Endorsement

As discussed above, and as evident by the examples that follow, First Manifestation Endorsements are generally designed to preclude coverage for "bodily injury" or "property damage" that takes place before the policy period, even if the insured did not know that "bodily injury" or "property damage" had taken place and even if the injury or damage was continuous or progressive. In other words, the intent is for coverage to be limited to "bodily injury" or "property damage" that first takes place during the policy period.

Axis Surplus Insurance Co. v. James River Insurance Co., 2009 U.S. Dist. LEXIS 22614 (W.D. Wash.)

At issue before the Western District of Washington in *Axis* was coverage for defects in the construction of a condominium. The earliest evidence of the condominium association board's discovery of defects was an April 26, 2006 letter from the board to the developer that included a non-exhaustive list of defects to be remedied. In July 2006 the board sued the

developer. In October 2007, an amended third-party complaint was filed by the developer that included Village Farmer's Corporation (VFC) as a defendant. VFC had provided the framing work for the project. *Axis* at *1-2.

VFC tendered the third-party action to Canal Indemnity Company, its insurer from May 2001 to May 2003, and Axis Surplus Insurance Company, its insurer from May 2003 to May 2006. The insurers agreed to defend VFC subject to a reservation of rights. VFC never tendered the claim to James River, its insurer starting from May 2006. *Id.* at *2-3.

Axis tendered VFC's defense to James River. Following some back and forth communications between Axis/Canal (who had joined forces) and James River, James River disclaimed coverage on the basis that all "property damage" was precluded by the "Claims in Progress" exclusion contained in its policy. The exclusion precluded coverage for property damage that "begins or takes place" before the inception date of the policy. *Id.* at *3-4.

Specifically, the Claims in Progress exclusion provided as follows:

> (a) This policy does not apply to . . . "property damage" which begins or takes place before the inception date of coverage, whether such . . . "property damage" is known to an insured, even though the nature and extent of such damage or injury may change and even though the damage may be continuous, progressive, cumulative, changing or evolving, and even though the "occurrence" causing such . . . "property damage" may be or may involve a continuous or repeated exposure to substantially the same general harm.
>
> (b) All "property damage" to units of or within a single project or development, and arising from the same general type of harm, shall be deemed to occur at the time of damage to the first such unit . . . .

Id. at *13-4. In concluding that the Claims in Progress exclusion precluded coverage, James River relied on the April 2006 letter from the board to the developer listing construction defects. James River asserted that, based on the April 2006 letter, whatever damage VFC was liable for had taken place prior to the inception of its policy. *Id.* at *3-4. Axis/Canal filed suit seeking a declaration that James River was obligated to participate in VFC's defense. *Id.* at *6-7.

The Western District of Washington concluded that James River was obligated to defend VFC. The court's decision was tied to Washington's broad duty to defend standard: "The duty to defend is triggered if the insurance policy *conceivably covers* the allegations in the complaint." *Id.* at *16 (citation omitted and emphasis in original). The court concluded that James River erred by looking to information outside the complaint to avoid its duty to defend:

> Relying solely on the two complaints in the underlying lawsuit, James River could not rule out the possibility that VFC caused damage that was beyond the scope of the Claims in Progress Exclusion. As the court noted, the pleadings give no information about when any property damage began or took place at the Regatta condominiums. At best, James River could have inferred that VFC completed its work at Regatta before the inception of its Policy, but this is insufficient, as its policy focuses on when the damage "begins or takes place.

Id. at *15. "Absent time-specific allegations, it was conceivable that VFC caused damage that began or took place after the inception of the James River Policy." *Id.* at *16-7.

While the *Axis* Court's decision was grounded more in Washington's duty to defend standard than the James River policy's Claims in Progress exclusion, the court nonetheless provided insight on its view of the exclusion:

> The April 26 letter does not unambiguously establish that the Claims in Progress Exclusion applies. It merely establishes that some defects and damages had manifest as of the date of the letter. None of those damages are, at least on their face, the result of framing work, much less framing work that VFC per-

> formed. The letter does not rule out the possibility that framing-related damages began later, after the inception date of the Policy. Thus, even if James River could properly look beyond the complaint, the April 26 letter is not a sufficient basis to avoid its duty to defend.

Id. at *17-8, n.3 (citation omitted).

Just as with the Montrose Endorsement, the court adopted a narrow interpretation of the Claims in Progress exclusion, and applied a strict test for sameness between the "property damage" that existed pre-policy inception date and that which took place during the policy period for which coverage was being sought.

Axis is not the only court to avoid application of a "trigger endorsement" on the basis that the duty to defend determination is tied solely to the allegations contained in the complaint — even though the endorsement may ultimately preclude coverage for damages when such determination is permitted to consider the actual facts. *See Great American Insurance Company v. North American Specialty Insurance Company*, 542 F. Supp. 2d 1203, 1210 (D. Nev. 2008) ("While the court recognizes there is conflicting evidence about whether the damage caused by the doors blowing in was a continuation, change or resumption of property damage that existed before the coverage period [*see* Montrose Endorsement at b.(3)], this controversy does not alter Defendant's duty to defend the LLC. Defendant's duty to defend must be determined from comparing the allegations of the complaint with the terms of Defendant's policies. Here, Skender and Brunson allege the LLC's misconduct led to damage of their home. The home's doors blew in during December 2002, which falls into the coverage period of Defendant's second policy. As such, Defendant must defend against the alleged damage caused by this incident."); *Trinity Universal Ins. Co. v. Employers Mutual Casualty Co.*, 586 F. Supp. 2d 718, 725 (S.D. Tex. 2008) ("Based on the inadmissibility of EMC's proffered extrinsic evidence [based on Texas's 'eight corners' rule], the absence of facts *on the face of the Petition* suggesting that Lacy Masonry was aware of any property damage to McKenna's building before the effective date of the EMC Policy [*i.e.*, Montrose Endorsement], and resolving all doubts in favor of the insured, the Court concludes that the allegations in the Petition potentially support a covered claim. Accordingly, Plaintiffs are entitled to declaratory judgment that EMC has a duty to defend Lacy Masonry in the underlying suit.") (emphasis added).

***Johnson v. Clarendon National Insurance Company,* 2009 Cal. App. Unpub. LEXIS 972**

Johnson provides another example of a court that precluded applicability of a First Manifestation Endorsement by adopting a strict sameness test between the "property damage" that existed pre-policy inception date and that which took place during the policy period for which coverage was being sought.

The Court of Appeal of California addressed coverage for "bodily injury" allegedly caused by exposure to mold. It was alleged that a landlord's negligence in maintaining the walls and roof of a condominium unit, and in overwatering the yard, caused water to leak inside the structure, resulting in mold growth in and around the tenant's home. *Johnson* at *1.

The crux of the *Johnson* opinion addressed whether the pollution exclusion served to preclude coverage. After concluding that it did not, the court turned its attention to a "discovered injury or damage" exclusion contained in one of the landlord's commercial general liability policies.

The exclusion provided as follows:

> The insurance provided under the [CGL] coverage part does not apply to 'bodily injury' . . . which occurred and was discovered before the inception date of this insurance stated in the policy declarations. It added, "For purposes of this exclusion: [P] (1) Injury or damage is 'discovered' when appreciable injury or damage is observed by anyone, whether an 'insured' or a non-'insured'; [P] (2) Discovery of some injury or damage caused by an 'occurrence' . . . constitutes discovery of all injury or damage caused by the same 'occurrence' or offense." Finally, the policy provides, "This exclusion applies regardless of whether, as of the date of inception of this insurance, there was uncertainty about any of the following: [P] (1) The extent of the injury or damage; [or] [P] (2) whether

> the injury or damage will continue to occur or would progressively deteriorate; . . . ."

Id. at *36-7. The landlord's insurer argued that, because "bodily injury" was experienced starting in 1998, prior to the October 2000 inception of the policy, the "discovered injury" exclusion applied. *Id.* at *37.

The *Johnson* Court disagreed. The court observed that, while external mold was discovered in 1998, internal mold was not discovered until 2001. The appeals court agreed with the trial court that the existence of external mold does not equate to the discovery of internal mold. *Id.* at *38. Then, turning to the "discovered injury" exclusion, the court concluded that the "bodily injury" had not been discovered before the policy inception date because *appreciable* injury had not been observed at such time:

> Constitution's policy states it does not insure for bodily injury "which occurred and was discovered before the inception date," but then broadly defines "discovered" as when "*appreciable* injury or damage is observed[.]" It did not require the "first instance" of damage to take place during the policy period. . . . . The parties stipulated to the facts, and the trial court reasonably concluded a reasonable policyholder standing in Johnson's shoes would understand "appreciable injury" to mean more than the discovery of their "undefined" and vague medical ailments, such as rashes, coughs, and sinusitis. Appreciable injury or damage was not observed until the Johnsons pulled up the carpet and discovered their apartment was full of mold-releasing toxic spores.

Id. at *41-2 (emphasis in original).

***Day Construction Company v. Clarendon America Insurance Company*, 459 F. Supp. 2d 1039 (D. Nev. 2006)**

In *Day*, the District Court of Nevada interpreted the requirements of an insuring agreement that there be an occurrence during the policy period and "property damage resulting from such occurrence first takes place during the policy period." *Day* at 1045. The policy also contained a "deemer provision" that stated:

> All property damage . . . arising from, caused by or contributed by, or in consequence of an occurrence shall be deemed to take place at the time of the first such damage, even though the nature and extent of such damage or injury may change and even though the damage may be continuous, progressive, cumulative, changing or evolving, and even though the occurrence causing such . . . property damage may be continuous or repeated exposure to substantially the same general harm.

Id.

At issue was coverage for a framing contractor whose faulty workmanship allegedly caused water intrusion around windows in 53 homes. The contractor's insurer argued that no coverage was owed because water intrusion first occurred prior to the policy period. Specifically, the insurer argued that, because the underlying litigation was a class action, the first occurrence arises at the onset of the first instance of water intrusion in any of the 53 class action homes. So the argument went, because the lead plaintiff in the class action alleged "property damage" prior to the inception of the policy, no possibility of coverage existed. *Id.* at 1047. The court disagreed, holding that the timing of the water intrusion must be determined on an individual home-by-home basis. *Id.* at 1047, 1048. In essence, the court's decision in *Day* can be characterized as adopting a strict sameness test for property damage prior to and during the policy period. *But see USF Insurance Company v. Clarendon America Insurance Company*, 452 F. Supp. 2d 972 (C.D. Calif. 2006) (At issue was the same policy language as in *Day* — specifically adopted, the court noted, to circumvent the continuous trigger — but the insurer was successful in using it to preclude coverage. Even though the insured-contractor had framed or performed carpentry on 90 homes, the court concluded, without discussion, that reports indicated that property damage at all homes had taken place prior to the policy period.)

***Golden Eagle Insurance Co. v. Gerling America Insurance Co.*, 2009 Cal. App. Unpub. LEXIS 2773**

In *Golden Eagle*, the insurer was successful in using a First Manifestation Endorsement to preclude coverage. However, the endorsement was wider in scope than others. Indeed, so wide that it prompted an illusory coverage argument. While not found to be illusory, the court did describe the coverage as "very slim."

The Court of Appeal of California addressed a coverage dispute over the applicability of a "Prior Damages Exclusion." Cal-State Steel Corporation was a subcontractor that installed steel stairs and wrought iron railings at the Rio Vista Project in 1996. Cal-State finished its work on the project in 1996 and the entire project was completed in December 1996. *Golden Eagle* at *3-4. A number of subcontractors, including Cal-State, allegedly provided defective workmanship at the project, resulting in water intrusion for which damages were sought in an underlying action. As to Cal-State specifically, handrails were allegedly not installed with the proper steel sleeve and they were not incorporated into a proper waterproofing system. *Id.* at *4.

Cal-State tendered its defense to Gerling America, which denied coverage based on its policy's Prior Damages Exclusion:

> This insurance shall not apply to: 'property damage'. . . arising out of any damage, defect, deficiency, inadequacy or dangerous condition which existed prior to the inception of the policy period . . . , whether visible or invisible, detected or undetected, known or unknown, to any Insured before such inception date. . . . This exclusion shall be applicable to all damage(s), defect(s), deficiency(ies), inadequacy(ies) or dangerous condition(s) including, but not limited to, damage, defect, deficiency, inadequacy, or dangerous condition. . . . '[P]roperty damage'. . . arising out of any damage, defect, deficiency, inadequacy or dangerous condition shall be deemed to have existed as of the earliest date by which any damage occurred, irrespective of whether the Insured was aware of the existence of any such damage, and irrespective of whether such damage may have been continuous or progressive or may have been due to repeated exposure to substantially the same harmful conditions or may have become progressively worse during the period of this Policy. . . . We have no obligation to investigate or defend any liability, claim or suit to which this insurance does not apply.

Id. at *2-3.

It was Gerling's determination that the Prior Damages Exclusion precluded coverage because all of the alleged defects had existed since the original installation of the insured's work, which was completed prior to the inception of the Gerling policy. *Id.* at *5. Gerling's position was challenged by Golden Eagle, another of Cal-State's insurers, which had accepted Cal-State's defense and was seeking contribution from Gerling. *Id.* at *6. Golden Eagle's position was that, for the Prior Damages Exclusion to operate as a bar to coverage, both "property damage" and a defect in the insured's work must precede the policy period. *Id.* at *15.

The California appeals court disagreed with Golden Eagle's interpretation, holding that the Prior Damages Exclusion precluded coverage simply on the basis that the alleged defect, deficiency or inadequacy in Cal-State's work incurred before the inception of the Gerling policy:

> The PDE provides, in relevant part: "This insurance shall not apply to: [P] 'property damage' . . . arising out of any damage, defect, deficiency, inadequacy or dangerous condition which existed prior to the inception of the policy period." Under the circumstances presented, there was no potential for coverage in the underlying action. The alleged defect, deficiency, or inadequacy in Cal-State's work that caused the damage necessarily existed by the time the work on the Rio Vista Project was completed in 1996, prior to the inception of the Gerling policy. As the allegedly defective construction at issue in the underlying action existed prior to the inception of the Gerling policy, the alleged property damage arising from that defect is excluded from coverage pursuant to the PDE.

Id. at *13-4.

The court also rejected Golden Eagle's argument that the Prior Damages Exclusion rendered the policy illusory. "[T]racking the plain language of the Gerling policy and the PDE, coverage is just very slim, requiring that both the work be completed and the first damage occur during the policy period." *Id.* at *18.

Montrose And First Manifestation Endorsements: Lessons Learned From The Early Decisions

Based solely on counting wins and losses, insurers that have sought to exclude coverage under Montrose Endorsements have not been successful. Indeed, one of the few wins to be achieved by an insurer — *Trinity Universal Insurance Co. v. Northland Insurance Company* — would have likely produced the same result even without the benefit of the endorsement.

On the other hand, the types of cases to date addressing the Montrose Endorsement may not be what ISO had in mind when it set out to reverse the Supreme Court of California's decision in *Montrose*. Montrose itself involved a traditional continuous injury — environmental property damage. Further, ISO noted that its concerns were particularly relevant in "those cases involving continuous or progressively deteriorating injury or damage."[8]

The decisions so far that have addressed the Montrose Endorsement have not involved traditional continuous injuries. The endorsement has principally been used in the context of construction defect claims. Here, insurers have generally argued that an insured's knowledge of one instance of "property damage" was tantamount to its knowledge of all other "property damage" that had the same cause. In other words, if the purpose of the Montrose Endorsement is to prevent insureds from purchasing insurance for known losses, the endorsement should preclude coverage for "property damage" that an insured knows is highly likely. After all, once an insured-contractor becomes aware that its faulty work has resulted in one instance of "property damage," it has knowledge that the same work may have caused other instances of "property damage."

But courts have generally not interpreted the endorsement in this manner. Rather, they have interpreted the Montrose Endorsement narrowly and applied a strict sameness test between the "property damage" that existed pre-policy inception date and that which took place during the policy period for which coverage was being sought. In other words, it is the "property damage" that must be known by the insured prior to the policy period *and not the cause of the "property damage."*

The *Montrose* Court concluded that "known loss" was not a bar to coverage even though it acknowledged that it was more probable than not that Montrose would be sued when it purchased its first policy. Ironically, that is generally the same message coming from the first decisions to address the Montrose Endorsement. In other words, once an insured-contractor becomes aware that its faulty work has resulted in one instance of "property damage," it has knowledge that other work it performed — in the same manner — may have caused other "property damage." Nonetheless, despite it being more probable than not that the contractor will be sued, the Montrose Endorsement, just as the *Montrose* decision, has for the most part not been a bar to coverage.

Because the types of cases to date addressing the Montrose Endorsement may not be what ISO had in mind when it put pen to paper, it would be premature to conclude that the objective of the Montrose Endorsement — use "known loss" to establish an end-date to the continuous trigger for progressively deteriorating injury or damage — has not been achieved.

Insurers attempting to disclaim coverage based on a Montrose Endorsement have also been hamstrung by courts applying a "four corners" duty to defend standard. In other words, some insurers may ultimately be able to preclude coverage; but they were nonetheless obligated to defend because all they were permitted to rely upon, in an attempt to satisfy the sameness test, were the allegations contained in the underlying complaint.

Another interesting observation of the early Montrose and First Manifestation Endorsement decisions is that so many involve *Insurer v. Insurer* litigation. It seems that when one insurer relies on one of these policy provisions to disclaim coverage, an insurer that has agreed to provide a defense is none too pleased that it is being denied cost sharing on account of the co-insurer's reliance on the provision. It remains

to be seen if insurers will remain fractured in their approach to Montrose and First Manifestation Endorsements. After all, an insurer that advocates against application of the endorsements may find the shoe on the other foot in the next case. Consider that an insurer that bemoans the continuous trigger at least benefits from its cost sharing feature in a case where such insurer would have otherwise been left standing alone if a manifestation trigger had been applied.

It is more difficult to reconcile the early First Manifestation Endorsement decisions as they involve different policy language. But, in general, they too have not been interpreted as insurers had advocated. Just as in the case of Montrose Endorsements, courts have narrowly interpreted First Manifestation Endorsements. Responding to insurers' efforts to disclaim coverage for "property damage" that took place during the policy period, on the basis that such damage first existed prior to the policy inception date, courts have applied a strict test of sameness between the two.

While it may be too soon to conclude that insurers should go back to the drawing board on Montrose and First Manifestation Endorsements, this much is clear. The early decisions suggest the type of facts that may be needed for insurers to successfully invoke these policy provisions, as well as which provisions may be more effective than others. Based on the spate of decisions over the past two to three years addressing Montrose and First Manifestation Endorsements, there is little doubt that a new era of trigger of coverage disputes has come upon commercial general liability policies.

Endnotes

1. *Coregis Insurance Company v. City of Harrisburg*, 2006 U.S. Dist. LEXIS 20340 (M.D. Pa.) (court rejected city's argument that a continuous trigger theory of liability should apply to cases of malicious prosecution); *Steadfast Insurance Company v. Purdue Frederick Company,* 2006 Conn. Super. LEXIS 1970 (court determined that the injuries caused by the ingestion of a pharmaceutical drug did not involve a continuous trigger); *Pharmacists Mut. Ins. Co. v. Urgent Care Pharm.*, 413 F. Supp. 2d 633 (D.S.C. 2006) (court adopted the use of a continuous trigger to claims for injury caused by a drug administered by injection); *Fidelity and Guaranty Insurance Underwriters, Inc. v. Nationwide Tanks, Inc.*, 2006 U.S. Dist. LEXIS 9854 (S.D. Ohio) (court rejected policyholder's argument that a continuous trigger should apply to damage to an above-ground storage tank); *Suter v. Gen. Accident Insurance Company*, 2006 U.S. Dist. LEXIS 48209 (D.N.J.) (court rejected a continuous trigger to bodily injury claims involving defective heart valves); *Maryland Casualty Company v. Hanson*, 902 A.2d 152 (Md. 2006) (court adopted a continuous trigger to claims for lead paint poisoning); *Polk v. Landings of Walden Condo. Ass'n*, 2005 Ohio 4042 (court adopted the continuous trigger for mold property damage claims); *Associated Aviation Underwriters v. Wood*, 98 P.3d 572 (Ariz. App. 2004) (court adopted a continuous trigger for claims involving exposure to TCE); *Stonelight Tile, Inc. v. California Ins. Guarantee Assn.*, 150 Cal. App. 4th 19 (2007) (court adopted a continuous trigger to claims for property damage caused by exposure to dust); and *Eckstein v. Cincinnati Ins. Co.*, 2005 U.S. Dist. LEXIS 27957 (W.D. Ky.) (court declined to adopt any trigger mechanism for builder's risk policies, but a continuous trigger was advocated by the insured).

2. Seventeen years later the Supreme Court of Texas had the same message for insurers: "If the manifestation rule offers advantages of ease of application or proof for the insurer or insured, insurance companies might consider adopting policies where coverage depends on manifestation of damage, and seeking approval of such policies by Texas insurance regulators." *Don's Building Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 29 (Tex. 2008).

3. "Introduction of Various New and Revised Commercial General Liability Endorsements," ISO Commercial General Liability Forms Filing GL-99-O99FO, at 3 ("From a coverage standpoint, there is a clear distinction between, on one hand, the injury or damage which has occurred and which, prior to the inception of the policy period, is known by the insured to have occurred, and, on the other hand, injury or damage which has yet to occur or which is occurring but is not yet known to the insured at

the inception of the policy period. We have serious concerns with court decisions which have held an insurer responsible for defense and/or indemnity of an insured in cases where the insured knew, prior to the inception of the policy period, that injury or damage had occurred or had begun to take place.").

4. *Id.* at 5.

5. The extent to which the Montrose Endorsement may alter the number of triggered policies, for both continuous and non-continuous injury and damage claims, is a complex issue. The endorsement could actually result in the triggering of *more* policies, on account of certain traditional claims handling conventions now being supplanted by policy language. This issue is beyond the scope of this article, but is explained in "Montrose Endorsement — Shining a Light on the 'Known Loss' Doctrine," an article that I published in *FC&S Bulletins, Public Liability*, November 2003.

6. On April 29, as this article was being prepared for publication, the Seventh Circuit affirmed the District Court's decision in *Sheehan*. The District Court's discussion of the Montrose Endorsement had been gratuitous. The Seventh Circuit had no need to address the Montrose Endorsement aspect of the lower court's decision and did not. *See Westfield Insurance Co. v. Sheehan Construction Co.*, United States Court of Appeals for the Seventh Circuit, No. 08-3463, April 29, 2009.

7. The court's decision in *Atlantic Mutual v. Greater New York* does not cite the relevant policy language and, in fact, refers to it as a "known loss" or "loss in progress" exclusion. However, a review of the Memorandum of Law in Support of Atlantic Mutual Insurance Company's Motion for Partial Summary Judgment — kindly provided by Atlantic Mutual's counsel, Leor Kaplan of Coughlin Duffy, LLP in New York City — reveals that the court was interpreting a Montrose Endorsement.

8. "Introduction of Various New and Revised Commercial General Liability Endorsements," ISO Commercial General Liability Forms Filing GL-99-O99FO, at 3. ■