The Montrose Endorsement—15 Years Later

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About 15 years ago, Insurance Services Office, Inc. (ISO), introduced its mandatory endorsement to the commercial general liability (CGL) coverage form—the "Amendment of Insuring Agreement—Known Injury or Damage (CG 00 57 0 99)" endorsement better known as the "Montrose" endorsement. To learn about the development of this change to the CGL insuring agreement, see "Known Injury or Damage" (October 2003).

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Despite some initial predictions of doom regarding the implications of the Montrose endorsement, whose wording has been incorporated into the CGL insuring agreement beginning with ISO's October 2001 CGL edition, litigation is still surprisingly light. And a fair amount of the litigation that has resulted involves one insurer against another insurer, seeking contribution for both defense costs and damages paid.

First Manifestation or Claims-Made Trigger?

At the time of the promulgation of the Montrose endorsement in 1999, a few commentators predicted that the new Montrose wording would effectively convert the CGL into a "first manifestation" or "claims-made" policy trigger. Fifteen years later, it is obvious neither is the case. Consider the following observation in 2009 by Randy J. Maniloff in Mealey's *Litigation Report: Insurance* 23, no. 25 (2009): 5:

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.

In other words, the Montrose wording does not prevent the triggering of multiple CGL policies, provided certain insureds *do not have prior knowledge* of the progressive or continuing bodily injury or property damage.

For example, if "property damage" begins and continues over five CGL policy periods, the Montrose wording would *not* restrict coverage *until* certain insureds have knowledge of the continuing property damage. And then, the coverage restriction applies*only* to subsequent CGL policies, so it is entirely possible all five CGL policies in this example would be triggered—even with the Montrose wording. Today's CGL is certainly *not* a "first manifestation" or "claims-made" policy simply by virtue of the Montrose wording.

The purpose of the Montrose wording is to explicitly establish by the policy terms the date that coverage for "continuous trigger"-type claims will end. In short, no coverage is provided in *future* CGL policies for injury or damage known to certain insureds *prior* to the inception date of these future CGL policies.

Excludes *All* Bodily Injury or Property Damage Commencing Prior to the Policy Period?

Some insurers may exclude *any* progressive or continuing bodily injury or property damage that *starts before* the CGL policy inception, regardless of whether any insured *knew* of the prior bodily injury or property damage. It is all too common for insurers to refer to or explain this highly restrictive non-ISO CGL endorsement as its "Montrose" wording or to say that such wording is the equivalent of the Montrose endorsement.

Such characterizations are extraordinarily misleading. The difference is this: for the ISO Montrose wording to apply, the insured must have *knowledge, prior to the policy inception,* of the continuing bodily injury or property damage. Excluding *any and all* bodily injury or property damage that has *commenced* before the CGL policy inception (but that continues into the policy period) bears little resemblance to the ISO Montrose wording—and is most decidedly not the equivalent of the Montrose endorsement. In other words, the difference between excluding *known* or *unknown* continuing bodily injury or property damage is enormous.

Failure to understand the trigger of an "occurrence"-based CGL policy also contributes to unnecessary confusion about the effect the Montrose wording. For example, consider the following in which the insurer argues that the "occurrence" did not take place during the policy period and thus no coverage was triggered. This fundamental misstatement of coverage was quickly cleared up by the court in *Travelers Cas. & Sur. Co. of Am. v. Netherlands Ins. Co.,* 312 Conn. 714 (2014):

Netherlands argues, however, that "[a]ll of the water intrusions constitute one occurrence, which began soon after January, 1996," and "all of the property damage alleged by the state was caused by Lombardo's alleged defective construction. The fact that the property damage progressed and took different forms over time does not trigger subsequent policies."

Netherlands' argument, however, contradicts the plain and unambiguous language of the policy, *which "does not require that the 'occurrence' take place within the policy period, only that the resulting injury or property damage occur during the policy period."* [Emphasis supplied.]

Prevents Stacking of CGL Policy Limits?

Wording to prevent the stacking of limits in liability policies is sometimes referred to as "Montrose" wording. For example, so-called noncumulation endorsements appended to CGL policies are loosely (and incorrectly) referred to as "Montrose" endorsements.

In an attempt to strike the "Known-Injury Amendment" as an unenforceable "noncumulation clause," the US District Court for the Southern District of New York noted the difference between the two in *Travelers Cas. & Sur. Co. v. Dormitory N.Y.,* 732 F. Supp. 2d 347 (S.D.N.Y. 2010):

The struck clause, however, was not a known-injury-or-damage exclusion, but rather, a "limit of liability" clause providing that the insurer would construe "all personal injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions" as "arising out of one occurrence."

The Known-Injury Amendment contained in the Ohio Casualty Policy, by contrast, deals not with the determination of when or how many "occurrences" have happened, but rather the insureds' knowledge at the time the insurance was purchased. As such, Spaulding does not support Travelers' argument.

Similar to the predictions that the Montrose wording changes the CGL coverage trigger to "first manifestation" or "claims-made," the notion that the Montrose wording is intended to prevent stacking of limits like a "noncumulation" clause is also mistaken.

Known "Loss" or Known Injury or Damage?

Attempting to equate the "known loss" doctrine with the Montrose known injury or damage wording may result in a more favorable coverage outcome for the policyholder. However, most courts (including *Travelers Cas. & Sur. v. Netherlands,* cited above) recognize that the two are separate and distinct:

… the "known injury or damage" exclusion in the CGL policy stands in distinction to that common law principle [known loss doctrine]; the contractual provision, when it exists governs independently of the common-law rule, although they may have overlapping effects…. Thus a state's narrow formulation of

the known loss rule cannot be used to defeat the unambiguous contrary intent of the parties as reflected in the policy language itself.

Stated differently, whether and to what extent a state may apply the common law known loss doctrine is not relevant to determine the application of the Montrose known injury or damage wording.

What Injury or Damage Must Be Known?

The question of what must be known to trigger the Montrose wording limitation is a bit mixed. Some courts have followed what is referred to as the "strict sameness" test—meaning the known injury or damage must be the same injury or damage that is being claimed.

An illustration of the "strict sameness" test is found in *Essex Ins. Co. v. H&H Land Dev. Corp.,* 525 F. Supp. 2d 1344 (M.D. Ga. 2007). In that case, the land developer was alleged to have damaged the property of abutters due to sediment and silt runoff from the development:

Essex's evidence that H&H knew of the property damage relates entirely to complaints by a neighboring land owner, Ron Carter, in 2000 and 2001. There is no evidence of any complaints by Malone or Blair.

Even though the cause of some property damage was known to the insured (H&H) prior to the CGL policy period, as the property damage was to the property of abutter Ron Carter and not to the abutters (and claimants) Malone and Blair, it was not the *same* property damage and thus did not fall within the Montrose wording limitation.

Stated differently, while H&H might have known the *cause* of prior property damage (sediment and silt runoff to the property of abutters), H&H did not know about prior property damage to the properties of claimants Malone and Blair. Thus, in this instance, the actual property damage itself—rather than the general cause of the property damage—must be known by certain insureds to trigger the Montrose wording limitation.

Are Attempts To Repair Considered Knowledge of Prior Injury or Damage?

Undoubtedly, one of the most difficult interpretations and applications of the Montrose known injury or damage wording will arise out of a contractor's attempt to repair problems that later result in property damage or even bodily injury. Any inquiry into how the Montrose wording applies is greatly dependent on the facts.

For example, in *American States Ins. Co. v. Edgerton,* 2008 U.S. Dist. LEXIS 79866 (D. Idaho Sept. 3, 2008), a plumbing contractor, Blair Edgerton, attempted at least a year prior to the purchase of insurance to fix the leaks in a water heater he previously installed. The leaks continued and caused property damage, prompting his insurer to deny coverage for the resulting property damage as property damage known by Mr. Edgerton prior to the CGL policy period:

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.

In this case, whether property damage had occurred prior to the purchase of the policy was a factual matter—and therefore not suited for summary judgment. That does not mean, however, that the insurer may not be able to demonstrate at a jury trial that the property damage was known by Mr. Edgerton prior to the insurer's CGL inception and thus would be excluded by the Montrose wording. On the other hand, the insurer may not be able to demonstrate to a jury that by fixing leaks Mr. Edgerton was aware that property damage had begun to occur.

In a different matter, in *Harleysville Mut. Ins. Co. v. Dapper LLC,* 2010 U.S. Dist. LEXIS 73237 (M.D. Ala. July 21, 2010), a contractor, Dapper, attempted to repair soil erosion, but the court found he knew of property damage prior to the policy period and the fact that he tried to fix the problem did not change the fact that he had knowledge of certain property damage prior to the insurer's policy period.

It is undisputed that Dapper received notice of the Fantail property damage directly from Fantail at least 2 months before the Dapper property was added to the Harleysville policies. The fact Palmer thought his remediation efforts would resolve the situation does not belie his knowledge of the damage.

Duty To Defend and Montrose?

Due to the broad nature of the duty to defend in a CGL policy, particularly in those state that follow the "four-corners" rule,[1]insurers may still need to defend allegations even if the facts ultimately show that the insured did know, prior to the policy inception date, of the continuing bodily injury or property damage. Consider the following, also from *Travelers Cas. & Sur. v. Netherlands,* cited above:

Although the allegations in the underlying complaint arguably permit a reasonable inference that Lombardo knew of the property damage in the law library prior to the inception of its policies with Netherlands … they do not compel that conclusion as a matter of law. Although paragraph 43 of the underlying complaint avers that the "defendants were given notice of these [water intrusion] problems and frequently visited the [law] library to ascertain the nature and extent of the problem," those allegations do not specify exactly when Lombardo received notice, other than to state that the water problems began "[d]uring the months and years" following the project's completion and the state's occupancy in January, 1996, and that forensic engineers were retained in the "2000s." … we conclude that the trial court properly determined that the facts alleged in the underlying complaint do not preclude coverage for purposes of the duty to defend.

Conclusion

In retrospect, the impact of the Montrose endorsement has not been as eventful as expected. Coverage litigation as to the application of the Montrose endorsement to the CGL remains limited—and is often between insurers.

Predictions that the Montrose endorsement would render the CGL a "first manifestation" or "claims-made" policy were speculative and did not materialize. Of substantial importance is distinguishing the ISO Montrose endorsement from other, non-ISO exclusionary endorsements that are too often characterized to be "like Montrose." Such descriptions or understandings may be misleading to the extreme, especially if the exclusion for prior bodily injury or property damage does not turn on whether an insured *knew,* prior to the policy, of the continuing bodily injury or property damage. Similarly, wording that is intended to avoid stacking of CGL policies, such as so-called noncumulation clauses, is clearly not and should not be understood to function as Montrose endorsements.

What constitutes knowledge by certain insureds of prior property damage or bodily injury is crucial and highly fact sensitive. On the one hand, knowledge that a repair has to be made is not, by itself, knowledge of property damage, which is defined in the CGL as "physical injury to tangible property." On the other hand, an insured may be charged with knowledge of property damage when the insured's attempts to repair do uncover property damage but the insured fully repaired at the time and fully believed the matter was resolved, only to have that same property damage resume or continue after the repair. Many courts limit the application of the knowledge of the property damage by applying the "strict sameness" test—while the cause of the property damage may be known, it must be the *same property* upon which the property damage resumes for the Montrose limitation to apply.

Finally, the Montrose wording may not be effective in eliminating the duty to defend, as whether certain insureds knew about the bodily injury or property damage is a factual matter that may not have been established at the time of the suit.

[1]The "four-corners" rule generally refers to the requirement that insurers determine their duty to defend by comparing the allegations in the complaint against the wording of the CGL policy—resort to extrinsic evidence is prohibited.

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