

AUG 18 2008

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DUARTE & WITTING, INC., dba Nader
Chrysler Plymouth; et al.,

Plaintiffs - Appellants,

v.

UNIVERSAL UNDERWRITERS
INSURANCE COMPANY,

Defendant - Appellee.

No. 06-16653

D.C. No. CV-05-01315-MHP

MEMORANDUM *

Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge, Presiding

Submitted August 14, 2008**
San Francisco, California

Before: O'SCANNLAIN and SILVERMAN, Circuit Judges, and SINGLETON***,
Senior District Judge.

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without
oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable James K. Singleton, Senior United States District
Judge for the District of Alaska, sitting by designation.

Duarte & Witting, Inc. and the Eghtesads appeal the district court's grant of summary judgment in favor of Universal Underwriters Insurance Company. We have jurisdiction pursuant to 28 U.S.C. § 1291 and review de novo. *Leonel v. Am. Airlines, Inc.*, 400 F.3d 702, 708 (9th Cir. 2005). We affirm.

Appellants argue that the district court erred by holding that the loss manifested prior to the effective date of the Universal policy. California follows the manifestation rule to determine insurer liability for first party property losses in which the losses progress over several policy periods. *Prudential-LMI Com. Ins. v. Super. Ct.*, 798 P.2d 1230, 1246 (Cal. 1990). The date of manifestation or inception of the loss occurs:

when appreciable damage occurs and is or should be known to the insured, such that a reasonable insured would be aware that his notification duty under the policy has been triggered.

Id. at 1232. The loss manifests when appreciable damage occurs, not when the extent of the damage is known by the insured. *Campanelli v. Allstate Life Ins. Co.*, 322 F.3d 1086, 1094 (9th Cir. 2003). “[I]nsurers whose policy terms commence after initial manifestation of the loss are not responsible for any potential claim relating to the previously discovered and manifested loss.” *Prudential-LMI*, 798 P.2d. at 1246-47.

Summary judgment was proper in this case. The undisputed facts establish that, prior to the effective date of the policy, the walls of the unreinforced masonry building were cracked from the top to the bottom of the building. The cracks had been patched and had reopened. The cracks were large enough that daylight was showing through the cracks. Appreciable damage had occurred, should have been known to the insured, and a reasonable insured would have been aware of the damage prior to the June 1, 2003 start of the policy. Because the loss occurred before the policy began, there is no coverage, and for that reason, it is unnecessary to pass upon the applicability of any policy exclusions.

AFFIRMED.