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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VIVIAN SCHWARTZ, an individual; LAWRENCE SCHWARTZ, an individual, Plaintiffs-Appellants, v. KEMPER INDEPENDENCE INSURANCE COMPANY, a Delaware corporation, Defendant-Appellee.	No. 21-56356 D.C. No. 8:19-cv-00559-FMO-ADS MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Fernando M. Olguin, District Judge, Presiding

Argued and Submitted October 19, 2022
Pasadena, California

Before: KLEINFELD, CHRISTEN, and BUMATAY, Circuit Judges.

In this diversity case, we consider whether the district court correctly granted summary judgment against the plaintiffs, Vivian and Lawrence Schwartz

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

(the Schwartzes). Because the parties do not contest the relevant facts, we only consider whether the district court correctly applied the relevant substantive law. *See Anthem Electronics, Inc. v. Pacific Employers Ins. Co.*, 302 F.3d 1049, 1054 (9th Cir. 2002).

The substantive law issue is whether Kemper Independence Insurance Company (Kemper) owes the Schwartzes duties of defense and indemnification for the costs of the Ragsdale arbitration under the Schwartzes' liability insurance policy with Kemper (the Policy). We hold that Kemper owed no such duties to the Schwartzes.

Under California law for general, occurrence-based liability insurance policies, the "potential [for] coverage is triggered by the occurrence of bodily injury or property damage during the policy periods, as a result of an accident or the continuous or repeated exposure to conditions." *Montrose Chemical Corp. v. Admiral Ins. Co.*, 913 P.2d 878, 893 (Cal. 1995) (internal quotation marks omitted) (*Montrose II*). "Under this trigger of coverage theory, bodily injuries and property damage that are continuous or progressively deteriorating throughout successive policy periods are covered by all policies in effect during those periods." *Id.* at 894.

But a duty to defend exists only where "the underlying claim *may* fall within policy coverage." *Montrose Chemical Corp. v. Superior Court*, 861 P.2d 1153, 1162 (Cal. 1993) (*Montrose I*). "[I]n an action where no claim is even potentially covered, the insurer owes no duty to defend." *Feldman v. Illinois Union Ins. Co.*, 198 Cal. App. 4th 1495, 1500 (2011). And "[a]bsent a *factual* dispute as to the meaning of policy language, which we do not have here, the interpretation, construction and application of an insurance contract is strictly an issue of law." *Atl. Mutual Ins. Co. v. J. Lamb, Inc.*, 100 Cal. App. 4th 1017, 1031 (2002).

In determining whether there could be coverage, a court must consider "the effect, if any, of any exclusions contained in [a policy]." *Montrose II*, 10 Cal. 4th at 907; *see also Feldman*, 198 Cal. App. 4th at 1504 (finding there was no duty to defend under a liability insurance policy because of an exclusion whilst assuming the underlying events were otherwise covered). "The absence of a duty to defend is established when the insurer shows that 'the underlying claim [could] not come within the policy coverage by virtue of . . . the breadth of an exclusion.'" *Total Call Int'l Inc. v. Peerless Ins. Co.*, 181 Cal. App. 4th 161, 167 (2010) (quoting *Montrose I*, 861 P.2d at 1162) (alteration in original). And "if there is no potential liability for covered damages as a matter of law, there cannot be the potential for

indemnification, nor can there be a duty to defend." *Aetna Casualty & Surety Co. v. Superior Court*, 19 Cal. App. 4th 320, 327 (1993).

The Schwartzes argue that *Montrose II* and its progeny dictate the existence of coverage under their theory of a continuous or repeated exposure. Their argument boils down to the proposition that under *Montrose II,* when a continuous occurrence begins during or runs through part of a liability policy's lifespan, that policy provides coverage for all subsequent liability derived from the same continuous occurrence, regardless of whether the occurrence was excluded from coverage during the entire policy period.

We disagree. *Montrose II* considered whether a policy was triggered, not whether there was a duty to defend considering policy exclusions. 10 Cal. 4th at 907. The other cases on which the Schwartzes rely also did not consider situations where it was certain that no covered occurrence took place during the policy period. *See, e.g., Aerojet-Gen. Corp. v. Transport Indemnity Co.*, 948 P.2d 909, 928 (Cal. 1997); *Pepperell v. Scottsdale Ins. Co.*, 62 Cal. App. 4th 1045, 1054 (1998); *Stonewall v. City of Palos Verdes*, 46 Cal. App. 4th 1810, 1839 (1996).

Here, the Policy's owned property exclusion prevented the Schwartzes from obtaining liability coverage for the damage to the home while they owned it. Then the Schwartzes cancelled the Policy before the water intrusion—the very injury

their negligent repairs failed to prevent—appeared to Ragsdale. By definition, an occurrence, the trigger for coverage, must have taken place during the policy period. In both of these circumstances, Kemper owed the Schwartzes no coverage and, without receiving evidence that suggested there might be coverage, had no duty to defend the Schwartzes in the third party action at any point.

We find persuasive the reasoning of the court in *Devin v. United Services Auto. Assn.*, 6 Cal. App. 4th 1149 (1992). On facts functionally similar to this case, the court in *Devin* reasoned that:

> [T]o the extent Mr. Devin's repairs caused damage which first appeared *before* he sold the house, they would be subject to the exclusion against personal liability coverage for damage to property owned by the insured. To the extent Mr. Devin's repairs caused damage which first appeared *after* he sold the house, they would not be covered under [the policy] because the injury would not have occurred while such policy was in effect.

6 Cal. App. 4th at 160 n.7. We agree. Although the footnote is dicta, we find the decisions of California's "district appellate courts are persuasive" and generally follow them. Such decisions "do not bind each other or us" and we use *Devin* for its persuasive value here. *Muniz v. UPS*, 738 F.3d 214, 219 (9th Cir. 2013).

The Policy did not impose on Kemper duties to defend or indemnify the Schwartzes for the costs of their arbitration. The Schwartzes lacked coverage during the policy period because of the owned property exclusion and lacked

coverage afterward because they cancelled the policy before the damage to the house manifested. As a result, no covered occurrence ever took place. Because we decide the case on these issues, we need not reach Kemper's alternative arguments against coverage.

AFFIRMED.