Case No. S244737

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,
Respondent;

CANADIAN UNIVERSAL INSURANCE COMPANY, INC., et al.,
Real Parties in Interest.

After a Decision by the Court of Appeal,
Second Appellate District, Division Three
Civil Case No. B272387

After Grant of Review and Transfer to Court of Appeal to Vacate Order Denying Writ of Mandate and Order to Show Cause
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Petition from the Superior Court of the State of California
for the County of Los Angeles
Case No. BC 005158, Honorable Elihu Berle, Presiding

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA'S COMBINED REPLY BRIEF ON THE MERITS

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I. INTRODUCTION

Decades of this Court's jurisprudence, from *Montrose v. Admiral* (1995) 10 Cal.4th 645 ("*Montrose*"), through *State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186 ("*Continental*"), establish a policyholder's right to enforce each of its "separate and independent" insurance contracts according to their terms (*Aerojet-Gen. Corp. v. Transport Indem. Co.* (1997) 17 Cal.4th 38, 57, n. 10 ("*Aerojet*") [quoting *Montrose*, 10 Cal.4th at p. 686]), including an "all-sums-with stacking" approach to calculating the coverage proceeds available from the numerous policies triggered by a continuous loss. (*Continental*, 55 Cal.4th at p. 201.) Insurers historically have sought to attack that jurisprudence in several ways, including, in *Continental*, by advocating a "*pro rata*" allocation scheme for excess indemnity coverage that would have required policyholders to spread their losses evenly across all policy years, regardless of express policy limits and the "all sums" language. This Court has rejected these efforts by enforcing the plain language of standard CGL policies, interpreted under longstanding policy construction rules.

The latest iteration of Insurers' continuing campaign is a variation on the same theme, now premised on imaginary "uber policy layers," which supposedly mandate that policyholders horizontally exhaust their coverage, regardless of each policy's specific attachment language, the

numerous substantive differences in terms and exclusions, and the varying layers of coverage limits across multiple policy periods. The goal of Insurers' horizontal exhaustion scheme is plain: They seek to impose on the policyholder the burden of litigating coverage under decades of subsequent policies with more restrictive terms before it is allowed to call upon more favorable excess insurance assets in a particular policy period. In practical terms, the Insurers hope to effectively nullify these valuable assets, for which individualized premiums were paid, by dramatically increasing their attachment points.

Much like the insurance industry's prior efforts to artificially limit coverage for continuous loss claims, Insurers' new rule cannot be squared with the plain language of excess CGL policies or established precedent interpreting their key terms. It is undisputed that each of the 115 policies in Montrose's portfolio (the "Policies") expressly references ***specific underlying insurance policies*** (or limits) which must be exhausted before each Policy's excess coverage attaches. This is the essence of the bargain between an excess insurer and the policyholder. Unless the attachment point is determined at the time of contracting, the insurer has no way to assess its exposure and calculate a premium to charge, and the policyholder has no way of assuring it is protected for losses above a defined amount.

Yet the Insurers argue that, solely in the context of continuous damage claims, boilerplate "other insurance" language overrides and exponentially increases these express attachment points by sweeping in ***non-specified policies***, including future policies that did not exist at the time of contracting, which must also be exhausted before the policyholder is indemnified.

The Insurers' position, however, directly conflicts with how California and other jurisdictions uniformly have interpreted and applied these provisions. Under this Court's decision in *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal. 4th 1059, 1079-1081 ("*Dart*"), and well-established insurance law, "other insurance" language has a limited import: (1) ***vis-à-vis the insured***, such clauses prevent a double recovery for the same loss; and (2) ***vis-à-vis other insurers***, such clauses inform the equitable analysis in contribution actions. Accordingly, these clauses have never been read to dictate exhaustion, because such a result would undermine the fundamental purpose of excess coverage and violate basic principles of insurance policy interpretation.

No reasonable insured would expect that general "other insurance" language would somehow render the specific provision defining an excess policy's attachment point meaningless. Moreover, the meaning and application of "other insurance" language, wherever found in excess policies, does not vary depending on the nature of the underlying damage.

Because the Policies insure "Property Damage" occurring within the policy period, both instantaneous and continuing, the exhaustion/attachment requirement for this coverage does not change. Had the parties wished to apply a different attachment point for continuous property damage claims, they would have referred to a specific, separate coverage limit in the underlying policy, just like many of the Policies state with respect to personal injury or other distinct damage.

Unable to support the commercial fiction that excess policies attach at a substantially greater amount of liability for continuous damage claims, the Insurers simply concoct a legal one. Relying on the phrase "uber policy" quoted in *Continental*, the Insurers greatly distort this Court's ruling and guidance. The Insurers assert a false equivalency between *Continental*'s permissive stacking holding, which provides that an insured may recover under policies in multiple coverage periods that are triggered by continuous damage, and mandatory horizontal exhaustion, which would artificially and impracticably combine the limits of all underlying policies into a monolithic "layer" of coverage. Contrary to the Insurers' tortured reading, this Court has never suggested that continuous property damage effectively rewrites the underlying policies and merges them into a mega-policy with a single combined limit and uniform coverage terms and exclusions. As *Montrose, Aerojet* and *Continental* definitively explain, the

individual policy terms and limits remain paramount and controlling for each contract.

Because mandatory horizontal exhaustion impermissibly prevents policyholders from exercising the property rights purchased in each of these separate and independent excess contracts, Respondent's order should be reversed and summary adjudication entered for Montrose.

II. ARGUMENT

As Montrose demonstrated in its Opening Brief on the Merits ("OB"), both the plain language of each individual Policy, and insurance coverage principles long declared by this Court, defeat Insurers' contention that mandatory horizontal exhaustion of excess coverage applies as a default rule governing all continuous loss insurance claims. Insurers seek to escape this conclusion by:

(1) espousing a new interpretation of "other insurance" clauses that conflicts with settled precedent and would effectively nullify or render as surplusage each excess Policy's basic coverage obligation and specified attachment point;

(2) distorting the holding in *Continental* to create "uber-policy layers" that are irreconcilable with the purpose, function and terms of complex, multi-year excess coverage portfolios like Montrose's; and

(3) rewriting California law, in the name of purported "fairness" to ***insurers***, to prevent policyholders from immediately accessing valuable insurance assets according to each contract's express terms, thereby frustrating recovery and forcing the policyholder to engage in protracted litigation under decades of more restrictive coverage.

None of the Insurers' arguments can overcome the plain language specifying an identifiable amount of underlying limits in the same policy period that must be exhausted before an excess policy may be called upon. Nor can the Insurers circumvent this Court's consistent jurisprudence culminating in *Continental*'s pronouncement that California law entitles policyholders facing continuous damage liabilities to obtain coverage from any triggered policy under an "all sums with stacking" interpretation. (*Continental*, *supra*, 55 Cal.4th at pp. 200-201.)

A. The Policies Expressly Establish the Precise Limits Which Must Be Exhausted for Excess Coverage to Attach

Insurers do not dispute that each of the Policies contains a provision (or combination of provisions) specifying an identifiable amount of underlying limits "in the same policy period that must be exhausted before the policy is up to bat." (Answer at p. 19; see generally 1PA6 at pp. 117-200; 1PA7 at pp. 207-234.) This "predetermined" dollar amount expressly resolves the question of when an excess policy is triggered. (See

generally *Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1304 ("*Fireman's Fund*").)[1]

Insurers nonetheless argue that general "other insurance" language overrides the specific attachment language and "prescribe[s] the *sequence* in which coverage must be obtained[.]" (Answer at p. 16; see also *id.* at p. 30 ["[H]igher-layer excess policies remain excess to all policies below it [*sic*] potentially triggered by a continuous loss[.]"].)[2] They insist that, solely in the context of a continuous loss, the "other insurance" language covertly multiplies the amount of coverage that must be exhausted, by implicitly incorporating into each Policy a requirement to exhaust any and all insurance the policyholder may have purchased in different years. (Answer at pp. 19, 26.) However, their concocted construction squarely conflicts with this Court's interpretation of these

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[1] Premiums are calculated based upon the risk assumed by the insurer. (See *Herzog v. National American Ins. Co.* (1970) 2 Cal.3d 192, 197.) In the context of excess policies, the risk assumed by the insurer is predicated on the "predetermined amount" of underlying coverage in the same policy year. (*Wells Fargo Bank v. California Ins. Guarantee Assn.* (1995) 38 Cal.App.4th 936, 940 & fn.2 ("*Wells Fargo*").) No consideration—and no reduction in premium—is given based upon the amount of coverage that the policyholder may or may not purchase in different years.

[2] Determining what constitutes a "lower layer" or "higher layer" policy presents a number of additional questions when there are no uniform attachment points or layers throughout the coverage portfolio. (See 1PA5 at 99; see generally OB at pp. 66-67; contra Answer at p. 11 [hypothesizing identical layers of coverage].)

clauses, as well as every published case from other jurisdictions analyzing the purpose and function of this boilerplate language.

1. This Court Established in *Dart* That Other Insurance Provisions Merely Govern the Allocation of Liability Among Insurers After the Policyholder Has Been Fully Indemnified

Far from the broad-reaching import ascribed by the Insurers, California law has long recognized that, in the absence of any double recovery concern, "other insurance" clauses primarily govern the rights and obligations of insurers covering the same risk ***vis-à-vis one another***, but do not affect a policyholder's right to recovery under those policies. (E.g., *Dart*, *supra*, 28 Cal. 4th at p. 1080.) This stems in large part from the fact that "[h]istorically, 'other insurance' clauses were designed to prevent multiple recoveries when more than one policy provided coverage for a particular loss." (*Fireman's Fund*, *supra*, 65 Cal.App.4th at p. 1304 [citation omitted].)

As the recently-approved Restatement of the Law, Liability Insurance explains, "'other insurance clauses' do not apply to policyholders" at all, but "are included in insurance policies only because there is no other contractual vehicle in which to define how to apportion liability among insurance companies . . . . Payment of the insured's claim always takes priority over the allocation of the loss between concurrent insurers." (See Restatement of the Law of Liability Insurance § 20

(Proposed Final Draft No. 2, 2018), Reporters' Note (a) ("Restatement") [citing Randall, *Coordinating Liability Insurance* (1995) 1995 Wis.L.Rev. 1339, 1353, fn. 48 and quoting Richmond, *Issues and Problems in "Other Insurance," Multiple Insurance, and Self-Insurance* (1995) 22 Pepperdine L.Rev. 1373, 1380-81].)

In *Dart*, this Court reviewed the historical purpose of the "other insurance" clause, and ruled that these "disfavored" conditions address the specific question of how to allocate (or "apportion") liability "among multiple insurers" ***after*** the policyholder is fully indemnified. (*Dart*, *supra*, 28 Cal.4th at pp. 1079-1081.) The Court's exposition and analysis of "other insurance" clauses has been cited dozens of times by California, federal and other state courts. (See, e.g., *State of California v. Continental Ins. Co.* (2017) 15 Cal.App.5th 1017, 1032 ("*Continental II*") (["[O]ther-insurance clauses are intended to apply in contribution actions between insurers, not in coverage litigation between insurer and insured."]; *Certain Underwriters at Lloyds, London v. Arch Specialty Ins. Co.* (2016) 246 Cal.App.4th 418, 429-430 [presence of an "other insurance" clause "would merely entitle the primary insurer to seek contribution from other insurers; it would not affect [the insurer's] obligation to its insured" (citing *Dart*)]; *Travelers Casualty & Surety Co. v. Century Surety Co.* (2004) 118 Cal.App.4th 1156, 1162-1164 [endorsing "the application of equitable principles to resolve the conflicting other insurance clauses" (discussing

Dart, *Montrose* and *Aerojet*)]; *Heartland Payment Systems, LLC v. Utica Mutual Ins. Co.* (Mo.Ct.App. 2006) 185 S.W.3d 225, 232 [following *Dart* and *Fireman's Fund*]; *Pepsi-Cola Metropolitan Bottling Co. v. Ins. Co. of North America, Inc.* (C.D. Cal., Dec. 28, 2010, No. CV 10-2696 SVW (MANx)) 2010 U.S. Dist. LEXIS 144401, *24-26 ["California courts have left battles of allocation of costs to separate contribution suits between liability insurers, rather than subjecting the insured to additional litigation."].)

In the face of this overwhelming authority, Insurers have no choice but to try to undermine *Dart*. Despite the decision's broad application, Insurers suggest the Court's holding was narrow, misleadingly claiming the Court was merely "concerned with 'other insurance' *disputes*" between insurers but did not address anything "outside the inter-insurer contribution context." (Answer at p. 40, n. 7 [discussing *Dart*, *supra*, 28 Cal.4th at p. 1078, fn. 6].) This assertion finds no support in the ruling. The Court expressly held that while "other insurance" clauses can be relevant in inter-insurer contribution disputes, "[t]hat apportionment . . . has no bearing upon the insurers' obligations to the policyholder." (*Dart*, *supra*, 28 Cal.4th at p. 1080; see also *ibid.* [if insurer's policy contained an "other insurance" clause, "all that would be established is that it had a right to seek some kind of contribution from successive insurers"].)

Insurers also suggest that *Dart* is inapplicable in situations where the policyholder has purchased enough coverage in other policy periods to potentially cover the loss. (Answer at pp. 36-37.) However, *Dart*'s interpretation does not wax and wane based on the amount of underlying insurance purchased in other periods. In fact, the Court's reasoning applies with even more force to insurance portfolios like Montrose's. If each Insurer were allowed to use the "other insurance" language as Insurers suggest, each excess Policy would be excess to every other Policy, and Montrose could be deprived of its right to recovery under any Policy. This absurd result is precisely why *Dart* rejected the insurer's interpretation. (See *Dart*, *supra*, 28 Cal.4th at pp. 1079-1081; see generally *MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 650, 652 [refusing to "interpret[ ] an exclusionary clause so broadly that it logically leads to absurd results"].)

2. "Other Insurance" Provisions Do Not Override the Express Attachment / Exhaustion Language That Establishes an Excess Policy's Coverage

Unable to escape the dispositive effect of *Dart*, Insurers rely on supposedly different iterations and locations of "other insurance" language to suggest that those clauses must be afforded unique interpretations and weight in this case. Regardless of the variation of "other insurance" language used, these provisions have the same basic meaning, as the language and case law makes clear. (See *Continental II, supra,* 15

Cal.App.5th at p. 1032 ["[O]ther-insurance clauses are intended to apply in contribution actions between insurers, not in coverage litigation between insurer and insured. . . . We see no reason to treat the other-insurance clause in this case differently just because it was repeated and incorporated into the definition of Ultimate Net Loss." (discussing *Dart*, 10 Cal.4th at p. 1080)].)

a. The Plain Language of the Policies' "Other Insurance" Provisions Supports This Court's Determination of Their Meaning and Purpose

Even accepting the Insurers' invitation to read the language of the "other insurance" provisions wholly in isolation from the specific express attachment language—which, of course, is improper as the language "must be construed in the context of that instrument as a whole" (*Continental*, *supra*, 55 Cal.4th at p. 195)—the Policies confirm this Court's interpretation in *Dart*.

The standard "other insurance" provision contained in most Policies refers to "other valid and collectible insurance." (See generally 1PA6 at pp. 118-166; 1PA7 at pp. 208-231.)[3] The phrase "other valid and collectible insurance," by its plain terms, clearly references ***all*** other coverage, irrespective of the attachment point. (See *Continental II*, *supra*,

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[3] Minor variants are contained in policies issued by American Centennial ["other collectible insurance"], Continental and Columbia Casualty ["other insurance"], and Northbrook ["any other insurance"]. (See 1PA6 at pp. 120, 146, 160.)

15 Cal.App.5th at p. 1032 ["other insurance" provision is "not limited to *lower-layer* insurance" and purports to avoid liability "as long as there is *any* other unexhausted insurance"].)[4]

As a result, under Insurers' theory that "other insurance" provisions supplant the express attachment language, no excess policy would apply until after the exhaustion of every policy issued in any year. This, of course, could never occur, because each of *those* policies also contains an "other insurance" provision making *that* policy excess to every other policy. (See *Continental II*, *supra*, 15 Cal.App.5th at pp. 1032-33 ["[A] court could not determine the amount any insurer owes without first determining what every insurer owes[.]"]; *Employers Reinsurance Corp. v. Phoenix Ins. Co.* (1986) 186 Cal.App.3d 545, 557 ["If we were to give effect to all three excess clauses in this instance, they would cancel each

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[4] Insurers contend that "other valid and collectible insurance" refers only to policies with lower attachment points because certain "other insurance" provisions state they are inapplicable to "insurance that is in excess of the insurance afforded by this policy." (See, e.g., Answer at p. 30.) However, that language merely confirms that a particular policy cannot purport to be excess to another policy ***in the same year expressly written as excess*** to the policy in question, not other policy years.

Indeed, many of the "other insurance" provisions in the Policies at issue make this explicit, stating that the "other insurance" condition "does not apply with respect to the underlying insurance or excess insurance ***purchased specifically*** to be in excess of this policy." (See 1PA6 at 146 [emphasis added]; see also *id.* at pp. 142-160; 1PA7 at pp. 208-231 [at least 36 policies issued by 12 different insurers contain "other insurance" provisions that exclude from their scope "insurance that is ***specifically stated*** to be in excess of this policy" or "***purchased specifically*** to apply in excess of this insurance" (emphasis added)].)

other out and afford the insured no coverage whatsoever. We would travel full circle with no place to say 'the buck stops here.'"].)

To escape the well-established meaning and purpose of these provisions, Insurers insist that the plain language "cannot possibly be" interpreted literally, but rather, "the other insurance being referred to ***has to be*** other 'underlying' insurance, ***whether the word 'underlying' is explicitly used or not***[.]" (Answer at p. 43 [emphasis added].) Insurers essentially seek to re-write the provision so that it refers to "other valid and collectible underlying insurance with a lower attachment point in any other period."[5]

In other words, Insurers contend that it would be irrational to apply the terms of the "other insurance" provision as written, so the Court

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[5] Insurers repeatedly use the phrase "underlying insurance" to refer to coverage in other years with a lower attachment point. (See, e.g., Answer at p. 29 [arguing for "horizontal exhaustion of all underlying insurance in policy years to which the continuous loss extends"].) This is inaccurate. "Underlying insurance" refers to lower-lying insurance in ***the same policy period***, *i.e.*, the insurance that lies "under" the policy at issue. (See *Legacy Vulcan Corp. v. Super. Ct.* (2010) 185 Cal.App.4th 677, 691 ("*Legacy Vulcan*") ["The term "underlying insurance" . . . must be interpreted in [insured's] favor to encompass only the underlying policies described in a schedule attached to the [excess] policy, rather than all of the collectible primary insurance available[.]"]). Indeed, Insurers recognize this is the more appropriate interpretation of "underlying insurance." (See Answer at p. 34 ["'[M]aintenance of underlying insurance' provisions . . . are not meant to ensure that there is insurance from other policy periods to exhaust. Rather, they simply serve to protect against the policyholder canceling or reducing ***the amount of the underlying insurance during any given policy period.***" (emphasis added)].)

must insert additional key terms to achieve the result they want. This is plainly improper, because that is not how the provision is written. As Insurers themselves recognize, California courts "do not rewrite any provision of any contract, [including an insurance policy], for any purpose." (*Id.* p. 41 [quoting *Rosen v. State Farm Gen. Ins. Co.* (2003) 30 Cal.4th 1070, 1073 (quotations omitted)]; see also *Mercury Casualty Co. v. Chu* (2014) 229 Cal.App.4th 1432, 1455 [courts "are not empowered" to engage in "rewriting (reforming) either the exclusion clause or the insured clauses" and "[e]xclusions and exceptions contained within a policy must be construed strictly against the insurer" (citations omitted)].) Had the drafters intended to refer to policies in different years with lower attachment points, they could have drafted the provision to clearly express that intent. They did not. (See *Continental II, supra*, 15 Cal.App.5th at p. 1032; see generally *Advent, Inc. v. Nat. Union Fire Ins. Co. of Pittsburgh, PA* (2016) 6 Cal.App.5th 443, 468 ("*Advent*") [reference to "other insurance" is "vague" without specificity concerning which "other insurance"].)

b. Separate Provisions Found in Certain Policies Do Not Alter the Meaning of "Other Insurance" Language

Because virtually all of the Policies have the same boilerplate "other insurance" language contained in the "Conditions" or other provisions that have been the subject of the extensive case and treatise

analysis discussed in the Opening Brief and herein, including *Dart*, Insurers next turn to the language of a few cherry-picked policies in hopes of obtaining a different result. Upon examination, none of these terms supports application of a mandatory horizontal exhaustion rule as to any one Policy, let alone every Policy in Montrose's coverage portfolio.

First, Insurers rely upon the reference to "other insurance**s**" in certain "Loss" provisions. (Answer at pp. 27, 29.) But California courts have ruled that defining "loss" as "sums paid as damages . . . after making deductions for all recoveries, salvages and other insurances (whether recoverable or not)" does ***not*** constitute an effective "other insurance" provision impacting the insurer's attachment point. (See *Fireman's Fund Indem. Co. v. Prudential Assurance Co.* (1961) 192 Cal.App.2d 492, 495 ("*Prudential*").) A "vague" reference to "other insurance," in a policy that "contain[s] specific language" triggering coverage immediately upon exhaustion of specified underlying policies, does not convert the definition of "loss" into a limitation on the policyholder's right to recovery. (*Advent, supra*, 6 Cal.App.5th at p. [discussing *Prudential*].)[6]

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[6] Because this policy language purports to extend to "***all***" other insurance, applying it as the Insurers suggest across a coverage portfolio would necessarily lead to the absurd, circular result that every policy is excess to every other policy. (See *supra*, pp. 22–23 [discussing *Continental II*, *supra*, 15 Cal.App.5th at pp. 1032-33; *Employers Reinsurance*, *supra*, 186 Cal.App.3d at p. 557]; cf. *MacKinnon*, *supra*, 31 Cal. 4th at p. 652 [rejecting "broad interpretation" of exclusion that "leads to absurd results and ignores the familiar connotations of the words used"].)

Multiple courts have rejected Insurers' argument concerning these "loss" provisions. *Continental II* recently held the same provision in the Continental policies "simply does not support" horizontal exhaustion because the clause is "not limited to *lower-layer insurance*" and purports to avoid liability "as long as there is *any* other unexhausted insurance—including policies in the same layer." (*Continental II*, *supra*, 15 Cal.5th at p. 1033.) Similarly, the court in *Prudential* specifically rejected the argument that "***all . . . other insurances***" in the definition of "Loss" "logically . . . must include underlying insurance in *other* policy periods." (Compare Answer at p. 27 with *Prudential*, *supra*, 192 Cal.App.2d at p. 497 [reference to "other insurances" in definition of "ultimate net loss" is "a limited declaration applicable solely to *the primary insurer's* other insurance."].)

Second, Insurers argue mandatory horizontal exhaustion should be applied to govern ***all 115 Policies*** in Montrose's portfolio because of the reference to "other underlying insurance" in the definition of "retained limit" in ***three*** American Centennial policies. (Answer at pp. 20, 28; contra *Signal Cos. v. Harbor Ins. Co.* (1980) 27 Cal.3d 359, 370 ("*Signal*") ["The contracts were separately negotiated with the insured . . . and must be independently interpreted."].)[7]

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[7] Insurers misleadingly suggest that "[n]umerous other policies have similar or identical language" to the American Centennial policies, *i.e.*

Since the American Centennial policies are first-layer excess policies, it is not surprising that they were written to attach upon exhaustion of underlying primary coverage, which contains a duty to defend potentially broader than any excess coverage. But the requirement that primary policies be exhausted prior to an excess policy dropping down to provide a defense does not mandate a horizontal exhaustion rule for indemnity under all ***excess*** policies. (See *State v. Continental Ins. Co.* (2009) 170 Cal.App.4th at 160, 184 ("*State v. Continental*"), aff'd, *Continental, supra*, 55 Cal.4th at p. 191.)

Finally, Insurers seek to compel their result based upon the "Limits" provisions in certain Fireman's Fund and National Surety Policies, which state that coverage under those policies apply "only after all underlying insurance has been exhausted." (Answer at p. 29; see also 1PA6

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references to "other underlying insurance." (See Answer at p. 21, fn. 3; see also *id.* at p. 29 [broadly asserting that the Policies' "insuring agreements specify, by their terms, that they do not cover any loss incurred by the insured until the insured exhausts both (1) any scheduled (vertically) underlying policies, *and* (2) any *other* underlying insurance."].) In reality, the three American Centennial policies referenced are the ***only*** policies in Montrose's coverage portfolio that contain language referring to "other *underlying* insurance."

Unlike the American Centennial policies, to which the Northbrook policies cited by Insurers partially follow form, the Northbrook policies cover "all sums" for which the insured becomes liable, rather than the insured's "ultimate net loss." (1PA6 at 159.) Consequently, the "retained limit" language from the American Centennial policy is untethered to any provision in the Northbrook policies. (*Ibid.*)

at 136.) This language instead supports ***Montrose's*** position, because the "underlying insurance" that must be exhausted is explicitly defined as the underlying insurance *in the same policy period*—not other insurance in different periods. (See 1PA6 at 136 [promising to indemnify the insured for "ultimate net loss in excess of the Insurance afforded under the Blanket Excess Liability or 'Umbrella' policies specified in Item 7 of the Declarations,[8] ***hereafter called underlying insurance***" (emphasis added)].)[9]

3. Policyholders Reasonably Expect to Obtain Coverage Under an Excess Policy Upon Exhaustion of the Immediately Underlying Insurance

According to Insurers' new exhaustion scheme, a policyholder purchasing excess insurance could not ascertain the policy's attachment point at the time of contracting, because the "other insurance" provision as interpreted by Insurers implicates future policies the policyholder ***has not even purchased yet***. This cannot be the rule. (See *Safeco Ins. Co. of Am. v. Robert S.* (2001) 26 Cal.4th 758, 766 ("*Safeco*") ["expectations of the insured are examined at the time the contract is made" (citing Civ. Code, §§ 1636, 1649; *Montrose*, *supra*, 10 Cal.4th at p. 666)].) A policyholder reasonably expects that the excess policy it is purchasing will attach upon

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[8] Item 7 of the Declarations refers to the "Schedule of Underlying Insurance: As on File with the Company." (*Id.* p. 137.)

[9] The American Centennial, Northbrook, American-Reinsurance and Lamorak policies cited by Insurers all contain similar provisions. (*Id.* pp. 121, 124, 160.)

the exhaustion of the immediately underlying insurance, since that is the essence of the bargain for which the parties agreed upon the premium. (See *Legacy Vulcan Corp.*, *supra*, 185 Cal.App.4th at p. 682 ["The very existence of a Schedule of Underlying Insurance suggests that the unqualified term 'underlying insurance' refers to that schedule."].)[10]

Insurers' position, however, rests on the premise that the "underlying insurance" which must be exhausted necessarily includes every policy with a lower attachment point for every year in which the policyholder purchased insurance. If that were true, the Policies' attachment provisions would not need to identify the underlying policies in effect during the same year, because they would already be included within the term "underlying insurance." Thus, the Insurers' argument renders superfluous the provisions identifying the specific underlying insurance by name and number, contravening the rules of insurance policy interpretation that this Court has adopted. (See, e.g., *AIU Ins. Co. v. Super. Ct.* (1990) 51 Cal.3d 807, 827-828 ("*AIU*") [refusing to adopt construction that would

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[10] No provision of the Policies purports to vary the attachment point or amount of coverage based upon the nature of the underlying damage alleged. (See 1PA6 at pp. 118-184; 1PA7 at pp. 208-233.) The Policies uniformly cover "Property Damage" occurring within the policy period, both instantaneous and continuing, without differentiating the exhaustion/attachment requirement according to the nature of the damage alleged. (See generally *Montrose*, *supra*, 10 Cal.4th at pp. 664, 672-673.)

render a phrase "redundant" or "meaningless"]; *Safeco, supra,* 26 Cal.4th at p. 764 [refusing to interpret an insurance policy in a way that would render's the policy's contractual promises "illusory"].)

Under California law, when the "plain language" of the insuring agreement ties a policy's attachment point to specified underlying insurance, and the policy does "not clearly and unequivocally" state that it is excess over policies insuring other years, courts do not allow "a generally worded 'other insurance' clause" to alter coverage. (*Carmel Development Co. v. RLI Ins. Co.* (2005) 126 Cal.App.4th 502, 511 ("*Carmel*") [citing *Dart, supra*, 28 Cal.4th at p. 1080]; see generally *State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1018 ["a coverage provision . . . will be construed broadly in favor of the insured" (citations omitted)]; *Delgado v. Heritage Life Ins. Co.* (1984) 157 Cal.App.3d 262, 271 ["[P]olicy provisions which limit insurance coverage . . . are strictly construed against the insurer and liberally interpreted in favor of the insured."].)[11]

Even if the Insurers' interpretation had not already been rejected by *Dart* and numerous other courts, the most it could ever do is render the

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[11] A specific provision relating to a particular subject governs despite a general provision that is broad enough to include the same subject. (See *Ortega Rock Quarry v. Golden Eagle Ins. Corp.* (2006) 141 Cal.App.4th 969, 981; Civ. Code, § 3534.)

Policies' reference to "other insurance" ambiguous.[12] However, in that event, the language must be construed in favor of coverage for the insured. (*AIU, supra*, 51 Cal.3d at p. 822 ["In the insurance context, we generally resolve ambiguities in favor of coverage."]; *Reserve Ins. Co. v. Pisciotta* (1982) 30 Cal.3d 800, 808 ["exclusionary clauses are interpreted narrowly against the insurer" (citations omitted)].)[13]

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[12] Several courts have found "other insurance" clauses ambiguous. (E.g., *St. Paul Fire & Marine Ins. Co. v. Ins. Co.* (N.D.Cal. Mar. 7, 2017, No. 15-CV-02744-LHK) 2017 U.S.Dist.LEXIS 32551 ("*St. Paul Fire & Marine*"), at *55-56 [based on ambiguities in "other insurance" language, "the Court cannot conclude that the Penn policy 'clearly and unequivocally inform[ed] the insured that [the Penn policy] was excess over all other insurance, primary and excess'" (citation omitted)]; *Advent, supra*, 6 Cal.App.5th at p. 468 [reference to "other insurance" is "vague" without specificity concerning which "other insurance"]; *Prudential, supra*, 192 Cal.App.2d at p. 495 ["The confusion which ["other insurance"] clauses engenders fastens upon the draftsman the obligation of writing a provision which is unequivocal."].)

As these cases recognize, the "other insurance" provision was never intended to refer to excess insurance in past (or future) years, but was intended to refer only to other, overlapping coverage issued in the same policy period. (See, e.g., *Benjamin Moore & Co. v. Aetna Casualty & Surety Co.* (2004) 179 N.J. 87, 98 ["'[O]ther insurance' clauses . . . are provisions typically designed to preclude a double recovery when multiple, concurrent policies provide coverage for a loss. . . . ***[S]uch clauses were not generally applicable in the continuous-trigger context*** where successive rather than concurrent policies were at issue." (emphasis added; citation omitted)]; see generally OB at pp. 46-47.) Insurers' Answer offers no response to this line of authority.

[13] Insurers repeatedly refer to Montrose as "sophisticated," implying it should not be entitled to the benefit of the general rules of construction this Court applies to interpret and apply standardized provisions like those in the Policies. (See Answer, at pp. 17, 44, 60; cf. *AIU*, 51 Cal.3d at 823.) However, Insurers cite no evidence for this implication, and California courts "depart from the normal rule of interpretation, that

B. The Insurers' Illogical "Uber Policy Layer" Construct Cannot Circumvent the Plain Meaning of the Specific Exhaustion Provisions

Although Insurers attempt to style their argument here with new phrases such as "uber policy layer," their aim has not changed since they were last before this Court. Insurers have long attempted to force policyholders seeking coverage for continuous loss claims into artificial schemes restricting the express contractual rights declared by this Court. In *Continental*, the insurance industry sought to mandate that the policyholder's liability be spread across all policy periods through "pro rata" allocation. (*Continental*, *supra*, 55 Cal.4th at p. 198.) Alternatively, the insurers insisted that under the *FMC* decision, insureds should not be allowed to "stack" policies at all, but rather must be limited to a ***single*** vertical "spike" (i.e. one period of primary and overlying excess policies) as the sole source of coverage, even if the policy limits of that "spiked" coverage tower were insufficient to cover the continuous damage spanning multiple policy years. (*Id.* pp. 193-194; see *FMC Corp. v. Plaisted & Cos.* (1998) 61 Cal.App.4th 1132, 1189.)

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ambiguities are interpreted in favor of coverage, ***only*** where there is 'evidence that the provision in question was jointly drafted; merely showing that policy terms were negotiated, and that the insured had legal sophistication and substantial relative bargaining power, is not enough.'" (*Martin Marietta Corp. v. Ins. Co. of North Am.* (1995) 40 Cal.App.4th 1113, 1134-1135 [emphasis added; quoting *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 738].)

This Court rejected both attempts to constrain the available coverage, instead adopting the "all-sums-with-stacking rule" dictated by the policy language, which "means that the insured has immediate access to the insurance purchased" and "does not put the insured in the position of receiving less coverage than it bought." (*Continental*, *supra*, 55 Cal.4th at p. 201.)[14]

The Court's ruling recognized that either method (pro rata or limited vertical spiking) for imposing a forced allocation of indemnity damages would be antithetical to "all sums" coverage. (*Continental*, *supra*,

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[14] Insurers mischaracterize Montrose's *amicus curiae* briefs in *Continental* in favor of "***stacking***" as espousing a rule of horizontal ***exhaustion***. (See Answer at p. 49.) To the contrary, Montrose argued that *FMC* was irreconcilable with prior decisions endorsing stacking of multiple consecutive polices, including *CRA*. Montrose's position has remained consistent throughout the years, as demonstrated by the section of Montrose's *amicus* brief that Insurers ignore, entitled "The Coverage Afforded Is and Should Be 'All Sums' Coverage, With Elective Stacking, Subject to Allocation Through Contribution," in which Montrose argued:

> [T]he insured "should be free to select the policy or policies under which it is to be indemnified[]" and "***when the policy limits of a given insurer are exhausted, [the insured] is entitled to seek indemnification from any of the remaining insurers which was on the risk***" during the progressive injury[.]

(See 7PA25 at p. 1770 [citing *J.H. Fr. Refractories Co. v. Allstate Ins. Co.* (Pa. 1993) 626 A.2d 502, 509 (emphasis added)].) Montrose advanced the same argument to this Court, which adopted the reasoning of *J.H. France*. (See 7PA25 at p. 1780; *Continental*, *supra*, 55 Cal.4th at p. 200 [citing *J.H. France*, 626 A.2d at 509].)

55 Cal.4th at pp. 199-202.) Having lost the battle to undermine the Court's "all sums" jurisprudence, Insurers now corrupt *Continental* in hopes of using "horizontal exhaustion" to effectuate the same result.

Insurers' Answer ignores the express factors that led this Court to adopt the "all-sums-with-stacking" rule and manufactures a novel artificial allocation scheme untethered from California law. They argue that solely in a continuous loss scenario, a policyholder's coverage portfolio—which can often stretch decades and include various attachments points and competing coverage provisions among the different policies—should be divided into many different "uber-***layers***." (E.g., Answer at p. 47.)[15]

Insurers premise this contention on the erroneous theory that *Continental*, by quoting a law review article that colloquially referred to the total amount of coverage available to a policyholder as an "uber-policy," held that policyholders are obligated to aggregate their coverage as a single, unified whole spread over all policy periods. (See Answer at pp. 12, 14.) That obviously was not the Court's holding. Rather, in adopting an "all sums with stacking" rule that ensured the policyholder "has ***access to*** far more insurance than it would ever be entitled to within any one period,"

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[15] Insurers repeatedly engage in a sleight of hand, misleadingly describing the rule announced by *Continental* as "all-sums-with-***horizontal***-stacking," in order to falsely equate this Court's decision with the novel scheme they advocate here. (See Answer at pp. 54-55; accord *id.* pp. 11, 50; cf. *id.* p. 49.)

this Court affirmed the decision of the Court of Appeal, which allowed the State to access coverage from multiple policy periods, rather than being limited to a single policy period. (*Continental*, *supra*, 55 Cal.4th at p. 201 ["We agree with the Court of Appeal, and find that the policies at issue here, which do not contain antistacking language, allow for its application. In so holding, we disapprove [*FMC*]."]; *State v. Continental*, *supra*, 170 Cal.App.4th at p. 178 ["[W]hen there is a continuous loss spanning multiple policy periods, *any* insurer that covered *any* policy period is liable for the entire loss, up to the limits of its policy." (italics in original)].)

From their flawed starting point, Insurers imagine that there are artificially derived horizontal "layers" of insurance coverage, "each" of which constitutes its own "different uber-polic[y]" applicable to a continuous loss. (Answer, at pp. 14, 46-47, 50-51.) This Court plainly did not endorse any such concept in *Continental*, which instead construed the terms and conditions of individual policy language to permit stacking.[16]

Importantly, the "uber layer" structure is not even contractually viable in the common multi-decade coverage portfolio (such as

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[16] The Court's single reference to "uber-policy" was surely never intended to mean that many years of insurance actually ***become*** one undifferentiated policy subject to uniform terms. (See *Continental*, *supra*, 55 Cal.4th at p. 201 ["***each*** policy can be called upon to respond to the claim up to the full limits of the policy," and once "the policy limits of a given insurer are exhausted, [the insured] is entitled to seek indemnification from ***any*** of the remaining insurers [that were] on the risk" (emphases added; alteration in original)].)

Montrose's), which contains numerous differences in policy language that may substantively impact the coverage available in different periods, and does not neatly segregate into equivalent "horizontal layers" across policy years. (See 1PA5 at 99.) There can be no "uber layer" because looking at the language—the universal starting point—there are not uniform policies (either in terms or limits) comprising any given "layer." Simply stated, diverse policies cannot merge into a single "uber layer," as the Insurers themselves recognize by continuing to assert their individual policy defenses (e.g. pollution exclusions).

Far from collapsing into a homogenous "uber layer," each of the Policies (and their respective underlying policies) is a separate and independent contract that may be accessed and must be enforced according to its own terms. (E.g., *Signal*, *supra*, 27 Cal.3d at p. 370 ["The contracts were separately negotiated with the insured . . . and must be independently interpreted."]; *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.* (1996) 45 Cal. App. 4th 1, 79, fn. 31 ["[I]nsurance policies should be interpreted as if no other insurance is available."].) These are distinct, not shared or unified obligations. (*Aerojet*, *supra*, 17 Cal.4th at p. 57 & n.10 ["'successive' insurers 'on the risk . . . are ***separately and independently*** 'obligated to indemnify the insured'" (emphasis added)]; *Emerald Bay Community Assn. v. Golden Eagle Ins. Corp.* (2005) 130 Cal.App.4th 1078, 1088 [where multiple policies are triggered, each insurer must "honor its

separate and independent contractual obligation"].) Aggregating discrete Policies and their individual underlying coverages into artificial "uber layers," and then mandating exhaustion of those false constructs is nonsensical.

The arguments flowing from Insurers' erroneous premise are also wrong. Contrary to the Insurers' contention, allowing a policyholder to choose the policy(ies) under which to seek indemnification does not "artificially break[ ] the long-tail injury into distinct periods of injury." (Answer at p. 51.) California law is clear that any policy "on the risk" during a continuous loss is obligated to indemnify "all sums" for which the policyholder is liable. (See *Montrose*, *supra*, 10 Cal.4th at p. 686; *Aerojet*, *supra*, 17 Cal.4th at p. 57, fn.10; *Continental*, *supra*, 55 Cal.4th at p. 200 ["when more than one policy is triggered by an occurrence, each policy can be called upon to respond to the claim up to the full limits of the policy"].)[17]

Accordingly, "[w]hen a continuous loss is covered by multiple policies, the insured may elect to seek indemnity under a ***single*** policy with adequate policy limits. If that policy covers 'all sums' for which the

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[17] Insurers repeatedly suggest that *CRA* endorsed their argument that "horizontal exhaustion is not only mandated . . . but it is also 'most consistent' with this Court's seminal continuous-loss decisions" in *Aerojet* and *Continental*. (See Answer, at pp. 44, 48.) A Court of Appeal decision issued in 1996 certainly did not analyze or opine on Supreme Court decisions issued in 1997 and 2012.

insured is liable, as most CGL policies do, that insurer may be held liable for the entire loss." (*Stonelight Tile, Inc. v. California Ins. Guarantee Assn.* (2007) 150 Cal.App.4th 19, 37 [emphasis added; citations omitted]; see also *State v. Continental*, *supra*, 170 Cal.App.4th at p. 178, aff'd, *Continental*, *supra*, 55 Cal.4th at p. 191; *Armstrong*, *supra*, 45 Cal.App.4th at p. 52 ["[A] policyholder may obtain full indemnification and defense from one insurer, leaving the targeted insurer to seek contribution from other insurers covering the same loss." (citation omitted)].) The fact that a policyholder may elect not to seek coverage under a policy (or policies) that are triggered by a continuous loss does not mean that no injury occurred during that year or that there would be no coverage if sought.

General insurance law principles support *Continental* and Montrose's approach: "[u]nder the all-sums approach" to continuous loss claims, insureds are permitted to "exhaust the coverage available in one year using a 'vertical-exhaustion' approach before accessing the coverage available in another year" (Restatement § 41, Rptr. Note i.):

> Under the most common all-sums approach—sometimes called the all-sums-with-stacking approach—an insured may seek recovery from one triggered insurer until the limits of that policy are exhausted, then seek recovery from another triggered insurer until the limits of that policy are exhausted, and so on, until either the claim is fully paid or the limits of all the triggered policies are exhausted.

(Restatement § 41, Rptr. Note c.)[18]

C. Mandatory Horizontal Exhaustion of Excess Coverage Is Inconsistent With California Law

Pivoting away from this Court's precedent and the controlling policy language, Insurers urge this Court to follow Respondent's lead and announce a new, "fair" rule requiring all excess CGL policies to be exhausted horizontally, i.e., that "horizontal exhaustion should apply in the absence of policy language specifically describing and limiting the underlying insurance." (See Answer at p. 35; 1PA1 at p. 54:14-17.) Insurers thus advocate a judicially-imposed, non-contractual rule of

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[18] Insurers' claim that horizontal stacking and horizontal exhaustion "go hand in hand" is a fabrication, contradicted by what the courts actually said in the cases cited. (*Compare* Answer at p. 49 with *Matter of Viking Pump, Inc.* (2016) 27 N.Y.3d 244, 265 ("[V]ertical exhaustion is conceptually consistent with an all sums allocation, permitting the Insured to seek coverage through the layers of insurance available for a specific year." (citation omitted)]; *Olin Corp. v. OneBeacon American Ins. Co.* (2d Cir. 2017) 864 F.3d 130, 145 ["*Viking Pump* dictates that we reject OneBeacon's position that the pro rata approach applies . . . an insured may simply tap a particular tower of its insurance program triggered by an occurrence and proceed up the tower upon depletion of the policies within each layer of coverage"]; *Westport Ins. Corp. v. Appleton Papers, Inc.* (Wis. Ct.App. 2010) 787 N.W.2d 894, 918 [affirming Wisconsin's "all sums" and stacking principles, and concluding that "[h]orizontal exhaustion is [] not consistent with policy provisions" which "required exhaustion only of the policies below them in that particular policy year"]; *Nooter Corp. v. Allianz Underwriters Ins. Co.* (Mo.Ct.App. 2017) 536 S.W.3d 251, 271-72 [concluding "vertical exhaustion shall apply to the aforementioned excess policies" because "courts typically pair either (1) 'all sums' allocation with vertical exhaustion or (2) 'pro-rata' allocation with horizontal exhaustion, finding the grouped methodologies conceptually consistent."].)

mandatory horizontal exhaustion, predicated on "general principles," which governs all "continuous loss cases" ***unless*** specific policy language disavows that new rule. (See 1PA1 at p. 52:4-26 [discussing *Community Redevelopment Agency v. Aetna Casualty & Surety Co.* (1996) 50 Cal.App.4th 329, 339 ("*CRA*")].)

This approach contravenes California law, which looks to policy language—not judicial rules—in the first instance. (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277.) Questions of insurance policy interpretation must be resolved by a "focus . . . upon the language of the policy itself, not upon 'general' rules of coverage that are not necessarily responsive to the policy language." (*American Cyanamid Co. v. American Home Assurance Co.* (1994) 30 Cal.App.4th 969, 978.) In fashioning the general rule here, Respondent and the Court of Appeal relied almost exclusively on the pre-*Continental* decision in *CRA*.

The lower courts' decisions extending *CRA* to excess coverage layers were without precedent or rationale. This Court has never endorsed *CRA*, and it is unclear whether horizontal exhaustion should apply, even at the primary level, in the wake of *Continental*. Indeed, no other published appellate decision since *Continental* has relied upon *CRA*'s primary horizontal exhaustion ruling. Regardless of whether horizontal exhaustion of ***primary*** coverage is required with respect to the duty to ***defend*** in

California, there is no justification for a rule of mandatory horizontal exhaustion of ***excess indemnity*** coverage.[19]

1. Horizontal Exhaustion Is a Limited Doctrine

As in the proceedings below, Insurers' Answer fails to cite a single decision imposing mandatory horizontal exhaustion of ***excess*** coverage. Instead, each of the cases cited by Insurers as purportedly supporting horizontal exhaustion concerned the exhaustion of ***primary*** insurance before excess coverage attaches.

For example, *Olympic*, a case discussed at length in Insurers' Answer, held that an excess policy "does not apply to cover a loss until the underlying ***primary insurance*** has been exhausted." (*Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.* (1981) 126 Cal.App.3d 593, 600 (emphasis added).) Likewise, in *CRA*, the court held that an excess policy "does not cover a loss, nor does any duty to defend the insured arise, until *all* of the ***primary insurance*** has been exhausted." (*Cmty. Redevelopment Agency v. Aetna Cas. & Sur. Co. (1996)* 50 Cal. App. 4th 329, 339 (emphasis added).)

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[19] Insurers incorrectly claim that "Montrose does not seriously dispute that it must horizontally exhaust its insurance at the primary level." (Answer at p. 32.) Montrose and the Insurers stipulated for purposes of the parties' cross-motions for summary adjudication that Montrose's primary coverage is exhausted. Accordingly, Montrose's position is that, regardless of whether exhaustion of primary insurance is required, it does not impact Montrose's rights under the excess Policies at issue.

The remainder of the cases cited by Insurers either: (a) arose in the context of a contribution dispute between insurers; or (b) required horizontal exhaustion of primary coverage before excess coverage was accessed. (See *Carmel*, *supra*, 126 Cal.App.4th at p. 502 [contribution action between insurers]; *Hartford Casualty Ins. Co. v. Travelers Indemnity Co.* (2013) 110 Cal.App.4th 710, 726-727 [same]; *Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 Cal.App.4th 1810, 1852-1853 [allocating "between primary and excess carriers"]; *Hoerner v. ANCO Insulations, Inc.* (La. Ct.App. 2002) 812 So.2d 45, 69 ["[E]xcess insurers are not required to make indemnity payments until all applicable primary limits are exhausted."]; *U.S. Gypsum Co. v. Admiral Ins. Co.* (1994) 268 Ill.App.3d 598, 652 ["The crux of this issue is how much primary insurance must be exhausted before Gypsum can seek coverage under an excess policy."]; *AAA Disposal Systems, Inc. v. Aetna Cas. & Sur. Co.* (2005) 355 Ill.App.3d 275, 286 [excess insurer's policies "serve as excess policies to all triggered primary policies"]; *Atchison, Topeka & Santa Fe Ry. Co. v. Stonewall Ins. Co.* (2003) 275 Kan. 698, 750 [excess coverage not triggered until horizontal exhaustion of self-insured retentions, which court found to be equivalent of primary insurance].)[20]

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[20] *Dow Corning Corp. v. Continental Cas. Co.* (Mich Ct.App. Oct. 12, 1999) 1999 WL 33435067, is an unpublished decision of the Michigan Court of Appeals that other courts have declined to follow. (See *Decker*

Insurers never confront the reasons why the doctrine of horizontal exhaustion could ***only*** make commercial sense, if at all, with respect to primary coverage. (See OB at pp. 31-35.) For example, the fact that primary insurers have a defense obligation—whereas excess insurers do not—was one of the main justifications for *CRA*'s holding. (See *Legacy Vulcan*, *supra*, 185 Cal.App.4th at p. 695 [explaining that the core "reason for th[e] rule" of *CRA* "is that the defense obligation falls on the primary insurer, whose greater premium reflects that risk."].) Insurers' failure to address this, or the other critical distinctions Montrose identified between primary and excess insurance, confirms the lack of commercial support for extending the doctrine of horizontal exhaustion to the excess layers. (See, e.g., *Viking Pump, Inc. v. Century Indemnity Co.* (Del.Super.Ct., Feb. 28, 2014, No. 10C-06-141) 2014 Del. Super. LEXIS 707, at *21-27, 36 ["It is unassailable that horizontal exhaustion is a limitation tending to deny coverage. While that makes sense at a primary/umbrella level where the policies specifically contemplate responding first, ***this limitation ought not apply to excess***." (discussing California cases; emphasis added)].)

CRA, if it survives at all, should be limited to primary policies containing a duty to defend. Given the broad defense provisions contained

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Manufacturing Corp. v. Travelers Indemnity Co. (W.D. Mich. Feb. 3, 2015, No. 1:13-CV-820) 2015 WL 438229 at *14.)

in primary policies and the higher premiums paid for this unique coverage, *CRA* concluded that primary policies should be exhausted before excess policies are called upon to assume the defense. However, that reasoning does not support extending horizontal exhaustion to excess policies in the *indemnity* context. Although not raised by the facts here, for clarity, to the extent *CRA* suggests that primary indemnity coverage must be exhausted horizontally before any excess coverage is reached, Montrose respectfully suggests that it should be disapproved.

2. Insurers Cannot Rewrite Coverage to the Policyholder's Detriment to Achieve "Fairness" For Insurers at Policyholders' Expense

Because continuous damages cases such as this involve billions of coverage dollars, the insurance industry is extremely motivated to avoid, or at least significantly delay, costly coverage obligations by shifting the burden of insurance recovery onto the backs of policyholders. Insurers' argument for doing so here essentially boils down to the contention that it is unfair for certain insurers to have to respond and indemnify the policyholder's liability when other insurers' policies may also be triggered. (See Answer at p. 53 [seeking to "most fairly assign[] responsibility amongst insurers"]; see *id.* at p. 52 (labeling mandatory horizontal exhaustion "the Fairer Approach"].) This argument relies on misplaced claims of injustice. Montrose does not dispute that losses may ultimately be apportioned between insurers on equitable grounds, but vehemently

challenges the Insurers' suggestion "requiring ***the insured***" to bear the cost of resolving disputes "amongst ***insurers***" as a precondition to accessing the indemnity coverage Montrose paid for.

Any concerns the Insurers may have about "fairness" amongst themselves can be addressed—as they frequently are—in ***equitable contribution*** actions between the insurers ***after*** the policyholder has been fully indemnified. (See *Continental*, 55 Cal.4th at p. 200 [where a continuous loss triggers multiple policy years, the carriers selected for indemnification "may then seek contribution from the other insurers on the risk during the same loss"]; *Aerojet*, *supra*, 17 Cal.4th at p. 57, fn. 10 ["allocation" disputes between insurers whose policies are successively triggered by a continuous loss are resolved "among such insurers," often through application of "equitable considerations" (quoting *Montrose*, *supra*, 10 Cal.4th at p. 687)]; *Truck Ins. Exchange v. Amoco Corp.* (1995) 35 Cal.App.4th 814, 828 ["Contribution claims are matters solely between insurers[.]"]; see generally *Trammell Crow Residential Co. v. St. Paul Fire and Marine Ins. Co.* (N.D. Tex., Jan. 21, 2014, No. 3:11-CV-2853-N) 2014 WL 12577393 at *2 ["[T]he choice between vertical and horizontal exhaustion is one of which side should bear the burden of seeking contribution from other insurers – the insured or the carrier. It does not seem inequitable to place this administrative burden (and associated risks) on the carrier rather than the insured."].)

In all events, the Insurers' disputes among themselves cannot impede Montrose's ability to obtain prompt indemnification of its losses. (See *Continental*, *supra*, 55 Cal.4th at pp. 200-201 [before proceeding to issues of allocation, the Court must first ensure that the policyholder "has immediate access to the insurance it purchased"]; *Pepsi-Cola Metropolitan Bottling Co. v. Ins. Co. of North America, Inc.* (C.D. Cal., Dec. 28, 2010, No. 10-2696) 2010 U.S. Dist. LEXIS 144401, *24-26 ["California courts have left battles of allocation of costs to separate contribution suits between liability insurers, rather than subjecting the insured to additional litigation."].)

The Insurers' other public policy arguments also fail. The Insurers correctly note that this Court should attempt to ascertain the "reasonable expectations of the parties" in interpreting the attachment language of the Policies (Answer at p. 25), as Montrose discussed at length above. (See *supra*, pp. 28-31.)

But contrary to Insurers' post-hoc view of "fairness" to the Insurers as a collective whole, the parties' reasonable expectations must be assessed as of the time of contracting of each individual policy. When a policyholder like Montrose purchases an excess policy above a specified amount of underlying coverage, it reasonably expects to be able to seek indemnification from that policy when it sustains liability exceeding the underlying policy's limit. The Insurers underwrote and charged a premium

based on that risk, and it is not inequitable or unreasonable for the policyholder to enforce the contract it purchased in the most commercially-beneficial manner. (See *Continental*, 55 Cal.4th at p. 200 ["all sums" rule "best reflects the insurers' indemnity obligations under the respective policies, the insured's expectations, and the true character of the damages that from a long-tail injury"].)

What Insurers seek is to retroactively change the policy's coverage after the policyholder suffers a long-tail loss, because of their grievance that this Court's "all sums" jurisprudence, including *Continental*'s "all sums with stacking" rule, "provides [] insureds far more coverage than they could have anticipated when they purchased their policies." (See Answer at p. 55.) This argument was considered and explicitly rejected by this Court. (See *Continental*, 55 Cal.4th at p. 201 ["An all-sums-with-stacking rule . . . ***comports with the parties' reasonable expectations***, in that the insurer reasonably expects to pay for property damage occurring during a long-tail loss it covered, but only up to its policy limits, while the insured reasonably expects indemnification for the time periods in which it purchased insurance coverage." (emphasis added)].) The Insurers' undisguised attempt to circumvent *Continental* should be rejected.

3. Insurers Fail to Address the Deleterious Impact of Mandatory Horizontal Exhaustion

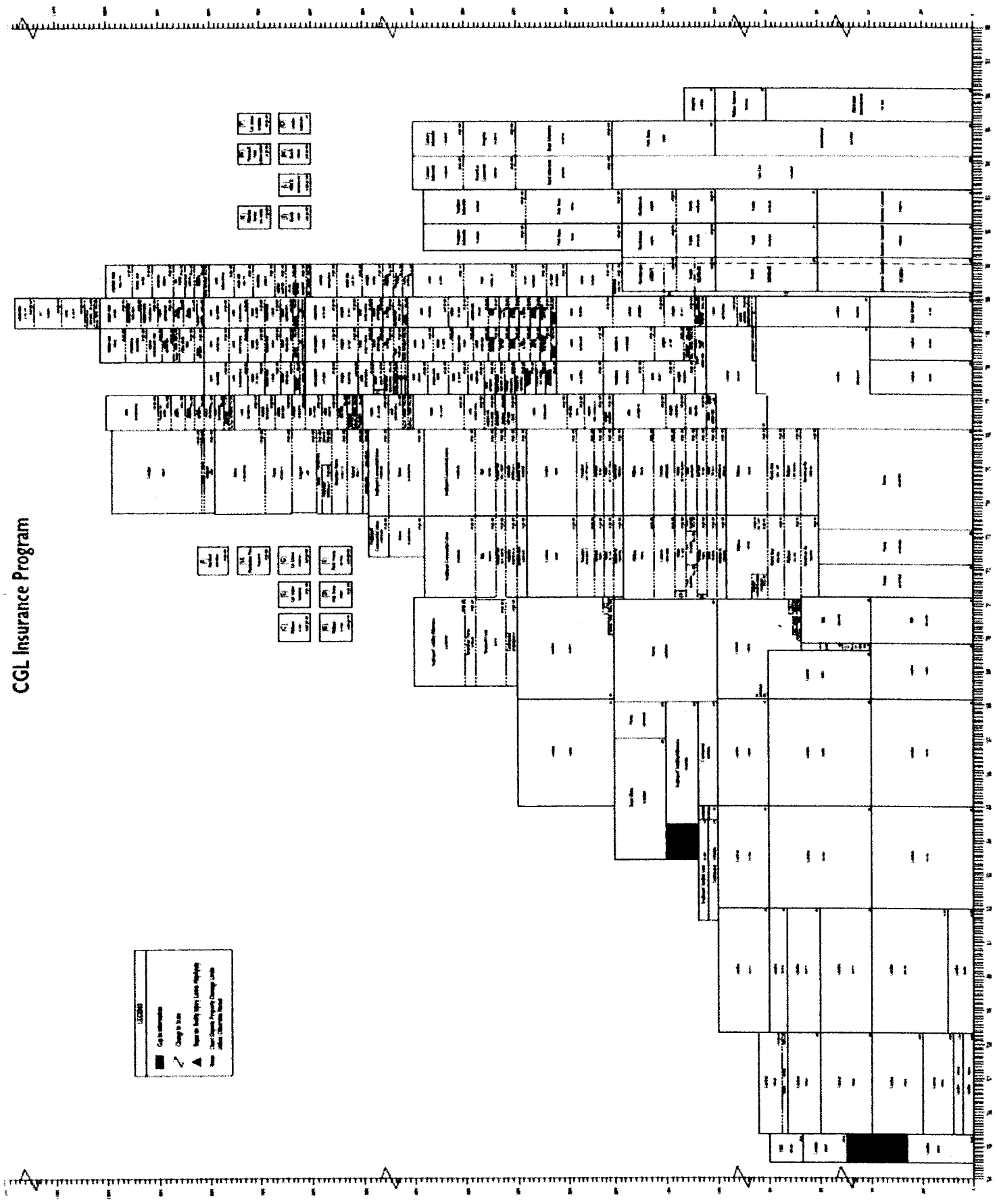
Insurers have no response to the numerous reasons why mandatory horizontal exhaustion imposes undue burdens on policyholders' rights, e.g., the fact that such a rule would compel the litigation of coverage issues unique to policies with more restrictive terms before accessing coverage under other policies with different terms and broader coverage. (See OB at pp. 53-69.) Insurers simply dismiss Montrose's legitimate and overarching concerns as "an unpersuasive parade of horribles," then pretend that notwithstanding those extensive arguments, Montrose "never offer[s] any reason why horizontal exhaustion . . . does not [ ] work well for excess layers." (Answer at pp. 16-17.)

Rather than confronting these effects, Insurers pivot to a different argument, attempting to show that proceeding horizontally through a coverage portfolio is more efficient than proceeding vertically. (See Answer at pp. 58-60.) This argument is belied by the nature of coverage programs implicated by long-tail claims. Excess policies in a given coverage year typically "follow form" to the provisions of the policies underneath them. Thus, by establishing coverage under the terms of the first-layer excess policy, the insured effectively establishes its right to coverage under the policies above it, and can then vertically exhaust those

policies moving sequentially up the tower. (See *Wells Fargo*, *supra*, 38 Cal.App.4th at p. 940.)

In contrast, proceeding horizontally across a coverage portfolio would require the policyholder to litigate coverage issues unique to policies with more restrictive terms (such as the pollution exclusion) before accessing coverage under other policies with different terms and broader coverage. (See OB at pp. 54-55; *Continental II*, *supra*, 15 Cal.App.5th at p. 1033 ["[I]f a lower-layer insurer for a different policy period happened to claim that some exclusion in its policy applied, a court could not determine whether Continental's policies were triggered without first determining that exclusion claim."].)

Moreover, Insurers' overly-simplistic hypothetical charts and description of the "bathtub approach" of horizontal exhaustion fail to provide answers to the many unresolved questions about how horizontal exhaustion would be applied in the context of ***actual*** complex insurance coverage portfolios, such as Montrose's, that do not contain any neatly ordered and uniform "uber-layers" of coverage:


CGL Insurance Program

(1PA5 at 99.)

Applying a rule of mandatory horizontal exhaustion to complex, decades-long coverage portfolios would be incredibly burdensome, and undoubtedly foster further litigation and delay Montrose's recovery. (See, e.g., *Continental*, 55 Cal.4th at p. 196 [in long-tail environmental claims, "insurers are unwilling to indemnify insureds" and "[t]heir refusal to indemnify often causes insureds to sue for coverage," which suits "tend to be complex"]; *Westport Ins. Corp. v. Appleton Papers Inc.* (Wis. 2010) 787 N.W.2d 894, 918-19 ["Horizontal exhaustion would create as many layers of additional litigation as there are layers of policies."].)

The far better approach—and the only one consistent with policy language and California law—is to allow the policyholder "immediate access to the insurance it purchased," according to its terms, and allow impacted carriers to "then seek contribution from the other insurers on the risk during the same loss." (*Continental*, *supra*, 55 Cal.4th at 200; see also *Armstrong*, *supra*, 45 Cal.App.4th at p. 52 ["[A] policyholder may obtain full indemnification and defense from one insurer, leaving the targeted insurer to seek contribution from other insurers covering the same loss." (quotations omitted)]; accord *Aerojet*, *supra*, 17 Cal.4th at p. 75.)

D. Respondent Superior Court Can Determine the Fact of Exhaustion of Underlying Insurance on Remand

Once again, Travelers files a separate brief based primarily on a mischaracterization of the relief Montrose has sought. In the trial court, Montrose asserted a declaratory relief claim to resolve a ripe dispute with the Insurers regarding what allocation method should govern Montrose's claims in this case. Specifically, Montrose sought a declaration that "in order to ***seek*** indemnification under the Defendant Insurers' excess policies, Montrose need only establish that its liabilities are sufficient to ***exhaust the underlying policy(ies) in the same policy period***, and is not required to establish that all policies insuring Montrose in every policy period (including policies issued to cover different time periods both before and after the policy period insured by the targeted policy), with limits of liability less than the attachment point of the targeted policy, have been exhausted." (See 4PA17 at p. 914, ¶ 63(a)(b) [emphasis added].)

Each of the Policies requires exhaustion of underlying coverage in the same policy year. The nature of that exhaustion—i.e. whether the underlying insurer must have "actually paid" its policy limits—will be impacted by the terms of the Policy(ies) targeted for indemnity. Thus, when Montrose seeks indemnity from any specific Policy(ies), for example by seeking to adjudicate its first cause of action and obtaining a ruling that Travelers has "the duty and obligation to fully indemnify Montrose against

any damages in [*U.S. v. Montrose*] up to the limits of liability" in the Travelers policies (4PA17 at 871), Travelers can attempt to oppose whether Montrose has exhausted the "underlying coverage" beneath each Travelers policy.[21]

It is not necessary to resolve disputes over the ***fact*** of exhaustion to rule on Montrose's motion for summary adjudication, which seeks a ruling resolving a ***legal*** cause of action concerning exhaustion and allocation requirements.[22]

It is equally unnecessary to address Travelers' choice of law argument at this stage. Travelers' argument is premised on the erroneous claim that Montrose's principal place of business was located in

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[21] As Travelers recognizes, its policies attach after "the underlying insurers have paid or ***been held to pay*** the full amount of their respective limits of liability as described in the underlying policies[.]" (Travelers Answer at p. 16 (emphasis altered).) A policyholder like Montrose can demonstrate exhaustion of underlying coverage through an order establishing the sequence of various policies' payments of their limits of liability.

[22] Because the determination of underlying exhaustion will be addressed by the trial court once the case advances to the point of allocating liability to specific policies, Travelers' discussion of *Qualcomm, Inc. v. Certain Underwriters at Lloyds, London* (2008) 161 Cal.App.4th 184, is irrelevant to the issues presented in Montrose's cause of action and motion for summary adjudication. (*See* Travelers Answer at pp. 18-19.) Notably, however, the Court of Appeal's interpretation of the exhaustion language of policies at issue in *Qualcomm* has not been favorably cited by any California court, and conflicts with other Court of Appeal decisions – both published (e.g., *Phoenix Ins. Co. v. U.S. Fire Ins. Co.* (1987) 189 Cal.App.3d 1511) and unpublished.

Connecticut at the time the Travelers policies were issued,[23] and flies in the face of decades of litigation between Montrose and the Insurers, including multiple proceedings before this Court, all of which has universally been conducted under California substantive law. (See 7PA29 at pp. 1857-58.)[24]

Regardless, the argument was not addressed by either of the lower courts,[25] and does not impact the legal ruling Montrose seeks—overturning the erroneous legal rulings below that "mandatory horizontal exhaustion" is compelled for Montrose to access its excess policies.

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[23] Travelers misleadingly cites a federal court decision addressing Montrose's primary place of business ***in 1997***, when its sole full-time employee maintained his office in Trumbull, Connecticut. (Travelers Answer, at pp. 10-11 ["During the period of the Travelers Policies . . . . Montrose's principal place of business was located in *Connecticut*."]; compare *Montrose Chem. Corp. v. American Motorists Ins. Co.* (9th Cir. 1997) 117 F.3d 1128, 1130.) This has nothing to do with assessing Travelers' obligations under policies issued decades earlier.

[24] Montrose filed its first coverage lawsuit against Travelers in Los Angeles Superior Court in April 1986, and the parties have litigated extensively in the three decades since, including: (a) *Montrose Chem. Corp. of Cal. v. Canadian Universal Ins. Co.*, Superior Court of Los Angeles, California, Case No. BC 005158 (this case); (b) *Montrose Chem. Corp. of Cal. v. Canadian Universal Ins. Co.*, Superior Court County of Los Angeles, California, Case Nos. C 594148, C547389; (c) *Montrose Chem. Corp. of Cal. v. Travelers Indemnity Co.*, Case No. BC 077158; (d) *Montrose Chem. Corp. of Cal. v. The Travelers Indemnity Co.*, Case No. BC 164315; and (e) *Montrose Chem. Corp. of Cal. v. Am. Motorists Ins. Co. et al.*, Case No. BC 130486. These cases have not only all been litigated exclusively under California law, but in some cases helped to shape the development of substantive insurance law in the state. (E.g. *Montrose Chem. Corp. v. Super. Ct.* (1993) 6 Cal.4th 287.)

[25] (See *Montrose Chemical Corp. v. Super. Ct.* (2017) 14 Cal.App.5th 1306, 1317; 1PA2 at 82.)

Accordingly, it should be addressed in the first instance on remand, following this Court's resolution of the parties' dispute regarding a policyholder's right to freely access its coverage portfolio in accordance with the terms of each individual Policy. (See *Hamilton v. Asbestos Corp., Ltd.* (2000) 22 Cal.4th 1127, 1149 [declining to address and remanding issues that Court of Appeal did not reach].)

III. CONCLUSION

For the foregoing reasons, Montrose respectfully requests that the Court direct Respondent Superior Court to immediately set aside its April 14, 2016 Order, and to enter a new order granting Montrose's Motion for Summary Adjudication on its Thirty-Second Cause of Action.

DATED: August 22, 2018

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I certify, pursuant to rule 8.504(d)(1), California Rules of Court, that the attached Combined Reply Brief on the Merits contains 10,661 words, including footnotes, as measured by the word count of the computer program (Microsoft Word) used to prepare this brief.

DATED: August 22, 2018

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On August 22, 2018, I served the following document described as:

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA'S COMBINED REPLY BRIEF ON THE MERITS

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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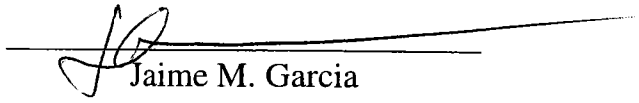
Executed on August 22, 2018, at San Diego, California.



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