

**Case No. S244737**

**IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA**

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**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.*

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**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 for an Order to Show Cause  
Supreme Court Case No. S236148**

**After Denial of Petition for Writ of Mandate by the Court of Appeal,  
Second Appellate District, Division Three  
Civil Case No. B272387**

**Petition from the Superior Court of the State of California  
for the County of Los Angeles  
Case No. BC 005158, Honorable Elihu Berle, Presiding**

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**MONTROSE CHEMICAL CORPORATION OF  
CALIFORNIA'S REQUEST FOR JUDICIAL NOTICE IN  
SUPPORT OF REPLY IN SUPPORT OF PETITION FOR  
REVIEW**

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Attorneys for Petitioner Montrose Chemical Corporation of California

Pursuant to California Rules of Court, rule 8.252, and Evidence Code sections 452 and 459, Petitioner Montrose Chemical Corporation of California (hereinafter, “Montrose”) respectfully requests that this Court take judicial notice of the following document:

**Exhibit 1**: The Reporter’s Transcript of Audiotaped Proceedings – Oral Argument, taking Place before the Honorable Lee Smalley Edmon, Presiding Justice, Richard D. Aldrich, Associate Justice, and Luis A. Lavin, Associate Justice in *Montrose Chemical Corporation of California v. Superior Court of the State of California, County of Los Angeles, et al.*, in the Court of Appeal of the State of California Second Appellate Division, Division Three, Case No. B272387, dated March 14, 2017 (“Transcript”). A copy of the certified Transcript is attached hereto as Exhibit 1 and authenticated by the Declaration of Drew T. Gardiner (“Gardiner Declaration”), ¶ 2, filed in support of this Request for Judicial Notice.

**MEMORANDUM OF POINTS AND AUTHORITIES**

California courts may take judicial notice of the records of any court of this state. (Evid. Code, § 452, subs. (d)(1) & (2); *id.*, § 459, subd. (a).)

The Transcript is relevant to Montrose’s Petition for Review because it contradicts arguments advanced in the Answer filed by Real Parties in Interest Continental Casualty Company and Columbia Casualty Company and the insurers that joined that Answer (“Insurers”).

The Transcript was not presented to Respondent Superior Court because the oral argument recorded on the Transcript took place at the Court of Appeal, postdating proceedings at the Superior Court.

Montrose has given the Insurers notice of this request, which is sufficient to enable the Insurers to prepare to meet this request (see proof of service, concurrently filed herewith), and has furnished this Court with sufficient information to enable it to take judicial notice of the document described above. (Evid. Code, § 452 d)(1); Evid. Code, § 459(a) [“The reviewing court may take judicial notice of any matter specified in Section 452.”].)

### **STATEMENT OF RELIEF SOUGHT**

For the foregoing reasons, Montrose requests that the Court take judicial notice of Exhibit 1 to Montrose’s Request for Judicial Notice filed in support of its Reply in Support of Petition for Review.

DATED: November 6, 2017

Respectfully submitted,

LATHAM & WATKINS LLP

Brook B. Roberts

John M. Wilson

Drew T. Gardiner

By:  \_\_\_\_\_

Drew T. Gardiner

Attorneys for Petitioner

Montrose Chemical

Corporation of California

## DECLARATION OF DREW T. GARDINER

I, Drew T. Gardiner, declare as follows:

1. I am an attorney duly licensed to practice law in the State of California and Counsel at the law firm of Latham & Watkins LLP, counsel for Petitioner Montrose Chemical Corporation of California in the above-entitled case. As such, I have personal knowledge of the matters set forth herein and, if called upon to do so, could and would testify as follows.

2. Attached hereto as Exhibit 1 is a true and correct copy of the certified Reporter's Transcript of Audiotaped Proceedings – Oral Argument, Taking Place Before The Honorable Lee Smalley Edmon, Presiding Justice, Richard D. Aldrich, Associate Justice, And Luis A. Lavin, Associate Justice, in *Montrose Chemical Corporation of California v. Superior Court of the State of California, County of Los Angeles, et al.*, before the Court of Appeal of the State of California Second Appellate Division, Division Three, Case No. B272387, dated March 14, 2017.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct and that this declaration was executed on November 6, 2017, at San Diego, California.



Drew T. Gardiner

# EXHIBIT 1

CIVIL NO. B272387

IN THE CALIFORNIA COURT OF APPEAL  
FOR THE SECOND APPELLATE DISTRICT  
DIVISION THREE

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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.

---

Petition from the Superior Court  
of the State of California  
for the County of Los Angeles  
Case No. BC 005158, Honorable Elihu Berle, Presiding

Following a Grant of Review and Transfer by the  
Supreme Court of California, Case No. S236148

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TRANSCRIPT OF ORAL ARGUMENT

MARCH 14, 2017

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION THREE

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. )

CIVIL CASE  
NO. B272387

REPORTER'S TRANSCRIPT OF AUDIOTAPED PROCEEDINGS  
PROCEEDINGS TAKING PLACE BEFORE THE HONORABLE  
LEE SMALLEY EDMON, presiding justice,  
RICHARD D. ALDRICH, associate justice, and  
LUIS A. LAVIN, associate justice

ORAL ARGUMENT

TUESDAY, MARCH 14, 2017

TRANSCRIBED WEDNESDAY, APRIL 19, 2017

APPEARANCES:

FOR PETITIONER: LATHAM & WATKINS LLP  
BY: JOHN M. WILSON, ESQ.  
12670 HIGH BLUFF DRIVE  
SAN DIEGO, CALIFORNIA 92130  
TRANSCRIBED BY: LAURIE HELD-BIEHL,  
CA CSR NO. 6781



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APPEARANCES (CONTINUED):

FOR REAL PARTIES IN  
INTEREST CONTINENTAL  
INSURANCE CO. &  
COLUMBIA INSURANCE CO.

AND OTHERS:                   BERKES CRANE ROBINSON & SEAL LLP  
BY: STEVEN M. CRANE, ESQ.  
515 SOUTH FIGUEROA STREET  
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FOR REAL PARTIES  
IN INTEREST TRAVELERS  
INDEMNITY CO. &  
TRAVELERS CASUALTY &  
SURETY CO.:

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425 LEXINGTON AVENUE  
NUMBER 15TH  
NEW YORK, NEW YORK 10017

1 CASE NUMBER: B272387  
2 CASE NAME: MONTROSE CHEMICAL CORPORATION  
3 OF CALIFORNIA V SUPERIOR COURT  
4 OF THE STATE OF CALIFORNIA,  
5 COUNTY OF LOS ANGELES  
6 LOS ANGELES, CA TUESDAY, MARCH 14, 2017  
7 TRANSCRIBED ON: WEDNESDAY, APRIL 19, 2017  
8 TRANSCRIBED BY: LAURIE HELD-BIEHL,  
9 CA CSR NO. 6781  
10 APPEARANCES: AS HERETOFORE NOTED.  
11  
12 JUSTICE EDMON: MATTER NUMBER 4, MONTROSE CHEMICAL  
13 CORPORATION.  
14 MR. WILSON: GOOD MORNING, YOUR HONORS.  
15 JOHN WILSON ON BEHALF OF MONTROSE CHEMICAL  
16 CORPORATION OF CALIFORNIA.  
17 JUSTICE EDMON: GOOD MORNING. AND I GUESS IT'S  
18 OBVIOUS WHO YOUR PANEL IS AT THIS POINT.  
19 DO YOU WANT TO RESERVE SOME TIME FOR  
20 REBUTTAL?  
21 MR. WILSON: I WOULD LIKE TO RESERVE THREE  
22 MINUTES.  
23 THANK YOU, YOUR HONOR.  
24 JUSTICE EDMON: THANK YOU.  
25 MR. WILSON: MAY IT PLEASE THE COURT, THE  
26 FUNDAMENTAL QUESTION PRESENTED BY TODAY'S  
27 REPETITION (SIC) IS THIS: UNDER CALIFORNIA LAW, IS A  
28 POLICYHOLDER ENTITLED TO ACCESS COVERAGE UNDER EACH OF

1 ITS MULTIPLE-TRIGGERED INSURANCE POLICIES IN ACCORDANCE  
2 WITH THE EXPRESS TERMS OF THOSE CONTRACTS, OR DOES  
3 CALIFORNIA LAW IMPOSE AN ARTIFICIAL SCHEME THAT DICTATES  
4 HOW COVERAGE MUST BE EXHAUSTED IN CONTINUOUS LOSS CASES?

5 THE ANSWER TO THIS QUESTION CAN BE FOUND IN  
6 A CONSISTENT AND LONG LINE OF DECISIONS FROM THE  
7 CALIFORNIA SUPREME COURT, FROM MONTROSE VERSUS ADMIRAL,  
8 TO AEROJET, AND MOST RECENTLY IN CONTINENTAL.

9 THE STATE SUPREME COURT HAS REPEATEDLY HELD  
10 THAT POLICYHOLDERS HAVE THE RIGHT TO CALL UPON THEIR  
11 INDIVIDUAL INSURANCE CONTRACTS ACCORDING TO THEIR OWN  
12 TERMS WITHOUT BEING FORCED INTO ANY KIND OF ARTIFICIAL  
13 EXHAUSTION SCHEME.

14 JUSTICE EDMON: YOU KNOW --

15 GO AHEAD.

16 JUSTICE ALDRICH: I'M SORRY.

17 YOU KNOW, YOUR COMMENT ABOUT "ACCORDING TO  
18 THEIR OWN TERMS" RAISES A QUESTION IN MY MIND AND THAT  
19 IS IT SEEMS TO ME THAT WHAT MONTROSE WANTED TO DO WAS TO  
20 ESTABLISH A VERTICAL EXHAUSTION OF PRIMARY COVERAGE  
21 SITUATION WHERE THE INSURANCE COMPANIES TOOK THE VIEW  
22 THAT IT SHOULD HAVE BEEN A HORIZONTAL EXHAUSTION.

23 BUT IN ORDER TO DETERMINE EITHER OF THOSE  
24 ARGUMENTS, THE VALIDITY OF EITHER OF THOSE ARGUMENTS,  
25 ISN'T IT NECESSARY TO LOOK TO THE CONTRACTS THEMSELVES  
26 TO SEE WHAT THEY PROVIDE?

27 MR. WILSON: SO TWO POINTS TO THAT, YOUR HONOR.

28 FIRST OF ALL, MONTROSE DID NOT ARGUE FOR

1 VERTICAL EXHAUSTION, THAT WAS SOMETHING THAT THE TRIAL  
2 COURT SUGGESTED DURING THE HEARING. BUT WE MADE CLEAR,  
3 BOTH IN OUR PAPERS AND AT THE ORAL ARGUMENT, THAT THAT'S  
4 NOT WHAT MONTROSE WAS ASKING FOR.

5 WHAT MONTROSE WAS ASKING FOR WAS NOT TO BE  
6 FORCED INTO A HORIZONTAL ALLOCATION SCHEME.

7 SO THERE MAY BE SITUATIONS, FOR EXAMPLE,  
8 WHERE A POLICYHOLDER WILL GO VERTICALLY UP ONE STACK  
9 BECAUSE THERE'S SUFFICIENT INSURANCE PROCEEDS TO COVER  
10 THEIR LIABILITY. THERE MAY BE OTHER SITUATIONS WHERE  
11 THEY NEED TO TAP INTO MULTIPLE YEARS' POLICIES.

12 SO MONTROSE WASN'T ASKING FOR A VERTICAL  
13 EXHAUSTION PRINCIPLE.

14 JUSTICE ALDRICH: IT WANTED HORIZONTAL, I GET  
15 THAT.

16 MR. WILSON: EXACTLY. EXACTLY.

17 IT WAS MORE OF A --

18 AND WE USE THE TERM, IT'S A -- IT'S JUST  
19 A -- A SHORTHAND THAT WE USE, BUT WE USE "ELECTIVE  
20 STACKING" AS A TERM TO MEAN WE GET TO CALL UPON ANY  
21 POLICY THAT'S BEEN TRIGGERED AND ENFORCE IT ACCORDING TO  
22 ITS TERMS.

23 JUSTICE ALDRICH: MY QUESTION WAS --

24 MR. WILSON: SURE.

25 JUSTICE ALDRICH: -- SLIGHTLY A DIFFERENT POINT  
26 AND, THAT IS, ISN'T IT NECESSARY, IN ORDER TO DETERMINE  
27 WHETHER THE EXCESS POLICY IS TRIGGERED, COVERAGE UNDER  
28 THAT POLICY IS TRIGGERED, TO LOOK AT THE UNDERLYING

1 POLICY OR THE EXCESS POLICY TO DETERMINE WHAT THE TERMS  
2 ARE WITH REGARD TO UNDERLYING EXHAUSTION?

3 MR. WILSON: THAT -- THAT'S CORRECT, YOUR HONOR.  
4 AND THAT'S THE FUNDAMENTAL PRINCIPLE AT THE HEART OF  
5 TODAY'S DISCUSSION IS THE POLICY LANGUAGE SHOULD  
6 CONTROL.

7 AND THE PROBLEM --

8 WHAT HAPPENED IN THE TRIAL COURT WAS THAT  
9 THE SUPERIOR COURT DECLARED A RULE THAT GOVERNS IN ALL  
10 CONTINUOUS LOSS SITUATIONS UNLESS THERE'S SOME POLICY  
11 LANGUAGE TO OVERCOME THAT SO-CALLED GENERAL RULE THAT  
12 HAD BEEN ANNOUNCED.

13 IF THE TRIAL COURT HAD PROPERLY LOOKED TO  
14 THE POLICY LANGUAGE, YOU WOULD SEE, SPECIFICALLY IN THE  
15 ATTACHMENT POINTS OF THE POLICIES, THE ATTACHMENT  
16 LANGUAGE THAT OCCURS, THAT EACH OF THOSE SPECIFIC  
17 PROVISIONS SETS FORTH A NUMBER -- AN AMOUNT OF LIABILITY  
18 AT WHICH THE EXCESS POLICY IS IMPLICATED. AND THEY DO  
19 SO BY REFERENCE TO THE SPECIFIC AMOUNTS OF COVERAGE IN  
20 THAT SAME POLICY YEAR.

21 JUSTICE EDMON: AND BY FOCUSING JUST ON THAT AND  
22 NOT ON OTHER POLICY LANGUAGE, IT'S HARD FOR ME TO  
23 UNDERSTAND HOW YOU GET TO THAT CONCLUSION; THAT IS, THAT  
24 ALL YOU HAVE TO DO IS EXHAUST TO THAT LIMIT AND NOTHING  
25 ELSE.

26 IT SEEMS THAT MANY OF THESE INSURANCE  
27 POLICIES HAVE "OTHER INSURANCE" CLAUSES. IN ADDITION, A  
28 NUMBER OF THEM, EVEN IN THE INSURING LANGUAGE, HAVE

1 LANGUAGE THAT SAY THAT THEY'LL COVER FOR "NET LOSS," AND  
2 THEN THEY DEFINE "NET LOSS" AS INCLUDING ANY OTHER VALID  
3 AND COLLECTIBLE INSURANCE.

4 I DON'T KNOW HOW YOU CAN ARGUE THAT YOU'RE  
5 ENTITLED TO CHOOSE TO TAKE ONE POLICY VERTICALLY WITHOUT  
6 ADDRESSING THOSE PROVISIONS AS WELL.

7 MR. WILSON: WELL, THE "OTHER INSURANCE"  
8 PROVISIONS, I'LL START WITH THOSE BECAUSE THAT WAS  
9 CERTAINLY WHAT THE INSURERS HUNG THEIR HAT ON. AND  
10 ALTHOUGH THE TRIAL COURT HAD DECLARED THIS GENERAL RULE,  
11 WITHOUT GETTING INTO ANY OF THIS POLICY LANGUAGE AT ANY  
12 LEVEL OF SPECIFICITY, THAT'S CERTAINLY WHAT THE INSURERS  
13 HANG THEIR HAT ON.

14 THE "OTHER INSURANCE" LANGUAGE HAS BEEN  
15 CONSTRUED BY THE SUPREME COURT IN A CONTINUOUS LOSS  
16 SITUATION. AND THE COURT IN DART SAID THE PURPOSE OF  
17 THOSE "OTHER INSURANCE" PROVISIONS IS TWOFOLD: FIRST OF  
18 ALL, IT'S A PROVISION THAT INSURES THAT THE POLICYHOLDER  
19 DOESN'T DOUBLE-RECOVER.

20 SO JUST TO USE THE SIMPLEST HYPOTHETICAL,  
21 LET'S SAY A POLICYHOLDER HAS 100 MILLION DOLLARS OF  
22 LIABILITY AND THREE YEARS OF COVERAGE, EACH OF WHICH  
23 PROVIDES 100 MILLION DOLLARS OF COVERAGE. THE  
24 POLICYHOLDER, ALTHOUGH UNDER THE LANGUAGE OF THE  
25 ATTACHMENT PROVISIONS OF THE POLICIES, WOULD HAVE A  
26 RIGHT TO GET 100 MILLION DOLLARS FROM EACH YEAR OF  
27 COVERAGE, THE "OTHER INSURANCE" PROVISIONS SAY "NO, YOU  
28 ONLY GET 100 MILLION TOTAL; YOU DON'T GET TO COLLECT 300

1 MILLION DOLLARS OF COVERAGE FOR 100 MILLION DOLLARS OF  
2 LIABILITY."

3 AND THE "OTHER INSURANCE" PROVISIONS  
4 ENFORCE THAT GENERAL RULE THAT YOU CAN'T DOUBLE-RECOVER  
5 FOR THE SAME LOSS.

6 SECONDLY, THE DART COURT SAID THAT "OTHER  
7 INSURANCE" PROVISIONS GIVE THE INSURERS A RIGHT TO SEEK  
8 CONTRIBUTION FROM ONE ANOTHER. AND MONTROSE DOESN'T  
9 QUIBBLE WITH THE FACT THAT, AT THE END OF THE DAY, THE  
10 INSURERS MAY HAVE THE RIGHT TO ALLOCATE RESPONSIBILITY  
11 FOR MONTROSE'S LIABILITIES AMONG THEMSELVES.

12 MONTROSE --

13 JUSTICE EDMON: SO BASICALLY YOU READ DART TO SAY  
14 THAT YOU JUST READ THESE "OTHER INSURANCE" PROVISIONS  
15 COMPLETELY OUT OF THE POLICY?

16 MR. WILSON: NO. I DON'T -- I DON'T THINK THAT WE  
17 WOULD READ THEM OUT OF THE POLICY AT ALL. THEY SERVE A  
18 SPECIFIC FUNCTION.

19 AND THESE ARE GENERAL BOILERPLATE "OTHER  
20 INSURANCE" PROVISIONS THAT THE COURT HAD AN OPPORTUNITY  
21 TO EVALUATE, ANALYZE AND APPLY IN A CONTINUOUS LOSS  
22 SITUATION AND SAY "HERE'S WHAT THOSE 'OTHER INSURANCE'  
23 PROVISIONS DO."

24 JUSTICE EDMON: BUT THOSE WERE ALL PRIMACY --  
25 PRIMARY POLICIES THAT THEY WERE REVIEWING, NOT EXCESS;  
26 TRUE?

27 MR. WILSON: THE --

28 NO. THE DART CASE INVOLVED AN EXCESS --

1 INVOLVED AN EXCESS POLICY. AND THE CARRIER WAS ARGUING  
2 THAT IF THERE IS AN "OTHER INSURANCE" PROVISION IN THE  
3 POLICY, OUR OBLIGATION MAY NOT ATTACH BECAUSE WE COULD  
4 SHIFT OUR LOSSES ONTO SOME OTHER CARRIERS.

5 AND THE COURT RULED I DON'T CARE WHAT YOUR  
6 "OTHER INSURANCE" POLICY LANGUAGE LOOKED -- YOUR "OTHER  
7 INSURANCE" PROVISION LANGUAGE LOOKS LIKE BECAUSE HERE'S  
8 WHAT "OTHER INSURANCE" PROVISIONS DO, THEY PROVIDE A  
9 HOOK TO PREVENT THE POLICYHOLDER FROM DOUBLE-RECOVERING  
10 AND TO GIVE THE CARRIERS THE RIGHT TO SEEK CONTRIBUTION  
11 FROM THE OTHER INSURERS.

12 JUSTICE EDMON: SO WHAT DO WE DO ABOUT THOSE  
13 PROVISIONS THAT ACTUALLY DO, AS PART OF THE INSURING  
14 PROVISION, DEFINE THAT THEY -- THAT THE INSURANCE  
15 COMPANY ONLY IS GOING TO COVER "NET LOSS" AND THEY  
16 DEFINE "NET LOSS" AS BEING NOT ONLY THE UNDERLYING  
17 COVERAGE THAT'S BEEN IDENTIFIED BUT, IN ADDITION, ANY  
18 OTHER VALID AND COLLECTIBLE INSURANCE?

19 MR. WILSON: WELL, THERE'S --

20 SO THERE ARE TWO DIFFERENT PROVISIONS THAT  
21 THE CARRIERS RAISED IN THEIR PAPERS. I'LL DEAL WITH THE  
22 FIRST ONE, WHICH IS THE AMERICAN CENTENNIAL POLICIES.  
23 THOSE ARE THE ONLY ONES THAT ACTUALLY HAVE LANGUAGE IN  
24 THE INSURING AGREEMENT THAT SUGGESTS YOU HAVE TO LOOK TO  
25 OTHER INSURANCE FIRST.

26 BUT THERE'S A VERY IMPORTANT DISTINCTION  
27 BETWEEN THE AMERICAN CENTENNIAL POLICIES, THREE OF THE  
28 115 POLICIES IN THE PORTFOLIO, AND ALL 112 OF THE



1 OTHERS. THOSE THREE AMERICAN CENTENNIAL POLICIES ARE  
2 FIRST-LAYER EXCESS POLICIES THAT SIT ONLY ABOVE PRIMARY  
3 COVERAGE.

4 THE RULES, AS WE STEPPED BACK AND LOOKED AT  
5 HOW THE SUPREME COURT HAS WEIGHED IN ON A  
6 POLICYHOLDERS'S RIGHTS TO ENFORCE THEIR INDIVIDUAL  
7 CONTRACTS, LOOKED AT COMMUNITY REDEVELOPMENT AND THOSE  
8 CASES AND THE SO-CALLED PRIMARY HORIZONTAL EXHAUSTION  
9 PRINCIPLE THAT THEY'VE USED, THE ONE RULE THAT YOU CAN  
10 ARRIVE AT IS THAT PRIMARY HORIZONTAL EXHAUSTION MAKES  
11 SENSE AT THAT LEVEL BECAUSE THERE'S A DIFFERENCE BETWEEN  
12 PRIMARY COVERAGE, WHERE THE CARRIERS HAVE COLLECTED  
13 ADDITIONAL PREMIUM IN EXCHANGE FOR THE PROMISE TO  
14 DEFEND, OFTEN OUTSIDE POLICY LIMITS AND THEREFORE HAVE  
15 TAKEN ON A MUCH GREATER BURDEN TO THEMSELVES, AND EXCESS  
16 COVERAGE WHERE THE CARRIERS HAVE CHARGED A MUCH LOWER  
17 PREMIUM BECAUSE THEY'RE ONLY GOING TO STEP IN WHEN  
18 INDEMNITY LIMITS ARE REACHED AND THEY'RE, IN MOST CASES,  
19 NOT GOING TO PROVIDE THE DEFENSE; SO PRIMARY HORIZONTAL  
20 EXHAUSTION MAY MAKE SOME SENSE IN CERTAIN SITUATIONS.

21 THE AMERICAN CENTENNIAL POLICIES, IN THE  
22 FIRST LAYER OF EXCESS COVERAGE, BASICALLY INCORPORATE  
23 THAT RULE. THEY SIT IN THE FIRST LAYER DIRECTLY ABOVE  
24 PRIMARY AND THEY BUILD INTO THEIR INSURING AGREEMENTS  
25 SOME LANGUAGE THAT ARGUABLY COULD BE CONSTRUED TO  
26 REQUIRE THAT ALL PRIMARY INSURANCE BE EXHAUSTED BEFORE  
27 TAPPING INTO THEIR POLICIES.

28 THAT'S NO DIFFERENT THAN THE RULE THAT

1 MONTROSE BELIEVES EXISTS AS ARTICULATED IN THE VARIOUS  
2 PRONOUNCEMENTS OF THE CALIFORNIA SUPREME COURT; SO  
3 THAT'S ONE SET IN RESPONSE TO YOUR QUESTION.

4 THE SECOND SET ARE A COUPLE OF THESE  
5 POLICIES THAT DEAL WITH ULTIMATE NET LOSS.

6 ULTIMATE NET LOSS IS NOT ABOUT WHEN A  
7 POLICY ATTACHES, ULTIMATE NET LOSS IS THE AMOUNT THAT  
8 THE CARRIER PAYS AFTER ITS POLICY HAS BEEN TAPPED INTO;  
9 SO IN THE C.D.M. INVESTORS CASE, FOR EXAMPLE, THAT WE  
10 CITE IN OUR PAPERS, THEY MAKE THIS DISTINCTION CLEAR.

11 THE QUESTION OF WHAT HAS TO HAPPEN IN ORDER  
12 TO TAP INTO A POLICY, IN ORDER FOR ITS ATTACHMENT POINT  
13 TO BE REACHED, IS A DIFFERENT QUESTION THAN WHAT  
14 ULTIMATE NET LOSS THE CARRIER THEN PAYS HAVING HAD ITS  
15 POLICY TAPPED.

16 THE "ULTIMATE NET LOSS" LANGUAGE THAT  
17 APPEARS IN A COUPLE OF THE POLICIES THAT THE CARRIERS  
18 CITE ESSENTIALLY SERVES THE SAME FUNCTION AS THE "OTHER  
19 INSURANCE" PROVISION. IT SAYS "IF YOU'VE COLLECTED  
20 MONEY FROM OTHER CARRIERS, WE'RE DEDUCTING THAT FROM THE  
21 CHECK THAT WE WRITE TO YOU BECAUSE YOU'RE NOT GOING TO  
22 GET TO DOUBLE-RECOVER."

23 NOW, THOSE CARRIERS HAVE BASICALLY IMPORTED  
24 THE "OTHER INSURANCE" LANGUAGE INTO THEIR DEFINITION OF  
25 "ULTIMATE NET LOSS," BUT THAT JUST TAKES US BACK TO THE  
26 QUESTION THAT WE TALKED ABOUT A MOMENT AGO THAT DART  
27 ANSWERED FOR US, "WHAT'S THE PURPOSE OF ANY OF THIS  
28 'OTHER INSURANCE' PROVISION?"

1 JUSTICE EDMON: IF THE PURPOSE OF THE "OTHER  
2 INSURANCE" PROVISION IS ONLY, AS YOU'VE DESCRIBED IT, TO  
3 PREVENT DOUBLE-RECOVERY AND TO PRORATE AMONG INSUREDS --

4 MR. WILSON: INSURANCE CONTRIBUTIONS.

5 JUSTICE EDMON: -- WHAT DO WE DO WITH THE  
6 COMMUNITY REDEVELOPMENT CASE? I MEAN, IN THAT CASE THE  
7 COURT DID APPLY THE "OTHER INSURANCE" PROVISION.

8 MR. WILSON: SO THE COMMUNITY REDEVELOPMENT CASE,  
9 I THINK --

10 THE ANSWER TO YOUR QUESTION, YOUR HONOR, IS  
11 YOU DON'T HAVE TO DO ANYTHING WITH COMMUNITY  
12 REDEVELOPMENT BECAUSE IT ADDRESSES AN ENTIRELY DIFFERENT  
13 SITUATION.

14 IN COMMUNITY REDEVELOPMENT IT WAS A FIGHT  
15 BETWEEN EXCESS CARRIERS AND THE PRIMARY INSURER ABOUT  
16 WHETHER OR NOT THE EXCESS CARRIER HAD TO DROP DOWN AND  
17 PROVIDE A DEFENSE; SO TWO IMPORTANT DISTINCTIONS THERE.

18 NUMBER ONE, THE POLICYHOLDER'S RIGHTS  
19 AREN'T BEING IMPLICATED, WHICH IS SOMETHING THAT DART  
20 AND ALL THE OTHER CASES THAT HAVE FOCUSED ON THIS  
21 CONTRIBUTION QUESTION HAVE ALWAYS USED TO SEPARATE.  
22 POLICYHOLDER'S RIGHTS AREN'T SUPPOSED TO BE PREJUDICED  
23 BY THE IMPLICATION -- THE INVOCATION OF "OTHER  
24 INSURANCE" PROVISIONS AT ALL; SO THAT'S THE FIRST ISSUE  
25 IS THAT COMMUNITY REDEVELOPMENT INVOLVED A DISPUTE  
26 BETWEEN THE INSURERS.

27 BUT THEN, SECONDLY, AND PERHAPS MORE  
28 IMPORTANTLY, IT INVOLVED THE QUESTION OF WHETHER THE

1 EXCESS CARRIERS HAD TO DROP DOWN AND PROVIDE A DEFENSE  
2 BEFORE ALL PRIMARY COVERAGE HAD BEEN EXHAUSTED. AND AS  
3 I HAD JUST BRIEFLY MENTIONED EARLIER, THERE'S A  
4 FUNDAMENTAL DIFFERENCE BETWEEN PRIMARY INSURANCE AND  
5 EXCESS WHEN IT COMES TO THE DUTY TO DEFEND.

6 THE PRIMARY CARRIERS UNDERWRITE AND CHARGE  
7 A HIGHER PREMIUM BECAUSE OF THE PROMISE THAT THEY'RE  
8 GOING TO PROVIDE A FIRST-DOLLAR DEFENSE, OFTEN OUTSIDE  
9 POLICY LIMITS, AS SOON AS THEIR INSURED IS SUED OR HAS A  
10 CLAIM BROUGHT AGAINST THEM.

11 THAT'S AN ENTIRELY DIFFERENT PROMISE THAN  
12 WHAT THE EXCESS CARRIERS DO. THE EXCESS CARRIERS ARE  
13 SORT OF SITTING ABOVE THE FRAY, LETTING THE PRIMARY  
14 INSURERS TAKE HOLD AND CONTROL THE DEFENSE. AND THEN  
15 ULTIMATELY, IF THERE ARE INDEMNITY MONIES THAT MAKE  
16 THEIR WAY UP INTO THE EXCESS LAYERS, THE EXCESS LAYERS  
17 HAVE TO PAY OUT. BUT THEY CHARGE A LOWER PREMIUM  
18 BECAUSE THEY DON'T HAVE TO STEP IN TO DEFEND IN THE  
19 FIRST INSTANCE.

20 AND THE COMMUNITY REDEVELOPMENT CASE WAS  
21 ASKING -- THE COMMUNITY REDEVELOPMENT COURT WAS ASKED  
22 THE QUESTION, "IS IT FAIR, ESSENTIALLY, TO MAKE THE  
23 EXCESS INSURERS DROP DOWN AND PROVIDE THAT FIRST-DOLLAR  
24 DEFENSE WHEN THE POLICYHOLDER HAS OTHER PRIMARY  
25 INSURANCE AVAILABLE TO IT THAT HAS AN OBLIGATION TO  
26 DEFEND, THAT COLLECTED HIGHER PREMIUMS IN EXCHANGE FOR  
27 THAT PROMISE?"

28 AND THEY SAID "NO, THAT DOESN'T MAKE SENSE;

1 THE PURPOSE OF PRIMARY INSURANCE AND THE PURPOSE OF  
2 EXCESS INSURANCE ARE FUNDAMENTALLY DIFFERENT,  
3 PARTICULARLY WITH RESPECT TO THE DUTY TO DEFEND. AND SO  
4 WE'RE GOING TO ENFORCE THAT DISTINCTION."

5 IF ANYTHING, THE COMMUNITY REDEVELOPMENT  
6 COURT POINTED TO THE "OTHER INSURANCE" LANGUAGE ALMOST  
7 AS AFFIRMATION, CONFIRMATION, OF THAT GENERAL PRINCIPLE,  
8 THAT IT DERIVED ON WHAT HAPPENS WITH THE DUTY TO DEFEND  
9 IN PRIMARY VERSUS EXCESS.

10 BUT I THINK JUSTICE CROSKY, ACTUALLY, IN  
11 THE LEGACY VULCAN CASE IN 2010 MADE THAT POINT CLEAR,  
12 THAT WHEN YOU'RE TALKING ABOUT THE DUTY TO DEFEND,  
13 THAT'S A DIFFERENT QUESTION. AND THAT -- THAT WAS A  
14 REASON FOR THE RULE OF COMMUNITY REDEVELOPMENT.

15 BUT THAT'S A DIFFERENT QUESTION THAN WHAT  
16 HAPPENS BETWEEN EXCESS INSURERS WHO ARE NOW FIGHTING  
17 ABOUT WHEN THEIR OBLIGATIONS ARE TRIGGERED. AND THE  
18 "OTHER INSURANCE" PROVISION IN THAT CIRCUMSTANCE, AS THE  
19 SUPREME COURT SAID IN DART, SIMPLY GIVES THE INSURERS A  
20 RIGHT TO ENFORCE CONTRIBUTION RIGHTS THAT THEY MAY HAVE  
21 AGAINST EACH OTHER.

22 SO A LONG WAY OF SAYING THIS COURT DOES NOT  
23 HAVE TO DO ANYTHING WITH COMMUNITY REDEVELOPMENT.

24 I THINK THERE COULD CERTAINLY BE ARGUMENTS  
25 ABOUT HOW COMMUNITY REDEVELOPMENT SHOULD BE APPLIED IN  
26 LIGHT OF THE SUPREME COURT'S RULING IN CONTINENTAL.  
27 WE'RE NOT HERE TO ADJUDICATE THAT OR ASKING THIS COURT  
28 TO DO SO BECAUSE WE'RE NOT DEALING WITH A FIGHT BETWEEN

1 INSURERS, RATHER WE ARE THE POLICYHOLDER THAT'S SEEKING  
2 TO INVOKE OUR INDEPENDENT CONTRACTUAL RIGHTS. AND WE'RE  
3 NOT DEALING WITH THE DUTY TO DEFEND.

4 THE PRACTICAL CONSEQUENCES OF THE SUPERIOR  
5 COURT'S RULING, I THINK, UNDERSCORE WHY THE CONSISTENT  
6 LINE OF AUTHORITY FROM THE SUPREME COURT ABOUT THE  
7 POLICYHOLDER'S RIGHT TO CALL UPON EACH OF ITS SEPARATE  
8 AND INDIVIDUAL CONTRACTS AS EFFICIENTLY AS IT CAN AT ITS  
9 ELECTION AS --

10 JUSTICE EDMON: CAN I ASK YOU ONE QUESTION?

11 MR. WILSON: SURE.

12 JUSTICE EDMON: I WANT TO MAKE SURE I UNDERSTAND  
13 YOUR POSITION.

14 IS -- IS IT YOUR POSITION THAT THIS IS --  
15 THAT THE ONLY QUESTION BEFORE US IS WHAT EXCESS GETS  
16 CALLED ON FIRST? IN OTHER WORDS, IS MONTROSE TAKING THE  
17 POSITION THAT YOU ARE REQUIRED TO EXHAUST ALL OF THE  
18 PRIMARY INSURANCE FOR ALL OF THE RELEVANT YEARS BEFORE  
19 CALLING ON THE EXCESS COVERAGE IN ANY POLICY?

20 MR. WILSON: THE ANSWER IS WE'RE NOT ASKING YOU TO  
21 DECIDE THAT BECAUSE THAT'S NOT AN ISSUE IN OUR CASE.

22 FOR PURPOSES OF THIS MOTION, AND FOR  
23 MONTROSE'S PURPOSES MORE BROADLY, THE PRIMARY INSURANCE  
24 INDEMNITY LIMITS HAVE ALL BEEN EXHAUSTED; SO IT'S NOT  
25 REALLY AN ISSUE HERE.

26 SO MONTROSE ISN'T ASKING THIS COURT TO  
27 WEIGH IN ONE WAY OR ANOTHER ON WHETHER THE PRIMARY  
28 HORIZONTAL EXHAUSTION DOCTRINE SURVIVES OR NOT.

1 I THINK THERE IS -- THERE CAN BE, IN  
2 CERTAIN CIRCUMSTANCES, A JUSTIFICATION FOR IT, AND SO  
3 THAT'S -- THAT'S WHY I DON'T THINK THAT YOU NEED TO DO  
4 ANYTHING -- THAT THE COURT NEEDS TO DO ANYTHING WITH  
5 COMMUNITY REDEVELOPMENT IN ORDER TO RULE ON THIS ISSUE.

6 BUT MONTROSE IS NOT ASKING FOR ANY KIND OF  
7 RULING ABOUT HOW PRIMARY HORIZONTAL EXHAUSTION SURVIVES,  
8 IF AT ALL, AFTER CONTINENTAL.

9 JUSTICE EDMON: THANK YOU.

10 JUSTICE LAVIN: SO YOU'RE REPRESENTING THAT ALL OF  
11 THE PRIMARY COVERAGE HAS BEEN EXHAUSTED?

12 MR. WILSON: THAT'S CORRECT.

13 JUSTICE LAVIN: FOR ALL OF THE POLICIES?

14 MR. WILSON: THAT'S CORRECT, YOUR HONOR.

15 SO THE PARTIES STIPULATED THAT THAT WAS THE  
16 CASE FOR PURPOSES OF THIS MOTION.

17 MONTROSE SETTLED WITH ALL OF ITS PRIMARY  
18 INSURERS YEARS AGO. AND, AS A RESULT OF THAT, THE  
19 POLICIES THAT ARE NOW AT ISSUE, AND IN DISPUTE BEFORE  
20 THE SUPERIOR COURT, ARE MERELY EXCESS POLICIES; SO THE  
21 FIGHT BETWEEN MONTROSE AND THE CARRIERS BELOW WAS DO THE  
22 EXCESS CARRIERS NOW GET TO TAKE THAT PRIMARY HORIZONTAL  
23 EXHAUSTION RULE OF CONTINENTAL -- EXCUSE ME, OF  
24 COMMUNITY REDEVELOPMENT, AND EXPAND THAT BEYOND THE  
25 CONTOURS OF PRIMARY INSURANCE TO APPLY AT EVERY LEVEL OF  
26 EXCESS?

27 AND IT'S IMPORTANT TO -- TO POINT OUT THAT  
28 WHEN COURTS HAVE HAD AN OPPORTUNITY TO EXPAND COMMUNITY

1 REDEVELOPMENT PAST THE PRIMARY INSURANCE AT ALL, THEY'VE  
2 CONSISTENTLY SAID NO; SO, IN OTHER WORDS --

3 JUSTICE EDMON: AND THE MONTGOMERY WARD CASE THAT  
4 INVOLVED SELF-INSURED RETENTIONS, IS THERE ANY OTHER  
5 CASE -- AND I DON'T SEE THE APPLICABILITY OF THAT CASE  
6 TO THIS.

7 SO IS THERE --

8 ARE THERE OTHER CASES THAT HAVE SAID THAT,  
9 "WE DON'T WANT TO EXTEND THAT RULE"?

10 MR. WILSON: THAT'S THE ONE THAT WE'VE CITED.

11 THE CONTINENTAL COURT, ON REMAND, FOLLOWING  
12 THE SUPREME COURT, SO AT THE TRIAL COURT LEVEL, BUT THE  
13 CONTINENTAL COURT REACHED THE EXACT SAME CONCLUSION  
14 FOLLOWING THE SUPREME COURT'S DECISION.

15 THE REASON THAT MONTGOMERY WARD, IN OUR  
16 VIEW, IS PERHAPS MORE APPLICABLE THAN IT WOULD BE IF YOU  
17 JUST THOUGHT OF THE FACT THAT ONE DEALT WITH  
18 SELF-INSURED RETENTIONS AND THE OTHER DIDN'T WAS THE  
19 LANGUAGE FROM MONTGOMERY WARD WAS THAT WE'RE NOT  
20 EXTENDING THE RULE OF COMMUNITY REDEVELOPMENT BECAUSE  
21 S.I.R.S, SELF-INSURED RETENTIONS, ARE NOT THE SAME THING  
22 AS PRIMARY INSURANCE.

23 JUSTICE LAVIN: MAY I JUST ASK A CLARIFICATION,  
24 THEN?

25 YOUR POSITION IS THERE IS NO DISPUTED ISSUE  
26 OF FACT THAT, FOR PURPOSES OF YOUR MOTION FOR SUMMARY  
27 ADJUDICATION FOR THE 32ND CAUSE OF ACTION, THAT YOU  
28 ACTUALLY EXHAUSTED ALL YOUR PRIMARY COVERAGE?



1 MR. WILSON: THAT'S CORRECT, YOUR HONOR.

2 THERE'S -- MONTROSE'S POSITION IS THERE'S  
3 NO DISPUTE AT ALL. THE PARTIES STIPULATED TO THAT FACT  
4 FOR PURPOSES OF TEEING UP THIS MOTION.

5 THE PRACTICAL CONSEQUENCES OF THE RULING  
6 UNDERSCORE WHY THE BASIC PRINCIPLES OF MONTROSE VERSUS  
7 ADMIRAL, AEROJET AND CONTINENTAL, AS WELL AS THE  
8 LIMITING PRINCIPLE THAT THE SUPREME COURT APPLIED TO  
9 "OTHER INSURANCE" PROVISIONS IN DART, CANNOT BE  
10 RECONCILED WITH THE SUPERIOR COURT'S RULING BELOW.

11 MANDATORY HORIZONTAL EXHAUSTION, AS THE  
12 TRIAL COURT DECLARED, WOULD FUNCTION AS AN IMPLIED  
13 COVERAGE LIMITATION IN CERTAIN POLICIES AND EFFECTIVELY  
14 PUNISH POLICYHOLDERS FOR THE PRUDENCE OF BUYING  
15 ADDITIONAL COVERAGE IN SUBSEQUENT YEARS.

16 JUSTICE EDMON: I DON'T UNDERSTAND THAT.

17 MR. WILSON: SO IF MANDATORY HORIZONTAL EXHAUSTION  
18 IS THE RULE, A POLICYHOLDER IS NOW, UNDER ANY PARTICULAR  
19 EXCESS POLICY --

20 LET'S SAY THERE'S AN EXCESS POLICY THAT  
21 ATTACHES AT -- AFTER 10 MILLION DOLLARS OF UNDERLYING  
22 COVERAGE HAS BEEN EXHAUSTED. UNDER A MANDATORY  
23 HORIZONTAL EXHAUSTION RULE, MONTROSE, OR ANY OTHER  
24 POLICYHOLDER, CAN'T TAP INTO THAT POLICY UNTIL A  
25 SIGNIFICANTLY HIGHER AMOUNT OF LIABILITY HAS BEEN  
26 INCURRED.

27 SO JUST TO USE MY THREE-YEAR HYPOTHETICAL  
28 EARLIER, IN -- IN THAT SITUATION, MONTROSE NOW HAS TO

1 INCUR 30 MILLION DOLLARS OF LIABILITY IN ORDER TO TAP  
2 INTO A POLICY THAT WE PAID A PREMIUM IN EXCHANGE FOR THE  
3 PROMISE TO ATTACH AFTER 10 MILLION DOLLARS OF LIABILITY  
4 IS ATTACHED.

5 JUSTICE EDMON: SO YOU STILL GET --

6 YOU STILL HAVE THE COVERAGE, IT'S JUST YOU  
7 CAN'T GET TO IT AS QUICKLY AS YOU WOULD LIKE TO?

8 MR. WILSON: WELL, THE COVERAGE --

9 THE POLICY IS STILL THERE BUT WE CAN'T  
10 ACCESS IT UNDER THE INSURERS RULE UNLESS, IN MY  
11 HYPOTHETICAL, THE POLICYHOLDER HAS SUFFERED 30 MILLION  
12 DOLLARS OF LIABILITY, WHEN WE PAID A PREMIUM IN EXCHANGE  
13 FOR THE RIGHT TO ACCESS THAT POLICY HAVING INCURRED  
14 10 MILLION DOLLARS OF LIABILITY.

15 SO AS A STARTING POINT, AS JUSTICE CROSKY  
16 SAID IN -- EXCUSE ME, AS THE SUPREME COURT IN DART SAID,  
17 CITING JUSTICE CROSKY, "OTHER INSURANCE" PROVISIONS  
18 THAT WOULD EFFECTUATE THAT RESULT ARE NECESSARILY A  
19 LIMITATION ON COVERAGE BECAUSE YOU'RE BARRING THE  
20 POLICYHOLDER FROM GETTING ACCESS TO THOSE FUNDS.

21 BUT MORE IMPORTANTLY, IN ORDER FOR MONTROSE  
22 TO ACCESS THAT POLICY THAT SAYS IT ATTACHES ABOVE  
23 10 MILLION DOLLARS OF LIABILITY, YOU WOULD FORCE THE  
24 POLICYHOLDER TO LITIGATE A WHOLE HOST OF OTHER POLICIES  
25 WITH DIFFERENT TERMS, LIKE "RETROACTIVE PREMIUMS" OR  
26 "AGGREGATE LIMITS," WITH MORE OR LESS RESTRICTIVE  
27 EXCLUSIONS, WITH --

28 THERE MAY BE DIFFERENT RELATIONSHIPS

1 BETWEEN THE POLICYHOLDER AND THE CARRIER; MAYBE THE  
2 POLICYHOLDER CONTINUES TO BUY COVERAGE FROM ONE CARRIER  
3 AND DOESN'T WANT TO UPSET THE BALANCE OF THAT COMMERCIAL  
4 RELATIONSHIP.

5 ALL OF THESE THINGS YOU'RE FORCING THE  
6 POLICYHOLDER TO DO AND TO LITIGATE ALL OF THESE OTHER  
7 POLICIES IN ORDER TO TAP INTO ONE THAT MAY BE TRIGGERED  
8 BY ITS EXPRESS TERMS. AND --

9 JUSTICE LAVIN: MIGHT I JUST REFER YOU BACK TO THE  
10 FIRST QUESTION I FIRST ASKED?

11 I THINK MY UNDERSTANDING IS TRAVELERS'  
12 INSURERS HAS TAKEN THE POSITION THAT DECLARATORY RELIEF  
13 IS PREMATURE BECAUSE YOU HAD NOT DEMONSTRATED THAT YOU'D  
14 ACTUALLY EXHAUSTED THE UNDERLYING PRIMARY POLICIES.

15 I TAKE IT YOU DISAGREE WITH THAT? I MEAN,  
16 YOU SAID THERE WAS A STIPULATION.

17 MR. WILSON: YES.

18 SO TRAVELERS' POSITION I THINK, AS I  
19 UNDERSTAND IT, AND PERHAPS THEY CAN CLARIFY AND I'LL BE  
20 HAPPY TO ADDRESS IT ON REBUTTAL, BUT TRAVELERS' POSITION  
21 IS THAT THE DECLARATORY RELIEF MONTROSE SEEKS  
22 ESSENTIALLY WOULD BE THAT IT'S NOW ENTITLED TO COVERAGE  
23 UNDER ALL OF THESE POLICIES EVEN THOUGH THE FACT OF  
24 EXHAUSTION -- LET'S PUT IT IN A HYPOTHETICAL.

25 THERE'S A PRIMARY POLICY THAT THE PARTIES  
26 HAVE ALL AGREED IS EXHAUSTED, THEN THERE'S A FIRST-LAYER  
27 EXCESS POLICY, A SECOND-LAYER EXCESS POLICY AND  
28 TRAVELERS HAS THE THIRD-LAYER EXCESS POLICY.

1 TRAVELERS' CONCERN IS THAT THE RULING  
2 MONTROSE SEEKS -- THE RULING THAT MONTROSE SEEKS IS  
3 THAT --

4 WE'VE ALREADY STIPULATED THE PRIMARY POLICY  
5 HAS BEEN EXHAUSTED SO THAT'S NOT AN ISSUE. BUT THE  
6 FIRST- AND SECOND-LAYER POLICIES ARE NOW DEEMED  
7 EXHAUSTED FOR PURPOSES OF MONTROSE ACCESSING TRAVELERS'  
8 THIRD-LAYER EXCESS POLICY.

9 BUT THAT'S NOT THE RELIEF THAT MONTROSE  
10 SEEKS AND ITS DECLARATORY RELIEF CAUSE OF ACTION DIDN'T  
11 ASK FOR THAT. ALL THAT MONTROSE ASKED FOR WAS A RULING  
12 THAT IT HAS THE RIGHT TO SEEK INDEMNIFICATION OF ANY  
13 POLICY BY PROVING THAT THAT POLICY'S ATTACHMENT POINT  
14 EXHAUSTION REQUIREMENT HAS BEEN SATISFIED ACCORDING TO  
15 ITS TERMS WITHOUT BEING FORCED INTO A MANDATORY  
16 HORIZONTAL EXHAUSTION SCHEME.

17 SO IN MONTROSE'S VIEW OF THE WORLD, IF THE  
18 COURT WERE TO RULE IN MONTROSE'S FAVOR, WHAT WOULD THEN  
19 BE DONE IS WE WOULD GO BACK TO THE TRIAL COURT, THERE  
20 WOULD NO LONGER BE A MANDATORY HORIZONTAL EXHAUSTION  
21 REQUIREMENT. AND MONTROSE WOULD BE ABLE TO SAY, IF IT  
22 CHOOSES TO, "I BELIEVE THE TRAVELERS POLICY IS THE ONE  
23 THAT I" -- "I WANT TO LOOK TO, TO INDEMNIFY X DOLLARS OF  
24 MY LIABILITY."

25 I NOW HAVE TO PROVE THAT THE FIRST-LAYER  
26 EXCESS POLICY HAS BEEN EXHAUSTED, THE SECOND-LAYER  
27 EXCESS POLICY HAS BEEN EXHAUSTED IN ORDER TO GET TO  
28 TRAVELERS' THIRD-LAYER EXCESS POLICY. MONTROSE DOESN'T

1 DISPUTE THAT THAT'S WHAT IT WOULD HAVE TO DO AND THAT  
2 THERE -- THERE MAY BE DISAGREEMENTS BETWEEN MONTROSE AND  
3 TRAVELERS AS TO WHETHER MONTROSE HAD PROPERLY EXHAUSTED  
4 THE ENTIRE UNDERLYING TOWER OF COVERAGE OR NOT.

5 BUT THE DECLARATORY RELIEF THAT MONTROSE  
6 SEEKS DOES NOT REQUIRE THIS COURT TO MAKE ANY SUCH  
7 RULING; RATHER, WE SIMPLY WANT A RULING THAT IN ORDER TO  
8 TAP INTO A POLICY, WE MERELY HAVE TO COMPLY WITH THE  
9 EXHAUSTION AND ATTACHMENT LANGUAGE OF THAT INDIVIDUAL  
10 POLICY WITHOUT HAVING TO LOOK TO OTHER POLICY YEARS.

11 SO I THINK MAYBE THE DISCONNECT THERE MAY  
12 BE OVER TRAVELERS' DISPUTE ABOUT EXHAUSTION MORE BROADLY  
13 AND THE PARTIES' AGREEMENT THAT THE PRIMARY POLICIES  
14 HAVE ALL BEEN EXHAUSTED FOR PURPOSES OF THE MOTIONS THAT  
15 WERE PRESENTED TO THE SUPERIOR COURT.

16 JUSTICE EDMON: I THOUGHT THE BASIS OF THE DISPUTE  
17 WAS THE LANGUAGE OF THE 32ND CAUSE OF ACTION THAT YOU  
18 WERE SEEKING TO HAVE SUMMARY ADJUDICATION OF WHICH  
19 SPECIFICALLY SAYS THAT YOU WERE SEEKING A FINDING THAT  
20 MONTROSE NEED ONLY ESTABLISH THAT ITS LIABILITIES ARE  
21 SUFFICIENT TO EXHAUST THE UNDERLYING POLICIES IN THE  
22 SAME POLICY PERIOD, RATHER THAN ACTUALLY HAVING TO SHOW  
23 THAT IT -- THAT THEY WERE, IN FACT, EXHAUSTED.

24 MR. WILSON: SO THE --

25 I THINK THE KEY LANGUAGE, YOUR HONOR, IN  
26 THE 32ND CAUSE OF ACTION, IS ACTUALLY THE VERY BEGINNING  
27 OF IT WHICH SAYS "IN ORDER TO SEEK INDEMNIFICATION,  
28 UNDER THE EXCESS INSURANCE POLICIES, WE MERELY NEED TO

1 SHOW THAT THE LIABILITIES" -- "WE'VE INCURRED  
2 LIABILITIES SUFFICIENT TO EXHAUST THE UNDERLYING  
3 AMOUNT."

4 SO ESSENTIALLY, AGAIN, BACK TO MY VERY  
5 SIMPLE HYPOTHETICAL, BUT WE'VE GOT A POLICY THAT  
6 ATTACHES AT 10 MILLION DOLLARS. LET'S SAY THAT'S --  
7 THERE WAS A FIRST-LAYER EXCESS POLICY FOR 7 MILLION AND  
8 A SECOND-LAYER EXCESS POLICY FOR 3 MILLION. IN ORDER TO  
9 SHOW THAT WE CAN LOOK TO THAT 3-MILLION-DOLLAR  
10 SECOND-LAYER EXCESS POLICY, WE HAVE TO SHOW THAT WE'VE  
11 ALREADY GOT AT LEAST 7 TO 10 MILLION DOLLARS OF  
12 LIABILITY.

13 NOW, AT THAT POINT THE INSURER COULD SAY  
14 "THAT'S FINE, YOU HAVE THAT LIABILITY SO YOU'RE ENTITLED  
15 TO LOOK TO MY POLICY, BUT I DON'T THINK YOU'VE ACTUALLY  
16 COLLECTED THE 7 MILLION DOLLARS FROM THE UNDERLYING  
17 CARRIER," OR OTHERWISE IT'S NOT INSOLVENT OR SOME OTHER  
18 WAY OF DEMONSTRATING EXHAUSTION.

19 WE COULD STILL HAVE THAT FIGHT OVER WHETHER  
20 THE EXHAUSTION, IN ORDER TO GET UP TO THE TARGETED  
21 POLICY, HAD BEEN LEGALLY SUFFICIENT OR NOT. BUT OUR  
22 32ND CAUSE OF ACTION SIMPLY SAID THE COURT CAN'T FORCE  
23 US TO LOOK, INSTEAD, TO EVERY SINGLE FIRST-LAYER EXCESS  
24 POLICY AND EVERY SINGLE SECOND-LAYER POLICY,  
25 IRRESPECTIVE OF THE DIFFERENT TERMS, CONDITIONS,  
26 ATTACHMENT POINTS, THEY KIND OF ATTACH AT VARIOUS  
27 DIFFERENT LEVELS, IN ORDER TO GET TO THAT THIRD-LAYER  
28 POLICY THAT WE REALLY WANT TO TARGET. AND THAT'S --

1 THAT'S THE CORE OF THE DISPUTE BETWEEN THE PARTIES.

2 AND AT BOTTOM, FROM MONTROSE'S PERSPECTIVE,  
3 POLICYHOLDERS ARE COMMERCIAL ACTORS; THEY HAVE THE RIGHT  
4 TO USE ASSETS THAT BELONG TO THEM AS THEY SEE FIT.  
5 THEY'VE PAID PREMIUMS FOR EACH SEPARATE INDIVIDUAL  
6 CONTRACT AND ARE ENTITLED TO CALL UPON THOSE CONTRACTS  
7 IN ACCORDANCE WITH THEIR TERMS.

8 AND THAT'S THE RULING THAT WE SEEK.

9 JUSTICE EDMON: THANK YOU.

10 MR. WILSON: THANK YOU.

11 MR. CRANE: MORNING, YOUR HONORS.

12 STEVE CRANE FOR CONTINENTAL CASUALTY  
13 COMPANY AND COLUMBIA CASUALTY COMPANY, AND I'M ALSO  
14 SPEAKING ON BEHALF OF THE OTHER INSURERS, EXCEPT FOR  
15 TRAVELERS HAS GOT A FEW MINUTES, I UNDERSTAND, ON ITS  
16 OWN UNIQUE ISSUES.

17 THE ESSENTIAL NATURE OF THE CLAIM AT ISSUE  
18 IS CRITICAL TO A CORRECT ANALYSIS HERE. AND THE TRIAL  
19 COURT PROPERLY RECOGNIZED THIS IN ITS DECISION.

20 THERE'S NO DISPUTE HERE THAT THIS CASE  
21 INVOLVES CONTINUOUS INJURY. AND THAT'S IMPORTANT  
22 BECAUSE IT'S WHAT MAKES THE POLICIES GET TRIGGERED IN  
23 THE FIRST INSTANCE.

24 THE MONTROSE CASE, AND THEN THE NEW STATE  
25 OF CALIFORNIA CASE, PROVIDE THAT THE INSURED CAN TRIGGER  
26 THE CONSECUTIVE LIMITS OF ALL THE POLICIES DURING THE  
27 CONTINUOUS INJURY PERIOD. AND IT IS THAT THAT THE  
28 POLICY LANGUAGE THAT WE'RE TALKING ABOUT TODAY IS

1 APPLIED TO, THE CONTINUOUS INJURY AND THE ABILITY TO  
2 TRIGGER ALL OF THE CONSECUTIVE POLICIES' LIMITS DURING  
3 THAT CONTINUOUS INJURY PERIOD.

4 HERE, AS YOUR HONORS HAVE ALREADY NOTED,  
5 THE EXCESS POLICIES HAVE TWO THINGS THAT HAVE TO BE  
6 REQUIRED BEFORE THEY'RE IMPLICATED: ONE, AS MONTROSE  
7 LIKES TO FOCUS ON, THE SCHEDULED VERTICAL UNDERLYING  
8 INSURANCE. BUT THERE'S MORE.

9 AS YOUR HONOR POINTED OUT, THERE'S  
10 REFERENCES TO "OTHER COLLECTIBLE INSURANCE." SOMETIMES  
11 THOSE PROVISIONS ARE IN THE INSURING AGREEMENTS, AND  
12 WE'VE CITED YOUR HONOR MULTIPLE POLICIES WHERE THAT'S  
13 THE CASE, AND IT'S NOT JUST THESE AMERICAN CENTENNIAL  
14 POLICIES THAT COUNSEL REFERRED TO. THERE'S A NUMBER OF  
15 POLICIES WHERE THE "OTHER INSURANCE" LANGUAGE IS IN THE  
16 INSURING PROVISIONS. AND THERE ARE OTHER POLICIES WHERE  
17 IT IS ELSEWHERE IN THE POLICY BUT TO THE SAME EFFECT,  
18 THAT THE -- IF THERE IS OTHER VALID AND COLLECTIBLE  
19 INSURANCE, THIS POLICY IS NOT UP TO BAT.

20 SO IT IS --

21 JUSTICE ALDRICH: I DON'T THINK COUNSEL WAS  
22 DISPUTING THAT POINT BUT, RATHER, TO SAY THAT THAT ISSUE  
23 HAS TO BE LITIGATED ACCORDING TO THE TERMS OF THE  
24 POLICY.

25 MR. CRANE: WE AGREE THAT THE TERMS OF THE POLICY  
26 ARE WHAT CONTROL HERE.

27 AND THE TERMS OF THE POLICY, AND THIS IS  
28 WHY I STARTED WITH THE NATURE OF THIS DISPUTE, WHICH IS



1 A CONTINUOUS INJURY DISPUTE, IT IS THE NATURE OF THE  
2 LOSS INVOLVED THAT IS A CONTINUOUS INJURY LOSS THAT  
3 MAKES THE "OTHER INSURANCE" LANGUAGE IMPLICATED.

4 IN THE NORMAL CASE, WHERE YOU HAVE A SINGLE  
5 EVENT, A CAR ACCIDENT OR AN INJURED WORKER AT A  
6 PARTICULAR POINT IN TIME, YOU MIGHT HAVE A LOSS THAT'S  
7 BIG ENOUGH TO GO THROUGH THE PRIMARY VERTICALLY AND HIT  
8 ONE OR MORE LAYERS OF EXCESS INSURANCE. AND, YES, IN  
9 THAT CIRCUMSTANCE, THE SCHEDULED UNDERLYING INSURANCE  
10 TELLS THE INSURED AND THE INSURERS WHO IS UP TO BAT, AND  
11 THAT'S ON A VERTICAL BASIS.

12 BUT IT'S THE NATURE OF THIS DISPUTE, THAT  
13 IS A CONTINUOUS INJURY DISPUTE, THAT IMPLICATES THE  
14 "OTHER INSURANCE" LANGUAGE BECAUSE, AS THE SUPREME COURT  
15 HAS TOLD US, IN A CONTINUOUS INJURY CASE, THE INSURED  
16 CAN STACK THE CONSECUTIVE LIMITS. IT'S THOSE  
17 CONSECUTIVE LIMITS THAT ARE THE OTHER INSURANCE THAT  
18 MUST BE TRIGGERED IN THESE POLICIES.

19 SO IN THESE POLICIES, IN THIS PARTICULAR  
20 FACT CIRCUMSTANCE, TWO THINGS HAVE TO HAPPEN: ONE,  
21 THERE HAS TO BE EXHAUSTION OF THE SCHEDULED, VERTICALLY  
22 UNDERLYING; AND TWO, EXHAUSTION OF THE OTHER INSURANCE,  
23 THAT IS, THE HORIZONTALLY CONSECUTIVE INSURANCE THAT THE  
24 STATE OF CALIFORNIA SAYS MONTROSE GETS IN THIS  
25 CIRCUMSTANCE.

26 AND I THINK THAT'S THE FUNDAMENTAL PROBLEM  
27 WITH MONTROSE'S POSITION IS THEY FOCUS SOLELY ON THE  
28 SCHEDULED UNDERLYING INSURANCE, WHICH, GRANTED, IS

1 APPLICABLE IN A SINGULAR-DATE-OF-EVENT SITUATION.

2 JUSTICE EDMON: LET ME ASK YOU, IT SEEMS THAT  
3 EVERYBODY AGREES THAT WE START WITH THE LANGUAGE OF THE  
4 CONTRACTS, THE POLICIES AT ISSUE, AND WE DON'T HAVE ANY  
5 POLICIES BEFORE US. I -- I -- I DON'T KNOW HOW WE COULD  
6 AFFIRM WHAT THE TRIAL COURT DID IN THIS CASE WITHOUT THE  
7 COMPLETE LANGUAGE OF ANY OF THE POLICIES.

8 MR. CRANE: I THINK YOU CAN, YOUR HONOR.

9 THE PARTIES STIPULATED TO THE RELEVANT  
10 POLICY LANGUAGE BELOW AND THE POLICY LANGUAGE IS IN THE  
11 RECORD. AND WHAT THE PARTIES AGREED AMONGST THEMSELVES  
12 IS THAT THESE ARE THE PROVISIONS THAT DICTATE THE  
13 OUTCOME OF THIS -- THESE CROSS-MOTIONS FOR SUMMARY  
14 JUDGMENT. AND -- AND THAT LANGUAGE IS IN THE RECORD AND  
15 IT'S QUOTED IN THE VARIOUS STATEMENTS OF UNDISPUTED  
16 FACT.

17 JUSTICE EDMON: THE SEPARATE STATEMENT OF  
18 UNDISPUTED FACTS SET FORTH VARIOUS POLICY PROVISIONS --

19 MR. CRANE: CORRECT.

20 JUSTICE EDMON: -- BUT MAYBE YOU COULD POINT ME TO  
21 THE --

22 I HAVEN'T FOUND A STIPULATION WHERE  
23 EVERYBODY AGREES "THIS IS THE ONLY RELEVANT POLICY  
24 LANGUAGE THAT WE HAVE TO CONSIDER IN ORDER TO DECIDE  
25 THIS CASE." I MEAN, IN FACT, I'VE GOT THE STIPULATION  
26 IN FRONT OF ME WHERE THE -- IT WAS A SEPARATE DOCUMENT  
27 WHERE YOU ATTACHED ALL THE POLICY LANGUAGE, BUT I DON'T  
28 SEE ANY LANGUAGE THAT SAYS "THE PARTIES AGREE THAT THIS

1 IS THE ONLY RELEVANT LANGUAGE."

2 MR. CRANE: WELL, I DON'T RECALL OFF THE TOP OF MY  
3 HEAD WHETHER THERE IS SUCH A SPECIFIC DOCUMENT.

4 BUT I CAN TELL YOU CATEGORICALLY THAT THE  
5 PARTIES CAME TOGETHER TO JOIN THIS ISSUE AND CRYSTALIZE  
6 THE ISSUE FOR THE TRIAL COURT AS THE FIRST MAJOR ISSUE  
7 FOR DECISION MAKING. AND THE PARTIES CATEGORICALLY  
8 AGREED THAT THIS IS THE RELEVANT LANGUAGE THAT THE COURT  
9 HAS TO MAKE THE DECISION ON.

10 AND THEN --

11 JUSTICE EDMON: SOME OF THE -- SOME OF THE  
12 LANGUAGE THAT -- IN SOME OF THESE INSURING PROVISIONS  
13 SAY THINGS LIKE "THEY'RE GOING TO FOLLOW OTHER INSURING  
14 AGREEMENTS," AND WE DON'T KNOW WHAT THE "OTHER INSURING  
15 AGREEMENTS" ARE.

16 I JUST -- AND I HAVE TROUBLE FINDING --  
17 FIGURING OUT HOW WE COULD EVER DECIDE THIS WITHOUT  
18 HAVING THE ACTUAL POLICY LANGUAGE.

19 MR. CRANE: RIGHT.

20 SO THE FOLLOWING-FORM LANGUAGE --

21 AS YOUR HONOR PROBABLY KNOWS, WHEN YOU GET  
22 TO THE EXCESS LEVEL AND YOU GET PAST THE UMBRELLA LAYER,  
23 WHICH USUALLY HAS ITS OWN TERMS AND CONDITIONS,  
24 TYPICALLY THE HIGHER-LEVEL EXCESS ARE WHAT'S CALLED  
25 "FOLLOWING-FORM POLICIES." AND THEY INCORPORATE  
26 LANGUAGE FROM SOME UNDERLYING POLICY, TO THE EXTENT IT'S  
27 NOT INCONSISTENT.

28 AND WHAT THE PARTIES AGREED TO HERE IS THAT

1 SOME OF THESE POLICIES ARE FOLLOWING FORM AND THEY  
2 EITHER HAVE THEIR OWN OR THEY'RE INCORPORATING  
3 OTHER "OTHER INSURANCE" LANGUAGE.

4 AND SO THESE POLICIES ALL HAVE THEIR OWN  
5 SCHEDULE OF UNDERLYING INSURANCE. AND THOSE ARE QUOTED  
6 IN THE SEPARATE STATEMENTS. AND THEN EACH POLICY HAS  
7 IDENTIFIED EITHER ITS OWN OR INCORPORATING AN "OTHER  
8 INSURANCE" PROVISION. AND --

9 FOR EXAMPLE, MY CLIENTS' POLICIES BOTH HAVE  
10 THE "OTHER INSURANCE" LANGUAGE IN THE INSURING  
11 AGREEMENTS, AND THOSE ARE QUOTED VERBATIM. OTHER  
12 POLICIES HAVE "OTHER INSURANCE" LANGUAGE ELSEWHERE IN  
13 THE POLICY, AND THOSE ARE QUOTED AS EITHER HAVING BEEN  
14 INCORPORATED BY FOLLOWING FORM OR STANDALONE PROVISIONS  
15 IN THEIR OWN POLICIES.

16 BUT I DON'T THINK THERE'S ANY DISPUTE AMONG  
17 THE PARTIES HERE THAT THIS PANEL HAS THE PROVISIONS IT  
18 NEEDS TO AFFIRM THE TRIAL COURT'S DECISION.

19 SO THE IMPLICATION OF BOTH OF THE  
20 TRIGGERING REQUIREMENTS THAT I MENTIONED BEFORE, THAT IS  
21 THE SCHEDULE OF UNDERLYING INSURANCE AND THE OTHER  
22 INSURANCE IN THIS CONTINUOUS INJURY CONTEXT IS, IN FACT,  
23 A DIRECT AND NATURAL OUTCOME OF THE MONTROSE CASE AND  
24 THE STATE OF CALIFORNIA CASE THAT REQUIRE TRIGGERING OF  
25 THE OTHER INSURANCE.

26 JUSTICE EDMON: YOU WANT TO ADDRESS COUNSEL'S  
27 ARGUMENT THAT THE "OTHER INSURANCE" PROVISIONS HAVE  
28 REALLY ONLY TWO FUNCTIONS, ONE IS TO PREVENT

1 DOUBLE-RECOVERY --

2 MR. CRANE: SURE.

3 JUSTICE EDMON: -- AND THE OTHER ONE IS TO --

4 MR. CRANE: AND I THINK THEY PARTICULARLY RELY ON  
5 THE DART CASE.

6 AS WE HAVE POINTED OUT IN OUR PAPERS, THE  
7 DART CASE WAS FUNDAMENTALLY A MISSING POLICY CASE. AND  
8 WHAT THE PARTIES HAD TO -- WHO HAD THE BURDEN AND WHAT  
9 THEY HAD TO PROVE IN TERMS OF PROVING THE MATERIAL TERMS  
10 OF A MISSING POLICY.

11 AND ONE OF THE PROVISIONS THAT ONE OF THE  
12 PARTIES RAISED, AS TO WHETHER THEY HAD TO PROVE IT OR  
13 NOT, WAS AN "OTHER INSURANCE" PROVISION. AND IT WAS IN  
14 THAT CONTEXT THAT THE SUPREME COURT WAS MAKING SOME  
15 GENERAL OBSERVATIONS AT THE PRIMARY LEVEL.

16 AND YOUR HONOR ASKED THE QUESTION "DIDN'T  
17 DART INVOLVE PRIMARY INSURANCE?" YES, IT DID. IT DID  
18 NOT INVOLVE EXCESS.

19 AND IT WAS IN THE CONTEXT OF POLICIES AT  
20 THE PRIMARY LEVEL WHERE THE PRIMARY POLICIES ARE  
21 POINTING -- POINTING THE FINGER AT EACH OTHER AND  
22 SAYING -- AND, IN FACT, THEY -- BECAUSE THEY'RE POINTING  
23 THE FINGER AT EACH OTHER, THEY BECOME IRRECONCILABLE,  
24 THAT THE COURT SAYS, IN THAT SPECIFIC CONTEXT, "WE'RE  
25 GOING TO PRORATE; YOU'RE NOT GOING TO TRUMP EACH OTHER  
26 OUT OF NEITHER OF YOU PROVIDING COVERAGE."

27 IN THIS CONTEXT, THE LAW IS ALSO CLEAR THAT  
28 THE "OTHER INSURANCE" PROVISIONS PROVIDE AN ADDITIONAL

1 PURPOSE. AND THAT'S THE COMMUNITY REDEVELOPMENT CASE  
2 AND SOME OF THE OTHER CASES THAT YOUR HONOR IS FAMILIAR  
3 WITH.

4 AT THE EXCESS LEVEL, THE "OTHER INSURANCE"  
5 PROVISIONS PROVIDE AN ATTACHMENT POINT PURPOSE; SO, YES,  
6 THE DART CASE SAID WHAT COUNSEL SAID IT SAYS BUT IT WAS  
7 SAID IN A DIFFERENT CONTEXT AND IT WAS CERTAINLY NOT  
8 MEANT TO FORECLOSE ITS PURPOSE IN ANOTHER CONTEXT, IN  
9 ANOTHER POLICY.

10 SO THIS IS EXACTLY WHY JUSTICE CROSKY, IN  
11 COMMUNITY REDEVELOPMENT, OBSERVED THAT "ALL PRIMARY IN  
12 FORCE DURING THE PERIOD OF CONTINUOUS LOSS WILL BE  
13 DEEMED PRIMARY POLICIES TO EACH OF THE EXCESS POLICIES."

14 IT'S BECAUSE OF THIS CONTINUOUS LOSS, AND  
15 AS WE NOW KNOW, CONSECUTIVE LIMIT STACKING, THAT EACH OF  
16 THE UNDERLYING POLICIES IS DEEMED EXCESS EVEN IF IT'S  
17 NOT IN THE VERTICAL PERIOD.

18 AND THIS CASE IS SIMPLY AN EXTENSION OF  
19 COMMUNITY REDEVELOPMENT PRINCIPLES AT THE EXCESS LEVEL.  
20 AND IT'S BECAUSE THE UNDERLYING LOSS IS GREATER.

21 IN COMMUNITY REDEVELOPMENT, THE COURT  
22 DIDN'T HAVE TO GET INTO WHAT HAPPENS AT THE  
23 SECOND-LEVEL, THIRD-LEVEL EXCESS BECAUSE THE LOSS WAS  
24 CAPTURED IN THE PRIMARY. BUT THE PRINCIPLES THAT  
25 COMMUNITY REDEVELOPMENT ESTABLISHED ARE EQUALLY  
26 APPLICABLE IN THIS CASE.

27 JUSTICE EDMON: COUNSEL TRIES TO DISTINGUISH  
28 COMMUNITY REDEVELOPMENT ON THE GROUNDS THAT WE'RE

1 TALKING ABOUT FIRST-LEVEL COVERAGE THAT INVOLVES A DUTY  
2 TO DEFEND WHICH IS DIFFERENT FROM THIS.

3 COULD YOU ADDRESS THAT?

4 MR. CRANE: SURE.

5 WE THINK THAT'S A -- A DISTINCTION WITHOUT  
6 A DIFFERENCE.

7 THE -- THE LANGUAGE THAT WE'RE TALKING  
8 ABOUT, THAT IS THE "OTHER INSURANCE" LANGUAGE, IS IN THE  
9 EXCESS POLICIES, IT'S NOT IN THE PRIMARY POLICIES. AND  
10 IT'S IN EACH EXCESS POLICY AT EACH LAYER; SO WHAT WE'RE  
11 TRYING TO DETERMINE IS WHEN THE EXCESS POLICY IS  
12 IMPLICATED BY ITS POLICY LANGUAGE.

13 THE FACT THAT COMMUNITY REDEVELOPMENT  
14 INVOLVED A DUTY TO DEFEND IS SIMPLY THE HAPPENSTANCE OF  
15 THAT CASE, THAT THAT'S WHAT WAS UP FOR DECISION MAKING.

16 BUT LET'S BE CLEAR, THE COURT IN COMMUNITY  
17 REDEVELOPMENT BROADLY TALKED ABOUT THESE PRINCIPLES  
18 AND -- TRYING TO BE CONSISTENT WITH THE PRINCIPLES OF  
19 MONTROSE'S CONTINUOUS INJURY, AND TALKED ABOUT IT NOT  
20 JUST IN TERMS OF THE DUTY TO DEFEND THAT WAS AT ISSUE IN  
21 THAT CASE BUT IN TERMS OF COVERAGE AND LOSS. AND THESE  
22 WERE THE WORDS THAT THE COURT WAS USING IN DESCRIBING  
23 THAT THESE "OTHER INSURANCE" PROVISIONS AT THE EXCESS  
24 LEVEL PROVIDE AN ORDERING OF TRIGGERING OF EXCESS  
25 POLICIES.

26 SO WE DON'T THINK THE FACT THAT COMMUNITY  
27 REDEVELOPMENT, IN TERMS OF ITS STRICT HOLDING, INVOLVED  
28 A DUTY TO DEFEND MATTERS; WE THINK THAT THE PRINCIPLES

1 THAT COME OUT OF COMMUNITY REDEVELOPMENT, THAT IS YOU  
2 LOOK AT THE ACTUAL POLICY LANGUAGE, YOU LOOK AT THE  
3 FACTS OF THE CASE AS APPLIED TO THE POLICY LANGUAGE,  
4 THAT IS CONTINUOUS TRIGGER, IS WHAT'S MOST IMPORTANT.

5 SO I WOULD ALSO POINT OUT THAT IN COMMUNITY  
6 REDEVELOPMENT IT RELIED ON AN OLDER CASE, PEERLESS,  
7 WHICH SAID "WE MUST CONCLUDE THAT WHEN A POLICY WHICH  
8 PROVIDES EXCESS INSURANCE ABOVE A STATED AMOUNT OF  
9 PRIMARY INSURANCE CONTAINS PROVISIONS WHICH MAKE IT ALSO  
10 EXCESS INSURANCE ABOVE ALL OTHER INSURANCE, WHICH  
11 CONTRIBUTES TO THE PAYMENT OF THE LOSS," AND I EMPHASIZE  
12 THE WORD "LOSS" THERE BECAUSE THAT'S AN INDEMNITY  
13 PHRASE, NOT JUST A DEFENSE PHRASE, "TOGETHER WITH  
14 SPECIFICALLY STATED PRIMARY INSURANCE, SUCH CLAUSE WILL  
15 BE GIVEN EFFECT AS WRITTEN."

16 THAT'S WHAT I'M TALKING ABOUT IN TERMS OF  
17 THE BROADER PRINCIPLES THAT WE DRAW FROM COMMUNITY  
18 REDEVELOPMENT; THAT IT WAS NOT JUST SPEAKING ABOUT DUTY  
19 TO DEFEND, IT WAS TALKING ABOUT LOSS IN COVERAGE IN  
20 CITING PEERLESS FOR THE PROPOSITION THAT WHEN YOU DO  
21 HAVE ONE OF THESE EXCESS "OTHER INSURANCE" PROVISIONS  
22 AT THE -- "OTHER INSURANCE" PROVISIONS AT THE EXCESS  
23 LEVEL, THEY ARE TO BE GIVEN FORCE AND EFFECT. AND HOW  
24 THEY'RE GIVEN FORCE AND EFFECT DEPENDS ON THE TYPE OF  
25 CASE YOU HAVE.

26 AND IN THIS TYPE OF CASE, THE STACKING OF  
27 LIMITS CREATES THE OTHER INSURANCE. THAT'S WHAT IT  
28 WOULD -- WHAT TRIGGERS THE OTHER INSURANCE AND CREATES



1 THE OTHER INSURANCE.

2 AND THE NAME THAT COMMUNITY REDEVELOPMENT  
3 ATTACHED TO THAT SITUATION WAS "HORIZONTAL EXHAUSTION."  
4 THAT'S SIMPLY A DESCRIPTION OF THE FACT THAT CONTINUOUS  
5 TRIGGER AND STACKING TRIGGERS OTHER INSURANCE. AND WHEN  
6 YOU HAVE OTHER INSURANCE AT THE EXCESS LEVEL, YOU HAVE,  
7 CONSISTENT WITH STACKING AND CONTINUOUS TRIGGER,  
8 HORIZONTAL EXHAUSTION.

9 JUSTICE EDMON: ONE OF THESE CASES, AND I THINK  
10 THAT MAYBE IT WAS CONTINENTAL, SAID THAT THE -- THE  
11 INSURANCE COMPANY -- THAT THE INSURED AND INSURER CAN  
12 NEGOTIATE WHAT POLICY LANGUAGE THEY WANT TO HAVE IN IT  
13 AND IT -- AND IT COULD INCLUDE NON-STACKING PROVISIONS,  
14 SOMETHING THAT WOULD EXCLUDE YOUR ABILITY TO DO THAT.

15 MR. CRANE: CORRECT.

16 JUSTICE EDMON: HAVE THE PARTIES STIPULATED  
17 THERE'S NOTHING LIKE THAT IN ANY OF THESE POLICIES?

18 MR. CRANE: I'M NOT AWARE OF IT IN OUR POLICIES.  
19 I CAN'T SPEAK FOR ALL THE POLICIES, BUT I'M NOT AWARE OF  
20 ANTI-STACKING LANGUAGE IN OUR POLICIES.

21 AND I CAN TELL YOUR HONOR THAT I WAS ON THE  
22 LOSING END OF THE STATE OF CALIFORNIA CASE AND IF THERE  
23 WERE ANTI-STACKING LANGUAGE IN OUR POLICIES, I WOULD  
24 HAVE BEEN FOCUSING ON IT.

25 SO I'LL CIRCLE BACK TO WHERE WE STARTED AND  
26 THAT IS I AGREE WITH YOUR HONORS, THAT THIS IS A  
27 CONTRACT LANGUAGE CASE. IT IS WITHOUT DISPUTE THAT THE  
28 LIABILITY OF THE EXCESS INSURERS IS A MATTER OF

1 CONTRACT. AND THAT THE CONTRACT LANGUAGE -- AND THIS IS  
2 CRITICAL TO THE ARGUMENT, THE CONTRACT LANGUAGE CANNOT  
3 BE REWRITTEN OR READ OUT OF THE POLICY. AND THAT'S WHAT  
4 MONTROSE'S ARGUMENT DOES.

5 THESE POLICIES DO NOT DELIMIT THEIR TRIGGER  
6 TO ONLY THE VERTICALLY UNDERLYING POLICIES, THEY EXPAND  
7 THEIR ATTACHMENT POINT WHEN OTHER INSURANCE IS  
8 AVAILABLE. AND HERE OTHER INSURANCE IS AVAILABLE  
9 BECAUSE OF THE NATURE OF THE CLAIM.

10 NOW --

11 JUSTICE EDMON: I'M SORRY, I MAY HAVE ASKED YOU  
12 THIS; WAS THERE A STIPULATION BY THE PARTIES THAT ALL  
13 THE UNDERLYING INSURANCE, ALL THE PRIMARY INSURANCE HAD  
14 BEEN EXHAUSTED?

15 MR. CRANE: I WAS GOING TO GET TO THAT, YOUR  
16 HONOR, BECAUSE --

17 THE ANSWER IS NO, THERE WAS NO STIPULATION  
18 THAT THE PRIMARY POLICIES WERE EXHAUSTED.

19 THE PARTIES AGREED THAT THE TRIAL COURT  
20 COULD DECIDE THE ISSUE OF WHEN THE EXCESS POLICIES ARE  
21 IMPLICATED BY WAY OF TWO PROCEDURAL VEHICLES: ONE WAS  
22 MONTROSE'S 32ND CAUSE OF ACTION WHERE THEY SOUGHT  
23 DECLARATORY RELIEF SPECIFICALLY TO PUT UP ON THE TEE  
24 THIS ISSUE.

25 AND THE SECOND WAS THE EXCESS INSURERS'  
26 DUTY ISSUE; THAT IS, DID WE HAVE A DUTY BEFORE  
27 UNDERLYING INSURANCE WAS EXHAUSTED?

28 AND SO THE ISSUE WAS JOINED IN BOTH OF

1 THOSE WAYS. AND THE PARTIES AGREED THAT IT WAS NOT  
2 NECESSARY FOR THE COURT TO DETERMINE WHETHER A  
3 PARTICULAR POLICY WAS ACTUALLY EXHAUSTED BEFORE DECIDING  
4 THE RULES OF THE ROAD ON EXHAUSTION.

5 BUT, NO, THERE WAS NO AGREEMENT THAT THE  
6 PRIMARY POLICIES WERE, IN FACT, EXHAUSTED, BUT I DON'T  
7 THINK IT'S IMPORTANT FOR THIS HEARING.

8 I DO HAVE TO SAY, AND WE SPENT SOME TIME IN  
9 OUR BRIEF ON THIS, BUT I DO HAVE TO SAY THAT MONTROSE'S  
10 RAILING AGAINST THIS HORIZONTAL EXHAUSTION PRINCIPLE  
11 THAT'S CLEARLY ARTICULATED IN COMMUNITY REDEVELOPMENT  
12 AND THE STONEWALL CASE ALSO APPLIES.

13 AND, BY THE WAY, THE STONEWALL CASE APPLIES  
14 THAT RULING IN THE INDEMNITY CONTEXT, NOT JUST THE  
15 DEFENSE CONTEXT.

16 THAT THIS RAILING IS -- IS -- IS A NEWFOUND  
17 POSITION.

18 MONTROSE WAS VIGOROUSLY ASSERTING  
19 HORIZONTAL EXHAUSTION EARLIER IN THIS CASE AND IN -- AS  
20 AN AMICUS IN THE STATE OF CALIFORNIA CASE BECAUSE IT  
21 WANTED THE SUPREME COURT AND THE COURT OF APPEAL AT THE  
22 TIME TO FIND FOR STACKING. AND THEY FOUND THOSE TWO  
23 THINGS SUPPORTED EACH OTHER.

24 NOW, I SAY THAT HERE TODAY, AND I EMPHASIZE  
25 THAT HERE TODAY, NOT FOR SOME JUDICIAL ESTOPPEL PURPOSE,  
26 BUT TO DEMONSTRATE THAT THEIR POSITION NOW IS STRAINED.  
27 THEY -- THEY KNEW THAT HORIZONTAL EXHAUSTION WAS THE  
28 RULE IN CALIFORNIA WHEN YOU HAD THE LANGUAGE OF THE

1 POLICIES THAT WE HAVE AND YOU HAD A CONTINUOUS TRIGGER  
2 LIKE WE HAVE HERE.

3 SO AT THE END OF THE DAY, BASED ON THE  
4 POLICY LANGUAGE AND BASED ON THE PRINCIPLES THAT COME  
5 OUT OF THE MANY CASES THAT TALK ABOUT THIS, WHICH  
6 COMMUNITY REDEVELOPMENT IS SORT OF THE SEMINAL CASE OF,  
7 WE WOULD ASK THE COURT TO DECLINE THE WRIT AND DISCHARGE  
8 THE ORDER TO SHOW CAUSE.

9 I -- I WANT TO MAKE ONE OTHER POINT AND  
10 THAT IS THE ISSUE ABOUT WHETHER THE INSURED, THE  
11 POLICYHOLDER, IS PUNISHED BY THIS RULE.

12 THE POLICYHOLDER IS NOT PUNISHED BY THIS  
13 RULE. THIS OUTCOME SIMPLY MEANS THAT ALL OF THE  
14 INSURANCE THAT MONTROSE PRUDENTIALY BOUGHT OVER THE  
15 YEARS OF INSURANCE GETS APPLIED AT A HORIZONTAL WAY.  
16 AND IT ACTUALLY GETS THE BENEFIT OF ALL THAT INSURANCE  
17 IT PRUDENTIALY BOUGHT; IT'S SIMPLY A MATTER OF WHEN IN  
18 TIME AND HOW BIG THIS LOSS IS WHETHER OTHER INSURERS  
19 PARTICIPATE OR NOT, IT'S NOT DEPRIVED OF ANY INSURANCE.

20 UNLESS THE PANEL HAS ANY QUESTIONS, I THANK  
21 YOU FOR YOUR ATTENTION.

22 JUSTICE EDMON: WE HAVE NONE.

23 THANK YOU.

24 MR. CRANE: THANK YOU.

25 MR. FRANKEL: GOOD MORNING, YOUR HONORS.

26 ANDY FRANKEL FOR REAL PARTIES IN INTEREST  
27 THE TRAVELERS COMPANIES.

28 AND I THINK I CAN BE VERY BRIEF,

1 PARTICULARLY IN VIEW OF THE CLARIFICATION THAT I HEARD  
2 FROM MR. WILSON.

3 AND, FIRST OF ALL, I DO AGREE WITH THE WAY  
4 MR. CRANE ARTICULATED THE ISSUE OF PRIMARY EXHAUSTION.  
5 TRAVELERS DID NOT STIPULATE -- STIPULATE TO THAT.

6 THAT WAS AN ISSUE -- WHEN THE COURT GETS  
7 DOWN THE ROAD IN DECIDING WHETHER EXHAUSTION -- THERE'S  
8 BEEN EXHAUSTION IN FACT, BUT THAT WASN'T THE BASIS FOR  
9 TRAVELERS' OBJECTIONS TO THE SUMMARY ADJUDICATION  
10 MOTION.

11 IT WAS, AS YOUR HONOR POINTED OUT, THE  
12 DISCONNECT BETWEEN THE LANGUAGE IN THE POLICIES  
13 REQUIRING ACTUAL EXHAUSTION AND THE DECLARATION THAT  
14 MONTROSE WAS SEEKING THAT SEEMED TO ALLOW FOR SOMETHING  
15 LESS THAN THAT, LIABILITY SUFFICIENT TO EXHAUST AND WHAT  
16 DOES THAT MEAN?

17 DOES THAT MEAN, YOU KNOW, POTENTIAL FUTURE  
18 LIABILITIES OR EVEN IF THERE'S NO COVERAGE IN THE  
19 UNDERLYING POLICIES? OR CAN THEY DOUBLE-RECOVER IF  
20 THERE'S BEEN NO ACTUAL PAYMENT AND JUST GO DOWN THE  
21 CHART? AND SO WE POINTED OUT THE LANGUAGE IN THE  
22 POLICIES.

23 AND WHAT I HEAR MR. WILSON EXPLAINING NOW  
24 IS NO, MONTROSE ACKNOWLEDGES THAT THAT LANGUAGE DOES  
25 APPLY, THAT MONTROSE WILL HAVE TO COMPLY WITH THAT  
26 POLICY LANGUAGE, WHICH REQUIRES, BEFORE PAYMENT, THAT  
27 THERE HAS BEEN ACTUAL PAYMENT BY THE UNDERLYING INSURER,  
28 OR A FINDING, AN ADJUDICATION, THAT THE UNDERLYING

1 INSURER IS LIABLE BEFORE THE EXCESS INSURER CAN BE --  
2 CAN BE ASKED TO PAY.

3 AND SO WE JUST DIDN'T THINK THAT  
4 CLARIFICATION -- OR THAT WAS CLEAR AT ALL FROM THE  
5 LANGUAGE.

6 AND IT'S INTERESTING THAT THEY COULD HAVE  
7 SIMPLY SAID THAT EITHER IN THE DECLARATION OR IN THE  
8 TRIAL COURT OR IN THEIR OPPOSITION PAPERS ON APPEAL IN  
9 THE WRIT PETITION.

10 BE THAT AS IT MAY, THERE WAS ANOTHER  
11 GROUNDS THAT'S INDEPENDENT FROM THE QUESTION OF THE  
12 METHOD OF EXHAUSTION, HORIZONTAL VERSUS VERTICAL  
13 EXHAUSTION, THAT THE TRAVELERS DEFENDANTS RAISED IN THE  
14 COURT BELOW. IT WASN'T ADDRESSED BY THE COURT IN VIEW  
15 OF THE COURT'S RULING ON THE QUESTION OF HORIZONTAL  
16 EXHAUSTION. AND THAT'S IN THE -- IN THE OPPOSITION  
17 PAPERS THAT WE CITED, TRAVELERS RAISED THE THRESHOLD  
18 QUESTION AS TO WHETHER OR NOT CALIFORNIA LAW APPLIES TO  
19 THOSE POLICIES.

20 TRAVELERS ISSUED ITS POLICIES NOT TO  
21 MONTROSE BUT TO STAUFFER CHEMICAL CORPORATION,  
22 15 POLICIES OVER THE COURSE OF MANY YEARS. MONTROSE WAS  
23 ADDED AS AN ADDITIONAL NAMED INSURED. AND AT --  
24 THROUGHOUT THE TIME PERIOD, ALL OF TRAVELERS, STAUFFER,  
25 AND EVEN MONTROSE, WERE ALL LOCATED IN CONNECTICUT.

26 THE ELECTIVE VERTICAL STACKING RULE THAT  
27 MONTROSE IS ASKING FOR IS CONTRARY TO THAT GOVERNING  
28 LAW. AND WE JUST ASK THAT THE -- THE COURT ADDRESS

1 THAT -- OR THE TRIAL COURT ADDRESS THAT AT THE  
2 APPROPRIATE TIME. IF IT AGREED WITH MONTROSE, IT WOULD  
3 HAVE TO ADDRESS THE CHOICE-OF-LAW ISSUE AS TO THE  
4 TRAVELERS POLICIES; THAT DIDN'T OCCUR.

5 SO WE RAISE THAT AS A -- MORE BY WAY OF  
6 PRESERVATION SINCE MONTROSE IS ASKING FOR A WRIT  
7 DIRECTING THIS COURT TO ORDER THE TRIAL COURT TO GRANT  
8 ITS MOTION, THAT THAT SIMPLY CAN'T OCCUR FOR THE  
9 TRAVELERS POLICIES.

10 WE HAVE NOTHING FURTHER, I PROMISED TO BE  
11 BRIEF, UNLESS THE COURT HAS ANY QUESTIONS.

12 THANK YOU.

13 JUSTICE EDMON: WE HAVE NO QUESTIONS.

14 MR. WILSON: THANK YOU, YOUR HONORS.

15 I'M GOING TO HAVE THREE QUICK POINTS BUT I  
16 WOULD LIKE TO ADDRESS JUSTICE LAVIN'S QUESTION.

17 AT PAGE 39 OF THE RECORD, LINES 17 THROUGH  
18 21, THE COURT ARTICULATED THAT FOR THE PURPOSES OF THE  
19 MOTIONS BEFORE THE SUPERIOR COURT, THE PRIMARY POLICIES  
20 WERE DEEMED EXHAUSTED AND THE DEFENDANTS WERE NOT  
21 CONTESTING THAT FOR PURPOSES OF THESE MOTIONS; SO THAT'S  
22 IN ANSWER TO YOUR QUESTION DIRECTLY FROM THE -- THE  
23 COURT'S -- THE COURT'S RULING.

24 BUT I WANTED TO ADDRESS THREE SUBSTANTIVE  
25 POINTS THAT WERE RAISED BY THE INSURERS.

26 THE -- THE GENESIS OF THE ENTIRE ARGUMENT,  
27 AS YOU HEARD FROM -- FROM MR. CRANE, IS THAT CONTINUOUS  
28 TRIGGER JUST PUTS US IN AN ENTIRELY DIFFERENT SITUATION;

1 THAT BECAUSE, UNDER CONTINENTAL AND MONTROSE, THE  
2 POLICYHOLDER CAN ACCESS POLICIES IN MULTIPLE YEARS, THAT  
3 IT THEREFORE MUST ACCESS POLICIES IN ALL OF THOSE YEARS  
4 AND DO SO IN THIS HORIZONTAL EXHAUSTION FASHION AS THE  
5 SUPERIOR COURT MANDATED.

6 BUT THAT'S NOT WHAT CONTINENTAL SAID. TO  
7 THE CONTRARY, THE SUPREME COURT SAID "EACH POLICY HAS AN  
8 INDEPENDENT OBLIGATION TO RESPOND. AND ONCE THAT POLICY  
9 HAS BEEN EXHAUSTED IN ACCORDANCE WITH ITS TERMS, THE  
10 POLICYHOLDER CAN LOOK TO ANY OTHER POLICY AND TAP INTO  
11 THAT ONE."

12 SO THE RULE THAT THE CARRIERS ARE  
13 ADVOCATING FOR IS SOMETHING THAT IS NOT SUPPORTED IN THE  
14 LITANY OF SUPREME COURT CASES THAT ARE BEFORE US,  
15 INCLUDING DART, WHICH WAS A CONTINUOUS LOSS SITUATION.

16 AND IN THAT CONTINUOUS LOSS SITUATION, DART  
17 SAID "EVEN IF THERE WAS AN 'OTHER INSURANCE' POLICY" --  
18 "AN 'OTHER INSURANCE' PROVISION BEFORE US IT WOULDN'T  
19 MATTER BECAUSE 'OTHER INSURANCE' PROVISIONS SERVE THE  
20 TWO PURPOSES," THAT I DISCUSSED EARLIER TODAY. AND THAT  
21 WAS IN A CONTINUOUS LOSS SITUATION.

22 SO THERE'S NO --

23 "OTHER INSURANCE" CLAUSES CAN'T GET  
24 IMPORTED INTO THE ATTACHMENT LANGUAGE OF POLICIES AND  
25 BECOME A TRIGGERING REQUIREMENT, AS THE INSURERS ARGUE  
26 TODAY. "OTHER INSURANCE" PROVISIONS SERVE A VERY  
27 SPECIFIC PURPOSE, AS THE SUPREME COURT ARTICULATED IN  
28 DART.



1                   WHAT THE INSURERS ARE ACTUALLY ASKING FOR,  
2 AS YOU HEARD IN ARGUMENT TODAY, IS AN EXTENSION OF  
3 COMMUNITY REDEVELOPMENT; THAT WAS THE WORD THAT THEY  
4 USED.

5                   THEY WANT TO TAKE COMMUNITY REDEVELOPMENT  
6 AND THE CASES THAT HAVE FOLLOWED IT, ALL OF WHICH HAVE  
7 ONLY DEALT WITH EXHAUSTION OF PRIMARY INSURANCE, AND AS  
8 WE SAID, THERE'S A REASON FOR THAT, THERE'S A DIFFERENCE  
9 BETWEEN PRIMARY AND EXCESS. ALL OF THE CASES THAT THEY  
10 RELY ON HAVE ONLY DEALT WITH HORIZONTAL EXHAUSTION OF  
11 PRIMARY INSURANCE AND THEY WANT THIS COURT TO EXTEND  
12 THAT AGAINST THE EXCESS LAYERS.

13                   SO I WANTED TO FOLLOW UP ON SOMETHING THAT  
14 JUSTICE EDMON ASKED EARLIER, IS THERE ANY CASE OTHER  
15 THAN MONTGOMERY WARD THAT MAKES CLEAR THAT YOU'RE NOT  
16 SUPPOSED TO EXTEND THAT RULE TO THE EXCESS LAYERS? AND  
17 I NEGLECTED TO MENTION THE COURT OF APPEAL IN  
18 CONTINENTAL.

19                   IN THAT COURT OF APPEAL DECISION THE COURT  
20 SAID "PRIMARY EXHAUSTION IS SOMETHING THAT" -- EXCUSE  
21 ME, "HORIZONTAL EXHAUSTION IS SOMETHING THAT ONLY  
22 APPLIES BETWEEN PRIMARY AND EXCESS CARRIERS, NOT BETWEEN  
23 EXCESS CARRIERS MORE GENERALLY." THE SUPREME COURT THEN  
24 SAID THE ALLOCATION SCHEME THAT THE COURT OF APPEAL HAD  
25 ADOPTED WAS THE RIGHT ONE AND WAS CONSISTENT WITH  
26 CALIFORNIA LAW.

27                   SO COURTS HAVE MADE CLEAR, ANY TIME THEY'VE  
28 BEEN GIVEN THE OPPORTUNITY, THAT COMMUNITY

1 REDEVELOPMENT, FOR WHATEVER RULE IT DERIVED AND THE  
2 MANNER IN WHICH IT GOT THERE, CANNOT APPLY OUTSIDE THE  
3 CONTEXT OF PRIMARY INSURANCE.

4 THE FINAL POINT IS -- I THINK SORT OF GOES  
5 TO THE QUESTION THAT BOTH JUSTICE EDMON AND  
6 JUSTICE LAVIN WERE ASKING OF INSURERS' COUNSEL WHICH IS  
7 WHAT DID THE COURT DO WITH THE SPECIFIC POLICY LANGUAGE  
8 BELOW?

9 THE ANSWER IS, AND THE PROBLEM THAT  
10 MONTROSE HAS, AND WHY WE TOOK THE WRIT PETITION, IS THE  
11 TRIAL COURT DIDN'T ANALYZE THE POLICY LANGUAGE AT ALL.

12 THE TRIAL COURT SAID THERE IS A DEFAULT  
13 GENERAL RULE THAT ALWAYS APPLIES IN THE CONTEXT OF  
14 CONTINUOUS LOSS CASES, IRRESPECTIVE OF POLICY LANGUAGE.  
15 IN FACT, AT PAGE 55 OF THE RECORD, THE COURT SAID IT MAY  
16 BE TRUE THAT EACH EXCESS POLICY DESCRIBES THE UNDERLYING  
17 LIMIT OF COVERAGE THAT MUST BE EXHAUSTED WITH RESPECT TO  
18 ITS SAME POLICY PERIOD, "BUT THIS ARGUMENT OVERLOOKS  
19 THAT THE PRESENT CASE IS A CONTINUOUS LOSS SCENARIO."

20 HAD THE COURT ACTUALLY REVIEWED THE POLICY  
21 LANGUAGE AND APPLIED THE ATTACHMENT LANGUAGE, AS IT  
22 SHOULD HAVE, READ THE OTHER INSURANCE PROVISIONS  
23 CONSISTENT WITH WHAT THE SUPREME COURT HAS SAID THEY  
24 MEAN IN CONTINUOUS LOSS CASES, IN DART, WHICH,  
25 IMPORTANTLY, POSTDATED COMMUNITY REDEVELOPMENT, THE  
26 ANSWER SHOULD HAVE BEEN CLEAR THAT MONTROSE, OR ANY  
27 OTHER SIMILARLY SITUATED POLICYHOLDER, HAS THE RIGHT TO  
28 LOOK TO ITS -- EACH OF ITS INDIVIDUAL COMMERCIAL ASSETS

1 AND UTILIZE THEM AS EFFICIENTLY AS IT CAN, AS IT SEES  
2 FIT, WITHOUT HAVING TO MAKE THOSE INDEPENDENT CONTRACTS  
3 SUBJECT TO THE REQUIREMENTS OF OTHER POLICIES.

4 BUT THE FINAL POINT IS EVEN IF THE COURT  
5 HAD LOOKED AT THE ATTACHMENT LANGUAGE, AS IT SHOULD  
6 HAVE, INSTEAD OF DECLARING THIS GENERAL RULE THAT'S  
7 INCONSISTENT WITH THE SUPREME COURT CASE LAW, AND EVEN  
8 IF HE CREDITED THE INSURERS' ARGUMENT THAT "OTHER  
9 INSURANCE" PROVISIONS MEAN SOMETHING ENTIRELY DIFFERENT  
10 THAN WHAT THE SUPREME COURT SAID THEY MEAN IN DART, THE  
11 BEST THE INSURERS COULD HOPE FOR IN THAT SITUATION IS TO  
12 CREATE AMBIGUITY BECAUSE THE POLICYHOLDER -- A  
13 REASONABLE POLICYHOLDER PICKS UP THE ATTACHMENT POINT  
14 AND SAYS "YOU AGREED TO PAY ME AFTER I'VE SUFFERED  
15 10 MILLION DOLLARS OF LIABILITY." THEN IT LOOKS AT THE  
16 "OTHER INSURANCE" PROVISION THAT, EVEN IF READ THE WAY  
17 THAT THE INSURERS WISH IT WERE, SAYS, "NO, YOU ACTUALLY  
18 HAVE TO GET 10 MILLION DOLLARS OF COVERAGE FROM EACH OF  
19 THE YEARS OF INSURANCE COVERAGE THAT YOU BOUGHT; SO NOW  
20 WE IMPORT THAT BACK INTO THE ATTACHMENT LANGUAGE AND YOU  
21 REALLY HAVE TO INCUR 30 MILLION DOLLARS OF LIABILITY."

22 A REASONABLE POLICYHOLDER IN THAT POSITION  
23 IS HOPELESSLY CONFUSED. AND AS --

24 WHAT'S THE RIGHT ANSWER?

25 THE REASONABLE EXPECTATION FOR ANY  
26 POLICYHOLDER IS TO LOOK TO THE PROMISES THAT WERE MADE,  
27 THE ATTACHMENT LANGUAGE THAT'S SPECIFICALLY SET OUT, NOT  
28 TO SOME GENERAL CONDITION ELSEWHERE IN THE POLICY.

1                   AND EVEN IF WE WERE TO CREDIT THE ARGUMENTS  
2                   THAT THE CARRIERS HAVE MADE, REGARDLESS OF THEIR  
3                   CONTRADICTION OF DART, THE BEST THEY COULD DO IS CREATE  
4                   AMBIGUITY.

5                   SO AT THE END OF THE DAY, THE TRIAL COURT'S  
6                   RULING THAT MANDATORY HORIZONTAL EXHAUSTION SHOULD TRUMP  
7                   A POLICYHOLDER'S RIGHT TO CALL UPON EACH OF ITS  
8                   INDIVIDUAL INSURANCE CONTRACTS, ACCORDING TO THEIR OWN  
9                   TERMS, CANNOT STAND. AND WE WOULD ENCOURAGE THE COURT  
10                  TO OVERRULE THE ORDER AND ENTER SUMMARY ADJUDICATION IN  
11                  MONTROSE'S FAVOR.

12                 JUSTICE EDMON: LET ME ASK YOU THE SAME QUESTION I  
13                 ASKED COUNSEL.

14                         WAS THERE ANY STIPULATION THAT THE POLICY  
15                         LANGUAGE THAT WE HAVE BEFORE US IN THE STIPULATION IS  
16                         THE ONLY LANGUAGE THAT'S RELEVANT TO THIS CASE?

17                 MR. WILSON: IT'S AN INTERESTING QUESTION AND I  
18                 THINK MR. CRANE DID AS WELL AS HE COULD.

19                         THE STIPULATION THAT WAS ENTERED WAS THE  
20                         PRODUCT OF LOTS OF NEGOTIATION OVER A LONG PERIOD OF  
21                         TIME. AND WE TRIED TO IDENTIFY THE PROVISIONS THAT BOTH  
22                         PARTIES THOUGHT THE SUPERIOR COURT SHOULD LOOK AT IN  
23                         ORDER TO RULE ON THE MOTIONS.

24                         THE STIPULATION ACTUALLY SAYS "THE PARTIES  
25                         ARE NOT STIPULATING TO THE RELEVANCE OF ANY POLICY  
26                         LANGUAGE --

27                 JUSTICE EDMON: THAT'S HOW I READ IT.

28                 MR. WILSON: -- CONTAINED HEREIN TO THE EXCESS

1 EXHAUSTION MOTIONS."

2 BUT I THINK IT IS FAIR TO SAY THAT EVERYONE  
3 WALKED INTO THE COURTROOM BEFORE JUDGE BERLE ON THE --  
4 FOR THE ADJUDICATION OF THE MOTIONS WITH THE  
5 UNDERSTANDING THAT WE'VE GIVEN YOU THE LANGUAGE THAT YOU  
6 OUGHT TO LOOK AT TO REACH A CONCLUSION AND PLEASE RULE  
7 WHO'S RIGHT, DO -- CAN THE CARRIERS MANDATE HORIZONTAL  
8 EXHAUSTION OR CAN MONTROSE INSTEAD ENFORCE EACH POLICY  
9 ACCORDING TO ITS TERMS?

10 SO THAT'S -- THAT'S THE BEST WAY I CAN  
11 ANSWER IT.

12 YOU'RE RIGHT, YOUR HONOR, THAT THE -- THE  
13 LANGUAGE IS -- SUGGESTS OTHERWISE, BUT THAT WAS THE WAY  
14 THAT THE PARTIES MARCHED INTO COURT.

15 JUSTICE EDMON: ALL RIGHT. THANK YOU VERY MUCH.

16 MR. WILSON: THANK YOU, YOUR HONOR.

17 JUSTICE EDMON: ALL RIGHT. THE MATTER STANDS  
18 SUBMITTED.

19 /

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION THREE

MONTROSE CHEMICAL CORPORATION OF )  
CALIFORNIA, )

PETITIONER, )

CIVIL CASE  
NO. B272387

V. )

SUPERIOR COURT OF THE STATE OF )  
CALIFORNIA, COUNTY OF LOS ANGELES, )

RESPONDENT; )

REPORTER'S  
CERTIFICATE

CANADIAN UNIVERSAL INSURANCE )  
COMPANY, INC., ET AL., )

REAL PARTIES IN INTEREST. )  
\_\_\_\_\_ )

I, THE UNDERSIGNED, A CERTIFIED SHORTHAND  
REPORTER OF THE STATE OF CALIFORNIA, STATE OF ILLINOIS  
AND THE STATE OF TEXAS, A CERTIFIED COURT REPORTER IN  
THE STATE OF NEW JERSEY, AND REGISTERED PROFESSIONAL  
REPORTER/CERTIFIED REALTIME REPORTER, DO HEREBY CERTIFY:  
THAT THE FOREGOING AUDIO RECORDING OF THE  
PROCEEDINGS DATED MARCH 14, 2017, PAGES 1 THROUGH 49,  
INCLUSIVE, WERE TRANSCRIBED BEFORE ME ON APRIL 19, 2017;  
THAT A VERBATIM RECORD OF THE AUDIO  
RECORDING OF THE PROCEEDINGS WAS MADE BY ME USING  
MACHINE SHORTHAND, TO THE BEST OF MY ABILITY, BASED ON  
THE QUALITY OF THE AUDIO RECORDING OF THE PROCEEDINGS,  
AND SAME WAS THEREAFTER TRANSCRIBED UNDER MY DIRECTION;

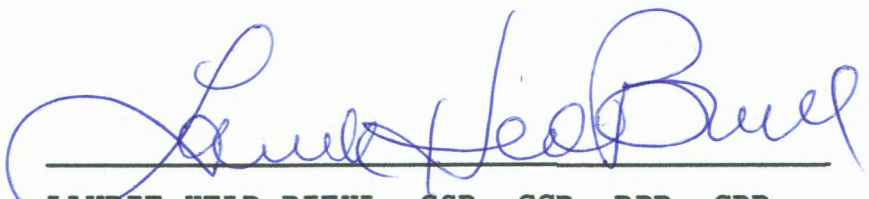
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FURTHER, THAT THE FOREGOING IS AN ACCURATE  
TRANSCRIPTION OF SAID AUDIO RECORDING OF PROCEEDINGS,  
AGAIN, TO THE BEST OF MY ABILITY, NOT HAVING PERSONALLY  
BEEN IN ATTENDANCE AT SAID PROCEEDINGS.

I FURTHER CERTIFY THAT I AM NEITHER  
FINANCIALLY INTERESTED IN THE ACTION NOR A RELATIVE OR  
EMPLOYEE OF ANY ATTORNEY OF ANY OF THE PARTIES.

IN WITNESS WHEREOF, I HAVE THIS DATE  
SUBSCRIBED MY NAME.

DATED:           24/19/17          



LAURIE HELD-BIEHL, CSR, CCR, RPR, CRR  
CA CSR NO. 6781, IL CSR NO. 084002860,  
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**PROOF OF SERVICE**

I am employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 12670 High Bluff Drive, San Diego, CA 92130.

On November 6, 2017, I served the following documents described as:

**MONTROSE CHEMICAL CORPORATION OF  
CALIFORNIA'S REQUEST FOR JUDICIAL NOTICE IN  
SUPPORT OF REPLY IN SUPPORT OF PETITION FOR  
REVIEW**

by serving a true copy of the above-described document in the following manner:

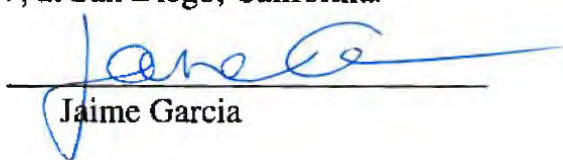
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**SEE ATTACHED SERVICE LIST**

I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed November 6, 2017, at San Diego, California.

  
Jaime Garcia



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STATE OF CALIFORNIA  
Supreme Court of California

**PROOF OF SERVICE**

STATE OF CALIFORNIA  
Supreme Court of California

Case Name: **MONTROSE CHEMICAL CORPORATION OF CALIFORNIA v. S.C  
(CANADIAN UNIVERSAL INSURANCE COMPANY)**

Case Number: **S244737**

Lower Court Case Number: **B272387**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **john.wilson@lw.com**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
REQUEST	Application to File Oversized Reply Brief
REQUEST	Application to File Combined Reply
REPLY TO ANSWER TO PETITION FOR REVIEW	Combined Reply In Support of Petition for Review
REQUEST	RJN ISO Reply Petition for Review

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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.

11-06-2017

Date

/s/John Wilson

Signature

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Law Firm