Case No. S244737

SUPREME COURT
FILED
FEB 16 2018
Jorge Navarrete Clerk
Deputy

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
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

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA'S OPENING BRIEF ON THE MERITS

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I. ISSUES RAISED IN PETITION FOR REVIEW

1. In a complex multi-year, multi-insurer, multi-layer comprehensive general liability ("CGL") program, does the standard "other insurance" condition in CGL policies dictate when an excess insurer's obligations to its policyholder are triggered, or are such provisions relevant only to contribution disputes between insurers, as this Court held in *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059 ("*Dart*") and the Fourth District Court of Appeal recently confirmed in *State of California v. The Continental Ins. Co.* (2017) 15 Cal.App.5th 1017 ("*Continental II*")?

2. Despite policy language stating that an excess policy attaches upon the exhaustion of a defined amount of immediately underlying insurance in the same period, does the mere presence of an "other insurance" provision override the agreed attachment point and obligate the policyholder to first pursue and exhaust coverage under excess policies issued in every other potentially triggered period spanning the years of continuous damage (including policies with more onerous terms and conditions), thereby effectively imposing mandatory horizontal exhaustion of excess coverage, in contravention of *State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186 ("*Continental*"), *Aerojet–Gen. Corp. v.*

Transport Indemnity Co. (1997) 17 Cal.4th 38 ("*Aerojet*"), and *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645 ("*Montrose*")?

II. INTRODUCTION

The insurance industry has long searched for ways to curtail CGL insurers' obligations to policyholders in connection with large-scale environmental and similar property damage claims. Over the last twenty-five years, as a result of its significant historic liabilities, Montrose Chemical Corporation of California ("Montrose") has been forced to the forefront of these disputes as a frequent party to seminal insurance coverage decisions by this Court.

In *Montrose v. Admiral*, this Court held that "where successive CGL policies have been purchased, bodily injury and property damage that is continuing or progressively deteriorating throughout more than one policy period is potentially covered by all policies in effect during those periods." (*Montrose*, *supra*, 10 Cal.4th at pp. 686-687.) This principle was reaffirmed by this Court just two years later in *Aerojet*. (*Aerojet*, *supra*, 17 Cal.4th at p. 57 & n.10 ["In *Montrose*, we also made plain that 'successive' insurers 'on the risk when continuous or progressively deteriorating [property] damage or [bodily] injury first manifests itself' are ***separately and independently*** 'obligated to indemnify the insured'[.]" (emphasis added)].)

Building on this precedent, in *State v. Continental*, this Court rejected the insurance industry's proposed rule of "pro rata" exhaustion of excess insurance policies, and declared 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.)

To counter these decisions, the insurance industry has seized on the concept of mandatory "horizontal exhaustion" in hope of achieving the "pro rata" result through other means. Insurers now seek to compel policyholders to horizontally exhaust all lower-level excess coverage across ***all*** triggered years before calling upon individual higher-layer excess policies triggered by their plain terms. This requires the Insurers to distort policy language and California law, and argue that the boilerplate "other insurance" clauses of standardized CGL excess policies rewrite and greatly multiply the policy's attachment point. However, as this Court has ruled, the "other insurance" provision serves no such function. Its purpose is merely to prevent double recovery and to permit insurers who cover the same loss to equitably allocate responsibility for the policyholder's claim, after the policyholder has been fully indemnified. (See *Dart*, *supra*, 28 Cal.4th at p. 1080.)

Nevertheless, at Insurers' behest, Respondent Superior Court ruled that the standard "other insurance" provisions contained in *all* of

Montrose's policies obligate Montrose to exhaust its excess coverage horizontally before tapping any other triggered excess policies. In doing so, Respondent relied on a Court of Appeal decision pre-dating *Continental* and *Dart*—*Community Redevelopment Agency v. Aetna Casualty & Surety Co.* (1996) 50 Cal.App.4th 329 ("*CRA*"). Although *CRA* had required horizontal exhaustion of primary policies providing defense coverage, Respondent expanded this older decision to ***indemnity*** coverage under ***excess*** policies, with no substantive analysis of the conflict with this Court's more recent precedent. In fact, Respondent's decision did not even attempt to reconcile its ruling with this Court's interpretation and application of "other insurance" provisions in *Dart*.

After the Second District Court of Appeal ("DCA") initially declined to review Respondent's erroneous decision, this Court granted Montrose's Petition for Review and directed the DCA to consider the merits of Montrose's position. On remand, the DCA effectively reached the same result as Respondent by concluding that standard "other insurance" language compels horizontal exhaustion, regardless of insuring language providing that the Policies attach "after other ***identified*** insurance is exhausted." (*Montrose Chemical Corp. v. Superior Court* (2017) 14 Cal.App.5th 1306, 1333 ("Opinion") (emphasis added); cf. *id.* at p. 1328 [recognizing Montrose's position is premised on "the insuring agreements and declarations"—i.e., the provisions specifying the policies' attachment

points].) The DCA recognized that the result of its "other insurance" analysis is "mandatory horizontal exhaustion" for any policy containing that standard condition. (*Id.* at pp. 1335-1336.)

If left uncorrected by this Court, mandatory "horizontal exhaustion" would require policyholders like Montrose to first exhaust numerous separate excess policies spread across all coverage years before obtaining benefits under any single policy triggered by its own insuring language. Such a rule would allow Insurers to re-write their basic coverage obligation and attachment point, despite the fact that the selected policy does not mention (much less require) exhaustion of adjacent years—separate and independent coverage which may not even have existed at the time the policy in question was written. This contrived obligation would even require exhaustion of unrelated policies with different or potentially greater coverage restrictions before broader excess coverage may be tapped. Ultimately, this scheme improperly would allow insurers to defeat coverage that plainly exists and convert policyholders' insurance assets into their own, benefiting from policyholders' prudent decision to obtain coverage in other years, even though the insurers did not bear the cost of that purchase.

Montrose's position rests instead on the plain language of each individual policy, and on insurance coverage principles long declared by this Court: Policyholders should not have their coverage rights truncated

by any artificial, extra-contractual allocation scheme, much less a "mandatory horizontal exhaustion" rule fundamentally at odds with the "all sums with stacking" interpretation recognized in *Continental.* Rather, California law enforces the policyholder's right to call upon any of the insurance contracts it purchased according to the contract's express individual terms. (See *Aerojet*, *supra*, 17 Cal.4th at p. 57 & fn. 10 ["'successive' insurers 'on the risk when continuous or progressively deteriorating [property] damage . . . first manifests itself' are separately and independently 'obligated to indemnify the insured'" (citing *Montrose*, *supra*, 10 Cal.4th at pp. 686-687)]; *Continental*, *supra*, 55 Cal.4th at pp. 200-201 ["***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)].)

The issues of exhaustion, allocation, and horizontal and vertical stacking in continuous damage cases involve literally ***billions*** of coverage dollars. Accordingly, the insurance industry fiercely litigates these questions with a strong incentive to avoid, or at least significantly delay, costly coverage obligations by shifting the burden of insurance recovery onto the backs of policyholders. Coverage delayed (or too burdensome to enforce) is often coverage denied, which prejudices not only policyholders,

but the claimants to whom insurance proceeds are ultimately directed. To balance these competing concerns, this Court has called for "immediate" indemnification, not protracted policyholder litigation in inter-carrier insurance battles over contribution. (*Continental*, *supra*, 55 Cal.4th at p. 201; *Dart*, *supra*, 28 Cal.4th at p. 1080.) Once again, the Court should resolve this weighty dispute, confirming that policyholders cannot be forced into a mandatory horizontal allocation and exhaustion scheme, but must instead be permitted to select the triggered policy(ies) under which to exercise their independent contractual rights in accordance with the policy terms.

III. STATEMENT OF THE CASE

A. Factual Background

Montrose was formerly the world's largest producer of DDT, a pesticide and anti-malarial agent. In 1990, various government plaintiffs sued Montrose, seeking damages arising from alleged releases of hazardous substances into the environment as a result of Montrose's operations at its former manufacturing facility in Torrance. (4PA17 at pp. 928-48.) Pursuant to partial consent decrees with the government plaintiffs, Montrose already has incurred damages of more than $100 million, and its anticipated future liability could approach or exceed that amount. (2PA12

at pp. 303-568.) These damages must be paid to fund environmental cleanup.

Between 1961 and 1985, the 40 defendant Insurers issued over 115 excess CGL policies (the "Policies") providing coverage to Montrose. (4PA17 at pp. 865-69; see 1PA5 at p. 99.) Each of the Policies provides that coverage thereunder attaches in excess of a ***predetermined*** amount of underlying insurance.[1]

Each Policy describes the applicable underlying coverage in one of four ways:

1. A schedule of underlying insurance listing all of the underlying policy(ies) in the same policy period by insurer name(s), policy number(s), and dollar amount(s).[2]

2. Reference to a specific dollar amount of underlying insurance in the same policy period and a schedule of underlying insurance on file with the insurer, *i.e.*:

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1 Cf. *Commercial Union Assurance Cos. v. Safeway Stores, Inc.* (1980) 26 Cal.3d 912, 919 ["The object of the excess insurance policy is to provide additional resources should the insured's liability surpass a ***specified sum***." (emphasis added)]; *Wells Fargo Bank v. Cal. Ins. Guarantee Assn.* (1995) 38 Cal.App.4th 936, 940, fn. 2 ("*Wells Fargo*") ["[W]e use the terms 'excess coverage' or 'excess policy' to mean insurance that begins only after a ***predetermined amount*** of underlying coverage is exhausted . . . ." (emphasis added)].

2 See 1PA10, p. 279 at ¶ 14 (listing 25 Policies employing this method).

> Underlying Insurance Limit of Liability
> $31,000,000 each occurrence
> $31,000,000 aggregate" . . .
>
> Schedule of Underlying Insurance: As on File with Company.[3]

3. Reference to a specific dollar amount of underlying insurance in the same policy period and identification of one or more of the underlying insurers, *i.e.*:

> Underlying Umbrella Policies:
> American Centennial Insurance Company . . .
>
> Underlying Umbrella Limits:
> $19,000,000.00.[4]

4. Reference to a specific dollar amount of underlying insurance that corresponds with the combined limits of the underlying policies in that policy period, *i.e.*:

> Underlying Insurance: $20,000,000 each occurrence and aggregate.[5]

Therefore, each of the Policies expressly provides that coverage attaches in excess of a specific, predetermined amount of underlying coverage ***in the same policy period***.[6] Importantly, the Policies' attachment

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[3] *Id.*, p. 278 at ¶ 12 (listing 13 Policies employing this method).

[4] *Id.*, pp. 276-77 at ¶ 10 (listing 35 Policies employing this method).

[5] *Id.*, p. 275 at ¶ 8 (listing 35 Policies employing this method).

[6] The DCA did not reconcile its ruling with this attachment language, instead claiming (falsely) that, "while Montrose repeatedly asserts that the excess policies attach upon the exhaustion of lower layer policies

language does ***not*** reference coverage available under policies in prior or subsequent years.

Other provisions of the Policies—such as the condition mandating that the underlying insurance "shall be maintained in full effect" during the policy period—corroborate the parties' understanding that coverage attaches upon exhaustion of the predetermined amount of coverage provided by the underlying policies in the same policy period. (See generally 1PA10 at p. 282-84, ¶ 18 [listing policies with comparable language].) The "maintenance of underlying insurance" condition ensures that the amount of underlying coverage taken into account by the underwriters in calculating an excess policy's premium is eroded only by the payment of covered losses. Notably, this provision does ***not*** require that the policyholder "maintain in full effect" coverage for other policy years, since that separate insurance—which the insured may or may not purchase—is not taken into account during the underwriting process.

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within the same policy period, ***it does not identify the provisions that supposedly have that effect.***" (Opinion at p. 1327 (emphasis added).) To the contrary, Montrose cited the above provisions multiple times in its briefs. (See Montrose's Petition For Writ of Mandate (filed May 23, 2016) ("Writ Petition") at pp. 19, 36, 59-60; Montrose's Combined Reply to Oppositions to Petition For Writ of Mandate (filed Dec. 15, 2016) at pp. 29-30.)

Finally, each of the Policies also contains or incorporates "other insurance" language, consistent with all standardized CGL policies. The standard language typically provides:

> If other valid and collectible insurance with any other insurer is available to the Insured covering a loss also covered by this policy, other than insurance that is in excess of the insurance afforded by this policy, the insurance afforded by this policy shall be in excess of and shall not contribute with such other insurance.

Approximately 90 of the Policies contain this formulation of the "other insurance" provision. The other Policies contain similar variations. (See generally 1PA6 at pp. 118-166, ¶¶ 1-21.)

Based on this boilerplate "other insurance" language, the Insurers asserted that Montrose cannot access coverage under any single excess Policy unless and until Montrose not only exhausts up to the express attachment point, but also ***all*** "underlying coverage" ***in every policy period across the decades of its insurance portfolio***.

B. Procedural History

Montrose amended its operative Complaint to assert a stand-alone cause of action to resolve this dispute, which the parties agreed was a critical threshold legal issue necessary to structure the litigation. (4PA17 at pp. 900, 914.) The parties filed cross-motions for summary adjudication of Montrose's Thirty-Second Cause of Action. Montrose's motion sought a

declaration that it was not obligated to horizontally allocate its liabilities across all policy periods:

> [I]n 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; and Montrose may select the manner in which [to] allocate its liabilities across the policy(ies) covering such losses.

(4PA17 at pp. 900, 914 (emphasis in original).)

Conversely, the Insurers' cross-motion argued that Montrose was obligated, as a matter of law, to allocate its losses evenly across all periods. (See 8PA32 at p. 1998 ["All underlying policy limits across the years of continuing property damage must be exhausted by payment of covered claims before any of the Insurers' excess policies have a duty to pay covered claims."].)

The Insurers joined Montrose in representing to the Superior Court (and later to the DCA) that the detailed policy language stipulations entered by the parties contain the language necessary to resolve the legal issue presented. (See 1PA6 at pp. 118-200; 1PA7 at pp. 208-234; accord Montrose's Request for Judicial Notice in Support of Reply in Support of Petition for Review (granted Nov. 29, 2017), Ex. 1 at 28:7-9 [Continental's

counsel: "The parties categorically agreed that this is the relevant language that the Court has to make the decision on."]; *id.* at 27:9-16 [Continental's counsel: "The parties stipulated to the relevant policy language . . . that language is in the record and it's quoted in the various statements of undisputed fact."].)

Respondent Superior Court denied Montrose's motion and granted Insurers' cross-motion, concluding that "the parties ***must employ a horizontal exhaustion approach***, whereby the aggregate limits of underlying policies for the applicable policy periods must first be exhausted before any excess policies incur a duty to indemnify Montrose for its liabilities[.]" (1PA1 at pp. 59:28-60:5 (emphasis added).) Respondent reached this result by concluding that there is a "***well-established rule*** that horizontal exhaustion should apply in the absence of policy language specifically describing and limiting the underlying insurance." (*Id.* at p. 54:14-17 (emphasis added).)

After finding that the Policies contain "some form of the [ ] standard [other insurance] language," Respondent held that:

> [T]he 'other insurance' provisions contained in the present excess policies must be read to require the exhaustion of all underlying insurance before their obligations to indemnify Montrose attach. The presence of 'other insurance' clauses would preclude the use of a vertical exhaustion approach even for those excess policies specifically [identifying] a

> particular underlying policy that must first be exhausted.

(See 1PA1 at pp. 55:26-56:6; *id.* at pp. 58:16-23.)

Notably, Respondent completely failed to address this Court's decision in *Dart* concerning the limited role of "other insurance" provisions, despite noting Montrose's reliance on that case. (*Id.* at 56:11-18.)

Montrose timely petitioned the DCA for writ review, which was denied summarily on July 13, 2016. On October 12, 2016, this Court granted Montrose's petition for review and transferred the case back to the DCA, with directions to vacate the order denying Montrose's petition and to issue an order to show cause why the relief Montrose sought should not be granted. Following additional briefing and oral argument, the DCA issued its Opinion on August 31, 2017.

The DCA's Opinion ignored the express language of the Policies stating that coverage attaches upon the exhaustion of a specified amount of underlying insurance in the same policy year, instead exalting the "other insurance" provisions and holding that these conditions actually define the amount of coverage that must be exhausted before an excess policy is triggered. (See Opinion at p. 1333 ["[A]n 'other insurance' clause may define the insurance ***that must be exhausted before the excess insurance***

attaches[.]" (emphasis added)]; *id.* at p. 1334 ("'[O]ther insurance' clauses may be relevant to determining . . . the order in which excess policies attach."]; contra *Dart, supra,* 28 Cal.4th at p. 1080.) The DCA recognized that the result of its "other insurance" analysis is "mandatory horizontal exhaustion" for any policy containing the standard "other insurance" language, as all standardized CGL policies do. (Opinion at pp. 1335-1336.)[7]

Respondent Superior Court's ruling and the misguided decision of the DCA improperly restrict Montrose's right to enforce the plain policy language of each individual policy and subvert numerous insurance principles long declared by this Court.

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[7] The DCA also ruled that further examination of the Policies' "other insurance" provisions should be conducted because "Montrose has not demonstrated [] that each of the policies at issue has an 'other insurance' clause[.]" (*Id.* at p. 1334, fn.7.) However both Montrose ***and the Insurers*** expressly recognized that ***all*** of the Policies contain standard "other insurance" provisions. (See, e.g., Continental's Opposition to Montrose's Petition For Writ of Mandate (filed Nov. 23, 2016) ("Writ Opposition") at p. 28 ["***[E]ach of the excess insurers' policies*** either itself contains or follows form to and incorporates language that makes the policies excess of vertically underlying coverage and excess of all 'other insurances,' 'other collectible insurance' or 'other valid and collectible' insurance." (emphasis added)].) Similarly, Respondent Superior Court found that the Policies contain standard "other insurance" provisions. (See 1PA1 at pp. 55:26-56:6 ["The 'other insurance' provisions in the policies generally include some form of the following standard language . . . ."].)

IV. ARGUMENT

Over the last two decades, this Court repeatedly has declared the fundamental principle that a policyholder has the contractual right, under any insurance policy(ies) triggered by a covered loss, to obtain immediate indemnification of its liabilities. (E.g., *Aerojet*, *supra*, 17 Cal.4th at p. 57 & fn. 10.) Most recently, the Court held that when a continuous injury triggers multiple policies, "***each*** policy can be called upon to respond to the claim up to the full limits of the policy." (*Continental*, *supra*, 55 Cal.4th at p. 200 (emphasis added).) 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.'" (*Ibid.* (citation omitted; alterations in original; emphasis added).) This rule safeguards the insured's right to "immediate access to the insurance it purchased." (*Id.* at p. 201.)

"Other insurance" provisions have ***no impact*** on the insured's coverage rights for continuous damage losses. (*Dart*, *supra*, 28 Cal.4th at p. 1080.) Instead, "other insurance" provisions govern inter-insurer allocations ***after*** the policyholder has been fully indemnified. (*Ibid.*) That "apportionment, however, has ***no bearing*** upon the insurers' obligations to the policyholder." (*Ibid.* (emphasis added); see also *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.* (1996) 45 Cal.App.4th 1,

106 ("*Armstrong*") ["allocation among insurers 'does not reduce their respective obligations to their insured'" (internal citation omitted)].)

These governing rules recently were applied by the Court of Appeal in *Continental II.* The Fourth District recognized that (1) this Court's decision in *Dart* establishes that "other insurance" provisions do not impact the policyholder's right to recovery under triggered excess insurance policies; and (2) the horizontal exhaustion principle discussed in *CRA* is applicable only to primary insurance. (*Continental II*, *supra*, 15 Cal.App.5th at pp. 1032, 1034.)

Respondent and the DCA diverged sharply from this approach, turning this Court's rules on their head by concluding that standard "other insurance" provisions function as coverage-limiting devices. According to the courts' novel interpretation, these provisions obligate policyholders to pursue and exhaust separate coverage in other policy periods, even though the policies contain materially different provisions affecting the scope of coverage. This result negates policyholders' right to call upon independent contracts according to their terms and disregards the clear guidance from both *Continental* and *Dart.*

A. Mandatory Horizontal Exhaustion Contradicts Established California Law By Artificially Restricting Policyholders' Rights

Prior to the decisions of Respondent Superior Court and the DCA, no California court had ruled that a policyholder must exhaust its

excess ***indemnity*** coverage horizontally across multiple separate policies and years as a prerequisite to vertically accessing other, independently-triggered ***excess policies***. California law instead provides that the policyholder may obtain excess indemnity coverage under ***any*** policy triggered by the underlying damage pursuant to the exhaustion language of that policy.

1. By Forcing Policyholders to Allocate Liability Across All Policy Years, Horizontal Exhaustion Directly Conflicts With This Court's Decisions Permitting Policyholders to Obtain Coverage Under Any Triggered Policy

In decisions dating back decades, this Court has adhered to the "settled rule" that "an insurer on the risk when continuous or progressively deteriorating damage or injury first manifests itself remains obligated to indemnify the insured for the entirety of the ensuing damage or injury." (*Montrose*, *supra*, 10 Cal.4th at p. 686.) This principle was reaffirmed two years after *Montrose*, when this Court made clear that each policy can be utilized "***separately and independently***." (*Aerojet*, *supra*, 17 Cal.4th at p. 57 & fn. 10 ["In *Montrose*, we also made plain that 'successive' insurers 'on the risk when continuous or progressively deteriorating [property] damage or [bodily] injury first manifests itself' are separately and independently 'obligated to indemnify the insured'[.]"]; *ibid.* ["The insurer is responsible for the full extent of the insured's liability . . . , not just for

the part of the [injury or] damage that occurred during the policy period." (citing *Armstrong*, *supra,* 45 Cal.App.4th at p. 105)].)

Building upon these rules, this Court subsequently held that "if an occurrence is continuous across two or more policy periods, the insured has paid two or more premiums and can recover up to the combined total of the policy limits." (*Continental*, *supra*, 55 Cal.4th at p. 202.) The Court emphasized that "***each*** policy can be called upon to respond to the claim up to the full limits of the policy." (*Id.* at p. 200 (emphasis added).) To ensure the insured's "immediate access to the insurance it purchased" (*id.* at p. 201), the insured "'is entitled to seek indemnification from ***any*** of the remaining insurers [that were] on the risk . . . .'" (*Id.* at p. 200 (citation omitted; emphasis added).)[8]

The ***policyholder's*** right to access coverage under any triggered policy is a cornerstone of California law, and this Court and the Courts of Appeal have steadfastly protected the insured's ability to enforce rights

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[8] The Court "conclude[d] that the Court of Appeal below correctly applied" the allocation rule prescribed by California law. (*Id.* at p. 191). The Court of Appeal had explained:

> [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. The insurer's remedy is to seek contribution from any other insurers that are also on the risk.

(*State of California v. Continental Ins. Co.* (2009) 170 Cal.App.4th 160, 178 (italics in original).)

under each of its independent contracts. (E.g., *Signal Cos., Inc. v. Harbor Ins. Co.* (1980) 27 Cal.3d 359, 370 ("*Signal*") ["The contracts were separately negotiated with the insured . . . and must be independently interpreted."]; *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"].)

Concomitantly, the "all sums" principle requires that "each policy triggered . . . has an independent obligation to respond 'in full' to a claim" once the policyholder chooses to access it. (*Armstrong, supra*, 45 Cal.App.4th at p. 49; accord *Dart, supra*, 28 Cal.4th at p. 1080 ["The insurers' contractual obligation to the policyholder is to cover the full extent of the policyholder's liability (up to the policy limits."]; *Aerojet, supra*, 17 Cal.4th at p. 57 & n. 10.)

Collectively, these pronouncements dictate that "[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 insured is liable, as most CGL policies do, that insurer may be held liable for the entire loss." (*Stonelight Tile, Inc. v. Cal. Ins. Guarantee Assn.* (2007) 150 Cal.App.4th 19, 37 (emphasis added); 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."]; *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)], aff'd, *Continental*, *supra*, 55 Cal.4th at p. 191.)

Accordingly, the policyholder's right to choose the policy(ies) under which to seek indemnity cannot be subjugated to the insurers' extra-contractual doctrine of "horizontal exhaustion." Mandating that the policyholder spread its liability across all policy periods triggered by a continuous loss would result in a "pro rata" allocation scheme directly conflicting with *Continental*, where this Court rejected the insurers' attempt to horizontally allocate indemnity damages as antithetical to "all sums" coverage. (*Continental*, *supra*, 55 Cal.4th at p. 199; accord *Westport Ins. Corp. v. Appleton Papers, Inc.* (Wis.Ct.App. 2010) 787 N.W.2d 894, 918 ["Horizontal exhaustion [ ] is another name for pro rata allocation."].)[9]

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[9] If mandatory horizontal exhaustion governed a policyholder's recovery, a policy written to attach upon exhaustion of $10 million would not be triggered until every policy providing coverage with an attachment point less than $10 million was first exhausted. In a portfolio with more than 25 years of coverage, this could require a policyholder to prorate its claim across policies covering more than $250 million of losses before accessing the policy it obtained to be triggered after $10 million.

2. Policyholders' Rights to Excess Indemnity Coverage Are Not Governed By the Inapposite Pre-*Dart/Continental* Court of Appeal Ruling in *CRA*

Despite this Court's rejection of a pro rata horizontal allocation scheme in *Continental*, the courts below agreed with the Insurers that a policyholder should be required to horizontally exhaust its excess coverage. Both Respondent Superior Court and the DCA mistakenly relied on the pre-*Dart* and pre-*Continental* Court of Appeal decision in *CRA*, which this Court has never had occasion to review.

In *CRA*, the Court of Appeal ruled that "an excess insurer has no obligation ***to provide a defense*** to its insured before the primary coverage is exhausted." (*CRA*, *supra*, 50 Cal.App.4th at p. 338 (emphasis added).) In reaching this narrow holding, the Court of Appeal cited the longstanding and basic differences between primary and excess coverage as foundational to its decision. (*Id.* at p. 337.)

"California insurance law recognizes a fundamental distinction between primary and excess insurance coverage[.]" (*JPI Westcoast Construction, L.P. v. RJS & Associates, Inc.* (2007) 156 Cal.App.4th 1448, 1460.) "Primary" insurance grants coverage whereby liability attaches immediately upon the happening of the occurrence that gives rise to liability, whereas "excess" insurance provides coverage "only after a predetermined amount of primary coverage has been exhausted." (*North American Capacity Ins. Co. v. Claremont Liability Ins. Co.* (2009) 177

Cal.App.4th 272, 291 (quoting *Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1304 ("*Fireman's Fund*")).)

Perhaps most importantly, primary policies include an (often unlimited) obligation to defend against third-party claims, a feature that significantly increases the primary insurer's exposure. This results in a much greater premium for primary versus excess coverage, because the latter only provides indemnity coverage after the policyholder's liability exceeds specified underlying policy limits. (See *Signal*, *supra*, 27 Cal.3d at p. 365 ["The policyholder pays for two kinds of liability coverage, each at a different rate. The premium charged by the primary insurer . . . takes into account costs of defense, including legal fees, which the primary insurer normally provides. The excess carrier is less frequently confronted with loss possibilities[.]" (citation omitted)]; see also *Padilla Construction Co., Inc. v. Transportation Ins. Co.* (2007) 150 Cal.App.4th 984, 989 [noting the "distinction between excess and primary insurance . . . . Reasonable insureds don't expect to receive a defense from a typically much cheaper excess policy unless all the expensive primary insurance they bought has been exhausted."].)[10]

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[10] (See generally *Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295-96 [noting that "[t]he insured's desire . . . to call on the insurer's superior resources for the defense of third party claims" is a "significant [ ] motive for the purchase of insurance"].)

These fundamental differences demonstrate why primary insurers' duties are categorically distinct from the obligations of excess insurers. It is that distinction which underlies the recognition by multiple courts since *CRA*, that "the horizontal exhaustion rule ***only governs the relationship between the primary and excess insurers***." (*State v. Continental, supra,* 170 Cal.App.4th at p. 184 (emphasis added); accord *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)].)[11]

Most recently, the Fourth District Court of Appeal rejected Continental's attempt to expand the rationale of *CRA* beyond the context of primary insurance. (*Continental II, supra,* 15 Cal.App.5th at 1033-34 ["Continental relies primarily on [*CRA*], which held that, in the case of a continuous loss across multiple policy periods, horizontal ehxuastion

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[11] The Delaware court's *Viking Pump* decision rejecting horizontal exhaustion subsequently was endorsed on certification of the question to the New York Court of Appeals. (*In the Matter of Viking Pump, Inc.* (2016) 27 N.Y.3d 244 ("*Matter of Viking Pump*"); accord *Olin Corp. v. OneBeacon American Ins. Co.* (2d Cir. 2017) 864 F.3d 130, 145 [insured "does not need to exhaust primary policies outside the policy year to reach the excess layer for its chosen policy year"].)

ordinarily applies to ***primary*** insurance . . . . ***[CRA] is not controlling***[.]" (emphasis added)]; *id.* at 1034 ("[*CRA*] reasoned that a primary policy is qualitatively different from an excess policy; the defense and indemnity obligations under a primary policy are immediate, whereas under an excess policy, they are merely contingent."].)

This recent case law confirms that *CRA* is, at best, questionable precedent in light of this Court's enforcement of the policyholder's right to immediately access any triggered policy, without regard to inter-carrier contribution issues. But even if *CRA* still applies in the unique context of ***primary defense*** coverage, there is no precedent or rationale for imposing a mandatory horizontal exhaustion rule on ***excess indemnity*** coverage.

Glossing over the express limitations of *CRA*, Respondent erroneously concluded that *CRA* had announced a "well-established rule" imposing mandatory horizontal exhaustion of ***excess*** coverage for policyholders enforcing ***indemnity*** rights under other, independently triggered policies. (1PA1 at p. 54:14-17.) There is no such rule in California, and no sound basis to extend *CRA*, which at most merely requires the exhaustion of ***primary*** policies before excess policies must drop down to ***defend***.

The DCA compounded Respondent's error, wrongly asserting that "case law" "establishes that 'other insurance' provisions" dictate horizontal exhaustion of excess policies. (Opinion at pp. 1322, 1330-1332

(discussing *CRA*).) Yet neither Respondent nor the DCA could reconcile their novel decisions with this Court's contrary rulings in *Dart* and *Continental*. Moreover, they refused to even address the clear distinctions between primary and excess coverage that weigh against the requirement of horizontal exhaustion of excess coverage, including the increased premiums paid for primary insurance which contains an often-unlimited duty to defend third-party claims. (See *Legacy Vulcan Corp. v. Superior Court* (2010) 185 Cal.App.4th 677, 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"].)

B. Mandatory Horizontal Exhaustion Is Not Supported By Standard CGL Excess Policy Language

This Court repeatedly has declared the principle that a policyholder has the contractual right to obtain immediate indemnification of its liabilities under any insurance policy(ies) triggered by a covered loss. (E.g., *Aerojet*, *supra*, 17 Cal.4th at p. 57 & fn. 10. ["'successive' insurers 'on the risk when continuous or progressively deteriorating [property] damage or [bodily] injury first manifests itself' are ***separately and independently*** 'obligated to indemnify the insured'" (emphasis added)]; *Continental*, *supra*, 55 Cal.4th at p. 200.)

Fundamentally, insurance policies are individual contracts between the policyholder and insurer, and must be interpreted accordingly.

(See *Signal*, *supra*, 27 Cal.3d at p. 370 ["The contracts were separately negotiated with the insured . . . and must be independently interpreted."]; *Armstrong*, *supra*, 45 Cal.App.4th at p. 79, fn. 31 ["As a general rule, insurance policies should be interpreted as if no other insurance is available."].) Thus, the core question presented here—at what point are an excess insurer's obligations triggered—must be determined by the provisions identifying the amount of underlying insurance beneath the individual targeted policy.

Mandatory horizontal exhaustion, however, ignores the policy's express attachment point above the immediately underlying coverage. Rather than reflecting the parties' intentions at the time of contracting, mandatory horizontal exhaustion is an extra-contractual fiction developed in litigation by Insurers as a way to force the policyholder to artificially spread its liability across all policy periods regardless of which policy the insured targets. The Insurers' motivations are plain: they seek the same result they were denied in *Continental*, albeit through different means.

Realizing that their proposed rule conflicts with this State's "all sums" jurisprudence, Insurers attempt to divorce the concepts of mandatory horizontal exhaustion and pro rata allocation. While mandatory horizontal exhaustion may differ in application from pro rata allocation in some circumstances, the underlying question as to each is the same: Is the insured obligated to spread coverage horizontally before accessing

additional triggered coverage in the same policy year? The answer from *Continental*, which upheld the independent obligation for "all sums" coverage under each triggered policy, is a resounding "no." Thus, mandatory horizontal exhaustion, like pro rata allocation, is an improper artificial limitation on policyholders' express contractual rights.

1. Excess Policies Are Written To Attach Upon the Exhaustion of Specified, Identified Underlying Insurance In The Same Policy Period

As a general matter, no one disputes that excess coverage does not attach until a certain amount of underlying coverage is exhausted. (*Commercial Union Assurance Cos. v. Safeway Stores, Inc.*, *supra*, 26 Cal.3d at 919 ["The object of the excess insurance policy is to provide additional resources should the insured's liability surpass a specified sum."]; *Wells Fargo*, *supra*, 38 Cal.App.4th at p. 940 ["[W]e use the terms 'excess coverage' or 'excess policy' to mean insurance that begins only after a predetermined amount of underlying coverage is exhausted and that does not broaden the underlying coverage."]; 4-24 New Appleman on Insurance Law Library Edition § 24.02[2](a) ["In keeping with the reasonable expectations of the parties—including the insured, which paid separate premiums for its primary and excess policies—excess coverage generally is not triggered until the underlying [] limits are exhausted[.]"].)

Like typical excess policies, each of the Policies at issue contains a provision (or combination of provisions) specifying some identifiable

amount of underlying limits that must be exhausted before its obligations attach. (See generally 1PA6 at pp. 117-200; 1PA7 at pp. 207-234.)[12]

Crucially, each Policy's reference to the underlying limits or underlying insurance that must be exhausted ***is limited to the underlying insurance in the same policy period***. Each Policy describes the applicable underlying coverage in one of four ways, all of which are tied to the coverage provided in the same period. The Policies either: (1) expressly list the underlying policy(ies);[13] (2) specify the dollar amount with reference to a schedule of underlying policies;[14] (3) specify the amount of underlying coverage and identify one or more of the underlying insurers;[15] or (4) specify a dollar amount of underlying insurance that exactly

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[12] Where this "attachment" language appears varies. Some Policies contain a "Loss Payable" clause, which provides that coverage is available upon exhaustion of underlying limits by payments from Montrose or other insurers, or stating that insurance afforded under the policy is conditioned upon "all underlying insurance [being] exhausted." (1PA10, pp. 273-74 at ¶¶ 3, 4.) Other Policies include similar provisions in the "Limits of Liability" section, stating that liability does not attach until after underlying insurers have paid or have been held to pay the full amount of their respective limits of liability, on account of such an occurrence. (1PA10, p. 274 at ¶¶ 5, 6.) Further still, other Policies state in the insuring agreement that the insurance afforded "shall apply only in excess of and after all UNDERLYING INSURANCE . . . has been exhausted." (1PA10, pp. 274-75 at ¶ 7].)

[13] See 1PA10, p. 279 at ¶ 14 (listing 25 Policies employing this method).

[14] *Id.*, p. 278 at ¶ 12 (listing 13 Policies employing this method).

[15] *Id.*, pp. 276-77 at ¶ 10 (listing 35 Policies employing this method).

corresponds with the combined limits of the underlying policies in that policy period.[16]

Therefore, each of the Policies expressly provides that coverage thereunder attaches in excess of a "predetermined" dollar amount keyed to specified underlying limits. (See 1PA6 at pp. 117-200; 1PA7 at pp. 207-234; see generally *Fireman's Fund*, *supra*, 65 Cal.App.4th at p. 1304 [excess insurance provides coverage "after a predetermined amount of primary coverage has been exhausted"].) Those limits refer solely to the underlying coverage ***in the same policy period***, be it through a schedule of underlying insurance or a specific dollar amount that matches a particular excess coverage tower.

Because the Policies' descriptions of underlying insurance do not include any reference to policies (or limits of policies) issued in prior or subsequent policy years, the clear meaning of these provisions entitles Montrose to seek indemnification under any policy once the immediately underlying insurance in the same policy year is exhausted. (See *Matter of Viking Pump*, *supra*, 27 N.Y.3d at p. 265 [rejecting mandatory horizontal exhaustion where excess policies "hinge their attachment on the exhaustion of underlying policies that cover ***the same policy period*** as the overlying

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[16] *Id.*, p. 275 at ¶ 8 (listing 35 Policies employing this method).

excess policy, and that are specifically identified by either name, policy number, or policy limit." (emphasis added)].)

Other provisions of the Policies corroborate the parties' understanding that coverage attaches upon exhaustion of underlying policies in the same policy period. One such provision—in addition to the attachment language detailed above—is the condition mandating the "maintenance of underlying insurance." Although the specific language varies, the Policies generally provide that the "policies referred to in the [ ] 'Schedule of Underlying Insurances,'" or "Underlying Umbrella Policies," "shall be maintained in full effect" during the policy period except for any reduction in those underlying limits by payment of claims occurring during the policy period. (See 1PA10 at p. 281-82, ¶¶ 16, 17; Zurich International (Bermuda), Ltd. policy no. ZI 7020 (1PA6 at pp. 164-65); Employers' Commercial Union policy no. EY 8389-002 (1PA6 at pp. 127-28); see generally 1PA10 at p. 282-84, ¶ 18 (listing policies with comparable language).)

Notably, the "maintenance of underlying insurance" provision does ***not*** require the policyholder to purchase coverage for other policy years. Instead, the condition simply ensures that the amount of underlying coverage specified and used to calculate an excess policy's premium is only eroded by the payment of covered losses. (*Commercial Union Assurance*

Cos. v. Safeway Stores, Inc., *supra*, 26 Cal.3d at p. 919; *Fireman's Fund*, *supra*, 65 Cal.App.4th at p. 1304.)[17]

Because excess coverage must respond after exhaustion of the underlying policies within that policy year, whether insureds choose to purchase or not purchase coverage in other policy years has no impact on an excess insurer's obligations. Indeed, the policyholder has no contractual obligation to buy prior or subsequent years of coverage (unlike the specifically-referenced underlying coverage), and could choose to "go bare" without any coverage in other years. (See *Aerojet*, *supra*, 17 Cal.4th at p. 75, fn. 25-26.) Yet the Insurers insist that the policyholder's prudent decision to purchase extra, separate and independent coverage for different policy years somehow retroactively changes the policy language, greatly multiplying the attachment limits and thereby negatively impacting the policyholder's rights under each of the policies purchased. This is

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[17] Premiums are calculated based upon the risk assumed by the insurer. (See *Herzog v. National American Ins. Co.* (1970) 2 Cal.3d 192, 197 [insurance premiums are commensurate with level of risk covered].) In the context of excess policies, the risk assumed by the insurer is predicated on the "predetermined amount" of underlying coverage. (*Wells Fargo*, *supra*, 38 Cal.App.4th at p. 940, fn. 2; *Fireman's Fund*, *supra*, 65 Cal.App.4th at p. 1304.) 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. (See *infra*, Section IV.C.2.)

nonsensical, and contrary to the way policies are actually underwritten.[18]

2. Elevating "Other Insurance" Provisions to Dictate the Trigger of Coverage Violates Fundamental Policy Interpretation Rules

The principles of insurance policy interpretation are well established. The fundamental goal "is to give effect to the mutual intention of the parties." (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.) The starting point for this analysis is the "plain language" of the written provisions of the insurance contract, guided by longstanding rules of construction. (See *Montrose*, *supra*, 10 Cal.4th at pp. 666-67.)

Provisions affording coverage must be read broadly, whereas limitations on the policyholder's right to coverage are construed narrowly. (See *State of Cal. v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1018 ["a coverage provision . . . will be construed broadly in favor of the insured"]; *Reserve Ins. Co. v. Pisciotta* (1982) 30 Cal.3d 800, 808 ["exclusionary clauses are interpreted narrowly against the insurer"].) Limitations on coverage must be "conspicuous, plain and clear," as courts will not imply coverage-limiting language. (See *Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1204 ["As we have declared time and again 'any

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[18] (Cf. *MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 653 ["amount of premium paid may be relevant to extent of coverage" (citation omitted)].)

exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect.'" (citation omitted)].)

Further, ambiguities in policy language are resolved in favor of coverage. (See *Allstate*, *supra*, 45 Cal.4th at p. 1018; *State Farm Mutual Automobile Ins. Co. v. Johnston* (1973) 9 Cal.3d 270, 274 ["If the insurer uses language which is uncertain any reasonable doubt will be resolved against it; if the doubt relates to extent or fact of coverage . . . the language will be understood in its most inclusive sense, for the benefit of the insured." (citations and emphasis omitted)].) If the policyholder's proffered interpretation is one reasonable meaning, that interpretation will govern. (E.g., *Allstate*, *supra*, 45 Cal.4th at p. 1018; *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822 ["In the insurance context, we generally resolve ambiguities in favor of coverage."]; *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."].)

In violation of these principles, the DCA ignored the Policies' specific attachment language, and held that the "other insurance" clauses "***define*** the insurance that must be exhausted before the excess insurance attaches" and therefore are "relevant to determining . . . the order in which excess policies attach." (Opinion at pp. 1333-1334 (emphasis added).) This ruling necessarily renders the specific attachment language either

meaningless or surplusage, contravening basic canons of insurance policy interpretation. (See *Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal.4th 495, 503 [rules of interpretation "disfavor constructions of contractual provisions that would render other provisions surplusage"].) Obviously, the express exhaustion language controls over the boilerplate "other insurance" condition, which has an entirely different meaning and purpose.

3. "Other Insurance" Provisions Have a Limited Purpose Under California Law

Numerous courts before and after this Court's decision in *Dart* have recognized that "other insurance" clauses merely 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., *JPI Westcoast Const., L.P., supra,* 156 Cal.App.4th at p. 1460.) 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 [citing Croskey et al., Cal. Practice Guide: Insurance Litigation 2 (The Rutter Group 1997) ¶ 8:10].) When there is no prospect of double recovery by the insured, courts have used "other

insurance" provisions solely to apportion liability among the various insurers, after the policyholder has been fully indemnified. (*Id.*)[19]

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.) That "apportionment, however, has no bearing upon the insurers' obligations to the policyholder." (*Ibid*; accord *Armstrong*, *supra*, 45 Cal.App.4th at p. 106 ["allocation among insurers 'does not reduce their respective obligations to their insured'" (citation omitted)].)

Although the DCA refused to follow *Dart*, many other decisions from the California appellate courts have faithfully adhered to its ruling when examining the purpose and application of the "other insurance" provision. (See, e.g., *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]

[19] A corollary is that "other insurance" clauses are only applied "when no prejudice to the interests of the insured will ensue." (*Ibid*; accord *Hartford Casualty Ins. Co. v. Travelers Indemnity Co.* (2003) 110 Cal.App.4th 710, 725; *see also Dart*, *supra*, 28 Cal.4th at p. 1080 ("[P]ublic policy disfavors 'escape' clauses, whereby coverage purports to evaporate in the presence of other insurance.") (citations omitted).)

obligation to its insured." (citing *Dart*, *supra*, 28 Cal.4th at 1080-1081)]; *Travelers Casualty & Surety Co. v. Century Surety Co.* (2004) 118 Cal.App.4th 1156, 1162.)

Most recently, the Fourth District Court of Appeal relied on *Dart* in rejecting Continental's effort to expand the limited role of "other insurance" provisions to mandate horizontal exhaustion of excess coverage. (See *Continental II*, *supra*, 15 Cal.App.5th at 1032 ["[O]ther-insurance clauses are intended to apply in contribution actions between insurers, not in coverage litigation between insurer and insured." (citing *Dart*)]; *id.* at 1033 [rejecting Continental's effort to distinguish *Dart*: "[T]he language that we have quoted was not dictum."].)

This Court's pronouncements in *Dart* are also echoed by the clear weight of authority from courts across the country, including a highly-publicized decision from the highest court of New York. (See *Matter of Viking Pump, Inc.*, *supra*, 27 N.Y.3d at p. 265 [permitting policyholder to vertically, rather than horizontally, exhaust excess policies because "the excess policies at issue primarily hinge their attachment on the exhaustion of underlying policies that cover the same policy period as the overlying excess policy, and that are specifically identified by either name, policy number, or policy limit" and because "vertical exhaustion is conceptually consistent with an all sums allocation"]; see also *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."]; *RLI Ins. Co. v. Hartford Accident & Indemnity Co.* (2d Cir. 1992) 980 F.2d 120, 122 (applying Connecticut law) ["'other insurance' clauses 'are valid for the purpose of establishing the order of coverage between insurers' and therefore are enforceable, but only 'as long as their enforcement does not compromise coverage for the insured'"]; *Bazinet v. Concord Gen. Mutual Ins. Co.* (Me. 1986) 513 A.2d 279, 281 ["'other insurance' clauses cannot be used by the insurers to defeat liability to their insureds."]; *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Co.* (D.N.J. 1993) 817 F.Supp. 1136, 1154 & fn. 11 ["The court notes that the 'Other Insurance' clauses found in certain of defendants' policies only affect the rights of the insurers among themselves. They do not implicate [the policyholder's] right to full recovery under each triggered policy."]; *Viking Pump, Inc.*, *supra*, 2014 Del. Super. LEXIS 707 at *36 ["'[O]ther insurance' clauses relate only to the apportionment of liability amongst insurers, not to limit an insured's coverage."]; *Arco Industries Corp. v. American Motorists Ins. Co.* (Mich.Ct.App. 1998) 232 Mich.App. 146, 165, aff'd, 462 Mich. 896 (2000) ["'Other Insurance' clauses . . . 'relate to the effect of concurrent coverages of a single occurrence. They are individual contractual agreements between

the insured and the insurer, designed to prevent the insured from recovering multiple times for an injury that occurs at one point in time."]; see also Douglas R. Richmond, *Issues and Problems in "Other Insurance," Multiple Insurance, and Self-Insurance* (1995) 22 Pepp. L. Rev. 1373, 1380-81 ["'Other Insurance' clauses only affect insurers' rights among themselves; they do not affect the insured's right to recovery under each concurrent policy."].)[20]

4. The Courts Below Erroneously Exalted "Other Insurance" Provisions, Defying Logic and This Court's Precedent

Respondent and the DCA should have honored this Court's direction regarding the limited purpose and use of standard "other insurance" clauses in disputes between policyholder and insurer. "When the Supreme Court has conducted a thorough analysis" of the interpretation and application of policy provisions, lower courts and litigants should respect that guidance. (See *People v. Rios* (2013) 222 Cal.App.4th 542, 563.)[21]

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[20] Cf. *Nooter Corp. v. Allianz Underwriters Ins. Co.* (Mo. App. E.D., Oct. 3, 2017) 2017 Mo. App. LEXIS 977, at *34 [concluding "vertical exhaustion shall apply to the aforementioned excess policies" because "policies containing 'other insurance' provisions [are] ambiguous on the issue of exhaustion"].

[21] While Respondent entirely ignored *Dart*, the DCA attempted to distinguish it on the basis that the insurer there "was a *primary* insurer, while the insurers in the present case are *excess* insurers." (Opinion at p. 1333.) However, nothing in *Dart* limits this Court's rationale to

Instead of applying *Dart*, Respondent—at Insurers' urging—did the opposite, adopting an expansive view of the "other insurance" language not supported by California law.[22] Specifically, Respondent wrongly concluded that "[t]he presence of 'other insurance' clauses would preclude the use of a vertical exhaustion approach even for those excess policies specifically [identifying] a particular underlying policy that must first be exhausted." (1PA1 at p. 58:20-23.) This conclusion not only assigns an

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primary coverage, or hints at any reason why standard "other insurance" provisions should assume a role in excess policies that they do not play in primary policies, as the DCA held. (Opinion at p. 1333 ["This difference between primary and excess insurance in this context is material."].) To the contrary, *Dart* recognized that contribution disputes between insurers arise in both the primary and excess layers: "'[o]ther insurance' clauses become relevant only where several insurers insure the same risk at the *same level* of coverage." (*Dart*, *supra*, 28 Cal.4th at p. 1079, fn. 6 (citation omitted).)

[22] As a threshold to addressing the "other insurance" argument advanced by Insurers, Respondent correctly determined based on the parties' stipulations that the Policies contain the "standard language" of "other insurance" provisions. (See 1PA1 at pp. 55:26-56:6.)

Two insurers (Continental and Columbia) have previously sought to distinguish themselves because their policies reference the standard "other insurance" language in the definition of "loss." However, as the Fourth District Court of Appeal explained in considering functionally equivalent policy language written by the same insurer, there is "no reason" to apply a different rule merely because "other insurance" provisions are "incorporated into the definition of" a different term. (See *Continental II*, *supra*, 15 Cal.App.5th at 1033.) Regardless, the effort by Continental and Columbia is irrelevant, because Respondent deemed any minor differences in the Policies' "other insurance" language so insignificant that it concluded the provisions ***uniformly*** mandated horizontal exhaustion. (See 1PA1 at pp. 58:15-23.)

importance to "other insurance" provisions wholly at odds with *Dart*, but also fails to address the inherent conflict between that reading of the "other insurance" language and other provisions of the Policies, which corroborate the parties' understanding that coverage attaches upon exhaustion of underlying policies in the same policy period. (Cf. *AIU Ins. Co. v. Superior Court*, *supra*, 51 Cal.3d at 822 ["In the insurance context, we generally resolve ambiguities in favor of coverage."]; *Delgado v. Heritage Life Ins. Co.*, *supra*, 157 Cal.App.3d at 271 ["[P]olicy provisions which limit insurance coverage . . . are strictly construed against the insurer and liberally interpreted in favor of the insured."].)

Respondent's ruling appears to have been based on the mistaken belief that while "other insurance" provisions are disfavored when they appear in primary policies, they are accorded significantly more importance when they appear in excess policies. (See 1PA1 at p. 44:17-22 ("[W]hen such a[n] [other insurance] provision appears in a primary policy, public policy disfavors its implementation."); *id.* at 56:24-27 ("While these general rules [limiting application of 'other insurance' clauses] do indeed apply in the primary insurance context, as already noted, the 'other insurance' clauses ***have broad implications when they appear in excess insurance policies***." [emphasis added].) Respondent did not cite any authority for its incorrect conclusion that the effect of an "other insurance"

provision depends on where in the policyholder's portfolio the policy is located. (*Ibid.*)

Respondent also failed to reconcile its ruling with the fact that the standard "other insurance" language does not refer merely to other available insurance with a ***lower*** attachment point, but rather to ***all*** other available insurance, wherever it resides in the policyholder's coverage portfolio and regardless of attachment point. If "other insurance" provisions determined an excess policy's attachment point, that policy would not attach until every other policy was exhausted, which could never occur, because each of those policies would also be excess to every other policy. This cannot be the rule. (See *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 other out and afford the insured no coverage whatsoever. We would travel full circle with no place to say 'the buck stops here.'"]; see also *Reserve Ins. Co. v. Pisciotta*, *supra*, 30 Cal.3d at p. 808 ["exclusionary clauses are interpreted narrowly against the insurer"].)

For this reason, California courts consistently have ruled "other insurance" provisions to be mutually repugnant. (See *Century Surety Co. v. United Pacific Ins. Co.* (2003) 109 Cal.App.4th 1246, 1257; *Travelers Casualty & Surety Co. v. Century Surety Co.*, *supra*, 118 Cal.App.4th at p. 1162.) Indeed, on remand from the Supreme Court, the Superior Court in

Continental recognized this very point as one of its reasons for rejecting Continental's effort to impose a rule of mandatory "horizontal exhaustion" on the policyholder in that case. (2PA11 at p. 295:5-7 ["[T]he [Other Insurance] provision is contained in each of the State's other excess policies, creating an irreconcilable conflict whereby, if each policy's 'other insurance' clause was enforced, the policyholder would be left without protection."].)

Nonetheless, the DCA concluded that "other insurance" clauses "***define*** the insurance that must be exhausted before the excess insurance attaches" and therefore are "relevant to determining . . . the order in which excess policies attach." (Opinion at pp. 1333-1334 [emphasis added].) The ***only*** authority cited by the DCA in support of its interpretation was *Carmel Development Co. v. RLI Ins. Co.* (2005) 126 Cal.App.4th 502 ("*Carmel*"), a decision not relied upon by the Insurers.

Critically, *Carmel* did not involve "other insurance" clauses contained in policies issued over multiple years—the fundamental issue in this case. Rather, the two policies in dispute were issued in the ***same policy year***, and the debate concerned whether either ***concurrent*** policy was intended to be excess to the other. A large body of case law confirms that "other insurance" clauses are ***only*** intended to apply to these concurrent policy situations:

> '[O]ther insurance' clauses 'apply when two or more policies provide coverage during the *same* period, and they serve to prevent multiple recoveries from such policies,' and [] **such clauses 'have nothing to do' with 'whether any coverage potentially exist[s] at all among certain high-level policies that were in force during *successive years*.'**

(*Matter of Viking Pump*, *supra*, 27 N.Y.3d at p. 266 (internal citations omitted; italics in original, boldface added); see also *ibid.* ["[O]ther insurance clauses are not implicated in situations involving successive — as opposed to concurrent — insurance policies[.]" (collecting cases)]; *Benjamin Moore & Co. v. Aetna Casualty & Surety Co.*, *supra*, 179 N.J. at p. 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."].)

This Court should reaffirm that its pronouncements in *Dart* apply equally to excess coverage, and conclusively establish that "other insurance" clauses are intended to apply in contribution actions between insurers, not in coverage litigation between insurer and insured.

C. Mandatory Horizontal Exhaustion Rewrites Coverage To Impose Unwarranted Burdens on the Policyholder's Right to Indemnity

The decisions below—inventing a new requirement that a policyholder is obligated to horizontally exhaust layers of excess

coverage—create time-consuming, costly and difficult hurdles that prevent policyholders from obtaining prompt indemnification of their losses. These obstacles include: (i) compelling the policyholder to resolve disputes arising under policies with more restrictive terms as a condition to accessing coverage under less restrictive policies; (ii) penalizing the policyholder (and rewarding insurers) for the policyholder's decision to purchase additional coverage; and (iii) forcing the insured to participate in the inter-insurer contribution process as part of proving "horizontal exhaustion" has occurred.

1. Mandatory Horizontal Exhaustion Deprives the Policyholder of the Right to Select Policies for Indemnity By Forcing Needless Litigation Under More Restrictive Policies in Every Potentially Triggered Period

Mandatory horizontal exhaustion is highly inefficient because it requires, and indeed prioritizes, resolution of issues that may not even need to be litigated, thereby wasting courts' precious resources to prematurely adjudicate issues.

Complex corporate insurance programs with multiple insurers over several decades typically contain different conditions and exclusions, self-insurance, no insurance, different retentions, and many other varying terms among separately written and negotiated contracts. Yet, horizontal exhaustion would ***require*** policyholders to litigate coverage issues unique to policies with more restrictive terms before accessing coverage under

other policies with different terms and broader coverage. As the Fourth District explained, "a court could not determine the amount *any* insurer owes without first determining what *every* insurer owes[.]" (*Continental II*, *supra*, 15 Cal.App.5th at p. 1033 (internal quotations omitted).)

For example, under mandatory horizontal exhaustion, Montrose and other similarly-situated policyholders seeking coverage for a continuous loss triggering policies from the 1960's through 1980's must first resolve the issue of whether the pollution exclusions that appear in most post-1971 policies apply to a claim, ***before*** obtaining coverage under earlier policies ***without pollution exclusions*** that clearly provide coverage for that same claim. This mandates resolution of issues that may not even need to be litigated, and more fundamentally, deprives policyholders of coverage under less restrictive policies until more restrictive policy terms are adjudicated. (*Id.* at 1033 ["This would deprive the [insured] of the timely indemnity that it bargained for."].)

A case in point is Continental, which issued three policies covering Montrose in the 1960's (without pollution exclusions). Each policy charged a premium in exchange for the promise of coverage attaching after $10 million of underlying excess policies had been exhausted. (1PA5, at p. 99.) However, to access these policies under mandatory horizontal exhaustion, Montrose could now be forced to litigate the pollution exclusion under at least 15 other policies from different

insurers from 1971 onward, and effectively convert a policy that expressly attaches above $10 million into a policy that Continental would argue attaches excess of over ***$130 million***. (Cf. 2PA11 at pp. 293, 295 [Superior Court in *Continental* noting that horizontal exhaustion would require policyholder to incur over $100 million in liabilities to trigger policy excess of ***$16 million***, merely because of the fortuity that the policyholder purchased insurance in other years].)

There are many reasons why a policyholder may choose not to target a particular policy in a complex coverage program. For example, a policyholder may reasonably prefer to exhaust ***earlier***-issued policies, to leave more recent coverage intact for future losses that do not trigger older policies. On the other hand, there could be reasons why a policyholder wishes to access ***later*** policies in the first instance when they are available (e.g., because the earlier policies contain retrospective premium obligations that the later policies do not). A policyholder may also reasonably wish to avoid accessing a particular insurer's policy because it does not want to disturb an existing commercial relationship with a company that continues to provide coverage.

These options should be the policyholder's to exercise because, having performed under the contract by paying the premium, and then suffering a loss triggering coverage, the policyholder has the right to determine whether or not to demand performance on its contract. Yet a

mandatory horizontal exhaustion rule deprives the policyholder of these rights, obtained by virtue of purchasing multiple different contracts each requiring separate premium payments, and instead compels the policyholder to expend significant time and resources litigating against insurers under policies not desired or needed for indemnification. This flatly contravenes California law. (E.g., *Signal*, *supra*, 27 Cal.3d at p. 370 ["The contracts were separately negotiated with the insured . . . and must be independently interpreted."]; *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.)

2. Mandatory Horizontal Exhaustion Penalizes Policyholders for Purchasing Additional Coverage

A rule of mandatory horizontal exhaustion would also be inequitable because it rewards ***the insurers*** for the ***policyholder's*** prudent decision to purchase additional coverage in other policy years. It is not disputed that the premium each excess insurer charges is determined based upon the amount of underlying coverage placed in ***the same policy year***. (See *Wells Fargo*, *supra*, 38 Cal.App.4th at p. 940 [excess coverage attaches "only after a predetermined amount of underlying coverage is exhausted"]; 1 Couch on Insurance (3rd ed. 2015) Overview, § 6:35 [excess

insurance "is purchased with relatively small premiums," since covered losses attach only following payment of the coverage limits of the underlying policy].)

The greater the amount of underlying coverage that must be exhausted before a given policy's coverage attaches, the lesser the risk to the insurer, which is reflected by a lower premium. Demonstrating this fact, certain policies issued to Montrose were underwritten to provide the same coverage at different layers, with different premiums for each layer reflecting the differences in underlying limits:

Layer "A"

$2,000,000 part of $15,000,000 excess of $25,000,000 and Marine
$17,460

Layer "B"

$3,000,000 part of $20,000,000 excess of $60,000,000 - $10,135

Layer "C"

$5,000,000 part of $20,000,000 excess of $80,000,000 - $1[illegible],125.

(See 1PA7 at p. 226 (National Union Policy No. 1229623).)[23]

During the underwriting process, no consideration—and no reduction in premium—is given based upon the amount of coverage that the policyholder purchased in prior years. And there certainly can be no

[23] The premium charged for Layer "C" ($0.002425 per dollar of coverage) is roughly one-quarter the rate of the premium for Layer "A" ($0.00873 per dollar of coverage), which reflects the lower risk associated with an additional $55 million of underlying insurance beneath Layer "C."

consideration given to how much insurance the policyholder may choose to obtain in the future, since the insurer's obligations are established at the time of contracting even if the policyholder elects to remain "uninsured" thereafter. (See *Aerojet*, *supra*, 17 Cal.4th at p. 75, fns. 25-26.)

Yet if mandatory horizontal exhaustion governed excess policies, insurers would receive an absurd windfall, because their policies would essentially be re-written to attach not upon exhaustion of the immediately underlying policies (as contemplated during the underwriting and premium calculation), but after exhaustion of the limits of many years of additional coverage. California courts reject rules that reward insurers—and harm policyholders—for policyholders' decision to purchase additional coverage. (E.g., *State v. Continental*, *supra*, 170 Cal.App.4th at p. 188 [rejecting rule under which "the insurers would benefit from the fact that the insured purchased multiple policies covering multiple periods," but "[t]he insured, who made this prudent choice, would not"], aff'd, *Continental*, *supra*, 55 Cal.4th 186; see generally *Aerojet*, *supra*, 17 Cal.4th at p. 75; *Armstrong*, *supra*, 45 Cal.App.4th at p. 105.)

Indeed, upon remand in *Continental*, the lower courts identified this as a reason why horizontal exhaustion would be unfair to the policyholder. As the Superior Court explained, under horizontal exhaustion, a carrier who collected premiums calculated based on the agreement to cover liability in excess of ***$16 million***, would not be

obligated to respond until its policyholder incurred over ***$100 million*** in liabilities, merely because of the fortuity that the policyholder purchased insurance in other years. (See 2PA11 at pp. 293, 295.) The Superior Court's rationale was echoed by the Fourth District on appeal. (See *Continental II*, *supra*, 15 Cal.App.5th at p. 1036 ["It would be paradoxical if the fact that the State prudently decided to protect itself further by buying insurance . . . actually made it harder for the State to obtain indemnity from any one insurer."].)

An exhaustion scheme which rewards insurers and punishes policyholders for their prudent decision to purchase additional coverage is fundamentally inconsistent with this State's law established in *Aerojet* nearly two decades ago. (See *Aerojet*, *supra*, 17 Cal.4th at p. 75, fns. 25-26; accord *Armstrong*, *supra*, 45 Cal.App.4th at p. 105.)

3. Mandatory Horizontal Exhaustion Unfairly and Inefficiently Delays Indemnity By Compelling Policyholders to Litigate Inter-Insurer Contribution Issues

As this Court explained, once a policyholder's coverage is triggered, the first step in a complex coverage dispute is to ensure that the policyholder "has immediate access to the insurance it purchased." (*Continental*, *supra*, 55 Cal.4th at p. 201.) To the extent that the loss triggered multiple policy years, the carriers selected for indemnification

"may ***then*** seek contribution from the other insurers on the risk during the same loss." (*Id.* at p. 200 (emphasis added).)

Horizontal exhaustion, however, significantly increases litigation costs and delays indemnification because it forces the policyholder to resolve allocation issues—and hence the insurers' contribution disputes—on the front end. Specifically, in proving actual exhaustion of each horizontal layer, the insured might be required to sort out allocation issues involving a myriad of policy provisions the insurers could invoke against each other, including competing time on the risk and limits arguments. (See *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."].)

Under a rule of mandatory horizontal exhaustion, the burden of fighting contribution battles is shifted to the ***policyholder***. Rather than immediately obtaining indemnity coverage in the first instance, as this Court envisioned in *Continental*, the insured must instead serve as ringmaster presiding over a protracted coverage allocation circus as a precondition to enforcing applicable policy rights. While that spectacle is

unfolding, policyholders and injured claimants are deprived of "immediate access" to excess insurance proceeds necessary to discharge the liabilities incurred in "continuous loss" property damage claims.

Insurers do not dispute this harmful consequence of mandatory horizontal exhaustion, touting below that "[t]here will be ***no need for subsequent litigation among insurers for equitable contribution***" if policyholders are required to horizontally allocate their liabilities. (Writ Opposition, at p. 53 (emphasis added).) Although the insurance industry would welcome such an inequitable result—because it shifts the insurers' burden onto the backs of policyholders and delays recovery by injured claimants—that is not the law of California. (See *Aerojet*, *supra*, 17 Cal.4th at p. 72 ["[C]ontribution applies *only* between insurers . . . . [citation] It therefore has no place between insurer and insured, which have contracted the one with the other."]; *Truck Ins. Exchange v. Amoco Corp.* (1995) 35 Cal.App.4th 814, 828 ["Contribution claims are matters solely between insurers[.]"].)[24]

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[24] (See also *Dart*, *supra*, 28 Cal.4th at p. 1080; *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 (applying California law) ["California courts have left battles of allocation of costs to separate contribution suits between liability insurers, rather than subjecting the insured to additional litigation."]; see generally *R.T. Vanderbilt Co. v. Hartford Accident & Indemnity Co.* (Conn. App. Ct. 2017) 156 A.3d 539, 562 ["In jurisdictions that follow an all sums approach, the policyholder is permitted to collect its total liability, up to the policy limit, under any policy in effect during the periods in which

Montrose's rights as an insured are governed by the terms of each of the Policies, not by equitable principles applicable to inter-insurer contribution analysis. (*Aerojet, supra*, 17 Cal.4th at p. 75, fn. 26 [discussing the "unsound" "assumption" that equitable contribution applies between insurer and policyholder]; *id.* at p. 72; *Armstrong, supra*, 45 Cal.App.4th at pp. 105-106.) Thus, if horizontal exhaustion were applicable at all, it could only be at a later stage of the case where the insurers apportion losses among themselves. (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"; impacted carriers "may then seek contribution from the other insurers on the risk during the same loss"]; *Dart, supra*, 28 Cal.4th at pp. 1079-1081; *Transcontinental Ins. Co. v. Ins. Co. of the State of Pa.* (2007) 148 Cal.App.4th 1296, 1305, fn. 4 ["[W]e need not address [insurer's] extensive discussion of the horizontal exhaustion rule as those cases invoke the doctrine of equitable contribution which is not controlling in this case."].)

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the progressive injuries occurred" and "[t]he burden then falls to the insurer . . . to seek contribution from the insurers that issued other triggered policies."].)

D. Allowing Policyholders to Select the Manner In Which To Exercise Their Contractual Rights Not Only Is Dictated By the Terms of Each Individual Policy, But Is Far More Efficient

As the party holding the contractual right to indemnity, the insured should be permitted to select from the available coverage to satisfy its liabilities. (See *Continental*, *supra*, 55 Cal.4th at p. 200; *Emerald Bay Community Association v. Golden Eagle Ins. Corp.*, *supra*, 130 Cal.App.4th at p. 1088 [where multiple policies are triggered, each insurer must "honor its separate and independent contractual obligation"].) Insurance policies are individual contracts between the policyholder and insurer, and must be interpreted accordingly. (See *Signal*, *supra*, 27 Cal.3d at p. 370 ["The contracts were separately negotiated with the insured . . . and must be independently interpreted."]; *Armstrong*, *supra*, 45 Cal.App.4th at p. 79, fn.31 ["As a general rule, insurance policies should be interpreted as if no other insurance is available."].)

In addition to being contrary to established law and inconsistent with the language of the excess Policies at issue, Respondent's ruling that Montrose must horizontally exhaust its excess coverage is also inefficient and impractical. Under Respondent's ruling, before Montrose can obtain coverage under any given excess policy, "the aggregate limits ***of***

underlying policies for the applicable policy periods must first be exhausted." (1PA1 at p. 60:2-3 (emphasis added).)[25]

However, applying this rule to Montrose's coverage portfolio would be unworkable. Determining when "underlying policies" have been exhausted is complicated by the many different attachment points of coverage over the thirty years of Montrose's coverage portfolio. (1PA5 at p. 99.) Consider the actual scenario from Montrose's insurance program depicted below. In a three-year period in the 1970s:

- Two insurers (Insurers A and B in the chart below) each issued $1 million quota share policies (each underwriting 1/10 of a $10 million coverage block) excess of $9 million underlying excess coverage.[26]
- The following year, Insurer C issued a $2 million quota share policy (underwriting 1/5 of a $10 million coverage block) excess of $10 million.[27]

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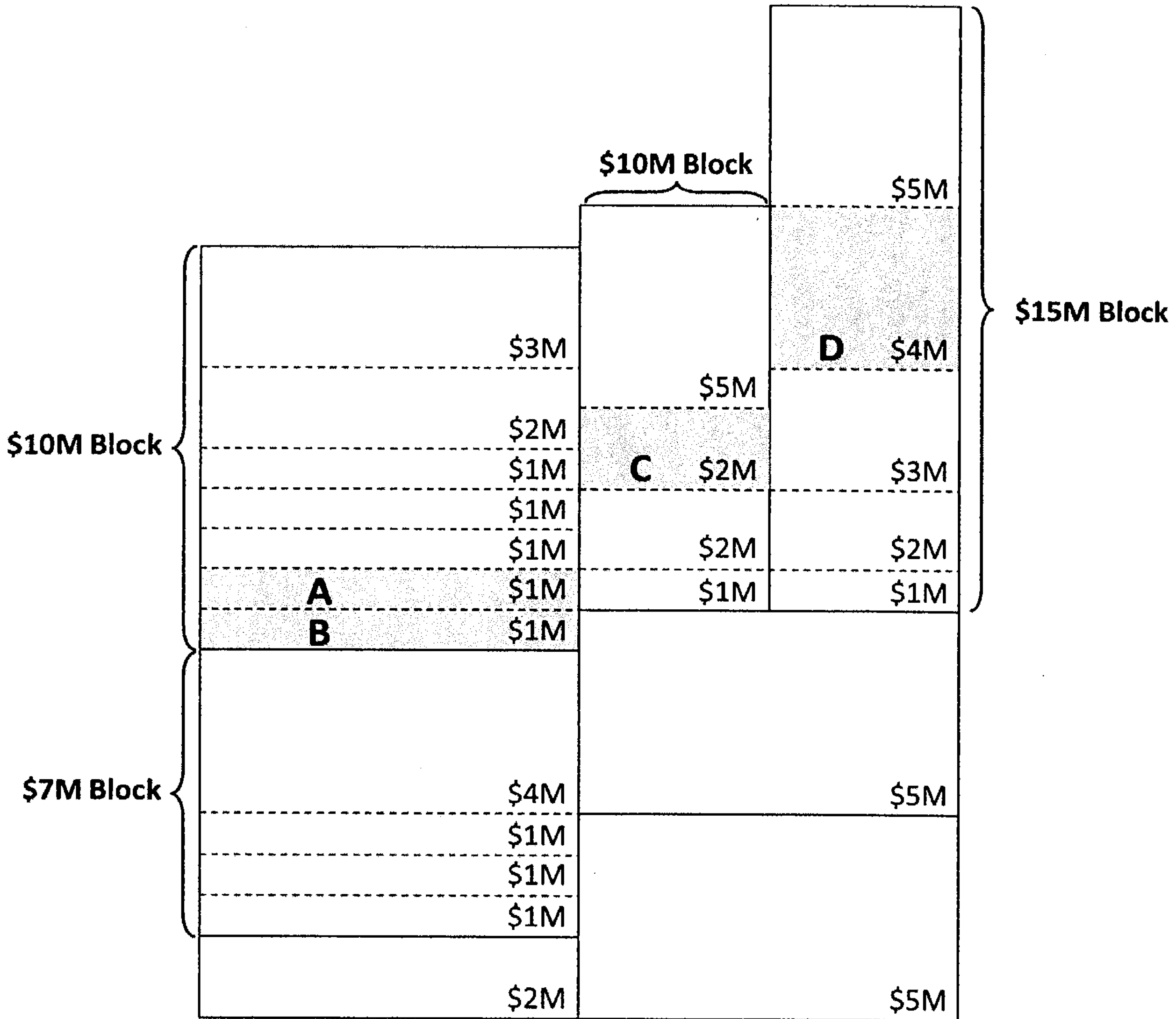
[25] As noted above, however, the actual "other insurance" language at issue does not merely state they are excess to *underlying* other insurance, but all other insurance. (See *supra*, Section IV.B.4. at p. 51.)

[26] "Insurer A": American Re-Insurance Company Policy No. M0704152. (1PA6 at pp. 122-24; 1PA5 at p. 99.)

"Insurer B": Federal Insurance Company Policy No. 79221510. (1PA6 at pp. 133-34; 1PA5 at p. 99.)

[27] "Insurer C": Lexington Insurance Company Policy No. GC5503015. (1PA7 at pp. 217-18; 1PA5 at p. 99.)

- The next year, Insurer D issued a $4 million quota share policy (part of a $15 million coverage block) also excess of $10 million.[28]



Under Respondent's ruling, which insurer must pay first? Must Insurers A and B pay their full policy limits (exhausting the entire $10

[28] "Insurer D": Prudential Reinsurance Company Policy No. DXCDX0152. (1PA6 at pp. 143-45; 1PA5 at p. 99.)

million coverage block they share with several other insurers) simply because their policies were written excess of $9 million, instead of $10 million? Or does their obligation cease once $1 million is collectively paid, thereby reaching the $10 million attachment point of the coverage blocks in which Insurers C and D's policies reside?

What about between Insurers C and D, who both issued policies which attach upon the exhaustion of $10 million of underlying coverage? Insurer C underwrote 20% of a $10 million limit, whereas Insurer D underwrote 27% of a $15 million limit. How is their liability allocated? Is the policyholder obligated to exhaust coverage chronologically, beginning with the earliest policies first? Or, must the policyholder exhaust the most recent policies, moving backward?

Insurers have no incentive to make the answers to these questions simple or efficient when it is time for them to open their checkbooks. Even after untangling the complex web spun by these three policy years, Montrose and the Insurers would still be left with another three decades worth of policies to address, each of which would present its own similar sets of questions. Montrose would therefore be forced to obtain coverage under policies one-by-one to satisfy the trial court's ruling that each "underlying policy" in every policy period has been exhausted. This clearly hinders Montrose's ability to obtain prompt indemnification of its liabilities, a right which California courts have long safeguarded. (See

Continental, *supra*, 55 Cal.4th at pp. 200-201 [insured is entitled to "immediate access to the insurance it purchased."]; *Dart*, *supra*, 28 Cal.4th at p. 1079-1081 ["[A]llocation among insurers 'does not reduce their respective obligations to their insured.' The insurers' contractual obligation to the policyholder is to cover the full extent of the policyholder's liability (up to the policy limits)." (citations omitted)]; *Aerojet*, *supra*, 17 Cal.4th at p. 72 ["[C]ontribution applies *only* between insurers . . . . It therefore has no place between insurer and insured, which have contracted the one with the other."].)[29]

This Court should not adopt a rule that could impose potentially insurmountable practical barriers to insurance recovery in complex insurance programs where insurers provide varying levels of coverage over many years, none of which easily translates into uniform horizontal coverage layers. The far more appropriate and efficient process is for the insured to select the policies under which it seeks to be

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[29] Policyholders with significant environmental and asbestos claims frequently run into conflict with insurers claiming their policy is not yet "up to bat." (See *Westport Ins. Corp. v. Appleton Papers, Inc.*, *supra*, 787 N.W.2d at pp. 918-19 ["Horizontal exhaustion would create as many layers of additional litigation as there are layers of policies . . . . The amount of first-level excess coverage that would have to be exhausted under horizontal exhaustion before the second level becomes available would require separate, complex litigation because of the variety of different first-level policy limits across the years."].)

indemnified, provided that the immediately underlying policies in that same policy year are exhausted, consistent with the terms of those policies.

V. 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: February 15, 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 Petition for Review 13,089 words, including footnotes, as measured by the word count of the computer program (Microsoft Word) used to prepare this brief.

DATED: February 15, 2018

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PROOF OF ELECTRONIC 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, and my electronic service address is jaime.garcia@lw.com.

On February 15, 2018, I served the following document described as:

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA'S OPENING BRIEF ON THE MERITS

on the interested parties listed below via TrueFiling by submitting an electronic version of the above-described document to TrueFiling through the user interface at www.truefiling.com:

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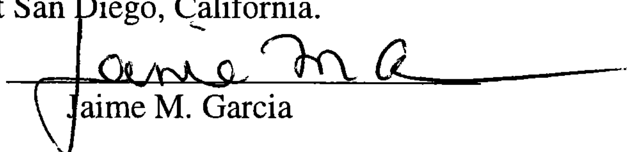
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 15, 2018, at San Diego, California.



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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 February 15, 2018, I served the following document:

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA'S OPENING BRIEF ON THE MERITS

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

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I am readily familiar with the office practice of Latham & Watkins LLP for collecting and processing packages for delivery by FedEx, which practice is that when packages are deposited with the Latham & Watkins LLP personnel responsible for depositing packages with FedEx, such packages are picked up by a representative of FedEx that same day in the ordinary course of business:

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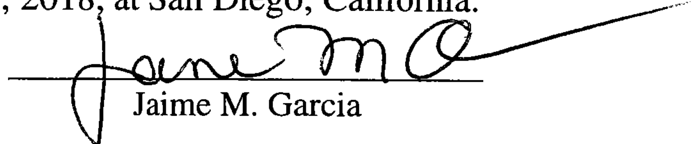
Los Angeles Superior Court
Department 309
Central Civil West Courthouse
600 South Commonwealth Ave.
Los Angeles, CA 90005

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 on February 15, 2018, at San Diego, California.



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