Case No. S244737

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,

Petitioner,

v.

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

Respondent.

and

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
Los Angeles County Superior Court Case No. BC005158
The Honorable Carolyn B. Kuhl
The Honorable Elihu M. Berle

ANSWERING BRIEF ON THE MERITS

GIBSON, DUNN & CRUTCHER LLP
*Theodore J. Boutrous, Jr. (SBN 132099) *tboutrous@gibsondunn.com*
Julian W. Poon (SBN 219843) *jpoon@gibsondunn.com*
Jeremy S. Smith (SBN 283812) *jssmith@gibsondunn.com*
Madeleine F. McKenna (SBN 316088) *mmckenna@gibsondunn.com*
333 South Grand Avenue
Los Angeles, California 90071
Tel: 213.229.7000
Fax: 213.229.7520
Attorneys for CONTINENTAL CASUALTY COMPANY, COLUMBIA CASUALTY COMPANY, AMERICAN CENTENNIAL INSURANCE COMPANY, and LAMORAK INSURANCE COMPANY

Case No. S244737

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,

Petitioner,

v.

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

Respondent.

and

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
Los Angeles County Superior Court Case No. BC005158
The Honorable Carolyn B. Kuhl
The Honorable Elihu M. Berle

ANSWERING BRIEF ON THE MERITS

GIBSON, DUNN & CRUTCHER LLP
*Theodore J. Boutrous, Jr. (SBN 132099) *tboutrous@gibsondunn.com*
Julian W. Poon (SBN 219843) *jpoon@gibsondunn.com*
Jeremy S. Smith (SBN 283812) *jssmith@gibsondunn.com*
Madeleine F. McKenna (SBN 316088) *mmckenna@gibsondunn.com*
333 South Grand Avenue
Los Angeles, California 90071
Tel: 213.229.7000
Fax: 213.229.7520
Attorneys for CONTINENTAL CASUALTY COMPANY, COLUMBIA CASUALTY COMPANY, AMERICAN CENTENNIAL INSURANCE COMPANY, and LAMORAK INSURANCE COMPANY

BERKES CRANE ROBINSON & SEAL LLP
Steven M. Crane (SBN 108930)
scrane@bcrslaw.com
Barbara S. Hodous (SBN 102732)
bhodous@bcrslaw.com
515 South Figueroa Street, Suite 1500
Los Angeles, CA 90071
Tel: 213.955.1150
Fax: 213.955.1155
Attorneys for Real Parties in Interest CONTINENTAL CASUALTY COMPANY and COLUMBIA CASUALTY COMPANY

CRAIG & WINKELMAN LLP
Bruce H. Winkelman
(SBN 124455)
bwinkelman@craig-winkelman.com
2140 Shattuck Avenue, Suite 409
Berkeley, CA 94704
Tel: 510.549.3330
Fax: 510.217.5894
Attorneys for Real Party in Interest MUNICH REINSURANCE AMERICA, INC. (formerly known as American Re-Insurance Company)

DUANE MORRIS LLP
Max H. Stern (SBN 154424)
mhstern@duanemorris.com
Jessica E. La Londe (SBN 235744)
One Market Plaza
Spear Street Tower, Suite 2200
San Francisco, CA 94105
Tel: 415.957.3000
Fax: 415.957.3001
Attorneys for Real Party in Interest AMERICAN CENTENNIAL INSURANCE COMPANY

BARBANEL & TREUER, P.C.
Alan H. Barbanel (SBN 108196)
abarbanel@btlawla.com
Ilya A. Kosten (SBN 173663)
ikosten@btlawla.com
1925 Century Park East, Suite 350
Los Angeles, CA 90067
Tel: 310.282.8088
Fax: 310.282.8779
Attorneys for Real Parties in Interest LAMORAK INSURANCE COMPANY (formerly known as OneBeacon America Insurance Company, as successor-in-interest to Employers Commercial Union Insurance Company of America, The Employers Liability Assurance Corporation, Ltd., and Employers Surplus Lines Insurance Company), and TRANSPORT INSURANCE COMPANY (as successor-in-interest to Transport Indemnity Company)

BARBER LAW GROUP
Bryan M. Barber (SBN 118001)
bbarber@barberlg.com
525 University Avenue, Suite 600
Palo Alto, CA 94301
Tel: 415.273.2930
Fax: 415.273.2940
Attorneys for Real Party in Interest EMPLOYERS INSURANCE OF WAUSAU

LEWIS BRISBOIS BISGAARD & SMITH LLP
Peter L. Garchie (SBN 105122)
peter.garchie@lewisbrisbois.com
James P. McDonald (SBN 281804)
701 B Street, Suite 1900
San Diego, CA 92101
Tel: 619.233.1006
Fax: 619.233.8627
Attorneys for Real Party in Interest EMPLOYERS MUTUAL CASUALTY COMPANY

SELMAN & BREITMAN, LLP
Elizabeth M. Brockman (SBN 155901)
ebrockman@selmanlaw.com
11766 Wilshire Boulevard
Suite 600
Los Angeles, CA 90025
Tel: 310.445.0800
Fax: 310.473.2525
Attorneys for Real Party in Interest FEDERAL INSURANCE COMPANY

ARCHER NORRIS
Charles R. Diaz (SBN 97513)
cdiaz@archernorris.com
777 South Figueroa Street, Suite 4250
Los Angeles, CA 90017
Tel: 213.437.4000
Fax: 213.437.4011
Attorneys for Real Parties in Interest FIREMAN'S FUND INSURANCE COMPANY and NATIONAL SURETY CORPORATION

ARCHER NORRIS
Andrew J. King (SBN 253962)
aking@archernorris.com
2033 North Main Street, Suite 800
Walnut Creek, CA 94569
Tel: 925.952.5508
Fax: 925.930.6620
Attorneys for Real Parties in Interest FIREMAN'S FUND INSURANCE COMPANY and NATIONAL SURETY CORPORATION

TRESSLER LLP
Linda Bondi Morrison (SBN 210264)
lmorrison@tresslerllp.com
2 Park Plaza, Suite 1050
Irvine, CA 92614
Tel: 949.336.1200
Fax: 949.752.0645
Attorneys for Real Parties in Interest ALLSTATE INSURANCE COMPANY (solely as successor-in-interest to Northbrook Excess and Surplus Insurance Company)

MCCURDY & FULLER LLP
Kevin G. McCurdy (SBN 115083)
kevin.mccurdy@mccurdylawyers.com
Vanci Y. Fuller (SBN 173317)
800 South Barranca Avenue, Suite 265
Covina, CA 91723
Tel: 626.858.8320
Fax: 626.858.8331
Attorneys for Real Parties in Interest EVEREST REINSURANCE COMPANY (as successor-in-interest to Prudential Reinsurance Company) and MT. MCKINLEY INSURANCE COMPANY (as successor-in-interest to Gibraltar Casualty Company)

LEWIS BRISBOIS BISGAARD & SMITH LLP
Jordon E. Harriman (SBN 117150)
jordon.harriman@lewisbrisbois.com
633 West 5th Street, Suite 4000
Los Angeles, CA 90071
Tel: 213.250.1800
Fax: 213.250.7900

BUDD LARNER PC
Michael J. Balch. Esq.
mbalch@buddlarner.com
150 John F. Kennedy Parkway
Short Hills, NJ 07078
Tel: 973.379.4800
Fax: 973.379.7734
Attorneys for Real Parties in Interest GENERAL REINSURANCE CORPORATION and NORTH STAR REINSURANCE CORPORATION

McCLOSKEY, WARING, WAISMAN & DRURY LLP
Andrew McCloskey (SBN 179511)
amccloskey@mwwllp.com
12671 High Bluff Drive, Suite 350
San Diego, CA 92130
Tel: 619.237.3095
Fax: 619.237.3789
Attorneys for Real Party in Interest WESTPORT INSURANCE CORPORATION (formerly known as Puritan Insurance Company, formerly known as The Manhattan Fire and Marine Insurance Company)

SINNOTT, PUEBLA CAMPAGNE & CURET, APLC
Mary E. Gregory (SBN 210247)
mgregory@spcclaw.com
550 S. Hope Street, Suite 2350
Los Angeles, CA 90017
Tel: 213.996.4200
Fax: 213.892.8322
Attorneys for Real Party in Interest ZURICH INTERNATIONAL (BERMUDA) LTD.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

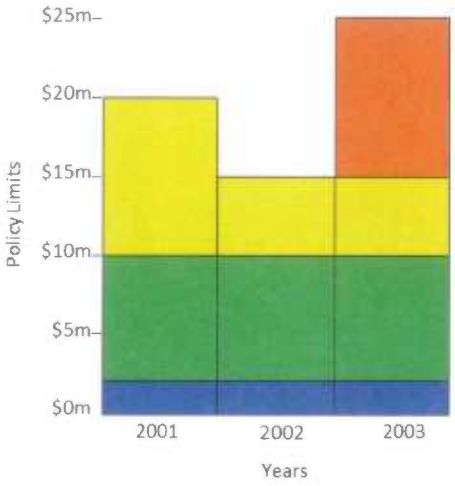
Statutes

Other Authorities

Page(s)

I. INTRODUCTION

The question presented by this case is whether an insured who causes progressive, multi-year environmental contamination or other "long-tail" damage must abide by the language of the insurance policies and access its lower-layer insurance across the impacted policy years before accessing higher-layer insurance. To illustrate, assume property damage occurred from 2001 to 2003 and the insured had several layers of insurance for each year:



After the insured exhausts the blue primary policies on the chart, does this insured polluter next need to access all of the green policies on the chart before accessing the higher-layer yellow and orange policies? Or can the insured adopt a fiction at odds with reality and this Court's rule of all-sums-with-horizontal-stacking for continuous-loss cases, and pretend the environmental harm occurred in only one particular year of its choosing (e.g., 2003) and exhaust coverage vertically—i.e., proceed up the blue, green, yellow, and orange policies from just that year (2003) without first accessing any of the policies from other years (e.g., 2001) in which it caused damage?

This hypothetical presents, in simplified form, the fundamental issue in this case. Montrose's mismanagement of a toxic chemical (dichloro-diphenyl-trichloroethane, or DDT) over *several decades* contaminated the soils, surface water, groundwater, and ocean surrounding its Torrance facility.

Under this Court's jurisprudence, Montrose can access the policy limits ("all sums") of its covered liabilities under the various insurance policies it purchased over time, which are horizontally stacked or added together into "one giant 'uber-policy,'" providing coverage for the many years (1961-1986) during which Montrose's continuing environmental damage took place. (*State v. Continental Ins. Co.* (2012) 55 Cal.4th 186, 201 ("*Continental*").) Also, the parties agree that since Justice Croskey's seminal 1996 decision in *Community Redevelopment Agency v. Aetna Casualty & Surety Co.* (1996) 50 Cal.App.4th 329, 340 ("*Community Redevelopment*"), policyholders like Montrose have been required to exhaust all primary policies impacted by a prolonged loss before reaching excess policies, unless the excess policies say otherwise.

Where the parties diverge is whether Montrose, after exhausting all of its primary policies, must horizontally exhaust its excess policies: i.e., the first level of excess for each year for 1961 to 1986, then the next excess level, and so forth, before it can access any higher-level excess policies in any given year. In other words, assuming the policy language does not require otherwise, does *Community Redevelopment*'s horizontal exhaustion rule extend to successive horizontal layers of excess coverage, contrary to Montrose's demand for the discretion to select whichever vertical towers of coverage it wants?

Under the plain language of the policies at issue in this case and the pertinent case law of this Court and the Courts of Appeal, the answer is yes, Montrose must horizontally exhaust. It may not, in other words, pick and choose, at its whim, particular policy years to vertically exhaust without having horizontally exhausted underlying insurance in other triggered years. (See *Montrose Chemical Corp. v. Superior Court* (2017) 14 Cal.App.5th 1306, 1320 ("Opinion").)

Horizontal exhaustion, far from resting on "an extra-contractual fiction" (OBM at p. 36), follows from the plain language of the insurance contracts entered into by Montrose. "The clear and explicit meaning of these provisions, interpreted in their ordinary and popular sense, ... controls judicial interpretation" (*Continental, supra*, 55 Cal.4th at p. 195, quoting *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18), and courts "may not rewrite what [the contracting parties] themselves wrote." (*Aerojet–General Corp. v. Transport Indem. Co.* (1997) 17 Cal.4th 38, 75 ("*Aerojet*") (Mosk, J.).) Each of the policies here states, in one way or another, that it will not pay until the insured has first exhausted not only all of the insurance policies vertically below it (and often listed in a schedule) in a particular policy year, but also ***any "other insurance."*** (1PA6 at pp. 117-200; 1PA7 at pp. 207-234, italics and bold added.) As the policies are written, the "other" insurance is, by definition, not the underlying insurance specifically listed (nor higher-layer excess insurance), but *other* lower-layer insurance from other policy years triggered by the same loss. Two decades' worth of reported decisions since *Community Redevelopment* confirm that, as between primary and excess insurance, the plain meaning of "other insurance" requires exhaustion of *all* underlying insurance before higher-layer policies are "up to bat."

Horizontal exhaustion also follows from this Court's jurisprudence, which also turned on the plain language of insurance contracts. In three seminal decisions governing indemnification for continuous-loss "long-tail" injuries—*Montrose Chemical Corp. v. Admiral Insurance Co.* (1995) 10 Cal.4th 645 ("*Montrose*"); *Aerojet, supra*, 17 Cal.4th 38; and *Continental, supra*, 55 Cal.4th 186—this Court held that the plain meaning of "occurrence" means that an insured seeking damages for continuing harm taking place over more than one policy period implicates all the policies during those policy periods under the "continuous injury trigger of coverage rule," and the phrase "all sums" means the insured has access "up to their policy limits, if applicable, as long as some of the continuous property damage occurred while each policy was 'on the loss.'" (*Continental, supra*, 55 Cal.4th at p. 197, 200-201.) In other words, the Court adopted the "all-sums-with-stacking" rule, which treats "the long-tail injury as a whole rather than artificially breaking it into distinct periods of injury." (*Id.* at p. 201.) The rule "effectively stacks the insurance coverage from different policy periods to form ***one giant 'uber-policy'*** with a coverage limit equal to the sum of all purchased insurance policies" layer by layer, over the range of years when the loss occurred. (*Ibid.*, italics and bold added, citation omitted.)

Yet Montrose would now have this Court adopt a rule under which it could artificially chop each "uber-policy" back up into its policy-year constituents and arbitrarily choose to assign all (or most) damage spanning across several years (if not decades) to the year or years Montrose has selected (e.g., those in which there is an especially large amount of excess insurance). But because each layer of coverage across the years becomes "one giant 'uber-policy,'" it follows that, just as lower-layer (e.g., primary) policies indisputably must be exhausted first in the basic case of a single-

point-in-time occurrence before higher-layer policies may be accessed (see, e.g., *Signal Companies, Inc. v. Harbor Ins. Co.* (1980) 27 Cal.3d 359, 365), so too must lower-layer "uber-poli[cies]" (whether primary or excess) be exhausted (absent specific policy language to the contrary) before the next higher layer of the "giant 'uber-policy'" spanning several years may be accessed.

And even if the Court were to look beyond the policy language, which it should not, basic fairness and the parties' reasonable expectations confirm that Montrose must horizontally exhaust unless the policy language expressly requires otherwise. A long-tail injury by definition spans multiple years, and so it is fundamentally unfair to allow an insured, for example, to arbitrarily go up to the tenth layer of excess insurance in two or three policy years and pretend all the injury spanning many more years (if not decades) occurred only in that small timespan, while accessing none of the excess insurance in other policy periods. Such arbitrariness also completely disregards not only the policy language here but also the reasonable expectations of the contracting parties, given that higher-level insurance is, as Montrose correctly concedes, typically less expensive than lower-level insurance. It makes no sense that an insured should be able to bypass the more expensive lower-layer insurance that was priced to cover the greater risk of having to pay first, and instead access less expensive, higher-layer insurance that was priced based on the lower likelihood it would be called upon to pay.

Montrose wants to redline out the policies' "other insurance" language, which in several instances appears in the insuring agreement itself *as well as* in a separate "other insurance" provision. Montrose attempts to pass off such contractual language as "repugnant" "boilerplate" entirely irrelevant to the insured (OBM at p. 12), even though it is a term in

a contract between the *insured* and the insurer. To support this remarkable proposition, Montrose misreads this Court's decision in *Dart Industries, Inc. v. Commercial Union Insurance Co.* (2002) 28 Cal.4th 1059, which is wholly inapt.

In *Dart*, an insured had three primary policies, one of which was missing. (*Dart*, *supra*, 28 Cal.4th at p. 1065.) The question for the Court was whether it mattered that the parties did not know what the "other insurance" clause said in the missing policy, when the same clauses in the other policies purported "to shift the burden away from one primary insurer wholly or largely to other insurers," canceling out coverage altogether. (*Id.* at p. 1080.) The Court held that the contents of the "other insurance" clause could not matter because in those circumstances (three policies at the same layer), courts do not enforce conflicting "other insurance" clauses that "defeat the insurer's obligations altogether." (*Id.* at p. 1079.)

But that is not the situation presented here. Between higher and lower layers of coverage, there cannot be a conflict between "other insurance" clauses that would "defeat the insurer's obligations altogether" and leave the insured with no coverage. Instead, "other insurance" clauses (like "other insurance" language in the insuring agreements here) simply prescribe the *sequence* in which coverage must be obtained: lower-layer policies must be exhausted first. Coverage is not defeated, only sequenced, between lower and higher layers.

Montrose's response is to trot out an unpersuasive parade of horribles that following the language of the "other insurance" provisions will supposedly produce. But the last two-plus decades of California jurisprudence proves otherwise. It has been settled law in California since *Community Redevelopment* that an insured must horizontally exhaust the

primary coverage across all years of the long-tail injury before it can access any (higher-layer) excess policies. (*Community Redevelopment*, *supra*, 50 Cal.App.4th at p. 340.) And there is no evidence that this rule has caused any of the adverse outcomes Montrose warns of in its brief. Indeed, Montrose implicitly recognizes as much by not taking issue with the longstanding *Community Redevelopment* rule, and by never offering any reason why horizontal exhaustion, which has worked well at the primary layer in long-tail situations, does not also work well for excess layers.

Montrose's inability to marshal any real reason why it should not have to horizontally exhaust, in accordance with the plain language of its insurance contracts and the logic of *Community Redevelopment*, is particularly telling. And Montrose's refusal to adhere to what the language of the insurance policies at issue here plainly require is particularly inappropriate, given that Montrose (and the other contracting parties in this case) are large, highly sophisticated commercial actors who have no excuse not to follow the language of the agreements they made. This Court should accordingly affirm the Court of Appeal's judgment and hold that the plain language of the policies requires horizontal exhaustion.

II. STATEMENT OF THE CASE

A. Factual Background

1. The Underlying Litigation

For decades, Montrose was the largest manufacturer in the United States of dichloro-diphenyl-trichloroethane (DDT), a well-known hazardous insecticide. (4PA17 at pp. 935, 954, 957.) Montrose began manufacturing DDT at its plant in Torrance, California, in 1947. (4PA17 at pp. 935, 957.) When DDT was banned for domestic use in 1972, Montrose

continued to produce DDT for export for another ten years. (4PA17 at pp. 935, 957.)

The United States and California sued Montrose in 1990 for the extensive environmental damage Montrose caused through its manufacturing of DDT and disposal of hazardous wastes at its Torrance plant. (Complaint, *United States v. Montrose Corp.* (C.D.Cal. June 18, 1990), No. CV 90-3122-AAH (JRx); 4PA17 at p. 928.) After ten years of litigation, and only after the court entered partial summary judgment in favor of the United States and California, Montrose entered into partial consent decrees to pay for the cleanup of soils, groundwater, and waterways, and for habitat restoration. (2PA12 at pp. 304-568; 4PA17 at pp. 869-870.)

While the litigation was ongoing, Montrose sought defense and indemnity coverage under the comprehensive general liability (CGL) policies Montrose had purchased from its primary insurers between 1960 and 1986. (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 292-293.)[1] Montrose also eventually sought indemnity from and sued the 40 defendant excess insurers here, who had collectively issued more

---

[1] "Primary" insurance refers to the first layer of coverage, under which "liability attaches immediately upon the happening of the occurrence that gives rise to liability." (*Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.* (1981) 126 Cal.App.3d 593, 597.) On the other hand, "the term 'excess coverage' refers to indemnity coverage that attaches upon the exhaustion of underlying insurance coverage for a claim." (*County of San Diego v. Ace Property & Cas. Ins. Co.* (2005) 37 Cal.4th 406, 416, fn. 4.)

than 115 excess policies during this same period. (4PA17 at pp. 865-869.)[2] The total amount of Montrose's excess coverage varied over time. As the Court of Appeal observed, "[i]n the early years, Montrose purchased just a few layers of excess coverage; in some later years, Montrose appears to have purchased more than 40 layers of excess coverage, with aggregate limits of liability in excess of $120 million." (Opinion, *supra*, 14 Cal.App.5th at pp. 1313-1314; see also 1PA5 at p. 99.)

2. The Policies' Language

All of the excess policies provide that Montrose must exhaust the limits of its underlying insurance before there can be coverage under the excess policies. (1PA6 at pp. 117-200 [stipulation]; 1PA7 at pp. 207-234 [stipulation].) Each excess policy identifies (as Montrose notes) specific underlying insurance—the so-called "scheduled" underlying insurance—in the same policy period that must be exhausted before the policy is up to bat. (See, e.g., 1PA6 at p. 121 [American Centennial policy "scheduling" underlying policies from two other insurers, Canadian Universal and INA, providing coverage during the same year]; OBM at pp. 17-18.) The "schedule" of underlying insurance, however, does not say anything about if, how, or when *other* underlying insurance must be exhausted—one must look to other provisions of the policies, including the insuring agreements and "other insurance" clauses, to answer those questions. These provisions require the insured to exhaust "***other*** insurances" *other than the scheduled underlying insurance* before the excess policy can be accessed. (E.g., 1PA6 at p. 146, italics and bold added.) The policies make clear that *all*

---

[2] Montrose has provided a chart depicting what it regards as all of its coverage between 1954 and 1986, which appears at 1PA5 at p. 99 and is attached to this brief for illustrative purposes.

underlying insurance must be exhausted in at least one of the following three ways.

a. Insuring Agreements and Related Definitions

First, many of the policies, based on the terms of their insuring agreements, are not up to bat as long as any scheduled underlying insurance *or "other insurance"* is available (as here) to the insured. For example, the insuring agreements of Continental Casualty policies RDX 030 807 62 18, RDX 8893542, RDX 8936616, and RDX 8936617 and Columbia Casualty policies RDX 1864012 and RDX 3652015 provide that they will "indemnify the insured ***for the amount of loss*** which is in excess of the applicable limits of liability of the underlying insurance inserted in column II of item 4 in the declarations"—i.e., the scheduled underlying insurance. (1PA6 at p. 145, italics and bold added.) "***Loss***" is then defined as "the sums paid as damages in settlement of a claim or in satisfaction of a judgment for which the insured is legally liable, *after making deductions for all recoveries, salvages and* ***other insurances*** *(whether recoverable or not) other than the underlying insurance and excess insurance purchased specifically to be in excess of this policy.*" (1PA6 at p. 146, italics and bold added.) The insuring agreement and definition of "loss" thus make clear that liability under the Continental and Columbia policies does not attach as long as Montrose can (as here) access "other insurances," including insurance "other than" the scheduled underlying insurance.

Similarly, the insuring agreements of American Centennial policies XC-00-03-64, XC-00-06-75, and XC-00-12-16 state that the insurer is liable for "***the ultimate net loss in excess of the retained limit***" for covered damages. (1PA6 at p. 119, italics and bold added.) "[R]etained limit," in turn, is defined to include "the applicable limits of any ***other underlying insurance.***" (1PA6 at p. 120, italics and bold added.)

Again, the insuring agreement establishes that liability does not attach until the limits of "any *other* underlying insurance" have first been exhausted.[3]

b. "Loss Payable" or "Limits" Provisions

Second, many of the policies contain "Loss Payable" or "Limits" provisions that require Montrose to first exhaust *other* underlying insurance (i.e., other than scheduled underlying insurance) before accessing higher-layer excess policies.

---

[3] Numerous other policies have similar or identical language to the above examples: American Re-Insurance nos. M0378792, M0378766, M0704152, and M1049241 (1PA6 at pp. 122-23 [policies shall be liable for the "[u]ltimate net loss" defined as "the sums paid in settlement of losses for which the Insured is liable after making deductions for all ... other insurances (other than recoveries under the underlying insurance ...)"]); Gibraltar Casualty Co. nos. GMX 00034, GMX 00035, GMX 00036, and GMX 00037 (1PA 6 at p. 151 [same]); Travelers Indemnity Co. (1PA 6 at p. 169 [same, defining "loss"]); Employers Commercial Union (Lamorak) no. EY 8389-004 (1PA6 at p. 129 [policy shall cover "ultimate net loss," defined as the amount payable "after making deductions for all recoveries and for other valid and collectible insurances"]); Northbrook Excess and Surplus Insurance Co. nos. 63 006 575, 63 007 771, and 63 008 590 (1PA6 at p. 159 [policy shall only be liable for the "ultimate net loss" over the "retained limit," which accounts for "the applicable limits of any other underlying insurance collectible by the insured"]); American Home nos. CE 338-1800, CE 338-1737, CE 2691596 (1PA7 at p. 212 [no liability for "[u]ltimate net loss" "when such expenses are included in other valid and collectible insurance"]); Granite State nos. SCLD-80-93267 and SCLD-80-93268 (1PA7 at p. 215 [same]); Lexington nos. 5511269 and 5511416 (1PA7 at p. 221 [same]); National Union nos. 1186489, 1186488, 1189408, 1189409, 1225300, and 1229623 (1PA7 at p. 227 [same]); AIU nos. 75-100078, 75-100079,75-101008, 75-101009, and 75-101010 (1PA7 at pp. 229, 231 [same]); and Landmark Insurance Co. no. FE 4001015 (1PA7 at p. 233 [same]).

For example, the "Loss Payable" provision of Transport Indemnity policy TEL00263C provides that it will pay "***any ultimate net loss***," defined as "the sums paid in settlement of losses for which the Insured is liable after making ***deductions for*** all recoveries, salvages and ***other insurance*** *(other than recoveries under the underlying insurance*, policies of co-insurance, or policies specifically in excess hereof)." (1PA6 at pp. 125-126, italics and bold added.)

The Fireman's Fund policies SN7774, XLX 1050776, XLX 1202619, XLX 1202620, XLX 1202871, XLX 1202873, XLX 1267232, XLX 1267245 and XLX 1369381, and National Surety policies XLX 1363006 and XLX 1363008 are similar. In those, the "Limits" provision provides that "the insurance afforded under this policy shall apply ***only after all underlying insurance*** has been exhausted." (1PA6 at p. 136, italics and bold added.)

c. "Other Insurance" Provisions

Third, the "other insurance" provisions—which are included in nearly every policy at issue in this case—reinforce or independently establish that the excess policies do not attach until Montrose has exhausted all other underlying insurance (other than just the scheduled vertically underlying insurance). Federal Insurance policy no. 7737-87-73, for example, in addition to listing the scheduled underlying insurance, states that "[i]f ***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." (1PA6 at p. 132, italics and bold added.)

Similarly, American Centennial policy CC-00-76-47 states that it shall be excess "over any other valid and collectible insurance ... ***whether or not*** described in the Schedule of Underlying Insurance Policies." (*Id.* at pp. 118-119, italics and bold added.)

B. Procedural Background

The parties filed cross motions for summary adjudication on exhaustion. Montrose sought summary adjudication on its thirty-second cause of action, which requests a declaration that "in order to seek indemnification under the Defendant Insurers' excess policies, Montrose need only establish that its liabilities are sufficient to exhaust the underlying policy(ies) issued 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." (1PA8 at p. 241; 4PA17 at pp. 900, 914, original underscore and bold.)

Montrose further sought a declaration that it may "select the manner in which [to] allocate its liabilities across the policy(ies) covering such losses." (4PA15 at p. 914.) Montrose argued that, under its "elective stacking approach," Montrose is permitted to "select any triggered policy in its portfolio to indemnify its liabilities, provided the policies immediately underlying that policy are exhausted in accordance with their terms." (1PA8 at p. 251.)

The excess insurers also moved for summary adjudication on Montrose's thirty-second cause of action, on the grounds that the excess policies do not permit an elective stacking approach. Almost all of the insurers also sought summary adjudication on the need for horizontal

exhaustion, requesting a declaration that "[a]ll 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." (8PA32 at p. 1998.)

The trial court denied Montrose's motion and granted the insurers' motion, holding that the excess policies required horizontal exhaustion in the context of this long-tail injury. (1PA1 at pp. 59-60.) Looking to the plain language of the policies, including the "other insurance" provisions, the court appropriately reasoned that "[u]ltimately, Montrose fails to cite any binding authority which persuades this court that the court should not follow the well-established rule that horizontal exhaustion should apply in the absence of policy language specifically describing and limiting the underlying insurance." (1PA1 at p. 54.)

Montrose filed a writ petition, which the Court of Appeal summarily denied. (Opinion, *supra*, 14 Cal.App.5th at p. 1320.) This Court then granted Montrose's petition for review and returned the case to the Court of Appeal with instructions to issue an order to show cause why the relief in the petition should not be granted. (*Ibid.*) The Court of Appeal, in a unanimous 45-page opinion by Justice Edmon, affirmed the trial court's denial of Montrose's motion for summary adjudication and affirmed in part the trial court's summary adjudication of the insurers' motion. (*Id.* at p. 1312.) The court concluded that "Montrose is not entitled to a declaration that it may access *any* of the more than 115 excess policies at issue" however it chooses. (*Id.* at p. 1321.) The court examined the wording of the American Centennial, Continental, and Columbia policies, including the insuring agreements and related definitions of terms such as "loss" and "retained limit," and "other insurance" provisions, and held that those policies were "written to provide coverage 'in excess of [an identified

primary policy] and the applicable limits of *any other* underlying insurance.'" (*Id.* at p. 1322, original italics, quoting Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2017) ¶ 8:182.) The court concluded that it follows from the plain language of those policies that they "attach not upon exhaustion of lower-layer policies within the same policy period, but rather upon exhaustion of *all* available insurance." (*Id.* at p. 1327, original italics.)

While the court determined that "at least some" of the policies unambiguously required horizontal exhaustion, it also concluded that because the parties "did not provide the trial court, and have not provided this court, with all of the policy language or with copies of the policies themselves," it could not decide the issue of exhaustion as to all of the policies. (*Id.* at pp. 1312, 1337-1338.) Accordingly, the court remanded the case to the trial court to make a policy-by-policy determination as to which policies required horizontal exhaustion. (*Ibid.*)

Montrose petitioned for review, which this Court granted on November 29, 2017.

III. ARGUMENT

The plain language of each of the policies in this case, this Court's precedents in *Continental*, *Aerojet*, and *Montrose v. Admiral*, the settled approach of *Community Redevelopment*, and basic fairness and the reasonable expectations of the parties all call for affirmance and support the Court of Appeal's and the trial court's holdings that Montrose must horizontally exhaust, absent specific language in a particular insurance contract to the contrary. Montrose's public policy and other arguments are deeply flawed, and moreover, they cannot override the plain language of the insurance contracts at issue or the pertinent authorities.

A. The Plain Language of the Insurance Contracts Requires Horizontal Exhaustion.

1. The Insurance Policies' Liability-Defining and "Other Insurance" Provisions Require Horizontal Exhaustion.

Resolving any dispute over an insurance policy requires examining the policy's plain language and interpreting it according to "the rules of construction applicable to contracts." (*Montrose*, *supra*, 10 Cal.4th at p. 666.) The "'clear and explicit' meaning" of the contractual provisions, as understood "in their 'ordinary and popular sense,'" "controls judicial interpretation." (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.* (1993) 5 Cal.4th 854, 867, quoting Civ. Code, §§ 1638, 1644.) Furthermore, "language in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case." (*Ibid.*, citation and italics omitted.) And when parties were "generally free to contract as they pleased," courts "may not rewrite what they themselves wrote." (*Aerojet*, *supra*, 17 Cal.4th at p. 75 (Mosk, J.).)

Here, the plain language of the policies makes clear that liability does not attach until the insured has first exhausted lower layers of insurance, including directly underlying insurance in the same policy period *as well as* "***other***" unscheduled underlying insurance in years to which the continuous-loss, "long-tail" damage extends. The policies impose this exhaustion requirement through at least one of three types of provisions: *first*, in the insuring agreements and related definitional provisions; *second*, in "loss payable" or "limits" provisions; and *third*, in "other insurance" provisions. Irrespective of where the "other insurance" language appears in the policies, the same result follows: Montrose must exhaust all underlying insurance in every triggered policy period before it can access higher-layer excess policies. It may not, in other words, exercise unbridled discretion in

picking whichever policy year (or years) it decides to single out in arbitrarily chopping up the "one giant 'uber-policy'" mandated by this Court in continuous-loss cases such as this one.

First, the policies' insuring agreements and related definitional provisions—the very provisions that define the scope of the liability undertaken by excess insurers—establish that each insurer's liability is limited to a "loss" which exceeds the coverage provided by "other insurances." (E.g., 1PA6 at p. 146.) For example, the insuring agreements in the Continental and Columbia Casualty policies provide that they will "indemnify the insured for the amount of the ***loss*** which is in excess of" the scheduled underlying insurance. (*Ibid.*, italics and bold added.) The policies then define "***loss***" as "the sums paid as damages in settlement of a claim or in satisfaction of a judgment ... after making deductions for ***all ... other insurances*** *(whether recoverable or not)* ***other than*** the underlying insurance and excess insurance purchased specifically to be in excess of this policy." (1PA6 at p. 146, italics and bold added.) Logically, those "other insurances" must include underlying insurance in *other* policy periods, which must first be horizontally exhausted.[4] Thus, not surprisingly, cases such as *Peerless Cas. Co. v. Continental Cas. Co.* (1956) 144 Cal.App.2d 617, which interpreted nearly identical policy language, held that such language necessitates exhaustion of *all* underlying insurance. (*Id.* at pp. 625-626.)

Other policies similarly require horizontal exhaustion through foundational provisions defining the terms "ultimate net loss" or "retained

---

[4] To the extent that "other insurance" may encompass other excess coverage at the *same layer* of coverage, any mutually repugnant "other insurance" clauses would not be given effect. (See *post*, at p. 37.)

limit." The insuring agreements in the Northbrook policies and American Centennial policies XC-00-03-64, XC-00-06-75, and XC-00-12-16, for example, state that the insurers "agree[] to pay on behalf of the insured the ultimate net loss in excess of the ***retained limit***"; the "retained limit" includes "***any other underlying*** insurance collectible by the insured." (1PA6 at pp. 119-120, 159, italics and bold added.) In other words, the insurers only "agree[] to pay" after the insured has collected "*any* ***other underlying*** insurance," including underlying insurance in other policy years covering the continuous loss. (*Ibid.*, italics and bold added.) This plain-meaning interpretation is confirmed by decisions such as *Legacy Vulcan Corp. v. Superior Court* (2010) 185 Cal.App.4th 677, 689, *Continental Insurance Co. v. Lexington Insurance Co.* (1997) 55 Cal.App.4th 637, 645, and *Community Redevelopment*, *supra*, 50 Cal.App.4th at p. 341, which held that parallel language in "retained limit" provisions required exhaustion of all underlying insurance.

Similarly, the American Re-Insurance policies describe the insurer's liability as the "***[u]ltimate net loss*** in excess of" the underlying insurance, while defining "ultimate net loss" as "the sums paid in settlement of losses for which the Insured is liable after making deductions for ***all ... other insurances (other than recoveries under the underlying insurance,*** policies of co-insurance, or policies specifically in excess hereof)." (1PA6 at pp. 122-123, italics and bold added.) American Centennial policy CC-00-76-47 also provides that the "ultimate net loss" excludes "recoveries under the ***underlying insurance***." (*Id.* at p. 118, italics and bold added.) And one of the Employers Commercial Union (Lamorak) policies defines "ultimate net loss" as the amount payable "after making deductions for all recoveries and for ***other valid and collectible insurances***." (1PA6 at p. 129, italics and bold added.) Again, such language requires exhaustion

of *all* underlying insurance, not only specifically scheduled underlying insurance. (See, e.g., *Peerless Cas. Co.*, *supra*, 144 Cal.App.2d at p. 626 ["ultimate net loss" provision requiring "*deductions* [of] ... other insurances" established that policy was excess "above all other insurance"].)

Simply put, the insuring agreements specify, by their terms, that they do not cover any loss incurred by the insured until the insured exhausts both (1) any scheduled (vertically) underlying policies, *and* (2) any *other* underlying insurance.

Second, in some of the policies, other provisions, such as the "Loss Payable" and "Limits" provisions, require horizontal exhaustion of all underlying insurance in policy years to which the continuous loss extends before the excess policies can attach. The "Loss Payable" provision of the Transport Indemnity policy, for example, establishes that the insurer is liable only for the insured's "ultimate net loss," which is defined as "the sums paid in settlement of losses for which the Insured is liable ***after making deductions for all*** recoveries, salvages and ***other insurance*** (*other than recoveries under the underlying insurance* policies of co-insurance, or policies specifically in excess hereof), whether recoverable or not." (1PA6 at pp. 125-126, italics and bold added.) Similarly, the "Limits" provision in the Fireman's Fund policies requires horizontal exhaustion as well: "It is a condition of this policy that the insurance afforded under this policy shall apply only after ***all underlying insurance has been exhausted.***" (1PA6 at p. 136, italics and bold added.)[5] Courts recognize that the effect of such

---

[5] In addition, the "Loss Payable" and "Limits" provisions in many of the policies provide that the excess policies do not attach until the

"other insurance" language is to require exhaustion of *all* underlying insurance. (See, e.g., *Legacy Vulcan Corp.*, *supra*, 185 Cal.App.4th at p. 689; *Continental Ins. Co. v. Lexington Ins. Co.*, *supra*, 55 Cal.App.4th at p. 645; *Community Redevelopment*, *supra*, 50 Cal.App.4th at p. 341.)

Third, the "other insurance" provisions—which appear in almost every policy at issue in this case—reinforce the need for lower-layer horizontal exhaustion. Nearly all of the policies contain language stating that the policies are excess to ***"other valid and collectible insurance,"*** excluding "insurance that is in excess" of the policies. (E.g., 1PA6 at pp. 120-121, italics and bold added; *id.* at pp. 118-119 [American Centennial policy CC-00-76-47 shall be excess "over any other valid and collectible insurance ... ***whether or*** not described in the Schedule of Underlying Insurance Policies," italics and bold added].) In other words, the "other insurance" provisions reinforce and also independently establish what many of the policies' other provisions have already made clear: higher-layer excess policies remain excess to all policies below it potentially triggered by a continuous loss until the lower policies have been exhausted. (*Community Redevelopment*, *supra*, 50 Cal.App.4th at p. 341 ["other insurance" provision "confirmed and reinforced" that horizontal exhaustion of all underlying insurance was required]; *see also Vons Companies, Inc. v. United States Fire Ins. Co.* (2000) 78 Cal.App.4th 52,

---

underlying insurers "have paid" or "have been held liable to pay" the amounts of their policies. (1PA6 at pp. 119, 121, 124, 126, 127, 130, 132, 142, 152, 155, 157, 160, 162, 164, 166, 168; 1PA7 at pp. 208, 211, 213, 214, 216, 218, 219, 222, 224, 226, 228, 230, 232.) This language alone precludes summary adjudication for Montrose, because Montrose must do more than show that "its liabilities are sufficient to exhaust the underlying policy(ies)"—it must show that the underlying insurers have already paid (or have been ordered to pay) the value of their policies. (4PA17 at p. 914.)

63 ["The term 'other valid and collectible insurance' simply means another policy which is legally valid and underwritten by a solvent carrier"].)[6]

2. This Court Should Reject Montrose's Efforts to Circumvent the Insurance Contracts' Clear Language.

Adopting Montrose's proposed rule that it should be allowed to cherry-pick whichever towers of insurance it chooses would require this Court to ignore these provisions entirely, violating fundamental canons against rendering provisions in insurance policies and other contracts surplusage. (OBM at pp. 25, 29, 38, 42; see also Civ. Code, § 1641 ["The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other"]; *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 838 [courts are "obligated to give effect to every part of an insurance policy" and avoid interpretations that would render provisions "meaningless"].)

Accepting Montrose's view would render meaningless the insurance contracts' references to "other insurance" or "other underlying insurance" in the insuring agreements and related definitions, the "loss payable" or "limits" provisions, and the "other insurance" provisions. Basic principles of contract interpretation foreclose Montrose's attempts to read such provisions out of existence so that it can "select the policies under which it seeks to be indemnified." (OBM at pp. 68-69.)

Where the "'contractual language is clear and explicit, it governs.'" (*Continental, supra*, 55 Cal.4th at p. 195, quoting *Bank of the West v.*

---

[6] This principle is also consistent with the logic that the typically less expensive upper-layer policies bear less risk than lower-layer policies with higher premiums, because lower-layer policies are likelier to be reached and pay more or all of their policy limits. (*Post*, at pp. 52-53.)

Superior Court (1992) 2 Cal.4th 1254, 1264; see also *Aerojet*, *supra*, 17 Cal.4th at p. 75 (Mosk, J.) [where "policies provide what they provide," courts "may not rewrite what [the parties] themselves wrote"].) None of Montrose's arguments can overcome this principle governing the construction of insurance contracts.

1. First, while Montrose does not seriously dispute that it must horizontally exhaust its insurance at the primary level, Montrose asserts that horizontal exhaustion of its excess policies is not required—only exhaustion of "underlying coverage in the same policy period"—focusing solely on the "schedule of underlying insurance." (OBM at p. 38.)

As shown already, this is demonstrably wrong. The policies' attachment provisions make clear that the policies do not attach unless "all ... other insurances," "any other underlying insurance," or "other valid and collectible insurances" have been exhausted, not just specifically scheduled vertically underlying insurance in the same policy period. (Accord, Opinion, *supra*, 14 Cal.App.5th at p. 1322 [if "an excess policy [is] written to provide coverage 'in excess of (identified primary policy) and the applicable limits of *any other* underlying insurance providing coverage to the insured,'" then "the excess insurer has no duty to defend or indemnify until *all underlying policies* available to the insured, whether or not listed in the excess policy, are exhausted"].)

Indeed, the "other insurance" *cannot* by definition be insurance vertically underlying (in the same policy year) the excess policy sought to be accessed. This follows from the use of the word "*other*." (E.g., 1PA6 at pp. 118, 123, 146, 151, 169.) The "other insurance" referenced in the policies must be underlying insurance *other than* the scheduled vertically underlying insurance, including policies from *before* and *after* a given

policy period. (See, e.g., 1PA6 at p. 146 [defining "other insurance" as insurance "*other than* the underlying insurance," italics added].)

2. Montrose next asks this Court to ignore the concept of "other insurance" entirely because "[e]ach of the Policies expressly provides that coverage attaches in excess of a specific, predetermined amount of underlying coverage ***in the same policy period***," which does not include the dollar amounts of policies from other years. (OBM at p. 18; see also *id.* at p. 39.) For example, Montrose appears to contend that because the schedule for American Centennial policy no. XX-00-03-64, covering 1980-81, only lists a $1 million Canadian Universal policy and a $1 million INA policy that cover the same policy year, those are the only two underlying policies that need to be exhausted even in a long-tail-injury situation. (1PA6 at p. 121.) Indeed, Montrose goes so far as to argue that giving effect to the references to "other insurance" would "render[]" this "specific attachment language either meaningless or surplusage, contravening basic canons of insurance policy interpretation." (OBM at pp. 43-44.)

Montrose is wrong. The specific attachment language is the operative language in the most common situation—a single-point-in-time injury (such as an explosion)—where an insured does not have "other insurance" applicable to that loss. In that situation, the specific attachment language governs the sequence in which the insured may access the insurance it has to cover that injury. (See, e.g., *Carmel Development Co. v. RLI Ins. Co.* (2005) 126 Cal.App.4th 502, 514.)

Instead, it is Montrose's proposed rule that would render key policy language "meaningless or surplusage, contravening basic canons of insurance policy interpretation." That is because, again, the policies specifically reference "insurance" "other" than just the vertically

underlying insurance identified by their specific dollar amounts. And it is hardly surprising that the insurance contracts do not list the specific dollar amount of the "other insurance." If they did, there would be no need for an "other insurance" catchall, which Montrose's reading strips of all meaning. As *Community Redevelopment* explained long ago, "'*even where there is more underlying primary insurance than contemplated by the terms of the [excess] policy*,'" the insurer must exhaust "*all* primary insurance ... before a secondary insurer will have exposure." (*Community Redevelopment*, *supra*, 50 Cal.App.4th at p. 339, original italics, quoting *Olympic Ins. Co.*, *supra*, 126 Cal.App.3d at p. 600.) This is true in a single-point-in-time occurrence, and "particular[ly]" in "continuous loss cases, such as the one before us," because "primary policies may have defense and coverage obligations which make them underlying insurance to excess policies which were effective in entirely different time periods and which may not have expressly described such primary policies as underlying insurance." (*Id.* at p. 340.)

3. Montrose similarly argues that the parties must not have contemplated the need to horizontally exhaust underlying coverage from other policy years because "the 'maintenance of underlying insurance' provision does ***not*** require the policyholder to purchase coverage for other policy years." (OBM at p. 40, original bold.)

Montrose's argument misconstrues the purpose of "maintenance of underlying insurance" provisions. They are not meant to ensure that there is insurance from other policy periods to exhaust. Rather, they simply serve to protect against the policyholder canceling or reducing the amount of the underlying insurance during any given policy period. (See, e.g., *Reserve Ins. Co. v. Pisciotta* (1982) 30 Cal.3d 800, 812-813; Seaman & Schulze, Allocation of Losses in Complex Insurance Coverage Claims

§ 9:2 (Dec. 2017 update) ["Maintenance of underlying insurance" clauses "evinc[e] an intention that the excess insurance contract does not 'drop down'"].)

4. Montrose also complains that enforcing the policy language here requires adopting a "mandatory" horizontal exhaustion rule in every case. (OBM at p. 12.) Not so—the policy language always governs. As Justice Croskey recognized in *Community Redevelopment* and as the Court of Appeal in this case explained, insurers and insureds remain free to contract around any requirement of horizontal exhaustion (and to opt for Montrose's preferred rule of vertical exhaustion, for example). (*Community Redevelopment, supra*, 50 Cal.App.4th at p. 340.) But "[a]bsent a provision in the excess policy *specifically describing* and *limiting* the underlying insurance," horizontal exhaustion is required. (*Ibid.*; see also Opinion, *supra*, 14 Cal.App.5th at p. 1335, original italics.)

5. Finally, and perhaps most tellingly, Montrose asks this Court to simply ignore the "other insurance" clauses in this case and read them out of existence as supposed "boilerplate" provisions "merely govern[ing] the rights and obligations of insurers covering the same risk ***vis-à-vis one another***." (OBM at p. 44, original italics and bold.) To make this remarkable argument, Montrose relies extensively on the inapposite case of *Dart Industries, Inc. v. Commercial Union Insurance Co.* (2002) 28 Cal.4th 1059, which had nothing to do with horizontal exhaustion or the language of Montrose's policies.

In *Dart*, the insured sought coverage for a long-tail injury from its three primary insurers. (*Dart, supra*, 28 Cal.4th at pp. 1064-1065.) All three of these insurers, at least two of which had "other insurance" clauses in their respective policies, denied that they had a duty to defend. (*Id.* at

pp. 1065, 1079.) The third insurer's policy was missing. (*Id.* at p. 1064.) After settling with the first two insurers, the insured sought a declaratory judgment that the third insurer had a duty to defend and indemnify. (*Id.* at p. 1065.) The insurer responded that it had no such duty, because the insured had failed to prove what was stated in the missing policy's "other insurance" clause, which the insurer argued could have made it excess to the two other primary policies—i.e., not yet up to bat. (*Id.* at pp. 1078-1079.) The question for the Court was thus whether the unknown contents of the "other insurance" provision in the third insurer's missing policy were material—i.e., could the "other insurance" provision relieve the insurer of any obligation to the insured? (*Id.* at pp. 1078-1079.)

This Court answered in the negative. The contents of the missing "other insurance" provision were held immaterial because the only situation in which the "other insurance" provision might bear on this dispute among three insurers at the same level (all primary) would lead to the inequitable situation in which enforcing the "other insurance" clause would "defeat the insurer's obligations altogether." (*Dart*, *supra*, 28 Cal.4th at p. 1079; see also *Signal Companies*, *supra*, 27 Cal.3d at p. 375 [plain language of insurance contracts must govern unless it would "invoke an absurdity"].) The Court explained that where primary insurers insist that conflicting "other insurance" provisions make their policies excess to other primary insurers' policies, the "other insurance" provisions act as disfavored "'escape' clauses"; in such cases, the solution is "to require equitable contributions on a pro rata basis" from all of the primary insurers rather than give effect to the mutually repugnant "other insurance" provisions as written. (*Dart*, *supra*, 28 Cal.4th at p. 1080.) In line with *Dart*, courts do not give effect to "other insurance" clauses in the unique situation (not present here) where doing so would leave the insured without coverage.

(E.g., *Century Sur. Co. v. United Pacific Ins. Co.* (2003) 109 Cal.App.4th 1246, 1258; compare with Montrose's Writ Petition, pp. 18-19 [conceding its insurance "should be sufficient to fully indemnify [its] liability incurred in *U.S. v. Montrose.*"].)

The other cases Montrose cites to try to read the "other insurance" provisions out of the insurance contracts at issue are similarly distinguishable: like *Dart*, they are all cases in which courts refused to allow "other insurance" clauses contained in policies that "share the *same* level of obligation on the *same* risk" to become mutually repugnant "'escape' clauses" that would leave the insured without coverage. (*Fireman's Fund Ins. Co. v. Maryland Cas. Co.* (1998) 65 Cal.App.4th 1279, 1294, fn. 4, 1305, original italics; see also *Certain Underwriters at Lloyds, London v. Arch Specialty Ins. Co.* (2016) 246 Cal.App.4th 418, 433-434 [refusing to enforce mutually repugnant "other insurance" provisions in primary policies]; *Travelers Cas. & Sur. Co. v. Century Sur. Co.* (2004) 118 Cal.App.4th 1156, 1161-1162 [same]; *Armstrong World Industries, Inc. v. Aetna Cas. & Sur. Co.* (1996) 45 Cal.App.4th 1, 105-106 [same]; *RLI Ins. Co. v. Hartford Acc. & Indem. Co.* (2d Cir. 1992) 980 F.2d 120, 122 [same]; *Bazinet v. Concord General Mut. Ins. Co.* (Me. 1986) 513 A.2d 279, 280-281 [same].)

But that is not the situation presented in this case, as both the trial court and the Court of Appeal correctly recognized. (Opinion, *supra*, 14 Cal.App.5th at p. 1333; 1PA1 at p. 56.) The "other insurance" clauses here, appearing in excess policies at different levels, cannot possibly conflict in a mutually repugnant fashion that would leave the insured without its bargained-for coverage, because the policies do not "operate at the same level." (*Carmel Development Co.*, *supra*, 126 Cal.App.4th at p. 517.) Indeed, no one has suggested that the "other insurance" clauses at issue

here could be used to "defeat the insurer's obligations altogether." (*Dart, supra*, 28 Cal.4th at p. 1079.) Rather, as the Court of Appeal recognized, horizontal exhaustion concerns "only the *sequence* in which policies are accessed, not the total coverage available to the insured." (Opinion, *supra*, 14 Cal.App.5th at 1335, original italics.) As Montrose itself explains, the issue before this Court is whether the insured must "horizontally exhaust all lower-level excess coverage across all triggered years before calling upon individual higher-layer excess policies." (OBM at p. 12, italics and bold removed.) And Montrose even concedes that the excess policies at issue "should be sufficient to fully indemnify [its] liability incurred in *U.S. v. Montrose.*" (Montrose's Writ Petition, pp. 18-19; Opinion, *supra*, 14 Cal.App.4th at p. 1335, fn. 8.) This case is about which insurer is up to bat at any given point in time, not about insurers attempting to use mutually repugnant "other insurance" provisions to escape any coverage obligation altogether. Montrose is attempting to force the square peg of cases taken from an entirely different context into the round hole of the circumstances presented by this case.

Outside of the unique and inapplicable situation of "other insurance" clauses being used as escape clauses, courts regularly give these provisions their intended effect in accordance with their plain meaning, as this Court should here. *Olympic Insurance Co. v. Employers Surplus Lines Insurance Co.*, 126 Cal.App.3d 593, illustrates this perfectly. In that case, there were two primary insurers and an excess insurer, each of which had "other insurance" clauses in their policies. (*Id.* at pp. 597-599.) The court refused to apply the mutually conflicting clauses found in both *primary* insurers' policies because doing so would have left the insured with no primary coverage. (*Id.* at p. 599.) But the court gave effect to the plain and intended meaning of the *excess* insurer's "other insurance" clause because

it did not conflict with "other insurance" clauses operating at a different, lower level of coverage in a way that would have laid bare the insured. The court enforced the "other insurance" clause, holding that "[a] secondary policy, by its own terms," does not attach "until *all* primary insurance," i.e., the "*other insurance*" available to the insured, is exhausted, even though "the total amount of primary insurance exceed[ed] the amount contemplated in the secondary policy." (*Id.* at p. 600, italics added.)

Indeed, it has long been the rule in California that "other insurance" provisions are enforced where they are not mutually repugnant and do not deprive the insured of coverage. (See, e.g., *JPI Westcoast Const., L.P. v. RJS & Associates, Inc.* (2007) 156 Cal.App.4th 1448, 1460 [recognizing that while "other insurance" provisions cancel out when they appear in two primary policies, the excess insurer's "other insurance" provision did not cancel out in a dispute between an excess and a primary insurer]; *Carmel Development Co.*, *supra*, 126 Cal.App.4th at pp. 516-517 [holding that the insured must exhaust the underlying insurance before higher-layer insurance can be triggered because "other insurance" clauses did not conflict]; *Hartford Cas. Ins. Co. v. Travelers Indem. Co.* (2003) 110 Cal.App.4th 710, 726-727 [enforcing "other insurance" provisions where provisions would not conflict]; *Olympic Ins. Co.*, *supra*, 126 Cal.App.3d at pp. 599-600; see also Seaman & Schulze, Allocation of Losses in Complex Insurance Coverage Claims (Dec. 2017 update) § 5:4[e][1]; Richmond, *Rights and Responsibilities of Excess Insurers* (2000) 78 Denv. U. L.Rev. 29, 91 ["In the excess insurance context, an 'other insurance' clause serves to limit the company's liability in the event insurance other than the scheduled underlying insurance is available"].)

That is why Justice Croskey, in his opinion for the Court of Appeal in *Community Redevelopment,* sensibly construed "other insurance"

provisions as calling for horizontal exhaustion of primary insurance across all triggered policy years (absent specific policy language to the contrary) in long-tail injury cases before a higher-layer excess insurance policy could be accessed. The excess insurer's "Other Insurance" provision "confirmed and reinforced" that the insured was obligated to exhaust all underlying insurance before the excess carrier's liability would attach. (*Community Redevelopment*, *supra*, 50 Cal.App.4th at p. 341.)[7] Many courts outside of California also agree that "other insurance" provisions in excess policies require exhaustion of lower-level coverage. (See, e.g., *U.S. Gypsum Co. v. Admiral Ins. Co.* (1994) 268 Ill.App.3d 598, 653 [holding that excess insurer's "other insurance" clause "clearly sets forth th[e] policy's status as an excess policy" and requires horizontal exhaustion]; *AAA Disposal Systems, Inc. v. Aetna Cas. & Sur. Co.* (2005) 355 Ill.App.3d 275, 285-286; *Atchison, Topeka, & Santa Fe Ry. Co. v. Stonewall Ins. Co.* (2003) 275

---

[7] In *Dart*, citing a treatise authored by Justice Croskey, this Court stated in one footnote that "'[o]ther insurance' clauses become relevant only where several insurers insure the same risk at the *same level* of coverage. An 'other insurance' dispute cannot arise between excess and primary insurers." (*Dart*, *supra*, 28 Cal.4th at p. 1079, fn. 6, original italics.) That footnote does not lay down a broad rule that "other insurance" clauses never have effect outside the inter-insurer contribution context; as Justice Croskey's opinion in *Community Redevelopment* makes clear, an excess policy's "other insurance" provision requires exhaustion of "other" *lower-level* insurance triggered by the same loss. This Court in *Dart* appears to have been concerned with "'other insurance' *dispute*[*s*]," i.e., the aforementioned mutually repugnant situation, which again arises only when policies "insure the same risk at the *same level* of coverage." (*Ibid.*, first italics added; see also *Century Sur. Co.*, *supra*, 109 Cal.App.4th at p. 1256 ["[A]n 'other insurance' dispute can only arise between carriers on the same level, it cannot arise between excess and primary insurers"].) Where there is no "'other insurance' dispute," "other insurance" clauses must be given effect according to their terms.

Kan. 698, 750; *Dow Corning Corp. v. Continental Cas. Co.* (Mich. Ct.App. Oct. 12, 1999) 1999 WL 33435067, at pp. 8-9 [nonpub. opn.].)

As the Court of Appeal has explained:

> [C]ourts will generally honor the language of excess 'other insurance' clauses when no prejudice to the interests of the insured will ensue. ... [A] true excess insurer—one that is solely and explicitly an excess insurer providing only secondary coverage—has no duty to defend or indemnify *until all the underlying primary coverage is exhausted* or otherwise not on the risk, [but] *primary* insurers with conflicting excess 'other insurance' clauses *can* have immediate defense obligations.

(*Century Sur. Co.*, *supra*, 109 Cal.App.4th at p. 1257, first italics added.)

This makes sense. Again, insurance contracts are interpreted according to their plain language. (*Aerojet*, *supra*, 17 Cal.4th at p. 76; *Montrose*, *supra*, 10 Cal.4th at p. 666, citing Civ. Code, § 1639.) And again, the provisions at issue here state that their respective policies "shall be *in excess of*" "other insurance." (E.g., 1PA6 at pp. 121, 123, 126, 127, 130, 132, italics added; see *ante*, at p. 22.) Thus, just like the definitional provisions in the insuring agreements, the "other insurance" provisions establish that excess liability does not attach as long as the insured has access to (and until the insured has exhausted) underlying insurance. Montrose cannot rewrite the policies it entered into. (*Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1073 ["'[W]e do not rewrite any provision of any contract, [including an insurance policy], for any purpose,'" quoting *Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 968, original alterations].)

Montrose's attempt to sideline the "other insurance" provisions as simply governing inter-insurer contribution disputes not only defies the policy language, it defies common sense. "Other insurance" clauses appear

in contracts between the insured and the insurer, ***not among insurers***. "'The reciprocal rights and duties of several insurers who have covered the same event do not arise out of contract, for their agreements are not with each other.'" (*Signal Companies*, *supra*, 27 Cal.3d at p. 369, quoting *American Auto. Ins. Co. v. Seaboard Sur. Co.* (1957) 155 Cal.App.2d 192, 195-196.) And the "'rights and obligations of insurers covering the same risk *vis-à-vis one another*'" are governed by "*equitable*" principles of contribution. (Opinion, *supra*, 14 Cal.App.5th at p. 1332, italics added.) So while the other insurance clauses may inform the contribution analysis in some circumstances, they do not "govern the rights and obligations of insurers ... vis-à-vis one another" because the insurers are not all parties to the agreement. (*Ibid.*) This Court should reject Montrose's contention that "other insurance" provisions have no effect even in policies that do not "share the *same* level of obligation on the *same* risk" (*Fireman's Fund*, *supra*, 65 Cal.App.4th at p. 1298, first italics added), as it is unsupported by authority, the policy language, and basic principles of contract interpretation.

Montrose also points to *State v. Continental Insurance Co.* (2017) 15 Cal.App.5th 1017 ("*Continental II*") for support. But it is both distinguishable and wrongly decided. *Continental II* focused on policies in excess of *self-insured retentions*, which are not subject to horizontal exhaustion. (*Continental II*, *supra*, 15 Cal.App.5th at p. 1034.) In a continuous-loss scenario, when the first coverage layer is comprised of self-insured retentions, rather than primary insurance, courts have explained that "other insurance" provisions do not mandate horizontal exhaustion because retentions are not "*insurance*." (*Montgomery Ward & Co. v. Imperial Cas. & Indem. Co.* (2000) 81 Cal.App.4th 356, 364, italics added.) Although the Court of Appeal recognized the "State filled in" some of its retentions with

insurance, it concluded "all of the applicable policies were excess to a retention" and thus held that "*Montgomery Ward*, and not *Community* [*Redevelopment*], should be controlling." (*Continental II*, *supra*, 15 Cal.App.5th at p. 1036.)

But even putting aside that *Continental II* is distinguishable, *Continental II* is also just wrong. In addition to relying on the distinction between retentions and insurance, the court adopted a watered-down version of Montrose's argument and refused to give effect to higher-layer excess insurers' "other insurance" provisions vis-à-vis lower-layer excess insurers because those provisions did not explicitly refer to "other ***underlying*** insurance," only "other insurance." (*Id.* at p. 1035, italics and bold added.)

But of course, the other insurance being referred to has to be other "underlying" insurance, whether the word "underlying" is explicitly used or not: a second-layer excess policy providing coverage from $5 million to $10 million cannot possibly be "excess" to a fifth-layer policy providing coverage from $50 million to $100 million. For example, Employers Commercial Union policy EY 8389-002, which states it is in "excess of $4,000,000.00," cannot possibly be excess to policy EY 8389-003, which is "excess of $29,000,000.00," which in turn cannot be excess to policy CY 8389-006, which is "excess of $39,000,000.00." (1PA6 at p. 128; see also 15 Couch on Insurance (3d ed. Dec. 2017) § 220:39 ["Where there are multiple layers of excess coverage, a higher-level excess insurer generally will not be liable on its policy until all the lower layers of insurance are exhausted"].) An excess policy's reference to "other insurance" must refer to insurance below (and not above) it—i.e., other *underlying* insurance. (See *ante*, at p. 27.) *Continental II* thus erred in departing from both the plain language of the "other insurance" provisions and the weight of

authority discussed above, which gives effect to "other insurance" provisions when they do not create a situation where it will "defeat the insurer's obligations altogether." (*Dart*, *supra*, 28 Cal.4th at p. 1079.)

* * *

In sum, Montrose fails in its attempts at circumventing the plain language of the insurance contracts entered into between the sophisticated parties here. This Court should enforce the plain meaning of the terms of those contracts, in accordance with well-settled precedent.

B. Horizontal Exhaustion Is the Natural and Logical Consequence of the Horizontal Stacking and the Creation of "One Giant 'Uber-Policy'" Mandated by This Court's Precedents.

Enforcing the plain language of the insurance contracts at issue in this case to require horizontal exhaustion is not only mandated by the basic principle that courts are "obligated to give effect to every part of an insurance policy" (*AIU Ins. Co., supra,* 51 Cal.3d at p. 838, citing Civ. Code, § 1641), but it is also "most consistent" with this Court's seminal continuous-loss decisions in *Montrose Chemical Corp. v. Admiral Insurance Co.* (1995) 10 Cal.4th 645, *Aerojet–General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, and *State v. Continental Insurance Co.* (2012) 55 Cal.4th 186. (*Community Redevelopment*, *supra*, 50 Cal.App.4th at p. 340.)

Montrose v. Admiral set the stage and held that "property damage that is continuous or progressively deteriorating throughout several policy periods is potentially covered by all policies in effect during those periods." (*Montrose v. Admiral*, *supra*, 10 Cal.4th at 655.) *Aerojet* followed, holding that in a continuous-loss situation, once successive policies are triggered under *Montrose v. Admiral*, each policy is responsible for "all sums"— i.e.

"as long as the policyholder is insured at some point during the continuing damage period, the insurers' indemnity obligations persist until the loss is complete, or terminates." (*Continental, supra,* 55 Cal.4th at p. 197, citing *Aerojet, supra,* 17 Cal.4th at p. 71.) Finally, *Continental* held that an insured may horizontally "stack" its policies across the consecutive policy periods applicable to the same continuous loss. (*Continental, supra,* 55 Cal.4th at p. 202.)[8]

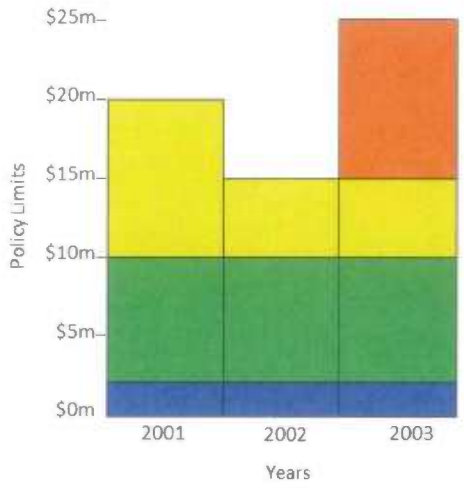
Together, those cases establish that, in continuous-loss matters, the "all-sums-with-stacking" rule applies to treat "the long-tail injury as a whole rather than artificially breaking it into distinct periods of injury." (*Continental, supra,* 55 Cal.4th at p. 201.) As a result, this Court has said that "[t]he all-sums-with-stacking indemnity principle ... 'effectively stacks the insurance coverage from different policy periods to form ***one giant 'uber-policy'*** with a coverage limit equal to the sum of all purchased insurance policies.'" (*Ibid.*, italics and bold added, citation omitted.)

The hypothetical from the Introduction illustrates this Court's logic. (See *ante*, at p. 11.) That hypothetical posited the continuous contamination of toxic chemicals by an insured over the span of three years, from 2001 to 2003—"a series of indivisible injuries attributable to

---

[8] Montrose incorrectly suggests that *Continental* already rejected horizontal exhaustion by stating that the "all-sums-with-stacking rule means that the insured has immediate access to the insurance it purchased." (*Continental, supra,* 55 Cal.4th at p. 201; e.g., OBM at p. 28.) But horizontal exhaustion was not at issue in *Continental*, as the quote itself highlights: "all-sums-with-stacking rule means ...." There is nothing in *Continental* to suggest that by using the phrase "immediate access" the Court was prejudging the issue of horizontal exhaustion, which was not before it. (See, e.g., *People v. Alvarez* (2002) 27 Cal.4th 1161, 1176 ["[I]t is axiomatic that cases are not authority for propositions not considered"].)

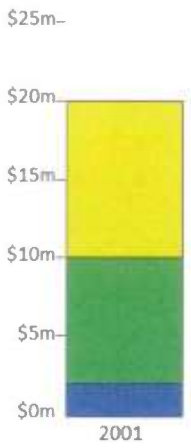
continuing events." (*Continental*, *supra*, 55 Cal.4th at pp. 195-196.) The *Montrose*, *Aerojet*, and *Continental* trilogy allow the insured to access the sum of all of the coverage provided in the policies covering 2001, 2002, and 2003, horizontally stacked together, based on the "occurrence" and "all sums" language in the insurance contracts. (*Id.* at pp. 196-200.) Thus, the law is clear, and Montrose agrees, that the insured has access, as needed, to all of the coverage in this example: the blue, green, yellow, and orange.



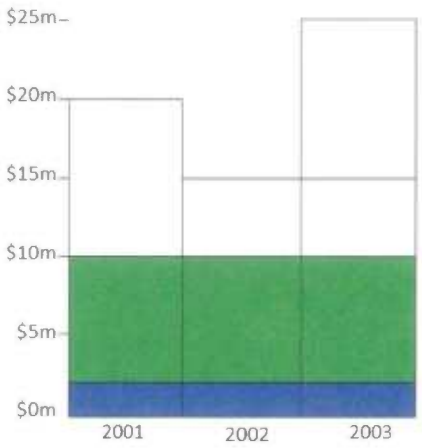
Applying the Court's trilogy to the above hypothetical, and of course assuming the language of the policies does not direct otherwise, the blue layer of coverage from 2001, 2002, and 2003 becomes, in this Court's words, "one giant 'uber-policy.'" (*Id.* at p. 201.) The second layer of coverage, in green, also becomes another "giant 'uber-policy,'" sitting on top of the first one, and so forth. (*Ibid.*)

By creating these uber-policies across the length of the long-tail injury, it follows that each of these uber-policies must be exhausted starting from the bottom up, just like they would have to in the context of a single-point-in-time occurrence in one particular policy period. (See *Carmel Development Co.*, *supra*, 126 Cal.App.4th at pp. 516-517 [holding that

second-layer excess insurer had no obligation until primary and first-layer excess policy limits were exhausted].) To illustrate, with a single-point-in-time occurrence, such as a fire or explosion at the insured's property, it is axiomatic that the insured must first exhaust its primary liability coverage (blue), then its first layer of excess (green), before it can access the third layer (yellow):



If all policies across the "long-tail injury" are to be treated "as a whole rather than artificially breaking it into distinct periods of injury" (*Continental*, *supra*, 55 Cal.4th at p. 201), each "giant uber-policy" layer should be exhausted before the next "uber-policy" layer can be called upon, just as in a traditional single-point-in-time setting, unless the policy language prescribes otherwise. If the liability from the environmental harm amounted to $30 million, the insured would first exhaust all of the blue and then the green to reach $30 million:



Horizontal exhaustion is thus "most consistent" with, and a natural corollary of, this Court's continuous-trigger rule from *Montrose v. Admiral*, the "all sums" rule from *Aerojet*, and its "all-sums-with-stacking" rule from *Continental*. (*Community Redevelopment*, *supra*, 50 Cal.App.4th at p. 340 ["[A] horizontal exhaustion rule ... is most consistent with the principles enunciated in *Montrose*"]; *Padilla Const. Co. v. Transportation Ins. Co.* (2007) 150 Cal.App.4th 984, 987, fn. 2 [same]; *Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 Cal.App.4th 1810, 1852-1853 ["[T]he 'horizontal' approach seems far more consistent with *Montrose*'s *continuous* trigger approach" than the "'vertical' approach"].) As the Court of Appeal explained, "if 'occurrences' are continuously occurring throughout a period of time, all of the primary policies in force during that period of time cover these occurrences, and all of them are primary to each of the excess policies." (*Stonewall Ins. Co.*, *supra*, 46 Cal.App.4th at p. 1853.) Logically, then, "if the limits of liability of each of these primary

policies is adequate in the aggregate to cover the liability of the insured, there is no 'excess' loss for the excess policies to cover." (*Ibid.*)[9]

Indeed, Montrose seemed to assert a decade ago that horizontal exhaustion is "most consistent" with this Court's jurisprudence. (*Community Redevelopment*, *supra*, 50 Cal.App.4th at p. 340.) In a 2008 amicus brief, Montrose extensively quoted from *Community Redevelopment* and even block-quoted Justice Croskey's explanation that "a horizontal exhaustion rule should be applied in continuous loss cases because it is most consistent with the principles enunciated in *Montrose*." (4PA17 (Montrose amicus brief) at pp. 996-998.)

Montrose's change in position cannot be explained by its reliance now on recent cases from New York and Texas. Those cases *confirm* that all-sums-with-horizontal-stacking and horizontal exhaustion go hand in hand. In cases where horizontal stacking has not been allowed, horizontal exhaustion is not the rule. (See, e.g., *Olin Corp. v. OneBeacon America Ins. Co.* (2d Cir. 2017) 864 F.3d 130, 144, 146; *In re Viking Pump, Inc.* (2016) 27 N.Y.3d 244, 265; *Trammell Crow Residential Co. v. St. Paul*

---

[9] Montrose contends that horizontal exhaustion "would result in a 'pro rata' allocation scheme" leading to a "conflict[] with *Continental*." (OBM at p. 30.) Not so. "Pro rata" allocation seeks to *apportion* the damage caused by a long-tail injury: typically, the amount each insurer owes is proportional to "the number of years an insurer was 'on the risk'" compared to "the total number of years that the progressive injury took place." (*Continental*, *supra*, 55 Cal.4th at p. 199.) Horizontal exhaustion does not apportion liability. It just requires the insured to exhaust the underlying insurance across the impacted years before accessing higher level insurance. (See *Community Redevelopment*, *supra*, 50 Cal.App.4th at p. 342.) Simply put, pro rata versus "all sums" controls *how much* a policy pays; exhaustion controls *when* a policy pays.

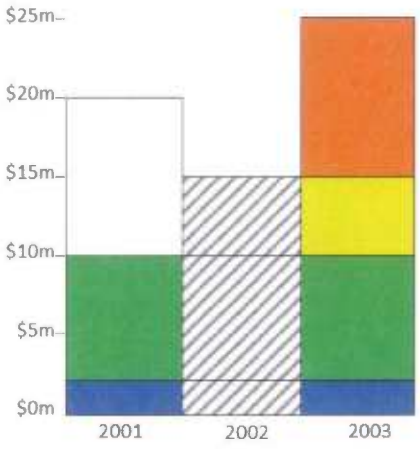
Fire & Marine Ins. Co. (N.D. Tex. Jan. 21, 2014) 2014 WL 12577393, at p. 2 [nonpub. opn.]; *LSG Technologies, Inc. v. U.S. Fire Ins. Co.* (E.D. Tex. Sept. 2, 2010), 2010 WL 5646054, at p. 11 [nonpub. opn.], judg. vacated and remanded on other grounds.)[10] But where horizontal stacking *is* required (as in California) and the policy language requires it (as in this case), horizontal exhaustion should also be required. (E.g., *Stonewall Ins. Co., supra*, 46 Cal.App.4th at p. 1853 [horizontal exhaustion required where horizontal stacking permitted]; *Hoerner v. ANCO Insulations, Inc.* (La. Ct.App. 2002) 812 So.2d 45, 69 [mandating horizontal exhaustion where state supreme court had previously adopted all-sums-with-stacking rule].) In other words, when insureds have the benefit of having access to "all sums" of their policies that have been stacked into a single "uber-policy," they also have an obligation to exhaust the full policy limits of the "uber-policy" before moving up to the next layer.

In contrast, Montrose's proposed rule backtracks from, is at odds with, and artificially chops up the "uber-policy" into its policy-period constituents. Even though Montrose accepts that this Court created (and previously advocated for the creation of) an uber-policy across all affected

---

[10] As in New York and Texas, courts in Missouri, New Jersey, and Wisconsin have also rejected horizontal exhaustion in favor of vertical exhaustion, but these jurisdictions do not follow California's rule of all-sums-with-horizontal-stacking. (*Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.* (D.N.J. 1997) 978 F.Supp. 589, 605, revd. on other grounds; *Nooter Corp. v. Allianz Underwriters Ins. Co.* (Mo. Ct.App. 2017) 536 S.W.3d 251, 272-273; *Westport Ins. Corp. v. Appleton Papers Inc.* (Wisc. Ct.App. 2010) 327 Wis.2d 120, 167.) Moreover, in *Nooter*, even though the court endorsed vertical exhaustion, it nonetheless held that higher-layer excess policies did not have to pay until the policy limits of all of the insured's underlying primary policies had been reached. (*Nooter, supra*, 536 S.W.2d at pp. 272-273.)

years, and even wishes to take advantage of that uber-policy when it chooses to, it *also* wants to have unbridled discretion to vertically chop up different uber-policies. (OBM at p. 56; 4PA17 [Montrose amicus brief] at pp. 996-998.) If, for example, Montrose "does not want to disturb an existing commercial relationship with a company that continues to provide coverage" or does not want to pay "retrospective premium obligations" that some of the policies contain (OBM at p. 56), or, for that matter, if Montrose wants to arbitrarily single out a particular disfavored group of excess insurers in one vertical policy-period tower, then, under Montrose's proposed rule, it would be free to artificially chop up, at will, the blue, green, and yellow "uber-policies" in the example from above:



But this runs counter to one of the key "advantages" that led this Court to adopt the "all-sums-with-stacking rule" in continuous-loss cases. (*Continental*, *supra*, 55 Cal.4th at p. 201.) Under Montrose's proposed rule, the law returns to "artificially breaking" the long-tail injury "into distinct periods of injury." (*Ibid.*) Now, even though there was "continuous property damage," Montrose wants to be able to *pretend* the injury occurred in just 2001 and 2003 (and not 2002), and even wants to *pretend* there was just $10 million of damage in 2001 (and not exhaust the

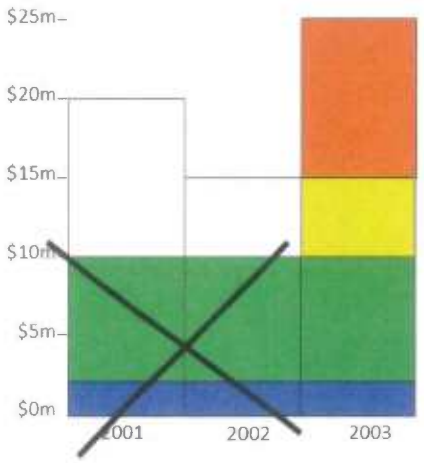
other $10 million available), and pretend there was $25 million of damage in 2003. This is a fiction based on an insured's unbridled discretion and whims. Montrose's proposed rule would create unpredictability and inconsistency around how losses are to be allocated in continuous loss cases, and could be misused in the settlement context to improperly pressure excess insurers. (See *Thing v. La Chusa* (1989) 48 Cal.3d 644, 647, 664 [recognizing the cost of "uncertainty" and the Court's "obligation to create a clear rule," and then choosing the clearer rule]. The better approach—the only one that follows from the plain meaning of the insurance contracts at issue here and is consistent with this Court's jurisprudence—is horizontal exhaustion.

C. Horizontal Exhaustion Is Also the Fairer Approach and Accords with the Parties' Reasonable Expectations About Which Policies Would Pay First.

Horizontal exhaustion also reflects the contracting parties' reasonable expectations about which policies would be called on to pay first, whether in a long-tail or single-point-in-time scenario. As Montrose correctly recognizes, higher-layer excess policies have "lower premium[s]" precisely because of the "lesser [] risk" they will be called on to pay. (OBM at p. 58 & fn. 23; accord Couch, *supra*, § 6:35 [a "primary policy" "requires relatively high premiums, since almost any covered loss will require the insurer to make some payment," whereas "'excess' insurance[] commonly kicks in at the maximum coverage under the primary policy, has a high maximum policy limit, and is purchased with relatively small premiums, since most covered losses will not reach the level at which the policy kicks in, hence the insurer expects to make payments seldom, if at all"]; *id.* at § 6:36 & fn. 2 [summarizing cases where higher-layer excess carriers charged lower premiums than lower-layer excess carriers].) For example, according to Montrose, a layer of insurance in excess of $25

million from this case cost 0.8¢ per dollar of coverage, whereas a layer of insurance in excess of $80 million cost approximately 0.2¢ per dollar of coverage. (OBM at p. 58 & fn. 23; 1PA7 at p. 226 [National Union policies].) Requiring the insured to exhaust more expensive, lower-layer policies before accessing less expensive, higher-layer policies accords with the parties' mutual intent and reasonable expectations, and most fairly assigns responsibility amongst insurers. (*Padilla Const. Co.*, *supra*, 150 Cal.App.4th at p. 1003 [disparity in primary and excess insurers' premiums reflects parties' "reasonable expectations" that primary policy must pay first]; *Kajima Const. Services, Inc. v. St. Paul Fire & Marine Ins. Co.* (2007) 227 Ill.2d 102, 116 [materially same].)

Montrose's proposed rule turns this simple economic consideration on its head. Under its rule, Montrose would be free to arbitrarily single out the much higher-layer, less expensive insurance (e.g., at 0.2¢ per coverage dollar) that was supposed to bear the "lesser [] risk" *before* it makes any attempt, if any, at exhausting the lower-layer insurance from other years that was supposed to bear the greater risk and that was appropriately priced higher, at *four* times that amount (e.g., at 0.8¢ per coverage dollar). (OBM at p. 58 & fn. 23; 1PA7 at p. 226 [National Union policies].) Returning to the example from above, Montrose wants carte blanche to tap into the much less expensive $15 million of coverage from the yellow and orange insurance from 2003, even if it makes no attempt to collect on the $20 million of coverage available to it under the blue and green insurance from 2001 and 2002:



This makes no sense.

Montrose contends that horizontal exhaustion would provide "an absurd windfall" to excess insurers by greatly multiplying each excess policy's attachment limit. (OBM at p. 59.) For example, each of the green policies is up to bat in a single-point-in-time occurrence when the liability exceeds $2 million. But when the three years (2001, 2002, and 2003) of coverage are horizontally stacked, none of the green policies will be up to bat unless the liability exceeds $6 million. (See *ibid.*) Montrose decries this result as unfair because "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." (*Id.* at p. 41, fn. 17.)

But what Montrose decries as unfair follows from the natural consequences of all-sums-with-horizontal-stacking. Of course the attachment limit rises. That is because the underlying policies across all the years of the long-tail injury have been continuously triggered and horizontally stacked in order to create "one giant 'uber-policy'" at each layer of coverage. (*Continental*, *supra*, 55 Cal.4th at p. 201.) That does not create a "windfall" (let alone an "absurd" one). If anything, this higher

attachment limit is the natural result of this Court's adoption, at the urging of insureds like Montrose, of its all-sums-with-horizontal-stacking rule, which provides these insureds far more coverage than they could have anticipated when they purchased their policies. (1PA5 at p. 99.)

Indeed, even though Montrose argues strenuously that horizontal exhaustion should not be the rule in moving from one excess layer to a higher excess layer, Montrose tellingly does not argue against the continued application of the longstanding rule of horizontal exhaustion in moving from the primary layer of coverage to the first excess (or umbrella) layer of coverage. (*Community Redevelopment*, *supra*, 50 Cal.App.4th at p. 338; cf. 4PA17 (Montrose 2005 brief) at pp. 1020-1021 [accepting that *Community Redevelopment* held that an excess carrier providing general excess coverage "has no duty to indemnify until all primary policies are exhausted"].) Again, *Community Redevelopment*, which interpreted the same policy language as many of the policies at issue here (1PA6 at pp. 120, 159), held that the insured must exhaust all triggered primary policies before reaching any excess policies "*even where there is more underlying primary insurance than contemplated by the terms of the secondary policy*." (*Community Redevelopment*, *supra*, 50 Cal.App.4th at p. 339, original italics, quoting *Olympic Ins.*, *supra*, 126 Cal.App.3d at p. 600; 1PA6 at pp. 120, 159; see also *LSG Technologies, Inc.*, *supra*, 2010 WL 5646054, at p. 16 ["[S]everal courts have adopted horizontal exhaustion as the rule," including California's]; 1 Plitt & Plitt, Practical Tools for Handling Insurance Cases (July 2017 update) § 4:3 [California courts "generally require horizontal exhaustion"]; Richmond, *supra*, 78 Denv. U. L.Rev. at p. 83 ["California courts generally favor 'horizontal exhaustion,'" citation omitted].)

Montrose has never really explained why the same basic principle of California law does not logically extend to each higher layer of excess insurance, nor can it. Of course there are "basic differences" between primary and excess insurance, such as primary insurers' "obligation to defend against third-party claims," and the fact that "'[p]rimary' 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.'" (OBM at pp. 31-32, citations omitted.) But Montrose never explains *why* these differences matter in determining whether horizontal exhaustion should be required at the primary (but not any excess) layer of coverage. They do not.[11]

Indeed, Montrose's recognition that the "increased premiums paid for primary insurance" may warrant requiring horizontal exhaustion at the primary level (OBM at p. 35) also warrants requiring horizontal exhaustion at *every* level. Just as it is axiomatic that first-level excess insurance provides coverage "only after a predetermined amount of primary coverage has been exhausted" (*Olympic Ins. Co.*, *supra*, 126 Cal.App.3d at p. 598), it is also axiomatic that higher levels of excess insurance only provide coverage after the lower levels of excess insurance have been exhausted. (*Carmel Development Co.*, *supra*, 126 Cal.App.4th at p. 512, fn. 4; see also

---

[11] Montrose cites *Viking Pump*, *supra*, 27 N.Y.3d 244 for the proposition that "the horizontal exhaustion rule only governs the relationship between the primary and excess insurers." (OBM at p. 33 & fn. 11, italics and bold omitted.) Aside from being wrong as a matter of contract interpretation, Montrose misstates the holding of the New York Court of Appeals, which stated that the "propriety" of horizontal exhaustion between excess layers was "not before us." (*Viking Pump*, *supra*, 27 N.Y.3d at p. 254, fn. 2.)

Couch, *supra*, § 6:35.) And as Montrose admits, that is exactly how they are priced. (OBM at p. 59.)

D. There Is No Merit to Montrose's Parade of Horribles.

Because Montrose's position is essentially atextual, it falls back on arguments that horizontal exhaustion supposedly produces bad public policy outcomes by creating "needless litigation" (OBM at p. 54), "penaliz[ing] policyholders for purchasing additional coverage" (*id.* at p. 57), "delay[ing] indemnification" (*id.* at p. 61), and otherwise being "unworkable" (*id.* at p. 65). Montrose is wrong on all counts.

To begin with, all of Montrose's the-sky-will-fall arguments are belied by the fact that horizontal exhaustion has been the rule in California at the primary level since Justice Croskey's 1996 decision in *Community Redevelopment*, yet there is no evidence (Montrose has certainly pointed to none) that the rule of horizontal exhaustion has spawned "needless litigation," "penalize[d] policyholders for purchasing additional coverage," led to "delay[ed] indemnification," or been "unworkable." Indeed, there are only a handful of reported decisions in California about horizontal exhaustion over the last two-plus decades, demonstrating that insurers and insureds have largely been able to apply the horizontal exhaustion rule without much difficulty, even though it is used in a wide variety of contexts, ranging from home construction to patent infringement to environmental damages. (See, e.g., *Padilla Const. Co.*, *supra*, 150 Cal.App.4th at p. 986 [construction defect]; *Stonewall Ins. Co.*, *supra*, 46 Cal.App.4th at p. 1850 [property damage]; *Lafarge Corp. v. Travelers Indem. Co.* (9th Cir. 2002) 32 F.Appx. 851, 852 [environmental damage]; *Iolab Corp. v. Seaboard Sur. Co.* (9th Cir. 1994) 15 F.3d 1500, 1502 [patent infringement].) And again, Montrose never explains why this rule,

which has worked well at the primary level of insurance, will not also work at the excess level.

Moreover, even if Montrose could substantiate Montrose's parade of horribles, the Court of Appeal below correctly concluded, in keeping with this Court's longstanding precedent, that "public policy is not an appropriate basis for rewriting the policy language." (Opinion, *supra*, 14 Cal.App.5th at p. 1335.) As Justice Mosk, writing for this Court in *Aerojet* explained, "the pertinent policies provide what they provide. … We may not rewrite what they themselves wrote." (*Aerojet, supra*, 17 Cal.4th at p. 75; see also *Rosen*, *supra*, 30 Cal.4th at p. 1073 ["[W]e do not rewrite any provision of any contract, [including an insurance policy], for any purpose"], quoting *Certain Underwriters*, *supra*, 24 Cal.4th at p. 968, original alterations.)

In any event, none of Montrose's four horribles can withstand scrutiny.

1. Montrose's claim that horizontal exhaustion "significantly increases litigation costs and delays indemnification" compared to vertical exhaustion incorrectly assumes there will necessarily be more insurers and more policies looking horizontally rather than vertically. (OBM at p. 61.) But that assumption is faulty and belied by the record in this case. According to Montrose's own coverage chart, there are far more policies in vertical columns than horizontal rows. (1PA5 at p. 99; see also Attachment [same].) At higher layers, Montrose appears to have purchased smaller amounts of coverage from a much wider array of insurers (again assuming arguendo the accuracy of Montrose's own coverage chart). (*Ibid.*)

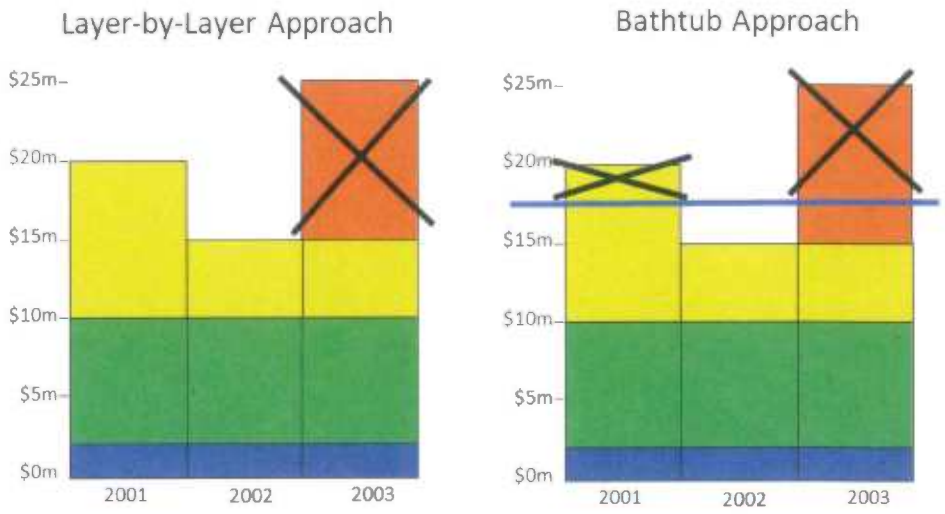
Nor is there any merit to Montrose's argument that under horizontal exhaustion "a court could not determine the amount *any* insurer owes

without first determining what *every* insurer owes." (OBM at p. 55, quoting *Continental II*, *supra*, 15 Cal.App.5th at p. 1033, internal quotations and citations omitted.) Whether exhausting vertically or horizontally, the parties (and the court, if necessary) only need to proceed up to the amount of liability. Just because Montrose chose to sue every insurer in this case by no means suggests an insured must do so.

2. Horizontal exhaustion does not "penalize[] policyholders for purchasing additional coverage." (OBM at p. 57.) As the Court of Appeal correctly recognized, "[h]orizontal exhaustion dictates only the *sequence* in which policies are accessed, not the total coverage available to the insured." (Opinion, *supra*, 14 Cal.App.5th at p. 1335.) Montrose has access to the coverage it needs and concedes as much by never arguing that horizontal exhaustion would somehow prevent it from covering its liabilities.

3. Horizontal exhaustion will not "delay[] indemnification" by "compelling policyholders to litigate inter-insurer contribution issues." (OBM at pp. 60-61.) Each excess policy clearly states what is required in order for the underlying insurance to be "exhausted," and thus there is no basis for assuming it will spark the "spectacle" of an "allocation circus." (OBM at p. 61.) Indeed, if any approach were to provoke a "circus," it would be Montrose's vertical elective exhaustion approach, under which Montrose could shoot up all or part of a stack from just a single year or two, even though its damage to the environment spanned decades, and without exhausting in accordance with its contractual agreements. It would be totally unfair for decades' worth of environmental damage to fall on the shoulders of disfavored insurers who happened to provide excess insurance (often at a fraction of the cost of lower-lying insurance in other affected policy years) during that single unlucky year or two.

4. Horizontal exhaustion is eminently "workable," and has been since *Community Redevelopment* was decided in 1996, particularly in cases like this one with large, sophisticated commercial entities on both sides of the insurer-insured transaction. There are at least two possible approaches to horizontal exhaustion: the layer-by-layer approach and the rising-bathtub approach. Under the layer-by-layer approach, liability moves up the chart in layers, whereas under the rising-bathtub approach, liability rises uniformly across the board like water fills up a bathtub. Here is how horizontal exhaustion would work under both approaches, using the example from above with a hypothetical liability of $50 million:



The Court need not decide whether the layer-by-layer or rising-bathtub approach is the better one to adopt; that issue is not before the Court. The above discussion simply demonstrates that horizontal exhaustion is workable and has been since 1996.

IV. CONCLUSION

Montrose calls for this Court to disregard the plain meaning of the insuring agreements and related definitions, "loss payable" or "limits"

provisions, and "other insurance" provisions, all of which make clear that such higher-layer insurance does not kick in until lower-layer "*other* insurance" has been exhausted. There is no justification, let alone a compelling one, to run roughshod over the insurance contracts' plain language and this Court's precedents. The Court should affirm the Court of Appeal's judgment and hold that, unless the policy specifically provides otherwise, an insured must exhaust horizontally across all affected policy years in seeking indemnification for a continuous-loss, long-tail injury before it can access higher-layer excess policies.

DATED: June 18, 2018

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP
*THEODORE J. BOUTROUS, JR.
JULIAN W. POON
JEREMY S. SMITH
MADELEINE F. MCKENNA

By: Theodore Boutrous/jp
Theodore J. Boutrous, Jr.

Attorneys for American Centennial Insurance Company, Columbia Casualty Company, Continental Casualty Company, and Lamorak Insurance Company (formerly known as OneBeacon America Insurance Company, as successor-in-interest to Employers Commercial Union Insurance Company of America, the Employers Liability Assurance Corporation, Ltd., and Employers Surplus Lines Insurance Company)

BARBANEL & TREUER, P.C.
ALAN H. BARBANEL
ILYA A. KOSTEN

By: _____
Ilya A. Kosten

Attorneys for Real Parties in Interest Lamorak Insurance Company (formerly known as OneBeacon America Insurance Company, as Successor-in-Interest to Employers Commercial Union Insurance Company of America, the Employers Liability Assurance Corporation, Ltd., and Employers Surplus Lines Insurance Company), and Transport Insurance Company (as Successor-in-Interest to Transport Indemnity Company)

CRAIG & WINKELMAN LLP
BRUCE H. WINKELMAN

By: _____
Bruce H. Winkelman

Attorneys for Real Party in Interest Munich Reinsurance America, Inc. (formerly known as American Re-Insurance Company)

LEWIS BRISBOIS BISGAARD & SMITH LLP
PETER L. GARCHIE
JAMES P. MCDONALD

By: _____
Peter L. Garchie

Attorneys for Real Party in Interest Employers Mutual Casualty Company

BARBER LAW GROUP
BRYAN M. BARBER

By: _____
Bryan M. Barber

Attorneys for Real Party in Interest Employers Insurance of Wausau

ARCHER NORRIS
CHARLES R. DIAZ
ANDREW J. KING

By: _____
Charles R. Diaz

Attorneys for Real Parties in Interest Fireman's Fund Insurance Company and National Surety Corporation

SELMAN & BREITMAN, LLP
ELIZABETH M. BROCKMAN

By: _____
Elizabeth M. Brockman

Attorneys for Real Party in Interest Federal Insurance Company

LEWIS BRISBOIS BISGAARD & SMITH LLP
JORDON E. HARRIMAN

BUDD LARNER PC
MICHAEL J. BALCH

By: _____
Jordon E. Harriman

Attorneys for Real Parties in Interest General Reinsurance Corporation and North Star Reinsurance Corporation

TRESSLER LLP
LINDA BONDI MORRISON

By: _____
Linda Bondi Morrison

Attorneys for Real Parties in Interest Allstate Insurance Company (solely as successor-in-interest to Northbrook Excess and Surplus Insurance Company)

MCCURDY & FULLER LLP
KEVIN G. MCCURDY
VANCI Y. FULLER

By: Kevin G. McCurdy
Kevin G. McCurdy

Attorneys for Real Parties in Interest Everest Reinsurance Company (as successor-in-interest to Prudential Reinsurance Company) and Mt. McKinley Insurance Company (as successor-in-interest to Gibraltar Casualty Company)

McCLOSKEY, WARING, WAISMAN & DRURY LLP
ANDREW MCCLOSKEY

By: _____
Andrew McCloskey

Attorneys for Real Party in Interest Westport Insurance Corporation (formerly known as Puritan Insurance Company, formerly known as The Manhattan Fire and Marine Insurance Company)

SINNOTT, PUEBLA CAMPAGNE & CURET, APLC
MARY E. GREGORY

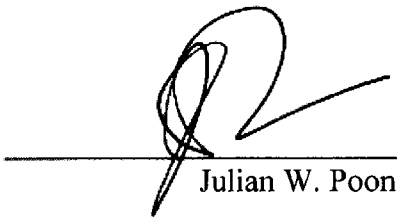
By: Mary E. Gregory
Mary E. Gregory

Attorneys for Real Party in Interest Zurich International (Bermuda) Ltd.

CERTIFICATION OF WORD COUNT

Pursuant to Rule 8.204(c)(1), California Rules of Court, the undersigned hereby certifies that this Answering Brief on the Merits contains 13,978 words, excluding the tables and this certificate, according to the word count generated by the computer program used to produce this document.

Dated: June 18, 2018



Julian W. Poon

Attorneys for American Centennial Insurance Company, Columbia Casualty Company, Continental Casualty Company, and Lamorak Insurance Company

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 333 South Grand Avenue, Los Angeles, CA 90071.

On June 18, 2018, I served true copies of the following document described as **ANSWERING BRIEF ON THE MERITS** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY ELECTRONIC SERVICE: I caused the document or documents to be electronically transmitted to TrueFiling, an electronic filing service provider, pursuant to the order authorizing electronic service and the instructions on that website.

On June 18, 2018, I also served true copies of the following document described as **ANSWERING BRIEF ON THE MERITS** on the following parties in this action as follows:

Brook B. Roberts, Esq. John M. Wilson, Esq. Drew T. Gardiner, Esq. LATHAM & WATKINS 12670 High Bluff Drive San Diego, CA 92130 Tel: 858.523.5400 Fax: 858.523.5450 Brook.Roberts@lw.com John.Wilson@lw.com Drew.Gardiner@lw.com	Attorneys for Plaintiff-Petitioner, MONTROSE CHEMICAL CORPORATION OF CALIFORNIA
Honorable Carolyn B. Kuhl Los Angeles Superior Court Department 12 Spring Street Courthouse 312 North Spring Street Los Angeles, CA 90012	Respondent SUPERIOR COURT

Honorable Elihu M. Berle
Los Angeles Superior Court
Department 6
Spring Street Courthouse
312 North Spring Street
Los Angeles, CA 90012

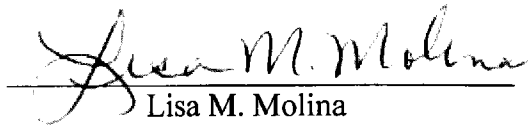
Respondent SUPERIOR COURT

Court of Appeal
Second Appellate District, Division 3
300 South Spring Street
2nd Floor, North Tower,
Los Angeles, CA 90013

BY OVERNIGHT DELIVERY: On the above-mentioned date, I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses shown above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier with delivery fees paid or provided for.

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

Executed on June 18, 2018, at Los Angeles, California.



Lisa M. Molina

SERVICE LIST

Brook B. Roberts, Esq. John M. Wilson, Esq. Drew T. Gardiner, Esq. LATHAM & WATKINS 12670 High Bluff Drive San Diego, CA 92130 Tel: 858.523.5400 Fax: 858.523.5450 brook.roberts@lw.com john.wilson@lw.com drew.gardiner@lw.com	Attorneys for Plaintiff-Petitioner, MONTROSE CHEMICAL CORPORATION OF CALIFORNIA [Overnight Delivery & E-Service]
Steven M. Crane, Esq. Barbara S. Hodous, Esq. BERKES CRANE ROBINSON & SEAL LLP 515 South Figueroa Street, Suite 1500 Los Angeles, CA 90071 Tel: 213.955.1150 Fax: 213.955.1155 scrane@bcrslaw.com bhodous@bcrslaw.com	Attorneys for Real Parties in Interest CONTINENTAL CASUALTY COMPANY and COLUMBIA CASUALTY COMPANY
Kenneth Sumner, Esq. Lindsey A. Morgan, Esq. SINNOTT PUEBLA CAMPAGNE & CURET, APLC 2000 Powell Street, Suite 830 Emeryville, CA 94608 Tel: 415.352.6200 Fax: 415.352.6224 ksumner@spcclaw.com lmorgan@spcclaw.com	Attorneys for Real Parties in Interest AIU INSURANCE COMPANY; AMERICAN HOME ASSURANCE COMPANY; GRANITE STATE INSURANCE COMPANY; LANDMARK INSURANCE COMPANY; LEXINGTON INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; and NEW HAMPSHIRE INSURANCE COMPANY

Max H. Stern, Esq. Jessica E. La Londe, Esq. DUANE MORRIS LLP One Market Plaza Spear Street Tower, Suite 2200 San Francisco, CA 94105 Tel: 415.957.3000 Fax: 415.957.3001 mhstern@duanemorris.com jelalonde@duanemorris.com	Attorneys for Real Party in Interest AMERICAN CENTENNIAL INSURANCE COMPANY
Bruce H. Winkelman, Esq. CRAIG & WINKELMAN LLP 2140 Shattuck Avenue, Suite 409 Berkeley, CA 94704 Tel: 510.549.3330 Fax: 510.217.5894 bwinkelman@craig-winkelman.com	Attorneys for Real Party in Interest MUNICH REINSURANCE AMERICA, INC. (formerly known as American Re-Insurance Company)
Richard B. Goetz, Esq. Zoheb P. Noorani, Esq. O'MELVENY & MYERS LLP 400 South Hope Street Los Angeles, CA 90071 Tel: 213.430.6000 Fax: 213.430.6407 rgoetz@omm.com znoorani@omm.com mreynolds@omm.com	Attorneys for Real Party in Interest TIG INSURANCE COMPANY (successor by merger to International Insurance Company)
Alan H. Barbanel, Esq. Ilya A. Kosten, Esq. BARBANEL & TREUER, P.C. 1925 Century Park East, Suite 350 Los Angeles, CA 90067 Tel: 310.282.8088 Fax: 310.282.8779 abarbanel@btlawla.com ikosten@btlawla.com	Attorneys for Real Parties in Interest LAMORAK INSURANCE COMPANY (formerly known as OneBeacon America Insurance Company, as successor-in-interest to Employers Commercial Union Insurance Company of America, The Employers Liability Assurance Corporation, Ltd., and Employers Surplus Lines Insurance Company), and TRANSPORT INSURANCE COMPANY (as successor-in-interest to Transport Indemnity Company)

Bryan M. Barber, Esq.
BARBER LAW GROUP
525 University Avenue, Suite 600
Palo Alto, CA 94301
Tel: 415.273.2930
Fax: 415.273.2940
bbarber@barberlg.com

Attorneys for Real Party in Interest EMPLOYERS INSURANCE OF WAUSAU

Peter L. Garchie, Esq.
James P. McDonald, Esq.
LEWIS BRISBOIS BISGAARD & SMITH LLP
701 B Street, Suite 1900
San Diego, CA 92101
Tel: 619.233.1006
Fax: 619.233.8627
peter.garchie@lewisbrisbois.com
james.mcdonald@lewisbrisbois.com

Attorneys for Real Party in Interest EMPLOYERS MUTUAL CASUALTY COMPANY

Charles R. Diaz, Esq.
ARCHER NORRIS
777 S. Figueroa Street, Suite 4250
Los Angeles, CA 90017
Tel: 213.437.4000
Fax: 213.437.4011
cdiaz@archernorris.com
gstargardter@archernorris.com

Attorneys for Real Parties in Interest FIREMAN'S FUND INSURANCE COMPANY and NATIONAL SURETY CORPORATION

Andrew J. King, Esq.
ARCHER NORRIS
2033 North Main Street, Suite 800
Walnut Creek, CA 94569
Tel: 925.952.5508
Fax: 925.930.6620
aking@archernorris.com

Attorneys for Real Parties in Interest FIREMAN'S FUND INSURANCE COMPANY and NATIONAL SURETY CORPORATION

Elizabeth M. Brockman, Esq.
SELMAN & BREITMAN, LLP
11766 Wilshire Boulevard, Suite 600
Los Angeles, CA 90025
Tel: 310.445.0800
Fax: 310.473.2525
ebrockman@selmanlaw.com

Attorneys for Real Party in Interest FEDERAL INSURANCE COMPANY

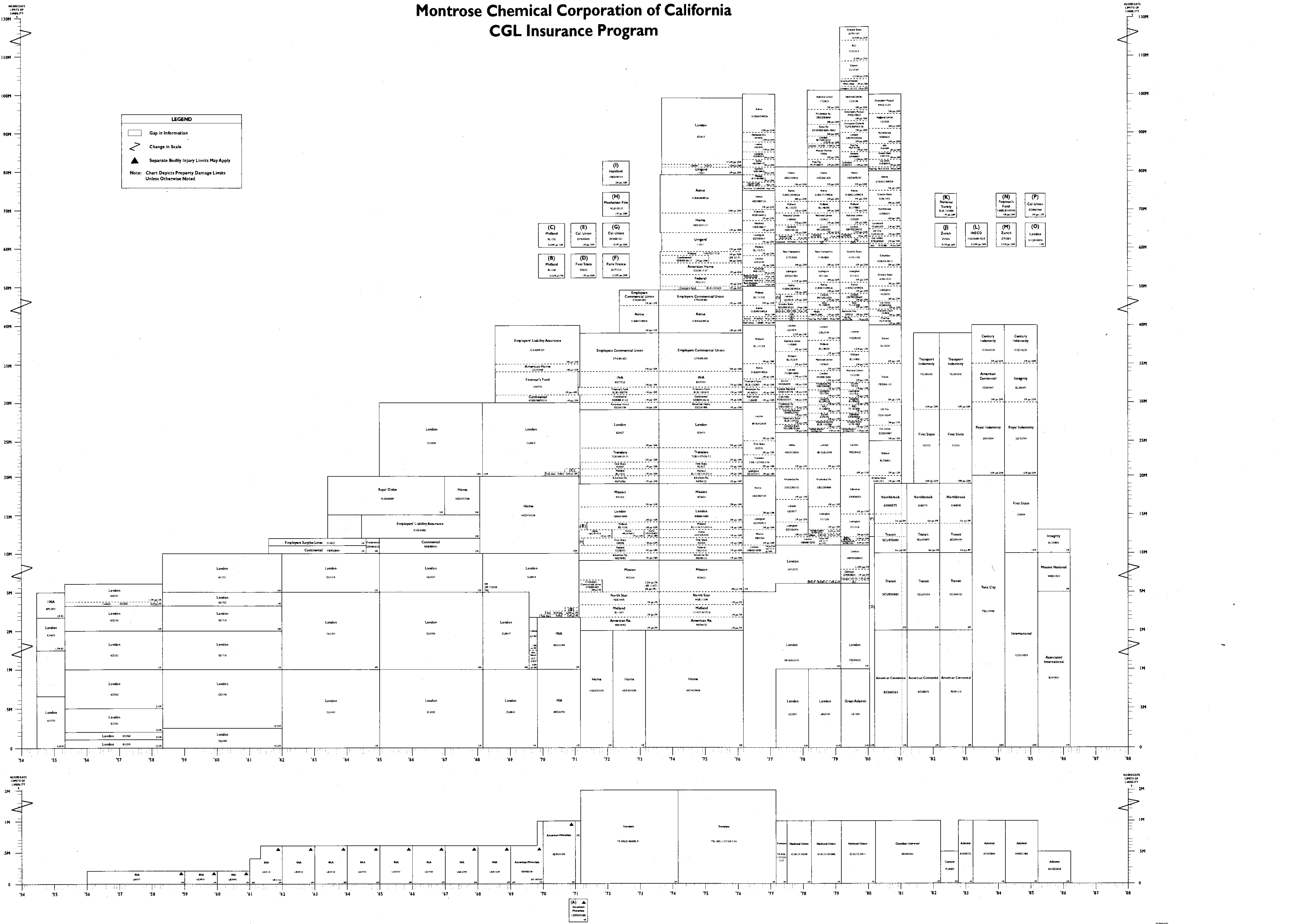
Linda Bondi Morrison, Esq. Lindsey D. Dean, Esq. TRESSLER LLP 2 Park Plaza, Suite 1050 Irvine, CA 92614 Tel: 949.336.1200 Fax: 949.752.0645 lmorrison@tresslerllp.com ldean@tresslerllp.com	Attorneys for Real Parties in Interest ALLSTATE INSURANCE COMPANY (solely as successor-in-interest to Northbrook Excess and Surplus Insurance Company)
Kevin G. McCurdy, Esq. Vanci Y. Fuller, Esq. MCCURDY & FULLER LLP 800 South Barranca Avenue, Suite 265 Covina, CA 91723 Tel: 626.858.8320 Fax: 626.858.8331 kevin.mccurdy@mccurdylawyers.com vanci.fuller@mccurdylawyers.com	Attorneys for Real Parties in Interest EVEREST REINSURANCE COMPANY (as successor-in-interest to Prudential Reinsurance Company) and MT. MCKINLEY INSURANCE COMPANY (as successor-in-interest to Gibraltar Casualty Company)
Kirk C. Chamberlin, Esq. Michael Denlinger, Esq. CHAMBERLIN & KEASTER LLP 16000 Ventura Boulevard, Suite 700 Encino, CA 91436 Tel: 818.385.1256 Fax: 818.385.1802 kchamberlin@ckbllp.com mdenlinger@ckbllp.com	Attorneys for Real Party in Interest PROVIDENCE WASHINGTON INSURANCE COMPANY (successor by way of merger to Seaton Insurance Company, formerly known as Unigard Security Insurance Company, formerly known as Unigard Mutual Insurance Company)
Thomas R. Beer, Esq. Peter J. Felsenfeld, Esq. HINSHAW & CULBERTSON LLP One California Street, 18th Floor San Francisco, CA 94111 Tel: 415.362.6000 Fax: 415.834.9070 tbeer@mail.hinshawlaw.com pfelsenfeld@mail.hinshawlaw.com	Attorneys for Real Party in Interest HDI-GERLING INDUSTRIE VERSICHERUNGS, AG (formerly known as GERLING KONZERN ALLGEMEINE VERSICHERUNGS-AKTIENGESELLSCHAFT)
Jordon E. Harriman, Esq. LEWIS BRISBOIS BISGAARD & SMITH LLP 633 West 5th Street, Suite 4000 Los Angeles, CA 90071 Tel: 213.250.1800 Fax: 213.250.7900 jordon.harriman@lewisbrisbois.com	Attorneys for Real Parties in Interest GENERAL REINSURANCE CORPORATION and NORTH STAR REINSURANCE CORPORATION

Michael J. Balch. Esq. BUDD LARNER PC 150 John F. Kennedy Parkway Short Hills, NJ 07078 Tel: 973.379.4800 Fax: 973.379.7734 mbalch@buddlarner.com	Attorneys for Real Parties in Interest GENERAL REINSURANCE CORPORATION and NORTH STAR REINSURANCE CORPORATION
Andrew T. Frankel, Esq. SIMPSON THATCHER & BARTLETT LLP 425 Lexington Avenue New York, NY 10017 Tel: 212.455.2000 Fax: 212.455.2502 afrankel@stblaw.com	Attorneys for Real Parties in Interest TRAVELERS CASUALTY AND SURETY COMPANY (formerly known as The Aetna Casualty & Surety Company) and THE TRAVELERS INDEMNITY COMPANY
Deborah Stein, Esq. SIMPSON THATCHER & BARTLETT LLP 1999 Avenue of the Stars, 29th Floor Los Angeles, CA 90067 Tel: 310.407.7500 Fax: 310.407.7502 pjordan@stblaw.com jmarek@stblaw.com dstein@stblaw.com	Attorneys for Real Parties in Interest TRAVELERS CASUALTY AND SURETY COMPANY (formerly known as The Aetna Casualty & Surety Company) and THE TRAVELERS INDEMNITY COMPANY
Andrew McCloskey, Esq. McCLOSKEY, WARING, WAISMAN & DRURY LLP 12671 High Bluff Drive, Suite 350 San Diego, CA 92130 Tel: 619.237.3095 Fax: 619.237.3789 amccloskey@mwwllp.com	Attorneys for Real Party in Interest WESTPORT INSURANCE CORPORATION (formerly known as Puritan Insurance Company, formerly known as The Manhattan Fire and Marine Insurance Company)
Mary E. Gregory, Esq. SINNOTT, PUEBLA CAMPAGNE & CURET, ALPC 550 South Hope Street, Suite 2350 Los Angeles, CA 90017 Tel: 213.996.4200 Fax: 213.892.8322 mgregory@spcclaw.com	Attorneys for Real Party in Interest ZURICH INTERNATIONAL (BERMUDA) LTD.
Philip R. King, Esq. COZEN O'CONNOR 123 North Wacker Drive, Suite 1800 Chicago, IL 60606 Tel: 312.382.3100 Fax: 312.382.8910 pking@cozen.com	Attorneys for Real Party in Interest ZURICH INTERNATIONAL (BERMUDA) LTD.

John K. Daly, Esq. COZEN O'CONNOR 707 17th Street, Suite 3100 Denver, CO 80202 Tel: 720.479.3900 Fax: 720.479.3890 jdaly@cozen.com	Attorneys for Real Party in Interest ZURICH INTERNATIONAL (BERMUDA) LTD.
The Honorable Carolyn B. Kuhl Los Angeles Superior Court Department 12 Spring Street Courthouse 312 North Spring Street Los Angeles, CA 90012	[Overnight Delivery Only]
Honorable Elihu M. Berle Los Angeles Superior Court Department 6 Spring Street Courthouse 312 North Spring Street Los Angeles, CA 90012	[Overnight Delivery Only]
Court of Appeal Second Appellate District, Division 3 300 South Spring Street 2nd Floor, North Tower, Los Angeles, CA 90013	[Overnight Delivery Only]

Attachment

Montrose Chemical Corporation of California
CGL Insurance Program



00099