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Supreme Court of California
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CASE #: S244737

Case No. _________

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,
Petitioner,

v.

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

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

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

**After Grant of Review and Transfer to Court of Appeal to Vacate Order
Denying Writ of Mandate and Order to Show Cause
Supreme Court Case No. S236148**

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

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

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA'S PETITION FOR REVIEW

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TABLE OF CONTENTS

Page No.

I. ISSUES PRESENTED 8

II. WHY REVIEW SHOULD BE GRANTED 9

III. STATEMENT OF THE CASE 17

IV. LEGAL DISCUSSION 23

A. The DCA's Expansion of Standard CGL "Other Insurance" Conditions Defies This Court's *Dart* Decision and Improperly Restricts Coverage in Continuous Damage Cases 24

1. Boilerplate "Other Insurance" Provisions Do Not Defeat or Delay Coverage 25

2. Elevating "Other Insurance" Provisions to Dictate the Trigger of Coverage Violates Fundamental Policy Interpretation Rules 28

B. Mandatory Horizontal Exhaustion of Excess Coverage Defies Policy Language and California Law 31

1. By Forcing Policyholders to Allocate Liability Across All Policy Years, Horizontal Exhaustion Directly Conflicts With This Court's Decisions Permitting Policyholders to Obtain Coverage Under Any Triggered Policy 31

2. Policyholders' Rights to Excess Indemnity Coverage Are Not Governed By the Inapposite Pre-*Dart*/*Continental* Court of Appeal Ruling in *CRA* 34

C. Mandatory Horizontal Exhaustion Rewrites Coverage To Impose Additional Burdens on the Policyholder's Right to Indemnity 36

1. Mandatory Horizontal Exhaustion Deprives the Policyholder of the Right to Select Policies for Indemnity By Forcing Needless Litigation Under More Restrictive Policies in Every Potentially Triggered Period 37

2. Mandatory Horizontal Exhaustion Unfairly and Inefficiently Delays Indemnity By Compelling Policyholders to Litigate Inter-Insurer Contribution Issues... 41

V. CONCLUSION 44

CERTIFICATE OF WORD COUNT 46

ATTACHMENT 1: *Montrose Chemical Corp. v. Super. Ct.* (2017) 14 Cal.App.5th 1306

ATTACHMENT 2: Montrose Chemical Corp. of California CGL Insurance Policy Chart

PROOF OF SERVICE

TABLE OF AUTHORITIES

Page No.

CASES

Aerojet–Gen. Corp. v. Transport Indemnity Co.
(1997) 17 Cal.4th 38 .... passim

Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.
(1996) 45 Cal.App.4th 1 .... 24, 31, 33, 40

Boghos v. Certain Underwriters at Lloyd's of London
(2005) 36 Cal.4th 495 30

Briggs v. Brown
(2017) 3 Cal.5th 808 16

Carmel Development Co. v. RLI Ins. Co.
(2005) 126 Cal.App.4th 502 26

Century Surety Co. v. United Pacific Ins. Co.
(2003) 109 Cal.App.4th 1246 25

Commercial Union Assurance Cos. v. Safeway Stores, Inc.
(1980) 26 Cal.3d 912 18

Community Redevelopment Agency v. Aetna Casualty & Surety Co.
(1996) 50 Cal.App.4th 329 .... passim

Dart Industries, Inc. v. Commercial Union Ins. Co.
(2002) 28 Cal.4th 1059 .... passim

Delgado v. Heritage Life Ins. Co.
(1984) 157 Cal.App.3d 262 29

Employers Reinsurance Corp. v. Phoenix Ins. Co.
(1986) 186 Cal.App.3d 545 42

Fireman's Fund Ins. Co. v. Maryland Casualty Co.
(1998) 65 Cal.App.4th 1279 .... 26, 28

Haynes v. Farmers Ins. Exchange
(2004) 32 Cal.4th 1198 29

Legacy Vulcan Corp. v. Super. Ct.
(2010) 185 Cal.App.4th 677 35

Matter of Viking Pump, Inc.
(N.Y. 2016) 27 N.Y.3d 244 .... 15, 27, 36

Montrose Chem. Corp. v. Admiral Ins. Co
(1995) 10 Cal.4th 645 .... 9, 14, 17, 32

People v. Manzo
(2012) 53 Cal.4th 880 17

People v. Rios
(2013) 222 Cal.App.4th 542 25

Pepsi-Cola Metro. Bottling Co. v. Ins. Co. of N. Am., Inc.
(C.D. Cal. Dec. 28, 2010, No. 10-2696)
2010 U.S. Dist. LEXIS 144401 43

Signal Cos., Inc. v. Harbor Ins. Co.
(1980) 27 Cal.3d 359 33

State of California v. Continental Ins. Co.
(2009) 170 Cal.App.4th 160 .... 32, 35

State of California v. Continental Ins. Co.
(2012) 55 Cal.4th 186 .... passim

State of California v. The Continental Ins. Co.
(Cal. Ct. App. Sept. 29, 2017, E064518)
2017 Cal.App. LEXIS 846 .... passim

Stonelight Tile, Inc. v. Cal. Ins. Guarantee Assn.
(2007) 150 Cal.App.4th 19 33

Trammell Crow Residential Co. v. St. Paul Fire and Marine Ins. Co.
(N.D. Tex. Jan. 21, 2014, No. 3:11-CV-2853-N)
2014 WL 12577393 43

Travelers Casualty & Surety Co. v. Century Surety Co.
(2004) 118 Cal.App.4th 1156 25

Truck Ins. Exchange v. Amoco Corp.
(1995) 35 Cal.App.4th 814 43

Viking Pump, Inc. v. Century Indemnity Co.
(Del.Super.Ct., Feb. 28, 2014, No. 10C-06-141)
2014 Del. Super. LEXIS 707 36

Wells Fargo Bank v. Cal. Ins. Guarantee Assn.
(1995) 38 Cal.App.4th 936.. 18, 30

Westport Ins. Corp. v. Appleton Papers, Inc.
(Wis.Ct.App. 2010) 787 N.W.2d 894 .... 34, 41

RULES

Cal. Rules of Court, rule 8.264(b)(1) 12

Cal. Rules of Court, rule 8.500(b)(1) 16

I. ISSUES PRESENTED

1. In a complex multi-year, multi-insurer, multi-layer comprehensive general liability ("CGL") program, does the standard "other insurance" condition in CGL policies dictate when an excess insurer's obligations to its policyholder are triggered, or are such provisions relevant only to contribution disputes between insurers, as this Court held in *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059 ("*Dart*") and the Fourth District Court of Appeal recently confirmed in *State of California v. The Continental Ins. Co.* (Cal. Ct. App. Sept. 29, 2017, E064518) 2017 Cal.App. LEXIS 846 ("*Continental* Opinion")?

2. Notwithstanding policy language stating that an excess policy attaches upon the exhaustion of a defined amount of immediately underlying insurance in the same period, does the presence of an "other insurance" provision obligate the policyholder to first pursue and exhaust coverage under excess policies issued in every other potentially triggered period spanning the years of continuous damage (including policies with more onerous terms and conditions), thereby effectively imposing mandatory horizontal exhaustion of excess coverage, in contravention of *State of California v. Continental Ins. Co*. (2012) 55 Cal.4th 186 ("*Continental*"), *Aerojet–Gen. Corp. v. Transport Indemnity Co.* (1997) 17

Cal.4th 38 ("*Aerojet*"), and *Montrose Chem. Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645 ("*Montrose*")?

II. WHY REVIEW SHOULD BE GRANTED

This Petition represents the apex of persistent litigation between the insurance industry and CGL policyholders concerning coverage for large-scale environmental and similar property damage claims. Once more leading the way in the national debate, this Court should again grant review to answer the most encompassing indemnity insurance question to date: *In a multi-year, multi-layer, multi-insurer coverage program, which insurers may be called upon to pay the policyholder's continuous damage liabilities and when?*

This question has resonated loudly in the years since *Continental*, which declared that California law entitles policyholders facing continuous damage liabilities to obtain coverage from ***any*** triggered policy under an "all sums with stacking" interpretation. Having failed to convince the Court to adopt their mandatory rule of "pro rata" exhaustion of excess insurance policies, the insurance industry has since searched tirelessly for an alternative method to restrict the basic coverage granted by each individual policy. Here, Insurers—led by the same party whose arguments were rejected in *Continental*—seek to accomplish their goal by a different means: compelling policyholders to "horizontally" exhaust all lower-level

excess coverage across all years before tapping individual excess policies triggered by their plain terms.

To do so, Insurers misinterpret policy language and California law, exalting the boilerplate "other insurance" clauses of standardized CGL excess policies into a provision that purportedly prohibits policyholders from accessing coverage under any particular excess policy until first litigating coverage under *every* lower-level policy issued in other coverage periods. At Insurers' behest, Respondent Superior Court ruled that the standard "other insurance" provisions contained in *all* of Montrose's policies obligated Montrose to horizontally exhaust its excess coverage. Respondent expanded a Court of Appeal decision issued prior to *Continental* and *Dart,* which required horizontal exhaustion of ***defense*** coverage under ***primary*** policies,[1] to ***indemnity*** coverage under ***excess*** policies. After the Second District Court of Appeal ("DCA") initially declined to review Respondent's erroneous decision, which did not even attempt to reconcile its ruling with this Court's interpretation of "other insurance" provisions in *Dart*, this Court granted review and directed the DCA to consider the merits of Montrose's position.

On remand, the DCA effectively reached the same result as Respondent by concluding that standard "other insurance" language

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[1] *Community Redevelopment Agency v. Aetna Casualty & Surety Co.* (1996) 50 Cal.App.4th 329 ("*CRA*").

compels horizontal exhaustion, regardless of insuring language providing that the Policies attach "after other ***identified*** insurance is exhausted." (Opinion at p. 1333 (emphasis added); cf. *id*. at p. 1328 [Montrose's position relies on "the insuring agreements and declarations"—i.e., the provisions specifying when coverage attaches].) The DCA attempted to narrow the scope of its sweeping pronouncement by directing further examination of whether "each of the policies at issue has an 'other insurance' clause" (*id*. at p. 1334, fn.7), but ultimately conceded that the result of its "other insurance" analysis is "mandatory horizontal exhaustion" for any policy containing that standard condition. (*Id*. at pp. 1335-1336.)[2]

The DCA's Opinion would make new law, creating nearly insurmountable coverage barriers for policyholders in continuous damage cases, because it directly contradicts this Court's prior determination in *Dart* that "other insurance" provisions apply ***only*** to prevent double recovery and to permit insurers who cover the same loss to equitably allocate responsibility for the policyholder's claim, after the policyholder has been fully indemnified. (See *Dart*, *supra*, 28 Cal.4th at p. 1080;

[2] There is no dispute that ***all*** of the Policies at issue contain boilerplate "other insurance" language—Insurers expressly acknowledged as much and Respondent Superior Court explicitly so found. (See Answer to Montrose's Petition at p. 28; 1PA1 at pp. 55-56).

compare Opinion at p. 1332 [“Montrose’s assertion about ‘other insurance’ clauses ***finds no support in*** **Dart**.”] [emphasis added].)

In failing to abide by this Court’s clear pronouncement in *Dart*, the DCA’s Opinion also creates an express conflict with a nearly contemporaneous decision recently issued by the Fourth District Court of Appeal. Upon remand from this Court’s decision in *State v. Continental*, Continental unsuccessfully advanced the same misguided horizontal exhaustion arguments urged here. The Superior Court squarely refused to apply “horizontal exhaustion” to the excess policies at issue, rejecting Continental’s reliance on both “other insurance” language and any “rule” purportedly mandated by *CRA*. (2PA11 at pp. 295:3-297:8.) The Fourth District affirmed, recognizing that *Dart* conclusively establishes that “other insurance” provisions do not impact the policyholder’s right to recovery under triggered insurance policies. (See *Continental* Opinion, at *18-20.)[3]

Compounding its erroneous application of the “other insurance” provision, the DCA’s Opinion also calls into question decades of this Court’s jurisprudence regarding the trigger of coverage for continuous losses under occurrence-based policies, suggesting that those decisions do

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[3] The Fourth District’s ruling that “other insurance” provisions do not limit policyholders’ rights to access a particular excess policy once the immediately underlying coverage has been exhausted, although not yet final (see Cal. Rules of Court, rule 8.264(b)(1)), represents a direct conflict with the DCA’s Opinion.

not apply to excess policies. (See Opinion at pp. 1326-1327 ["[T]he court in *Continental* did not consider the aspect of 'trigger of coverage' before us in this case—what lower layer excess policies must be exhausted before a higher-layer excess policy is triggered."].) As a result, the DCA invites confusion and multiplication of complex insurance disputes, as excess insurers use the Opinion as new fodder to re-litigate coverage obligations under law previously settled. Indeed, insurers immediately began citing the DCA's ruling as a basis to avoid or delay their obligations to policyholders.[4]

The DCA's "other insurance" ruling will not only increase coverage litigation exponentially, but far worse, will deprive policyholders of their immediate right to coverage under the plain terms of a single excess policy by bringing all "other insurance" into play before any one policy must pay. This unprecedented rule would require policyholders to tap into and exhaust separate excess policies spread across all coverage years before obtaining benefits under any one policy triggered by its own insuring language. Insurers would invoke this implied coverage limit despite the fact that the selected policy does not mention (much less require) exhaustion of adjacent years—separate and independent coverage which

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[4] See Request for Judicial Notice, filed in support of Montrose's Petition for Review ("RJN"), Declaration of Drew T. Gardiner, ¶¶ 2-3, Exhibits 1, 2.

may not even have existed at the time the policy in question was written. This contrived obligation would even require exhaustion of unrelated policies with different or potentially greater coverage restrictions before broader excess coverage may be tapped. Ultimately, this scheme would improperly allow insurers to defeat coverage that plainly exists and to convert policyholders' insurance assets into their own, benefiting from policyholders' prudent decision to obtain coverage in other years, even though the insurers did not bear the cost of that purchase.

Montrose's position, by contrast, rests on the plain policy language of each individual policy, and on insurance coverage principles long declared by this Court: Policyholders should not have their coverage rights truncated by any artificial, extra-policy exhaustion or "other insurance" scheme, much less a "mandatory horizontal exhaustion" rule fundamentally at odds with the "all sums with stacking" interpretation recognized in *Continental*. Rather, California law expressly enforces the policyholder's right to call upon any of the individual insurance contracts it purchased. (See *Aerojet*, *supra*, 17 Cal.4th at p. 57 & fn.10 ["'successive' insurers 'on the risk when continuous or progressively deteriorating [property] damage . . . first manifests itself' are separately and independently 'obligated to indemnify the insured'" (citing *Montrose*, *supra*, 10 Cal.4th at pp. 686-687)]; *Continental*, *supra*, 55 Cal.4th at pp. 200-201 ["***each policy*** can be called upon to respond to the claim up to the

full limits of the policy," and once "the policy limits of a given insurer are exhausted, [the insured] is entitled to seek indemnification from ***any*** of the remaining insurers on the risk." (emphases added; alteration in original)].)

The issues of exhaustion, allocation, and horizontal and vertical stacking in continuous damage cases are not easy, but they are unquestionably important. Because they involve literally ***billions*** of coverage dollars and challenging legal questions, these issues are litigated intensively by an insurance industry focused on shifting the burden of insurance recovery onto the backs of policyholders. Coverage delayed is often coverage denied, and this Court has called for "immediate" indemnification, not protracted policyholder litigation in inter-carrier insurance battles over contribution. (*Continental*, *supra*, 55 Cal.4th at p. 201; *Dart*, *supra*, 28 Cal.4th at p. 1080.) Definitive resolution of these weighty issues, once again, calls this Court to the forefront of national insurance jurisprudence.[5]

[5] Courts across the country—including most recently New York's highest court—are also grappling with insurers' attempts to force mandatory horizontal exhaustion upon policyholders. (See *Matter of Viking Pump, Inc*. (N.Y. 2016) 27 N.Y.3d 244, 265 [permitting policyholder to vertically exhaust because "the excess policies at issue primarily hinge their attachment on the exhaustion of underlying policies that cover the same policy period as the overlying excess policy" and because "vertical exhaustion is conceptually consistent with an all sums allocation"].)

This complex litigation involving most of the industry's largest excess CGL insurers provides an ideal vehicle for resolution. The DCA's evasion of *Dart*, its limitation of decades of "trigger" jurisprudence, and its unwarranted extension of a pre-*Dart*/*Continental* Court of Appeal ruling (*CRA*) to excess coverage layers, requires prompt correction. Otherwise, courts across the state will, as the recent conflicting Court of Appeal decisions confirm, continue to issue contradictory rulings and litigants will incur significant time and expense in unwieldy coverage litigations like this one. The cost of obtaining coverage should not exceed the coverage benefit itself—an inevitable consequence of forcing policyholders to endlessly litigate the insurers' respective obligations in continuous loss, multi-policy cases.

Last October, this Court recognized the widespread importance of the issues presented by Montrose's petition when it directed the DCA to consider the merits of the parties' arguments. The DCA's decision repeats the fundamental mistake made by the Superior Court, and conflicts with the subsequent decision from the Fourth District Court of Appeal. This Court should grant review to resolve this "important" question of law and "secure uniformity of decision" in the courts below. (Cal. Rules of Court, rule 8.500(b)(1).)[6]

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[6] (See *Briggs v. Brown* (2017) 3 Cal.5th 808, 861 [explaining the Supreme Court's "important role . . . to secure harmony and uniformity

III. STATEMENT OF THE CASE

Montrose was formerly the world's largest producer of DDT, a pesticide and anti-malarial agent. In 1990, various government plaintiffs sued Montrose, seeking damages arising from alleged releases of hazardous substances into the environment as a result of Montrose's operations at its former manufacturing facility in Torrance. (4PA17 at pp. 869-70.) Pursuant to partial consent decrees with the government plaintiffs, Montrose already has incurred damages of more than $100 million, and its anticipated future liability could approach or exceed that amount. (2PA12 at pp. 300-568.) These damages must be paid to fund environmental cleanup.

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

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in the decisions [of the Courts of Appeal], their conformity to the settled rules and principles of law, [and] a uniform rule of decision throughout the state"]; *Montrose*, *supra*, 10 Cal.4th at p. 661 [granting petition to decide "the complex and important issue" of which CGL policies are triggered when continuous damage spans multiple policy years]; *People v. Manzo* (2012) 53 Cal.4th 880, 884 [granting review "[b]ecause of [a] published conflict" between Courts of Appeal].)

underlying insurance.[7] Each Policy describes the applicable underlying coverage in one of four ways:

1. Schedule of underlying insurance listing known underlying policies in the same policy year by insurer, policy number, and dollar amount;[8]
2. Specific dollar amount of underlying insurance in the same policy period *and* schedule of underlying insurance on file with the insurer;[9]
3. Specific dollar amount of underlying insurance in the same policy period *and* identifying at least one underlying insurer;[10] or
4. Specific dollar amount of underlying insurance that corresponds with the combined limits of underlying policies in that policy period.[11]

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

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

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

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

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

Therefore, each of the Policies expressly provides that coverage attaches in excess of a specific, predetermined amount of underlying coverage ***in the same policy year***. The DCA did not reconcile its ruling with this attachment language, instead claiming (falsely) that "while Montrose repeatedly asserts that the excess policies attach upon the exhaustion of lower layer policies within the same policy period, ***it does not identify the provisions that supposedly have that effect***." (Opinion at p. 1327 (emphasis added).) To the contrary, Montrose cited the above provisions multiple times in its briefs. (See Writ Petition at pp. 19, 36, 59-60; Combined Reply at p. 30.)

Consistent with other standardized CGL policies, the Policies also contain or incorporate an "other insurance" condition, which typically provides:

> If other valid and collectible insurance with any other insurer is available to the Insured covering a loss also covered by this policy, other than insurance that is in excess of the insurance afforded by this policy, the insurance afforded by this policy shall be in excess of and shall not contribute with such other insurance.[12]

Citing this boilerplate language, Insurers argued that Montrose cannot access coverage under any one policy unless and until Montrose exhausts ***all*** "underlying coverage" ***in every policy period across the***

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

decades of damage. This requirement is not supported by the "other insurance" provisions, and would be grossly oppressive in practice given the many different attachment points and varying terms of the hundreds of triggered Policies stretching over Montrose's multi-decade coverage portfolio. (See generally Attachment 2.) Because of the inordinately complicated undertaking required to determine the manner in which "underlying" policies are exhausted, "mandatory horizontal exhaustion" could deprive Montrose of immediate indemnification under its Policies.

Montrose amended its operative Complaint to assert a stand-alone cause of action to resolve this dispute, which the parties agreed was a critical threshold legal issue necessary to structure the litigation. (4PA17 at pp. 900, 914.) The parties filed cross-motions for summary adjudication of Montrose's Thirty-Second Cause of Action. Montrose's motion sought a declaration that it could seek coverage under any chosen excess policy after proving exhaustion of the immediately underlying policies, and Insurers' cross-motion argued that Montrose was obligated, as a matter of law, to allocate its losses evenly across all periods. Insurers did not argue that supposed variations in policy language prevented resolution of this threshold and pivotal legal issue.

Respondent Superior Court denied Montrose's motion and granted Insurers' cross-motion. (1PA2 at pp. 80-82.) Respondent held that Montrose is required as a matter of law to horizontally allocate its coverage

claim across all policy periods, thereby preventing Montrose from vertically accessing excess coverage in any one period, even after exhaustion of the Policy(ies) directly beneath it, until first exhausting coverage available from Policies issued by different insurers and governed by different terms, in every other period. (1PA1 at pp. 59:27-60:6.)

Montrose timely petitioned the DCA for writ review, which was denied summarily on July 13, 2016. On October 12, 2016, this Court granted Montrose's petition for review and transferred the case back to the DCA, with directions to vacate the order denying Montrose's petition and to issue an order to show cause why the relief Montrose sought should not be granted. Following additional briefing and oral argument, the DCA issued its opinion on August 31, 2017. (See *Montrose Chemical Corp. v. Super. Ct.* (2017) 14 Cal.App.5th 1306 ("Opinion"), attached hereto as Attachment 1.)

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

attaches[.]" (emphasis added)]; *id.* at p. 1334 ("'[O]ther insurance' clauses may be relevant to determining . . . the order in which excess policies attach."]; contra *Dart*, *supra*, 28 Cal.4th at p. 1080.)

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

Thus, the purely legal issue now before this Court is whether the boilerplate "other insurance" language omnipresent in standard CGL policies, including all of Montrose's Policies, can be read to mandate horizontal exhaustion of an indeterminate amount of "underlying

insurance" in different policy years. (Opinion at p. 1333.) Because that ruling conflicts with both the express insuring language specifying that each of the Policies attaches above a predetermined amount of coverage in the same period, and settled California law announced by this Court in a consistent line of decisions from *Montrose* to *Aerojet* to *Dart* to *Continental*, Montrose seeks review of the DCA's decision.

IV. LEGAL DISCUSSION

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

Concomitantly, this Court has held that "other insurance" provisions have ***no impact*** on the insured's coverage rights for continuous

damage losses. (*Dart*, *supra*, 28 Cal.4th at p. 1080.) Instead, "other insurance" provisions may impact inter-insurer allocation exercises ***after*** the policyholder has been fully indemnified. (*Ibid.*) That "apportionment, however, has ***no bearing*** upon the insurers' obligations to the policyholder." (*Ibid.* (emphasis added); see also *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.* (1996) 45 Cal.App.4th 1, 106 ("*Armstrong*") ["allocation among insurers 'does not reduce their respective obligations to their insured'" (internal citation omitted)].)

In the decision below, the DCA turned these foundational rules on their head, concluding that standard "other insurance" provisions obligate policyholders to pursue and obtain coverage from policies (even with less favorable provisions) in different years, thereby negating policyholders' right to call upon individual contracts according to their terms. This unjustified result disregards decades of this Court's jurisprudence, including the clear guidance from both *Continental* and *Dart*.

A. The DCA's Expansion of Standard CGL "Other Insurance" Conditions Defies This Court's *Dart* Decision and Improperly Restricts Coverage in Continuous Damage Cases

This case is not the first in which insurers have attempted to exploit the standard "other insurance" condition contained in all CGL policies to artificially limit their obligations to policyholders. However,

California courts have long made clear that these provisions serve discrete, limited functions, and do not impact insurers' obligations to their policyholders. Most importantly, in *Dart*, this Court reviewed the historical purpose of the "other insurance" clause, and ruled that these "disfavored" conditions relate solely to inter-insurer allocation after the policyholder has been fully indemnified. (*Dart*, *supra*, 28 Cal.4th at p. 1080 (internal citation omitted).) The DCA should have honored this determination: "When the Supreme Court has conducted a thorough analysis" of the interpretation and application of policy provisions, lower courts and litigants must abide. (See *People v. Rios* (2013) 222 Cal.App.4th 542, 563.) Instead, the DCA elevated the "other insurance" provision to effectively mandate horizontal exhaustion of standard CGL excess policies.

1. Boilerplate "Other Insurance" Provisions Do Not Defeat or Delay Coverage

Prior attempts to expand the application of standard "other insurance" conditions have been rejected by California courts because the purposes of these mutually repugnant provisions are merely to prevent double recovery, and to support contribution between insurers after the policyholder has been fully indemnified. (See, e.g., *Century Surety Co. v. United Pacific Ins. Co.* (2003) 109 Cal.App.4th 1246; *Travelers Casualty & Surety Co. v. Century Surety Co.* (2004) 118 Cal.App.4th 1156.) Thus, courts only enforce boilerplate "other insurance" clauses "when no

prejudice to the interests of the insured will ensue." (*Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1304 ("*Fireman's Fund*").)

Violating this clear precedent, the DCA reached the novel conclusion that "other insurance" clauses instead "define the insurance that must be exhausted before the excess insurance attaches" and therefore are "relevant to determining . . . the order in which excess policies attach." (Opinion at pp. 1333-1334; contra *Dart*, 28 Cal.4th at p. 1079, fn.6 ["An 'other insurance' dispute ***cannot*** arise between" insurers in different layers (emphasis added)].)

The ***only*** authority cited by the DCA in support of its bold new interpretation was *Carmel Development Co. v. RLI Ins. Co.* (2005) 126 Cal.App.4th 502 ("*Carmel*"). The decision below devotes three pages to *Carmel*, despite the fact that it was not relied upon by the Insurers—for good reason. Specifically, *Carmel* did not involve "other insurance" clauses contained in policies issued over multiple years—the fundamental issue in this case. Rather, the two policies in dispute were issued in the ***same policy year***, and the debate concerned whether either ***concurrent*** policy was intended to be excess to the other. A large body of case law confirms that "other insurance" clauses are ***only*** intended to apply to these concurrent policy situations:

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

(*Viking Pump*, *supra*, 27 N.Y.3d at p. 266 (internal citations omitted; emphasis in original); *ibid.* ["[O]ther insurance clauses are not implicated in situations involving successive — as opposed to concurrent — insurance policies[.]" (collecting cases)].)

Rather than relying on an inapt Court of Appeal decision, the DCA should have applied this Court's guidance regarding the purpose and proper use of standard "other insurance" clauses. Yet the DCA attempted to distinguish *Dart* on the basis that the insurer there "was a *primary* insurer, while the insurers in the present case are *excess* insurers." (Opinion at p. 1333.)

However, nothing in *Dart* limits this Court's rationale to primary coverage, or hints at any reason why standard "other insurance" provisions should assume a role in excess policies that they do not play in primary policies, as the DCA held. (Opinion at p. 1333 ["This difference between primary and excess insurance in this context is material."].) To the contrary, *Dart* recognized that contribution disputes between insurers arise in both the primary and excess layers: "'[o]ther insurance' clauses become

relevant only where several insurers insure the same risk at the *same level* of coverage." (*Dart*, *supra*, 28 Cal.4th at p. 1078, fn.6 (citation omitted).)

In direct contrast to the DCA, the Fourth District subsequently confirmed the clear import of this Court's ruling in *Dart* by rejecting Continental's effort to expand the limited purpose of "other insurance" provisions. (See *Continental* Opinion, *supra*, 2017 Cal.App. LEXIS 846, at *18-20.) This Court should grant review to resolve this conflict, reaffirm that its pronouncements in *Dart* apply equally to excess coverage, and conclusively establish that "other insurance clauses are intended to apply in contribution actions between insurers, not in coverage litigation between insurer and insured." (*Id*. at *18.)

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

Like any standard excess policy, Montrose's Policies include express language stating that they attach upon exhaustion of a specified amount of underlying insurance in the ***same policy period***. Each provides that coverage thereunder attaches in excess of a "predetermined" dollar amount keyed to specified underlying limits. (See 1PA6 at pp. 117-206; see generally *Fireman's Fund*, *supra*, 65 Cal.App.4th at p. 1304 [excess insurance provides coverage "after a predetermined amount of primary coverage has been exhausted"].) Those limits refer solely to the underlying coverage ***in the same policy year***. (See, *supra*, at p. 18 [identifying the four

methods the Policies use to define the underlying insurance].) Importantly, this attachment or exhaustion language in the Policies does ***not*** reference coverage available under Policies in prior or subsequent years.[13]

A rule requiring exhaustion of coverage in different policy periods improperly attempts to override this express trigger language. (See *Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1204 ["[A]ny provision that takes away or limits coverage reasonably expected by an insured must be 'conspicuous, plain and clear.'"]; *Delgado v. Heritage Life Ins. Co.* (1984) 157 Cal.App.3d 262, 271 ["[P]olicy provisions which limit insurance coverage . . . are strictly construed against the insurer and liberally interpreted in favor of the insured."].)

The DCA's ruling that "other insurance" provisions define the coverage that must be exhausted before a given excess policy attaches necessarily renders the Policies' specific attachment language either meaningless or surplusage, in violation of fundamental principles of insurance policy interpretation. (See *Boghos v. Certain Underwriters at*

[13] The DCA focused on policies issued by two insurers (Continental and Columbia) that reference "other insurance" in the definition of "loss." (Opinion at pp. 1328-1329.) This fact was superfluous to the Court's decision because those policies also contain "other insurance" provisions. (*Id*. at pp. 1329-1330.) Moreover, as the Fourth District explained in considering functionally equivalent policy language written by the same insurer, there is "no reason" to apply a different rule merely because "other insurance" provisions are "incorporated into the definition of Ultimate Net Loss" as in Continental's policies. (See *Continental* Opinion, *supra*, 2017 Cal.App. LEXIS 846, at *19.)

Lloyd's of London (2005) 36 Cal.4th 495, 503 [rules of interpretation "disfavor constructions of contractual provisions that would render other provisions surplusage"].) Obviously, the express exhaustion language controls over the boilerplate "other insurance" condition, which, as shown above, has an entirely different meaning and purpose.

Indeed, the policyholder had no contractual obligation to buy prior or subsequent years of coverage (unlike the specifically-referenced underlying coverage), and could have chosen to "go bare" without any coverage in other years. Yet the Insurers insist that the policyholder's prudent decision to purchase extra, separate and independent coverage for different policy years somehow retroactively changes the policy language, greatly multiplying the attachment limits and thereby negatively impacting the policyholder's rights under each of the policies purchased. This is nonsensical, and contrary to the way policies are actually underwritten, as will be detailed in the merits briefing.[14]

Mandatory horizontal therefore rewards insurers for the policyholders' decision to purchase additional coverage, while at the same

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[14] Premiums are calculated based upon the risk assumed by the insurer. In the context of excess policies, the risk assumed by the insurer is predicated on a "predetermined amount" of underlying coverage purchased in the same policy year and specified in the policy. (See *Wells Fargo*, *supra*, 38 Cal.App.4th at p. 940, fn. 2.) 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.

time restricting the policyholder's ability to obtain prompt indemnification under a policy of its choosing, contravening California law. (See *Continental* Opinion, *supra*, 2017 Cal.App. LEXIS 846, at *26-27 ["It would be paradoxical if the fact that the State prudently decided to protect itself further by buying insurance . . . actually made it harder for the State to obtain indemnity from any one insurer."]; cf. *Aerojet*, *supra*, 17 Cal.4th at p. 75, fns. 25-26; *Armstrong*, *supra*, 45 Cal.App.4th at p. 105.)

B. Mandatory Horizontal Exhaustion of Excess Coverage Defies Policy Language and California Law

Prior to the DCA's decision, no California appellate court had ever hinted that a policyholder could be forced to horizontally exhaust its ***excess indemnity*** coverage across multiple separate policies and years as a prerequisite to vertically accessing other, independently-triggered excess policies. California law instead dictates that the policyholder may obtain excess indemnity coverage under ***any*** policy triggered by the underlying damage in accordance with the exhaustion language of that policy.

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

In a series of decisions dating back two decades, this Court has developed the "settled rule" that "an insurer on the risk when continuous or progressively deteriorating damage or injury first manifests itself remains

obligated to indemnify the insured for the entirety of the ensuing damage or injury." (*Montrose*, *supra*, 10 Cal.4th at p. 686.) This principle was reaffirmed by *Aerojet*, which noted that each insurer is "separately and independently" responsible for "the full extent of the insured's liability." (*Aerojet*, *supra*, 17 Cal.4th at p. 57 & fn.10.)

Building upon these rules, this Court subsequently affirmed that "if an occurrence is continuous across two or more policy periods, the insured has paid two or more premiums and can recover up to the combined total of the policy limits." (*Continental*, *supra*, 55 Cal.4th at p. 202.) The Court emphasized that "***each*** policy can be called upon to respond to the claim up to the full limits of the policy." (*Id*. at p. 200 (emphasis added).) To ensure the insured's "immediate access to the insurance it purchased" (*id*. at p. 201), the insured "'is entitled to seek indemnification from ***any*** of the remaining insurers [that were] on the risk . . . .'" (*Id*. at p. 200 (citation omitted; emphasis added).)[15]

The Court's consistent recognition that the ***policyholder*** has the right to access coverage under any triggered policy is based on bedrock

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[15] The Court "conclude[d] that the Court of Appeal below correctly applied" the allocation rule it adopted as the law of this state (*id*. at p. 191): "[W]hen there is a continuous loss spanning multiple policy periods, *any* insurer that covered *any* policy period is liable for the *entire* loss, up to the limits of its policy. The insurer's remedy is to seek contribution from any other insurers that are also on the risk." (*State of California v. Continental Ins. Co.* (2009) 170 Cal.App.4th 160, 178 (italics in original).)

California law. For decades, this Court and the Courts of Appeal have affirmed the insured's entitlement to enforce rights under each of its independent contracts. (E.g., *Signal Cos., Inc. v. Harbor Ins. Co.* (1980) 27 Cal.3d 359, 370 ["The contracts were separately negotiated with the insured . . . and must be independently interpreted."].) Concomitantly, the "all sums" principle requires that "each policy triggered . . . has an independent obligation to respond 'in full' to a claim" once the policyholder chooses to access it. (*Armstrong*, *supra*, 45 Cal.App.4th at p. 49; accord *Dart*, *supra*, 28 Cal.4th at p. 1080 ["The insurers' contractual obligation to the policyholder is to cover the full extent of the policyholder's liability (up to the policy limits."].)

Collectively, these pronouncements dictate the correct rule of law: "When a continuous loss is covered by multiple policies, ***the insured may elect to seek indemnity under a single policy*** with adequate policy limits. If that policy covers 'all sums' for which the insured is liable, as most CGL policies do, that insurer may be held liable for the entire loss." (*Stonelight Tile, Inc. v. Cal. Ins. Guarantee Assn.* (2007) 150 Cal.App.4th 19, 37 (emphasis added); see also *Armstrong*, *supra*, 45 Cal.App.4th at p. 52 ["[A] policyholder may obtain full indemnification and defense from one insurer, leaving the targeted insurer to seek contribution from other insurers covering the same loss."].)

Under no circumstances can the policyholder's right to choose the policy(ies) under which to seek indemnity be subjugated to the insurers' insistence on "horizontal exhaustion" of policies issued in different policy years. Indeed, mandating that the policyholder spread its liability across all policy periods triggered by a continuous loss would result in a prorated allocation directly conflicting with *Continental*, where this Court rejected the insurers' attempt to horizontally allocate indemnity damages on a "pro rata" basis as antithetical to "all sums" coverage. (*Continental*, *supra*, 55 Cal.4th at p. 199; accord *Westport Ins. Corp. v. Appleton Papers, Inc.* (Wis.Ct.App. 2010) 787 N.W.2d 894, 918 ["Horizontal exhaustion [ ] is another name for pro rata allocation."].)

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

Despite this Court's rejection of a pro rata horizontal allocation scheme in *Continental*, Insurers argue, and the courts below agreed, that a policyholder can be required to horizontally exhaust its excess coverage. In support of this finding, both the Superior Court and the DCA mistakenly relied on the pre-*Dart* and pre-*Continental* Court of Appeal decision in *CRA*, which this Court has never had occasion to review.[16]

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[16] Citing *CRA*, Respondent erroneously held there is a "***well-established rule*** that horizontal exhaustion should apply in the absence of policy language specifically describing and limiting the underlying insurance." (1PA1 at p. 54:14-17 (emphasis added); accord Opinion at p. 1319.)

In *CRA*, the Court of Appeal ruled that "an excess insurer has no obligation ***to provide a defense*** to its insured before the primary coverage is exhausted." (*CRA*, *supra*, 50 Cal.App.4th at p. 338 (emphasis added).) In reaching this narrow holding, the Court explicitly noted the key distinctions between primary and excess coverage. (*Id*. at p. 337.) Perhaps most importantly, primary policies include an (often unlimited) obligation to defend against third-party claims, a feature that significantly increases the primary insurer's exposure, which in turn results in a greater premium than what is charged for excess coverage, because the latter only provides indemnity coverage after the policyholder's liability exceeds specified underlying policy limits.

These fundamental differences demonstrate why primary insurers' duties are categorically distinct from the obligations of excess insurers. (See *Legacy Vulcan Corp. v. Super. Ct.* (2010) 185 Cal.App.4th 677, 695 [explaining that the core "reason for the rule" of *CRA* "is that the defense obligation falls on the primary insurer, whose greater premium reflects that risk"].)

Given the differences between primary and excess coverage, multiple courts since *CRA* have recognized that "the horizontal exhaustion rule ***only governs the relationship between the primary and excess insurers***." (*State v. Continental*, *supra*, 170 Cal.App.4th at p. 184 (emphasis added); accord *Viking Pump, Inc. v. Century Indemnity Co.*

(Del.Super.Ct., Feb. 28, 2014, No. 10C-06-141) 2014 Del. Super. LEXIS 707, at *21-27, 36 ["It is unassailable that horizontal exhaustion is a limitation tending to deny coverage. While that makes sense at a primary/umbrella level where the policies specifically contemplate responding first, ***this limitation ought not apply to excess***." (discussing California cases; emphasis added)].)[17]

This recent case law confirms that *CRA* is, at best, questionable precedent in light of this Court's emphasis on the policyholder's right to access any triggered policy immediately and without regard to inter-carrier contribution issues. But even if *CRA* still applies in the unique context of ***primary defense*** coverage—an issue that the Court need not address in deciding Montrose's writ petition—there is no precedent or rationale for imposing a mandatory horizontal exhaustion rule on ***excess indemnity*** coverage.

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

The DCA's pronouncement that standard "other insurance" provisions mandate horizontal exhaustion contravenes bedrock California insurance principles by creating obstacles to the policyholder obtaining

[17] The Delaware court's *Viking Pump* decision subsequently was endorsed on certification of the question to the New York Court of Appeals. (*Matter of Viking Pump, Inc.*, *supra*, 27 N.Y.3d at p. 265.)

prompt indemnification of its losses. These include: (i) compelling the policyholder to resolve disputes arising under policies with more restrictive terms as a condition to accessing coverage under less restrictive policies; (ii) imposing potentially insurmountable practical barriers to insurance recovery in a complex insurance program where insurers provide varying levels of coverage over many years, none of which easily translates into uniform horizontal coverage layers; and (iii) forcing the insured to participate in the inter-insurer contribution process as part of proving "horizontal exhaustion" has occurred.

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

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

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

other policies with different terms and broader coverage. As the Fourth District explained, "a court could not determine the amount *any* insurer owes without first determining what *every* insurer owes[.]" (*Continental* Opinion, *supra*, 2017 Cal.App. LEXIS 846, at *20 (internal quotations omitted).)

For example, under mandatory horizontal exhaustion, Montrose and other similarly-situated policyholders seeking coverage for a continuous loss triggering policies from the 1960's through 1980's must first resolve the issue of whether the pollution exclusions that appear in most post-1971 policies apply to a claim, ***before*** obtaining coverage under earlier policies ***without pollution exclusions*** that clearly provide coverage for that same claim. This mandates resolution of issues that may not even need to be litigated, and more fundamentally, deprives policyholders of coverage under less restrictive policies until more restrictive policy terms are adjudicated. (*Continental* Opinion, *supra*, 2017 Cal.App. LEXIS 846, at *20 ["This would deprive the [insured] of the timely indemnity that it bargained for."].)[18]

[18] A case in point is Continental, which issued three policies covering Montrose in the 1960's (without pollution exclusions). Each policy charged a premium in exchange for the promise of coverage attaching after $10 million of underlying excess policies had been exhausted. (1PA5, at p. 99.) However, to access these policies under mandatory horizontal exhaustion, Montrose could now be forced to litigate the pollution exclusion under at least 15 other policies from different insurers from 1971 onward, and effectively convert a policy that

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

These options should be the policyholder's to exercise because, having performed under the contract by paying the premium, and then suffering a loss triggering coverage, the policyholder has the right to determine whether or not to demand performance on its contract. Yet a mandatory horizontal exhaustion rule deprives the policyholder of these rights, obtained by virtue of purchasing multiple different contracts each

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

requiring separate premium payments, and instead compels the policyholder to expend significant time and resources litigating against insurers under policies not desired or needed for indemnification. This flatly contravenes California law. (E.g., *Armstrong*, *supra*, 45 Cal.App.4th at p. 52 ["[A] policyholder may obtain full indemnification and defense from one insurer, leaving the targeted insurer to seek contribution from other insurers covering the same loss." (quotations omitted)]; accord *Aerojet*, *supra*, 17 Cal.4th at p. 75.)

It is indisputable that mandating horizontal exhaustion by policyholders with decades-long coverage portfolios is incredibly burdensome, if not unworkable in many cases. Determining when "underlying policies" have been "horizontally" exhausted often requires tortuous and expensive litigation given the different attachment points and varying policy terms that govern many years of insurance coverage. (E.g., Attachment 2; 1PA5 at p. 99.) Insurers simply have no incentive to make this process simple or efficient when it is time for them to open their checkbooks. This clearly obstructs the policyholder's ability to obtain prompt indemnification of its liabilities, a right which this Court has long safeguarded. (See *Continental*, *supra*, 55 Cal.4th at pp. 200-201; *Dart*, *supra,* 28 Cal.4th at p. 1080; *Aerojet*, *supra*, 17 Cal.4th at p. 72.)[19]

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[19] Hence, policyholders with significant environmental and asbestos claims frequently run into conflict with insurers claiming their policy is

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

Mandatory horizontal exhaustion necessarily increases the time and expense of litigation, for both policyholders and the courts. As this Court explained, the first step in a complex coverage case is to ensure that the policyholder "has immediate access to the insurance it purchased." (*Continental*, *supra*, 55 Cal.4th at p. 201.) Impacted carriers "may ***then*** seek contribution from the other insurers on the risk during the same loss." (*Id*. at p. 200 (emphasis added).)

Horizontal exhaustion contradicts governing authority by forcing the policyholder to resolve allocation issues—and hence the insurers' contribution disputes—on the front end. Specifically, in proving actual exhaustion of each horizontal layer, the insured might be required to sort out allocation issues involving any and all of the myriad policy provisions

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not yet "up to bat." (See *Westport*, *supra*, 787 N.W.2d at pp. 918-19 ["Horizontal exhaustion would create as many layers of additional litigation as there are layers of policies. . . The amount of first-level excess coverage that would have to be exhausted under horizontal exhaustion before the second level becomes available would require separate, complex litigation because of the variety of different first-level policy limits across the years."]; RJN, Declaration of Drew T. Gardiner, ¶ 3, Exhibit 2.)

the insurers could invoke against each other, including competing time on the risk and limits arguments.[20]

Thus, with horizontal exhaustion the burden of fighting contribution battles is shifted to the ***policyholder***. Rather than immediately obtaining indemnity coverage in the first instance, as this Court envisioned in *Continental*, under a horizontal exhaustion regime, the insured must instead serve as ringmaster presiding over a protracted coverage allocation circus as a precondition to enforcing applicable policy rights. While that spectacle is unfolding, policyholders and injured claimants are deprived of "immediate access" to excess insurance proceeds necessary to discharge the liabilities incurred in "continuous loss" property damage claims.[21]

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[20] This process, which the DCA opinion would impose by importing a requirement that policyholders exhaust all "other insurance" across policy years into the trigger of coverage for excess policies, would lead to absurd results. The "other insurance" provision does not refer merely to other available insurance with a ***lower*** attachment point, but rather to ***all*** other available insurance, wherever it resides in the policyholder's coverage portfolio and regardless of attachment point. If "other insurance" provisions determined the attachment point of excess policies, a given policy in a portfolio would not attach until every other policy was exhausted, which could never occur, because each of those policies would also be excess to every other policy. This cannot be the rule. (See *Employers Reinsurance Corp. v. Phoenix Ins. Co.* (1986) 186 Cal.App.3d 545, 557 ["If we were to give effect to all three excess clauses in this instance, they would cancel each other out and afford the insured no coverage whatsoever. We would travel full circle with no place to say 'the buck stops here.'"].)

[21] (See *Trammell Crow Residential Co. v. St. Paul Fire and Marine Ins. Co.* (N.D. Tex. Jan. 21, 2014, No. 3:11-CV-2853-N) 2014 WL 12577393 at *2 ["[T]he choice between vertical and horizontal

Insurers do not dispute this harmful consequence of mandatory horizontal exhaustion, touting below that "[t]here will be ***no need for subsequent litigation among insurers for equitable contribution***" if policyholders are required to horizontally allocate their liabilities. (Answer at p. 53 (emphasis added).) While the insurance industry would welcome such an inequitable result—because it shifts the insurers' burden onto the backs of policyholders and delays recovery by injured claimants—that is not the law of California. (See *Aerojet*, *supra*, 17 Cal.4th at p. 72 ["[C]ontribution applies *only* between insurers . . . . [citation] It therefore has no place between insurer and insured, which have contracted the one with the other."]; *Truck Ins. Exchange v. Amoco Corp.* (1995) 35 Cal.App.4th 814, 828 ["Contribution claims are matters solely between insurers."].)[22]

exhaustion is one of which side should bear the burden of seeking contribution from other insurers – the insured or the carrier. It does not seem inequitable to place this administrative burden (and associated risks) on the carrier rather than the insured."].)

[22] (See also *Dart*, *supra*, 28 Cal.4th at p. 1080; *Pepsi-Cola Metro. Bottling Co. v. Ins. Co. of N. Am., Inc.* (C.D. Cal. Dec. 28, 2010, No. 10-2696) 2010 U.S. Dist. LEXIS 144401, *24-26 (applying California law) ["California courts have left battles of allocation of costs to separate contribution suits between liability insurers, rather than subjecting the insured to additional litigation."].)

V. CONCLUSION

Montrose respectfully requests that the Court grant review to resolve what may fairly be called the single most important insurance issue since this Court's "continuous trigger" decision in *Montrose*. With full appreciation and concern for this Court's scarce resources, Montrose respectfully submits that this is a significant and rare case meriting immediate review: The interlocking questions of exhaustion, allocation and stacking, which dictate how entire excess insurance programs come into play (particularly in complex environmental damage cases), constitute the pinnacle of continuous damage CGL coverage litigation.

Until this Court provides definitive guidance on the proper interpretation of "other insurance" provisions now erected as an obstacle to immediate coverage and a vehicle for mandatory horizontal exhaustion, policyholders and insurers will continue to be at loggerheads over this issue. Moreover, courts will continue to issue contradictory rulings as the Second and Fourth Districts recently have done, unnecessarily consuming judicial resources and depriving policyholders and third parties of prompt indemnification of losses.

DATED: October 6, 2017

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I certify, pursuant to rule 8.504(d)(1), California Rules of Court, that the attached Petition for Review 8,264 words, including footnotes, as measured by the word count of the computer program (Microsoft Word) used to prepare this brief.

DATED: October 6, 2017

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ATTACHMENT 1

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; CANADIAN UNIVERSAL INSURANCE COMPANY, INC., et al., Real Parties in Interest.

B272387

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

14 Cal. App. 5th 1306*; *2017 Cal. App. LEXIS 759

August 31, 2017, Opinion Filed

NOTICE:

As modified Sept. 8, 2017.

SUBSEQUENT HISTORY: Modified by *Montrose Chemical Corp. v. Superior Court, 2017 Cal. App. LEXIS 779 (Cal. App. 2d Dist., Sept. 8, 2017)*

PRIOR HISTORY: **[**1]** Petition for writ of mandate from an order of the Superior Court of Los Angeles County, No. BC005158, Elihu Berle, Judge.
Montrose Chemical Corporaation of California v. Superior Court, 2016 Cal. LEXIS 8391 (Cal., Oct. 12, 2016)

DISPOSITION: Granted in part and denied in part with directions.

SUMMARY: [*1306]

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court granted summary adjudication to excess insurers, ruling that the insured could not access higher level excess policies until lower level policies covering its environmental liability had been horizontally exhausted for all policy years. (Superior Court of Los Angeles County, No. BC005158, Elihu Berle, Judge.)

The Court of Appeal granted writ relief in part and denied it in part. The court concluded that even if some excess insurance policies had been triggered by the exhaustion of only the underlying scheduled comprehensive general liability insurance policies for the same policy year, rather than by the exhaustion of all available insurance, the insured was not entitled to elective stacking as to its entire policy portfolio because it did not show that each policy could be read in this fashion. Because each of the "other insurance" provisions in the various policies had to be given effect according to its terms, the insured had to exhaust lower layers of coverage before accessing higher layers of coverage if the language of the excess policies so required. The insured's public policy claims lacked merit. The different terms of the policies precluded summary adjudication that horizontal exhaustion was required. (Opinion by Edmon, P. J., with Aldrich, J.,* and Lavin, J., concurring.)

* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

HEADNOTES [*1307]

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Insurance Contracts and Coverage § 119--

Apportionment--Excess Insurance--Policy Terms.--There are two levels of insurance coverage--primary and excess. Primary coverage is insurance coverage whereby, under the terms of the policy, liability attaches immediately upon the happening of the occurrence that gives rise to liability. Primary insurers generally have the primary duty of defense. Excess or secondary coverage is coverage whereby, under the terms of the policy, liability attaches only after a predetermined amount of primary coverage has been exhausted. It is not uncommon to have several layers of secondary insurance. An excess insurance policy may be written as excess to specifically identified coverage--i.e., to a particular policy or policies; or coverage provided by a particular insurer. Alternatively, an excess policy may be written to provide coverage in excess of (identified primary policy) and the applicable limits of any other underlying insurance providing coverage to the insured. Under such a policy, 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.

(2) Insurance Contracts and Coverage § 119--Apportionment--Excess Insurance--Environmental Liability Claims.--The relationship between primary and excess insurance (or multiple layers of excess insurance) is particularly complex in environmental injury cases where harm is alleged to have occurred over many years and many policy periods. Injuries of this kind, termed long-tail injuries, are a series of indivisible injuries attributable to continuing events without a single unambiguous cause and produce progressive damage that takes place slowly over years or even decades. Because comprehensive general liability insurance policies typically are silent as to coverage for long-tail injuries, they frequently give rise to coverage disputes.

(3) Insurance Contracts and Coverage § 11--Interpretation--Question of Law--Applying Contract Interpretation Rules.--Interpretation of an insurance policy is a question of law that is decided under settled rules of contract interpretation. While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply.

(4) Contracts § 28--Construction and Interpretation--Intention of Parties--Inferred from Written Provisions.--The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. Such intent is to be inferred, if possible, solely from the written provisions of the contract. If contractual language is clear and explicit, it **[*1308]** governs. The clear and explicit meaning of these provisions, interpreted in their ordinary and popular sense, unless used by the parties in a technical sense or a special meaning is given to them by usage (*Civ. Code, § 1644*), controls judicial interpretation.

(5) Insurance Contracts and Coverage § 79.6--Coverage of Contracts--Liability Insurance--Risks Covered--Environmental Risks--All Sums with Stacking.--"All sums" language obligates insurers to pay all sums for property damage attributable to a contaminated site, up to their policy limits, if applicable, as long as some of the continuous property damage occurred while each policy was on the loss. This coverage extends to the entirety of the ensuing damage or injury, and best reflects the insurers' indemnity obligations under the respective policies, the insured's expectations, and the true character of the damages that flow from a long-tail injury. "Stacking" generally refers to the stacking of policy limits across multiple policy periods that were on a particular risk. In other words, stacking policy limits means that when more than one policy is triggered by an occurrence, each policy can be called upon to respond to the claim up to the full limits of the policy. When the policy limits of a given insurer are exhausted, the insured is entitled to seek indemnification from any of the remaining insurers that were on the risk. The 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. Instead of treating a long-tail injury as though it occurred in one policy period, this approach treats all the triggered insurance as though it were purchased in one policy period.

(6) Insurance Contracts and Coverage § 118--Apportionment--All Sums with Stacking.--The all-sums-with-stacking rule means that the insured has immediate access to the insurance it purchased. It does not put the insured in the position of receiving less coverage than it bought. It also acknowledges the uniquely progressive nature of long-tail injuries that cause progressive damage throughout multiple policy periods. Absent antistacking provisions, statutes that

forbid stacking, or judicial intervention, standard policy language permits stacking. However, there exists a significant caveat to all-sums-with-stacking indemnity allocation--i.e., that an insurer may avoid stacking by specifically including an antistacking provision in its policy. Contracting parties can write into their policies whatever language they agree upon, including limitations on indemnity, equitable pro rata coverage allocation rules, and prohibitions on stacking.

(7) Insurance Contracts and Coverage § 118--Apportionment--Giving Effect to Policy Terms.--The case law has not announced a general **[*1309]** principle that insureds covered by multiple policies are entitled to select which policy(ies) to access for indemnification in the manner they deem most efficient and advantageous. Instead, insurance policies must be interpreted according to their terms, even if alternative allocation schemes might be more desirable.

(8) Insurance Contracts and Coverage § 119--Apportionment--Excess Insurance--Giving Effect to Policy Terms--Elective Stacking.--There was tremendous variation among an insured's excess insurance policies, and each had to be interpreted according to its own language. There might have been some policies that were triggered by the exhaustion of only the underlying scheduled insurance for the same policy year. To demonstrate that it was entitled to elective stacking as to its entire policy portfolio, however, the insured had to show that each policy was susceptible of being read in this fashion. It did not do so.

[*Cal. Insurance Law & Practice (2017) ch. 14, § 14.07.*]

(9) Insurance Contracts and Coverage § 119--Apportionment--Excess Insurance--Giving Effect to Policy Terms.--When a policy which provides excess insurance above a stated amount of primary insurance contains provisions which make it also excess insurance above all other insurance which contributes to the payment of the loss together with the specifically stated primary insurance, such clause will be given effect as written.

(10) Insurance Contracts and Coverage § 119--Apportionment--Excess Insurance--Exhaustion of Underlying Insurance.--Because exhaustion of underlying insurance is an explicit prerequisite for the attachment of excess insurance--and because an "other insurance" clause may define the insurance that must be exhausted before the excess insurance attaches--case law involving a primary insurer that stated apportionment among insurers has no bearing on the insurers' obligations to the policyholder does not apply in the excess insurance context.

(11) Insurance Contracts and Coverage § 119--Apportionment--Excess Insurance--Other Insurance Clauses.--A court does not read "other insurance" clauses in isolation. It instead undertakes a broader examination of each policy to ascertain the context in which the "other insurance" provisions appear. References to "other insurance" may play different roles in different policies. Where two (or more) policies are at the same level for the same risk (e.g., both primary or both excess) and contain conflicting "other insurance" provisions purporting to be excess over all other available insurance, courts may refuse to give effect to those provisions and, instead, require each to contribute to the costs of defense or **[*1310]** indemnity on a pro rata basis. Under other circumstances, however, "other insurance" clauses may be relevant to determining whether two policies provide the same level of coverage--and, thus, the order in which excess policies attach.

(12) Insurance Contracts and Coverage § 10--Interpretation--Public Policy.--Public policy is not an appropriate basis for rewriting policy language. Insurance policies provide what they provide. Insureds and insurers are generally free to contract as they please and do so. They thereby establish what is fair and just inter se. A court may not rewrite what they themselves wrote.

(13) Insurance Contracts and Coverage § 119--Apportionment--Excess Insurance--Horizontal Exhaustion.--Insureds must exhaust lower layers of coverage before accessing higher layers of coverage if the language of the excess policies so requires.

(14) Insurance Contracts and Coverage § 119--Apportionment--Excess Insurance--Horizontal Exhaustion.--Horizontal exhaustion dictates only the sequence in which policies are accessed, not the total coverage available to the insured. There is nothing unfair about requiring an insured to access policies in the manner their provisions dictate.

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No appearance for Respondent.

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Sinnott, Puebla, Campagne & Curet, Randolph P. Sinnott; Cozen O'Conner and John Daly for Real Party in Interest Zurich International (Bermuda) Ltd.

Duane Morris, Max H. Stern and Jessica E. La Londe for Real Party in Interest American Centennial Insurance Company. **[*1311]**

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Selman & Breitman and Elizabeth M. Brockman for Real Party in Interest Federal Insurance Company.

Berkes, Crane, Robinson & Seal, Steven M. Crane and Barbara S. Hodous for Real Parties in Interest Continental Casualty Company and Columbia Casualty Company.

Lewis Brisbois Bisgaard **[**2]** & Smith, Peter L. Garchie and James P. McDonald for Real Party in Interest Employers Mutual Casualty Company.

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McCloskey, Waring & Waisman and Andrew McCloskey for Real Parties in Interest Westport **[**3]** Insurance Corporation et al. **[*1312]**

Simpson Thacher & Bartlett, Peter R. Jordon, Andrew T. Frankel and Deborah Lynn Stein for Real Parties in Interest Travelers Casualty and Surety Company and The Travelers Indemnity Company.

JUDGES: Opinion by Edmon, P. J., with Aldrich, J.,* and Lavin, J., concurring.

> * Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

OPINION BY: Edmon, P. J.

OPINION

EDMON, P. J.--Petitioner Montrose Chemical Corporation of California (Montrose) for many years manufactured the pesticide dichloro-diphenyl-trichloroethane (DDT). Real parties in interest are insurers that issued excess comprehensive general liability (CGL) policies to Montrose in relevant years. The present dispute concerns the sequence in which Montrose may access its excess CGL policies to cover its liability for environmental injuries caused by DDT.

Through a motion for summary adjudication, Montrose sought a declaratory judgment that it may "electively stack" excess policies--i.e., that it may access any excess policy issued in any policy year so long as the lower lying policies for the *same policy year* have been exhausted. All of the excess insurers opposed **[**4]**

Montrose's motion for summary adjudication; many of the excess insurers also sought through a cross-motion for summary adjudication a ruling that no insurer had a duty to pay a covered claim until Montrose had "horizontally exhausted" its lower lying excess policies in all triggered policy years.

The trial court rejected "elective stacking" in favor of "horizontal exhaustion," ordering that higher level excess policies could not be accessed until lower level policies had been exhausted for all policy years. It thus denied Montrose's motion for summary adjudication and granted the excess insurers' cross-motion for summary adjudication. Montrose then filed the present petition for writ of mandate challenging the trial court's summary adjudication order.

We agree with the trial court that "elective stacking" is inconsistent with the policy language of at least some of the more than 115 excess policies at issue and is not compelled by California Supreme Court authority. We therefore conclude that the trial court properly denied Montrose's motion for summary adjudication. Our holding is not as expansive as the trial court's, however. Specifically, we do not hold that policies must be horizontally **[**5]** exhausted at *each* coverage level and for *each* year before higher-level policies may be accessed. Instead, we conclude that the sequence in which policies may be accessed must be decided on a policy-by-policy basis, taking into account the relevant provisions of each policy. We therefore reverse in part the trial court's grant of the insurers' motion for summary adjudication. **[*1313]**

FACTUAL AND PROCEDURAL HISTORY

I.

Background

From 1947 to 1982, Montrose manufactured DDT at a facility in Torrance, California. During the 1960's, conservationists began to raise concerns about the effects of DDT on the environment, and in 1972 the federal government prohibited its use within the United States. Montrose continued to manufacture DDT for export at its Torrance facility until 1982. (*Montrose Chemical Corp. v. Superior Court (1993) 6 Cal.4th 287, 292-293 [24 Cal. Rptr. 2d 467, 861 P.2d 1153]* (*Montrose I*).)

In 1990, the United States and the State of California sued Montrose in the United States District Court for the Central District of California under the *Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9607 et seq.) (CERCLA)*. (*United States v. Montrose Chemical Corp. of California* (U.S. Dist. Ct. C.D.Cal.) 1990 No. CV 90-3122-AAH (JRx) (*CERCLA* action).) The *CERCLA* **[**6]** action alleged that Montrose's operation of its Torrance facility caused environmental contamination that damaged land, water, and wildlife in the Los Angeles Harbor and neighboring waters. (*Montrose I, supra, 6 Cal.4th at pp. 292-293*.)

Montrose represents that it has entered into partial consent decrees in the *CERCLA* action through which it has incurred damages in excess of $100 million, and that additional future damages could approach or exceed that amount.

II.

The Present Coverage Litigation

Montrose purchased "layers" of CGL policies from various insurance carriers to cover its operations at the Torrance facility from 1960 to 1986. In each of the relevant years, Montrose purchased a layer of "primary" CGL insurance policies that required the insurers to defend and indemnify Montrose for covered losses up to the policy limits. (*Montrose I, supra, 6 Cal.4th at pp. 292-293*.) Above the "primary" insurance policies were multiple layers of "excess" CGL coverage, which provided additional coverage once underlying insurance was exhausted. In 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 **[*1314]** liability in excess of $120 million. Montrose **[**7]** asserts that because the policies provide for different amounts of coverage in different years, the layers of excess coverage are not uniform. To provide just a single example, in some policy years the first layer excess policies provided coverage of up to $1 million; in other years, the first layer excess policies provided coverage of up to $2 million, $5 million, or $10 million.

In August 1990, Montrose filed the present action, *Montrose Chemical Corp. of California v. Canadian Universal Ins. Co., Inc.*, case No. BC005158, to resolve various coverage disputes with its primary insurers. Subsequently, Montrose amended its complaint to name

its excess insurers as additional defendants.

In 2006, the superior court stayed this action in response to Montrose's concern that discovery in this case could prejudice its defense in the *CERCLA* action. The court lifted the stay in June 2014.

In 2012, the California Supreme Court issued a decision in *State of California v. Continental Ins. Co. (2012) 55 Cal.4th 186 [145 Cal. Rptr. 3d 1, 281 P.3d 1000]* (*Continental*). As discussed more fully below, *Continental* held that where an ongoing environmental injury triggers multiple policies across many policy years, the insured may "stack" the policies "'to form one giant "uber-policy" with **[**8]** a coverage limit equal to the sum of all purchased insurance policies.'" (*Id. at pp. 200-201*.)

Following the Supreme Court's decision in *Continental*, Montrose filed a fifth amended complaint (complaint) in this action in September 2015. The complaint asserted a new 32nd cause of action for declaratory relief, seeking a declaration that:

"a. In order to seek indemnification under the Defendant Insurers' excess policies, Montrose need only establish that its liabilities are sufficient to exhaust the underlying policy(ies) in *the same policy period*, and is not required to establish that all policies insuring Montrose in *every* policy period (including policies issued to cover different time periods both before and after the policy period insured by the targeted policy) with limits of liability less than the attachment point of the targeted policy, have been exhausted; and

"b. Montrose may select the manner in which [to] allocate its liabilities across the policy(ies) covering such losses." **[*1315]**

III.

Cross-motions for Summary Adjudication

A. *Montrose's Motion for Summary Adjudication*

Montrose moved for summary adjudication of the 32nd cause of action. Montrose asserted that a controversy had arisen between it and its **[**9]** excess insurers about the manner in which it could obtain indemnification under the excess policies. According to Montrose, the excess insurers had taken the position that Montrose could not access coverage under any excess policy until its liabilities exhausted *all* of the lower lying excess coverage in *every* policy period. Montrose depicted the insurers' approach as follows, assuming a hypothetical coverage portfolio and $100 million of liability resulting from continuous property damage over five years. In this example, Montrose must exhaust its first and second layer excess policies (each layer representing $10 million of coverage) in each policy year before accessing any of its third-layer excess policies:

	Year 1	Year 2	Year 3	Year 4	Year 5
$50 mil Layer 5					
$40 mil Layer 4					
$30 mil Layer 3					
$20 mil Layer 2					
$10 mil Layer 1					

Montrose rejected the insurers' horizontal exhaustion approach, asserting that it instead was entitled under the language of the excess policies and the Supreme Court's holding in *Continental* to "electively stack" its coverage--i.e., to "select any policy to indemnify its liabilities, provided the policies immediately underlying that policy are exhausted" in the same policy period.

[10]** Montrose provided the following example of how elective stacking might work, using the same hypothetical losses and coverage portfolio depicted above. In this example, Montrose accesses coverage from the first through third excess insurance layers for policy years two and three, and the first through fourth excess insurance layers for policy year four, without accessing *any* excess

coverage for policy years one and five: **[*1316]**

	Year 1	Year 2	Year 3	Year 4	Year 5
$50 mil Layer 5					
$40 mil Layer 4					
$30 mil Layer 3					
$20 mil Layer 2					
$10 mil Layer 1					

B. *Insurers' Oppositions and Cross-motion for Summary Adjudication*

A group of excess insurers (hereinafter, the Continental insurers)[1] filed an opposition to Montrose's motion for summary adjudication, and separately filed their own cross-motion for summary adjudication. That motion sought summary adjudication on two grounds: (1) the 32nd cause of action (by which the Continental insurers sought a determination that Montrose was not entitled as a matter of law to electively stack its excess policies), and (2) the following "issue of duty": "All underlying policy limits across the years of continuing property damage must be exhausted by payment of covered claims before any **[**11]** of the Insurers' excess policies ha[s] a duty to pay covered claims." The Continental insurers contended that well-established California law and the language of the relevant policies required Montrose to "exhaust **[*1317]** coverage from *all* underlying insurers in each of the triggered policy periods, such that higher-level excess insurers' obligations are triggered only when all primary and lower-level excess policies have been exhausted." (Italics added.)

1 Those insurers are: Continental Casualty Company (Continental) and Columbia Casualty Company (Columbia), joined by AIU Insurance Company; Allstate Insurance Company (as successor in interest to Northbrook Excess and Surplus Insurance Company); American Centennial Insurance Company (American Centennial); American Home Insurance Company; Federal Insurance Company; Employers Insurance Company of Wausau; Everest Reinsurance Company (as successor in interest to Prudential Reinsurance Company); Fireman's Fund Insurance Company; General Reinsurance Corporation; Granite State Insurance Company; Lamorak Insurance Company (formerly known as OneBeacon America Insurance Company), as successor in interest to Employers Commercial Union Insurance Company of America and The Employers Liability Assurance Corporation, Ltd.; Landmark Insurance Company; Lexington Insurance Company; Mt. McKinley Insurance Company (as successor in interest to Gibraltar Casualty Company); Munich Reinsurance America, Inc. (formerly known as American Re-Insurance Company); National Surety Corporation; National Union Fire Insurance Company of Pittsburgh, PA; New Hampshire Insurance Company; North Star Reinsurance Corporation; 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); Transport Insurance Company (as successor in interest to Transport Indemnity Company); Westport Insurance Corporation, formerly known as Puritan Insurance Company (formerly known as Manhattan Fire and Marine Insurance Company); and Zurich International (Bermuda), Ltd.

Travelers Indemnity and Travelers Surety (formerly known as Aetna) (the Travelers insurers) opposed Montrose's motion for summary adjudication, but did not separately move for summary adjudication. The Travelers insurers urged that California law did not apply to their policies, and that under the clear language of the policies,

Montrose had to demonstrate that the underlying insurers "*have paid or been held to pay* the full amount of their respective limits of liability"--not merely that Montrose's liabilities "*are sufficient to exhaust* the underlying policy(ies) in the same policy period."[2] According to the Travelers insurers, Montrose's assertion that its primary policies should be "deemed" exhausted was "misleading because the parties have not **[**12]** stipulated--and the Court has not found or ordered--that Montrose's primary policies be 'deem[ed]' exhausted. Montrose, of course, will have the burden of proving that, in fact, its underlying insurance (including with respect to primary coverage) has been exhausted before it can seek coverage under its excess policies. That factual issue is not before the Court, and may not be decided in the guise of Montrose's Motion currently before the Court."

2 The Travelers insurers therefore urged that the declaration sought by Montrose "appears to leave open the possibility that Montrose can access Travelers' higher-level excess policies (i) based solely on estimated liabilities that Montrose has not actually paid to date, (ii) based on liabilities allegedly incurred even if those liabilities were not actually paid by the underlying insurers (including settling insurers), or (iii) without showing that Montrose's liabilities are actually covered under the terms of the underlying policies such that they might one day exhaust those underlying policies." Indeed, the Travelers insurers asserted, "Montrose's declaration would not even require Montrose to prove that its liabilities would be *covered* by underlying insurance, much less that they would ever actually exhaust that underlying insurance." (Fn. omitted.)

IV.

Order Denying Montrose's Motion and Granting Continental Insurers' Cross-motion for Summary Adjudication

The superior court denied Montrose's motion and granted the Continental insurers' cross-motion. The court began by describing the issues raised by the competing motions for summary adjudication:

"[I]t's the insurers' contention that Montrose cannot access coverage under any of the excess policies until Montrose exhausts all the underlying excess coverage in each policy period. This approach is generally referred to as a 'horizontal exhaustion.' **[*1318]**

"In contrast, Montrose argues that it should instead be entitled to vertically stack all excess coverage triggered [in] each individual policy period, in effect allowing Montrose to select any available **[**13]** excess policy to indemnify its liabilities assuming that the policies immediately underlying that policy are exhausted for this specific policy in question. The approach is referred to as a 'vertical exhaustion.'"

The court then discussed the law generally applicable to primary and excess insurance:

"Before coverage can attach under an excess policy, the policy limits of the underlying primary policy or policies must typically be exhausted. [Citation.] [¶] Normally, primary coverage is exhausted when a primary insurer pays its policy limits to settle a claim or to satisfy a judgment against the insurer. [Citation.]

"Under California law, vertical exhaustion applies where an excess policy expressly provides coverage in excess of a specific primary policy for that same policy period. In such a scenario, excess coverage will attach after the specifically identified primary insurance has been exhausted, notwithstanding the existence of other underlying policies. [Citation.]

"On the other hand, horizontal exhaustion applies in those situations where an excess policy provides coverage in excess to all underlying insurance, whether specifically scheduled or not. [Citation.] [¶] ... [¶]

"In cases **[**14]** such as the one before the court today in which the damages at issue occur continuously over a long period of time, questions regarding policy exhaustion prove to be very complex. [¶] ... [¶]

"Consistent with the general rule[s] of insurance polic[y] interpretation, the first inquiry in continuous loss scenarios remains whether the excess policy imposes specific limits upon the coverage provider.

"As the California Court of Appeal held in *Community Redevelopment [Agency v. Aetna Casualty & Surety Co. (1996) 50 Cal.App.4th 329 [57 Cal. Rptr. 2d 755]* (*Community Redevelopment*)], where an excess policy does not specifically describe ... [¶] ... and limit the underlying insurance policies [that must be exhausted], the horizontal exhaustion doctrine should

apply."

The court then turned to the facts of the case before it:

"In the present case, Montrose argues that pursuant to the California Supreme Court holding in [*Continental*], Montrose should be entitled to **[*1319]** access its excess coverage under an elective stacking approach whereby a policyholder may select any triggered policy in its portfolio to indemnify its liabilities, provided that the policies underlying that policy are exhausted in accordance with their terms. [¶] ... [¶]

"Ultimately, Montrose fails to cite any binding authority **[**15]** 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.

"Montrose additionally asserts that the language in [the] excess policies at issue here is inconsistent with application of the horizontal exhaustion doctrine. In so arguing, Montrose suggests that each of the policies contained a provision or provisions which specifies some identifiable amount of underlying limits that must be exhausted before its obligation attaches.

"More specifically, Montrose argues that each excess policy's description of the underlying limit or coverage that must be exhausted is described with respect to its same policy period. While this may be true, this argument overlooks the fact that the present case is a continuous loss scenario; thus, Montrose's contention that exhaustion should be applied vertically with respect to each individual policy period is undermined by the very authority supporting its own stacking arguments as noted by the California Supreme Court decision in *[Continental, supra,] 55 Cal.4th 186*, which decision allows the insured to stack the policy limits of **[**16]** those policies triggered in more than one policy period.

"Therefore, the stacking approach endorsed by the Supreme Court in *Continental* would direct ... that the aggregate value of all underlying policies throughout the duration of a continuous loss must be exhausted before excess coverage is accessible to the insured ... ."

The court concluded: "The 'other insurance' provisions contained in the present excess policies must be read to require the exhaustion of all underlying insurance before [the excess insurers'] obligations to indemnify Montrose attach. The presence of 'other insurance' clauses would preclude the use of a vertical exhaustion approach even for those excess policies specifically identified in a particular underlying policy that must first be exhausted. [¶] The [inclusion] of such broad 'other insurance' language invokes the rules set forth in *Community Redevelopment* that horizontal exhaustion must apply absent a provision of the excess policy that both specifically describes and limits the underlying insurance. [¶] Whereas here the excess policy included language that invokes all underlying insurance, no such limitation can be reasonably argued to exist. [¶] ... **[**17]** [¶] **[*1320]**

"So in conclusion, in light of the authorities cited, the court concludes that the parties must employ a horizontal exhaustion approach, whereby the aggregate limits of underlying policies for the applicable policy periods must first be exhausted before any excess policies incur a duty to indemnify Montrose for its liabilities ... ."

V.

Present Petition for Writ of Mandate

Montrose filed a petition for writ of mandate in this court, seeking an order directing the trial court to grant Montrose's motion for summary adjudication and deny the insurers' cross-motion for summary adjudication. We summarily denied the petition. Montrose filed a petition for review. The Supreme Court granted review and transferred the matter to this court with directions to issue an order to show cause why the relief sought in the petition should not be granted.

We issued an order to show cause and received supplemental briefing. The Continental insurers and the Travelers insurers filed briefs in opposition to the petition, and ITT LLC and Santa Fe Braun, Inc., filed an amicus curiae brief in support of Montrose.

SUMMARY OF ISSUES

Montrose urges the court to adopt what it terms an "elective stacking" approach. **[**18]** Under this approach, where a policyholder is liable for a continuing injury that potentially is covered by primary and excess policies in multiple policy years, the policyholder "may elect to proceed 'vertically' to exhaust policies for a single

coverage year, once the underlying policy exhaustion provisions are satisfied." Montrose urges that "elective stacking" is consistent with Supreme Court precedent "recognizing that policyholders are entitled to look to any independent contract to cover the full extent of their liability (up to policy limits) in accordance with the terms of each individual policy," as well as with the language of the relevant excess policies.

The Continental insurers urge a "horizontal exhaustion" approach. They contend that the excess policies at issue contain provisions "that make them excess to vertically underlying policies in the same policy period *plus* 'other valid and collectible' insurance, that is, other insurance that is not vertically underlying and also triggered by the same occurrence." The Travelers insurers separately urge declaratory relief is premature because Montrose has not demonstrated that it has exhausted its underlying primary policies, **[**19]** and there **[*1321]** is no basis for issuing a writ of mandate because Montrose has failed to demonstrate that it lacks an adequate remedy at law or is at risk of irreparable harm.

As we now discuss, we reject Montrose's "elective stacking" approach. Specifically, we conclude that Montrose is not entitled to a declaration that it may access *any* of the more than 115 excess policies at issue so long as its liabilities are sufficient to exhaust the underlying policies for the same policy year. We therefore conclude that the trial court properly denied Montrose's motion for summary adjudication and granted the insurers' cross-motion for summary adjudication of the 32nd cause of action because we conclude that Montrose is not entitled to the declaration sought in that cause of action *as a matter of law*.

However, we do not adopt the trial court's conclusion that all excess policies must be horizontally exhausted. Instead, because there is tremendous variation among the policies at issue, we decline to adopt a single exhaustion scheme that applies to Montrose's entire coverage portfolio, and instead direct that each policy be interpreted according to its terms. We therefore conclude that the trial court **[**20]** erred in granting the Continental insurers' motion for summary adjudication insofar as it sought to summarily adjudicate the issue of duty.

STANDARD OF REVIEW

"A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (*Code Civ. Proc., § 437c, subd. (f)(1).*) The moving party "bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if [the moving party] carries [its] burden of production, [it] causes a shift, and the opposing party is then subjected to a burden of production of [its] own to make a prima facie showing of the existence of a triable issue of material fact. ... A prima facie showing is one that is sufficient to support the position of the party in question." (*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850-851 [107 Cal. Rptr. 2d 841, 24 P.3d 493]*, fns. omitted.)

We review de novo an order granting or denying a motion for summary adjudication. (*Aguilar v. Atlantic Richfield Co., supra, 25 Cal.4th at p. 860.*) The trial court's stated reasons for granting summary adjudication are not binding on the reviewing court, which reviews the trial court's ruling, not its rationale. (*Haering v. Topa Ins. Co. (2016) 244 Cal.App.4th 725, 732 [198 Cal. Rptr. 3d 291].*) **[*1322]**

DISCUSSION

I.

Primary and Excess Insurance

(1) There are two levels of insurance coverage--primary and excess. **[**21]** "*Primary* coverage is insurance coverage whereby, under the terms of the policy, liability attaches immediately upon the happening of the occurrence that gives rise to liability. [Citation.] Primary insurers generally have the primary duty of defense. [¶] ... '*Excess*' or *secondary* coverage is coverage whereby, under the terms of the policy, liability attaches only after a predetermined amount of primary coverage has been exhausted. [Fn. omitted.] It is not uncommon to have several layers of secondary insurance ... ." (*Olympic Ins. Co. v. Employers Surplus Lines Ins. Co. (1981) 126 Cal.App.3d 593, 597-598 [178 Cal. Rptr. 908]*, some italics omitted; see also *Community Redevelopment Agency v. Aetna Casualty & Surety Co., supra, 50 Cal.App.4th at pp. 337-338* (*Community Redevelopment*) [discussing primary and excess coverage].)

An excess insurance policy may be written as excess to specifically identified coverage--i.e., to "a particular

policy or policies (e.g., 'excess to liability coverage provided under Aetna Policy No. 246789') (see *20th Century Ins. Co. v. Liberty Mut. Ins. Co. (9th Cir. 1992) 965 F.2d 747, 757* (applying Calif. law)); or [¶] coverage provided by a particular insurer (e.g., 'excess to the primary insurer, Liberty Mutual') (see *20th Century Ins. Co. v. Liberty Mut. Ins. Co., supra, 965 F.2d at 757*)." (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2017) ¶ 8:181 (Croskey).) Alternatively, an excess policy may be written to provide coverage "'in excess of (identified primary policy) and the applicable limits of *any other* **[**22]** underlying insurance providing coverage to the insured.' [¶] Under such a policy, 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. [See [*Community Redevelopment, supra,] 50 Cal.App.4th [at pp.] 339-341*; *Continental Ins. Co. v. Lexington Ins. Co. (1997) 55 Cal.App.4th 637, 645 [64 Cal. Rptr. 2d 116]*." (Croskey, *supra*, ¶ 8:182.)

(2) The relationship between primary and excess insurance (or multiple layers of excess insurance) is particularly complex in environmental injury cases where harm is alleged to have occurred over many years and many policy periods. Injuries of this kind, termed "'long-tail'" injuries, are "a series of indivisible injuries attributable to continuing events without a single unambiguous 'cause'" and produce progressive damage that takes place **[*1323]** slowly over years or even decades. (*Continental, supra, 55 Cal.4th at pp. 195-196*.) Because CGL policies typically are silent as to coverage for long-tail injuries, they frequently give rise to coverage disputes. (*Ibid.*)

II.

The Trial Court Correctly Rejected Montrose's "Elective Stacking" Approach; Therefore, It Correctly Denied Montrose's Motion for Summary Adjudication and Granted the Continental Insurer's Cross-motion for Summary Adjudication of the 32nd Cause of Action

Montrose asserts that **[**23]** the trial court erred in rejecting elective stacking in favor of mandatory horizontal exhaustion. Specifically, Montrose contends: (1) elective stacking is the only approach consistent with the Supreme Court's recent guidance in *Continental*; (2) each of the relevant policies contains express language stating that coverage attaches upon exhaustion of specified underlying limits of lower layer policies within the *same policy period*; and (3) elective stacking is consistent with sound public policy. We consider each of these issues below.

A. Continental *Does Not Dictate "Elective Stacking" in This Case*

We begin by addressing Montrose's contention that the result in this case is dictated by the California Supreme Court's decision in *Continental, supra, 55 Cal.4th 186*. Montrose asserts: "Over the last two decades, the California Supreme Court has repeatedly declared the fundamental principle that a policyholder has the contractual right, under any insurance policy (or policies) triggered by a covered loss, to obtain immediate indemnification of its liabilities. ... [¶] ... [In *Continental*], the high court held that when a continuous injury triggers multiple policies, '*each* policy can be called upon to respond to the claim **[**24]** up to the full limits of the policy.' (*Id. at p. 200*, emphasis added.)" Indeed, Montrose urges, the court in *Continental* "rejected the very scheme Defendant insurers argue[] for" and "confirm[ed] the policyholder's right to choose the policy(ies) and seek to allocate the losses vertically or horizontally as the policyholder sees fit."

As we now discuss, *Continental* does not dictate the result in this case. Importantly, both the relevant policy language and the issues confronting the *Continental* court were very different from the language and issues before us; and nothing in *Continental* suggests that, in the context of the present case, an insured has an absolute right to "select which policy(ies) to access for indemnification in the manner they deem most efficient and advantageous." **[*1324]**

1. Continental*: Insured Liable for Long-tail Claim May "Stack" Policies Issued in Different Policy Periods*

In *Continental, supra, 55 Cal.4th 186*, the Supreme Court considered insurers' indemnity and defense obligations in the context of a long-tail environmental injury. Between 1956 and 1972, the State of California operated an industrial waste disposal facility that was later discovered to have leaked hazardous materials. Before 1963, the state was uninsured; between **[**25]** 1964 and 1976, the state purchased 10 excess CGL policies from different insurers. The state had drafted a master liability policy form that it required its insurers to use, and thus the relevant language of each of the policies

was essentially the same. Specifically, each policy obligated the insurer "'[t]o pay on behalf of the Insured *all sums* which the Insured shall become obligated to pay by reason of liability imposed by law ... for damages ... because of injury to or destruction of property, including loss of use thereof.'" (*Continental, supra, at pp. 192-193*, italics added.)

After a federal court found the state liable for past and future cleanup costs associated with the disposal facility, the state sued several of its insurers, seeking indemnification for its liability in the federal action. (*Continental, supra, 55 Cal.4th at pp. 192-193*.) Following a bench trial, the superior court held that the state could not "stack," or combine, policy limits across multiple policy periods. Instead, the state "had to choose a single policy period for the entire liability coverage, and it could recover only up to the total policy limits in effect during that policy period." (*Id. at p. 193*.)

The Supreme Court disagreed, concluding that the language of the policies at issue permitted **[**26]** the stacking of policy limits *across multiple policy periods*, so as to effectively create "'one giant "uber-policy" with a coverage limit equal to the sum of all purchased insurance policies.'" (*Continental, supra, 55 Cal.4th at pp. 200-201*.)

(3) The Supreme Court began its analysis by reiterating basic principles of insurance interpretation: "In general, interpretation of an insurance policy is a question of law that is decided under settled rules of contract interpretation. [Citations.] '"While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply." [Citations.]' [Citation.] **(4)** 'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.' [Citations.] 'Such intent is to be inferred, if possible, solely from the written provisions of the contract.' [Citation.] 'If contractual language is clear and explicit, it governs.' [Citation.] '"The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' (*[Civ. Code,]* **[*1325]** *§ 1644*), controls judicial interpretation. [Citation.]" [Citations.]' [Citation.]" **[**27]** (*Continental, supra, 55 Cal.4th at pp. 194-195*.)

(5) The court then addressed the "all sums" language of the relevant policies, explaining that such language "obligate[s] the insurers to pay all sums for property damage attributable to the [contaminated] site, 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. 200*.) This coverage "extends to the entirety of the ensuing damage or injury [citation], and best reflects the insurers' indemnity obligations under the respective policies, the insured's expectations, and the true character of the damages that flow from a long-tail injury." (*Ibid.*)

(6) *Continental* determined that the policies at issue enabled the insured "to stack the consecutive policies and recover up to the policy limits of the multiple plans. 'Stacking' generally refers to the stacking of policy limits across multiple policy periods that were on a particular risk. In other words, 'Stacking policy limits means that when more than one policy is triggered by an occurrence, each policy can be called upon to respond to the claim up to the full limits of the policy.' [Citation.] 'When the policy limits of a given insurer are exhausted, [the insured] is entitled **[**28]** to seek indemnification from any of the remaining insurers [that were] on the risk ... .' [Citations.] The 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. Instead of treating a long-tail injury as though it occurred in one policy period, this approach treats all the triggered insurance as though it were purchased in one policy period. The [insured] has access to far more insurance than it would ever be entitled to within any one period.' [Citation.] The all-sums-with-stacking rule means that the insured has immediate access to the insurance it purchased. It does not put the insured in the position of receiving less coverage than it bought. It also acknowledges the uniquely progressive nature of long-tail injuries that cause progressive damage throughout *multiple* policy periods. [Citation.]" (*Continental, supra, 55 Cal.4th at pp. 200-201*.)

Continental emphasized that "absent antistacking provisions, statutes that forbid stacking, or judicial intervention, 'standard policy language *permits* stacking.'" (*Continental, supra, 55 Cal.4th at p. 201*.) The court therefore concluded that "the policies **[**29]** at issue here, *which do not contain antistacking language*, allow for its application. ..." (*Id. at p. 201*, italics added.) The court noted, however, that there exists a "significant caveat" to all-sums-with-stacking indemnity

allocation--i.e., that an insurer "may avoid stacking by specifically including an 'antistacking' provision in its policy. Of course, in **[*1326]** the future, contracting parties can write into their policies whatever language they agree upon, including limitations on indemnity, equitable pro rata coverage allocation rules, and prohibitions on stacking." (*Id. at p. 202*.)

2. *What Continental Did and Did Not Decide*

As the foregoing discussion makes clear, the issue before the court in *Continental* was very different from the issue presented by the present petition. Before the court in *Continental* was the question of whether the insured could access policies in effect during multiple triggered policy periods, as the insured contended, or whether it could access only those policies that covered a single policy period, as urged by the insurers. The issue before us, in contrast, is not *whether* an insured can access policies written for different policy years (it can), but the *order or sequence* in which **[**30]** it may or must do so.

Moreover, as we have said, the court's analysis in *Continental* was based on the language of the particular policies before it in that case, and specifically the insurers' promises "'[t]o pay on behalf of the Insured *all sums* which the Insured shall become obligated to pay by reason of liability imposed by law ... for damages ... because of injury to or destruction of property,'" up to specified policy limits. (*Continental, supra, 55 Cal.4th at p. 193*, italics added.) In contrast, many of the excess policies relevant to our analysis do not include "all sums" language, and thus the high court's analysis of the "all sums" language has limited application here.

(7) Further, *Continental* did *not*, as Montrose asserts, announce a general principle that insureds covered by multiple policies are entitled to "select which policy(ies) to access for indemnification in the manner they deem most efficient and advantageous." Indeed, *Continental* did not announce *any* general principles applicable to *all* insureds and *all* policies. Instead, it reaffirmed the principle that insurance policies must be interpreted *according to their terms*, even if alternative allocation schemes might be more desirable. (See *Continental, supra, 55 Cal.4th at p. 199* ["Although some states **[**31]** have concluded, as the insurers urge in this case, that pro rata coverage would be more fair and equitable when compared to all sums allocation, we are constrained by the language of the applicable policies here."].)

Finally, while *Continental* held that each "triggered" policy may be called upon to respond to a claim (*Continental, supra, 55 Cal.4th at p. 200*), it did not consider when a higher layer excess policy is "triggered" in the context of a long-tail environmental injury. That is, *Continental* discussed the "'trigger of coverage'" issue *temporally*, explaining that "'[t]he issue is largely one of timing--what must take place *within the policy's effective dates* for the **[*1327]** potential of coverage to be "triggered"?'" (*Id. at p. 196*.) Because it was not called upon to do so, the court in *Continental* did not consider the aspect of "trigger of coverage" before us in this case--what lower layer excess policies must be exhausted before a higher layer excess policy is triggered.

In short, while *Continental* provides a general framework for our analysis, it provides limited guidance on the specific question before us: Whether Montrose may access higher level excess insurance before exhausting lower level excess insurance written for different policy periods. **[**32]** As *Continental* directs, we turn to the language of the relevant policies to decide that question.

B. *The Language of the Excess Insurance Policies Does Not Mandate "Elective Stacking"*

1. *The Policies' "Plain Language"*

Montrose acknowledges that the starting point of policy interpretation is "the 'plain language' of the written provisions of the insurance contract," and it asserts that each of the excess policies at issue contains "express language" stating "that coverage thereunder attaches upon the exhaustion of a specified amount of underlying insurance issued *in the same policy year*." (Italics added.) The latter assertion is the linchpin of Montrose's plain language analysis: If Montrose is correct that the policies provide for coverage as soon as lower layer policies *within the same policy period* are exhausted, then elective stacking necessarily follows.

The problem with Montrose's analysis is that it is largely unsubstantiated by the policy language. That is, while Montrose repeatedly asserts that the excess policies attach upon the exhaustion of lower layer policies within the same policy period, it does not identify the provisions that supposedly have that effect.

Our analysis of **[**33]** the policies, moreover, leads us to conclude that many of the policies attach not upon

exhaustion of lower layer policies within the same policy period, but rather upon exhaustion of *all* available insurance. A few examples will illustrate the point:

(1) *American Centennial Policies Nos. XC-00-03-64, XC-00-06-75, and XC-00-12-16*. The insuring agreements of these policies state that the insurer "agrees to pay on behalf of the insured the ultimate net loss in excess of the **[*1328]** retained limit[3] hereinafter stated." The declarations then identify the underlying policies to which the American Centennial policies are specifically in excess (the "scheduled policies"); for example, for policy year 1980 to 1981, the American Centennial policy references a Canadian Universal Insurance Company, Inc., CGL policy, written for policy period March 1980 through March 1981, with a combined single limit of $1 million.

3 "Retained limit" "refers to a specific sum or percentage of loss that is the insured's initial responsibility and must be satisfied *before* there is any coverage under the policy." (Croskey, *supra*, ¶ 7:384.)

Focusing on only the insuring agreements and declarations, Montrose would have us conclude that the American Centennial policies attach upon the exhaustion of the scheduled policies--in the example provided above, when Montrose's liabilities exceed $1 million, thus exhausting the limits of the Canadian Universal policy. **[**34]** But that interpretation ignores other relevant policy provisions, including the following:

The "*retained limit*" *clause*: This clause provides: "'[T]he company's liability shall be only for the ultimate net loss in excess of the insured's retained limit defined as the greater of: [¶] ... . the total of the applicable limits of the underlying policies listed in [the declarations] hereof, *and the applicable limits of any other underlying insurance collectible by the insured*.'" (Italics added.) This clause thus expressly states that the excess insurer's liability is in excess of the identified underlying insurance *and* the applicable limits of *any other underlying insurance* collectible by the insured.

The "*other insurance*" *clause*: This clause states: "'If other collectible insurance ... is available to the insured covering a loss also covered hereunder (except insurance purchased to apply in excess of the sum of the retained limit and the limit of liability hereunder) the insurance hereunder shall be in excess of and not contribute with, such other insurance.'" This clause thus provides that the American Centennial policies are excess to both *scheduled and unscheduled* policies.

(2) *Continental* **[**35]** *Policies Nos. RDX 030 807 62 18, RDX 8893542, RDX 8936616 and RDX 8936617, and Columbia Policies Nos. RDX 1864012 and RDX 3652015*. The indemnification provisions of these policies require the insurers "'[t]o indemnify the insured for the amount of loss which is in excess of the applicable limits of liability of the underlying insurance [identified in the schedule of primary and umbrella[4] coverage].'" The **[*1329]** schedules of primary and umbrella coverage identify the underlying policies to which the Continental and Columbia policies are specifically in excess; for example, policy No. RDX 030 807 62 18 references a primary policy written by INA, as well as three umbrella policies written by Lloyds and Home Insurance.

4 "Umbrella policies are usually excess policies in the sense that they afford coverage that is excess over underlying insurance. [Citations.] [¶] However, an umbrella policy may also provide coverage for *losses not covered* by any underlying insurance; and as to those losses, the umbrella policy is primary [citation]. Umbrella policies may thus fill gaps in coverage both *vertically* (by providing excess coverage) and *horizontally* (by providing primary coverage for losses covered by the excess policy)." (Croskey, *supra*, ¶ 8:203.)

Montrose would have us conclude that Continental's and Columbia's policies attach immediately upon the exhaustion of the policies specifically identified in the schedule of primary and umbrella coverage. But that analysis ignores the other relevant policy provisions, including the following:

Definition of "*loss*": Continental's and Columbia's policies define "loss" (as used in the indemnification provisions) as "'the sums paid as damages in settlement **[**36]** 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.'" (Italics added.) These policies thus define loss *in terms of* other insurance.

"*Other insurance*" *clauses*: The "other insurance"

clauses state: "'If, with respect to a loss covered hereunder, the insured has other insurance, whether on a primary, excess or contingent basis, there shall be no insurance afforded hereunder as respects such loss; provided, that if the applicable limit of liability of this policy is greater than the applicable limit of liability provided by the other insurance, this policy shall afford excess insurance over and above such other insurance in an amount sufficient to give the insured, as respects the layer of coverage afforded by this policy, a total limit of liability equal to the applicable limit of liability afforded by this policy.'" This provision "'does not apply with respect to the underlying insurance or excess insurance purchased specifically to be in excess **[**37]** of this policy.'" It thus expressly states that the Continental and Columbia policies shall not cover losses for which the insured has other insurance.

(8) We caution that the foregoing discussion addresses just a few of the excess policies at issue, and thus nothing we have said should be understood to apply to *all* of the excess policies before us. To the contrary, there is tremendous variation among the relevant policies, and each must be interpreted according to its own language.[5] There may well be some policies that, as Montrose argues, are triggered by the exhaustion of only the underlying **[*1330]** scheduled insurance for the same policy year. To demonstrate that it is entitled to elective stacking as to its entire policy portfolio, however, Montrose must show that *each* policy is susceptible of being read in this fashion. It plainly has not done so.

5 We disagree with Montrose's contention that "[w]hile there are various nuances and variations in the insuring agreement for each of the Policies, these differences do not change the basic grant of coverage " or materially alter the determination of the proper exhaustion methodology." As we have said, there is significant diversity among the various excess policies--the relevant language of which fills approximately 90 pages of Montrose's appendix.

2. *Case Law Establishes That "Other Insurance" Provisions Must Be Given Effect According to Their Terms*

(a) Community Redevelopment

Our conclusion that (at least some of) the policies before us are excess to lower lying policies written in both the same *and other years* is consistent with the conclusion of *Community Redevelopment, supra, 50 Cal.App.4th 329*. There, the insured was a developer who constructed **[**38]** housing complexes on improperly filled land. (*Id. at pp. 333-334*.) The insured had purchased primary insurance policies from United Pacific Insurance Company (United) for policy years 1982 to 1984, and from State Farm Fire and Casualty Insurance Company (State Farm) for policy year 1985-1986; for policy year 1985-1986, the developer also purchased an excess policy from Scottsdale Insurance Company (Scottsdale). (*Id. at p. 334*.) When the insured was sued by homeowners for continuing property damage that spanned these policy periods, it tendered claims to all three insurers.

After State Farm's primary policy limits were exhausted, a dispute arose between United and Scottsdale as to which insurer was responsible to the developer for the remaining defense costs. United argued that Scottsdale's policy was excess to State Farm's primary policy, and thus Scottsdale's duty to defend arose as soon as the State Farm policy was exhausted. (*Community Redevelopment, supra, 50 Cal.App.4th at p. 337*.) Scottsdale disagreed, urging that its insurance was excess to all other primary insurance available to the developer.

(9) To resolve the issue, the court reviewed the language of the Scottsdale excess policy. The court noted that there was "no dispute" that Scottsdale's $5 million coverage was **[**39]** purchased as excess to the $1 million primary policy issued by State Farm. (*Community Redevelopment, supra, 50 Cal.App.4th at p. 338*.) However, "the express provisions of the [excess] policy further provide that Scottsdale's liability was also excess to 'the applicable limits of *any other underlying insurance* collectible by the [insured parties].' (Italics added.) This express description as to the scope of Scottsdale's excess coverage is entirely consistent with, and is reinforced by, other policy **[*1331]** language dealing with Scottsdale's duty to defend and the impact of 'other insurance.' Scottsdale agreed to defend its insured provided that 'no other insurance affording a defense or indemnity against such a suit is available.' The policy also provided that the insurance afforded by the policy 'shall be excess insurance over any other valid and collectible insurance available to the [insured parties] whether or not described in the Schedule of Underlying Insurance' (which schedule listed State Farm's $1 million policy)." (*Ibid.*) Thus, applying "settled rules of policy

construction," the court concluded that Scottsdale's exposure was excess to *all* other primary insurance available to the developer. (*Id. at pp. 338-339*; see also *Padilla Construction Co., Inc. v. Transportation Ins. Co. (2007) 150 Cal.App.4th 984 [58 Cal. Rptr. 3d 807]* [under its plain language, excess policy **[**40]** was not triggered until all primary insurance was exhausted, including primary insurance written in different policy years]; *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co. (1981) 126 Cal.App.3d 593, 600 [178 Cal. Rptr. 908]* ["'[W]hen a policy which provides excess insurance above a stated amount of primary insurance contains provisions which make it also excess insurance above all other insurance which contributes to the payment of the loss together with the specifically stated primary insurance, such clause will be given effect as written.'"].)

Montrose urges that *Community Redevelopment* is not relevant to our analysis because that case involved primary coverage and "did [not] announce any rule about a policyholder's right to access higher-lying coverage before the exhaustion of *excess* policies in different policy periods."[6] We do not agree. While Montrose is correct that the underlying layer of insurance in *Community Redevelopment* was a primary layer, rather than a lower lying excess layer, Montrose suggests no reason why we should differently interpret *first-layer* excess policies (that is, excess policies immediately above primary policies) and *higher level* excess policies (excess policies immediately above other excess policies). Montrose also suggests that *Community Redevelopment* **[**41]** is not relevant because it "had nothing to do with a policyholder's right to *indemnity* coverage," but rather addressed the duty to defend. In fact, although the specific question before the court in *Community Redevelopment* was whether the excess insurer had an obligation "to 'drop down' and provide a defense," the answer to that question depended on whether the excess insurer's exposure for either defense *or* indemnity was excess to *all* other **[*1332]** lower lying policies, or to only the lower lying policy to which the excess policy specifically referred--the very issue before us in this case. (*Community Redevelopment, supra, 50 Cal.App.4th at pp. 332, 336-339*.)

6 Montrose also argues, citing *Montgomery Ward & Co. v. Imperial Casualty & Indemnity Co. (2000) 81 Cal.App.4th 356, 369 [97 Cal. Rptr. 2d 44]* (*Montgomery Ward*), that "California courts that have been asked by insurers to expand *Community Redevelopment* beyond the contours of *primary* insurance have refused to do so." However, *Montgomery Ward* concerned the obligations of excess insurers to an insured in the context of a self-insured retention, which the court concluded was not "'other collectible insurance with any other insurer'" within the meaning of the policy language before it (*id. at pp. 366-367*); it therefore is irrelevant to our analysis.

(b) Dart Industries, Inc. v. Commercial Union Ins. Co. *Does Not Compel Us To Ignore the Policies' "Other Insurance" Provisions*

Montrose acknowledges that many of the policies purport to be excess to "other insurance," but citing *Dart Industries, Inc. v. Commercial Union Ins. Co. (2002) 28 Cal.4th 1059 [124 Cal. Rptr. 2d 142, 52 P.3d 79]* (*Dart*), Montrose urges that "other insurance" clauses are relevant only to "the specific question of how to allocate (or 'apportion') liability disputes 'among multiple insurers' *after* the policyholder is fully indemnified"--*not* to "'the insurers' obligations to the policyholder.'" In other words, Montrose contends, "' **[**42]** [O]ther insurance' clauses govern the rights and obligations of insurers covering the same risk vis-à-vis one another, but do not affect a policyholder's right to recovery under those policies."

Montrose's assertion about "other insurance" clauses finds no support in *Dart. Dart* concerned claims made by women injured as a result of prenatal exposure to diethylstilbestrol (DES) manufactured by Dart from the 1940's through the 1960's. During some of those years, Dart was covered by a CGL policy issued by Commercial Union Insurance Company (Commercial Union), but all copies of the policy had been lost. (*Dart, supra, 28 Cal.4th at pp. 1064-1065*.) Commercial Union urged, among other issues, that an "other insurance" clause might reduce or extinguish its liability, and thus that Dart had to establish the terms of the lost policy's "other insurance" clause in order to trigger Commercial Union's duties to defend and indemnify. One of the issues on appeal, therefore, was whether Dart's inability to prove the precise terms of the "other insurance" clause was fatal to its claim. (*Id. at pp. 1078-1079*.)

The court held that Dart's ignorance of the language of the policy's "other insurance" clause did not relieve Commercial Union of its policy obligations. The court **[**43]** noted that "the modern trend is to require equitable contributions on a pro rata basis from all

primary insurers regardless of the type of 'other insurance' clause in their policies." (*Dart, supra, 28 Cal.4th at p. 1080*, italics added.) It was undisputed that Commercial Union was a primary insurer during the relevant time period. Thus, an "other insurance" clause--whatever its terms--was irrelevant to Commercial Union's obligation to provide *primary* coverage to its insured: "'When multiple policies are triggered on a single claim, the insurers' liability is apportioned pursuant to the "other insurance" clauses of the policies [citation] or under the equitable doctrine of **[*1333]** contribution [citations]. *That apportionment, however, has no bearing upon the insurers' obligations to the policyholder*. [Citation.] ... The insurers' contractual obligation to the policyholder is to cover the full extent of the policyholder's liability (up to the policy limits).' [Citations.] This principle is consistent with 'the settled rule that an insurer on the risk when continuous or progressively deteriorating damage or injury first manifests itself remains obligated to indemnify the insured for the entirety of the ensuing damage or injury.' [Citation.]" **[**44]** (*Ibid.*, italics added.)

(10) Montrose relies on the italicized language to suggest that references to "other insurance" in its policies are relevant only to the insurers' obligations to one another, *not* to the insurers' obligations to it. But in so urging, Montrose ignores a key difference between *Dart* and the present case--namely, that the insurer in *Dart* was a *primary* insurer, while the insurers in the present case are *excess* insurers. The difference between primary and excess insurance in this context is material. In *Dart*, the "other insurance" clause was held not to extinguish the insurer's duty to the insured under the relevant primary policies because such duty attached "'when continuous or progressively deteriorating damage or injury first manifests itself'" and covered "'the full extent of the policyholder's liability (up to the policy limits).'" (*Dart, supra, 28 Cal.4th at p. 1080*.) The excess policies at issue in the present case, however, attach only after other identified insurance is exhausted, *not* immediately upon the occurrence giving rise to liability. (Croskey, *supra*, at ¶¶ 8:176 to 8:177.) Thus, because exhaustion of underlying insurance is an explicit prerequisite for the attachment of excess insurance--and because an "other **[**45]** insurance" clause may define the insurance that must be exhausted before the excess insurance attaches--*Dart*'s statement that apportionment among insurers has no bearing on the insurers' obligations to the policyholder simply does not apply in the present context.

The distinction between primary and excess policies for purposes of giving effect to "other insurance" clauses is aptly illustrated by *Carmel Development Co. v. RLI Ins. Co. (2005) 126 Cal.App.4th 502 [24 Cal. Rptr. 3d 588]* (*Carmel*). That case involved excess CGL policies issued by RLI Insurance Company (RLI) and Fireman's Fund Insurance Company (Fireman's Fund). (*Id. at p. 506*.) After the limits of the primary policies were exhausted, a dispute arose between RLI and Fireman's Fund as to whether RLI was required to contribute on an equal basis with Fireman's Fund to a settlement entered into by the insured.

(11) The trial court held that because the two excess policies had competing "other insurance" clauses, the excess insurers had to contribute to the settlement on a pro rata basis. (*Carmel, supra, 126 Cal.App.4th at p. 507*.) The Court of Appeal reversed. It agreed with the trial court that both policies **[*1334]** contained similar "other insurance" clauses, and it said it thus would uphold the trial court's decision if the "other insurance" clauses were considered in isolation. **[**46]** The *Carmel* court declined to read the clauses in isolation, however. It instead undertook "a broader examination of each policy to ascertain the context in which the 'other insurance' provisions appeared." (*Id. at p. 509*.)

The *Carmel* court noted that Fireman's Fund's insuring agreement promised to pay the insured "'those sums in excess of Primary Insurance'" described in the "'Limits of Insurance.'" (*Carmel, supra, 126 Cal.App.4th at p. 510*, boldface & some capitalization omitted.) In contrast, RLI's insuring agreement promised to pay the insured's "ultimate net loss in excess of ... the applicable limits of scheduled underlying insurance ... *plus the limits* of *any unscheduled underlying insurance ...* .'" (*Ibid.*, italics added & boldface omitted.) Based on this language, the *Carmel* court concluded that RLI and Fireman's Fund did not place themselves in identical positions with respect to other insurance. It explained: "Fireman's Fund undertook to provide coverage immediately upon exhaustion of [the specifically identified primary insurer's] policy limits, whereas RLI obligated itself to step in only when the limits of *both* the [specifically identified primary] policy and *all other* available coverage--primary and excess--were exceeded." (*Carmel, supra, at pp. 510-511*.) Thus, "the overall intent and purpose of the two policies **[**47]** at issue here can be discerned from their respective insuring terms read in context and in light of the entire policy in which they

appear. Fireman's Fund provided coverage specifically excess to the underlying primary policy, whereas RLI was liable for claims in excess of *any* other insurance. Because the two policies did not operate at the same level of coverage, it was irrelevant that they both contained excess-only 'other insurance' clauses. As the Fireman's Fund policy limit was not exceeded by the [underlying] settlement, RLI had no duty to contribute to the indemnification of [the insured]." (*Id. at pp. 516-517.*)

Carmel makes clear that references to "other insurance" may play different roles in different policies. Where two (or more) policies are at the same level for the same risk (e.g., both primary or both excess) and contain conflicting "other insurance" provisions purporting to be excess over all other available insurance, courts may refuse to give effect to those provisions and, instead, require each to contribute to the costs of defense or indemnity on a pro rata basis. (*Carmel, supra, 126 Cal.App.4th at p. 508.*) Under other circumstances, however, "other insurance" clauses may be relevant to determining whether two policies **[**48]** provide the same level of coverage--and, thus, the order in which excess policies attach.[7]

7 Montrose also contends that giving effect to "other insurance" provisions in the context of determining a policyholder's right to recovery "would lead to the absurd result that Montrose could not obtain coverage under *any* Policy, because each Policy purports to require Montrose to first exhaust *all* 'other valid and collectible insurance' in other policy periods." The claim is without merit. It is true, as Montrose notes, that where multiple policies contain "other insurance" clauses purporting to be excess to one another such that honoring the clauses would deprive the insured of coverage, "the conflicting clauses will be ignored and the loss prorated among the insurers." (*Fireman's Fund Ins. Co. v. Maryland Casualty Co. (1998) 65 Cal.App.4th 1279, 1304-1305 [77 Cal. Rptr. 2d 296].*) However, Montrose has not demonstrated either that each of the policies at issue has an "other insurance" clause, or that giving effect to the "other insurance" clauses will deprive it of coverage.

[*1335]

C. *Montrose's Public Policy Claims Are Without Merit*

(12) Notwithstanding the foregoing, Montrose contends that there are multiple reasons why a rejection of elective stacking would be "inconsistent with sound public policy." However, public policy is not an appropriate basis for rewriting the policy language: As our Supreme Court has said, "[T]he pertinent policies provide what they provide. [The insured] and the insurers were generally free to contract as they pleased. [Citation.] They evidently did so. They thereby established what was 'fair' and 'just' inter se. We may not rewrite what they themselves wrote." (*Aerojet-General Corp. v. Transport Indemnity Co. (1997) 17 Cal.4th 38, 75 [70 Cal. Rptr. 2d 118, 948 P.2d 909].*)

In any event, Montrose's public policy claims are without merit for the reasons that follow:

(13) Montrose first urges that mandatory horizontal exhaustion obligates the policyholder to obtain coverage from policies it may not wish to access. We do not agree that our holding in this case has the effect of "obligating" any policyholder to seek indemnification under any particular policy. *All* we hold today is that insureds must exhaust lower layers of coverage before accessing higher layers of coverage **[**49]** *if the language of the excess policies so require*--a result hardly inconsistent with sound public policy.

(14) Montrose next argues that mandatory horizontal exhaustion penalizes policyholders for their "prudent decision" to purchase additional coverage. Not so. Horizontal exhaustion dictates only the *sequence* in which policies are accessed, not the total coverage available to the insured.[8] There is nothing unfair about requiring an insured to access policies in the manner their provisions dictate. (E.g., *Continental, supra, 55 Cal.4th at p. 199* [in allocating losses across multiple policies, court is "constrained by the language of the applicable policies," even if another allocation scheme "would be more fair and equitable"].)

8 Indeed, Montrose concedes that the hundreds of millions of dollars of excess coverage the policies at issue collectively provide "should be sufficient to fully indemnify Montrose's liability incurred in *U.S. v. Montrose*."

Montrose argues finally that mandatory horizontal exhaustion is "unworkable in practice" because of the complexity of its coverage portfolio. We do **[*1336]** not doubt that allocating more than $200 million in liability across more than 100 policies covering nearly 25 years is

likely to be a complicated process. That complexity, however, is not relevant to our analysis, as we cannot, in the service of expediency, impose obligations that are inconsistent with the terms of the contracts Montrose itself **[**50]** negotiated.

D. *Conclusion: The Trial Court Properly Denied Montrose's Motion for Summary Adjudication of the 32nd Cause of Action*

Having concluded that the trial court properly rejected Montrose's "elective stacking" approach, we now consider the effect of this conclusion on Montrose's motion for summary adjudication of the 32nd cause of action.

To reiterate, the 32nd cause of action sought a declaration that "a. In order to seek indemnification under the Defendant Insurers' excess policies, Montrose need only establish that its liabilities are sufficient to exhaust the underlying policy(ies) in *the same policy period*, and is not required to establish that all policies insuring Montrose in *every* policy period (including policies issued to cover different time periods both before and after the policy period insured by the targeted policy) with limits of liability less than the attachment point of the targeted policy, have been exhausted; and [¶] b. Montrose may select the manner in which [to] allocate its liabilities across the policy(ies) covering such losses."

To be entitled to summary adjudication of the 32nd cause of action, Montrose must demonstrate that the judicial declaration it **[**51]** sought applies not just to *some* of the excess policies, but to *all* of them. For the reasons discussed, while such a declaration may be appropriate with respect to some of the policies--an issue we do not reach--such broad relief manifestly could not apply to all of them. Therefore, the trial court did not err in denying Montrose's motion for summary adjudication of the 32nd cause of action.[9]

9 The Travelers insurers, joined by the Continental insurers, urge that Montrose's request for summary adjudication is improper because it sought a ruling that "would excuse it from making the required showing for exhaustion" under California law: "Specifically, Montrose sought a declaration that, in order to seek indemnification under the defendant insurers' excess policies, Montrose 'need only establish that its liabilities *are sufficient to exhaust*' the insurance underlying the excess policy(ies) it is targeting, not that Montrose has *actually* exhausted that underlying insurance or even that the terms of the underlying insurance would cover Montrose's liabilities." Because we have concluded for other reasons that Montrose is not entitled to summary adjudication, we need not reach this issue.

Having concluded that the trial court properly denied Montrose's motion for summary adjudication of the 32nd cause of action, we readily conclude that the court properly granted the insurer's cross-motion for summary adjudication of that cause of action. Montrose's and the Continental insurers' **[*1337]** competing motions for summary adjudication of the 32nd cause of action were mirror images of one another. Because Montrose was not entitled to the declaratory relief it sought *as a matter of law*, summary adjudication of the 32nd cause of action in favor of the Continental insurers was warranted.

III.

The Present Record Does Not Support a Universal "Horizontal Exhaustion" Approach; Thus, the Trial Court Erred in Granting the Insurers' Motion on the Issue of Duty

We now reach the **[**52]** final issue raised in this writ proceeding: whether the Continental insurers were entitled to summary adjudication on the issue of duty. To repeat, the Continental insurers sought a declaration that: "All underlying policy limits across the years of continuing property damage must be exhausted by payment of covered claims before any of the Insurers' excess policies ha[s] a duty to pay covered claims."

As we have said, California law requires that insurance contracts be interpreted according to their terms, and there is tremendous variation among the terms of the excess policies at issue in this matter. Further, although the parties have stipulated as to some of the language of the relevant policies, they 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. The absence of these policies makes it impossible for us to "'interpret [policy] language *in context*, with regard to its intended function in the policy.' [Citation.]" (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc. (2014) 59 Cal.4th 277, 288 [172 Cal. Rptr. 3d 653, 326 P.3d 253]*, italics added.)

Additionally, some of the policies "'follow form'"--i.e., incorporate the provisions of the immediately underlying policies (*Fuller-Austin Insulation Co. v. Highlands Ins. Co. (2006) 135 Cal.App.4th 958, 967 [38 Cal.Rptr.3d 716])*--but the insurers have not provided us with all of **[**53]** the underlying policies or, indeed, made clear which policies apply in each policy year. For example, American Centennial policy No. CC-00-76-47 provides: "Except as may be inconsistent with this Policy, the coverage provided by this Policy *shall follow the insuring agreements, conditions and exclusions of the underlying insurance (whether primary or excess) immediately preceding the layer of coverage provided by this Policy*, including any change by endorsements." (Italics added.) We cannot determine from the information provided, however, the "underlying insurance" to which this policy refers.

For these reasons, we cannot conclude that *each* of the more than 115 policies at issue requires "horizontal exhaustion" of the underlying policy **[*1338]** layers for each policy year. Accordingly, the Continental insurers were not entitled to summary adjudication on the issue of duty.

DISPOSITION

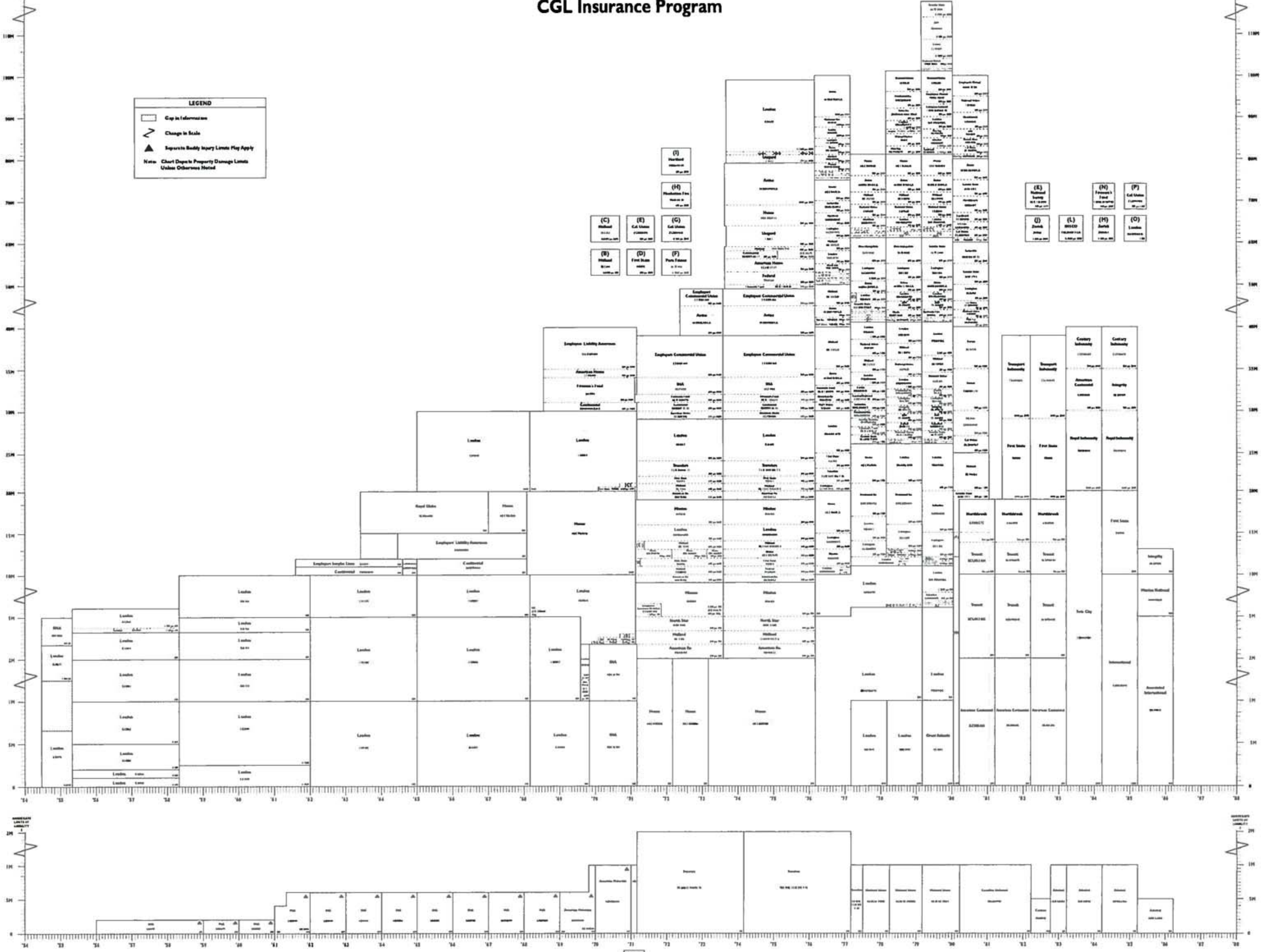
The petition for writ of mandate is granted in part and denied in part. The respondent superior court is directed to vacate the portion of its order granting the Continental insurers' motion for summary adjudication on the issue of duty, and to enter a new and different order denying their cross-motion for summary **[**54]** adjudication on the issue of duty; in all other respects (and specifically insofar as it challenges the court's summary adjudication of the 32nd cause of action), the writ petition is denied. The cause is remanded to the respondent superior court for further proceedings consistent with this opinion. The parties shall bear their own costs in this proceeding. (*Cal. Rules of Court, rule 8.493*.)

Aldrich, J.,* and Lavin, J., concurred.

* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

ATTACHMENT 2

Montrose Chemical Corporation of California
CGL Insurance Program



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

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

Jaime Garcia

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Executed on October 6, 2017, at San Diego, California.

Michelle Wright