No. S275179

In the Supreme Court
of the
State of California

TRUCK INSURANCE EXCHANGE,
Plaintiff and Appellant,

v.

KAISER CEMENT AND GYPSUM CORP., *et al.*,
Defendants, Cross-complainants and Appellants.

EXCESS INSURERS' RESPONSE TO AMICUS BRIEFS

After a Decision by the Court of Appeal of the State of California
Second Appellate District
Case No. B278091

Appeal from the Superior Court for the State of California,
County of Los Angeles, Case No. BC249550
The Honorable Kenneth Freeman, Judge

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EXCESS INSURERS' RESPONSE TO AMICUS CURIAE BRIEFS OF UNITED POLICYHOLDERS AND SANTA FE BRAUN

In the highly litigious field of liability insurance for long-tail claims, a field which has brought scores of cases to this Court over the years, it is an exceedingly rare occurrence for policyholders and liability insurers to agree on anything, much less file briefs supporting their traditional adversaries. But Truck's positions in this case are so antithetical to the basic principles that govern the relationship between policyholders and commercial insurers, they have forced a substantial portion of the policyholder bar to stand up and push back. On virtually every important issue in this appeal, amici curiae United Policyholders and SantaFe Braun reject Truck's positions and support the Excess Insurers' positions.[1]

First, all the amici agree that absent an express agreement to the contrary, there can be no equitable contribution by a primary insurer against an excess insurer. (United Policyholders' Brief (UP), p. 34; SantaFe Braun Brief (SFB), p. 8.) The point has been settled California law for many decades. (See, e.g., *Signal Cos. v. Harbor Insurance* (1980) 27 Cal.3d 359, 367-368; *Reliance Nat. Indemnity Co. v. General Star Indemnity Co.* (1999) 72 Cal.App.4th 1063, 1078; *Transcontinental Ins. Co. v. Ins. Co. of the State of Pennsylvania* (2007) 148 Cal.App.4th 1296, 1303-

[1] Excess Insurers submit this response brief pursuant to the Court's order dated January 18, 2023, and request leave that it be considered.

04.) As explained in *Fireman's Fund Ins. Co. v. Maryland Cas. Co.* (1998) 65 Cal.App.4th 1279, 1300, "in the absence of an agreement to the contrary, there is *never* any right to contribution between primary and excess insurers of the same insured." For this reason, the issue of horizontal and vertical exhaustion never comes into play in this appeal, as amici correctly observe. (SFB, p. 16 ["Here, Truck loses whichever exhaustion rule applies. It may not obtain equitable contribution from the Excess Insurers under either rule."].)

Truck's quest to overturn this basic California law is without precedent. No case supports Truck's position—and over the course of more than 40 years, courts continue to expressly reject it. (Excess Insurers' Answering Brief, pp. 26-27.) Truck's effort to seek equitable contribution from the excess insurers here is just another attempt in a long line of failed attempts by primary insurers to shift their own separate contractual obligations owed to their insureds onto excess insurers. (See, e.g., *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.* (1981) 126 Cal.App.3d 593, 599-601 [rejecting primary's arguments that loss should be prorated along with excess insurer because all had "excess other insurance" clauses]; *Chubb/Pacific Indem. Group v. Insurance Co. of North America* (1987) 188 Cal.App.3d 691, 698-99 [rejecting effort by primary to cede policy limits and transfer defense to excess insurer]; *North River Ins. Co. v. American Home Assurance Co.* (1989) 210 Cal.App.3d 108, 113 [rejecting primary's argument that "excess other insurance" clause in its policy made the primary policy excess to the excess insurer's

policy]; *Reliance, supra*, 72 Cal.App.4th at pp. 1078, 1080-81 [rejecting primary's attempt to obtain contribution from excess]; *Ticor Title Ins. Co. v. Employers Ins. of Wausau* (1995) 40 Cal.App.4th 1699, 1708-09 [rejecting contention that excess insurer must drop down and defend where primary insurer refused to participate in defense].)

Second, the amici reject Truck's interpretation of the phrase "continue in force" as a basis to justify a departure from decades of California insurance law. (UP, pp. 16, 37-44; SFB, pp. 9-10.) As amici point out, Truck's interpretation of the "continue in force" provision "is neither supported by the case law nor consistent with the language of the excess policies themselves." (UP, p. 16.) Instead, as the United Policyholders explain, the phrase "continue in force" serves "to prevent a gap in Kaiser's coverage once the primary policy pays its limits," not to "require the excess insurers to reimburse Truck for defense and settlement costs that Truck may pay under its 1974 primary policy, as that would negate the remaining terms of the excess policies, contrary to basic rules of insurance policy interpretation." (UP, p. 39.)

The phrase "continue in force" also must be read in the context of the fundamental difference between primary and excess insurance, and with each excess policy interpreted as a whole and subject to all its policy provisions. For this reason, the amici reject the idea that the excess policies here are some sort of "hybrid," subject to different rules. (SFB, p. 8-10 ["Truck's invocation of the terms ' hybrid policies' and 'hybrid insurers' to

describe insurance policies issued as 'excess policies' by 'excess insurers' is telling."]; UP, pp. 33-34, n. 15 [rejecting Truck's argument that Excess Insurers are not really excess insurers, explaining that the excess policies at issue are "precisely the definition of excess insurance."].) Simply put, and as the lower court correctly held, the "continue in force" language does not transform an excess policy into a primary policy and Truck, as a primary insurer, is not entitled to equitable contribution from an excess insurer.

Third, and related, the amici also reject Truck's attempt to use the policyholder's "reasonable expectations" doctrine to its own advantage. (SFB, pp. 9-10, 15; UP, pp. 33-34 and n. 15, 44-45.) The reasonable expectations doctrine has no applicability to an insurer vs. insurer dispute proceeding under equitable principles. (*Argonaut Ins. Co. v. Transport Indem. Co.* (1972) 6 Cal.3d 496, 506 [the reasonable expectations doctrine is inapplicable where the dispute "concerns only the respective liabilities of two insurers"]; see also *Hartford Acc. & Indem. Co. v. Sequoia Ins. Co.* (1989) 211 Cal.App.3d 1285, 1300 [same]; *Atlantic Mut. Ins. Co. v. Travelers Ins. Co.* (1983) 147 Cal.App.3d 1054, 1057 [same].) Instead, the reasonable expectations doctrine seeks to protect the *insured's* benefit of the bargain. "Truck did not bargain for, or pay, for the excess policies at issue— Kaiser Cement did." (SFB, p. 11.) Kaiser Cement has made clear that its "expectations at the time of contracting was that Truck's right to equitable contribution would be limited to *other primary policies* issued by *other primary carriers*." (SFB, p. 15.)

Truck's effort to pass its contractual primary obligations onto excess insurers with aggregated limits under the guise of equity has the effect of reducing Truck's obligations to Kaiser and depriving Kaiser of excess insurance coverage for claims in excess of $500,000, thereby reducing the insurance coverage available to the insured, as the amici and Kaiser Cement all explain. (UP, pp. 50-51 [Truck's scheme "could prevent Kaiser from accessing the coverage in excess of Truck's 1974 primary policy" as described further in Excess Insurers' Answering Brief, at pp. 40-41]; UP, pp. 17 ["Put most simply, every dollar that an excess insurer pays to Truck by way of equitable contribution is one less dollar available to Kaiser to use to compensate asbestos claimants."]; UP, pp. 40-41 ["Truck's contribution scheme would enrich Truck while depleting the channeling trust's assets by eroding the limits of liability of the excess policies, thereby threatening to deprive the trust of funds needed to compensate individuals with asbestos-related disease"]; SFB, pp. 10-11 ["Truck wants to receive contribution from excess insurers whose policies *contain* aggregate limits of liability to reduce its liability under a primary policy that lacks an aggregate limit of liability."]; Kaiser Cement's Answering Brief, p. 15 ["Kaiser's reasonable expectations here—where it bargained for and obtained *non-aggregate limit* primary policies—are not protected if Truck is permitted, through equitable contribution, to deplete Kaiser's available coverage under *aggregate limit* excess policies."].) Truck's scheme also has the effect of reducing insurance otherwise available to compensate injured claimants.

(UP, pp. 50-51 and p. 19.) The only party that comes out ahead in Truck's scheme is Truck.

Fourth, all the amici recognize that *Community Redevelopment v. Aetna Cas. & Sur. Co.* (1996) 50 Cal.App.4th 328, embracing horizontal exhaustion of primary coverage remains valid at least in the context of equitable contribution disputes between insurers. (UP, pp. 35-36 and n.16; SFB, p. 21.) Importantly it is also law of the case here, as the United Policyholders recognize. (UP, p. 35.)

Finally, in addition to the law of the case rulings, the plain language of the insurance policies, and the lack of case law to support Truck's equitable contribution claim, amici also recognize that ultimately, the matter here is one left to the sound discretion of the trial judge in fashioning an equitable resolution. (UP, pp. 45-46.) The trial judge must weigh multiple equitable considerations in determining "what is *equitable* in an action for equitable contribution analysis." (*Id.* at p. 46.) United Policyholders cite equitable factors such as the "relation of the insured to the insurers" and the "effect of an equitable contribution scheme on the interest of the insured and claimants." (*Ibid.*) "These factors provide ample support for the

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conclusion that the Superior Court below did not abuse its discretion when it rejected Truck's equitable contribution claim." (*Ibid*.)

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