No. S273179

In the

Supreme Court

of the

State of California

TRUCK INSURANCE EXCHANGE, Plaintiff, Cross-Defendant, Appellant, Respondent and Cross-Respondent, v. KAISER CEMENT AND GYPSUM CORPORATION, Defendant, Cross-Complainant, Appellant and Respondent.	Court of Appeal Second Dist., Div. 4 No. B278091 Los Angeles Superior Court No. BC249550

KAISER CEMENT'S ANSWER TO PETITION FOR REVIEW

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Pursuant to rule 8.500(a)(2) of the California Rules of Court, Respondent Kaiser Cement and Gypsum Corporation ("Kaiser") submits this Answer to Truck Insurance Exchange's ("Truck") petition for review, filed February 15, 2022 (the "Petition"), regarding the Court of Appeal's January 7, 2022 unpublished opinion (2022 WL 71771) (the "Opinion").

INTRODUCTION AND SUMMARY OF ARGUMENT

This Answer by policyholder Kaiser addresses only the Petition's second "question presented" regarding California's "all sums" rule in determining insurance coverage for continuing injuries and reallocation of amounts paid by insurers under that rule. (Pet. at pp. 7, 38-42.)

Summary: The Petition's second question fails to present any "important question of law" that warrants review by this Court. The Petition identifies no unresolved legal question but rather only Truck's attempt to evade the routine application of settled law. Truck cites no example of a court's endorsement of Truck's novel position nor does Truck even suggest there is a conflict among appellate courts on this issue. What the Petition calls "confusion" is nothing but an insupportable and novel argument that is recognized by no court, as the Opinion correctly concludes.

The Opinion confirms that the issue of "all sums" and horizontal allocation is settled law: The Petition states its second "question presented" as follows:

> "2. Is a carrier's right to horizontally allocate to policies in other policy periods covering the insured for the same loss limited to policies issued by other carriers or does it apply equally to policies issued by the same carrier?" (Pet. at p. 7.)

In its detailed Opinion, the Court of Appeal correctly answered this question, and the Petition presents no reason to revisit or disturb the outcome. Under controlling precedent, Truck's question answers itself. Permitting horizontal allocation to other policies issued by the same carrier would destroy the protections afforded to the policyholder by the "all sums" rule, long recognized in California insurance law for continuous loss.

The "all sums" rule allows a policyholder sued for a continuous loss covered by multiple successive policies to select to receive defense and indemnity under a single policy. In turn, that selected carrier can seek equitable contribution from other insurers whose policies cover the risk. But nothing supports Truck's strained musings regarding a parallel right for an insurer to allocate amounts paid from the policy selected by the insured to other policy years *issued by the same carrier*—particularly given the resulting injury to the policyholder, which Truck concedes. (E.g., Pet. at p. 41 ["doing so might reduce Kaiser's policy limits in other policy years"].)

The Opinion confirms that no court has ever endorsed an intra-carrier re-allocation like the one proposed by Truck: "*Armstrong* . . . does not support Truck's proposition that there can be contribution between policies issued by the same insurer, *nor does any other California case*." (Op. at p. 48, referring to *Armstrong World Indus. Inc. v. Aetna Cas. & Surety Co.* (1996) 45 Cal.App.4th 1, emphasis added.)

Alleged error by the Court of Appeal is not a ground for review: The Petition amounts only to Truck's dissatisfaction with the Opinion, which Truck accuses of being "without citation or reasoning" and "wrong." (Pet. at pp. 40-41.) Instead of showing any grounds for review by this Court under rule 8.500(b)(1), Truck rehashes its arguments from below, even citing to its unsuccessful petition for rehearing. (*Id.* at p. 40.) But Truck's mere claim of error is not a valid ground for review. The Court of Appeal simply did not accept Truck's erroneous arguments. And thus, the Opinion, which was followed by the Court of Appeal's denial of Truck's petition for rehearing, should end the matter.

No viable legal argument: The Petition presents no viable legal reason to warrant revisiting the Opinion's resolution of the issue. The Petition devotes only a small fraction of its discussion to the issue; it appears to be only a mere afterthought. And the Petition cites almost no case law, relying principally on the excess exhaustion case of *Montrose Chem. Corp. of Cal. v. Superior Court* (2020) 9 Cal.5th 215 ("*Montrose III*"). But that case contains no guidance on

the intra-carrier horizontal allocation question. Rather, to the extent it has any application here, *Montrose III* only confirms an ordinary application of the "all sums" rule and equitable contribution.

The Petition goes so far as to claim the Opinion "calls into question" the equitable contribution "premise" of the "all sums" rule, threatening the rule's "collapse." (Pet. at pp. 38, 42.) But the Opinion does no such thing. Rather, it applies the "all sums" rule in a routine fashion and confirms that intra-carrier allocation is not the same as equitable contribution among different insurers on the risk. Specifically, unlike contribution among insurers, an intra-carrier allocation would benefit a single insurer to the detriment of its policyholder—a zero-sum transaction that violates the principle of equity and offends the policyholder's reasonable expectations. As a result, settled California law on these insurance issues remains entirely intact.

No broad significance: The unpublished Opinion presents no issue of broad significance. Although the Petition calls this intra-carrier allocation issue "omnipresent" (Pet. at p. 42), Truck does not identify even a single instance in which any insurance carrier has made the same argument to a California court.

LEGAL DISCUSSION

A. The grounds for review by this Court are strictly limited.

A party petitioning this Court typically has the burden to show review is "necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).)

Here, the Petition fails to cite Rule 8.500 or identify precisely which statutory grounds Truck is invoking in seeking review. The Petition claims no inconsistency in appellate decisions on the allocation issue. And although it appears to be the basis of Truck's argument, mere error by the court of appeal is not a basis for review:

> The court of appeal's primary function is to review for trial court error; but the supreme court's purpose is to decide important legal questions and maintain statewide harmony and uniformity of decision. The supreme court's focus is not on correction of error by the court of appeal in a specific case. In practical effect, the supreme court functions as an "institutional overseer" of the state courts. It decides cases involving important public policy questions and other matters significantly affecting the administration of justice, and resolves conflicts among the courts of appeal.

(J. Eisenberg & L. Hepler, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2021) ¶ 13:1.)

B. The Opinion manifestly is based on settled law.

The Opinion is based directly on controlling case law, particularly the "all sums" rule, which has been endorsed by multiple cases published by this Court and the courts of appeal. (Op. at pp. 46-54.) As shown by the following verbatim excerpts from the Opinion, no ambiguity or unresolved question exists regarding these settled rules or their application to this case. [1]

1. Truck's proposal violates the "all sums" rule of *Armstrong*.

> *Armstrong* holds that once a policy is triggered, the policy typically obligates the insurer to pay "all sums" that the insured shall become liable to pay as damages. (*Armstrong*, *supra*, 45 Cal.App.4th at p. 105.) With long-tail injuries such as ABIC, this may include damages attributable to other policy periods. (*Ibid*.)

(Op. at p. 8.)

> As a result, where a continuous loss is covered by multiple policies, the insured may elect to seek indemnity under a single policy with adequate policy limits. (*Montrose I*, *supra*, 10 Cal.4th at p. 664.) If that policy covers "all sums" for which the insured is liable, as most CGL policies do, that insurer may

[1] The pertinent facts and procedural history of this long-running insurance coverage dispute are recited in the Opinion, notably at pages 3-4, 9-14, 19, and 40-46.

> be held liable for the entire loss. (*Id.* at p. 665; *Armstrong*, *supra*, 45 Cal.App.4th at pp. 49-50.) "The insurer called upon to pay the loss may seek contribution from the other insurers on the risk. [Citation.]" (*Stonelight Tile*, *supra*, 150 Cal.App.4th at p. 37.)

(Op. at p. 9, citing *Stonelight Tile, Inc. v. California Ins. Guarantee Assn.* (2007) 150 Cal.App.4th 19, 37.)

> Here, Truck seeks to import the concept of contribution among insurers into the "all sums" structure of its own 19 policies, analogizing its policies to those issued by multiple insurers. *We find to do so would contravene the "all sums" language of the policies requiring Truck to pay all sums due to Kaiser, and is inconsistent with Armstrong* because it could reduce the amount of insurance available to Kaiser and the asbestos claimants by exhausting policies with aggregate limits.

(Op. at p. 52, emphasis added.)

2. Truck's proposal is not equitable contribution.

Armstrong addressed contribution rights amongst different insurers on the same risk. The court observed that successive insurers had the obligation to "'respond in full'" to the insured's claim, but that obligation was subject to "'equitable contribution from the issuers of

> other policies triggered by the same claim.'" (*Armstrong*, *supra*, 45 Cal.App.4th at p. 51.) In discussing contribution, *Armstrong* considered how such contribution amongst insurers might be calculated, but did not consider intra-insurer contribution. (*Id.* at pp. 51–52.) ***Armstrong therefore does not support Truck's proposition that there can be contribution between policies issued by the same insurer, nor does any other California case.***

(Op. at p. 48, emphasis added.)

> Based on these authorities, we conclude Truck's proposal is not a theory of equitable contribution. ***Truck's proposal could expose Kaiser to detrimental exhaustion of Truck's policies having an aggregate limit, resulting in Kaiser losing coverage for what could have been covered claims.*** Similarly, it could deplete or exhaust layers of excess insurance above the other Truck policies. Truck does not seek contribution from another insurer on the same loss, but rather seeks to shift responsibility for payment of future claims from itself to excess carriers or its insured.

(*Ibid.*, emphasis added.)

3. The 2013 *ICSOP* Court of Appeal decision further dooms Truck's argument.[2]

> Contrary to Truck's assertion, *ICSOP* does not further its argument and does not permit allocating Kaiser's losses across non-1974 triggered policies. *ICSOP* concluded that based on the policies' anti-stacking provisions, the 1974 policy was the only policy available to pay claims triggering that policy. (*ICSOP*, *supra*, at p. 30.) *This holding alone dooms Truck's argument for cross-policy allocation as it is law of the case.* The doctrine "precludes a party from obtaining appellate review of the same issue more than once in a single action." [Citations.]

(Op. at p. 50, emphasis added.)

C. The Petition establishes no legal grounds for review, including the Petition's reliance on *Montrose III*.

The Petition cites little case law, relying almost exclusively on *Montrose Chem. Corp. of Cal. v. Superior Court* (2020) 9 Cal.5th 215 ("*Montrose III*"). But that case does not support review here. Although *Montrose III* is the purported lynchpin of Truck's exhaustion argument for the Petition's first question presented,

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[2] *Kaiser Cement and Gypsum Corp. v. Ins. Co. of the State of Penn.* (Apr. 8, 2013) No. B222310, 155 Cal.Rptr.3d 283, opn. ordered nonpub. Jul. 17, 2013 ("*ICSOP*").

Truck's effort to also shoehorn that case into the Petition's horizontal allocation question is unavailing. Specifically, Truck cites *Montrose III* on the allocation question only for the ordinary point that an insurance carrier can seek equitable contribution from other carriers on the risk in an "all sums" situation. (Pet. at pp. 38-39.) But that does not resolve the question of an intra-carrier horizontal allocation and certainly is not a sufficient basis to warrant review. If anything, the significance of *Montrose III* here is confirmation that this Court has recently acknowledged both the importance of the insured's reasonable expectations and operation of the "all sums" rule the Court previously recognized in *Montrose Chem. Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 678 ("*Montrose I*"). (*Montrose III*, 9 Cal.5th at p. 227, citing *State of Cal. v. Continental Ins. Co.* (2012) 55 Cal.4th 186, 197, 200.)

In particular, *Montrose III* confirms that the "all sums" rule applies to both primary and excess coverage; once the insured selects a policy year to respond to a continuing injury, all insurers for that year stand fully liable for *all sums* due under those policies, regardless of untapped coverage in other policy years. California law on the "all sums" rule and equitable contribution stands unified, with these Supreme Court precedents in accord with prior court of appeal decisions like *Armstrong* and *Stonelight Tile*.

Moreover, the holding of *Montrose III* only pertains to a narrow issue of *excess* coverage not at issue here—i.e., an insured's access to higher layers of excess coverage when excess policies with

lower attachment points from other policy years of a continuing injury remain unexhausted. In that situation, the *Montrose III* holding is only this: "[T]he insured has access to any excess policy once it has exhausted other directly underlying excess policies with lower attachment points, but an insurer called upon to indemnify the insured's loss may seek reimbursement from other insurers that issued policies covering relevant policy periods." (*Montrose III*, *supra*, 9 Cal.5th at p. 226.)

But this *Montrose III* holding has no bearing on horizontal primary allocation, and that case expressly states it has no bearing on any issue arising from unexhausted primary coverage: "Because the question is not presented here, we do not decide when or whether an insured may access excess policies before all primary insurance covering all relevant policy periods has been exhausted." (*Id.* at p. 226, fn. 4.)

As such, *Montrose III* does not support Truck's attempt to reallocate indemnity, paid by Truck under a *primary* policy year selected by Kaiser, to Truck's other primary policy years—much less does the case demonstrate any unresolved issues on this topic requiring review.

CONCLUSION

For all these reasons, Kaiser respectfully requests that this Court deny summarily the entire Petition. It presents no important question of law requiring resolution of any issue, or any other basis

for review under rule 8.500, but only unavailing arguments by an unsuccessful private party on appeal.

Dated: March 7, 2022

Respectfully submitted,

THE COOK LAW FIRM, P.C.

By: /s/Philip E. Cook_____

Attorneys for Respondent
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CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **KAISER CEMENT'S ANSWER TO PETITION FOR REVIEW** contains approximately 2,340 words, including footnotes, based on the Microsoft Word program, and not including the Tables of Contents and Authorities, the caption page, signature blocks, attachments or this certification page.

Dated: March 7, 2022

THE COOK LAW FIRM, P.C.

By: /s/Philip E. Cook_____

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In the Supreme Court of the State of California

Truck Insurance Exchange v.
Kaiser Cement and Gypsum Corp., et al.
No. S273179

No. B278091 / BC249550

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