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 CORP., et al.

Defendant, Cross-Complainants,
Appellants, and Respondents.

California Court of Appeal, Second District,
Division Four, No. B278091
Los Angeles Superior Court No. BC249550

REPLY IN SUPPORT OF PETITION FOR REVIEW

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REPLY IN SUPPORT OF PETITION FOR REVIEW

The answers filed by various self-proclaimed "excess" carriers and the insured, Kaiser Cement, are all about obfuscation or ignoring the uncertain state of the law. They don't undermine the conflict in the law and the important legal issues that require this Court's intervention and review.

I. Horizontal Exhaustion.

A. The law is undeniably in conflict.

The self-proclaimed "excess" carriers do not refute that the case they and the Opinion rely on—*Community Redevelopment Agency v. Aetna Casualty & Surety Co.* (1996) 50 Cal.App.4th 329 (*Community Redevelopment*), decided before this Court's decision in *Montrose Chemical Corp. of California v. Superior Court* (2020) 9 Cal.5th 215 (*Montrose III*)—directly conflicts with *SantaFe Braun, Inc. v. Insurance Company of North America* (2020) 52 Cal.App.5th 19 (*SantaFe Braun*), which applies *Montrose III*. They don't dispute that *Community Redevelopment* sets out a strict rule of multiple-policy-period horizontal exhaustion of all policy-year primary insurance before any supposed "excess" insurance is triggered. Nor can they dispute that *SantaFe Braun* rejected that rule.

Their inability to reconcile *Community Redevelopment* and *SantaFe Braun* is not surprising. *SantaFe Braun* could not have been clearer in rejecting *Community Redevelopment*'s rationale: "These cases, however, rely on an interpretation of policy language rejected by the Supreme Court in *Montrose III*. (See

Community Redevelopment, *supra*, 50 Cal.App.4th at p. 341, ….)" (*SantaFe Braun*, *supra*, 52 Cal.App.5th at p. 30.)

The Opinion found *SantaFe Braun* and *Community Redevelopment* at odds, choosing the older pre-*Montrose III* decision over the more recent one applying *Montrose III*: "*SantaFe Braun* found *Community Redevelopment*'s horizontal exhaustion rule did not apply because it relied on an interpretation of the policy language rejected by *Montrose III*. ([*SantaFe Braun*, 52 Cal.App.5th] at p. 30.) … [¶] We *disagree* with *SantaFe Braun* that there is no distinction between multiple layers of excess insurance, as in *Montrose III*, and layers of primary and excess insurance…. [¶] We therefore apply *Community Redevelopment* to the language in the excess insurers' policies, and find horizontal exhaustion applies." (Opn. at 66, italics added.) The carriers' answer ignores that the Opinion here expressly recognized the conflict in the law and chose one—older—path over a more recent one that interprets and applies *Montrose III*.

B. The attempts to dodge the conflict do not work.

The "excess insurers are special" dodge. The self-proclaimed supposed "excess" carriers (who are not described in their own policies as excess carriers) claim that this case is distinguishable from *Montrose III* because *Montrose III* involved different layers of excess insurance and this case involves supposed excess insurance and primary level insurance. In essence, the carriers claim that by declaring themselves "excess"

insurers the normal rules of policy interpretation should not apply. But *SantaFe Braun* applied *Montrose III* to a dispute involving first-level excess insurance versus primary level insurance.

Indeed, the supposed excess carriers criticized *SantaFe Braun* on this very basis when before the Court of Appeal. (See July 24, 2020, Rule 8.254 Letter at 2.) They likewise argued in favor of a Connecticut intermediate appellate decision, purporting to apply California law, that disagreed with *SantaFe Braun*. (February 24, 2021, Rule 8.254 Letter; compare *Continental Casualty Company v. Rohr, Inc.* (2020) 201 Conn.App. 636 [disagreeing with *SantaFe Braun*] with *Gull Industries, Inc. v. Granite State Insurance Company* (2021) 18 Wash.App.2d 842 [following *SantaFe Braun*].) The conflict in the law is palpable and nationwide. It is not going away.

The "continue in force as" versus duty to defend dodge. The supposed excess carriers attempt to dodge the clear implication of *SantaFe Braun* by asserting their policies are excess policies, pure and simple. But that's false. Their policies *expressly* promise to "continue in force as underlying insurance" upon exhaustion not of the universe of primary policies, but just of specifically identified and scheduled policies. (Opn. at 57 ["The policy also provided that in the event of reduction or exhaustion of *the underlying policies listed on Schedule A*, the Westchester policy 'shall continue in force as underlying insurance,'" italics added]; 3JAA:1082 (Petn. For Rev. at 127); see 3JAA:1080 (Petn. For Rev. at 125) [First State policy promises to "continue in force

as underlying insurance" once "the aggregate limits of liability of the underlying policies *listed in the schedule of underlying insurance*, are exhausted," italics added]; 3JAA:1076-1077 (Petn. For Rev. at 122-123) [more recent London Market Insurers' policy forms promise to "continue in force as underlying insurance" upon the "exhaustion of the aggregate limits of liability" of "*the underlying insurances as set out in the attached schedule,*" italics added].) The self-declared "excess" insurers' pitch is simply that this language in their own policies should be ignored. Ignoring or mischaracterizing policy language is no basis to deny review.

Likewise, the supposed excess carriers' claim that they can never act as primary insurance because they generically disclaim a duty to defend. To begin with, they never point to specific language to that effect. (See Westchester Fire Ins. RB 40, fn. 14 ["for example, there are issues relating to whether the Westchester Policy includes a defense duty or whether defense costs constitute "Ultimate Net Loss"].) Rather, a number of the policies *expressly* cover defense expenses as a part of covered "ultimate net loss," subject to an "other insurance" qualification. (3JAA:1083 (Petn. For Rev. at 128) ["ultimate net loss" = "2. All expenses, other than defense settlement provided in Insuring Agreement II, incurred by the insured in the investigation, negotiation, settlement *and defense* of any claim or suit seeking such damages, excluding only the salaries of the insured's regular employees," italics added]; 3JAA:1077 (Petn. For Rev. at 123) ["The term 'Ultimate Net Loss' shall mean the total sum which the Assured, or any company as his insurer, or both, become

obligated to pay by reason of personal injury, property damage or advertising liability claims, either through adjudication or compromise, and shall also include … *expenses for* doctors, *lawyers*, nurses and investigators and other persons, *and for litigation*, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder," italics added].)

Not surprisingly, the law across the country is that the "continue in force as underlying insurance" language *includes* defense costs. (E.g., *Interstate Fire & Cas. Co. v. Auto-Owners Ins. Co.* (Minn. 1988) 433 N.W.2d 82, 86 & fn. 2 ["Interstate's policy provides that, '[i]n the event of . . . exhaustion of the aggregate limits of liability under said underlying insurances by reason of losses paid hereunder, this policy shall . . . continue in force as underlying insurance.' This clause seems to provide that, once Continental has paid up to its limits, Interstate becomes the underlying, or primary, insurer"; carrier with continue-in-force-as language primarily liable as policy "closest to the risk" versus another policy affording primary level coverage]; *Sinclair Oil Corp. v. Allianz Underwriters Ins. Co.* (Ill.Ct.App. 2015) 39 N.E.3d 570, 580-581 [despite disclaimer of duty to defend elsewhere in policy, promise "subject to the terms and conditions of the underlying insurance . . . (b) in the event of exhaustion continue in force as underlying insurance" includes duty to defend where underlying insurance owed duty to defend].)

And that is what *SantaFe Braun* holds: "[O]ne would reasonably expect the excess insurer to contribute to the defense

once the scheduled primary policies have been exhausted and the attachment points reached." (52 Cal.App.5th at p. 29.) The Court of Appeal Opinion here did not disagree with this well-established meaning and effect of "continue in force" language. Rather, it held (at odds with *SantaFe Braun*) that a horizontal exhaustion principle applied first to trump any such language. The supposed excess carriers' mischaracterization of the effect of "continue in force as underlying insurance" language is no basis to deny review.

But even if defense costs were excluded from the "continue in force as underlying insurance" obligation, the horizontal exhaustion issue still would be relevant. Truck has made hundreds of millions of dollars in primary level *indemnity* payments. Without a horizontal exhaustion requirement, the supposed "excess" but in reality "continue in force as underlying insurance" carriers owe contribution to those indemnity payments.

The "claims between carriers" versus "claims by insureds against carriers" dodge. Finally, the supposed excess carriers assert that "other insurance" language in the same policies should have a different meaning depending on who proffers the interpretation—an insured seeking to tap coverage or a co-insurer seeking equitable contribution. This was *not* the rationale of *Community Redevelopment*. It is a made-up rationale seeking to avoid the inescapable logic of *Montrose III* and *SantaFe Braun* and their proclamations on the limitations of "other insurance" policy language.

The supposed excess carriers' answer conspicuously fails to acknowledge *Montrose III*'s adoption of the Restatement's limiting explanation "that 'other insurance' clauses have generally been used to address '[a]llocation questions with respect to overlapping *concurrent policies*.' (Rest., Liability Insurance, *supra*, § 40, com. c, p. 345, italics added.)" (*Montrose III*, *supra*, 9 Cal.5th at p. 232; see Rehearing Petn. at 13-14 [noting that Opinion does not even cite to the Restatement].) Nor does it acknowledge *Montrose III*'s recognition, citing to multiple sister state Supreme Court cases, that "most courts to address the issue have found that 'other insurance' clauses are not aimed at governing the proper allocation of liability among successive insurers in cases of long-tail injury." (*Montrose III*, *supra*, 9 Cal.5th at pp. 232-233.) These statements are not limited to claims by insureds against carriers. (E.g., *Steadfast Insurance Co. v. Greenwich Ins.* (2019) 385 Wis.2d 213 [contribution claim between carriers, cited with approval in *Montrose III*, *supra*, 9 Cal.5th at p. 233]; *Ohio Cas. Ins. Co. v. Unigard Ins. Co.* (Utah 2012) 268 P.3d 180 [same].)

It makes no sense to read the same English language words and phrases in the same documents being interpreted for the same purpose—whether and to the extent that insurance coverage exists—differently depending on who proffered the construction. That is the land of Humpty Dumpty, not the rule of law. (See Carroll, Alice's Adventures in Wonderland and Through the Looking-Glass (Collier Books 1962) p. 247 [conversation between Humpty Dumpty and Alice: "'When I use

a word,' Humpty Dumpty said in a rather a scornful tone, 'it means just what I choose it to mean—neither more nor less,'" cited in *ACL Technologies, Inc. v. Northbrook Property & Casualty Ins. Co.* (1993) 17 Cal.App.4th 1773, 1794, fn. 50].)

In a sense, this is the crux not only of this petition but of the standard for review—there needs to be consistent understanding and application of the meaning of words in insurance policies and in the law generally. (See Cal. Rules of Court, rule 8.500(b)(1).)

C. The issue presented has profound effects.

Importantly, the supposed "excess" carriers do not and cannot contest the huge impact of this issue. This case alone involves hundreds of millions of dollars. Nor do they contest that this issue permeates insurance coverage issues in long-tail injury claims—e.g., asbestos, environmental—involving multiple losses and multiple years and layers of insurance policies. These are often high-value, intensely litigated disputes. The issue may have greater effect where, as here, there is a primary policy in at least one policy year that has no aggregate limit, but it applies in the aggregate-limits primary policies scenario as well where policy-year aggregate limits for each and every policy period have not yet exhausted. *Montrose III* and *SantaFe Braun* illustrate how often these types of issues come up.

The supposed excess carriers do not contest that until this Court resolves the conflict between *Community Redevelopment* and *SantaFe Braun*, the ongoing uncertainty as to the rights and obligations of various carriers in long-tail claims involving

multiple years and levels of insurance policies will continue to plague courts. Inevitably, such claims involve large sums that will trigger substantial disputes and litigation and necessary expenditure of significant resources, both litigant (which ultimately come out of premiums charged to policyholders) and judicial. The longer this uncertainty festers, the greater the resource expenditure inflicted on litigants and courts.

II. Horizontal Allocation.

Kaiser's answer primarily focuses on the horizontal allocation question. As with the supposed excess carriers' answer, Kaiser's answer obfuscates and dodges rather than clarifies.

A. *Armstrong World Industries Inc. v. Aetna Casualty & Surety Co.* (1996) 45 Cal.App.4th 1, does not resolve this issue.

The premise of Kaiser's answer is that *Armstrong World Industries Inc. v. Aetna Casualty & Surety Co.* (1996) 45 Cal.App.4th 1 (*Armstrong*), affords the insured the right to select which "all sums" policy will have to respond to a claim *and* the insured's selection is binding for all purposes, precluding the selected insurer from obtaining contribution from any other policy. The first part of the premise is correct. The insured gets to select which "all sums" policy is to *initially* respond to the claim. But the second half of Kaiser's premise is dead wrong.

The insured does not get to finally and absolutely decree which policy, and which policy alone, must bear the entirety of a loss covered by multiple policies. The Opinion itself recognizes

that under *Armstrong* the initially selected carrier gets to seek equitable contribution from other carriers with policies covering the same risk. (Opn. at 48; see *Montrose III, supra,* 9 Cal.5th at p. 236 [policyholder selected second-level excess "insurers may seek contribution from other excess insurers also liable to the insured"].) Kaiser's misstatement of the law is no reason to deny review.

B. Horizontal allocation between policies issued by the same carrier is an important unresolved issue of law.

Other than ipse dixit, neither the Opinion nor Kaiser's answer affords any reason why the rule of equitable contribution between multiple policies should differ depending on whether policies are issued by the same or different carriers. They just say it should. Why? No reason is given. Nor does any rationale exist for such a difference. "Where the reason is the same, the rule should be the same." (Civ. Code, § 3511.)

Kaiser does not dispute that circumstances often arise where the same carrier issues policies in multiple policy years covering the same loss, putting horizontal allocation at issue. This is a classic instance of an important, unresolved purely legal issue—whether horizontal allocation of losses between policy periods can be made for policies covering the same loss that the same carrier happens to have issued. (See Cal. Rules of Court, rule 8.500(b)(1).)

C. There is no law-of-the-case obstacle.

Finally, both Kaiser and the supposed excess carriers claim law of the case premised on a now-final prior appeal, *Kaiser Cement & Gypsum Corp. v. Insurance Co. of Pennsylvania* (*ICSOP*) (Apr. 8, 2013, No. B222310), review den. and opn. ordered nonpub. There is no law-of-the-case obstacle.

As the petition explained (Petn. For Rev. at 41-42, fn. 8), the law-of-the-case doctrine "does not apply to points of law that might have been, but were not determined on the prior appeal." (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 302.) *ICSOP* never considered whether Truck can, after paying all sums owed, allocate its indemnity payment among various Truck policy years. Truck's ability to allocate claims between policy years was not a subject of Kaiser's complaint or the subject summary adjudication motion against the carrier there, ICSOP. (See Opn. at 4 ["that opinion decided issues relating to *obligations of the Insurance Company of the State of Pennsylvania (ICSOP)* under an excess insurance policy it had issued to Kaiser," italics added].) It could not have been at issue on appeal.

Other than citing to isolated language out of context, neither Kaiser nor the supposed excess carriers point to how or why horizontal allocation of losses, especially losses that do not approach primary policy limits as is typically the case, was at issue in *ICSOP*. *ICSOP* involved an excess policy over Truck's policy primary limits that was triggered. It had nothing to do with settlements within primary policy limits or their allocation. *ICSOP* capped Truck's primary policy liability at one policy limit.

It did not decide how losses (whether under that limit or once that limit was reached) were to be allocated among the 19 years of Truck policies.

III. This Case Is A Perfect Vehicle For Resolving These Issues.

The horizontal exhaustion conflict between *Community Redevelopment* and *SantaFe Braun* and their competing rationales is clearly set up in this petition. So, too, are the questions expressly left open by *Montrose III* as to applying its holdings to claims involving primary and excess carriers and claims between carriers. These are pure issues of law on the face of insurance policies with undisputed language and no extrinsic evidence. (Opn. at 60; 3JAA:1164.) All agree that "the key language is the 'other insurance' language of the policies …." (Opn. at 67; see *Montrose III*, *supra*, 9 Cal.5th at p. 230; *SantaFe Braun*, *supra*, 52 Cal.App.5th at p. 23; *Community Redevelopment*, *supra*, 50 Cal.App.4th at p. 341.) These issues are heavily litigated in high-stakes cases that take time to wind their way to this Court. They are clearly presented here. This Court should seize the opportunity to resolve the conflict now.

The horizontal allocation question is likewise squarely raised. The trial court and Court of Appeal imposed a bright-line legal rule: no horizontal allocation between policies issued by the same carrier. That is an important unresolved, purely legal issue.

CONCLUSION

Review is necessary to clear up the horizontal exhaustion issue, especially as it pertains to existing primary coverage in one policy period and triggered promises to "continue in force as underlying insurance" upon exhaustion of only scheduled underlying insurance in another policy period. This issue pervasively impacts insurance coverage for continuing long-tail loss claims—necessarily expensive and high-leverage claims, such as asbestos and environmental losses. The conflict between *SantaFe Braun* and *Community Redevelopment* is not going away, as this case demonstrates.

The necessarily related horizontal allocation question equally reflects an important, unresolved issue of pure law.

This Court should grant review of both issues.

Date: March 16, 2022

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **REPLY IN SUPPORT OF PETITION FOR REVIEW** contains **2,986** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: March 16, 2022

/s/ Robert A. Olson
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Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S273179**
Lower Court Case Number: **B278091**

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

3/16/2022

Date

/s/Monique Aguirre

Signature

Olson, Robert (109374)

Last Name, First Name (PNum)

Greines Martin Stein & Richland LLP

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