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 BRIEF ON THE MERITS

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Court has stated the limited issue for review as follows:

> May a primary insurer seek equitable contribution from an excess insurance carrier after the primary policy underlying the excess policy has been exhausted (vertical exhaustion), or is equitable contribution from an excess insurance carrier available only after all primary policies have been exhausted (horizontal exhaustion)?

As framed, the issue suggests that there may be circumstances in which equitable contribution between a primary and an excess insurance carrier might be appropriate. Certainly, following this Court's recent decision in *Montrose Chem. Corp. of Ca. v. Superior Court* (2020) 9 Cal.5th 215 *("Montrose III")*, a policyholder's selection of policies to respond to a covered claim and the order in which the policies are to exhaust might well warrant an examination of equitable contribution between insurers.

But under the express terms of the insurance policies Truck sold to Kaiser here, the equitable contribution Truck seeks would inflict injury on the policyholder, defeating Kaiser's reasonable expectations of coverage for *no aggregate limits at the primary layer*, an expectation that Kaiser bargained for when procuring the Truck primary policy. As the Court of Appeal correctly concluded,

equitable contribution under these circumstances would *inequitably* deplete the policyholder's aggregate limits of excess coverage.

As the policyholder, Kaiser's position on the pending issue for review is that the "equitable" contribution that Truck seeks is not equitable at all and impermissible on the facts of this case under any rationale. Thus, the vertical versus horizontal exhaustion issue is beside the point and need not be reached. Accordingly, this Court should either affirm or instead dismiss review under rule 8.528(b)(1) of the California Rules of Court.

The issue for review, based on the actual Kaiser policies at hand, is visually depicted below, with P1 representing primary coverage in YEAR 1, E1 representing excess coverage above P1 in YEAR 1; P2 representing primary coverage in YEAR 2, and E2 representing excess coverage above P2 in YEAR 2. Importantly, to complete the illustration, the policies in YEAR 1 have no aggregate limits while the policies in YEAR 2 do.

YEAR 1	YEAR 2
E1 (No Agg Limits)	E2 (Agg Limits)
P1 (No Agg Limits)	P2 (Agg Limits)

The issue thus is: Can P1 obtain equitable contribution from E2

while P1 is unexhausted? Under established California law, the answer is no.

Although Truck's Opening Brief ignores the injury that its proposed contribution would inflict on its policyholder, by this Answer Brief, Kaiser underscores why any contribution taken from Kaiser's excess coverage and delivered to Truck, under the terms of the contracts at bar, would be inequitable. Unfortunately, Truck's briefing before this Court—both in its Petition for Review and its Opening Brief on the Merits—has obfuscated these unique facts, resulting in an issue for review that incorrectly *assumes* equitable contribution, turning on a binary choice between a vertical or a horizontal exhaustion requirement.

In short, Truck's attempt to allocate defense and indemnity paid from its *non-aggregate limit* primary policy to exhaust Kaiser's aggregate limit coverage in other policy periods will harm Kaiser and thus is contrary to California law, the contracts at bar and equity.

STATEMENT OF FACTS

Respondent Kaiser Cement and Gypsum Corporation ("Kaiser") refers the Court to the January 7, 2022 Court of Appeal opinion in this matter, which thoroughly and accurately sets forth the pertinent facts and procedural history of this long-running insurance coverage dispute. (*Truck Ins. Exch. v. Kaiser Cement and Gypsum Corp., etc.*, No. B278091 (Cal. Ct. App. Jan. 7, 2022), rehg. den. (Feb. 3, 2022), review granted No. S273179 (Apr. 13, 2022,)

2022 WL 71771, pp. *3-11, 22-24 [nonpub. opn.] (hereinafter, "*Truck v. Kaiser Cement*"). A brief summary follows.

A. Procedural history

Although the issue for review is limited, it arises from the larger context of coverage litigation that began in 2001, including Court of Appeal decisions on substantive coverage issues in 2007, 2013 and 2022—the most recent of which followed a series of multi-phase bench trials. Phase I involved Truck Insurance Exchange's ("Truck") attempt to levy time-barred deductibles against Kaiser. Phase II involved Truck's attempt to allocate indemnity to other Truck primary policy years after Kaiser selected a single Truck policy to pay "all sums." Phase III involved Truck's attempt to force the excess carriers above other non-Truck exhausted primaries to drop down and contribute.

The Court of Appeal ruled against Truck on every issue.

Truck sought review in this Court, including review of its Phase II defeat through Truck's Second Question Presented, which stated as follows: "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?" By contrast, the pending Phase III issue for review pertains only to equitable contribution from excess carriers above primary insurers other than Truck. As explained below, although the Phase II issue is not before the Court,

some of Kaiser's Phase II evidence, in the record on Truck's appeal, applies to the pending Phase III issue.

B. Factual background

Truck provided Kaiser applicable primary coverage from 1965 to 1983. The 1971-1979 Truck policies were especially favorable to Kaiser because they do not have aggregate limits.[1] In addition to its primary coverage, Kaiser obtained excess coverage from a number of insurance carriers. (*Truck v. Kaiser Cement*, *supra*, 2022 WL 71771, pp. *5-6, 23.) Useful graphics summarizing Kaiser's coverage are set forth at 3 JRA 1023-1025 [Trial Exs. 398-400].[2]

At trial, Kaiser submitted uncontradicted evidence to demonstrate the injury that Truck's contribution approach would

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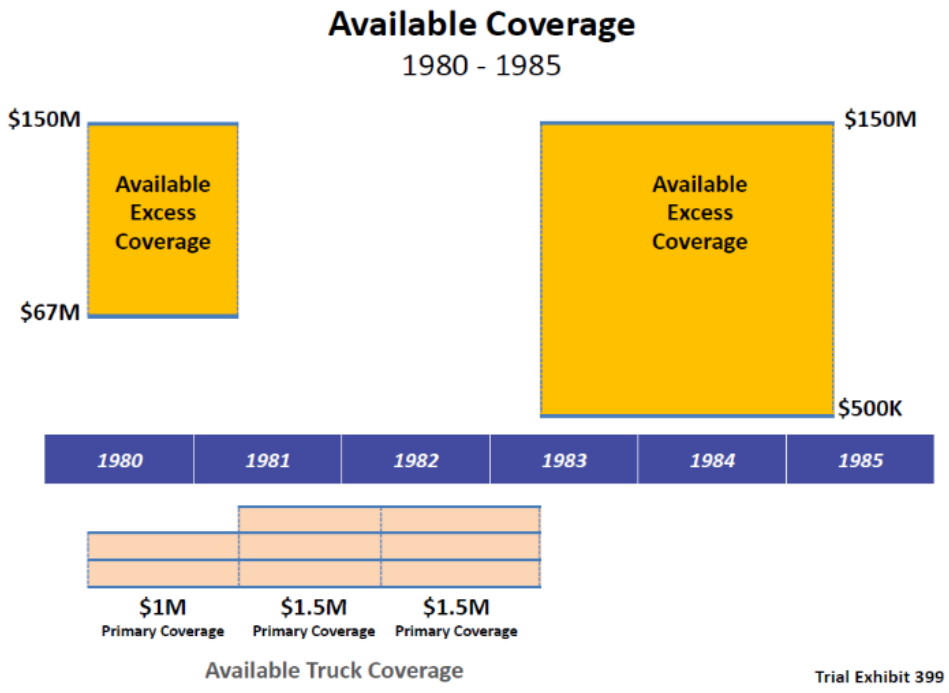
[1] Kaiser also had primary coverage from other carriers in other years—i.e., from Fireman's Fund Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA, and Home Indemnity Company. *All* of these primary policies had aggregate limits, *all* contributed to the costs to defend and indemnify Kaiser, and *all* are now exhausted. (*Truck v. Kaiser Cement, supra*, 2022 WL 71771, p. *5, fn. 6; see 3 JRA 1025 [Trial Ex. 400].) Truck's Opening Brief misstates the scope of this coverage. (Truck's Opening Brief, p. 15 [omitting primary coverage issued by National Union].)

[2] In this Answer Brief, JRA refers to the Joint Respondents' Appendix on Truck's Appeal; JAA refers to the Joint Appellants' Appendix on Kaiser's Appeal; and RT refers to the Reporter's Transcript.

cause.[3] Kaiser's showing included the testimony of Ross Mishkin, an expert regarding claim allocations for continuing asbestos injuries. (3 JRA 987-990 [Trial Ex. 367, Mishkin CV].) Mishkin's testimony included the following summary graphic (at 3 JRA 1024 [Trial Ex. 399]):



Truck sought to allocate payments it made from its 1974 non-aggregate limit policy selected by Kaiser to its 1980 to 1983 aggregate limit policies (shown in beige, above), which would exhaust the 1980 to 1983 policy limits. If permitted, claims with exposures triggering only post-1979 coverage would then force

[3] Although this evidence was presented in the Phase II trial, the evidence applies to any similar attempt by Truck to deplete excess coverage by contribution and thus is relevant to the Court's review.

Kaiser to tap coverage under its 1983-1985 excess policies (shown in yellow above). As Mishkin explained, permitting that allocation (or, as Truck characterized it, obtaining "contribution" from its 1980-1983 policies) would injure Kaiser because those excess policies provide less protection than the Truck primary policies. Among other things, the excess policies only reimburse for the "Ultimate Net Loss," they have no duty to defend and they are narrower than the coverage provided by other policies. As Mishkin explained:

> [T]hose excess policies do not have a duty to defend, and whatever defense that those policies reimburse would contribute towards eroding the actual coverage which will impair that coverage more quickly[.]

(3 RT 367:3-9 [R. Mishkin testimony].)

C. Court of Appeal finding of injury to policyholder

The Court of Appeal ruled that Truck's contribution claim would injure the policyholder by depleting available excess coverage. Although the Court of Appeal stated this in connection with its ruling on Phase II, the point expressly applies to any depletion of excess coverage by contribution:

> 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.

(*Truck v. Kaiser Cement*, *supra*, 2022 WL 71771, p. *20.)

DISCUSSION

A. This Court's *Montrose III* decision resolves the issue.

Truck relies extensively on this Court's decision in *Montrose Chem. Corp. of Ca. v. Superior Court* (2020) 9 Cal.5th 215 *("Montrose III")*, but this reliance is misplaced. *Montrose III* is a policyholder case; if anything, it applies here to resolve the pending issue in the policyholder's favor.[4]

[4] Nor does *Montrose III* explicitly support the *contribution* argument as Truck frames it because *Montrose III* is not a contribution case, but instead is a contract case, rooted in the relationship between a policyholder and its insurers. Despite Truck's contortions, it is forced to concede that neither *Montrose III* nor *SantaFe Braun, Inc. v. Ins. Co. of N. Am.* (2020) 52 Cal.App.5th 19 is a contribution case. (Truck's Opening Brief, p. 47.)

In *Montrose III*, the Court recognized the policyholder's right to the full benefit of its contract and allowed no argument based on exhaustion or equitable claims to deprive the policyholder of its contractual rights. In holding that an insured could access multiple layers of excess coverage with conflicting attachment points, this Court chose not to recognize an exhaustion requirement "that would limit [the insured's] ability to access the excess insurance coverage it has paid for." (*Id.*, p. 237.) Rather, the Court accorded the insured the full benefit of everything "the policy language at issue here permits." (*Ibid.*) Finally and for good measure, the Court noted: "To the extent any of the language of these policies remains ambiguous, we resolve these ambiguities to protect the objectively reasonable expectations of the insured." (*Id.*, p. 235, citation omitted.)

Applied here, *Montrose III* justifies providing the policyholder with all that the Truck policy language permits, regardless of Truck's claim of unfairness or its gripe of suffering a large liability, all by itself, relative to the premium it charged to Kaiser. Truck's grievance has no legal consequence under California insurance law, which imposes a strict duty on primary insurers like Truck to defend covered claims to settlement or judgment, regardless of the existence of excess insurance. (*Diamond Heights Homeowners Assn. v. Nat'l Am. Ins. Co.* (1991) 227 Cal.App.3d 563, 577-578 ["[E]ven if the insured's potential liability exceeds primary policy limits and invades excess coverage, . . . [t]he primary insurer's duty to defend is not extinguished until settlement or payment of judgment."]; see also

Montrose III, *supra*, 9 Cal.5th at p. 236 ["There is no evident unfairness to insurers when their insureds incur liabilities triggering indemnity coverage under the negotiated policy contract."].)[5]

Properly exercising its contractual rights, Kaiser has selected a single policy year to cover "all sums" of defense and indemnity arising from an alleged injury that triggers the policy. (*Armstrong World Indus. Inc. v. Aetna Cas. & Surety Co.* (1996) 45 Cal.App.4th 1, 104-107.) Importantly, the Truck policy that Kaiser has selected under *Armstrong* has (i) no aggregate limits, and (ii) a defense obligation that does not erode its per occurrence limit of $500,000 per claim. (*Truck v. Kaiser Cement*, *supra*, 2022 WL 71771, pp. *3, 5; 8 JAA 3327-3328 [Trial Ex. 302 [Truck 1974 Policy], Insuring Agreement § II, Defense, Settlement, Supplementary Payments.) As noted, Truck's obligation to Kaiser under *Diamond Heights* is to defend a tendered claim "until settlement or payment of judgment." Any equitable rights that Truck might try to assert against other insurers must arise solely from Truck's performance of its unique obligations to Kaiser under its primary policy.

[5] Truck's grievance concerning its large liability relative to the premium it received is unavailing for other reasons, as well. For instance, Truck claims it paid a total liability of "over $400 million," but this assertion is not based on actual *evidence* of Truck payments (which Truck would of course know) but instead on an incorrect, annual "extrapolat[ion]" only. (Truck's Opening Brief, pp. 14-15, fn. 2.)

In short, *Montrose III* leaves no hole that has to be filled now, and certainly not under the facts of this case.

B. Equitable contribution against the excess would inequitably injure the policyholder.

Despite the length of Truck's Opening Brief, it fails to acknowledge the detriment that the supposed "equitable" contribution it seeks would cause to its policyholder (i.e., premature exhaustion of available excess coverage), focusing instead on relative fairness considerations between primary and excess insurers only.

Permitting Truck to seek equitable contribution against Kaiser's excess insurers to satisfy Truck's defense and indemnity obligations would violate the "all sums" rule by depleting coverage in a year that Kaiser did not select.[6] And permitting this contribution would ignore the coverage that Kaiser bargained for when it purchased the Truck primary policy—i.e., a no-aggregate limit policy with a non-eroding defense duty. The policy is, in effect, "inexhaustible" when properly enforced, which Truck concedes. (Truck's Opening Brief, p. 13.)

[6] Notably, in Phase II, the Court of Appeal ruled that Truck's attempt to equitably "allocate" indemnity payments to other Truck policy years, much like its attempt to allocate to excess insurers here, violated the "all sums" rule. (*Truck v. Kaiser Cement, supra*, 2022 WL 71771, pp. *19-22.)

Moreover, Truck's attempt would only be "equitable," and consistent with the "all sums" principle, where the policyholder's interests remain undisturbed. (*Montrose III*, *supra*, 9 Cal.5th at pp. 227-228.) *Montrose III* requires the selected primary policy be enforced to its full extent, resolving any "ambiguities to protect the objectively reasonable expectations of the insured." (*Montrose III*, *supra*, 9 Cal.5th at p. 234.) 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.

C. The Court of Appeal correctly concluded that equitable contribution is not available here from the excess.

The Court of Appeal ruled against Truck's equitable contribution claim, affirming the trial court's ruling in Phase III on horizontal exhaustion and other legal grounds. The opinion thoroughly sets forth the reasons for that conclusion, including analysis of all the relevant caselaw.

By its literal terms, the issue for review refers only to "equitable contribution." But as a threshold point, *pure equitable contribution against an excess is simply unavailable in this situation under longstanding California insurance law*. The Court of Appeal correctly explained as follows:

> Insurers can obtain contribution from other insurers on the same risk and sharing the same level of liability (*North American Capacity Ins. Co. v. Claremont Liability Ins. Co.* (2009) 177 Cal.App.4th 272, 295, 99 Cal.Rptr.3d 225.) Absent a specific agreement to the contrary, there is no contribution between primary and excess insurers. (*Reliance Nat. Indemnity Co. v. General Star Indemnity Co.* (1999) 72 Cal.App.4th 1063, 1080, 85 Cal.Rptr.2d 627.)
>
> Here, Truck's argument necessarily assumes its own erroneous conclusion: that the excess policies have already dropped down and thus contribution is appropriate between insurers because they are now on the same level. The reality is that Truck, as a primary insurer, cannot obtain contribution from an insurer on a different level.

(*Truck v. Kaiser Cement*, *supra*, 2022 WL 71771, pp. *27-28.)

Truck's Opening Brief offers no rebuttal to this, and this point alone should end the discussion. Truck cites no contrary case on point—i.e., no case whatsoever permitting a primary to obtain direct *contribution* from an excess. Importantly, a policyholder's exercise of its contractual rights to access primary or excess coverage cannot be equated with a primary insurer's attempt to obtain contribution from other insurers. Truck's strained efforts to step into the shoes of

its policyholder and, from that position, seek contribution must not be permitted under the circumstances.

In sum, denying equitable contribution to Truck here is merely the result of enforcing the terms of Kaiser's policies, particularly in light of the harm that would come to Kaiser from spreading a loss covered by a Truck primary policy to other policies that do not share the same risk—i.e., "on the risk during the same loss," as Truck's cited authority states. (Truck's Opening Brief, p. 59, citing *State of Ca. v. Continental Ins. Co.* (2012) 55 Cal.4th 186, 200.)

CONCLUSION

For all these reasons, this Court should affirm the opinion of the Court of Appeal on the pending issue regarding Truck's attempt to obtain equitable contribution from Kaiser's excess carriers by confirming that equitable contribution is not available under these circumstances or instead by simply dismissing review. Through either route, such an outcome follows from *Montrose III* and is necessary to protect the contractual interests and reasonable expectations of Truck's policyholder.

Dated: September 30, 2022

Respectfully submitted,

THE COOK LAW FIRM, P.C.

By: /s/Philip E. Cook

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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 BRIEF ON THE MERITS** contains approximately 2,850 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: September 30, 2022 THE COOK LAW FIRM, P.C.

By: /s/Philip E. Cook

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PROOF OF SERVICE

In the Supreme Court of the State of California

Truck Ins. Exchange v.

Kaiser Cement and Gypsum Corp., et al.

No. S273179
Appeal No. B278091
Los Angeles Superior Court No. BC249550

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 626 Wilshire Blvd. Suite 820, Los Angeles, CA 90017.

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Executed on September 30, 2022 at Los Angeles, California.

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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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

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/s/Philip E. Cook

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