SUPREME COURT
FILED

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Jorge Navarrete Clerk

Deputy

Case No. S244737

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
Los Angeles County Superior Court Case No. BC 005158
The Honorable Carolyn B. Kuhl
The Honorable Elihu M. Berle

ANSWERING BRIEF ON THE MERITS OF TRAVELERS CASUALTY AND SURETY COMPANY AND THE TRAVELERS INDEMNITY COMPANY

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INTRODUCTION

Through its Petition, Montrose Chemical Corporation of California ("Montrose") seeks far more than just a determination that "vertical exhaustion" is the rule in California for triggering higher-level excess insurance in cases involving progressive, multi-year environmental contamination. Rather, Montrose seeks to secure a declaration that would materially alter the showing that it must make as policyholder prior to accessing *any* of its higher-level excess coverage, and regardless of whether "vertical" or "horizontal" exhaustion controls. Travelers Casualty and Surety Company and The Travelers Indemnity Company (together, "Travelers") write separately because Travelers did not affirmatively move for summary adjudication on the exhaustion methodology issue, though it did oppose Montrose's motion for summary adjudication in view of the sweeping nature of the declaration sought by Montrose. Montrose's requested relief—that this Court direct the Superior Court to grant Montrose's motion for summary adjudication on its Thirty-Second Cause of Action—should be denied as to Travelers for at least two independent reasons.

First, as discussed in Section I below, Montrose's requested declaration, read literally, would allow it to establish actual exhaustion in a manner directly contrary to the terms of the Travelers Policies (as defined herein). Specifically, Montrose sought a declaration that, in order to seek

indemnification under its excess policies, Montrose need only show that "*its liabilities are sufficient to exhaust* the underlying policy(ies) in the same policy period." 4PA17 at 914:11-18 (original emphasis removed; new emphasis supplied). But the excess policies, as confirmed by numerous decisions, require *actual* exhaustion before a policyholder may access excess coverage. Indeed, Montrose concedes that actual exhaustion is required, though it nonetheless seeks entry of an order that appears to be designed to excuse it of the need to make such a showing in the manner required by the policies.

Thus, while Montrose focuses its Petition on the question of "vertical" versus "horizontal" exhaustion, the relief Montrose actually seeks, if granted, would be improper. Neither the trial court nor the Court of Appeal reached this issue in view of the rulings below rejecting Montrose's approach to exhaustion in favor of horizontal exhaustion. Because Montrose's petition seeks a ruling that would be improper regardless of how this Court ultimately decides the question of "horizontal" versus "vertical" exhaustion, Montrose's petition should be denied as to Travelers and other insurers similarly situated.

Second, Montrose's principal claim, that it may pick and choose excess policies in any particular year or years at its whim, and seek the full amount of excess coverage on an "all sums" basis, is predicated on its misinterpretation of the policy terms and California law. However, as

discussed in Section II below, even if this Court were to *agree* with Montrose on this approach to exhaustion, it would contravene the law that governs the Travelers Policies. As Travelers argued in the trial court, pursuant to Section 1646 of the California Civil Code, California law does not apply to any of the Travelers Policies at issue here. Those policies were *not* issued to Montrose, but to Stauffer Chemical Company ("Stauffer") during periods when Travelers, Stauffer and even Montrose (which claims to be an "additional insured" under the Stauffer policies) were all located in Connecticut. Because Montrose's requested declaration would contravene the law applicable to the Travelers Policies, for this reason as well, Montrose's sweeping request that its motion for summary adjudication be granted as to all insurers, including Travelers, should be denied.

STATEMENT OF THE CASE

I. Montrose, DDT and the Underlying Litigation

From 1947 to 1982, Montrose manufactured the pesticide dichlorodiphenyl-trichloroethane (DDT) at its facility in Torrance, California. *Montrose Chem. Corp. of Cal. v. Superior Court*, 6 Cal. 4th 287, 292 (1993). During the 1960s, serious concerns were raised about the effect of DDT on the environment and, in 1972, the federal government prohibited its use within the country. *Id.* Montrose continued to manufacture DDT for export at the Torrance facility until it closed the plant in 1982. *Id.*

In June 1990, the United States filed a lawsuit against Montrose and others in the United States District Court for the Central District of California, captioned *United States v. Montrose Chem. Corp. of Cal.*, No. 903122 AAH (JRx). 4PA17 at 869:25-870:5. As Montrose described, the government's complaint sought "damages for alleged injury or harm in connection with releases of hazardous substances into the environment in and around Los Angeles." *Id.*

Montrose entered into a number of partial consent decrees to resolve aspects of the underlying action, most after the District Court held that Montrose was liable under CERCLA Section 107 for past and future response costs related to Onshore Areas and the Palos Verdes shelf.[1] Montrose also entered into a number of settlement agreements with its

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[1] These include a Partial Consent Decree (Onshore Past Costs), *United States v. Montrose Chemical Corp. of Cal.*, No. 2:90-cv-03122 (C.D. Cal. Oct. 20, 2000) ECF No. 2570; Partial Consent Decree (Relating to Offshore Matters and Department of Justice Costs), *United States v. Montrose Chemical Corp. of Cal.*, No. 2:90-cv-03122 (C.D. Cal. Mar. 15, 2001) ECF No. 2645; Partial Consent Decree (Relating to the Current Storm Water Pathway), *United States v. Montrose Chemical Corp. of Cal.*, No. 2:90-cv-03122 (C.D. Cal. June 26, 2002) ECF No. 2687; Partial Consent Decree (Relating to the Neighborhood Areas), *United States v. Montrose Chemical Corp. of Cal.*, No. 2:90-cv-03122 (C.D. Cal. June 26, 2002) ECF No. 2688, and Partial Consent Decree (Construction of the Dual Site Groundwater Operable Unit Treatment System), *United States v. Montrose Chemical Corp. of Cal.*, No. 2:90-cv-03122 (C.D. Cal. Aug. 22, 2012) ECF No. 2735.

primary and some excess insurers to fund its ongoing environmental litigation.

Montrose itself does not appear to have any ongoing business. It no longer manufactures or sells any product, nor does it have any bona fide business operations. *See Montrose Chem. Corp. of Cal. v. Am. Motorists Ins. Co.*, 117 F.3d 1128, 1132 (9th Cir. 1996). Rather, Montrose is a shell with a mere three employees and a board of directors, whose sole purpose seems to be to act as a conduit for managing ongoing insurance coverage litigation, administering prior insurance settlements, and responding to environmental claims asserted by state and federal bodies—all of which are litigated by Montrose's outside counsel at the expense of Travelers and other insurers that issued policies *not* to Montrose, but to another third party, Stauffer. *See id.* at 1030, 1032.

II. The Travelers Policies

The Travelers Indemnity Company issued three excess liability insurance policies to Stauffer for the policy years 1971 through 1977. Travelers Casualty and Surety Company (formerly known as Aetna Casualty and Surety Company) issued twelve excess liability insurance policies to Stauffer for the policy years 1972 through 1982 (together with the three Travelers Indemnity Company policies, the "Travelers Policies"). Montrose contends that it is an additional insured under these policies issued to Stauffer. *See* 4PA17 at 865:14-18, 869:4-7.

At the time each of these policies was issued, both Travelers Indemnity and Travelers Casualty were principally located in Hartford, Connecticut. *See, e.g.*, 5PA21 at 1258, 1294. Similarly, the policies identified Stauffer as located in Westport, Connecticut on all thirteen of the Travelers Casualty policies, *id.* at 1294-1442, and one of the three Travelers Indemnity policies, *id.* at 1284. For two of the Travelers Indemnity policies (issued in 1971 and 1973), Stauffer was identified as located in New York, New York. *Id.* at 1258, 1267.

Other than with respect to the identification of Stauffer as the named insured, none of the Travelers Policies specified where the insured risks were located. *See id.* at 1258-1442. During the period of the Travelers Policies, Stauffer was a manufacturing company in multiple lines of business with locations throughout the world and in 28 states throughout the United States. 4PA20 at 1063-1150; 5PA 20 at 1152-1205. Montrose alleges in its complaint that at all pertinent times, it was a corporation formed and existing under the laws of the State of *Delaware*. 4PA17 at 856:11-14. Montrose's principal place of business was located in *Connecticut*. *See Am. Motorists Ins. Co.*, 117 F.3d at 1135 (after dismissal of federal action for lack of diversity of citizenship and imposition of sanctions on Montrose on the basis that Connecticut was its only reasonable place of business, reversing award of sanctions since Montrose had a non-frivolous basis to argue that Nevada was its place of business). Indeed, in

prior litigation, Montrose "freely stated . . . that its headquarters, mailing address, and most employees were in Connecticut," and that Montrose's chief executive officer testified that its headquarters were located in Connecticut. 5PA20 at 1235 n.39. Thus, at the time the Travelers Policies were issued, and as noted on the insurance contracts themselves, Travelers, Stauffer, and Montrose were located in and/or had principal places of business in Connecticut, save for two Travelers Indemnity policies in which Stauffer stated it was located in New York.

III. The Coverage Action in the Trial Court and the Motions Precipitating Montrose's Writ Petition

In the coverage action pending in the trial court, Montrose seeks declarations that the various defendant insurers have a duty to indemnify Montrose for liabilities it bears from the underlying litigation. *See* 4PA17 at 871-900. The defendants contend, among other things, that pollution exclusions under the relevant policies bar coverage for the type of pollution events for which Montrose is liable. *See, e.g.*, 4PA18 at 1034:18-20. Issues concerning the applicability and enforcement of the policies' pollution exclusions, as well as other significant issues, have not, to date, been adjudicated in this action.

On November 23, 2015, Montrose and certain of the defendants (not including Travelers) cross-moved for summary adjudication on Montrose's

Thirty-Second Cause of Action, which seeks the following declaration against all defendants (including Travelers):

> [I]n 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) issued 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.

4PA17 at 900:14-20 (emphasis removed). Specifically, Montrose sought—as it seeks now—a declaration that it need only demonstrate liabilities "sufficient to exhaust" its underlying insurance before accessing its higher-level excess insurance, and that it need not demonstrate *actual* exhaustion of that lower-level insurance as required by the policies. Though Travelers did not join the other insurers' motion, it did oppose Montrose's motion on multiple grounds, including on the basis that the declaration Montrose sought was impermissible because it was contrary to the unambiguous policy terms and both the law applicable to the Travelers Policies as well as California law.

The trial court denied Montrose's motion and granted the motion of the other insurer defendants, which precipitated Montrose's petition for writ of mandate. The trial court's order (the "Trial Court Order") was entered on April 14, 2016.

IV. Montrose's Writ Petition and Petition for Review

On May 23, 2016, Montrose petitioned the Court of Appeal for a writ of mandate compelling the trial court to reverse the Trial Court Order and grant Montrose's motion for summary adjudication against all defendants while denying the insurers' motion for summary adjudication. The excess insurers subsequently filed Preliminary Oppositions to the Petition and the Court of Appeal denied the Petition on July 13, 2016.

On July 25, 2016, Montrose filed a Petition for Review in the California Supreme Court, to which the insurer defendants filed oppositions. On October 12, 2016, the California Supreme Court granted the petition and transferred the matter back to the Court of Appeal with directions to vacate its order denying mandate and to issue an order directing respondent Superior Court of Los Angeles County to show cause why the relief sought in the petition should not be granted.

After briefing and oral argument, the Court of Appeal issued its opinion (the "DCA Opinion"), which denied Montrose the full relief it sought. Montrose filed a Petition for Review of the DCA Opinion, which Travelers opposed in its Answer in Opposition. This Court approved Montrose's Petition for Review of the DCA Opinion.

ARGUMENT

I. The Declaration Montrose Seeks Is Contrary to Express Policy Language and Settled Law Requiring Actual Exhaustion

By seeking a declaration that Montrose need only establish that "its liabilities are sufficient to exhaust the underlying policy(ies) in the same policy period," the writ Montrose seeks would compel a declaration by the trial court that is contrary to express policy language and settled law requiring actual exhaustion. *Regardless* of how this Court rules on the question of horizontal or vertical exhaustion, let alone Montrose's contention that it can pick and choose which layers of excess coverage to access at its whim—Montrose's requested declaration remains improper and should be rejected.

A. Courts are not permitted to rewrite unambiguous policy language.

"If contractual language in an insurance contract is clear and unambiguous, it governs, and we do not rewrite it 'for any purpose.'" *Aerojet-General Corp. v. Commercial Union Ins. Co.*, 155 Cal. App. 4th 132, 145 (2007) (quoting *Certain Underwriters at Lloyd's of London v. Super. Ct.*, 24 Cal. 4th 945, 968 (2001)). This Court has recognized that the failure to apply plain, unambiguous language is reversible error. *See Rosen v. State Farm Gen. Ins. Co.*, 30 Cal. 4th 1070, 1073 (2003) (emphasizing *Lloyd's of London* prohibition against rewriting contract provisions). Montrose purports to acknowledge the primacy afforded to the policy

language agreed to by the parties in their insurance contracts. 1PA9 at 264:25-265:2 ("Given the primacy afforded to policy language, and the clear provisions in the Policies discussed above, there is no support for . . . attempt[ing] to fashion a rule that applies irrespective of, and would in fact trump, clear policy language.").

B. The Travelers Policies unambiguously require actual exhaustion—not "liabilities sufficient to exhaust."

Travelers policies TEX-960101-71, TEX-110T456-7-73, and TEX-110T456-7-76 each expressly states that "liability under this policy shall attach to [Travelers] only after the underlying insurers *have paid or been held to pay the full amount* of their respective limits of liability as described in the underlying policies." 1PA6 at 168:14-17 (emphasis added). The policies further state that liability "shall not attach unless and until the underlying insurers shall have admitted liability for the primary limits or unless and until the insured has by final judgment or by settlement with the consent of [Travelers] been adjudged *to pay a sum which exceeds such primary limits*." *Id.* at 168:24- 27 (emphasis added).

Montrose's Opening Brief makes no mention of the proposed "liabilities sufficient to exhaust" language, let alone attempt to defend that language in any way. Indeed, the language is indefensible for a number of reasons, including that it appears to leave open the possibility that Montrose would be allowed to 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 settled 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.

Thus, rather than simplifying the issues the trial court must resolve, Montrose's proposed declaration would open the door to additional confusion and unnecessary motion practice. There is no need to rewrite the terms of the policies through the declaration Montrose seeks because the policies themselves specify when excess coverage potentially attaches, namely: (i) "only after the underlying insurers *have paid or been held to pay the full amount* of their respective limits of liability as described in the underlying policies," and (ii) "the underlying insurers shall have admitted liability for the primary limits or . . . the insured has by final judgment or by settlement with the consent of [Travelers] been adjudged to pay a sum which exceeds such primary limits." 1PA6 at 168 (emphasis added). Even Montrose concedes that "[a]s a general matter, no one disputes that excess coverage does not attach until a certain amount of underlying coverage is exhausted." Opening Br. at 37 (citations omitted).

Because Montrose's proposed declaration would improperly rewrite unambiguous policy terms governing when Montrose's higher-level excess

coverage is triggered, it is impermissible. *See Rosen*, 30 Cal. 4th at 1073; *First Am. Title Ins. Co. v. XWarehouse Lending Corp.*, 177 Cal. App. 4th 106, 115 (2009) ("[W]hen the terms of the policy are plain and explicit the courts will not indulge in a forced construction so as to fasten a liability on the insurance company which it has not assumed.") (internal quotation and citation omitted); *see also Aerojet-General*, 155 Cal. App. 4th at 145–46 (refusing to rewrite unambiguous insurance contract language "for any purpose"); *Wolf v. Walt Disney Pictures & Television*, 162 Cal. App. 4th 1107, 1129 n.13 (2008) (finding that "rewrit[ing] the contract to confer a right not bargained for" is "not a proper judicial function").

California precedent also makes clear that a showing of actual exhaustion—not merely liabilities sufficient to exhaust—is required before excess policies like those at issue in this case are implicated.[2] In

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[2] In opposing Montrose's motion for summary adjudication, Travelers contended that California law does not govern the Travelers Policies and that, rather, New York or Connecticut law applies instead pursuant to Section 1646 of the California Civil Code, as discussed further in Section II below. Choice of law is determined on an issue-by-issue basis, and on the question of actual exhaustion there is no conflict between California, New York, and Connecticut law. *See Forest Labs., Inc. v. Arch Ins. Co.*, 984 N.Y.S.2d 361, 361 (App. Div. 2014) ("The motion court properly determined that the express terms of RSUI's policy providing excess coverage to plaintiff required the previous layer of excess coverage to be exhausted *through actual payment of that policy's limit* prior to RSUI being required to pay.") (emphasis added); *Ali v. Federal Ins. Co.*, 719 F.3d 83, 91 (2d Cir. 2013) ("[W]e agree with the District Court's conclusion that the 'express language' of the relevant contract terms 'establishes a clear condition precedent to the attachment of the Excess Policies,' by 'expressly

Qualcomm, Inc. v. Certain Underwriters at Lloyds, London, 161 Cal. App. 4th 184 (2008), for example, the Court of Appeal for the Fourth District analyzed an excess policy with language that closely mirrors the language of the Travelers Policies noted above. Specifically, the disputed excess policy in *Qualcomm* provided that the excess insurer "shall be liable *only after* the insurers under each of the Underlying policies *have paid or have been held liable to pay the full amount* of the Underlying Limit of Liability." *Id.* at 195 (emphasis in original); *accord, e.g.*, 1PA6 at 168:14-17 ("[L]iability under this policy shall attach to [Travelers] *only after* the underlying insurers *have paid or been held to pay the full amount* of their respective limits of liability as described in the underlying policies.") (emphasis added). The Court of Appeal in *Qualcomm* correctly concluded that "the phrase 'have paid . . . the full amount of [the underlying limit]' . . . cannot have any other reasonable meaning than actual payment of no less than" the limit of the underlying insurance. *Qualcomm*, 161 Cal. App. 4th

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stat[ing] that coverage does not attach until there is *payment* of the underlying losses.'") (emphasis in original); *O & G Indus., Inc. v. Litchfield Ins. Grp., Inc.*, No. CV126006448S, 2015 WL 3651786, at *6 (Conn. Sup. Ct. May 15, 2015) (holding that exhaustion requires actual payment by the underlying insurer or the insured). Accordingly, Travelers' discussion of California law on the issue of exhaustion by actual payment is not, and should not be interpreted as, a concession that California law governs the Travelers Policies as to any other issue.

at 195 (citing *Powerine Oil Co., Inc. v. Superior Court*, 37 Cal. 4th 377, 402–03 (2005)).

The declaration Montrose seeks would flout the holding in *Qualcomm* by allowing Montrose, through judicial fiat, to avoid application of unambiguous policy terms that have been held to require actual exhaustion before the triggering of excess coverage. Instead, Montrose could seek coverage under higher-level excess policies simply by demonstrating "liabilities sufficient to exhaust" its underlying coverage, a substantially lesser showing than that required by the policy language in this case and as correctly construed in *Qualcomm*. Indeed, on its face, Montrose's desired declaration would not even require Montrose to prove that its liabilities would be *covered* under its underlying insurance,[3] much less that they would ever actually exhaust that underlying insurance. That is not what the policies—or the law—require.

Montrose itself appears to acknowledge its obligation to actually exhaust the insurance underlying the excess policy from which it seeks coverage. For example, Montrose explains that, "*in proving actual exhaustion of each horizontal layer*, the insured might be required to sort out allocation issues involving a myriad of [sic] policy provisions the

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[3] For purposes of this brief, "underlying limits," "underlying insurance," and "underlying policies" mean whichever insurance applies under the method of exhaustion adopted by the Court.

insurers could invoke against each other." Opening Br. at 61 (emphasis added). And, Montrose explains, under its proposed approach, "the policyholder may select any policy to indemnify its liabilities, provided the policies immediately underlying that policy *are exhausted*, consistent with the terms of each policy." 1PA9 at 253:12-14 (emphasis added). In other words, Montrose appears to concede that—no matter what this Court decides with respect to *which* policies must be exhausted—Montrose must *actually* exhaust that underlying insurance before pursuing higher-level excess insurance.

Because Montrose's motion for summary adjudication sought a declaration that departs from the plain and unambiguous terms of the policies, Montrose's motion was properly denied. It follows that Montrose's request for relief from this Court should likewise be denied.

II. Montrose's Requested Declaration Conflicts with the Law Applicable to the Travelers Policies

A second and independent reason that Montrose is not entitled to an order from this Court directing the Superior Court to grant Montrose's motion for summary adjudication is that the ruling it seeks is contrary to the law governing the Travelers Policies. In seeking summary adjudication against all excess insurers indiscriminately, Montrose simply assumes that California law would apply to the Travelers Policies. However, as Montrose recognizes, ultimately each party's contractual obligations must

"rest[] . . . on the plain language of *each individual policy* . . . ." Opening Br. at 14 (emphasis added). In opposing Montrose's motion for summary adjudication, Travelers explained that California law does not apply to the Travelers Policies where, as here, there is a conflict between that law and the law that would otherwise apply to those policies. Rather, pursuant to Section 1646 of the California Civil Code, "[a] contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law of and usage of the place where it is made." Cal. Civ. Code § 1646.

Here, the Travelers Policies do not provide locations where the policies are to be performed except to the extent they identify Stauffer as the named insured located in Westport, Connecticut, or, for two of the fifteen Travelers Policies, New York. Nor do the policies provide a location of the insured risks other than by identifying the location of the named insured. As noted above, at the relevant time, Stauffer had locations and insured risks throughout the world and in multiple locations throughout the United States. 4PA20 at 1063-1150; 5PA20 at 1152-1205. Because no particular place of performance can be gleaned from the Travelers Policies, Section 1646 requires that the law where the contract was made apply to issues of contract interpretation, which here was clearly Connecticut (where Travelers, Stauffer, and Montrose were located), or arguably New York, where Stauffer was located for two of the Travelers Indemnity policies.

See, e.g., *Arrow Electronics, Inc. v. Aetna Cas. & Surety Co.*, No. CV17-5247 JFW (JEMx), 2018 WL 2278247, at *5 (C.D. Cal. May 15, 2018) (under Civil Code §1646, where "there is no place of performance indicated in the Policies," which provide coverage for all property damage caused by an occurrence taking place anywhere in the United States, "the Court must look to the law of the place the Policies were made . . . [*i.e.*,] in the place of acceptance"); *Ameron Int'l Corp. v. Am. Home Assur.* Co., No. CV 11-1601 CAS AGRX, 2011 WL 2261195, at *4 (C.D. Cal. June 6, 2011) (same).[4]

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[4] In the trial court, Montrose relied on *Stonewall Surplus Lines Insurance Co. v. Johnson Controls, Inc.*, 14 Cal. App. 4th 637 (1993), for application of California law to the Travelers Policies on the theory that multiple risk policies should be treated as if they "involved separate policies, each insuring an individual risk, and apply the law of the state of principal location of the particular risk involved." *Id.* at 647. As numerous subsequent decisions have explained, however, the disputed policy in *Stonewall* contained state-specific amendatory endorsements, and courts have limited *Stonewall*'s approach to policies that specifically identify specific jurisdictions as locations of the insured risks. *See, e.g., Costco Wholesale Corp. v. Liberty Mut. Ins. Co.*, 472 F. Supp. 2d 1183, 1206 (S.D. Cal. 2007) (distinguishing disputed policy on grounds that, although it "cover[ed] nationwide activities," the parties did not "reasonably expect[] the law of multiple states to govern the Policy interpretation"); *see also Store Kraft Mfg. v. Wausau Bus. Ins. Co.*, No. SACV 13-00545-JVS (JPRx), 2014 WL 12561603, at *5 (C.D. Cal. Mar. 24, 2014) (place where insurance contract accepted applies, holding "that a contract is to be performed anywhere it could be performed would eliminate the second prong of the section 1646 test, insofar as virtually every contract would thus indicate a place of performance") (emphasis in original); *Ameron Int'l Corp. v. Am. Home Assurance Co.*, No. CV 11-1601 CAS (AGRx), 2011 WL 2261195, at *8 (C.D. Cal. June 6, 2011) ("Although the 2004 proposal lists Hawaii among the locations where [the insured] has operations, unlike *Stonewall*, the only amendatory endorsement the policies include was accepted in California and applies to the policy as a whole."); *Jones v. St.*

Travelers raised the choice-of-law issue in opposing Montrose's motion for summary adjudication on the exhaustion issue because Montrose's "pick and choose" elective stacking method of exhaustion that Montrose is advocating is contrary to the way exhaustion must be demonstrated under the Travelers Policies. *See* 4PA18 at 1037:18-23. In contrast to California law, Connecticut law requires that defense and indemnity costs be allocated on a *pro rata* basis, based on the time on the risk during the period of injury or damage. *See Security Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co.*, 264 Conn. 688, 710 (2003) (adopting "the pro rata approach to the allocation of defense costs in long latency loss claims that implicate multiple insurance policies"). As this Court explained in *Continental*, "[c]ourts apportioning coverage on a pro rata basis require the allocation of loss to a particular policy to be proportionate to the damage suffered during that policy's term. . . . This approach emphasizes that part of a long-tail injury will occur outside any particular policy period. Rather than requiring any one policy to cover the

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Paul Travelers, 496 F. Supp. 2d 1079, 1084-85 (N.D. Cal. 2007) (distinguishing *Stonewall* on similar grounds). More fundamentally, the *Stonewell* court was addressing choice of law in the context of punitive damages that did not involve contract *interpretation*, as to which Section 1646 applies. *See Frontier Oil Corp. v. RLI Ins. Co.*, 153 Cal. App. 4th 1436, 1460-61 (2007).

entire long-tail loss, [pro rata] allocation instead attempts to produce equity across time." *State of California v. Continental Ins. Co.*, 55 Cal. 4th 186, 198 (2012) (internal citations and quotations omitted).[5]

In theory, there is no inconsistency between "vertical" *exhaustion* and *pro rata allocation*. Under the *pro rata* approach, an excess policy can be called upon to pay its *pro rata* share once underlying insurance in the same policy year has been exhausted, regardless of whether primary policies in other years have been fully exhausted. However, Montrose seeks more than simply a rule of vertical exhaustion. Rather, it seeks a ruling that it may pick and choose policies in any particular year or years, and seek the full amount of excess coverage on an "all sums" basis, relying entirely on California law. Because that approach conflicts with the governing law applicable to the Travelers Policies (an issue the trial court has yet to decide), regardless of how the Court rules with respect to Montrose's requested method of exhaustion, the writ should be denied as

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[5] Recent case law in New York, decided after briefing closed in the trial court, adopted an "all sums" approach to allocation depending on the specific terms of the policies at issue. *In re Viking Pump, Inc.*, 27 N.Y.3d 244, 260-61 (2016). The trial court has not reached the issue of choice of law as to the two Travelers Indemnity policies (or any of the other Travelers Policies) in view of its denial of Montrose's motion on the merits, and thus has not had an opportunity to determine the impact, if any, of any law other than California law on Montrose's theory of exhaustion and the terms of the policies.