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

After Grant of Review and Transfer to Court of Appeal to Vacate Order Denying Writ of Mandate and Order to Show Cause
Supreme Court Case No. S236148

After Denial of Petition for Writ of Mandate by the Court of Appeal,
Second Appellate District, Division Three
Civil Case No. B272387

Petition from the Superior Court of the State of California
for the County of Los Angeles
Case No. BC 005158, Honorable Elihu Berle, Presiding

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA'S COMBINED REPLY BRIEF ON THE MERITS

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

After Grant of Review and Transfer to Court of Appeal to Vacate Order Denying Writ of Mandate and Order to Show Cause
Supreme Court Case No. S236148

After Denial of Petition for Writ of Mandate by the Court of Appeal,
Second Appellate District, Division Three
Civil Case No. B272387

Petition from the Superior Court of the State of California
for the County of Los Angeles
Case No. BC 005158, Honorable Elihu Berle, Presiding

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA'S COMBINED REPLY BRIEF ON THE MERITS

LATHAM & WATKINS LLP
BROOK B. ROBERTS (STATE BAR NO. 214794)
BROOK.ROBERTS@LW.COM
JOHN M. WILSON (STATE BAR NO. 229484)
JOHN.WILSON@LW.COM
DREW T. GARDINER (STATE BAR NO. 234451)
DREW.GARDINER@LW.COM
12670 HIGH BLUFF DRIVE
SAN DIEGO, CALIFORNIA 92130
(858) 523-5400 • FAX: (858) 523-5450

Attorneys for Petitioner Montrose Chemical Corporation of California

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

Decades of this Court's jurisprudence, from *Montrose v. Admiral* (1995) 10 Cal.4th 645 ("*Montrose*"), through *State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186 ("*Continental*"), establish a policyholder's right to enforce each of its "separate and independent" insurance contracts according to their terms (*Aerojet-Gen. Corp. v. Transport Indem. Co.* (1997) 17 Cal.4th 38, 57, n. 10 ("*Aerojet*") [quoting *Montrose*, 10 Cal.4th at p. 686]), including an "all-sums-with stacking" approach to calculating the coverage proceeds available from the numerous policies triggered by a continuous loss. (*Continental*, 55 Cal.4th at p. 201.) Insurers historically have sought to attack that jurisprudence in several ways, including, in *Continental*, by advocating a "*pro rata*" allocation scheme for excess indemnity coverage that would have required policyholders to spread their losses evenly across all policy years, regardless of express policy limits and the "all sums" language. This Court has rejected these efforts by enforcing the plain language of standard CGL policies, interpreted under longstanding policy construction rules.

The latest iteration of Insurers' continuing campaign is a variation on the same theme, now premised on imaginary "uber policy layers," which supposedly mandate that policyholders horizontally exhaust their coverage, regardless of each policy's specific attachment language, the

numerous substantive differences in terms and exclusions, and the varying layers of coverage limits across multiple policy periods. The goal of Insurers' horizontal exhaustion scheme is plain: They seek to impose on the policyholder the burden of litigating coverage under decades of subsequent policies with more restrictive terms before it is allowed to call upon more favorable excess insurance assets in a particular policy period. In practical terms, the Insurers hope to effectively nullify these valuable assets, for which individualized premiums were paid, by dramatically increasing their attachment points.

Much like the insurance industry's prior efforts to artificially limit coverage for continuous loss claims, Insurers' new rule cannot be squared with the plain language of excess CGL policies or established precedent interpreting their key terms. It is undisputed that each of the 115 policies in Montrose's portfolio (the "Policies") expressly references ***specific underlying insurance policies*** (or limits) which must be exhausted before each Policy's excess coverage attaches. This is the essence of the bargain between an excess insurer and the policyholder. Unless the attachment point is determined at the time of contracting, the insurer has no way to assess its exposure and calculate a premium to charge, and the policyholder has no way of assuring it is protected for losses above a defined amount.

Yet the Insurers argue that, solely in the context of continuous damage claims, boilerplate "other insurance" language overrides and exponentially increases these express attachment points by sweeping in ***non-specified policies***, including future policies that did not exist at the time of contracting, which must also be exhausted before the policyholder is indemnified.

The Insurers' position, however, directly conflicts with how California and other jurisdictions uniformly have interpreted and applied these provisions. Under this Court's decision in *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal. 4th 1059, 1079-1081 ("*Dart*"), and well-established insurance law, "other insurance" language has a limited import: (1) ***vis-à-vis the insured***, such clauses prevent a double recovery for the same loss; and (2) ***vis-à-vis other insurers***, such clauses inform the equitable analysis in contribution actions. Accordingly, these clauses have never been read to dictate exhaustion, because such a result would undermine the fundamental purpose of excess coverage and violate basic principles of insurance policy interpretation.

No reasonable insured would expect that general "other insurance" language would somehow render the specific provision defining an excess policy's attachment point meaningless. Moreover, the meaning and application of "other insurance" language, wherever found in excess policies, does not vary depending on the nature of the underlying damage.

Because the Policies insure "Property Damage" occurring within the policy period, both instantaneous and continuing, the exhaustion/attachment requirement for this coverage does not change. Had the parties wished to apply a different attachment point for continuous property damage claims, they would have referred to a specific, separate coverage limit in the underlying policy, just like many of the Policies state with respect to personal injury or other distinct damage.

Unable to support the commercial fiction that excess policies attach at a substantially greater amount of liability for continuous damage claims, the Insurers simply concoct a legal one. Relying on the phrase "uber policy" quoted in *Continental*, the Insurers greatly distort this Court's ruling and guidance. The Insurers assert a false equivalency between *Continental*'s permissive stacking holding, which provides that an insured may recover under policies in multiple coverage periods that are triggered by continuous damage, and mandatory horizontal exhaustion, which would artificially and impracticably combine the limits of all underlying policies into a monolithic "layer" of coverage. Contrary to the Insurers' tortured reading, this Court has never suggested that continuous property damage effectively rewrites the underlying policies and merges them into a mega-policy with a single combined limit and uniform coverage terms and exclusions. As *Montrose, Aerojet* and *Continental* definitively explain, the

individual policy terms and limits remain paramount and controlling for each contract.

Because mandatory horizontal exhaustion impermissibly prevents policyholders from exercising the property rights purchased in each of these separate and independent excess contracts, Respondent's order should be reversed and summary adjudication entered for Montrose.

II. ARGUMENT

As Montrose demonstrated in its Opening Brief on the Merits ("OB"), both the plain language of each individual Policy, and insurance coverage principles long declared by this Court, defeat Insurers' contention that mandatory horizontal exhaustion of excess coverage applies as a default rule governing all continuous loss insurance claims. Insurers seek to escape this conclusion by:

(1) espousing a new interpretation of "other insurance" clauses that conflicts with settled precedent and would effectively nullify or render as surplusage each excess Policy's basic coverage obligation and specified attachment point;

(2) distorting the holding in *Continental* to create "uber-policy layers" that are irreconcilable with the purpose, function and terms of complex, multi-year excess coverage portfolios like Montrose's; and

(3) rewriting California law, in the name of purported "fairness" to ***insurers***, to prevent policyholders from immediately accessing valuable insurance assets according to each contract's express terms, thereby frustrating recovery and forcing the policyholder to engage in protracted litigation under decades of more restrictive coverage.

None of the Insurers' arguments can overcome the plain language specifying an identifiable amount of underlying limits in the same policy period that must be exhausted before an excess policy may be called upon. Nor can the Insurers circumvent this Court's consistent jurisprudence culminating in *Continental*'s pronouncement that California law entitles policyholders facing continuous damage liabilities to obtain coverage from any triggered policy under an "all sums with stacking" interpretation. (*Continental*, *supra*, 55 Cal.4th at pp. 200-201.)

A. The Policies Expressly Establish the Precise Limits Which Must Be Exhausted for Excess Coverage to Attach

Insurers do not dispute that each of the Policies contains a provision (or combination of provisions) specifying an identifiable amount of underlying limits "in the same policy period that must be exhausted before the policy is up to bat." (Answer at p. 19; see generally 1PA6 at pp. 117-200; 1PA7 at pp. 207-234.) This "predetermined" dollar amount expressly resolves the question of when an excess policy is triggered. (See

generally *Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1304 ("*Fireman's Fund*").)[1]

Insurers nonetheless argue that general "other insurance" language overrides the specific attachment language and "prescribe[s] the *sequence* in which coverage must be obtained[.]" (Answer at p. 16; see also *id.* at p. 30 ["[H]igher-layer excess policies remain excess to all policies below it [*sic*] potentially triggered by a continuous loss[.]"].)[2] They insist that, solely in the context of a continuous loss, the "other insurance" language covertly multiplies the amount of coverage that must be exhausted, by implicitly incorporating into each Policy a requirement to exhaust any and all insurance the policyholder may have purchased in different years. (Answer at pp. 19, 26.) However, their concocted construction squarely conflicts with this Court's interpretation of these

---

[1] Premiums are calculated based upon the risk assumed by the insurer. (See *Herzog v. National American Ins. Co.* (1970) 2 Cal.3d 192, 197.) In the context of excess policies, the risk assumed by the insurer is predicated on the "predetermined amount" of underlying coverage in the same policy year. (*Wells Fargo Bank v. California Ins. Guarantee Assn.* (1995) 38 Cal.App.4th 936, 940 & fn.2 ("*Wells Fargo*").) No consideration—and no reduction in premium—is given based upon the amount of coverage that the policyholder may or may not purchase in different years.

[2] Determining what constitutes a "lower layer" or "higher layer" policy presents a number of additional questions when there are no uniform attachment points or layers throughout the coverage portfolio. (See 1PA5 at 99; see generally OB at pp. 66-67; contra Answer at p. 11 [hypothesizing identical layers of coverage].)

clauses, as well as every published case from other jurisdictions analyzing the purpose and function of this boilerplate language.

1. This Court Established in *Dart* That Other Insurance Provisions Merely Govern the Allocation of Liability Among Insurers After the Policyholder Has Been Fully Indemnified

Far from the broad-reaching import ascribed by the Insurers, California law has long recognized that, in the absence of any double recovery concern, "other insurance" clauses primarily govern the rights and obligations of insurers covering the same risk ***vis-à-vis one another***, but do not affect a policyholder's right to recovery under those policies. (E.g., *Dart*, *supra*, 28 Cal. 4th at p. 1080.) This stems in large part from the fact that "[h]istorically, 'other insurance' clauses were designed to prevent multiple recoveries when more than one policy provided coverage for a particular loss." (*Fireman's Fund*, *supra*, 65 Cal.App.4th at p. 1304 [citation omitted].)

As the recently-approved Restatement of the Law, Liability Insurance explains, "'other insurance clauses' do not apply to policyholders" at all, but "are included in insurance policies only because there is no other contractual vehicle in which to define how to apportion liability among insurance companies . . . . Payment of the insured's claim always takes priority over the allocation of the loss between concurrent insurers." (See Restatement of the Law of Liability Insurance § 20

(Proposed Final Draft No. 2, 2018), Reporters' Note (a) ("Restatement") [citing Randall, *Coordinating Liability Insurance* (1995) 1995 Wis.L.Rev. 1339, 1353, fn. 48 and quoting Richmond, *Issues and Problems in "Other Insurance," Multiple Insurance, and Self-Insurance* (1995) 22 Pepperdine L.Rev. 1373, 1380-81].)

In *Dart*, this Court reviewed the historical purpose of the "other insurance" clause, and ruled that these "disfavored" conditions address the specific question of how to allocate (or "apportion") liability "among multiple insurers" ***after*** the policyholder is fully indemnified. (*Dart*, *supra*, 28 Cal.4th at pp. 1079-1081.) The Court's exposition and analysis of "other insurance" clauses has been cited dozens of times by California, federal and other state courts. (See, e.g., *State of California v. Continental Ins. Co.* (2017) 15 Cal.App.5th 1017, 1032 ("*Continental II*") (["[O]ther-insurance clauses are intended to apply in contribution actions between insurers, not in coverage litigation between insurer and insured."]; *Certain Underwriters at Lloyds, London v. Arch Specialty Ins. Co.* (2016) 246 Cal.App.4th 418, 429-430 [presence of an "other insurance" clause "would merely entitle the primary insurer to seek contribution from other insurers; it would not affect [the insurer's] obligation to its insured" (citing *Dart*)]; *Travelers Casualty & Surety Co. v. Century Surety Co.* (2004) 118 Cal.App.4th 1156, 1162-1164 [endorsing "the application of equitable principles to resolve the conflicting other insurance clauses" (discussing

Dart, *Montrose* and *Aerojet*)]; *Heartland Payment Systems, LLC v. Utica Mutual Ins. Co.* (Mo.Ct.App. 2006) 185 S.W.3d 225, 232 [following *Dart* and *Fireman's Fund*]; *Pepsi-Cola Metropolitan Bottling Co. v. Ins. Co. of North America, Inc.* (C.D. Cal., Dec. 28, 2010, No. CV 10-2696 SVW (MANx)) 2010 U.S. Dist. LEXIS 144401, *24-26 ["California courts have left battles of allocation of costs to separate contribution suits between liability insurers, rather than subjecting the insured to additional litigation."].)

In the face of this overwhelming authority, Insurers have no choice but to try to undermine *Dart*. Despite the decision's broad application, Insurers suggest the Court's holding was narrow, misleadingly claiming the Court was merely "concerned with 'other insurance' *disputes*" between insurers but did not address anything "outside the inter-insurer contribution context." (Answer at p. 40, n. 7 [discussing *Dart*, *supra*, 28 Cal.4th at p. 1078, fn. 6].) This assertion finds no support in the ruling. The Court expressly held that while "other insurance" clauses can be relevant in inter-insurer contribution disputes, "[t]hat apportionment . . . has no bearing upon the insurers' obligations to the policyholder." (*Dart*, *supra*, 28 Cal.4th at p. 1080; see also *ibid.* [if insurer's policy contained an "other insurance" clause, "all that would be established is that it had a right to seek some kind of contribution from successive insurers"].)

Insurers also suggest that *Dart* is inapplicable in situations where the policyholder has purchased enough coverage in other policy periods to potentially cover the loss. (Answer at pp. 36-37.) However, *Dart*'s interpretation does not wax and wane based on the amount of underlying insurance purchased in other periods. In fact, the Court's reasoning applies with even more force to insurance portfolios like Montrose's. If each Insurer were allowed to use the "other insurance" language as Insurers suggest, each excess Policy would be excess to every other Policy, and Montrose could be deprived of its right to recovery under any Policy. This absurd result is precisely why *Dart* rejected the insurer's interpretation. (See *Dart*, *supra*, 28 Cal.4th at pp. 1079-1081; see generally *MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 650, 652 [refusing to "interpret[ ] an exclusionary clause so broadly that it logically leads to absurd results"].)

2. "Other Insurance" Provisions Do Not Override the Express Attachment / Exhaustion Language That Establishes an Excess Policy's Coverage

Unable to escape the dispositive effect of *Dart*, Insurers rely on supposedly different iterations and locations of "other insurance" language to suggest that those clauses must be afforded unique interpretations and weight in this case. Regardless of the variation of "other insurance" language used, these provisions have the same basic meaning, as the language and case law makes clear. (See *Continental II, supra,* 15

Cal.App.5th at p. 1032 ["[O]ther-insurance clauses are intended to apply in contribution actions between insurers, not in coverage litigation between insurer and insured. . . . We see no reason to treat the other-insurance clause in this case differently just because it was repeated and incorporated into the definition of Ultimate Net Loss." (discussing *Dart*, 10 Cal.4th at p. 1080)].)

a. The Plain Language of the Policies' "Other Insurance" Provisions Supports This Court's Determination of Their Meaning and Purpose

Even accepting the Insurers' invitation to read the language of the "other insurance" provisions wholly in isolation from the specific express attachment language—which, of course, is improper as the language "must be construed in the context of that instrument as a whole" (*Continental*, *supra*, 55 Cal.4th at p. 195)—the Policies confirm this Court's interpretation in *Dart*.

The standard "other insurance" provision contained in most Policies refers to "other valid and collectible insurance." (See generally 1PA6 at pp. 118-166; 1PA7 at pp. 208-231.)[3] The phrase "other valid and collectible insurance," by its plain terms, clearly references ***all*** other coverage, irrespective of the attachment point. (See *Continental II*, *supra*,

---

[3] Minor variants are contained in policies issued by American Centennial ["other collectible insurance"], Continental and Columbia Casualty ["other insurance"], and Northbrook ["any other insurance"]. (See 1PA6 at pp. 120, 146, 160.)

15 Cal.App.5th at p. 1032 ["other insurance" provision is "not limited to *lower-layer* insurance" and purports to avoid liability "as long as there is *any* other unexhausted insurance"].)[4]

As a result, under Insurers' theory that "other insurance" provisions supplant the express attachment language, no excess policy would apply until after the exhaustion of every policy issued in any year. This, of course, could never occur, because each of *those* policies also contains an "other insurance" provision making *that* policy excess to every other policy. (See *Continental II*, *supra*, 15 Cal.App.5th at pp. 1032-33 ["[A] court could not determine the amount any insurer owes without first determining what every insurer owes[.]"]; *Employers Reinsurance Corp. v. Phoenix Ins. Co.* (1986) 186 Cal.App.3d 545, 557 ["If we were to give effect to all three excess clauses in this instance, they would cancel each

---

[4] Insurers contend that "other valid and collectible insurance" refers only to policies with lower attachment points because certain "other insurance" provisions state they are inapplicable to "insurance that is in excess of the insurance afforded by this policy." (See, e.g., Answer at p. 30.) However, that language merely confirms that a particular policy cannot purport to be excess to another policy ***in the same year expressly written as excess*** to the policy in question, not other policy years.

Indeed, many of the "other insurance" provisions in the Policies at issue make this explicit, stating that the "other insurance" condition "does not apply with respect to the underlying insurance or excess insurance ***purchased specifically*** to be in excess of this policy." (See 1PA6 at 146 [emphasis added]; see also *id.* at pp. 142-160; 1PA7 at pp. 208-231 [at least 36 policies issued by 12 different insurers contain "other insurance" provisions that exclude from their scope "insurance that is ***specifically stated*** to be in excess of this policy" or "***purchased specifically*** to apply in excess of this insurance" (emphasis added)].)

other out and afford the insured no coverage whatsoever. We would travel full circle with no place to say 'the buck stops here.'"].)

To escape the well-established meaning and purpose of these provisions, Insurers insist that the plain language "cannot possibly be" interpreted literally, but rather, "the other insurance being referred to ***has to be*** other 'underlying' insurance, ***whether the word 'underlying' is explicitly used or not***[.]" (Answer at p. 43 [emphasis added].) Insurers essentially seek to re-write the provision so that it refers to "other valid and collectible underlying insurance with a lower attachment point in any other period."[5]

In other words, Insurers contend that it would be irrational to apply the terms of the "other insurance" provision as written, so the Court

---

[5] Insurers repeatedly use the phrase "underlying insurance" to refer to coverage in other years with a lower attachment point. (See, e.g., Answer at p. 29 [arguing for "horizontal exhaustion of all underlying insurance in policy years to which the continuous loss extends"].) This is inaccurate. "Underlying insurance" refers to lower-lying insurance in ***the same policy period***, *i.e.*, the insurance that lies "under" the policy at issue. (See *Legacy Vulcan Corp. v. Super. Ct.* (2010) 185 Cal.App.4th 677, 691 ("*Legacy Vulcan*") ["The term "underlying insurance" . . . must be interpreted in [insured's] favor to encompass only the underlying policies described in a schedule attached to the [excess] policy, rather than all of the collectible primary insurance available[.]"]). Indeed, Insurers recognize this is the more appropriate interpretation of "underlying insurance." (See Answer at p. 34 ["'[M]aintenance of underlying insurance' provisions . . . are not meant to ensure that there is insurance from other policy periods to exhaust. Rather, they simply serve to protect against the policyholder canceling or reducing ***the amount of the underlying insurance during any given policy period.***" (emphasis added)].)

must insert additional key terms to achieve the result they want. This is plainly improper, because that is not how the provision is written. As Insurers themselves recognize, California courts "do not rewrite any provision of any contract, [including an insurance policy], for any purpose." (*Id.* p. 41 [quoting *Rosen v. State Farm Gen. Ins. Co.* (2003) 30 Cal.4th 1070, 1073 (quotations omitted)]; see also *Mercury Casualty Co. v. Chu* (2014) 229 Cal.App.4th 1432, 1455 [courts "are not empowered" to engage in "rewriting (reforming) either the exclusion clause or the insured clauses" and "[e]xclusions and exceptions contained within a policy must be construed strictly against the insurer" (citations omitted)].) Had the drafters intended to refer to policies in different years with lower attachment points, they could have drafted the provision to clearly express that intent. They did not. (See *Continental II, supra*, 15 Cal.App.5th at p. 1032; see generally *Advent, Inc. v. Nat. Union Fire Ins. Co. of Pittsburgh, PA* (2016) 6 Cal.App.5th 443, 468 ("*Advent*") [reference to "other insurance" is "vague" without specificity concerning which "other insurance"].)

b. Separate Provisions Found in Certain Policies Do Not Alter the Meaning of "Other Insurance" Language

Because virtually all of the Policies have the same boilerplate "other insurance" language contained in the "Conditions" or other provisions that have been the subject of the extensive case and treatise

analysis discussed in the Opening Brief and herein, including *Dart*, Insurers next turn to the language of a few cherry-picked policies in hopes of obtaining a different result. Upon examination, none of these terms supports application of a mandatory horizontal exhaustion rule as to any one Policy, let alone every Policy in Montrose's coverage portfolio.

First, Insurers rely upon the reference to "other insurance**s**" in certain "Loss" provisions. (Answer at pp. 27, 29.) But California courts have ruled that defining "loss" as "sums paid as damages . . . after making deductions for all recoveries, salvages and other insurances (whether recoverable or not)" does ***not*** constitute an effective "other insurance" provision impacting the insurer's attachment point. (See *Fireman's Fund Indem. Co. v. Prudential Assurance Co.* (1961) 192 Cal.App.2d 492, 495 ("*Prudential*").) A "vague" reference to "other insurance," in a policy that "contain[s] specific language" triggering coverage immediately upon exhaustion of specified underlying policies, does not convert the definition of "loss" into a limitation on the policyholder's right to recovery. (*Advent, supra*, 6 Cal.App.5th at p. [discussing *Prudential*].)[6]

---

[6] Because this policy language purports to extend to "***all***" other insurance, applying it as the Insurers suggest across a coverage portfolio would necessarily lead to the absurd, circular result that every policy is excess to every other policy. (See *supra*, pp. 22–23 [discussing *Continental II*, *supra*, 15 Cal.App.5th at pp. 1032-33; *Employers Reinsurance*, *supra*, 186 Cal.App.3d at p. 557]; cf. *MacKinnon*, *supra*, 31 Cal. 4th at p. 652 [rejecting "broad interpretation" of exclusion that "leads to absurd results and ignores the familiar connotations of the words used"].)