SUPREME COURT
FILED

SEP 26 2018

Jorge Navarrete Clerk

Deputy

**`No. S244737**

**IN THE SUPREME COURT**

**OF THE STATE OF CALIFORNIA**

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MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,

*Petitioner,*

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES,

*Respondent.*

and

CANADIAN UNIVERSAL INSURANCE COMPANY, INC., et al.,

*Real Parties in Interest,*

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After a Decision by the Court of Appeal
Second Appellate District, Division Three, Civil Case No. B272387
Los Angeles County Superior Court Case No. BC005158
The Honorable Carolyn B. Kuhl
The Honorable Elihu M. Berle

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# APPLICATION OF UNITED POLICYHOLDERS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANT AND BRIEF *AMICUS CURIAE*

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## APPLICATION OF UNITED POLICYHOLDERS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to California Rules of Court, rule 8.520(f), proposed amicus, United Policyholders ("UP"), hereby respectfully applies to this Court for leave to file the accompanying Brief of *Amicus Curiae* in Support of Montrose Chemical Corporation of California, in the above-captioned case.[1]

United Policyholders is a non-profit organization based in California that serves as a voice and information resource for insurance consumers in the 50 states. The organization is tax-exempt under Internal Revenue Code §501(c)(3). UP is funded by donations and grants and does not sell insurance or accept money from insurance companies.

UP's work is divided into three program areas: *Roadmap to Recovery*™ (disaster recovery and claim help for victims of wildfires, floods, and other disasters); *Roadmap to Preparedness* (insurance and financial literacy and disaster preparedness); and *Advocacy and Action* (advancing pro-consumer laws and public policy). UP hosts a library of tips, sample forms and articles on commercial and personal lines insurance products, coverage and the claims process at www.uphelp.org.

UP monitors the insurance sales, claims and law sectors, conducts surveys and hears from a diverse range of individual and

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[1] No party or counsel for any party authored any portion of the brief. No party or counsel for any party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than the *amicus curiae*, its members and its counsel made a monetary contribution intended to fund the preparation or submission of the brief. (California Rules of Court, rule 8.520(f)(4).) The undersigned represents UP on a *pro bono* basis.

business policyholders throughout California on a regular basis. The organization interfaces with state regulators in its capacity as an official consumer representative in the National Association of Insurance Commissioners. UP provides topical information to courts via the submission of *amicus curiae* briefs in cases involving insurance principles that matter to people and businesses.

UP's consumer surveys recently assisted this Court in *Association of California Insurance Companies v. Jones* (2017) 2 Cal.5th 376, and this Court has adopted UP's arguments in *TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19 and *Vandenberg v. Super. Ct.* (1999) 21 Cal.4th 815. UP has filed *amicus curiae* briefs in nearly 400 cases throughout the United States.

UP seeks to fulfill the "classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." (*Miller-Wahl Co. v. Commissioner of Labor & Indus.* (9th Cir. 1982) 694 F.2d 203, 204.) This is an appropriate role for *amicus curiae*. As commentators have stressed, an *amicus curiae* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." (Robert L. Stern et al., *Supreme Court Practice* (6th ed. 1986) 570-571 (citation omitted).)

UP is familiar with all the briefs that have been previously filed in this case. UP has experience with the legal issues of this case, and believes its experience in these issues will make its proposed brief of assistance to this Court. UP has an interest in ensuring that all policyholders may freely and efficiently access the entirety of their insurance coverage portfolios to protect themselves and third party claimants against the risks of a long-tail loss triggering numerous different policies spanning several policy periods.

UP therefore respectfully requests leave to file the attached *amicus curiae* brief presenting additional authorities and discussion in support of Appellant's arguments.

DATE: September 21, 2018 Respectfully submitted,

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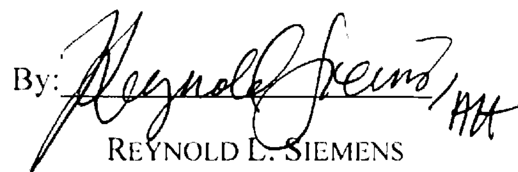
By: 
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## TABLE OF CONTENTS

INTRODUCTION .......... 13

ARGUMENT .......... 17

I. A BLANKET RULE REQUIRING HORIZONTAL EXHAUSTION WOULD IMPERMISSIBLY RE-WRITE POLICIES, LIKE THOSE AT ISSUE HERE, THAT WERE WRITTEN ON A "SPECIFIC EXCESS" BASIS. .......... 17

II. ESTABLISHED PRECEDENT MAKES CLEAR THAT INSURERS CANNOT DEFER OR AVOID THEIR COVERAGE OBLIGATIONS ON ACCOUNT OF "OTHER INSURANCE" CLAUSES. .......... 19

A. This Court Ruled In *Dart* That Other Insurance Clauses Only Apply In Inter-Insurer Disputes. .......... 19

B. Equitable Principles Developed In Inter-Insurer Cases Such As *Community Redevelopment* Are Inapplicable To Disputes Between Policyholders And Their Insurers. .......... 22

III. THE INSURERS' POSITION CONFLICTS WITH DECADES OF PRECEDENT, INCLUDING THIS COURT'S DECISIONS IN *MONTROSE*, *AEROJET* AND *CONTINENTAL*. .......... 29

IV. UNDER THE APPLICABLE RULES OF INTERPRETATION, "OTHER INSURANCE" CLAUSES CANNOT BE CONSTRUED IN THE MANNER URGED BY THE INSURERS. .......... 31

A. "Other Insurance" Clauses Are Not Conspicuous, Nor Are They Phrased In "Clear And Unmistakable" Language. .......... 32

B. The Insurers' Interpretation Of The "Other Insurance" Clauses Is Not The "Only Reasonable One," And Therefore Cannot Be Adopted. .......... 37

C. The Result Is The Same No Matter Where In The Policies Insurers Place "Other Insurance" Clauses. .......... 41

V. "UNDERLYING INSURANCE" MEANS *SCHEDULED* UNDERLYING INSURANCE ABSENT CLEAR AND UNAMBIGUOUS LANGUAGE TO THE CONTRARY .......... 42

A. The Vague References To "Underlying Insurance" Or "Other Underlying Insurance" Do Not Clearly Apprise The Policyholder Of Their Purported Effect, And Therefore Cannot Be Construed In The Manner Urged. .......... 42

B. The Unqualified References To "Underlying Insurance" And "Other Underlying Insurance" Are At Best Ambiguous, And Therefore Must Be Construed In Favor Of Coverage. .......... 44

CONCLUSION .......... 49

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*20th Century Ins. Co. v. Liberty Mut. Ins. Co.*
(9th Cir. 1992) 965 F.2d 747 .......................................................... 19

*A.C. Label Co. v. Transamerica Ins. Co.*
(1996) 48 Cal.App.4th 1188 .......................................................... 39

*Advent, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*
(2016) 6 Cal.App.5th 443, 468 .......................................................... 42

*Aerojet-General Corp. v. Transport Indem. Co.*
(1997) 17 Cal.4th 38 .......................................................... *passim*

*AIU Ins. Co. v. Superior Court*
(1990) 51 Cal.3d 807 .......................................................... 18, 38

*Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*
(1996) 45 Cal.App.4th 1 .......................................................... 20, 31

*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.*
(1993) 5 Cal.4th 854 .......................................................... 18, 19

*Carmel Dev. Co. v. RLI Ins. Co.*
(2005) 126 Cal.App.4th 502 .......................................................... 18, 25

*Century Surety Co. v. United Pacific Ins. Co.*
(2003) 109 Cal.App.4th 1246 .......................................................... 24, 25

*Certain Underwriters at Lloyds, London v. Arch Specialty Ins. Co.*
(2016) 246 Cal.App.4th 418 .......................................................... 25, 38, 42

*Community Redevelopment Agency of City of Los Angeles v. Aetna Casualty & Surety Company*
(1996) 50 Cal.App.4th 329 .......................................................... *passim*

*Consolidated Edison Co. of New York, Inc. v. Allstate Ins. Co.,*
(2002) 98 N.Y.2d 208, 774 N.E.2d 687 .......................................................... 39

*Continental Ins. Co. v. Lexington Ins. Co.*
(1997) 55 Cal.App.4th 637 ........................................ 23, 25

*Cooper Companies v. Transcontinental Ins. Co.*
(1995) 31 Cal.App.4th 1094 ........................................ 39

*Cunningham v. Universal Underwriters*
(2002) 98 Cal.App.4th 1141 ........................................ 18

*Dart Industries, Inc. v. Commercial Union Ins. Co.*,
(2002) 28 Cal.4th 1059 ........................................ *passim*

*Fireman's Fund Indem Co. v. Prudential Assur. Co.*
(1961) 192 Cal.App.2d 492 ........................................ *passim*

*Fireman's Fund Ins. Co. v. Maryland Cas. Co.*
(1998) 65 Cal.App.4th 1279 ........................................ 23, 25, 26, 38

*Foster-Gardner, Inc. v. National Union Fire Ins. Co.*
(1998) 18 Cal.4th 857 ........................................ 46

*George v. Automobile Club of Southern California*
(2011) 201 Cal.App.4th 1112 ........................................ 29

*Hartford Casualty Ins. Co. v. Travelers Indemnity Co.*
(2003) 110 Cal.App.4th 710 ........................................ 25

*Haynes v. Farmers Ins. Exch.*
(2004) 32 Cal.4th 1198 ........................................ *passim*

*In re Viking Pump, Inc.*,
(2016) 27 N.Y.3d 244, 52 N.E.3d 1144 ........................................ 39

*JPI Westcoast Construction, L.P. v. RJS & Associates, Inc.*
(2007) 156 Cal.App.4th 1448 ........................................ 22, 23, 25

*Legacy Vulcan Corp. v. Superior Court*
(2010) 185 Cal.App.4th 677 ........................................ 45, 46

*London Market Insurers v. Superior Court*
(2007) 146 Cal.App.4th 648 ........................................ 46

*MacKinnon v. Truck Ins. Exch.*
(2003) 31 Cal.4th 635 ........................................ *passim*

*Marwell Constr., Inc. v. Underwriters at Lloyd's, London*
(Alaska 1970) 465 P.2d 298 .......................................................... 13

*Montrose Chem. Corp. v. Admiral Ins. Co.*
(1995) 10 Cal.4th 645 .......................................................14, 16, 18, 30

*Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.*
(1981) 126 Cal.App.3d 593 ..........................................................25

*Padilla Construction Co., Inc. v. Transportation Ins. Co.*
(2007) 150 Cal.App.4th 984 .....................................25, 27, 28, 29

*Peerless Cas. Co. v. Continental Cas. Co.*
(1956) 144 Cal.App.2d 617 ..........................................................25

*Reliance Nat. Indem. Co. v. General Star Indem. Co.*
(1999) 72 Cal.App.4th 1063 ..........................................................23

*Root v. American Equity Specialty Ins. Co.*
(2005) 130 Cal.App.4th 926 ..............................................32, 42, 43

*Safeco Ins. Co. v. Robert S.*
(2001) 26 Cal.4th 758 ..........................................................36

*Signal Companies, Inc. v. Harbor Ins. Co.*
(1980) 27 Cal.3d 359 ..........................................................23

*State of California v. Continental Ins. Co.*
(2012) 55 Cal.4th 186 (*Continental*) .......................................*passim*

*State of California v. Continental Ins. Co.*
(2017) 15 Cal.App.5th 1017 (*Continental II*)...........................*passim*

*Stonewall Ins. Co. v. City of Palos Verdes Estates*
(1996) 46 Cal.App.4th 1810 ....................................................23, 25

*Travelers Cas. & Sur. Co. v. Century Sur. Co.*
(2004) 118 Cal.App.4th 1156 ..........................................................25

*Travelers Cas. & Sur. Co. v. Transcontinental Ins. Co.*
(2004) 122 Cal.App.4th 949 ..........................................................19

*Waller v. Truck Ins. Exchange, Inc.*
(1995) 11 Cal.4th 1 ..........................................................18

**Statutes**

Civ. Code § 1441 .......... 33

Civ. Code § 1439 .......... 32

Civ. Code § 1442 .......... 32

Civ. Code § 1636 .......... 18

Civ. Code § 1639 .......... 18

Civ. Code § 1641 .......... 46

**Other Authorities**

*Black's Law Dictionary* (10th ed. 2014) .......... 47

H. Walter Croskey et al., *California Practice Guide: Ins. Litig.* ¶¶ 8:236-38 (rev. ed. 2018) .......... 18

Rest., Liability Insurance § 2 (Proposed Final Draft No. 2, 2018) .......... 38

*Webster's Encyclopedic Unabridged Dict. of the English Language* (2d ed. 1996) p. 2062 .......... 47

## INTRODUCTION

The dispute here concerns "other insurance" clauses, that is, provisions in liability insurance policies that purport to address what happens if more than one insurance policy covers a particular loss. The problem arises when, as another court put it nearly 50 years ago, "an Insurer who has written the policy and taken the Assured's premium" later invokes the "other insurance" clause in its policy to direct its policyholder "to go elsewhere [for coverage] ... because another insurer is, or ought to be, or may be, liable for the whole, half, or part of a loaf." *Marwell Constr., Inc. v. Underwriters at Lloyd's, London* (Alaska 1970) 465 P.2d 298, 300 (*quoting American Fidelity & Cas. Co. v. St. Paul-Mercury Indem. Co.* (5th Cir. 1957) 248 F.2d 509, 510 (citations omitted)).

In this instance, the dispute arises in the context of a multi-year insurance program, with each year having primary and excess liability insurance policies. Under those circumstances, what consideration if any, should California courts give to "other insurance" clauses in excess liability policies when a policyholder asks multiple insurers to indemnify it against claims for damage spanning successive policy periods? Specifically:

i) May the policyholder access the limits of a higher-level excess insurance policy in one year upon exhausting the immediately underlying coverage in the same policy period in accordance with the higher-level policy's insurance agreement, if the excess policy contains a clause stating that it is excess of "other insurance"? That was the holding of the Court of Appeal in *State of California v. Continental Ins. Co.* (2017) 15 Cal.App.5th 1017 (*Continental II*), which this Court declined to review on December 20, 2017; or

ii) Must the policyholder exhaust the limits of every lower-level policy in every potentially-triggered year before it can call upon a policy at

any higher level to indemnify it, even if the insuring language of each excess policy does not expressly and unambiguously require the policyholder to do so? That is the result urged by the Insurers here, and was the holding of the Court of Appeal below.

The issue presented by this case is the latest iteration of an ongoing dispute between companies like Montrose and their insurers about how to allocate "long tail" losses (from asbestos, product liability, construction defect, toxic tort, or environmental liabilities that develop over many years) among the successive years and layers of liability policies that may provide coverage. This Court has previously addressed these issues in the following contexts, which help frame the issues before the Court today.

In *Montrose Chem. Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, this Court held that when a policyholder faces liability for an underlying claim involving continuous or progressive injuries, a "continuous trigger" of coverage applies. Specifically, for the environmental claims against Montrose, this Court held that every insurance policy in effect from the time property damage began until final judgment was entered years later against the company in the underlying action potentially applied.

In *Aerojet-General Corp. v. Transport Indem. Co.* (1997) 17 Cal.4th 38, this Court adopted an "all sums" approach to allocating liability to the successive years of policies that apply to such a loss, and rejected the "pro rata" approach favored by the insurance industry. Under the "all sums" approach, when an insurer promises to pay "all sums" the insured becomes legally obligated to pay as damages, each successive insurer has a "separate and independent" duty to the insured which "extends to all specified harm caused by an included occurrence, even if some such harm results beyond the policy period." *Id.* at 56-57, 70 (citations omitted). This Court rejected the insurers' argument that the insured was required to collect a "pro rata" share of its loss from each successive insurer on the risk for a continuing

injury, so that a portion of the loss should therefore be "allocated" to the policyholder if it was uninsured in some years. The Court held that even though the "insurers may be required to make an equitable contribution ... among themselves" the "insured is not required to make such a contribution together with insurers." *Aerojet*, 17 Cal.4th at 73.

In *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, this Court held that "other insurance" clauses do not affect the policyholder's coverage rights vis-à-vis its insurers, but instead apply only to contribution claims between insurers at the same level of coverage after they have paid the loss. *Id.* at 1078, fn. 6.

> When multiple policies are triggered on a single claim, the insurers' liability is apportioned pursuant to the 'other insurance' clauses of the policies [citation] or under the equitable doctrine of contribution [citations]. That apportionment, however, has no bearing upon the insurers' obligations to the policyholder. [Citation.] A pro rata allocation among insurers 'does not reduce their respective obligations to their insured.' [Citation.] The insurers' contractual obligation to the policyholder is to cover the full extent of the policyholder's liability (up to the policy limits).

*Id.* at 1080 (*quoting Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.* (1996) 45 Cal.App.4th 1, 105-06).

In *State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186 (*Continental*) – in which Montrose appeared as an amicus curiae – this Court held that when a continuous injury claim triggers multiple years of liability insurance, the insured is permitted to collect its loss in full up to the combined limits of the policies in whichever year or years it selects, with the selected insurers being entitled subsequently to seek contribution from other insurers on the risk during other years of the loss. This "'all-sums-with-stacking' rule means that the insured has immediate access to

the insurance it purchased" and "does not put the insured in the position of receiving less coverage than it bought." *Id.* at 201.

Against the weight of the foregoing authority, the Insurers urge this Court to rule that standard "other insurance" clauses in excess policies require policyholders such as Montrose to "horizontally exhaust" their insurance unless the policies clearly state otherwise. The Insurers' position is contrary to California law for at least the following reasons:

*First,* California law is clear that issues of coverage are decided by the language of the insurance policy construed under the statutorily-imposed rules of contract interpretation. The proposed presumption of "horizontal exhaustion" directly conflicts with those rules where, as here, the policies were written as "specific excess" policies and promise to attach upon the exhaustion of the vertically underlying policies.

*Second,* California law draws a clear distinction *between* (i) coverage disputes between policyholders and insurers *and* (ii) disputes between insurers seeking to reapportion losses they have paid on account of covered claims. Policyholder-insurer coverage disputes are governed by contract law; inter-insurer disputes are governed by equitable principles of subrogation and contribution. "Other insurance" clauses are generally irrelevant to policyholder-insurer disputes, but frequently considered in inter-insurer disputes. The Insurers ignore this distinction, and rely extensively on inter-insurer equitable apportionment cases to argue, *inter alia,* that "other insurance" clauses should be construed as limiting their obligations to Montrose.

*Third,* this Court has made clear in prior decisions such as *Montrose, Aerojet* and *Continental* that each policy triggered by a continuing loss is obligated to pay up to its limits, without any deduction for amounts attributable to periods in which the policyholder had other insurance or no insurance. Any other approach would deny a policyholder's right to obtain

"immediate access to the insurance it purchased[.]" *Continental*, 55 Cal.4th at 200-01. The Insurers disregard this, contending that they are entitled to withhold payment of otherwise covered amounts on account of "other insurance" allegedly available in other policy periods, even if that other insurance is not even "recoverable." Answering Brief ("AB") at 20 (citing language the Insurers contend allows them to defer payment on account of "other insurances ... whether recoverable or not...."). That approach not only deprives the policyholder of "immediate access" to its insurance, but also impermissibly puts it in the position of "receiving less coverage than it bought." *Continental*, 55 Cal.4th at 201.

*Fourth*, this Court has made clear that an insurer cannot avoid coverage unless the alleged exception is both conspicuous and phrased in clear and unmistakable terms. *Haynes v. Farmers Ins. Exch.* (2004) 32 Cal.4th 1198, 1204-05. Even if an insurer meets those "two rigid drafting rules" (*id.* at 1211), it still cannot avoid coverage unless it can show its coverage-restricting interpretation is the "only reasonable one." *MacKinnon v. Truck Ins. Exch.* (2003) 31 Cal.4th 635, 655. The Insurers' attempts to avoid coverage on account of the supposed existence of "other insurance" do not withstand the scrutiny of these rules, and must therefore fail.

For the foregoing reasons, and as discussed in greater detail below, *amicus curiae* respectfully request to decline the Insurers' efforts to avoid coverage on account of "other insurance."

## ARGUMENT

### I. A BLANKET RULE REQUIRING HORIZONTAL EXHAUSTION WOULD IMPERMISSIBLY RE-WRITE POLICIES, LIKE THOSE AT ISSUE HERE, THAT WERE WRITTEN ON A "SPECIFIC EXCESS" BASIS.

The key to any insurance coverage dispute is the language of the insurance policy. As this Court explained 28 years ago, whether an

insurance policy provides coverage "is to be found solely in the language of the [applicable insurance] policies, not in public policy considerations." *AIU Ins. Co. v. Super. Ct.* (1990) 51 Cal.3d 807, 818; *see also Cunningham v. Universal Underwriters* (2002) 98 Cal.App.4th 1141, 1148 (the court's "focus must be upon 'the language of the policy itself, not upon 'general' rules of coverage that are not necessarily responsive to the policy language.'") (*quoting Am. Cyanamid Co. v. Am. Home Assur. Co.* (1994) 30 Cal.App.4th 969, 978). In urging this Court to adopt a general rule of "horizontal exhaustion," the Insurers here disregard this basic principle of insurance policy construction.

Interpretation of insurance policy provisions is governed by the mutual intent of the parties. Civ. Code § 1636; *Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.* (1993) 5 Cal.4th 854, 867. Intent is to be inferred, if possible, from the language of the policy itself. Civ. Code § 1639, *Bay Cities*, 5 Cal.4th at 867; *Montrose,* 10 Cal.4th at 666. The "clear and explicit" meaning of the insurance contract provisions, interpreted in their "ordinary and popular sense," controls their judicial interpretation. *Waller v. Truck Ins. Exch., Inc.* (1995) 11 Cal.4th 1, 18.

California law distinguishes between two kinds of excess insurance policies: (1) "specific excess policies," which promise to start paying covered claims as soon as specifically identified policies or limits underlying them are exhausted; and (2) excess policies that do not identify any particular underlying coverage, and start paying only after all primary insurance has been exhausted. H. Walter Croskey, et al., *California Practice Guide: Ins. Litig.* (rev. ed. 2018) ¶¶ 8:236-38.

Courts in California have recognized that whether a policy provides "specific excess" coverage is dictated by the language of that excess policy, not language found in other insurance policies. *See, e.g., Carmel Dev. Co. v. RLI Ins. Co.* (2005) 126 Cal.App.4th 502, 516 (finding a policy to be

"specifically excess" because its "insuring terms" provided that it was "excess to the underlying primary"); *Travelers Cas. & Sur. Co. v. Transcontinental Ins. Co.* (2004) 122 Cal.App.4th 949, 959 (where an excess policy provides that it is excess of specified coverage, it must pay immediately upon exhaustion of that coverage regardless of the existence of other insurance); *20th Century Ins. Co. v. Liberty Mut. Ins. Co.* (9th Cir. 1992) 965 F.2d 747, 757 (finding a policy to provide specific excess coverage when it identified the underlying primary policy).

Here, it is undisputed that each of the 115 policies in Montrose's portfolio expressly provides coverage that attaches in excess of a specific, predetermined amount of underlying coverage in the same policy period. Opening Brief ("AOB") at 17-18; Reply Brief ("RB") at 11, 15. This means that the parties intended the policies to respond to claims as soon as the specified underlying insurance policies or coverage limits identified by them are exhausted. *See Bay Cities*, 5 Cal.4th at 867 (intent is to be inferred "solely" from language of the insurance policy itself).

## II. ESTABLISHED PRECEDENT MAKES CLEAR THAT INSURERS CANNOT DEFER OR AVOID THEIR COVERAGE OBLIGATIONS ON ACCOUNT OF "OTHER INSURANCE" CLAUSES.

### A. This Court Ruled In *Dart* That Other Insurance Clauses Only Apply In Inter-Insurer Disputes.

In *Dart*, this Court addressed the effect of "other insurance" clauses like those upon which the Insurers rely in this case. 28 Cal.4th at 1078, fn. 6. Rejecting the position advocated by the Insurers here, the Court held that provisions stating that a policy is excess of the policyholder's "other insurance" do not impose conditions or limitations upon the policyholder's contractual coverage rights vis-à-vis its insurers; instead, they only apply to contribution claims between the insurers after one or more of them have paid the insured's loss. This Court explained that the obligation of each

successive insurer to its policyholder "to cover a continuously manifesting injury is a separate issue from the obligations of the insurers to each other." *Id.* at 1080. The latter issue is governed by "the 'other insurance' clauses of the policies [citation] or under the equitable doctrine of contribution [citations]." *Id.* (*quoting Armstrong*, 45 Cal.App.4th at 105-106). "That apportionment, however, has no bearing upon the insurers' obligations to the policyholder," which is "to cover the full extent of the policyholder's liability (up to the policy limits)." *Id.*

The Insurers assert that *Dart* does not apply to excess insurance policies, but applies only when "primary insurers insist that conflicting 'other insurance' provisions make their policies excess to other primary insurers' policies." AB at 36. The Insurers also assert that *Dart* only applies to "other insurance" provisions in policies at the same level of coverage. *Id.* at 36-37.

The holding and rationale of *Dart* are not so limited. To the contrary, *Armstrong*—which this Court quoted with approval in *Dart*—*did* involve excess insurers. The Court of Appeal held there that an "other insurance" clause "does not affect the obligation of the insurers to respond in full" to the policyholder's coverage claim, explaining that "'a policyholder may obtain full indemnification and defense from one insurer, leaving the targeted insurer to seek contribution from other insurers covering the same loss'" according to the "other insurance" provisions in their policies or equitable principles. *Armstrong*, 45 Cal.App.4th at 52 (citation omitted). Consistent with that reasoning, this Court rejected in *Dart* the insurers' contention that an "other insurance" provision is a "condition of coverage" that the policyholder must satisfy as a prerequisite to its coverage claim. 28 Cal.4th at 1078-79.

Implicit in the Insurers' entire argument is the notion that treating "other insurance" provisions as a "condition of coverage," which the

policyholder must satisfy before it is entitled to payment from its insurer, does not prejudice the insured or "defeat the insurers' obligations" because it affects "only the *sequence* in which the policies are accessed, not the total coverage available to the insured." *See* AB at 38.

In *Dart*, however, this Court explicitly rejected the notion that "other insurance" clauses can regulate the sequence in which insurers at different levels must respond to the policyholder's claim for coverage: "'Other insurance' clauses become relevant only where several insurers insure the same risk at the *same level* of coverage. An 'other insurance' dispute cannot arise between primary and excess insurers." *Id.* at 1078, fn.6 (quotation omitted) (emphasis in the original). That conclusion is the only one that is consistent with the Court's holding that an "other insurance" provision is not a "condition of coverage" that the policyholder must satisfy as a prerequisite to its coverage claim. 28 Cal.4th at 1078-79.

Often, moreover, there are "gaps" within horizontal layers of insurance policies that are created by the insolvency of insurers in certain years, or pollution exclusions that are more prevalent in later policies, or a range of other coverage issues. It can be expensive and time-consuming to litigate such issues. Therefore it is not always the case that it is easier, or even possible, for the insured to recover from lower-level insurance policies before it seeks payment from higher-level policies covering the same continuing loss. Treating "other insurance" provisions as a "condition of coverage" that the policyholder must satisfy as a prerequisite to its claim would accordingly prejudice the insured by depriving it of "immediate access to the insurance it purchased," which is ensured only if the policyholder "is entitled to seek indemnification from *any* of the ... insurers on the risk." *Continental*, 55 Cal.4th at 200-01 (emphasis added); *see also Continental II*, 15 Cal.App.5th at 1033 ("[A]s the State aptly points out, 'Under [Continental]'s approach, a court could not determine the amount

any insurer owes without first determining what every insurer owes ....' (Fn. omitted.) For example, if a lower-layer insurer for a different policy period happened to claim that some exclusion in its policy applied, a court could not determine whether Continental's policies were triggered without first determining that exclusion claim. This would deprive the State of the timely indemnity that it bargained for.").

If the Insurers are correct that there are "lower level" insurers ready and willing to pay, a paying "higher level" insurer could seek to reallocate its payment among the other insurers according to whatever equitable rights it might have. *JPI Westcoast Constr., L.P. v. RJS & Assocs., Inc.* (2007) 156 Cal.App.4th 1448, 1466 (excess insurer entitled to recover from primary insurer under subrogation theory). But such re-allocation rights do "not relieve [the insurer] from either its obligation to indemnify or to defend [the policyholder]" in the first instance). *Dart*, 28 Cal.4th at 1080-81. There is accordingly no prejudice to the Insurers in requiring the Insurers to provide their policyholder with "immediate access to the insurance it purchased." *Continental*, 55 Cal.4th at 200-01.

**B. Equitable Principles Developed In Inter-Insurer Cases Such As *Community Redevelopment* Are Inapplicable To Disputes Between Policyholders And Their Insurers.**

The Insurers mistakenly claim that *Community Redevelopment Agency of City of Los Angeles v. Aetna Casualty & Surety Company* (1996) 50 Cal.App.4th 329 established a "longstanding rule" of horizontal exhaustion that is "eminently 'workable,' ... particularly in cases like this one with large, sophisticated commercial entities on both sides of the insurer-insured transaction." AB at 55, 60. That case was an inter-insurer allocation case regarding defense obligations, not a dispute about insurers' contractual obligations to indemnify their own policyholders. And even in that context, the court held that policy language trumped any general rule of

horizontal exhaustion. *Community Redevelopment* is therefore is inapposite even if what the Insurers say about it is correct.

*Community Redevelopment* involved a dispute between a primary insurer, United Pacific, and an umbrella insurer, Scottsdale. Following settlement of the underlying construction dispute, United Pacific sought a declaration that Scottsdale was obligated under a theory of equitable contribution to reimburse United Pacific for defense costs it incurred during the pendency of the action. 50 Cal.App.4th at 333, fn. 1. The court ruled against United Pacific, holding that Scottsdale—as the excess insurer—had no duty to reimburse United Pacific for any portion of the defense costs it had paid in fulfilling its primary duty to defend the policyholder. *Id.* at 342.

*Community Redevelopment* was not the "sea change" the Insurers claim, but instead is just one of many cases that have followed this Court's holding that a primary insurer has no right of contribution from an excess insurer absent "some compelling equitable consideration." *Signal Companies, Inc. v. Harbor Ins. Co.* (1980) 27 Cal.3d 359, 369; *see also Stonewall,* 46 Cal.App.4th 1810; *Continental Ins. Co. v. Lexington Ins. Co.* (1997) 55 Cal.App.4th 637, 647; *Fireman's Fund Ins. Co. v. Maryland Cas. Co.* (1998) 65 Cal.App.4th 1279, 1299; *Reliance Nat. Indem. Co. v. General Star Indem. Co.* (1999) 72 Cal.App.4th 1063, 1078; *JPI Westcoast Constr., L.P.*, 156 Cal.App. at 1466.[1]

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[1] *Community Redevelopment* was not even the first apportionment case to adapt the continuous loss trigger established by this Court in *Montrose* to an inter-insurer dispute involving primary and excess policies, as the Insurers seem to suggest. That honor belongs to *Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 Cal.App.4th 1810, which was decided several months before *Community Redevelopment.*