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

APPLICATION TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER MONTROSE CHEMICAL COMPANY OF CALIFORNIA

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

APPLICATION TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER MONTROSE CHEMICAL COMPANY OF CALIFORNIA

*Jeffrey S. Raskin (SBN 169096)
Thomas M. Peterson (SBN 96011)
MORGAN, LEWIS & BOCKIUS LLP
One Market Street, Spear Tower
San Francisco, CA 94105
Telephone No. (415) 442-1000
Facsimile No. (415) 442-1001

Paul A. Zevnik (SBN 75343)
David S. Cox (SBN 181232)
MORGAN, LEWIS & BOCKIUS LLP
300 South Grand Avenue, 22nd Floor
Los Angeles, CA 90071
Telephone No. (213) 612-2500
Facsimile No. (213) 612-2501

Attorneys for Amicus Curiae
SANTA FE BRAUN, INC.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

APPLICATION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER MONTROSE CHEMICAL COMPANY OF CALIFORNIA

I. INTRODUCTION

Santa Fe Braun, Inc. (formerly known as C.F. Braun & Co.) respectfully requests leave to appear as *amicus curiae* and file the accompanying brief in support of Petitioner Montrose Chemical Company of California.

Issues relating to the exhaustion of underlying insurance and the trigger of excess policies arise in virtually every case involving insurance coverage for long-term injury claims, such as those involving environmental damage, product liability and toxic torts. In these long-term injury cases, progressive injury or damage often takes place over many years, thereby implicating different insurance policies and multiple policy years. Santa Fe Braun has an appeal pending in the First District Court of Appeal. It involves insurance coverage for long-term injury claims. It also involves an issue raised by Montrose here, namely, whether policies spanning several years must all be horizontally exhausted before higher levels of coverage must respond to claims. Santa Fe Braun thus seeks leave to appear here because the resolution of this case will likely have a direct impact on the resolution of Santa Fe Braun's insurance coverage rights.

More specifically, Santa Fe Braun is concerned with issues associated with the existence of "other insurance" and whether there is a "general rule" or "presumption" in California favoring horizontal exhaustion of insurance coverage before accessing umbrella or excess insurance coverage.

II. NATURE OF THE INTEREST OF *AMICUS CURIAE*

Santa Fe Braun has an appeal pending in the First District Court of Appeal. It involves an important question raised before this Court, namely, whether California law imposes a blanket rule requiring that each layer of liability insurance coverage be "horizontally exhausted" before succeeding layers of excess coverage may be accessed.[1]

"Horizontal exhaustion" means that when multiple policies and policy years are "triggered" by a cumulative injury, or a progressive or continuing loss, an excess policy cannot be accessed until the policyholder first exhausts insurance policies across all policy years at lower levels of coverage. *Community Redevelopment Agency v. Aetna Casualty & Surety Co.* (1996) 50 Cal.App.4th 329, 340.

Santa Fe Braun respectfully submits that no "general rule" of horizontal exhaustion exists under California law, and such a rule would be incompatible with foundational principles of insurance policy interpretation, as well as with the insurance contracts themselves.

Santa Fe Braun is an affiliate of the Braun Trust, a qualified settlement fund established by an order of the Superior Court for the County of San Francisco to hold certain of Santa Fe Braun's insurance proceeds used to defend and resolve asbestos liability claims. Santa Fe Braun faces long-tail injury claims that present

---

[1] *Santa Fe Braun, Inc. v. Insurance Company of North America*, Case No. A151428.

long-tail liabilities. These exceed the limits of Santa Fe Braun's primary insurance. They have exceeded the limits of several of its excess policies, as well.

Santa Fe Braun's excess insurers assert that the decision in *Community Redevelopment* imposes a "presumption," or "general rule," requiring horizontal exhaustion of all underlying insurance, as a matter of law, whenever a policy is designated "excess." If the insurers are right, that would seriously restrict Santa Fe Braun's access to coverage needed to address long-term injury claims.

But the insurers are not right. The "presumption" or "general rule" they advocate is contrary to the wordings in the policies sold to Santa Fe Braun and Montrose; it conflicts with rules established by decades of California jurisprudence governing insurance contract interpretation; and it fails to account for the reasonable expectations of insureds that purchased excess insurance coverage over at least four decades beginning after 1947.

III. CONCLUSION

Leave to appear as *amicus curiae* should be granted.

Dated: September 20, 2018

Respectfully submitted:

MORGAN, LEWIS & BOCKIUS LLP

By: _____
Jeffrey S. Raskin
Thomas M. Peterson
David S. Cox

Attorneys for *Amicus Curiae*
SANTA FE BRAUN, INC.

BRIEF *AMICUS CURIAE* OF SANTA FE BRAUN, INC. IN SUPPORT OF MONTROSE CHEMICAL COMPANY OF CALIFORNIA, INC.

I. INTRODUCTION

The excess insurers in this case urge the adoption and application of a supposed "general rule" of horizontal exhaustion tied to all levels of coverage. This imagined rule of general application is derived from an erroneous expansion of *Community Redevelopment Agency v. Aetna Casualty & Surety Co.* (1996) 50 Cal.App.4th 329 ("*Community Redevelopment*"). "Horizontal exhaustion," as described by *Community Redevelopment*, means:

> all of the *primary policies* in force during the period of continuous loss will be deemed primary policies to each of the excess policies covering that same period. Under the principle of horizontal exhaustion, all of the primary policies must exhaust before any excess will have coverage exposure.

Id. at 340.[2] The court of appeal here expanded this limited rationale to require (at least potentially) the exhaustion of all underlying insurance at succeeding levels of coverage before liability attaches under any excess policy.[3] *Montrose Chemical Corp. v. Superior Court* (2017) 14 Cal.App.5th 1306, 1333 ("Opinion").

This decision, and this interpretation of *Community Redevelopment*, is indefensible. California law does not countenance an across-the-board "general rule"—a presumption—that supplants the coverage rights arising from policy

---

[2] Emphasis is added in quoted materials and internal citations omitted except where indicated.

[3] As the *Community Redevelopment* court explained, "vertical exhaustion" means that an excess policy attaches "when the limits of a specifically scheduled underlying policy are exhausted...." 50 Cal.App.4th at 339-40.

language. Insurance policies, like all contracts, must be interpreted based on policy language and rules governing the interpretation of insurance policies. *Montgomery Ward & Co., Inc., v. Imperial Cas. and Indem. Co.* (2001) 81 Cal.App.4th 356, 368-69. These rules, which should apply here, include: (i) the proper interpretation of policy language controls; (ii) limitations on coverage must be clear, conspicuous and narrowly construed; (iii) ambiguous terms must be construed in favor of coverage; and (iv) the "reasonable expectations" of the insured at the time of contracting ultimately prevail in favor of coverage. The court of appeal erred in failing to apply these rules.

Another rule applies here too: California *disfavors* generally worded "excess only" "other insurance" provisions "by which carriers seek exculpation whenever the loss falls within another carrier's policy limit." *CSE Ins. Group v. Northbrook Prop. & Cas. Co.* (1994) 23 Cal.App.4th 1839, 1842, 1845. Contrary to this authority, the court of appeal here invoked boilerplate "other insurance" clauses as textual support for concluding that excess policies with these provisions require the exhaustion of *all* underlying insurance before an excess insurer's obligation to indemnify attaches. See, Opinion, at 1333. ("other insurance" clauses "define the insurance that must be exhausted before the excess insurance attaches"). As another court has aptly noted, *Community Redevelopment* was *not* based on the interpretation of "other insurance" clauses but, principally, on the wording of the insuring agreement in that case:

> Although the court in *Community Redevelopment* considered the policy's "other insurance" clause, it viewed the clause as reinforcing the language of the insuring agreement, which itself expressly made coverage excess to all underlying insurance.

HDI-Gerling America Ins. Co. v. Homestead Ins. Co. (N.D. Cal., July 11, 2008) 2008 WL 2740338 at *8.

Thus, *Community Redevelopment* does *not* represent a broad application of the type of "other insurance" clauses that California courts disfavor. At most, *Community Redevelopment* signals that "other insurance" clauses may sometimes *reinforce* an excess policy's insuring provision insofar as it dictates how liability attaches under the policy. But other insurance clauses, in and of themselves, have "no bearing on the insurers' obligation to the policyholder." *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1080; see also *id.* at 1079-80 ("[E]ven if Commercial Union had a 'null and void with excess' 'other insurance' clause, all that would be established is that it had a right to seek some kind of contribution from successive insurers also liable to Dart. It would not relieve Commercial Union from either its obligation to indemnify or to defend Dart").

In sum, there is no "general rule" or "presumption" of horizontal exhaustion under current California law and this Court should not create one.[4]

---

[4] To the extent that certain language in *Community Redevelopment* might be read to endorse a "presumption" or "general rule" favoring horizontal exhaustion—"[a]bsent a provision in the excess policy specifically describing and limiting the underlying insurance," horizontal exhaustion is required (50 Cal.App.4th at 340)—it should be disapproved so as to eliminate confusion in future cases.

The attachment of liability under excess policies must be based on particular policy language defining the relationship between the insurer and the policyholder, informed by application of the rules governing the interpretation of insurance contracts.

II. ARGUMENT

A. Insurance Disputes Are Resolved By Contract Language Defining The Rights Of The Insurer And The Policyholder, Not By Supplanting Presumptions Or Rules Of General Application.

The insurers claim California has a "general rule" of horizontal exhaustion under which each policy at each level of coverage must be exhausted before excess policies at any succeeding level of coverage must honor their promises of coverage.[5]

This argument collides at the outset with bedrock principles of California law. In this state, insurance contract terms dictate the rights and obligations of the insurer and policyholder. "Presumptions" and "generally applicable" rules do not:

> The proper initial focus for a court in resolving a question of insurance coverage is on the language of the insurance policy itself, rather than on judicially created "general" rules that are not necessarily responsive to the policy language or facts of the dispute.

Garriott Crop Dusting v. Superior Court (1990) 221 Cal.App.3d 783, 790. As an earlier court aptly cautioned: "rather than continuing the unproductive pursuit of a rule governing all cases, we consider instead the language of the policies

---

[5] "It has been settled law in California since *Community Redevelopment* that an insured must horizontally exhaust the primary coverage across all years of the long-tail injury before it can access any (higher-layer) excess policies." Answering Brief On The Merits ("AB"), at 16-17.

themselves." *Harbor Ins. Co. v. Central National Ins. Co.* (1985) 165 Cal.App.3d 1029, 1036.

Consequently, each individual policy must be interpreted "as though it were the only insurance available." *Monolith Portland Cement Co. v. American Home Assur. Co.* (1969) 273 Cal.App.2d 115,123; *see also Armstrong, World Indus., Inc. v. Aetna Ca. & Sur. Co.* (1996) 45 Cal.App.4th 1, 78 fn. 31 (each policy "should be interpreted as if no other insurance is available"). This rule makes abundant sense. An interpretation derived from the language of one policy might not fit the language of another policy. Across-the-board rules are incompatible with the required, contract-specific focus on policy interpretation. Across-the-board rules are also incompatible with the need to give effect over a span of years to variations in policy language, and to protect the reasonable expectations of policyholders as to the coverage they purchased.

Furthermore, a contract must be interpreted based on the parties' intent *at the time of contracting. Thomas v. Buttress & McClellan, Inc.* (1956) 141 Cal.App.2d 812, 816 (1956); *accord, AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 821-22. "Subsequent unforeseen events"—like continuing environmental property damage not contemplated at the time of contracting, continuing asbestos injury, or the variable about whether and to what extent the policyholder buys insurance in subsequent years—"cannot be allowed to control in arriving at that intent." *Thomas*, 141 Cal.App.2d at 816

Community Redevelopment lends support to these principles. Despite commenting on a supposed "California general rule" favoring horizontal exhaustion of *primary* coverage, the court acknowledged that policy language controls and supplants any purported "presumption" or "general rule":

> If an excess policy states that it is excess over a specifically described policy and will cover a claim when that specific primary policy is exhausted, such language is sufficiently clear to overcome the usual presumption that all primary coverage must be exhausted.

50 Cal.App.4th at 340 fn. 6.

The paramount role of contract language in determining the attachment point of an excess policy was recognized by courts both before and after *Community Redevelopment* was decided:

> [T]hese cases, like all other insurance cases, look first to the terms of the policy. [*Community Redevelopment* ("*CRA*")] likewise looked to the policy language, which it found "certainly unambiguous": the policy expressly provided the insurer's liability was excess to "the applicable limits of any other underlying insurance collectible by the [insured parties]..." *CRA* does not stand for the proposition all primary coverage must be exhausted before excess policies may be reached without regard to the terms of the excess policies.

Montgomery Ward, 81 Cal.App.4th at 368-69; see also *Carmel Development Co. v. RLI Ins. Co.* (2005) 126 Cal.App.4th 502 ("whether horizontal exhaustion applies depends on policy language" and "labels are not dispositive; it is the policy language that controls the attachment of coverage"); *20th Century Ins. Co. v. Liberty Mut. Ins. Co.* (9th Cir. 1992) 965 F.2d 747, 756 ("we look to the language of each policy to determine when it purports to attach, focusing on the intended application of each policy to the particular collision at issue, and applying

judicially-crafted presumptions of priority only when terms of applicable policies are in conflict").

Ultimately, all of the cases addressing horizontal versus vertical exhaustion rest on the same fundamental principle: policy language controls and, in particular, the language of the policy's insuring agreement controls, not "other insurance" policy conditions that are addressed to issues that may arise among the insurers, not between the insurer and its policyholder.

B. Horizontal Exhaustion Is Not Dictated By "Other Insurance" Clauses Or By References To "Other Insurance" In Definitions Of "Ultimate Net Loss" Found In Certain Policies.

1. The Decision In *Community Redevelopment* Does Not Turn On The "Other Insurance" Clause In That Case.

Community Redevelopment was decided based upon the insuring agreement found in the policy in that case. Scottsdale Insurance Company's insuring agreement stated that the policy was excess to "underlying insurance listed in the Schedule of Underlying Insurance (Schedule A), *plus the applicable limits of any other underlying insurance collectible by the insured.*" 50 Cal.App.4th at 335 (emphasis original). The policy's intent that coverage would only be triggered upon exhaustion of the listed underlying insurance—*plus* the limits of any other underlying insurance collectible by the insured—was *restated* in the policy's "other insurance" clause: "[t]he insurance afforded by this policy shall be excess insurance *over any other valid and collectible insurance* available to the Insured,

whether or not described in the Schedule of Underlying Insurance...." *Id.* (emphasis original).

Based upon the specific language in Scottsdale's *insuring agreement*—as reinforced by the Scottsdale's "other insurance" provision—the court of appeal affirmed the decision that Scottsdale had no duty to defend its insured because all of its underlying insurance had not been exhausted:

> Scottsdale's duty to provide a defense was never triggered and the underlying actions were all settled and resolved prior to exhaustion of all of the primary policies. Thus, all defense expenditures were incurred by one or more primary insurers without exhausting the policy limits of all of the primary policies. Therefore, Scottsdale had no duty to provide a defense and thus has no obligation to contribute to the cost of that defense and the trial court's judgment in favor of Scottsdale was correct.

Id. at 340.[6]

Consequently, it is not the breadth of an "other insurance" clause that makes a policy excess over "all underlying insurance." Rather, case law makes clear that "other insurance" clauses, by themselves, do not require horizontal exhaustion no matter how broad their wording. Rather, in all cases (including *Community Redevelopment*), whether liability attaches under an excess policy

---

[6] A similarly specific and reinforcing "other insurance" clause was at play in *Padilla Constr. Co., Inc. v. Transp. Ins. Co.* (2007) 150 Cal.App.4th 984. In *Padilla*, the "other insurance" clause stated that "[w]henever you are covered by other: [¶] a. primary [¶] b. excess; or c. excess-contingent [¶] insurance *not scheduled on this policy as 'scheduled underlying insurance'*, this policy shall apply only in excess of, and will not contribute with, such other insurance..." *Id.* at 993-94. This was consistent with the insurer's promise to cover the insured in excess of all underlying insurance, and not just the insurance described in the schedule. *Id.* at 1003-04.

based on horizontal versus vertical exhaustion turns on the language in the excess policy's insuring agreement:

> Although the court in *Community Redevelopment* considered the policy's "other insurance" clause, it viewed the clause as reinforcing the language of the insuring agreement, which itself expressly made coverage excess to all underlying insurance.

HDI-Gerling America Ins. Co. v. Homestead Ins. Co. (N.D. Cal., July 11, 2008) 2008 WL 2740338 at *8; see also *The Flintkote Co. v. General Accident Assur. Co. of Canada* (N.D. Cal., June 18, 2008) 2008 WL 2477420 (horizontal exhaustion *not* required for liability to attach under an excess policy where the insuring agreement stated that the insurer would indemnify "the insured for ultimate net loss in excess of the underlying limit," which it described as "amounts of the applicable limits of liability of the underlying insurance as stated in the Schedule of Underlying Insurance Policies"); *Liberty Mut. Ins. Co. v. Indian Harbor Ins. Co.* (S.D. Cal., Feb. 28, 2012) 2012 WL 642890 at *6 ("Whether vertical exhaustion applies here turns on whether the [excess policy] is a general excess policy or a specified excess policy. As explained above, [excess policy] is specifically excess to the [primary policy], and vertical exhaustion is therefore proper").

2. References To "Other Insurance" In The Definitions Of "Loss" Or "Ultimate Net Loss" Do Not Require Or Support A Rule Of Horizontal Exhaustion.

The insurers argue before this Court that certain excess policies in this case contain definitions of "Loss" and "Ultimate Net Loss" that mention "other

insurance" and thereby support a rule of horizontal exhaustion. AB, at 27-29. There are at least three flaws in the insurers' argument.

First, the phrases "Loss" and "Ultimate Net Loss" have nothing to do with how liability attaches under an excess insurance policy. Rather, these terms affect the amount payable by an insurer once liability attaches: "The phrase in the coverage clause is used in reference to what amount the insurer will pay after the insurer becomes obligated to pay rather than as a trigger of the insurer's obligation to pay." *CDM Investors v. Travelers Cas. & Sur. Co.* (2006) 139 Cal.App.4th 1251, 1263; see also *County of San Diego v. Ace Property & Cas. Ins.* (2005) 37 Cal.4th 406, 419, 420 (definition of ultimate net loss "merely serves to define the insured's total loss that will count toward [the] policy limits").

Second, the insurers' argument here was properly rejected in *State of California*. There, the insurer asserted that horizontal exhaustion was required by a definition of "ultimate net loss" that is functionally identical to what the policies here provide:

> the amount payable in settlement of the liability of the [State] arising only from the hazards covered by this policy after making deductions for all recoveries and for other valid and collectible insurances excepting however policy/ies in respect of the insured's retention....

15 Cal.App.4th at 1028. The court held that the incorporation of "other insurance" concepts into a provision defining what the excess insurer pays did not turn the policy into one requiring horizontal exhaustion: "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." *Id.* at 1033.

Advent, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA (2016) 6 Cal.App.5th 443, is also instructive on this issue. There, Topa Insurance Company agreed to "indemnify the insured for the amount of loss which is in excess of the applicable limits of liability, whether collectible or not, of the Underlying Insurance inserted in Item 6 of the Declarations ...." Item 6 of the declarations lists, as the general liability policy, a policy issued by Landmark Insurance Company." *Id.* at 46. In arguing that its excess policy required the exhaustion of more than the Landmark policy identified in the excess policies' declarations, Topa invoked the policy's definition of "loss":

> the sum paid in settlement of losses for which the insured is liable after making deduction for all recoveries, salvages or other insurance (other than recoveries under the policy of the Underlying Insurance) whether recoverable or not, and shall include all expenses and "costs."

Id. "Other insurance" was not defined, however. *Id.*

Advent rejected the insurers' argument: "the definition of 'loss' that the insurer attempted to construe as an 'other insurance' clause referred to insurance which the *primary insurer* could enlist—therefore if the *primary insurer* could reduce its loss by other insurance, the insurer would get the benefit." *Id.* at 468. This possibility had nothing to do with when or how liability to the policyholder attached under Topa's excess policy:

> enforcement of the provision in the way argued by the insurer could conceivably result in a denial of insurance protection to the insured, since the clause calls for deduction of other insurance whether recoverable or not ... if the company would limit its liability by the interposition of "other insurance," it should at least define the "other insurance"

Id. The "loss" definition in the Topa policy did not transform a "specific" excess policy (requiring exhaustion of the directly underlying insurance) into a "general" excess policy (requiring exhaustion of all underlying insurance):

> Although Topa's definition of "loss" referenced "other insurance," the reference was vague. There was no definition of what this "other insurance" included. Additionally, Topa's policy contained specific language that indicated that coverage applied immediately once the Landmark policy was exhausted."

Id.

Third, the definition of "ultimate net loss" touted by the insurers here contains ambiguities that preclude its use to limit coverage to continuing or progressive loss situations like those presented by environmental property damage claims:

> [T]he definition states that the deduction is for "all recoveries for other valid and collectible insurance." The word "all" modifies recoveries and leaves ambiguous whether the deduction applies to "all other valid and collectible insurances" or just "some other valid and collectible insurances."

St. Paul Fire and Marine Ins. Co. v. Ins. Co. of the State of Pennsylvania (N.D. Cal. March 7, 2017) 2017 WL 897437, at *18. The definitions in some of Montrose's excess policies use the same ambiguous terminology—after making deductions for *all recoveries* and for other valid and collectible insurances—thus

leaving open issues about whether it applies to "all" other valid and collectible insurance, or only to "some" valid and collectible insurance.

This ambiguity is amplified by other problems associated with using the "ultimate net loss" definition to differentiate vertical and horizontal exhaustion situations:

> the definition of ultimate net loss does not speak to the timing of when [the excess insurer] becomes liable, but rather solely acts to limit the amount of [the insurer's] liability. While a statement that recoveries for "all other valid and collectible insurance" may have indicated that the Penn policy does not have to pay until all other insurances pay, there is an ambiguity here as to what other insurances are counted. The "all recoveries for valid and collectible insurance" could simply indicate, for example, that at the time the underlying insurance exhausts, all recoveries that have already been collected from primary insurance are deducted.

2017 WL 8974237 at 18.

Consequently, the definitions of "ultimate net loss" and "loss" do not "clearly and unequivocally" promulgate a horizontal exhaustion requirement. These definitions have nothing to do with whether excess policies require vertical or horizontal exhaustion.

3. Horizontal Exhaustion Is Not "Settled Law" In California Since *Community Redevelopment.*

The insurers assert that "two-plus decades of California jurisprudence" since *Community Redevelopment* has resulted in "settled law ... that an insured must horizontally exhaust the primary coverage across all years of the long-tail injury before it can access any (higher-layer) excess policies." AB, at 16-17. No authority is cited for this grandiose assertion, which also assumes, contrary to any

case or principle, that special exhaustion rules apply to claims involving "long-tail injury" (like environmental property damage and asbestos bodily injury claims) as opposed to what the insurers describe as "a single point-in-time injury (such as an explosion)." AB, at 33.

In truth, policies do not distinguish between the two different types of claims. Insurer obligations attach under an excess policy for environmental-related property damage the same way they attach for property damage resulting from an explosion—when a "predetermined amount" of underlying coverage is exhausted. *Wells Fargo Bank, N.A. v. California Insurance Guarantee Association et al.* (1995) 38 Cal.App.4th 936.

In the two decades since *Community Redevelopment* was decided, many courts have held that excess policies that identify and sit above "predetermined" amounts of primary coverage are "specific" (as opposed to "general") excess policies subject only to *vertical* exhaustion of the specifically identified underlying coverage. *See State of California*, 15 Cal.App.5th at 1032 ("Continental's liability attaches upon an 'Ultimate Net Loss' that is in excess of the specified ($16 or $25 million) retention. This would seem to be the very definition of vertical exhaustion"); *Carmel Development*, 126 Cal.App.4th at 510 (excess policy promising to "pay on behalf of the Insured those sums in excess of Primary Insurance" subject to vertical exhaustion: "Fireman's Fund clearly provided a policy specifically excess to that of the primary insurer, which was defined as Reliance."); *Travelers Cas. & Sur. Co. v. Transcontinental Ins. Co.* (2004) 122