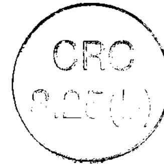
Case No. S244737



SUPREME COURT
FILED
OCT 29 2018
Jorge Navarrete Clerk
Deputy

**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.

and

CANADIAN UNIVERSAL INSURANCE COMPANY, INC. ET AL.,

Real Parties in Interest.

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

REAL PARTIES IN INTEREST'S CONSOLIDATED ANSWER TO AMICUS BRIEFS

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I. INTRODUCTION

Amici United Policyholders and Santa Fe Braun, Inc. urge this Court to follow the "language" and "terms" of the insurance contracts. (Brief of United Policyholders ("United Br.") at p. 17; Brief of Santa Fe Braun, Inc. ("Santa Fe Braun Br.") at p. 14.) According to United Policyholders, the answer to "whether an insurance policy provides coverage 'is to be found solely in the language of the [applicable insurance] policies ....'" (United Br. at pp. 17-18, quoting *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 818.) And Santa Fe Braun explains that "[i]n this State, insurance contract terms dictate the rights and obligations of the insurer and policyholder." (Santa Fe Braun Br. at p. 14.)

The Real Parties in Interest[1] could not agree more. The language of the insurance contracts, "interpreted in their 'ordinary and popular sense,' ... controls judicial interpretation." (*State v. Continental Ins. Co.* (2012) 55 Cal.4th 186, 195 ("*Continental*"), quoting *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18 ("*Waller*").) The courts "may not rewrite what [the contracting parties] themselves wrote." (*Aerojet–General Corp. v. Transport Indem. Co.* (1997) 17 Cal.4th 38, 75 ("*Aerojet*").)

Here, each of the contracts states, in one way or another and often in more ways than one, that the insurer is not obligated to pay until the insured has first exhausted not only all of the insurance policies directly below it (and often listed in a schedule) in a particular policy year, but also ***any "other insurance"*** applicable to the same claim. (1PA6 at pp. 117-200; 1PA7 at pp. 207-234, italics and bold added.) Some of the policies do

[1] The full names and identities of the Real Parties joining in this brief are set forth both on the cover and signature pages hereto.

this in the insuring agreement itself by declaring that each insurer's liability is limited to a "loss" that exceeds the coverage provided by "***other insurances***." (E.g., 1PA6 at p. 146, italics and bold added.) Other policies have a "Limits" provision, which explains that "the insurance afforded under this policy shall apply only ***after all underlying insurance has been exhausted***." (1PA6 at p. 136, italics and bold added.) And nearly every policy provides through the "other insurance" provision that the policies are in excess to "***other valid and collectible insurance***," excluding "insurance that is in excess" of the policies. (E.g., 1PA6 at pp. 118, 123, italics and bold added.) Under the most basic principle of contract law that everyone (Real Parties, Montrose, and the Amici) in this case agrees upon—the terms of the contract govern—these provisions must be given effect. The insured must first exhaust the insurance below a given excess policy—both the insurance policies specifically listed in the schedule and any ***other*** insurance underlying it applicable to the same claim.

Yet, despite professing adherence to the terms of the insurance contracts, Amici (and Montrose, for that matter) spend pages and pages trying to convince this Court that it should *not* follow that language. Amici advance four main arguments to avoid the plain language in the contracts at issue, which calls for horizontal exhaustion. *First*, Amici concoct a straw man that Real Parties are asking this Court for a "general" rule or "presumption" mandating horizontal exhaustion in all cases. (United Br. at p. 17; Santa Fe Braun Br. at p. 8.) *Second*, Amici argue that the language in the contracts about "other underlying insurance" does not mean what it says. (United Br. at p. 43; Santa Fe Braun Br. at p. 27.) *Third*, Amici claim that *Dart Industries, Inc. v. Commercial Union Insurance Co.* (2002) 28 Cal.4th 1059 renders the "other insurance" provisions nugatory in the insured-insurer context. (United Br. at pp. 19-21; Santa Fe Braun Br. at

p. 13.) And *fourth*, Amici contend that even if the "other insurance" language does mean what it says and "precedent" cannot excise it, then the Court should still not apply the plain meaning of the contracts at issue because insurance provisions are enforced (according to Amici) only if phrased in "clear," "unmistakable," and "unequivocal" language. (United Br. at pp. 17; 32; Santa Fe Braun Br. at p. 22.) As explained below, all four arguments are wrong, and only serve to confirm that this Court should faithfully apply the terms of these contracts, which call for horizontal exhaustion.

II. THERE IS NO VALID BASIS FOR IGNORING THE PLAIN LANGUAGE OF THE INSURANCE CONTRACTS

A. Real Parties Are Only Asking This Court to Apply the Plain Language of the Insurance Contracts at Issue.

Both United Policyholders and Santa Fe Braun lead with the faulty premise that Real Parties are supposedly asking this Court to adopt a "general" rule or "presumption" mandating horizontal exhaustion in all cases. (United Br. at p. 17; Santa Fe Braun Br. at p. 8; see also Montrose's RBM at p. 14 [asserting that Real Parties seek "mandatory horizontal exhaustion" that applies as a "default rule governing all continuous loss insurance claims"].) Not so.

As Real Parties explained in the *very first sentence* of their brief, "[t]he question presented by this case is whether an insured who causes progressive, multi-year environmental contamination or other 'long-tail' damage must abide ***by the language of the insurance policies*** and access its lower-layer insurance across the impacted policy years before accessing higher-layer insurance." (ABM at p. 11, italics and bold added.) Indeed, Real Parties' answering brief reiterated that "the policy language always governs" and that horizontal exhaustion would *not* apply if the "policy

language prescribes otherwise." (ABM at pp. 35, 47; see also, e.g., *id.* at p. 12 ["assuming the policy language does not require otherwise"]; *id.* at p. 15 ["absent specific policy language to the contrary"]; *id.* at p. 40 ["absent specific policy language to the contrary"]; *id.* at p. 47 ["unless the policy language prescribes otherwise"].)

To suggest otherwise, Santa Fe Braun is forced to quote out of context Real Parties' statement that "'[i]t 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.'" (Santa Fe Braun Br. at p. 14 fn. 5.) But Real Parties' statement was made in response to Montrose's "parade of horribles" that would supposedly ensue from "following the language of the 'other insurance' provisions." (ABM at p. 16.) The sentence about *Community Redevelopment Agency v. Aetna Casualty & Surety Co.* (1996) 50 Cal.App.4th 329 thus assumes (as is true here) that there is language in the operative contracts calling for exhaustion of "other insurance," because, of course, that is the situation in which *Community Redevelopment* would apply. Where, as here, there is contract language calling for horizontal exhaustion, "'[i]t 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.'" (ABM at pp. 16-17.)

Real Parties' position is simple: "[T]he policy language always governs" and horizontal exhaustion would *not* apply if the "policy language prescribes otherwise." (ABM at pp. 35, 47.)

B. Amici May Not Rewrite the Contracts at Issue Here.

United Policyholders and Santa Fe Braun fail in their attempt at rewriting and excising key terms like "other insurance" from the insurance contracts at issue.

First, United Policyholders and Santa Fe Braun argue that "'underlying insurance' is limited to *scheduled* underlying insurance in the same policy year." (United Br. at p. 45; see also Santa Fe Braun Br. at p. 24.) In other words, all that an insured such as Montrose must exhaust, according to Amici, is the insurance specifically listed in the schedule.

But Amici's contention cannot be reconciled with the fact that all the policies, in one way or another, refer to both the scheduled insurance *and* "*other* insurance." It thus makes no sense to say that the "*other* insurance" refers to the *same* insurance listed in the schedule. "Other" and "same" are antonyms, not synonyms. (Merriam-Webster, https://www.merriam-webster.com/thesaurus/other.) "Other" describes things that have not already been mentioned or included; it means "being the one (as of two or more) *remaining or not included*," "being the one or ones *distinct from that or those first mentioned* or implied," and "*not the same*." (Webster's Ninth New Collegiate Dictionary (1986) at p. 835, italics added.) Thus, "other insurance" must refer to insurance *other than* the insurance policies listed in the schedule, as the plain terms of the insurance contracts at issue make clear. For example:

- The Continental and Columbia Casualty policies provide coverage "for the amount of the ***loss*** which ***is in excess of*** the underlying insurance. "Loss," in turn, is defined as "the sums paid ... after making deductions for ***all ... other insurances*** (whether recoverable or not) ***other than the underlying insurance*** and excess insurance

purchased specifically to be in excess of this policy." (1PA6 at pp. 145-146, italics and bold added.)

- The Northbrook policies and American Centennial policies XC-00-03-64, XC-00-06-75, and XC-00-12-16 provide coverage for "the ultimate net loss in excess of the ***retained limit***," which includes "***any other underlying insurance*** collectible by the insured." (1PA6 at pp. 119-120, 159, italics and bold added.)

- The American Re-Insurance policies provide coverage for the "***[u]ltimate net loss in excess of*** the underlying insurance"; "ultimate net loss," in turn, is defined as the loss incurred "***after making deductions for all ... other insurances (other than recoveries under the underlying insurance,*** policies of co-insurance, or policies specifically in excess hereof)." (1PA6 at pp. 122-123, italics and bold added; see also 1PA6 at pp. 125-126 [Transport Indemnity policy using the same "ultimate net loss" definition].)

- Each Fireman's Fund policy states that "[i]t is a condition of this policy that the insurance afforded under this policy shall apply only after ***all underlying insurance has been exhausted***." (1PA6 at p. 136, italics and bold added.)

- American Centennial policies XC-00-03-64, XC-00-06-75, and XC-00-12-16 provide that the insurer's "liability shall be only for the ultimate net loss in excess of" the retained limit; "ultimate net loss" is defined as "the total of the applicable limits of ***the underlying policies listed*** in [Schedule A/Item 4 of the declarations] hereof, ***and the applicable limits of any other underlying insurance*** collectible by the insured." (1PA6 at p. 120, italics and bold added.)

- American Centennial policy CC-00-76-47 provides that it is excess "over ***any other*** valid and collectible insurance … ***whether or not described in the Schedule of Underlying Insurance Policies***." (1PA6 at pp. 118-119, italics and bold added.)

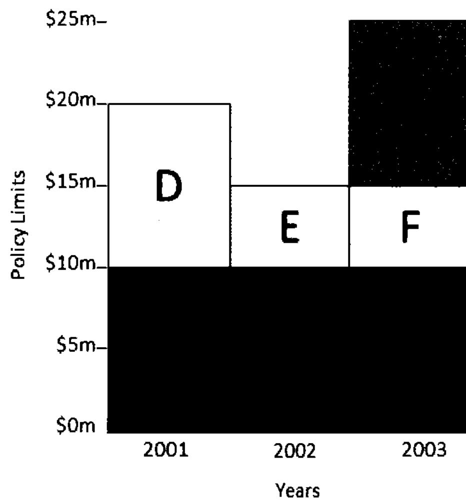
- Employers Commercial Union policy EY 8389-004 states that the insurer is liable for the insured's "ultimate net loss," defined as "the amount payable in settlement of the liability of the Insured ***after making deductions for all recoveries and for other valid and collectible insurances*** …." (1PA6 at p. 129.)

- And nearly all of the policies contain language stating that the policies are excess to "***other valid and collectible insurance***" *except for* "insurance that is in excess" of the policies—i.e., all underlying insurance (scheduled and unscheduled). (E.g., 1PA6 at pp. 120-121, italics and bold added.)

Each of the policies, though using different formulations of "other insurance," makes clear that Montrose's obligation to exhaust scheduled underlying insurance is separate from its obligation to exhaust *other underlying* insurance (i.e., insurance *other than* the specifically-scheduled lower-layer policies).

Second, United Policyholders argues that "*unscheduled* policies issued in other years *cannot* reasonably be described as 'underlying'" because "[p]olicies issued in other years are not underneath the excess policies." (United Br. at p. 48.) According to United Policyholders, the "policies issued [for] other years …. are better described as being 'next to,' 'preceding' or 'following' the policies issued in other years." (*Ibid.*)

The textual flaw in United Policyholder's argument stems from ignoring the fact there is both a horizontal (X) axis and a vertical (Y) axis in coverage charts for long-tail injuries. This can be illustrated with the aid of a simplified hypothetical coverage chart from Real Parties' Answering Brief. (See ABM at p. 11.) In the diagram below, Policy A is both "preceding" (on the X axis) *and* "below" or "underneath" policy E (on the Y axis):



United Policyholders' argument is really that policies from other years are not *directly* underneath higher-level policies: e.g., policy A is not directly underneath policy E. But the terms of the policies at issue do not limit the exhaustion requirement to policies directly underneath any particular excess policy. The policies never limit the "other insurance" to those "*directly* underlying" or "directly underneath." And the plain meaning of "underlying" is *not* limited to "*directly* underlying" (or immediately underneath). It simply means "lying beneath or below" (Webster's Ninth New Collegiate Dictionary (1986) at p. 1286); "beneath" and "below," respectively, mean "in or to a lower position than," and "in or to a lower place." (*Id.* at p. 143.) The "lower-layer" policies are just that in a long-tail-injury situation—they are in a lower position than "higher-layer"

policies by virtue of their lower attachment points. No one could dispute, for example, that in the figure above, policy A is in a lower position than policy E.[2]

Indeed, courts have had little trouble concluding that the term "underlying" as used in excess insurance contracts encompasses lower-layer insurance in *all* affected policy periods, not just *directly* underlying insurance in the same policy period. In *Community Redevelopment*, the Court of Appeal emphasized that "[t]he *only* reasonable interpretation" of the term "underlying insurance" "include[s] *all available primary insurance, not just the policy expressly listed in the Schedule of Underlying Insurance.*" (*Community Redevelopment, supra*, 50 Cal.App.4th at p. 341, italics added.)

Third, United Policyholders and Santa Fe Braun also maintain that the contracting parties could not have intended for the "other insurance" language to encompass insurance from other policy periods because the parties would not have known "at the time of contracting," "whether and to

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[2] *State v. Continental Insurance Co.* (2017) 15 Cal.App.5th 1017 ("*Continental II*") does not suggest otherwise, and does not establish that the phrase "other insurance" must mean all other insurance, whether above or below the policy at issue. *Continental II* is distinguishable because it involved self-insured retentions that do not qualify as "insurance" and thus are not encompassed by a provision that refers to "other insurance." (ABM at pp. 42-43.) In any event, there is no reason to adopt the "'strained or absurd'" position that, for example, a second-layer excess policy providing coverage from $5 million to $10 million could actually be excess to a fifth-layer policy that provides coverage from $50 million to $100 million. (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 867 ("*Bay Cities*"), quoting *Reserve Ins. Co. v. Pisciotta* (1982) 30 Cal.3d 800, 807.) "'Courts will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists.'" (*Ibid.*)

what extent the policyholder [would buy] insurance in subsequent years." (Santa Fe Braun Br. at p. 15; see also United Br. at p. 39.) Amici have it backwards. "Intent is to be inferred, if possible, from the language of the policy itself." (United Br. at p. 18, citing Civ. Code, § 1639; *Bay Cities*, *supra*, 5 Cal.4th at p. 867; *Montrose Chem. Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 666.) The use of the phrase "other insurance" manifests the parties' intention to capture policies they did not specifically identify (and could not have yet)—i.e., *other* insurance. If the parties intended to limit the scope of the applicable policies to those specifically known to them at the time they entered into the insurance contracts at issue, the contract would have either just listed all the known policies in the schedule or used a term like "known policies." But the parties did not do that; they left the language broad and captured any "other insurance."

Fourth, Amici contend that the parties must not have intended the "other insurance" language to encompass insurance from other policy periods because doing so "raise[s] the attachment point" specified in the excess policies at issue and thus engenders the "perverse" incentive that "the more insurance an insured purchases over time, and the greater the number of policy years 'triggered' by a continuing loss, the more difficult it becomes to access excess insurance because the attachment point in excess coverage increases as the insured purchases additional insurance in subsequent years." (Santa Fe Braun Br. at p. 28; United Br. at pp. 39-40.) But this again conflates the scheduled underlying insurance with the *other* insurance. As Real Parties explained in their Answering Brief, there would be no need for the "other insurance" catchall if the parties knew about and could add the limits of every underlying policy of insurance to the attachment point. The whole point of a catchall is to catch what has not been, or cannot be, specified. (See, e.g., *City of Los Angeles v. Belridge Oil*

Co. (1954) 42 Cal.2d 823, 829 [refusing to give credence to a narrow interpretation of a catchall tax provision because "[s]uch argument seeks to narrow the meaning of the words used to the point of actually destroying the general purpose of a 'catch-all' section"].)

Nor is there anything "perverse" about honoring and upholding the plain language of insurance policies and other contracts. Courts have long recognized that "[a] secondary policy, by its own terms, does not apply to cover a loss until the underlying primary insurance has been exhausted." (*Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.* (1981) 126 Cal.App.3d 593, 600 ("*Olympic Ins. Co.*"); see also *Community Redevelopment, supra*, 50 Cal.App.4th at p. 339.) And where an excess policy conditions coverage on both scheduled underlying insurance and "other" insurance, the insured must exhaust all underlying insurance "even where there is more underlying primary insurance than contemplated by the terms of the secondary policy." (*Olympic Ins. Co., supra*, 126 Cal.App.3d at p. 600; see also *McConnell v. Underwriters at Lloyds of London* (1961) 56 Cal.2d 637, 646 [excess policy did not attach until combined limits of all primary insurance were exhausted].)

Furthermore, horizontal exhaustion simply concerns *when* a policy is "up to bat"—the *sequence* or order in which excess policies must pay, in other words. (ABM at pp. 11, 13.) Following the plain language and requiring the insured to first exhaust other underlying insurance just ensures that—as with a single-point-in-time occurrence—the more expensive, lower-layer policies pay before the less expensive, higher-layer policies pay. (OBM at p. 58 & fn. 23 [Montrose recognizing that higher-layer excess policies have "lower premium[s]" precisely because of the "lesser [] risk" they will be called on to pay]; see also ABM at pp. 52-53.) As a leading treatise explains, a "primary policy" "requires relatively high

premiums, since almost any covered loss will require the insurer to make some payment," whereas "'excess' insurance[] … is purchased with relatively small premiums, since most covered losses will not reach the level at which the policy kicks in, hence the insurer expects to make payments seldom, if at all." (15 Couch on Insurance (3d ed. Dec. 2017) § 6:35.) As even the proposed Restatement revision recognizes (despite proposing the adoption of Montrose's atextual rule), "vertical exhaustion under the all-sums approach puts some excess insurers in the position of paying long before primary insurers [do], which is inconsistent with the pricing of excess and primary coverage." (Rest. Liability Insurance (Proposed Final Draft No. 2, Mar. 28, 2018) § 41, com. i.)

Finally, United Policyholders argues that it is "internally inconsistent," "confusing," and "makes no sense" for Real Parties to always define "underlying insurance" as including "both [the] scheduled and 'other insurance.'" (United Br. at pp. 43-44.) But this is yet another straw man. Real Parties have *never* offered a single "interpretation" of terms "across all policies." (*Ibid.*) The meaning of the "other insurance" language in each policy depends on the precise words used in each policy and the context (a long-tail-injury situation), in which the "other insurance" language applies. For example, American Centennial policy No. XC-00-03-64 uses the term "underlying insurance" more broadly to include both the scheduled underlying insurance and "any other underlying insurance." (1PA6 at pp. 119-120.) In contrast, American Centennial policy No. CC-00-76-47 uses the term "underlying insurance" to refer to only the scheduled insurance, and then captures other insurance by using the phrase "all … other insurance[]." (E.g., 1PA6 at p. 118 (American Centennial policy, No. CC-00-76-47).)

What all of the policies do have in common though is that each policy—*in one way or another*—states that the insurer will not pay until the insured has first exhausted not only all of the insurance policies vertically below it (and often listed in a schedule) in a particular policy year, but also any *other* underlying insurance. Just because all the policies do not do so in precisely the same words or, in Amici's view, in one "consistent" way, hardly justifies this Court throwing up its hands, as Amici effectively ask the Court to do; rather, it calls for a close examination and application of the pertinent text of each policy to the situation at hand (a long-tail injury). (See ABM at pp. 19-23, 26-31.)

C. *Dart* Does Not Nullify the "Other Insurance" Provisions at Issue.

Finding no support for their position in the plain language of the policies, Amici follow Montrose's lead and misread the pertinent caselaw in order to effectively excise the policies' "other insurance" provisions. Specifically, Amici contend that *Dart Industries, Inc. v. Commercial Union Insurance Co.* (2002) 28 Cal.4th 1059 precludes this Court from giving effect to "other insurance" provisions as written. According to Amici, *Dart* held that "other insurance" clauses "*only* apply in inter-insurer disputes" and "do not impose conditions or limitations upon the policyholder's contractual coverage rights." (United Br. at p. 19, italics added; see also Santa Fe Braun Br. at p. 13.)

Amici are reading far too much into *Dart* and violating the fundamental principle that "'[a]n opinion is not authority for propositions not considered.'" (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 680, quoting *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195.) *Dart* said nothing about exhaustion—let alone exhaustion of excess insurance—at all.