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.

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

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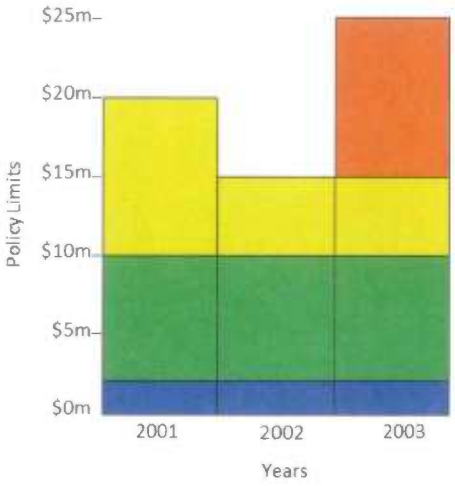
I. INTRODUCTION

The 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. To illustrate, assume property damage occurred from 2001 to 2003 and the insured had several layers of insurance for each year:



After the insured exhausts the blue primary policies on the chart, does this insured polluter next need to access all of the green policies on the chart before accessing the higher-layer yellow and orange policies? Or can the insured adopt a fiction at odds with reality and this Court's rule of all-sums-with-horizontal-stacking for continuous-loss cases, and pretend the environmental harm occurred in only one particular year of its choosing (e.g., 2003) and exhaust coverage vertically—i.e., proceed up the blue, green, yellow, and orange policies from just that year (2003) without first accessing any of the policies from other years (e.g., 2001) in which it caused damage?

This hypothetical presents, in simplified form, the fundamental issue in this case. Montrose's mismanagement of a toxic chemical (dichloro-diphenyl-trichloroethane, or DDT) over *several decades* contaminated the soils, surface water, groundwater, and ocean surrounding its Torrance facility.

Under this Court's jurisprudence, Montrose can access the policy limits ("all sums") of its covered liabilities under the various insurance policies it purchased over time, which are horizontally stacked or added together into "one giant 'uber-policy,'" providing coverage for the many years (1961-1986) during which Montrose's continuing environmental damage took place. (*State v. Continental Ins. Co.* (2012) 55 Cal.4th 186, 201 ("*Continental*").) Also, the parties agree that since Justice Croskey's seminal 1996 decision in *Community Redevelopment Agency v. Aetna Casualty & Surety Co.* (1996) 50 Cal.App.4th 329, 340 ("*Community Redevelopment*"), policyholders like Montrose have been required to exhaust all primary policies impacted by a prolonged loss before reaching excess policies, unless the excess policies say otherwise.

Where the parties diverge is whether Montrose, after exhausting all of its primary policies, must horizontally exhaust its excess policies: i.e., the first level of excess for each year for 1961 to 1986, then the next excess level, and so forth, before it can access any higher-level excess policies in any given year. In other words, assuming the policy language does not require otherwise, does *Community Redevelopment*'s horizontal exhaustion rule extend to successive horizontal layers of excess coverage, contrary to Montrose's demand for the discretion to select whichever vertical towers of coverage it wants?

Under the plain language of the policies at issue in this case and the pertinent case law of this Court and the Courts of Appeal, the answer is yes, Montrose must horizontally exhaust. It may not, in other words, pick and choose, at its whim, particular policy years to vertically exhaust without having horizontally exhausted underlying insurance in other triggered years. (See *Montrose Chemical Corp. v. Superior Court* (2017) 14 Cal.App.5th 1306, 1320 ("Opinion").)

Horizontal exhaustion, far from resting on "an extra-contractual fiction" (OBM at p. 36), follows from the plain language of the insurance contracts entered into by Montrose. "The clear and explicit meaning of these provisions, interpreted in their ordinary and popular sense, ... controls judicial interpretation" (*Continental, supra*, 55 Cal.4th at p. 195, quoting *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18), and courts "may not rewrite what [the contracting parties] themselves wrote." (*Aerojet–General Corp. v. Transport Indem. Co.* (1997) 17 Cal.4th 38, 75 ("*Aerojet*") (Mosk, J.).) Each of the policies here states, in one way or another, that it 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 insurance."*** (1PA6 at pp. 117-200; 1PA7 at pp. 207-234, italics and bold added.) As the policies are written, the "other" insurance is, by definition, not the underlying insurance specifically listed (nor higher-layer excess insurance), but *other* lower-layer insurance from other policy years triggered by the same loss. Two decades' worth of reported decisions since *Community Redevelopment* confirm that, as between primary and excess insurance, the plain meaning of "other insurance" requires exhaustion of *all* underlying insurance before higher-layer policies are "up to bat."

Horizontal exhaustion also follows from this Court's jurisprudence, which also turned on the plain language of insurance contracts. In three seminal decisions governing indemnification for continuous-loss "long-tail" injuries—*Montrose Chemical Corp. v. Admiral Insurance Co.* (1995) 10 Cal.4th 645 ("*Montrose*"); *Aerojet, supra*, 17 Cal.4th 38; and *Continental, supra*, 55 Cal.4th 186—this Court held that the plain meaning of "occurrence" means that an insured seeking damages for continuing harm taking place over more than one policy period implicates all the policies during those policy periods under the "continuous injury trigger of coverage rule," and the phrase "all sums" means the insured has access "up to their policy limits, if applicable, as long as some of the continuous property damage occurred while each policy was 'on the loss.'" (*Continental, supra*, 55 Cal.4th at p. 197, 200-201.) In other words, the Court adopted the "all-sums-with-stacking" rule, which treats "the long-tail injury as a whole rather than artificially breaking it into distinct periods of injury." (*Id.* at p. 201.) The rule "effectively stacks the insurance coverage from different policy periods to form ***one giant 'uber-policy'*** with a coverage limit equal to the sum of all purchased insurance policies" layer by layer, over the range of years when the loss occurred. (*Ibid.*, italics and bold added, citation omitted.)

Yet Montrose would now have this Court adopt a rule under which it could artificially chop each "uber-policy" back up into its policy-year constituents and arbitrarily choose to assign all (or most) damage spanning across several years (if not decades) to the year or years Montrose has selected (e.g., those in which there is an especially large amount of excess insurance). But because each layer of coverage across the years becomes "one giant 'uber-policy,'" it follows that, just as lower-layer (e.g., primary) policies indisputably must be exhausted first in the basic case of a single-

point-in-time occurrence before higher-layer policies may be accessed (see, e.g., *Signal Companies, Inc. v. Harbor Ins. Co.* (1980) 27 Cal.3d 359, 365), so too must lower-layer "uber-poli[cies]" (whether primary or excess) be exhausted (absent specific policy language to the contrary) before the next higher layer of the "giant 'uber-policy'" spanning several years may be accessed.

And even if the Court were to look beyond the policy language, which it should not, basic fairness and the parties' reasonable expectations confirm that Montrose must horizontally exhaust unless the policy language expressly requires otherwise. A long-tail injury by definition spans multiple years, and so it is fundamentally unfair to allow an insured, for example, to arbitrarily go up to the tenth layer of excess insurance in two or three policy years and pretend all the injury spanning many more years (if not decades) occurred only in that small timespan, while accessing none of the excess insurance in other policy periods. Such arbitrariness also completely disregards not only the policy language here but also the reasonable expectations of the contracting parties, given that higher-level insurance is, as Montrose correctly concedes, typically less expensive than lower-level insurance. It makes no sense that an insured should be able to bypass the more expensive lower-layer insurance that was priced to cover the greater risk of having to pay first, and instead access less expensive, higher-layer insurance that was priced based on the lower likelihood it would be called upon to pay.

Montrose wants to redline out the policies' "other insurance" language, which in several instances appears in the insuring agreement itself *as well as* in a separate "other insurance" provision. Montrose attempts to pass off such contractual language as "repugnant" "boilerplate" entirely irrelevant to the insured (OBM at p. 12), even though it is a term in

a contract between the *insured* and the insurer. To support this remarkable proposition, Montrose misreads this Court's decision in *Dart Industries, Inc. v. Commercial Union Insurance Co.* (2002) 28 Cal.4th 1059, which is wholly inapt.

In *Dart*, an insured had three primary policies, one of which was missing. (*Dart*, *supra*, 28 Cal.4th at p. 1065.) The question for the Court was whether it mattered that the parties did not know what the "other insurance" clause said in the missing policy, when the same clauses in the other policies purported "to shift the burden away from one primary insurer wholly or largely to other insurers," canceling out coverage altogether. (*Id.* at p. 1080.) The Court held that the contents of the "other insurance" clause could not matter because in those circumstances (three policies at the same layer), courts do not enforce conflicting "other insurance" clauses that "defeat the insurer's obligations altogether." (*Id.* at p. 1079.)

But that is not the situation presented here. Between higher and lower layers of coverage, there cannot be a conflict between "other insurance" clauses that would "defeat the insurer's obligations altogether" and leave the insured with no coverage. Instead, "other insurance" clauses (like "other insurance" language in the insuring agreements here) simply prescribe the *sequence* in which coverage must be obtained: lower-layer policies must be exhausted first. Coverage is not defeated, only sequenced, between lower and higher layers.

Montrose's response is to trot out an unpersuasive parade of horribles that following the language of the "other insurance" provisions will supposedly produce. But the last two-plus decades of California jurisprudence proves otherwise. 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. (*Community Redevelopment*, *supra*, 50 Cal.App.4th at p. 340.) And there is no evidence that this rule has caused any of the adverse outcomes Montrose warns of in its brief. Indeed, Montrose implicitly recognizes as much by not taking issue with the longstanding *Community Redevelopment* rule, and by never offering any reason why horizontal exhaustion, which has worked well at the primary layer in long-tail situations, does not also work well for excess layers.

Montrose's inability to marshal any real reason why it should not have to horizontally exhaust, in accordance with the plain language of its insurance contracts and the logic of *Community Redevelopment*, is particularly telling. And Montrose's refusal to adhere to what the language of the insurance policies at issue here plainly require is particularly inappropriate, given that Montrose (and the other contracting parties in this case) are large, highly sophisticated commercial actors who have no excuse not to follow the language of the agreements they made. This Court should accordingly affirm the Court of Appeal's judgment and hold that the plain language of the policies requires horizontal exhaustion.

II. STATEMENT OF THE CASE

A. Factual Background

1. The Underlying Litigation

For decades, Montrose was the largest manufacturer in the United States of dichloro-diphenyl-trichloroethane (DDT), a well-known hazardous insecticide. (4PA17 at pp. 935, 954, 957.) Montrose began manufacturing DDT at its plant in Torrance, California, in 1947. (4PA17 at pp. 935, 957.) When DDT was banned for domestic use in 1972, Montrose

continued to produce DDT for export for another ten years. (4PA17 at pp. 935, 957.)

The United States and California sued Montrose in 1990 for the extensive environmental damage Montrose caused through its manufacturing of DDT and disposal of hazardous wastes at its Torrance plant. (Complaint, *United States v. Montrose Corp.* (C.D.Cal. June 18, 1990), No. CV 90-3122-AAH (JRx); 4PA17 at p. 928.) After ten years of litigation, and only after the court entered partial summary judgment in favor of the United States and California, Montrose entered into partial consent decrees to pay for the cleanup of soils, groundwater, and waterways, and for habitat restoration. (2PA12 at pp. 304-568; 4PA17 at pp. 869-870.)

While the litigation was ongoing, Montrose sought defense and indemnity coverage under the comprehensive general liability (CGL) policies Montrose had purchased from its primary insurers between 1960 and 1986. (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 292-293.)[1] Montrose also eventually sought indemnity from and sued the 40 defendant excess insurers here, who had collectively issued more

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[1] "Primary" insurance refers to the first layer of coverage, under which "liability attaches immediately upon the happening of the occurrence that gives rise to liability." (*Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.* (1981) 126 Cal.App.3d 593, 597.) On the other hand, "the term 'excess coverage' refers to indemnity coverage that attaches upon the exhaustion of underlying insurance coverage for a claim." (*County of San Diego v. Ace Property & Cas. Ins. Co.* (2005) 37 Cal.4th 406, 416, fn. 4.)

than 115 excess policies during this same period. (4PA17 at pp. 865-869.)[2] The total amount of Montrose's excess coverage varied over time. As the Court of Appeal observed, "[i]n the early years, Montrose purchased just a few layers of excess coverage; in some later years, Montrose appears to have purchased more than 40 layers of excess coverage, with aggregate limits of liability in excess of $120 million." (Opinion, *supra*, 14 Cal.App.5th at pp. 1313-1314; see also 1PA5 at p. 99.)

2. The Policies' Language

All of the excess policies provide that Montrose must exhaust the limits of its underlying insurance before there can be coverage under the excess policies. (1PA6 at pp. 117-200 [stipulation]; 1PA7 at pp. 207-234 [stipulation].) Each excess policy identifies (as Montrose notes) specific underlying insurance—the so-called "scheduled" underlying insurance—in the same policy period that must be exhausted before the policy is up to bat. (See, e.g., 1PA6 at p. 121 [American Centennial policy "scheduling" underlying policies from two other insurers, Canadian Universal and INA, providing coverage during the same year]; OBM at pp. 17-18.) The "schedule" of underlying insurance, however, does not say anything about if, how, or when *other* underlying insurance must be exhausted—one must look to other provisions of the policies, including the insuring agreements and "other insurance" clauses, to answer those questions. These provisions require the insured to exhaust "***other*** insurances" *other than the scheduled underlying insurance* before the excess policy can be accessed. (E.g., 1PA6 at p. 146, italics and bold added.) The policies make clear that *all*

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[2] Montrose has provided a chart depicting what it regards as all of its coverage between 1954 and 1986, which appears at 1PA5 at p. 99 and is attached to this brief for illustrative purposes.

underlying insurance must be exhausted in at least one of the following three ways.

a. Insuring Agreements and Related Definitions

First, many of the policies, based on the terms of their insuring agreements, are not up to bat as long as any scheduled underlying insurance *or "other insurance"* is available (as here) to the insured. For example, the insuring agreements of Continental Casualty policies RDX 030 807 62 18, RDX 8893542, RDX 8936616, and RDX 8936617 and Columbia Casualty policies RDX 1864012 and RDX 3652015 provide that they will "indemnify the insured ***for the amount of loss*** which is in excess of the applicable limits of liability of the underlying insurance inserted in column II of item 4 in the declarations"—i.e., the scheduled underlying insurance. (1PA6 at p. 145, italics and bold added.) "***Loss***" is then defined as "the sums paid as damages in settlement of a claim or in satisfaction of a judgment for which the insured is legally liable, *after making deductions for all recoveries, salvages and* ***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 p. 146, italics and bold added.) The insuring agreement and definition of "loss" thus make clear that liability under the Continental and Columbia policies does not attach as long as Montrose can (as here) access "other insurances," including insurance "other than" the scheduled underlying insurance.

Similarly, the insuring agreements of American Centennial policies XC-00-03-64, XC-00-06-75, and XC-00-12-16 state that the insurer is liable for "***the ultimate net loss in excess of the retained limit***" for covered damages. (1PA6 at p. 119, italics and bold added.) "[R]etained limit," in turn, is defined to include "the applicable limits of any ***other underlying insurance.***" (1PA6 at p. 120, italics and bold added.)

Again, the insuring agreement establishes that liability does not attach until the limits of "any *other* underlying insurance" have first been exhausted.[3]

b. "Loss Payable" or "Limits" Provisions

Second, many of the policies contain "Loss Payable" or "Limits" provisions that require Montrose to first exhaust *other* underlying insurance (i.e., other than scheduled underlying insurance) before accessing higher-layer excess policies.

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[3] Numerous other policies have similar or identical language to the above examples: American Re-Insurance nos. M0378792, M0378766, M0704152, and M1049241 (1PA6 at pp. 122-23 [policies shall be liable for the "[u]ltimate net loss" defined as "the sums paid in settlement of losses for which the Insured is liable after making deductions for all ... other insurances (other than recoveries under the underlying insurance ...)"]); Gibraltar Casualty Co. nos. GMX 00034, GMX 00035, GMX 00036, and GMX 00037 (1PA 6 at p. 151 [same]); Travelers Indemnity Co. (1PA 6 at p. 169 [same, defining "loss"]); Employers Commercial Union (Lamorak) no. EY 8389-004 (1PA6 at p. 129 [policy shall cover "ultimate net loss," defined as the amount payable "after making deductions for all recoveries and for other valid and collectible insurances"]); Northbrook Excess and Surplus Insurance Co. nos. 63 006 575, 63 007 771, and 63 008 590 (1PA6 at p. 159 [policy shall only be liable for the "ultimate net loss" over the "retained limit," which accounts for "the applicable limits of any other underlying insurance collectible by the insured"]); American Home nos. CE 338-1800, CE 338-1737, CE 2691596 (1PA7 at p. 212 [no liability for "[u]ltimate net loss" "when such expenses are included in other valid and collectible insurance"]); Granite State nos. SCLD-80-93267 and SCLD-80-93268 (1PA7 at p. 215 [same]); Lexington nos. 5511269 and 5511416 (1PA7 at p. 221 [same]); National Union nos. 1186489, 1186488, 1189408, 1189409, 1225300, and 1229623 (1PA7 at p. 227 [same]); AIU nos. 75-100078, 75-100079,75-101008, 75-101009, and 75-101010 (1PA7 at pp. 229, 231 [same]); and Landmark Insurance Co. no. FE 4001015 (1PA7 at p. 233 [same]).