No. S273179

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

TRUCK INSURANCE EXCHANGE,

Plaintiff, Cross-Defendant, Appellant,
Respondent, and Cross-Respondent,

v.

KAISER CEMENT AND GYPSUM CORP., et al.

Defendant, Cross-Complainants,
Appellants, and Respondents.

California Court of Appeal, Second District,
Division Four, No. B278091
Los Angeles Superior Court No. BC249550

OPENING BRIEF

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ISSUE ON WHICH REVIEW WAS GRANTED

May a primary insurer seek equitable contribution from an excess insurance carrier after the primary policy underlying the excess policy has been exhausted (vertical exhaustion), or is equitable contribution from an excess insurance carrier available only after all primary policies have been exhausted (horizontal exhaustion)?

(Order granting review, April 13, 2022.)

INTRODUCTION

Insurance policy language, like the language in other contracts, should be read consistently. The same policy/contract language should mean the same thing in all contexts. Meaning should not depend on whether the plaintiff is an insured seeking coverage against an insurer or an insurer seeking contribution from other carriers. Rights based on insurance policies, including equitable rights of contribution between insurance carriers, should be founded on particular policies' specific language, *not* on non-contract or non-record-based assertions or judicial gloss.

Two years ago, in *Montrose Chemical Corp. v. Superior Court* 9 Cal.5th 215 (*Montrose III*), this Court interpreted policy provisions comparable to the ones at issue here in the context of a policyholder seeking to tap an additional layer of insurance coverage. Specifically, this Court held:

- In construing obligations under an insurance policy, courts must look first to the policy language;

- Policy language seeking to disclaim coverage upon the existence of other insurance is treated the same no matter where in the policy it appears;
- Such language seeking to disclaim coverage upon the existence of other insurance is presumed to be limited to other insurance in the *same policy period* (in so holding, *Montrose III* followed the Restatement and decisions from multiple sister State Supreme Courts).

Here, Truck Insurance Exchange (Truck) provides insurance covering asbestos losses that span multiple carriers' policy periods. Asbestos claims are so-called long-tail claims as they trigger coverage in multiple policy periods, often decades worth of policy periods. Other insurers also cover the same long-tail claims that Truck covers. In particular, a handful of other insurers' policies promise to "continue in force as underlying insurance" upon the exhaustion of specifically identified, same-policy-period policies. (Exhaustion refers to payment of a policy's available policy limits.) It is undisputed that the specifically identified, same-policy-period policies have all been exhausted.

The other insurers claim (and the trial court and Court of Appeal held) that they don't have to live up to their "continue in force as underlying insurance" promises despite exhaustion of the specifically identified policies. This they claim is because Truck's policy should be considered available underlying other insurance to their own coverage even though it pertains to a different policy period. Because Truck's policy has no aggregate limit, this theory means that Truck and Truck alone must *always* bear *all* defense

costs and the first $500,000 of indemnity expense for all claims its policy concurrently covers, including for claims that span the other carriers' policy periods and for which those carriers collected substantial premiums. But one can only reach this conclusion by ignoring the governing policy language and this Court's express *Montrose III* analysis.

The judicial construction of insurance policy language should be consistent, no matter which party asserts a particular meaning. Consistent reading of the policy language at issue in this equitable contribution action leads to only one result: The other carriers must live up to their "continue in force as underlying insurance" promises and contribute with Truck to the defense and indemnity of their common insured on claims that all of the policies cover. That is the only way to afford a fair result among multiple carriers, all covering the same losses.

STATEMENT OF FACTS

A. Truck Insurance Exchange defends and pays decades' worth of asbestos bodily injury claims made against Kaiser Cement.

1. Truck insures Kaiser Cement for policy years 1965 to April 1983, excluding amounts covered by other insurance.

Truck insured Kaiser Cement for bodily injury claims from December 31, 1964 until April of 1983. (2JA-535 ¶ 6.)[1] Truck's policies provided primary insurance, subject to the condition that such policies are excess of any other insurance covering the same loss: "If the insured has other insurance against a loss covered by this policy, the insurance under this policy shall be excess insurance over all such other valid and collectible insurance ...." (See, e.g., 1JA-153.)

The Truck policies had differing applicable bodily injury limits, ranging from $100,000 per person/$300,000 per occurrence to $500,000 per person/$500,000 per occurrence. (2JA-536 ¶¶ 6a, 6b, 6c.) From 1964 to 1971, there was a $300,000 aggregate limit; from April 1980 until April 1983, there was a $1.5 million aggregate limit. (2JA-536 ¶¶ 6a, 6c.) Critically, from 1971 until April 1980, the Truck policies had no aggregate limit, providing coverage for an inexhaustible number of occurrences. (1JA-140; 2JA-536 ¶ 6b.) Truck issued the no-aggregate limit policies at a time when this Court had yet to adopt multiple-policy-period

[1] We cite to the joint appendix as [volume]JA-[page].

coverage for long-tail claims, such as asbestos injury. (See Argument § I.A, *post*.)

All of the Truck policies also had an anti-stacking provision, which, for a single occurrence, limits recovery under all Truck policies combined to a single per-occurrence limit. (See, e.g., 1JA-145.) Each Truck policy has a duty to defend and indemnify Kaiser Cement for asbestos bodily injury claims triggering that policy. (E.g., 1JA-141, 213.)

The Insurance Company of the State of Pennsylvania (ICSOP) provides excess insurance over Truck's 1974 primary policy. (6JA-2428.)

2. Kaiser Cement tenders to Truck and Truck affords defense and indemnity of asbestos bodily injury claims under Truck's 1974 policy with a $500,000 per-occurrence limit but no aggregate limit.

Kaiser Cement tendered to Truck, and Truck alone, the defense and indemnification of any and all asbestos injury claims that trigger—that is, potentially fall within the coverage of—the 1974 Truck no-aggregate-limit policy, regardless of whatever other policies those claims may also trigger. (2JA-539 ¶ 22.)

Truck has spent upwards of $450 million defending and indemnifying Kaiser Cement under the 1974 policy.[2] Kaiser

[2] For the 38 months from July 1, 2004 to September 1, 2007, Kaiser incurred $77.45 million in defense and indemnity costs that were Truck's responsibility. (*Truck Insurance Exchange v. Kaiser Cement* (Cal.Ct.App., Jan. 7, 2022, No. B278091) 2022 WL 71771 at p. *7 (*Truck v. Kaiser Cement I*) [nonpub. opn.].) That's

Cement paid only a $118,000 premium for that policy. (8JA-3345, ¶ E.)

B. Other primary insurers on the risk, both before and after Truck's policy period, have long since exhausted their policy limits.

Truck was not Kaiser Cement's only asbestos bodily injury primary insurer. Injuries occurring over a long period of time—injuries caused by asbestos exposure are a prime example—trigger coverage under multiple insurance policies. (See *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 686-687 (*Montrose I*).)

From 1947 until 1964, Fireman's Fund was Kaiser Cement's primary insurer against that risk. (2JA-535 ¶ 3.)

Home Insurance Company (Home Insurance) was Kaiser Cement's primary insurer between April of 1983 and April of 1985, after Truck was off the risk. (2JA-535 ¶ 4.)

Those policies have long since paid their aggregate policy limits: Fireman's Fund in April of 2004; Home Insurance in December of 1999. (2JA-535 ¶¶ 3-4.)

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roughly $24 million per year. That extrapolates to over $400 million for the 17 years from July 2004 to July 2021. That's in addition to over $50 million in indemnity payments (not including defense expenses) that Truck made before October 2004. (*Id.* at p. *8.)

C. For policy periods covered by the now-exhausted primary coverage, First State, Westchester, and London Market Insurers issued policies promising to drop down as primary insurance upon exhaustion of the specifically referenced primary policies.

The exhausted primary policies issued by Fireman's Fund and Home Insurance are backstopped by at least one layer of additional policies.[3]

The hybrid First State and Westchester policies. First State Insurance Company issued an "Umbrella Liability Policy" covering from April 1983 through April 1984. (8JA-3014.) The International Insurance Company (Westchester) issued a "**The Defender** Commercial Comprehensive Catastrophe Liability Policy" covering May 1984 to April 1985. (8JA-3065, original emphasis.) These policies do not purport to be pure excess policies. Instead, they are hybrids. As discussed below, both the First State and Westchester policies promise to step into the shoes of the specifically identified, now-exhausted Home Insurance policy.

The hybrid and excess London Market Insurers' policies. The London Market Insurers issued policies triggered upon the exhaustion of the specifically scheduled Fireman's Fund

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[3] Many, but not all, of the key policy provisions were set out in a stipulated summary, 3JA-1074-1083, that is attached as an appendix to this brief per California Rules of Court, rules 8.204(d) & 8.520(b)(1). (Page 3JA-1079 is blank except for policy forms references and is omitted.)

primary policies. The London Market Insurers' policies were written on three forms, two of which are materially the same.

The policies in effect each year from 1953 to 1958 were written on the T.P. 7 "Excess Public Liability" form. (7JA-2473.)

From 1958 to 1964, the London Market Insurers issued "Umbrella" policies (3JA-1076) using the Price Forbes form (1958-1961) and the L.R.D. 60 form (1961-1964), which the parties agreed are materially the same. (3JA-1138-1141.) These later London Market Insurers policies are hybrids, not pure excess insurance.

1. The policy limits.

First State policy: The First State policy has a $10 million policy limit "in excess of: A. The amount recoverable under the underlying insurance as set out in Schedule A attached." (8JA-3014.)

Westchester policy: The Westchester policy has a $10 million policy limit in excess of "the total of the applicable limits of the underlying policies listed in Schedule A hereof, and the applicable limits of any other insurance collectible by the insured." (8JA-3065, 3077.)

London Market Insurers' Policies: The London Market Insurers "Excess Public Liability" T.P. 7 form has a $2 million policy limit "after the Primary Insurers have paid or have been held liable to pay" "$200,000 in ultimate net loss," with "Primary Insurers" defined as "Insurers shown on the Schedule attached." (7JA-2473.)

The London Market Insurers 1958-1964 "Umbrella" policies have limits "for the ultimate net loss the excess of … (a) the limits of the underlying insurances as set out in the attached schedule in respect of each occurrence covered by said underlying insurances." (3JA-1076.)

2. With one exception, the various backstopping policies promise to "continue in force" as primary insurance, including defense costs, once the specifically scheduled underlying policies are exhausted.

The First State, Westchester, and various London Market policies, initially written above the now-exhausted primary policies, promise to "continue in force as underlying insurance" once the specified, scheduled same-policy-period underlying primary insurance policies have exhausted, as has happened.

First State policy: First State promised that its policy would "continue in force *as underlying insurance*" once "the aggregate limits of liability *of the underlying policies, listed in the schedule of underlying insurance*, are exhausted ...." (8JA-3012, italics added.) The First State policy's schedule of underlying insurance lists only a now-exhausted Home Insurance policy. (8JA-3015.) No mention is made of any other policy having to exhaust before the First State policy continues in force as underlying insurance, i.e., as primary insurance.

First State's policy's coverage "includes investigation, adjustment, appraisal, appeal a*nd defense costs* paid or incurred by the INSURED with respect to damages covered hereunder"

unless an "underlying insurer" is obligated to pay them. (8JA-3027 ["Ultimate Net Loss," italics added].)

Westchester policy: The Westchester policy contains almost identical language, agreeing to "continue in force *as underlying insurance*" upon "the aggregate limits of liability *of the underlying policies listed in Schedule A*" being exhausted "by reason of losses paid thereunder." (8JA-3078, italics added.) "Schedule A," in turn, lists an exhausted Home Insurance policy as the only scheduled underlying liability insurance. (8JA-3075.) Again, no mention is made of any primary policy other than the scheduled same-policy-period insurance before the Westchester policy "continues in force" as primary insurance.

The Westchester policy covers "[a]ll expenses, other than defense settlement provided in Insuring Agreement II, incurred by the insured in the investigation, negotiation, settlement *and defense* of any claim or suit seeking such damages, excluding only the salaries of the insured's regular employees," but "shall not include any damages or expense because of liability excluded by this policy." (8JA-3080, italics added.) Again, it purports to not apply to defense or legal expenses covered by "underlying insurance." (*Ibid.*) "Defense settlement" in "Insuring Agreement II" affords coverage for "any occurrence not covered, as warranted by the underlying policies listed in Schedule A hereof or not covered by any other underlying insurance collectible by the insured." (8JA-3079.) As to such claims, the Westchester policy promises to "defend any suit against the insured" and to "make such investigation, negotiation and settlement of any claim or

suit as it deems expedient." (*Ibid.*) Defense expenses are in addition to the policy limits. (*Ibid.*)

The London Market Insurers' Price Forbes and L.R.D. 60 forms (1958-1964): The two London Market Insurers' policy forms covering from 1958 to 1964 likewise promise to "continue in force *as underlying insurance*" upon the "exhaustion of the aggregate limits of liability under said underlying insurances"; the preceding language references "*the underlying insurances as set out in the attached schedule*," i.e., "said underlying insurances"—a schedule specifying only now-exhausted Fireman's Fund policies. (3JA-1076-1077.) No mention is made of exhausting any other insurance policy before the duty to "continue in force as underlying insurance" is triggered.

These policies define covered "Ultimate Net Loss" as including "expenses for doctors, *lawyers*, nurses and investigators and other persons, and *for litigation*, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder, excluding only the salaries of the Assured's or of any underlying insurer's permanent employees." (3JA-1077, italics added.)

The London Market Insurers' T.P. 7 specific-excess form: By contrast, the earlier London Market Insurers' T.P. 7 policy form (1953-1958) simply "attach[es]" after "Primary Insurers" have paid their limits, with "Primary Insurers" defined as "Insurers shown on the Schedule attached"—specifically scheduled same-policy-period underlying policies. (7JA-2473.)

No mention is made of unscheduled underlying insurance. The specifically scheduled underlying Fireman's Fund policies have been exhausted.

3. The policies purport to disavow coverage to the extent there is "other insurance."

The traditional excess "other insurance" policy provisions. Except for the early London Market Insurers' T.P. 7 form (see 7JA-2473-2485), the relevant policies contain traditional excess "other insurance" clauses:[4]

First State policy: "If other collectible insurance with any other INSURER is available to the INSURED covering a loss covered hereunder"—except insurance intended to apply in excess of the First State policy—then the First State policy "shall be in excess of, and not contribute with, such other insurance." (8JA-3028.)

The Westchester policy: The policy is "in excess of" any "other collectible insurance" available to Kaiser Cement—except for insurance intended to be in excess of the Westchester policy. (8JA-3082.)

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[4] "Other insurance" clauses come in various forms. An "excess" clause makes the policy excess to other insurance. In contrast, an "escape" clause purports to eliminate all coverage if there is other applicable insurance. And, a "pro rata" clause mandates sharing losses pro rata with other applicable policies. (*Commerce & Industry Ins. Co. v. Chubb Custom Ins. Co.* (1999) 75 Cal.App.4th 739, 743-744.) The various formulations are treated equivalently—disregarded in favor of prorating the losses—when they conflict. (*Id.* at pp. 744-745.)

The London Market Insurers' Price Forbes and L.R.D. 60 forms: "If other valid collectible insurance with any other insurer is available to the Assured covering a loss also covered by this policy"—with the exception of insurance written to be in excess of the policy—then "the insurance afforded by this policy shall be in excess of and shall not contribute with such other insurance." (3JA-1078.)

The "ultimate net loss" and "retained limits" phrasings. In addition, the various policies seek through other provisions to disavow coverage when other applicable insurance exists, e.g., defining covered "ultimate net loss" or "retained limits" terms to exclude amounts covered by other insurance:

First State policy: The First State policy purports to be "liable only for the ULTIMATE NET LOSS in excess of" the limits of both (1) the scheduled Home Insurance policy and (2) "the applicable limits of any other underlying insurance," whether or not it appears in the schedule of underlying insurance. (8JA-3012.) The policy further defines "ultimate net loss," in relevant part, to be "the sums paid as damages in settlement of a claim or in satisfaction of a judgment" after "making deductions for all other recoveries, salvages, and other insurances (whether recoverable or not) ...." (8JA-3027.)

In addition, the policy defines its "Underlying Limit" as "an amount equal to the limits of liability indicated beside the underlying insurance listed in the Schedule A of underlying insurance, plus the applicable limits of any other underlying insurance collectible by the insured." (8JA-3012.)

Westchester policy: Like the First State policy, the Westchester policy purports to be liable "only for the ultimate net loss in excess of" both "the total applicable limits in the underlying policies listed in Schedule A"—the Home Insurance policy—"and the applicable limits of any other insurance collectible by the insured." (8JA-3077.) In addition, it asserts that it "shall not apply to defense, investigation, settlement or legal expenses covered by underlying insurance." (8JA-3080.)

The London Market Insurers' Price Forbes and L.R.D. 60 forms (1958-1964): The London Market Insurers purport to limit coverage to Kaiser Cement's "ultimate net loss," defining "ultimate net loss" as "the total sum" that Kaiser Cement "or any company as his [*sic*] insurer, or both, become obligated to pay," including a bevy of possible litigation expenses. This broad "ultimate net loss" definition is then subject to the caveat that "[t]he Underwriters shall not be liable for expenses as aforesaid when such expenses are included in other valid and collectible insurance." (3JA-1077.)

The London Market Insurers' T.P. 7 form (1953-1958): The T.P. 7 form defines "ultimate net loss" as "the sums paid in settlement of losses for which the Assured is liable after making deductions for all recoveries, salvages and other insurances (other than recoveries under the policy/ies of the [scheduled] Primary Insurers), whether recoverable or not ...." (7JA-2473.)

STATEMENT OF THE CASE

The litigation among Truck, Kaiser Cement, and its other insurers has been lengthy and complex. We focus only on the history relevant to the issue before this Court on review.

A. *London Market Insurers v. Superior Court*: Each asbestos bodily injury claim is a separate occurrence.

Truck and Kaiser Cement initially agreed that there was only one asbestos bodily injury occurrence per policy year, with the relevant "occurrence" being "Kaiser's manufacture and distribution of asbestos products," and not an injured person's exposure to those products. (*London Market Insurers v. Superior Court* (2007) 146 Cal.App.4th 648, 660 (*London Market Insurers)*.) The Court of Appeal rejected that approach, holding that an "'occurrence' means injurious exposure to asbestos, not the manufacture and distribution of those products," i.e., a separate occurrence per claimant. (*Id.* at p. 651.)

London Market Insurers is law of the case. (See *People v. Ary* (2011) 51 Cal.4th 510, 517 (*Ary*).)

B. *Kaiser Cement v. ICSOP*: Anti-stacking provisions in Truck's policies mean that Truck's coverage is exhausted by payment of one $500,000 per-occurrence limit, instead of requiring exhaustion of the cumulative per-occurrence limits in all of Truck's primary policy periods.

In 2004, Kaiser Cement began tendering its asbestos bodily injury claims under Truck's 1974 policy. (2JA-539 ¶ 22.) ICSOP provided coverage above that 1974 policy. (6JA-2428.) The

parties disputed who would pay for amounts in excess of the $500,000 per-occurrence limit in the 1974 policy. ICSOP argued that its policy was only triggered once *all* Truck primary policy years' per-occurrence limits (plus those of other primary carriers) were exhausted.

The Court of Appeal resolved the issue in *Kaiser Cement and Gypsum Corp. v. Insurance Co. of State of Pennsylvania* (2013) 155 Cal.Rptr.3d 283 (*ICSOP*).[5] *ICSOP* first recognized that *Montrose I*, *supra*, 10 Cal.4th 645 "adopted a "'continuous injury" trigger of coverage' approach to continuing injury claims. Under that approach, bodily injuries and property damage that occur in several insurance policy periods are potentially covered by *all* policies in effect during those periods. (*Id.* at pp. 654-655, 689.)" (155 Cal.Rptr.3d at p. 285, original italics.)

The ICSOP policy was in excess of primary insurance *collectible by Kaiser Cement*. (*Id.* at p. 286.) *ICSOP* held that the collectible amount was *not* equal to the sum of the policy limits of every triggered Truck policy. (*Id.* at pp. 304-305.) The Truck policies prevent Kaiser Cement from stacking their limits. The Truck policies only allow Kaiser Cement to collect a single Truck policy limit even though a claim triggers multiple Truck policies. (*Id.* at pp. 301-305.) That means that Kaiser Cement's amount of *collectible* Truck primary insurance is *only* $500,000 worth of coverage per occurrence (the maximum per occurrence policy

[5] This Court ordered the Court of Appeal's opinion not published. The unpublished *ICSOP* opinion is the law of the case and cited solely on that basis. (Cal. Rules of Court, rule 8.1115(b)(1).)

limit of any Truck policy)—not the more than $8 million per occurrence that tapping every Truck policy simultaneously would provide. (*Id.* at pp. 304-305.) ICSOP must pay up to its own policy limits beginning at $500,000.01.

ICSOP is law of the case. (*Ary*, *supra*, 51 Cal.4th at p. 517.)[6] Thus, the *ICSOP* decision resolved who has to pay for asbestos bodily injury claims that exceed Truck's 1974 policy limits (which covered all Truck policies from 1964-1983). But *ICSOP* did not resolve who has to contribute towards amounts Truck pays *within* its limits, including for defense expenses.

C. The trial court's horizontal exhaustion ruling: All primary insurance, no matter what policy period covered, must first exhaust, such that the other carriers' promises to continue in force as primary insurance upon exhaustion of specifically scheduled underlying primary policies will never be triggered despite the exhaustion of those policies.

In the next phase of litigation between the carriers, the trial court addressed whether the putative "excess" insurers—which promised to take over upon the exhaustion of the specified Fireman's Fund and Home Insurance policies covering policy periods outside of Truck's—became, in effect, primary policies

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[6] *ICSOP* left open whether other primary insurance remained in force that Kaiser Cement might have to exhaust before tapping the ICSOP policy, but all parties have since agreed that the other primary insurance—from Fireman's Fund and Home Insurance—has been exhausted. (*ICSOP*, *supra*, 155 Cal.Rptr.3d at p. 306; see 2JA-535 ¶¶ 3-5.)

subject to equitable allocation of liability and defense expenses initially borne by Truck.

Truck argued that the specifically scheduled and referenced underlying policies having exhausted, the provisions in the First State, Westchester, and London Market Insurers' policies required each of them to do precisely that: to continue in force *as primary insurance* and, as such, to equitably contribute with Truck to defense and indemnity of claims within Truck's policy limits. Each of those insurers and Kaiser Cement opposed.

As to First State, Westchester, and the London Market Price Forbes and L.R.D. 60 forms, Truck argued that the relevant policy language explicitly required those policies to "continue in force *as underlying insurance*" upon "the exhaustion of the aggregate limits of liability" of just the *scheduled* Home Insurance and Fireman's Fund policies, respectively—exhaustion that occurred long ago. (3JA-969-970, 972-974, 976-978, 980-982.) Truck explained that this meant that, upon exhaustion of the specified scheduled policies, the continue-in-force policies would operate as primary insurance.

The "other insurance" language in the continue-in-force policies would then operate just like "other insurance" provisions in primary policies, effectively canceling out Truck's other insurance provision. (3JA-972, 974, 978-979, 980; see *Commerce & Industry Ins. Co. v. Chubb Custom Ins. Co.*, *supra*, 75 Cal.App.4th at pp. 744-745.) The continue-in-force insurers should, as a result, contribute to Kaiser Cement's defense and indemnity as primary insurers. (3JA-980.) Any other reading

would render meaningless the continue-in-force provisions' specific exhaustion requirement, limited to scheduled policies *only*.

As to the London Market T.P. 7 form, Truck argued that the insurance was triggered, i.e., became effective, "after the Primary Insurers"—indisputably, *only* the scheduled Fireman's Fund policies—"have paid or have been held liable to pay" their limits. (3JA-967.) It is undisputed that the relevant Fireman's Fund policies were exhausted by April 2004. (2JA-535 ¶ 3.) It, too, would have to contribute to indemnity amounts Truck has paid.

The trial court ruled in favor of First State, Westchester, and the London Market Insurers. After laying out all of the relevant policy language (3JA-1137-1145), the trial court opined that *Community Redevelopment Agency v. Aetna Casualty & Surety Co.* (1996) 50 Cal.App.4th 329 (*Community Redevelopment*)—which creates a default horizontal exhaustion rule—"in particular" led it to find in the continue-in-force insurers' favor. (3JA-1147-1148.)

The trial court recognized that the policies' continue-in-force language was conditioned solely on the exhaustion of specifically identified policies. (3JA-1152-1153.) It nonetheless gave that language no effect. (3JA-1153.) The trial court reasoned that "read[ing] the policy as a whole," the more general "other insurance" language controlled. (3JA-1153-1154.) It found *ICSOP* not binding but "highly persuasive" in interpreting respondents' policies. (3JA-1152, fn. 81.)

D. The trial court enters judgment and this appeal follows.

The trial court entered judgment against Truck on the "horizontal exhaustion" issue and Truck timely appealed. (3JA-1165, 4JA-1483, 1497.)[7]

E. This Court's intervening *Montrose III* decision.

While the appeal was pending, this Court decided *Montrose III*, *supra*, 9 Cal.5th 215, in which it held, among other things, that "other insurance" language in insurance policies, wherever it may appear in policies, applies only to policies in the same policy period. (9 Cal.5th at p. 234.) *Montrose III* allowed an insured to access policy coverage from a second-level excess policy without first proving that all other first-level excess coverage in other policy periods had "horizontally" exhausted. (*Id.* at p. 237.)

The Court of Appeal in *SantaFe Braun, Inc. v. Insurance Company of North America* (2020) 52 Cal.App.5th 19 (*SantaFe Braun*) applied *Montrose III* to allow an insured to access first-level excess coverage without first showing horizontal exhaustion of primary insurance coverage in all other policy periods. *SantaFe Braun* held that *Montrose III* had superseded the rationale of *Community Redevelopment*. (*SantaFe Braun*, *supra*, 52 Cal.App.5th at p. 30.)

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[7] Truck, Kaiser Cement, and various other insurers appealed other issues—e.g., Kaiser Cement's deductible obligation, whether Truck could horizontally allocate losses to other Truck policy periods, and how Truck's deductible operates—that the Court of Appeal has now resolved.

Montrose III and *SantaFe Braun* were addressed in supplemental briefing in the present appeal.

F. The Court of Appeal follows a pre-*Montrose III* rule requiring "horizontal exhaustion" of primary insurance across all policy periods before any other policy contributes.

The Court of Appeal here affirmed the trial court's pre-*Montrose III* ruling, relying, like the trial court, on *Community Redevelopment*. Agreeing with *Community Redevelopment* and expressly disagreeing with *SantaFe Braun*, it held that a "default 'horizontal exhaustion' rule" applies such that "an excess insurer had no duty to drop down and provide a defense to an insured before the liability limits of all primary policies [i.e., across all policy periods] had been exhausted." (*Truck v. Kaiser Cement I*, *supra*, 2022 WL 71771 at p. *25.) It reasoned that "primary and excess insurance [policies] are *qualitatively* different" such that the express promises in an excess policy should not be enforced according to their actual terms so long as any primary policy is available in any policy period. (*Id.* at p. *27, italics added.)

Although the so-called "excess" (actually mostly hybrid) policies here promised to "continue in force as underlying insurance" upon the exhaustion only of specific, identified same-policy-period scheduled policies, the Court of Appeal found that language inoperative. In its view, the "continue in force" language is conditioned not only on the exhaustion of the specified underlying policies, but also on the exhaustion of "other insurance" in other policy periods. (*Truck v. Kaiser Cement I*, *supra*, 21WL71771 at *27.) "Indeed, the key language is the

'other insurance' language of the policies, which requires horizontal exhaustion." (*Ibid.*)

The Court of Appeal attempted to distinguish *Montrose III*, viewing *Montrose III* as leaving *Community Redevelopment* intact, indeed as approving it. (*Truck v. Kaiser Cement I*, *supra*, 21WL71771 at p. *25.) On the other hand, the Court of Appeal expressly "disagree[d] with *SantaFe Braun*." (*Id.* at p. *27.)

This Court granted review.

ARGUMENT

I. This Court's *Montrose III* Decision Compels That Horizontal Exhaustion Is Not A Principle Of Equitable Contribution Among Different Policy-Period Insurers Covering The Same, Unitary Loss.

The issue presented is a pure question of law, as both the Court of Appeal and the trial court recognized. (*Truck v. Kaiser Cement I*, *supra*, 21WL71771 at pp. *11, 24; 3JA-1164.) The issue solely concerns the interpretation of written policy language, undeniably a question of law subject to this Court's de novo review. (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 288; *State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186, 194 (*State of California*); *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.)

As we now discuss, properly read, the other carriers' coverage has been triggered under their policies' plain language.

A. Backdrop: This Court adopted multi-policy-period insurance coverage for long-tail losses after Truck wrote its 1974 policy.

When most of the insurance policies at issue here were written, including the 1974 Truck policy, no one had in mind multi-policy-period coverage for long-tail personal injury claims. (Abraham, *The Long-Tail Liability Revolution: Creating The New World Of Tort And Insurance Law* (2021) 6 U. Pa. J.L. & Pub. Affairs 347, 368 ["There is no evidence, however, that from the 1940s until the late 1970s, insurers gave serious consideration to this possibility [of multi-policy-period coverage for long-tail claims], or to its implications"].)

This Court did not recognize multi-policy-period coverage for long-tail claims in the third-party liability context until 1995 in *Montrose I*, *supra*, 10 Cal.4th 645. In doing so, it *disapproved* prior Court of Appeal precedent, *Fireman's Fund Ins. Co. v. Aetna Casualty & Surety Co.* (1990) 223 Cal.App.3d 1621, which held that insurance for only one policy period was responsible for a long-tail liability claim. (*Id.* at p. 1629.)

Montrose I noted that the "leading case espousing" a continuous (i.e., multi-policy-period) "trigger of coverage analysis" was a 1980 Sixth Circuit decision, *Ins. Co. of North America v. Forty–Eight Insulations* (6th Cir. 1980) 633 F.2d 1212, clarified on rehg. (1981) 657 F.2d 814. (*Montrose I*, *supra*, 10 Cal.4th at p. 674.) Thus, when at least some of the various policies at issue were written, there was no understanding that they might apply or interact with other policies covering other policy periods.

B. This Court's *Montrose III* decision rejects "horizontal exhaustion" for successive policies and holds that "other insurance" language only applies to the same policy period.

Montrose III is this Court's most recent foray into multi-policy-period insurance coverage for continuous or "long-tail" liability claims. In *Montrose III*, an insured faced claims for causing continuous environmental damage over decades. (9 Cal.5th at pp. 221-222.) It had many years of primary insurance and excess insurance layers. (*Id.* at pp. 222-223.) The insured asserted "vertical exhaustion," whereby it could tap a particular policy period's second-layer excess policy upon exhausting the first-layer excess policy for that same policy period regardless of

whether other periods' first-layer excess was exhausted. (*Id.* at p. 225.) The excess insurers there, like the putative excess insurers here, argued for multi-policy-period "horizontal exhaustion," requiring the insured to exhaust *all* policy periods' "underlying" first-layer excess insurance before obtaining coverage under *any* policy-period second-layer excess policy. (*Ibid.*)

This Court rejected "horizontal exhaustion," instead adopting single-policy-period vertical exhaustion. (*Id.* at p. 226.) As between excess policies, once the next lower layer exhausts in any one policy period, the insured can seek payment from that policy period's next excess coverage layer. (*Ibid.*) This Court declined to opine whether the same rule applies to exhaustion of multiple-policy-period primary coverage or contribution claims between carriers, issues not before it. (*Ibid.*, fn. 4.) Nor did this Court address more specific "vertical exhaustion" policy provisions—present in this case—directly promising to "continue in force as underlying insurance" coverage upon exhaustion of identified "scheduled" underlying insurance. (*Id.* at p. 238.) But *Montrose III*'s reasoning still has direct application here:

What matters is policy language, not artificial rules.

- "We therefore begin by looking, as we must, to the language of the insurance policies at issue." (9 Cal.5th at pp. 229-230, citations omitted.)

There is no per se horizontal exhaustion rule. This Court *rejected* a rule requiring horizontal exhaustion across

policy periods, opting instead for same-policy-period vertical exhaustion:

- "Reading the relevant policy language in light of background principles of insurance law and considering the parties' reasonable expectations, we conclude that a rule of vertical exhaustion is appropriate. Under that rule, the insured has access to any excess policy once it has exhausted other directly underlying excess policies with lower attachment points, but an insurer called upon to indemnify the insured's loss *may seek reimbursement from other insurers that issued policies covering relevant policy periods*." (9 Cal.5th at p. 226, italics added.)

- Multi-period horizontal underlying insurance exhaustion does not apply absent "clear and explicit" policy language to that effect. (9 Cal.5th at p. 230.)

- "Given the generally understood purpose of 'other insurance' clauses, it is difficult to read the clauses here as a clear and explicit direction to adopt a requirement of horizontal exhaustion in cases of long-tail injury." (9 Cal.5th at p. 233.)

The key is the meaning and effect of policies' "other insurance" language.

- "The parties' dispute centers on the meaning of the 'other insurance' clauses in the excess insurance policies. These clauses provide, in a variety of ways, that each

policy shall be excess to other insurance available to the insured, whether or not the other insurance is specifically listed." (9 Cal.5th at p. 230.)

"Other insurance" language is treated the same no matter where in the policy it appears.

- "Ultimate net loss," "loss payable," "limits," and similar provisions that "'other insurance' must be exhausted" before policy coverage triggers are no different than traditional "other insurance" conditions that the policy is excess to any other valid and collectible insurance—such provisions are considered collectively as "other insurance" clauses regardless where they might appear in the policy. (9 Cal.5th at pp. 224-225.)

"Other insurance" is limited to insurance in the same policy period.

- "The 'other insurance' clauses at issue clearly require exhaustion of underlying insurance, but none clearly or explicitly states that Montrose must exhaust insurance with lower attachment points *purchased for different policy periods*." (9 Cal.5th at p. 230, original italics.)
- "Policies that disclaim coverage for amounts covered by 'other underlying insurance,' or require exhaustion of 'all underlying insurance,' for example, could fairly be read to refer only to other *directly* underlying insurance *in the same policy period* that was not specifically identified in the schedule of underlying insurance,

anticipating that the scheduled underlying insurance may later be replaced or supplemented with different policies." (9 Cal.5th at pp. 230-231, first italics in original, second italics added.)

- "The insurers do not explain why the reference is not properly understood to mean 'other *directly underlying* insurance'—that is, a requirement that the insured exhaust only excess insurance with lower attachment points from the *same* policy period." (9 Cal.5th at p. 231, original italics.)

- "'[H]istorically, "other insurance" clauses were designed to prevent multiple recoveries when more than one policy provided coverage for a particular loss.' [Citation.] They have not generally been understood as dictating a particular exhaustion rule for policyholders *seeking to access successive excess insurance policies in cases of long-tail injury*." (9 Cal.5th at p. 231, quotation marks omitted, italics added.)

- "'[O]ther insurance' clauses are not aimed at governing the proper allocation of liability among successive insurers in cases of long-tail injury." (9 Cal.5th at p. 232, citations omitted.)

- "Other insurance" is equated with "other underlying insurance," which, in turn, is best understood as "other *directly underlying* insurance." (9 Cal.5th at pp. 230-231, original italics.)

The Restatement and sister state Supreme Court decisions confirm the limited scope of "other insurance" language. This Court found its holdings in line with the law across the country:

- "[T]he Restatement explains that 'other insurance' clauses have generally been used to address '[a]llocation questions with respect to overlapping *concurrent policies*.' (Rest., Liability Insurance, § 40, com. c, p. 345, italics added.)" (9 Cal.5th at p. 232, original italics.)
- "Consistent with this understanding, most courts to address the issue have found that 'other insurance' clauses *are not aimed at governing the proper allocation of liability among successive insurers in cases of long-tail injury or the appropriate sequence in which a policyholder may access its insurance across several policy periods*." (9 Cal.5th at pp. 232-233, italics added, quoting cases from the New York Court of Appeals ["'[O]ther insurance' clauses do not mandate horizontal exhaustion under all sums allocation.... [O]ther insurance clauses are not implicated in situations involving successive—as opposed to concurrent—insurance policies"] and the Supreme Courts of Wisconsin ["'The accepted meaning of "other insurance" provisions does not include application to successive insurance policies'"], Utah ["'[O]ther insurance' provisions do not apply to successive insurers"], Massachusetts ["'[O]ther insurance' clauses simply

reflect a recognition of the many situations in which concurrent, not successive, coverage would exist for the same loss"], and New Jersey ["'[O]ther insurance' clauses, ... [are] not generally applicable in the continuous-trigger context where successive rather than concurrent policies [are] at issue."].)

The policies' references to specific policy-period scheduled insurance reinforce that underlying and other insurance are limited to the same policy year.

- "[T]the excess policies regularly include or reference schedules of underlying insurance—all for the same policy period. Under [the insured's] reading, these schedules provide a presumptively complete list of insurance coverage that must be exhausted before the excess policy may be accessed, with the 'other insurance' clauses serving as a backstop to prevent double recovery in the rare circumstance where underlying coverage changes after the excess policy is written." (9 Cal.5th at p. 234.)

- Applying "horizontal exhaustion" makes little sense when various policies have differing limits and differing "attachment" points (that is, the amount of other insurance that has to be paid before the excess policy comes into play): "Nor does anything in the text of these policies tell us how an 'other insurance' clause in a policy from one period ought to apply to a policy from

another period that contains both a lower attachment point and a higher coverage limit." (9 Cal.5th at p. 235.)

The insured's initial selection of a policy to respond is not determinative of a final allocation of coverage.

- The "all sums" rule—whereby an "all sums" carrier covering a continuous loss must pay all damages flowing from a policy-period loss, including those suffered in other policy periods—governs a carrier's *initial* payment obligation regardless of whether other insurance has been exhausted. (9 Cal.5th at pp. 227-228.) The insured gets to initially select the carrier to respond, giving the insured "'immediate access to the insurance it purchased.' [Citation.] The insurers can then sort out their proportional share through actions for equitable contribution or subrogation." (*Id.* at p. 228.)

- "Even though a rule of vertical exhaustion permits [the insured] to access excess insurance from any given policy period, provided the directly underlying insurance has been exhausted, insurers may seek contribution from other excess insurers also liable to the insured." (9 Cal.5th at p. 236.) "The exhaustion rule does not alter the usual rules of equitable contribution between insurers. An insurer required to provide excess coverage for a long-tail injury may lessen its burden by seeking reimbursement from other insurers that issued policies during the relevant period. (*Ibid.*)

- "[T]he insured has access to any excess policy once it has exhausted other directly underlying excess policies with lower attachment points, but *an insurer called upon to indemnify the insured's loss may seek reimbursement from other insurers that issued policies covering relevant policy periods*." (9 Cal.5th at p. 236, fn. omitted, italics added.)

Reserved issues: *Montrose III* specifically distinguished *Community Redevelopment,* and neither approved nor rejected "horizontal exhaustion" in the primary/excess carrier contribution context. *Montrose III* specifically reserved the question presented here:

- "This case, unlike *Community Redevelopment*, is not a contribution action between primary and excess insurers; it is, rather, a coverage dispute between excess insurers and their insured. *Regardless of whether Community Redevelopment was correct to apply a rule of horizontal exhaustion in that distinct context—a question not presently before us*—we are unpersuaded that the reasoning of *Montrose I* requires us to apply a rule of horizontal exhaustion that would limit Montrose's ability to access the excess insurance coverage it has paid for." (9 Cal.5th at p. 237.)

C. The Court of Appeal in *SantaFe Braun* applies this Court's reasoning in *Montrose III* to exhaustion of primary insurance.

SantaFe Braun, supra, 52 Cal.App.5th 19 took the reasoning of *Montrose III* one step further. In *SantaFe Braun*, an insured facing asbestos claims, as here, sought to tap a first-level excess insurance policy where the primary insurance policy in the same policy period had exhausted but primary policies in other policy periods may not have exhausted. (*Id.* at p. 21.)

SantaFe Braun, like *Montrose III*, emphasized that the issue is one of contract interpretation and courts must start with the policy language. (*Id.* at p. 24.) *SantaFe Braun* rejected that supposed qualitative differences between primary and excess insurance might provide a reason to depart from *Montrose III*'s reading of the same policy language. (*Id.* at pp. 28-29.)

SantaFe Braun recognized that to the extent primary and excess policies might have different premium structures, that might be a factor in vertical exhaustion rules, but risk assessments made on the assumption of horizontal exhaustion would be complete speculation. (52 Cal.App.5th at pp. 29-30.) Likewise, that defense obligations might differ provides no basis to categorically exclude the primary/excess circumstance from *Montrose III*'s reasoning. (*Id.* at p. 29.)

Finally, *SantaFe Braun* noted that the pre-*Montrose III* Court of Appeal opinion in *Community Redevelopment* relied on a reading "that 'other insurance' clauses preclude attachment of

coverage until there has been horizontal exhaustion" and that "*Montrose III* holds otherwise." (*Id.* at p. 30.)

D. The reasoning of both *Montrose III* and *SantaFe Braun* apply here.

Montrose III, *SantaFe Braun*, and *Community Redevelopment* all agree on one thing: The *key* factor in determining whether vertical or horizontal exhaustion applies is the meaning of "other insurance" in the non-Truck-policy-period policies. (*Montrose III*, *supra*, 9 Cal.5th at p. 230 ["The parties' dispute centers on the meaning of the 'other insurance' clauses in the excess insurance policies"]; *SantaFe Braun*, *supra*, 52 Cal.App.5th at p. 30 [distinguishing *Community Redevelopment* and preceding cases on the ground that "[t]hese cases, however, rely on an interpretation of policy language rejected by the Supreme Court in *Montrose III*. [Citations.]"]; *Community Redevelopment*, *supra*, 50 Cal.App.4th at p. 341 ["'when a policy which provides excess insurance above a stated amount of primary insurance contains provisions which make it also excess insurance above *all other* insurance which contributes to the payment of the loss together with specifically stated primary insurance, *such clause will be given effect as written*'" quoting *Peerless Cas. Co. v. Continental Cas. Co.* (1956) 144 Cal.App.2d 617, 626; italics added in *Community Redevelopment*].)

Here, the reasoning of *Montrose III* and *SantaFe Braun* compels reversal of the Court of Appeal's judgment.

Montrose III's reading of "other insurance" and "underlying insurance" could not be clearer: "'[O]ther insurance' clauses are

not aimed at governing the proper allocation of liability among successive insurers in cases of long-tail injury." (9 Cal.5th at p. 232, citations omitted; see *id.* at pp. 232-233 ["most courts to address the issue have found that 'other insurance' clauses are not aimed at governing the proper allocation of liability among successive insurers in cases of long-tail injury"].) Those terms, absent clear and explicit language not present here, are limited to insurance *in the same policy period*. (9 Cal.5th at p. 233 ["Given the generally understood purpose of 'other insurance' clauses, it is difficult to read the clauses here as a clear and explicit direction to adopt a requirement of horizontal exhaustion in cases of long-tail injury."].) And, when read as "other underlying insurance" it means "other *directly underlying* insurance." (*Id.* at pp. 230-231, original italics.)

Montrose III did not come up with that reading out of the blue. Rather, it followed the Restatement of the Law of Liability Insurance (Rest., Liability Insurance, § 40, com. c, p. 345 ["'other insurance' clauses have generally been used to address '[a]llocation questions with respect to overlapping *concurrent policies*,'" italics added) and the decisions of *multiple* sister state Supreme Courts that "most courts to address the issue have found that 'other insurance' clauses are not aimed at governing the proper allocation of liability among successive insurers in cases of long-tail injury" (*Montrose III*, *supra*, 9 Cal.5th at pp. 232-233). These statements include claims where one insurer is seeking contribution from another. (E.g., *Steadfast Insurance Co. v. Greenwich Ins.* (Wis. 2019) 385 Wis.2d 213 (*Steadfast*)

[contribution claim between carriers; cited with approval in *Montrose III*, *supra*, 9 Cal.5th at p. 233]; *Ohio Cas. Ins. Co. v. Unigard Ins. Co.* (Utah 2012) 268 P.3d 180 [same].)

Truck's policy and the other policies at issue here are not "concurrent" policies. They do not cover the same policy period. Rather, they are "successive" policies covering different policy periods. (See Rest., Liability Insurance, § 40 com. a; *Steadfast*, *supra*, 352 Wis.2d at p. 227.) The "other insurance" clauses are therefore irrelevant: "'[O]ther insurance' clauses do not apply unless two policies are concurrent. 'The accepted meaning of "other insurance" provisions does not include application to successive insurance policies.' If the 'other insurance' clauses cannot be used to establish a primary and an excess insurer, then 'neither insurer is given priority over the other and each contributes toward the loss pro rata.'" (*Steadfast*, *supra*, 385 Wis.2d at p. 228, citations omitted.)

There are further reasons to limit "underlying insurance" in the various policies to insurance in the same policy period. To begin with, insurance in one policy period does not "underlie" insurance in another policy period. There is no indication that the umbrella and "Defender Commercial Comprehensive Catastrophe Liability" policies were written "over" otherwise unmentioned policies. The policies written before 1974 could not have been written "over" Truck's 1974 policy because that policy did not yet even exist. The policies' specific references to the underlying insurance in the attached schedules confirm that

"underlying insurance" means in the same policy period. (Compare 7JA-2473, 3JA-1076, 8JA-3014 and 8JA-3065, 3077 with *Montrose III*, *supra*, 9 Cal.5th at p. 234.)

Nor do successive policies' limits and attachment points necessarily match up. For example, if an umbrella or excess policy attaches once a specifically enumerated primary policy with a $300,000 limit exhausts, and a primary policy with a $500,000 policy limit exists in another policy period, it would make no sense to say that the umbrella or excess policy attaches at $300,000 and is somehow also "over" a $500,000 limit policy. (Compare 2JA-536 [Truck's 1974 policy had a $500,000 policy limit] with 3JA-1074, 7JA-2473 [early London Market Insurers' policy attaches after enumerated $200,000 primary policy exhausts].) Yet that is where the other carriers' and the Court of Appeal's arguments lead.

The point is brought home by the language in the hybrid policies that they will "continue in force *as underlying* insurance" upon the exhaustion of specifically identified policies. If "underlying insurance" means insurance in *any* triggered policy period, then the hybrid policies would be promising to "continue in force" as insurance over multiple policy periods. The carriers clearly did not promise that. But "underlying insurance" cannot mean one thing in the "continue in force" clause but another thing elsewhere in the policy. (See *E.M.M.I. Inc. v. Zurich American Ins. Co.* (2004) 32 Cal.4th 465, 475 [a word or phrase used in multiple places in a contract is to be given the same

meaning throughout]; *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2003) 107 Cal.App.4th 516, 526.) Thus, "other insurance" and "underlying insurance" mean only insurance in the same policy period. (See *Montrose III*, *supra*, 9 Cal.5th at pp. 230-231, 233-234.)

If, as *Montrose III* holds, "other insurance" language in its various incarnations is the key and such provisions only apply to the same policy-period insurance, then the result here is straightforward: The various policies at issue, whether they "continue in force as underlying insurance" or simply require indemnity payments, are triggered by the exhaustion of specified, scheduled policies. Since those underlying policies are exhausted, the carriers must share proportionately in the loss with Truck's coverage for its policy period.

It makes no difference that *Montrose III* and *SantaFe Braun* involved suits between insureds and their carriers, rather than a carrier suing other carriers for contribution. The cases involved the same policy language at issue here, and the meaning of such language is a question of law. The identical policy language and provisions cannot mean something different in the context of contribution claims between carriers than for an insured's asserted claims for coverage. The same English words in the same document, as a matter of law, cannot mean two different things depending on who proposes the interpretation. That is the land of Humpty Dumpty, not the rule of law. (See Carroll, Alice's Adventures in Wonderland and Through the

Looking-Glass (Collier Books 1962) p. 247 [conversation between Humpty Dumpty and Alice: "'When I use a word,' Humpty Dumpty said in a rather a scornful tone, 'it means just what I choose it to mean—neither more nor less,'" cited in *ACL Technologies, Inc. v. Northbrook Property & Casualty Ins. Co.* (1993) 17 Cal.App.4th 1773, 1794, fn. 50.)

The same rules of policy interpretation apply whether the question is an insured's rights versus a carrier or equitable contribution between carriers. (Compare *Montrose III*, *supra*, 9 Cal.5th at p. 230 [interpreting policy regarding insured's rights] with *Energy Ins. Mutual Limited v. Ace American Ins. Co.* (2017) 14 Cal.App.5th 281, 290 [interpreting policies in the context of equitable contribution] and *American States Ins. Co. v. Travelers Property Casualty Co. of America* (2014) 223 Cal.App.4th 495, 506 [same]; see Civ. Code, § 1635 [all contracts are interpreted by the same rules].) The same interpretative rules applied to the same policy language should yield the same result. (See Civ. Code, § 3511 ["Where the reason is the same, the rule should be the same."].)

II. None Of The Reasons Proffered To Avoid *Montrose III* Has Merit.

A. *Community Redevelopment* is inconsistent with this Court's *Montrose III* reading of "other insurance" language.

The Court of Appeal in this case based its decision on *Community Redevelopment*, *supra*, 50 Cal.App.4th 329. *Community Redevelopment* is the genesis of a "horizontal

exhaustion" rule in multi-policy-period cases—a rule that *all* primary policies in *every* policy period have to exhaust before enforcing the promises of "excess" or hybrid policies to respond or to step into the shoes of specifically identified, exhausted underlying policies. But *Community Redevelopment*, decided in 1996, lacked the benefit of this Court's *Montrose III* decision, as well as the five sister-state Supreme Court decisions and recent Restatement of the Law of Liability Insurance principles that *Montrose III* relied on. (See 9 Cal.5th at pp. 232-233.)

Community Redevelopment instead took a principle that applied to *same-policy-period* policies—that "other insurance" means all other primary insurance—and extended it without analysis to the multiple-policy-period context. (*Community Redevelopment*, *supra*, 50 Cal.App.4th at p. 339.) The cases it relied on *all* involved *same*-policy-period insurance. (See *ibid.*, citing *McConnell v. Underwriters at Lloyds* (1961) 56 Cal.2d 637, 646, disapproved on another point in *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 814; *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.* (1981) 126 Cal.App.3d 593; *Lamb v. Belt Casualty Co.* (1935) 3 Cal.App.2d 624, 633-634; *Iolab Corp. v. Seaboard Sur. Co.* (9th Cir.1994) 15 F.3d 1500, 1504.) *Community Redevelopment* conducted zero analysis as to why "other insurance" means insurance in *successive* policy periods.

Montrose III performed that analysis. This Court held, consistent with sister-state decisions and the Restatement, that "other insurance" language does *not* mean insurance in other policy periods. That determination rejects the essential predicate

for *Community Redevelopment*'s holding. Without that assumption, *Community Redevelopment*'s conclusion collapses. (Civ. Code, § 3510 ["when the reason for the rule ceases, so should the rule"].) And, that is what *SantaFe Braun* recognizes: "These cases, however, rely on an interpretation of policy language rejected by the Supreme Court in *Montrose III*. (See *Community Redevelopment*, *supra*, 50 Cal.App.4th at p. 341; *Padilla Constr. Co. v. Transportation Ins. Co.* [(2007)] 150 Cal.App.4th [984,] 988.) While those cases hold, for example, that 'other insurance' clauses preclude attachment of coverage until there has been horizontal exhaustion, *Montrose III* holds otherwise." (52 Cal.App.5th at p. 30.)[8]

Put simply, *Community Redevelopment* offers nothing beyond an interpretation of "other insurance" policy language that is irreconcilable with *Montrose III*.

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[8] The Washington Court of Appeals reached the same result as *SantaFe Braun* finding that "[t]he reasoning underlying the decisions in *Montrose* [*III*] and *SantaFe* and the application of vertical exhaustion to continuous environmental or asbestos damage claims in those cases is sound and persuasive." (*Gull Industries, Inc. v. Granite State Insurance Company* (2021) 493 P.3d 1183, 1195, ¶ 47.) In contrast, an intermediate Connecticut appellate court disagreed with *SantaFe Braun* and deemed *Montrose III* irrelevant, relying on *Community Redevelopment* and the same pre-*Montrose III*, single-policy-period cases that *Community Redevelopment* relied on. (*Continental Casualty Company v. Rohr, Inc.* (2020) 201 Conn.App. 636, 702, fn. 22, 703-706.)

B. Neither true excess insurance nor the hybrid policies at issue here qualitatively differ from primary liability insurance.

Excess carriers urging a multi-period horizontal exhaustion rule often argue that excess insurance is somehow special and should not be subject to the same rules as other insurance policies. But there is no basis for such a presumption, particularly given the language of the policies at issue here.

The insurance policies at issue here, with one exception, are not "excess" policies. They are hybrid policies. (See Statement of Facts, § C.2., *ante*.) They specifically promise to step into the shoes of and act as "underlying insurance"—that is, as *primary* insurance—and they expressly promise to pay defense expenses in various circumstances (unlike true excess policies). They are titled "Umbrella" policies and "The Defender Commercial Comprehensive Catastrophe Liability Policy" (defense is in its title), not "excess" insurance. The only exception, the older London Market Insurers form, proves the point. It is titled an "excess" policy and makes no mention of defense expenses.

The hybrid policies do not qualitatively differ from Truck's policy. They promise to step into the shoes of specifically identified policies once they exhaust, that is, to be primary policies. (See *AMHS Ins. Co. v. Mut. Ins. Co. of Arizona* (9th Cir. 2001) 258 F.3d 1090, 1096 [applying Arizona law, "excess" policies that attached upon exhaustion of specifically identified underlying policy had to share coverage with primary level

policy].) They promise to cover defense expenses, just as Truck's policy does. They have "other insurance" provisions, just as Truck's policy does.

But even if all the policies could be considered "excess" policies, it would make no difference. Excess policies do not qualitatively differ from other insurance policies, particularly as to policy interpretation. There is no special statutory scheme that courts must interpret excess insurance policy language differently from the language in other policies. Excess insurance policies are insurance contracts, and their language must be interpreted the same as any other insurance contract. (E.g., *Montrose III*, *supra*, 9 Cal.5th at pp. 229-230 [interpreting excess policy language under the same rules as any other policy language]; *State of California*, *supra*, 55 Cal.4th at pp. 194-195 [same].)

Thus, what matters is the policy language, not how a carrier might label or title a policy. This Court explained in *Montrose III* that "[w]e therefore begin by looking, as we must, to the language of the insurance policies at issue." (9 Cal.5th at pp. 229-230.) California law has long held that "labels are not dispositive; it is the policy language that controls the attachment of coverage." (*Carmel Dev. Co. v. RLI Ins. Co.* (2005) 126 Cal.App.4th 502, 514; *20th Century Ins. Co. v. Liberty Mut. Ins. Co.* (9th Cir. 1992) 965 F.2d 747, 756.)

C. The premiums canard.

Some cases suggest that excess coverage must be more limited because the premium charged may be smaller. (E.g., *American Safety Indemnity Company v. Admiral Insurance Company* (2013) 220 Cal.App.4th 1, 11.) But the amount of premium charged cannot trump a policy's plain language. The same policy language cannot mean different things just because one insurer charged a different premium than another or the same insurer charged different premiums in different policy periods.

And even assuming the premium charged might have some relevance in a single-policy-period context, it makes no sense in the multiple-policy-period long-tail claims context. (*SantaFe Braun*, *supra*, 52 Cal.App.5th at pp. 29-30.) Here, for example, Truck charged $118,000 for its 1974 policy "selected" by Kaiser Cement, yet Truck has paid upwards of $450 million in defense and indemnity costs. (8JA-3345, ¶ E; see fn. 2, *ante*.) That's nearly 4,000 *times* its charged premium. Truck cannot escape its policy language just because its premium nowhere approaches the obligations imposed.[9] Nor can other carriers wield premium

[9] The premium for the 1983 First State policy was $170,000. (8JA-3014.) The 1984 Westchester policy's premium was $195,000. (8JA-3071.) Those would be equivalent in 1974 dollars to approximately $82,800 and $91,000, 70% and 80% of Truck's premium, respectively. (See https://data.bls.gov/cgi-bin/cpicalc.pl.)

amounts as a basis to avoid their contractual obligations. The policy language controls.

Carriers calculate premiums based on their assessment, at the time of contracting, of the insured risk under the particular policy language. Sometimes carriers get that assessment wrong (Truck undoubtedly did as regards its 1974 policy, as it failed to predict this Court would adopt its rule for long-tail losses covering multiple policy periods or the Court of Appeal's *London Market Insurers* holding that each individual's exposure was a separate occurrence]). When carriers get their risk assessment wrong, they must bear the consequences, whether the carrier wrote primary, excess, hybrid, umbrella, or any other type of coverage. The meaning of contract language drives premium calculations, not the other way around.

D. "Continue in force as underlying insurance" upon exhaustion of specifically identified policies means just what it says.

The other carriers cannot escape equitably contributing to the losses that Truck has, in the first instance, paid by seeking to limit or circumscribe their promises to "continue in force as underlying insurance." The hybrid policies here clearly promise—without any qualification or limitation—to "continue in force as underlying insurance" upon exhaustion of identified, scheduled policies. (See 8JA-3078 [Westchester policy; agreeing to "continue in force *as underlying insurance*" upon exhaustion of "the aggregate limits of liability *of the underlying policies listed in Schedule A*," italics added; 8JA-3012 [First State policy

promises to "continue in force as underlying insurance" once "the aggregate limits of liability of the underlying policies *listed in the schedule of underlying insurance*, are exhausted," italics added]; 3JA-1076-1077 [more recent London Market Insurers' policy forms promise to "continue in force as underlying insurance" upon the "exhaustion of the aggregate limits of liability" of "*the underlying insurances as set out in the attached schedule,*" italics added].)

This language cannot be ignored. In interpreting policy language, a court's task is to give effect to *all* of its provisions. (*State of California*, *supra*, 55 Cal.4th at p. 195; Civ. Code, § 1651.)

These policies promise that they act as underlying insurance—that is, as *primary* insurance—upon the exhaustion of specifically enumerated policies. That event happened. The policies, thus, are the same as the formerly underlying insurance in their respective policy periods, that is, primary insurance.

Those same hybrid policies *expressly* cover defense expenses as a part of covered "ultimate net loss," subject to an "other insurance" qualification. (3JA-1083 ["ultimate net loss" includes "2. All expenses, other than defense settlement provided in Insuring Agreement II, incurred by the insured in the investigation, negotiation, settlement *and defense* of any claim or suit seeking such damages, excluding only the salaries of the insured's regular employees," italics added]; 3JA-1077 ["The term 'Ultimate Net Loss' shall mean the total sum which the Assured, or any company as his [*sic*] insurer, or both, become obligated to

pay by reason of personal injury, property damage or advertising liability claims, either through adjudication or compromise, and shall also include … *expenses for* doctors, *lawyers*, nurses and investigators and other persons, *and for litigation*, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder," italics added]; *ibid.* [covered "ultimate net loss" includes expenses for "lawyers" and "for litigation"].)

Not surprisingly, the law across the country is that the "continue in force as underlying insurance" language *includes* defense costs. (E.g., *Interstate Fire & Cas. Co. v. Auto-Owners Ins. Co.* (Minn. 1988) 433 N.W.2d 82, 86 & fn. 2 ["Interstate's policy provides that, '[i]n the event of ... exhaustion of the aggregate limits of liability under said underlying insurances by reason of losses paid hereunder, this policy shall ... continue in force as underlying insurance.' *This clause seems to provide that, once Continental has paid up to its limits, Interstate becomes the underlying, or primary, insurer*"; carrier with continue-in-force-as language primarily liable as policy "closest to the risk" versus another policy affording primary level coverage, italics added]; *Sinclair Oil Corp. v. Allianz Underwriters Ins. Co.* (Ill.Ct.App. 2015) 39 N.E.3d 570, 580 [despite disclaimer of duty to defend elsewhere in policy, promise "subject to the terms and conditions of the underlying insurance ... (b) in the event of exhaustion [to] continue in force as underlying insurance" includes a duty to defend where underlying insurance owed a duty to defend].)

And that is what *SantaFe Braun* holds: "[O]ne would reasonably expect the excess insurer to contribute to the defense once the scheduled primary policies have been exhausted." (52 Cal.App.5th at p. 29.)

But even if defense costs were excluded from the "continue in force as underlying insurance" obligation, the other carriers should contribute at least to indemnity of settlements and judgments. Truck has made hundreds of millions of dollars in primary level *indemnity* payments. (See fn. 2, *ante*.) The carriers with the "continue in force as underlying insurance" promises, at a minimum, owe Truck contribution regarding those indemnity payments.

And, the London Market Insurers' T.P. 7 policy form (1953-1958) owes contribution, at least, to indemnity payments. That form expressly "attaches" after the specifically scheduled underlying policies have paid their limits. (7JA-2473.) It may not have a provision for defense expenses, but it unequivocally attaches without *any* reference to unscheduled underlying or other insurance.

E. Equitable contribution is not categorically banned here.

The Court of Appeal's position here is that it is *never* fair for other carriers that would normally have to pay a claim (either defense or indemnity) to contribute, so long as there is *a* primary carrier left in any of decades' worth of triggered successive overlapping coverage that can be made to alone bear the burden of the totality of losses that all carriers collected premiums to

cover. But that categorial bar is contrary to the entire premise and purpose of equitable contribution.

The concept of equitable contribution is founded in Civil Code section 1432: "[A] party to a joint, or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him." In other words, those with joint obligations share in the expense.

"Equitable contribution is the right to recover from a co-obligor who shares a liability with the party seeking contribution. [Citations.] '[T]he right to contribution arises when several insurers are obligated to indemnify or defend the same loss or claim, and one insurer has paid more than its share of the loss or defended the action.... Equitable contribution permits reimbursement to the insurer that paid on the loss for the excess it paid over its proportionate share of the obligation, on the theory that the debt it paid was *equally* and *concurrently* owed by the other insurers and should be shared by them pro rata in proportion to their respective coverage of the risk.'" (*North American Capacity Ins. Co. v. Claremont Liability Ins. Co.* (2009) 177 Cal.App.4th 272, 295, original italics, quoting *Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1293.)

The equitable contribution right is independent of the insured's dictates. "'The reciprocal rights and duties of several insurers who have covered the same event do not arise out of contract, for their agreements are not with each other.... Their

respective obligations flow from equitable principles designed to accomplish ultimate justice in the bearing of a specific burden.'" (*Signal Companies, Inc. v. Harbor Ins. Co.* (1980) 27 Cal.3d 359, 369, quoting *American Auto. Ins. Co. v. Seaboard Surety Co.* (1957) 155 Cal.App.2d 192, 195-196.)

That a targeted carrier can obtain equitable contribution from other carriers covering the same loss underpins this Court's *Montrose III* view that it is fair to allow an insured to *initially* select any one carrier to respond fully to the loss: "An insurer required to provide excess coverage for a long-tail injury may lessen its burden by seeking reimbursement from other insurers that issued policies during the relevant period." (9 Cal.5th at p. 236.) It explained that the result was fair to the selected carrier because "the critical difference between a rule of vertical exhaustion and horizontal exhaustion thus *is not whether a single disfavored* excess *insurer* will be made to carry a disproportionate burden of indemnification, but instead whether *the administrative task of spreading the loss* among insurers is one that must be borne by the insurer instead of the insured." (*Ibid.*, italics added.) What is fair for a selected, disfavored excess insurer is fair for a selected, disfavored primary insurer.

In other words, the insured, in return for joint and several carrier liability over all triggered policy periods, does not get to permanently foist *all* loss on one disfavored carrier. *Montrose III* simply restated the long-established justification for allowing the insured to collect, initially, from just one carrier. (See *State of California*, *supra*, 55 Cal.4th at p. 200 ["When the entire loss is

within the limits of one policy, the insured can recover from that insurer, *which may then seek contribution from the other insurers on the risk during the same loss*," italics added].) There is no reason the right to equitable contribution should differ between primary policies (including now "continuing as underlying" primary insurance policies) and when excess carriers are seeking contribution from other excess policies.

At heart, equitable contribution is about fairness between carriers that insure the same loss. It is not fair for one carrier (Truck) to bear hundreds and hundreds of millions of dollars in losses, thousands of times its policy premium, while other carriers, which collected premiums in return for specific promises to step into the shoes of enumerated primary policies when they exhausted, contribute nothing. It cannot be said that there is *no* way to fairly allocate among the successive policies covering the same losses.

Because this is an equitable principle *between those jointly obligated*, the insured does not get to choose which carrier alone must bear the loss. "[N]othing about the rule of vertical exhaustion requires a single insurer to shoulder the burden of indemnification alone. As we explained in the context of primary insurance, 'the obligation of successive primary insurers to cover a continuously manifesting injury is a separate issue from the obligations of the insurers to each other.' [Citation.] … The exhaustion rule does not alter the usual rules of equitable contribution between insurers." (*Montrose III*, *supra*, 9 Cal.5th at p. 236 [addressing shared excess coverage].)

CONCLUSION

The logic, holdings, and reasoning of *Montrose III* compel the conclusion that the decades of losses covered by the Truck policy under the broad "all sums" rule must be shared by other policies, the express terms of which establish that they are triggered for other successive policy periods. Generic "other insurance" language in those other policies does not affect the obligations of carriers with successive coverage. Such sharing of losses among successive policy period carriers is and should be the rule. *Equitable* contribution and basic fairness demand no less.

The judgment of the Court of Appeal should be reversed, and the Court of Appeal should be directed to enter a new judgment directing the trial court to vacate that portion of its judgment denying equitable contribution between Truck's policy and policies in other policy periods that, but for Truck's policy, otherwise would be triggered. Upon vacating that portion of the judgment, the matter should be remanded to the trial court to

determine in the first instance the carriers' respective fair equitable contributions.

Date: June 22, 2022

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Scott R. Hoyt
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By: */s/ Robert A. Olson*
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Attorneys for
TRUCK INSURANCE EXCHANGE

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **OPENING BRIEF** contains **11,520** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: June 22, 2022

/s/ Robert A. Olson
Robert A. Olson

ATTACHMENT

Per California Rules of Court, rule 8.204(d)

PHASE III-A

EXEMPLAR EXCESS POLICY LANGUAGE

1953 – 1958 London Excess Wording [See TEX 152, TABS A-F]

THIS INSURANCE, subject to the terms, conditions and limitations hereinafter mentioned, is to indemnify the Assured in respect of accidents occurring during the period commencing [March 1, 1953 and ending March 1, 1954] for any and all sums which the Assured shall by law become liable to pay and shall pay or by final judgment be adjudged to pay to any person or persons (excepting employees of the Assured injured during the course of their employment) as damages for bodily injures, including death at any time resulting therefrom, caused by accident arising out of the hazards covered by and as defined in the underlying policy/ies specified in the Schedule herein and issued by the Insurers shown on the Schedule attached hereinafter called the "Primary Insurers".

PROVIDED ALWAYS THAT it is expressly agreed that liability shall attach to the Underwriters only after the Primary Insurers have paid or have been held liable to pay the full amount of their respective ultimate net loss liability as follows:

$ 200,000.00 ultimate net loss in respect of each person and, subject to that same limit each person,
$1,000,000.00 ultimate net loss in respect of each accident but, as regards Products Liability,
$1,000,000.00 ultimate net loss in the aggregate in any one period of insurance (hereinafter referred to as the "Primary Limit or Limits");

and the Underwriters shall then be liable to pay only such additional amounts as will provide the Assured with a total coverage under the policy/ies of the Primary Insurers and this Insurance combined of

$400,000.00 ultimate net loss in respect of each person and, subject to that same limit each person,
$2,000,000.00 ultimate net loss in respect of each accident but, as regards Products Liability, not exceeding
$2,000,000.00 ultimate net loss in the aggregate in any one period of insurance.

DEFINITIONS

1. ACCIDENT - The word "accident" shall be understood to mean an accident or series of accidents arising out of one event or occurrence.

2. ULTIMATE NET LOSS - The words "ultimate net loss" shall be understood to mean the sums paid in settlement of losses for which the Assured is liable after making deductions for all recoveries, salvages and other insurances (other than recoveries under the policy/ies of the Primary Insurers), whether recoverable or not, and shall exclude all expenses and "Costs."

3. COSTS – The word "Costs" shall be understood to mean interest on judgments, investigation, adjustment and legal expenses (excluding, however, all expenses for salaried employees and retained counsel of and all office expenses of the Assured).

(LMIPOLSTIP000015; LMIPOLSTIP 000065; LMIPOLSTIP 000103)

***

CONDITIONS

***

2. APPLICATION OF SALVAGE – All salvages, recoveries or payments recovered or received subsequent to a loss settlement under this Insurance shall be applied as if recovered or received prior to such settlement and all necessary adjustments shall then be made between the Assured and the Underwriters, provided always that nothing in this clause shall be construed to mean that losses under this Insurance are not recoverable until the Assured's ultimate net loss has been finally ascertained.

3. ATTACHMENT OF LIABILITY – Liability under this Insurance shall not attach unless and until the Primary Insurers shall have admitted liability for the Primary Limit or Limits, or unless and until the Assured has by final judgment been adjudged to pay a sum which exceeds such Primary Limit or Limits.

4. MAINTENANCE OF PRIMARY INSURANCE - This Insurance is subject to the same warranties, terms and conditions (except as regards the premium, the obligation to investigate and defend, the amount and limits of liability and the renewal agreement, if any, and except as otherwise provided herein) as are contained in or as may be added to the policy/ies of the Primary Insurers prior to the happening of an accident for which claim is made hereunder and should any alteration be made in the premium for the policy/ies of the Primary Insurers during the currency of this Insurance, then the premium hereon shall be adjusted accordingly.

It is a condition of this Insurance that the policy/ies of the Primary Insurers shall be maintained in full effect during the currency of this Insurance except for any reduction of the aggregate limit contained therein solely by payment of claims in respect of accidents occurring during the period of insurance.

(LMIPOLSTIP000015-16; LMIPOLSTIP 000065-66; LMIPOLSTIP 000103-104)

1958 – 1964 London Excess Wording (Price Forbes and LRD-60 Umbrella)
[See TEX 152, TABS G-L]

INSURING AGREEMENTS

I. COVERAGE –

Underwriters hereby agree, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of the liability

(a) imposed upon the Assured by Law,

or (b) assumed under contract or agreement by the Named Assured and/or any officer, director, stockholder, partner or employee of the Named Assured, while acting in his capacity as such,

for damages, direct or consequential and expenses, all as more fully defined by the term "ultimate net loss" on account of:

(i) Personal injuries, including death at any time resulting therefrom,

(ii) Property Damage,

(iii) Advertising liability,

caused by or arising out of each occurrence happening anywhere in the world.

(LMIPOLSTIP000211; LMIPOLSTIP 000282; LMIPOLSTIP000331)

II. LIMIT OF LIABILITY-

Underwriters hereon shall only be liable for the ultimate net loss the excess of either

(a) the limits of the underlying insurances as set out in the attached schedule in respect of each occurrence covered by said underlying insurances,

or (b) $25,000 ultimate net loss in respect of each occurrence not covered by said underlying insurances,
(hereinafter called the "underlying limits");

and then only up to a further sum as stated in Item 2 (a) of the Declarations in all in respect of each occurrence – subject to a limit as stated in Item 2 (b) of the Declarations in the aggregate for each annual period during the currency of this Policy, separately in respect of Products liability and in respect of Personal Injury (fatal or non-fatal) by Occupational Disease sustained by any employees of the Assured.

In the event of the reduction of exhaustion of the aggregate limits of liability under said underlying insurances by reasons of losses paid thereunder, this policy shall

(1) in the event of reduction pay the excess of the reduced underlying limit

(2) in the event of exhaustion continue in force as underlying insurance.

The inclusion or addition hereunder of more than one Assured shall not operate to increase Underwriters' limit of liability.

(LMIPOSTIP000211; LMIPOLSTIP 000283; LMIPOLSTIP000331-332)

THIS POLICY IS SUBJECT TO THE FOLLOWING DEFINITIONS:

***

6. ULTIMATE NET LOSS –

The term "Ultimate Net Loss" shall mean the total sum which the Assured, or any company as his insurer, or both, become obligated to pay by reason of personal injury, property damage or advertising liability claims, either through adjudication or compromise, and shall also include hospital, medical and funeral charges and all sums paid as salaries, wages, compensation, fees, charges and law costs, premiums on attachment or appeal bonds, interest, expenses for doctors, lawyers, nurses and investigators and other persons, and for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder, excluding only the salaries of the Assured's or of any underlying insurer's permanent employees.

The Underwriters shall not be liable for expenses as aforesaid when such expenses are included in other valid and collectible insurance.

(LMIPOLSTIP000212; LMIPOLSTIP 000285; LMIPOLSTIP000333)

***

THIS POLICY IS SUBJECT TO THE FOLLOWING CONDITIONS:

***

H. ASSISTANCE AND CO-OPERATION

The Underwriters shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding instituted against the Assured but Underwriters shall have the right and shall be given the opportunity to associate with the Assured or the Assured's underlying insurers, or both, in the defense and control of any claim, suit or proceeding relative to an occurrence where the claim or suit involves, or appears reasonably

likely to involve Underwriters, in which event the Assured and Underwriters shall co-operate in all things in the defense of such claim, suit or proceeding.

(LMIPOLSTIP000214; LMIPOLSTIP000288; LMIPOLSTIP000337)

***

J. LOSS PAYABLE

Liability under this policy with respect to any occurrence shall not attach unless and until the Assured, or the Assured's underlying insurer, shall have paid the amount of the underlying limits on account of such occurrence. The Assured shall make a definite claim for any loss for which the Underwriters may be liable under the policy within twelve (12) months after the Assured shall have paid an amount of ultimate net loss in excess of the amount borne by the Assured or after the Assured's liability shall have been fixed and rendered certain either by final judgment against the insured after actual trial or by written agreement of the Assured, the claimant, and Underwriters. If any subsequent payments shall be made by the Assured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy.

***

L. OTHER INSURANCE

If other valid and collectible insurance with any other insurer is available to the Assured covering a loss also covered by this policy, other than insurance that is in excess of the insurance afforded by this policy, the insurance afforded by this policy shall be in excess of and shall not contribute with such other insurance. Nothing herein shall be construed to make this policy subject to the terms, conditions and limitations of other insurance.

(LMIPOLSTIP000214; LMIPOLSTIP000288; LMIPOLSTIP000337)

***

T. MAINTENANCE OF UNDERLYING INSURANCE

It is a condition of this policy that the policy or policies referred to in the attached "Schedule of Underlying Insurances" shall be maintained in full effect during the currency of this policy except for any reduction of the aggregate limit or limits contained herein solely by payment of claims in respect of accidents and/or occurrences occurring during the period of this policy. Failure of the Assured to comply with the foregoing shall not invalidate this policy but in the event of such failure, the Underwriters shall only be liable to the same extent as they would have been had the Assured complied with the said condition.

- **1983-1984 First State Excess Wording [See TEX 153, EXHIBIT 1]**

II. UNDERLYING LIMIT – RETAINED LIMIT

The Company shall be liable only for the ULTIMATE NET LOSS in excess of the greater of the INSURED'S:

A. UNDERLYING LIMIT – an amount equal to the limits of liability indicated beside the underlying insurance listed in the Schedule A of underlying insurance, plus the applicable limits of any other underlying insurance collectible by the INSURED; OR

B. RETAINED LIMIT – The amount specified in Item 3.I.B of the Declarations as the result of any one occurrence not covered by said underlying insurance, and which shall be borne by the INSURED.

(MPF 002237)

III. LIMITS OF LIABILITY

Regardless of the number of persons and organizations who are INSUREDS under this policy and regardless of the number of claims made and suits brought against any or all INSUREDS, the total limit of the Company's liability for ULTIMATE NET LOSS resulting from any one OCCURRENCE shall not exceed the amount specified in Item 3I of the declarations.

The Company's liability shall be further limited to the amount stated as the annual aggregate limit in item 3 II of the declarations on account of all OCCURRENCES during each policy year arising out of:

A. either the PRODUCTS HAZARD or COMPLETED OPERATIONS HAZARD or both combined; or
B. occupational disease by all employees of the INSURED.

In the event that the aggregate limits of liability of the underlying policies listed in the schedule of underlying insurance, are exhausted solely as the result of OCCURRENCES taking place after the inception date of this policy, this policy shall, subject to the Company's limit of liability and to other terms of this policy, with respect to OCCURRENCES which take place during the period of this policy, continue in force as underlying insurance for the remainder of the policy year of the underlying policy or until the aggregate limit of liability as stated in Item 3 II is exhausted, but not for broader coverage than was provided by the exhausted underlying insurance.

In the event that the aggregate limits of liability of the underlying insurance are exhausted or reduced as the result of OCCURRENCES taking place prior to the inception date of this policy, the Company shall only be liable to the same extent as if the aggregate limits had not been so exhausted or reduced.

For purpose of determining the limit of the Company's liability:

(a) all PERSONAL INJURY and PROPERTY DAMAGE arising out of continuous or repeated exposure to substantially the same general conditions, and
(b) all ADVERTISING INJURY OR DAMAGE involving the same injurious material or act, regardless of the number or kind of media used, or frequency of repetition thereof, whether claim is made by one or more persons
shall be considered as arising out of one OCCURRENCE.

(MPF 002237)

CONDITIONS

***

H. Other Insurance: If other collectible insurance with any other INSURER is available to the INSURED covering in loss covered hereunder, except insurance purchased to apply in excess of the sum of the RETAINED LIMIT and LIMIT OF LIABILITY hereunder, the insurance hereunder shall be in excess of, and not contribute with, such other insurance. If collectible insurance under any other policy(ies) of the COMPANY is available to the INSURED, covering a loss also covered hereunder (other than underlying insurance of which the insurance afforded by this policy is in excess), the COMPANY'S total liability shall in no event exceed the greater or greatest limit of liability applicable to such loss under this or any other such policy(ies). If other collectible insurance under any policy(ies) of the COMPANY is available to the INSURED, the ULTIMATE NET LOSS as the result of any one OCCURRENCE not covered by underlying insurance shall not be cumulative.

(MPF002253)

1984-1985 Westchester Excess Wording [See TEX 155, EXHIBIT A]

V RETAINED LIMIT - LIMIT OF LIABILITY

With respect to Coverage I (a), I (b) or I (c), or any combination thereof, the company's liability shall be only for the ultimate net loss in excess of the insured's retained limit defined as the greater of:

(a) the total of the applicable limits of the underlying policies listed in Schedule A hereof, and the applicable limits of any other insurance collectible by the insured; or

(b) an amount as stated in Item 4(C) of the declarations as the result of any one occurrence not covered by the said policies or insurance; and then up to an amount not exceeding the amount as stated in Item 4 (A) of the declarations as the result of any one occurrence. There is no limit to the number of occurrences during the policy period for this claims may be made, except that the liability of the company on account of all occurrences during each policy years shall not exceed the aggregate amount stated in Item 4 (B) of the declarations separately in respect of

1. the products hazard,
2. all professional liability or
3. any other underlying insurance listed in the Schedule of Underlying Insurance which contains coverages (s) which are subject to an aggregate limit of liability for all insured damages.

In the event of the reduction or exhaustion of the aggregate limits of liability of the underlying policies listed in Schedule A by reason of losses paid thereunder, this policy, subject to the above limitations, (1) in the event of reduction, shall pay the excess of the reduced underlying limits; or (2) in the event of exhaustion, shall continue in force as underlying insurance.

All other terms and conditions of this policy remain unchanged.

(KINS-1228-1229)

***

III DEFINITIONS

***

5. "ULTIMATE NET LOSS"

"Ultimate net loss" means the total of the following sums with respect to each occurrence:

1. All sums which the insured. or any company as his insurer, or both, is legally obligated to pay as damages. whether by reason of adjudication or settlement. Because of personal injury, property damage or advertising liability to which this policy applies. and

2. All expenses, other than defense settlement provided in Insuring Agreement II. incurred by the insured in the investigation, negotiation. settlement and defense of any claim or suit seeking such damages, excluding only the salaries of the insured's regular employees, provided "ultimate net loss" shall not include any damages or expense because of liability excluded by this policy.

This policy shall not apply to defense, investigation.settlement or legal expenses covered by underlying insurance.

(KINS-1231)

***

CONDITIONS

***

E. Assistance and Co-operation. Except as provided in Insuring Agreement II (Defense Settlement) or in Insuring Agreement V (Retained Limit – Limit of Liability) with respect to the exhaustion of the aggregate limits of underlying policies listed in Schedule A, or in Condition J (Underlying Insurance) the company shall not be called upon to assume charge of the settlement or defense of any claim made or proceeding instituted against the insured; but the company shall have the right and opportunity to associate with the insured in the defense and control of any claim or proceeding reasonably likely to involve the company. In such event the insured and company shall cooperate fully.

(KINS-1233)

***

I. Other Insurance . If other collectible insurance including other insurance with this company is available to the insured covering a loss also covered hereunder (except insurance purchased to apply in excess of the sum of the retained limit and the limit of liability hereunder) the insurance hereunder shall be in excess of and not contribute with, such other insurance.

(KINS-1233)

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, California. I am over the age of 18 years and not a party to the within action. My business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036, my email address is mna@gmsr.com.

On June 22, 2022, I served the foregoing document(s) described as: **OPENING BRIEF** on the interested party(ies) in this action, addressed as follows:

SEE ATTACHED SERVICE LIST

(X) I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

(X) By Mail: By placing a true copy thereof enclosed in sealed envelopes addressed as above and placing the envelopes for collection and mailing following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

Executed this June 22, 2022 at Los Angeles, California.

(X) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/s/ Monique N. Aguirre
Monique N. Aguirre

Truck Insurance Exchange v. Kaiser Cement and Gypsum Corp.
Supreme Court Case No. S273179

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VIA U.S. MAIL AND TRUEFILING:

The Honorable Kenneth Freeman
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