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

TRUCK INSURANCE EXCHANGE'S COMBINED REPLY TO AMICUS BRIEFS

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INTRODUCTION

The amicus briefs filed by United Policyholders and Santa Fe Braun, Inc. (collectively, the "amici") largely retread the same ground covered by the respondent carriers' merits brief.[1] The parroting of the same shotgun arguments is no more persuasive now than when presented by the respondent carriers.

A. An Insured's Reasonable Expectations Are That *All* Carriers On The Risk Will Contribute To Jointly Covered Losses.

Civil Code section 1432. The starting point of equitable contribution is statutory: Per 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." Section 1432 is the foundation of equitable contribution claims among carriers. (*Employers Ins. Co. v. Travelers Indemnity Co.* (2006) 141 Cal.App.4th 398, 403-404 [relying on section 1432]; *Safeco Ins. Co. of America v. Superior Court* (2006) 140 Cal.App.4th 874, 879 [same]; *Fireman's Fund Ins. Co. v. Maryland Cas. Co.* (1998) 65 Cal.App.4th 1279, 1293 & fn. 3 [same].) Yet neither amicus brief even mentions section 1432. The statute cannot be ignored: Section 1432 provides carriers with equitable contribution rights independent of the insured's interests.

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[1] See Truck's Reply Brief, at 9, fn. 1, regarding the definition of "respondent carriers."

The amici's position is that a carrier's "share" should be determined by the *insured's* interests at the moment the equitable contribution claim arises. But the law does not envision such ever-changing situational jurisprudence. To begin with, the law in effect *at the time of a policy's issuance* necessarily defines the insured's expectations: "As a general rule, all applicable laws in existence when an agreement is made, which laws the parties are presumed to know and to have had in mind, necessarily enter into the contract and form a part of it, without any stipulation to that effect, as if they were expressly referred to and incorporated." (*Swenson v. File* (1970) 3 Cal.3d 389, 393, cleaned up.[2]) Section 1432 has been in effect since 1872. Concepts of contribution between insurance carriers existed long before Kaiser Cement purchased the 1974 Truck policy. (See *Pacific Emp. Ins. Co. v. American Mut. Liability Ins. Co.* (1966) 65 Cal.2d 318, 321, overruled on another ground by *Herzog v. National American Ins. Co.* (1970) 2 Cal.3d 192; *Continental Cas. Co. v. Zurich Ins. Co.* (1961) 57 Cal.2d 27, 37 [pro rata contribution to defense expenses].)

In purchasing the 1974 Truck policy, Kaiser Cement is deemed to have known and understood that Truck, as part and parcel of its obligations under the policy, would have the right to seek contribution from other carriers affording coverage for the

[2] By "cleaned up," we mean citations or internal quotation marks omitted or both. (See Truck's Reply Brief, at 13, fn. 2.)

same losses. That, by law, was Kaiser Cement's reasonable expectation.

Nor could Kaiser Cement have expected that only "primary" policies in other policy years might be called upon to contribute even if those other policies were triggered because of exhaustion of underlying coverage. Section 1432 covers *all* entities that are jointly and severally liable for the same loss.

No Targeted-Tender Rule. Section 1432's rule is the near universal rule across the country regarding contribution between carriers on long-tail claims covered by multiple policies and policy periods. (See Truck's Reply Brief, at 34-36.) The amici, besides ignoring section 1432 itself, also ignore this nationwide precedent. Nor do they address *American States Ins. Co. v. National Fire Ins. Co. of Hartford* (2011) 202 Cal.App.4th 692, 706, fn. 8, which reaffirms the California rule that carriers are entitled to contribution and there is no selective-tender rule allowing the insured to choose which carrier is to bear the entirety of a loss. (See Truck's Reply Brief, at 34-35.)

The "Other Insurance" Expectation. Truck's policy, like every other policy involved here, has an "other insurance" provision to the effect that it will not afford coverage if coverage is provided by other insurance. Although per *Montrose Chemical Corporation v. Superior Court of Los Angeles County* (2020) 9 Cal.5th 215, 232-233 (*Montrose III*), such clauses do not apply to *other* policy years, the policy language provides a clear signal to Kaiser Cement that Truck will not bear coverage alone for the *same* policy period.

Penalizing No-Aggregate Limit Policies. The amici suggest that Truck should be penalized for having agreed to a "no aggregate limit" policy. (Santa Fe Braun ("SFB") Amicus Brief, at 11-12, 15; United Policyholders ("UP") Amicus Brief, at 54-56.) But Truck is living up (at huge expense) to its "no aggregate limit" obligations by defending and settling thousands upon thousands of individual cases, even though that liability rests on Supreme Court precedent regarding long-tail coverage decided after Truck agreed to the policy. But a no-aggregate limit does not waive statutorily premised contribution rights against other carriers that jointly and severally cover the same risk. There is no reason to penalize an insurer living up to its no-aggregate-limit obligations by holding that such an insurer also forfeits its statutory right to contribution.

The amici argue that Truck should not be relieved of a bad "business decision" in issuing a no-aggregate policy. (SFB Amicus Brief, at 15.) But even ignoring that insurance-coverage law changed after Truck agreed to the policy, Truck is not asking to be relieved of its decision. It asks only that it pay its share, not all other insurance carriers' shares too. The amici's position would relieve the respondent carriers of *their* business decisions to promise to continue in force as underlying insurance after the exhaustion of specified scheduled insurance policies or, in the case of the early London Market policies, to pay *all* amounts owed on covered losses after the exhaustion of only specified, scheduled insurance policies.

Relying on *Montrose III*, United Policyholders argues that this Court has rejected arguments regarding "fairness" between carriers notwithstanding what section 1432 requires. (See UP Amicus Brief, at 54.) But that is not what *Montrose III* holds. *Montrose III* rejects a rule requiring horizontal exhaustion across all policy periods because the question "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. There is no obvious unfairness to insurers from a rule that requires them to bear this *administrative* burden." (*Montrose III*, *supra*, 9 Cal.5th at p. 236, italics added.) The Court noted: "Even though a rule of vertical exhaustion permits Montrose 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." (*Ibid.*, italics added.)

The reason *Montrose III* touts the burden on the carrier as administrative, not substantive, is because the initially responding carrier can obtain contribution from other carriers that would be liable to the insured. The ability to obtain contribution is an integral part of *Montrose III*'s fairness calculation. Whenever appellate courts have applied an "all sums" broad requirement to compel a carrier to pay for losses accruing in other policy periods, they have acknowledged in their next breath that the initially tagged carrier can obtain

contribution from other carriers. (See, e.g., *Montrose III*, *supra*, 9 Cal.5th at p. 228 ["Importantly, the insured has immediate access to the insurance it purchased. The insurers can then sort out their proportional share through actions for equitable contribution or subrogation," cleaned up]; *State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186, 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"].)

The amici seek to remove the underlying contribution predicate to the "all sums" rule. But that predicate is what makes the rule fair to carriers and insureds (who still get paid what the various carriers agreed to pay—no more, no less).

B. Once The Underlying Policies Specified And Scheduled In Respondent Carriers' Policies Were Exhausted, Those Carriers And Truck Were On The Same Level.

United Policyholders correctly notes that "the first step in an equitable contribution analysis is to examine the pertinent insurance policies." (UP Amicus Brief, at 30.) But the policy language supports Truck, not the amici and respondent carriers.

Express Policy Language. The policy language can mean only one thing: Upon exhaustion of the specifically identified policies, respondent carriers function as primary carriers. The amici argue that Truck and respondent carriers can *never* be on the same level and that the exhaustion of specified, scheduled underlying policy limits effectively has no effect on the

respondent carriers' standing. (SFB Amicus Brief, at 10-11, 15-16; UP Amicus Brief, at 33-34.) But that make no sense. (See Truck's Reply Brief, at 29.)

Most of the respondent carriers' policies expressly promise that they "continue in force *as* underlying insurance." (See Truck's Opening Brief, at 18-20, italics added.) "As" means "to the same degree." (See Dictionary.com <https://www.dictionary.com/browse/as> [1. "to the same degree, amount, or extent; similarly; equally"]; Merriam-Webster Online Dict. <https://www.merriam-webster.com/dictionary/as> [1. "to the same degree or amount"].) Thus, the policy's plain language indicates that upon exhaustion of the specifically scheduled primary policies the coverage continues in force as underlying—that is, primary—insurance.

This is not just Truck's view. The definitive treatise on umbrella policies agrees that this is what the plain language means. (See Robertson, The Umbrella Book (2d ed., Warren, McVeigh & Griffin 1980) p. 12 ["Drop-down feature: When underlying aggregate policy limits are reduced or exhausted through the payment of loss, or when there is no underlying coverage, the umbrella should 'drop down' *to become the primary insurance* for defense, indemnity and related expenses," bold omitted, italics added].) If the "continue in force as underlying insurance" does not mean *as* primary insurance like the exhausted specifically scheduled policies, the language becomes meaningless and unintelligible.

That Truck lives up to its obligations by responding to every claim within its coverage is no reason to relieve respondent carriers of *their* express promises to "continue in force as underlying insurance" upon the exhaustion of specifically scheduled particular policies or *their* obligation to pay all sums due upon the exhaustion of specifically-scheduled policies.

Given the policy language about exhaustion of only specifically identified, scheduled same-policy-period underlying policies, no issue exists regarding contribution between insurers on different "levels." Upon exhaustion of the specifically identified scheduled policies, Truck and respondent carriers were on the *same* level and share the *same* joint and several obligations as to Kaiser Cement's losses. In this context, the well-worn concept that there is no contribution between excess and primary carriers in the same policy period is beside the point. (Nor is it clear, in any event, that any such hard and fast rule exists; *Signal Companies, Inc. v. Harbor Ins. Co.* (1980) 27 Cal.3d 359, 369 (*Signal*), leaves open the *possibility*, in the appropriate case, of contribution between excess and primary policies in the same policy period.)

And, even as to the older London Market policies, once the scheduled underlying policies exhausted, London Market was on the same level as Truck as regards indemnity obligations even if they do not share defense expenses.

No Different Rule For Insureds And Carrier-Sought Contribution. Presumably if Truck were not on the scene, Kaiser Cement and its friends would be arguing that continuing

as primary insurance is *exactly* what that language means. Not surprisingly, this Court has held that ostensible "excess" insurance policies must respond *as primary policies* when that is what their policy language dictates. (*Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 398 & fn. 9 (*Powerine II*) ["[T]he policies here in question are *not* merely intended to operate as excess insurance. Under the limitation of liability provision, Central National has agreed to pay the excess of 'the amount of ultimate net loss ... in respect of each occurrence *not covered by said underlying insurances*,'" original italics; umbrella policy provisions]; see *American States Insurance Company v. Insurance Company of Pennsylvania* (9th Cir. 2020) 800 Fed.Appx. 452, 454 [umbrella carrier required to contribute to defense costs paid by primary carrier].) The same is true here: The policies at issue here were "*not* merely intended to operate as excess insurance." (*Powerine II*, at 398, original italics.)

United Policyholders seeks to distinguish cases that hold that "continue in force as underlying insurance" means just what Truck argues, by claiming they only apply in insured-carrier disputes. (UP Amicus Brief, at 42-43, discussing *Interstate Fire & Cas. Co. v. Auto-Owners Ins. Co.* (Minn. 1988) 433 N.W.2d 82 and *Sinclair Oil Corp. v. Allianz Underwriters Ins. Co.* (Ill.Ct.App. 2015) 39 N.E.3d 570.) But there is no justification for the same policy language having different meanings in contribution claims. The language cannot mean different things depending on whether Truck's policy is in the mix or not. United Policyholders offers no rationale other than the fact that having

two contrary readings of the same policy language might reach a result that its friend Kaiser Cement seeks in this particular instance. The law does not support such a push-me-pull-you approach.

Contribution From Other Carriers Equally At A Primary Level. United Policyholders recognizes that Truck properly obtained contribution from other policy period primary carriers before those policies exhausted: "No one disputes that under *Montrose III*, Truck would be entitled to seek equitable contribution from Kaiser's other *primary* insurers as they would be covering the same risk at the same level as Truck." (UP Amicus Brief, at 32, original italics.) Thus, the amici concede that in that context Truck's no-aggregate-limit promise did not waive Truck's right to seek contribution, even though Kaiser Cement's primary coverage in other policy periods eroded. Nor did Truck obtaining contribution from other primary carriers alter the obligation of the excess carrier over Truck's policy (Insurance Company of the State of California) to pay losses to the extent that they exceed Truck's $500,000 policy limit. The amici provide no reason why the result should differ here.

Duty To Defend And Policy Limits. Likewise, it is not at all clear whether "continue in force as underlying insurance" would mean that defense costs assumed in doing so would reduce policy limits. They do not in typical primary insurance policies, such as the now-exhausted specifically scheduled policies. Nor do they do so when umbrella policies drop down to become primary insurance. (See Robertson, The Umbrella Book, *supra*, at p. 12

[upon exhaustion of the underlying policy, the umbrella policy becomes "the primary insurance for *defense*, indemnity and related expenses," italics added].) The "continue in force as underlying insurance" language would hardly function to "fill the gap"—the function claimed by the amici and respondent carriers in their briefs—if it resulted in the insured being left without a defense. One expects that if Truck were not on the scene, Kaiser Cement and its friends would be vigorously arguing that "continue in force as underlying insurance" means act as a primary carrier in *all* respects. The policy interpretation cannot depend on whether Truck's policy exists or not.

United Policyholders argues that the "continue in force" promise is only owed to Kaiser Cement and cannot affect the contribution analysis. (UP Amicus Brief, at 44.) It cites the federal, pre-*Montrose III*, district court opinion, *Flintkote Co. v. General Acc. Assur. Co. of Canada* (N.D.Cal. Aug. 6, 2008, No. C 04-01827 MHP) 2008 WL 3270922, at *19, for that proposition. But as we have already explained, *Flintkote* does not say that. (See Truck's Reply Brief, at 19, 29.) United Policyholders' made-up rule proves too much, as one could always argue as a means of avoiding contribution that one promise or another is only made to the insured. Contribution, per section 1432, is measured by a joint and several *obligation to the insured*. If the policy obligates the carrier to the insured, it creates a joint and several obligation subject to contribution.

Excess Is Not Forever. The amici also argue, in effect, that once an excess carrier, always an excess carrier, regardless

of policy language. (See SFB Amicus Brief, at 8-10, 15-16, 22; UP Amicus Brief, at 15-16, 33-35, 44.) (Recall that *none* of the policies other than the older London Market policies, in fact, label themselves as "excess" policies.) There is no support for such a proposition. And it runs counter to the case law allowing insureds early access to "excess" carrier funds as if those policies are now first up. Both *Montrose III* and *SantaFe Braun, Inc. v. Insurance Company of North America* (2020) 52 Cal.App.5th 19 (*SantaFe Braun*) hold that once the specified same-policy-year underlying insurance is exhausted, second-level excess policies (*Montrose III*) and first-level excess policies (*SantaFe Braun*) have to respond as if they are the first-position, prime policy at issue. If the rule were once an excess or second-level excess policy, always an excess or second-level excess policy, *Montrose III* and *SantaFe Braun* would have come out differently.

By the express terms of their promise to "continue in force *as* underlying insurance," the respondent carriers agreed to become *primary* carriers on the happening of a specific event—exhaustion of same policy-period scheduled insurance. (*Powerine II*, *supra*, 37 Cal.4th at p. 398 & fn. 9.) The respondent carriers cannot promise one thing and then claim refuge under a standard that assumes the promises don't exist. "What we have said in prior cases applies here as well: There is no evident unfairness to insurers when their insureds incur liabilities triggering indemnity coverage under the negotiated policy contract." (*Montrose III*, *supra*, 9 Cal.5th at p. 236.)

Policy As A Whole. United Policyholders argues that the "continue in force as underlying insurance" language has to be read as part of the policy as a whole. (UP Amicus Brief, at 38-39.) But United Policyholders, like respondent carriers, has no explanation for what meaning that language can have that conforms to its specific wording—that is, to the fact that the language is tied to exhaustion of *only* specifically identified scheduled policies, unlike the rest of the policy. The policy language does not support a supposition that the scheduled-policies-exhaustion-only trigger somehow creates an otherwise unarticulated rule of horizontal exhaustion across multiple policy periods. United Policyholders nowhere addresses the rule that where different language is used in different portions of the policy, different meaning is presumed. (See Truck's Reply Brief, at 16.) No reasonable basis exists to limit the "continue in force as underlying insurance" promises. Nor can the whole policy mean one thing as to an insured and another as to contribution from other carriers.

Premiums Cannot Be Determinative. United Policyholders also repeats the respondent carriers' flawed argument about supposed policy premium differences. (See UP Amicus Brief, at 15-16, 20.) The argument remains equally unpersuasive. As Truck explained in its opening brief (at 53-54) and its reply brief (at 31-33), premiums charged cannot be the basis to determine coverage obligations across policy periods. That's what *SantaFe Braun*, *supra*, 52 Cal.App.5th at p. 29, holds. And for good reason. Premiums are dependent upon a

multitude of factors that differ from year to year, including insurance market conditions and the overall state of the economy. (See Truck's Reply Brief, at 32.) Respondent carriers presumably priced in their continue-in-force-as-underlying-insurance obligations when setting their premiums. Even the older London Market policies presumably priced in that they would have to respond in the first instance once the scheduled underlying policies exhausted. If premiums were the measure of coverage, Truck would not have had to pay north of $400 million on a policy that had a premium of a little over $100,000.

C. Neither *Signal, Community Redevelopment,* Nor Any Other Case Bars Or Undermines Contribution Here.

Both amicus briefs, like the respondent carriers' brief, seek to find solace in *Signal*, *supra*, 27 Cal.3d 359. (See SFB Amicus Brief, at 9; UP Amicus Brief, at 16, 55.) But *Signal* does not help them. To begin with, *Signal* expressly disavows a one-size-fits-all rule. (*Id.* at p. 369.) Further, *Signal* did not involve coverage in multiple policy periods involving long-tail claims. Nor did it involve policies that promised to "continue in force as underlying insurance," that expressly covered defense expenses when doing so, or that promised to pay all claims upon a condition that had long ago occurred (the exhaustion of specified scheduled policies). *Signal* is irrelevant.

And *Signal*'s citation of *Universal Underwriters Ins. Co. v. Aetna Ins. Co. of Hartford, Conn.* (1967) 249 Cal.App.2d 144 (see SFB Amicus Brief, at 9) makes sense when read in context. In

Universal Underwriters Ins. Co., the court decided that in a single-policy-period motor-vehicle-accident case, one policy was primary and another was excess. It held that "[s]ince Aetna provided primary coverage in an amount sufficient to cover the entire loss, it also was liable to pay all costs of defense including attorney fees." (*Universal Underwriters Ins. Co.*, at p. 152.) That's not even remotely close to this case. Here, respondent carriers are not (or at least are no longer) excess. And this case involves multiple policy periods in which the original "primary coverage" in the relevant policy periods not only is *not* "in an amount sufficient to cover the entire loss," but no longer even exists.

The amici also extensively rely on *Community Redevelopment Agency v. Aetna Casualty & Surety Co.* (1996) 50 Cal.App.4th 329 (*Community Redevelopment*). But as Truck has already explained, and *SantaFe Braun* expressly recognizes, the reasoning in *Montrose III* and *SantaFe Braun* compels the conclusion that *Community Redevelopment*'s horizontal exhaustion requirement is no longer the law. (See Truck's Opening Brief, 32-50; Truck's Reply Brief, 9-12, 20-26; *SantaFe Braun*, *supra*, 52 Cal.App.5th at p. 30 [noting that *Community Redevelopment* and cases following it "rely on an interpretation of policy language rejected by the Supreme Court in *Montrose III*. While those cases hold, for example, that 'other insurance' clauses preclude attachment of coverage until there has been horizontal exhaustion, *Montrose III* holds otherwise," cleaned up]; see also *Gull Industries, Inc. v. Granite State Insurance Company*

(Wash.Ct.App. 2021) 493 P.3d 1183, 1195 ["[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"].) Nor are the other cases the amici rely on relevant:

- *Transcontinental Ins. Co. v. Insurance Co. of the State of Pennsylvania* (2007) 148 Cal.App.4th 1296 (*Transcontinental*), was previously cited by respondent carriers. As Truck already has explained (Truck's Reply Brief, at 29-30, fn. 5), *Transcontinental* involved carriers that insured *different* entities, and thus had no joint and several liability; and it expressly disavowed addressing equitable contribution. (*Id.* at pp. 1300-1301, 1304.)
- *Aerojet-General Corp. v. Transport Indem. Co.* (1997) 17 Cal.4th 38 (*Aerojet*) involved an insured which obtained "fronting" policies where, in fact, the insured paid all expenses. (*Id.* at pp. 49-50.) No such "fronting" policies are involved here. *Aerojet* holds that other carriers could not obtain contribution *from the insured* for what, essentially, was the insured's own direct obligation. (*Id.* at p. 72.) The insured was not jointly and severally obligated to itself. Truck is not seeking a penny in contribution from Kaiser Cement. Its contribution claim is against other carriers covering the same loss.
- In *Carmel Development Co. v. RLI Ins. Co.* (2005) 126 Cal.App.4th 502 (*Carmel*), one excess carrier promised to pay sums in excess of a specifically scheduled policy,

while another excess carrier promised only to pay sums in excess of *all* scheduled and unscheduled policies. (*Id.* at pp. 510-511.) *Carmel* held that the first carrier was a specific excess obligated to respond before the second carrier, which was a general excess. (*Id.* at pp. 516-517.) Of course, here, respondent carriers promised to continue in force as *underlying* insurance upon the exhaustion of *specifically scheduled* policies. (And the older London Market policies promised to pay losses upon the exhaustion of specifically scheduled policies.) Respondent carriers are in the position of the first carrier in *Carmel*, not the second.

- In *Span, Inc. v. Associated Internat. Ins. Co.* (1991) 227 Cal.App.3d 463, the insured claimed that an excess carrier had to drop down to cover amounts below its trigger limit because the underlying primary carrier was insolvent. (*Id.* at p. 469.) But the excess carrier's policy expressly provided that it did *not* have to cover amounts not covered because of the primary carrier's insolvency. (*Id.* at p. 480.) By contrast here, respondent carrier's policies expressly state that they *will* continue in force as underlying insurance upon exhaustion of specified scheduled policies.[3]

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[3] Like respondent carriers, United Policyholders makes a cursory one-paragraph, no-heading law-of-the-case argument based on *Kaiser Cement & Gypsum Corp. v. Insurance Co. of the State of Penn. (ICSOP)* (2013) 215 Cal.App.4th 210, 215-16, opn. ordered depub. July 17, 2013. (See UP Amicus Brief, at 35.) The untitled

None of these cases determines the outcome here. Indeed, even United Policyholders acknowledges that there is no published on-point opinion. (See UP Amicus Brief, at 41.) As a result, this case must be decided based on well-established general propositions:

(1) Statutorily premised equitable contribution arises from carriers' joint and several obligations to the same insured;

(2) The scope of the carriers' obligations to the insured has to be measured by their respective policy language;

(3) The same policy language, interpreted as a matter of law, means the same thing no matter who is reading or applying it;

(4) "Other insurance" provisions do not apply across policy periods;

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argument should be ignored. (See *Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1294 [cursory argument without heading waived]; *Roe v. McDonald's Corp.* (2005) 129 Cal.App.4th 1107, 1114 [same].)

In any event, the argument fares no better on the merits than the same argument in respondent carriers' brief. United Policyholders posits that *ICSOP* followed *Community Redevelopment*, *supra*, 50 Cal.App.4th 329. But *ICSOP* did not involve the equitable contribution issue before this Court, the Court of Appeal here never relied on *ICSOP* or law of the case in its Phase III analysis, and *ICSOP* was decided before *Montrose III* and *SantaFe Braun*. (See Truck's Reply Brief, at 41-43.) *ICSOP* and law of the case are simply irrelevant distractions here.

(5) Although the insured gets to pick a carrier to respond *initially*, that carrier gets to seek contribution from other triggered policies and simply undertakes the *administrative* task of fronting funds and then collecting contribution from other carriers; and

(6) California and the vast majority of states reject a targeted-tender rule and do *not* allow the insured to choose the *final* allocation of losses between carriers.

D. The Trial Court Did Not Exercise Discretion; It Made A Decision As A Matter Of Law.

United Policyholders, echoing respondent carriers, argues that the trial court's decision to deny *any* contribution to Truck must be reviewed as an exercise of discretion. (UP Amicus Brief, at 16-17, 31-33, 45-56.) But United Policyholders erroneously cites comments from the trial court's phase II decision, which is not before this Court and therefore is irrelevant. (See JAA 1225-1257; see UP Amicus Brief, at 17.) In the phase III determination that *is* before this Court, the trial court did *not* exercise discretion and it certainly did not do so understanding the proper legal framework. (See JAA 1260-1310.)

The trial court's phase III decision does *not* mention balancing equities. Rather, it is premised *exclusively* on the trial court's (incorrect) views on policy interpretation. The phase III discussion heads with: "*Under the specific provisions of the excess policies at issue*, and under the law of the case, the excess carriers are not obligated to drop down and equitably contribute." (JAA 1292, bold omitted, italics added.) It then "[a]ppl[ied] the *rules of*

policy interpretation referenced *supra*, and … examined the applicable provisions of the excess policies at issue," to conclude that "*under California law* … the excess obligations of the carriers in this case are not triggered until all of the primary policies horizontally exhaust." (JAA 1297-1298, italics added and omitted.)

In reaching this matter of law conclusion, it repeatedly relied on *Community Redevelopment*, *supra*, 50 Cal.App.4th 329, and its progeny. (JAA 1270, 1272-1273, 1275, 1293-1296 ["A line of *California cases* illustrates why the Court is not persuaded by Truck's position," italics added], 1299-1301.) The trial court nowhere mentions factors that it is supposedly balancing.

Likewise, the Court of Appeal did not hold that the trial court exercised discretion. Like the trial court, it followed the now-questionable precedent of *Community Redevelopment*. Nowhere did the Court of Appeal talk about the trial court's phase III ruling as flowing from the balancing of equitable factors. (See *Truck Insurance Exchange v. Kaiser Cement* (Cal.Ct.App., Jan. 7, 2022, No. B278091) 2022 WL 71771, at *25-*28.)

If *Community Redevelopment* and its horizontal exhaustion requirement are no longer the law (as the reasoning in *Montrose III* and *SantaFe Braun* compels), then the trial court's phase III decision must be revisited. As pointed out in Truck's Reply Brief (at 26-27), the non-exercise of discretion or the exercise of discretion under a mistaken legal standard *is an abuse of discretion*. By ignoring these basic propositions, United

Policyholder's resort to review for abuse of the exercise of discretion rings hollow.

E. The Amici's Request For Situational Jurisprudence Based On An Insured's Shifting Interests Must Be Rejected.

At heart, the amici argue for situational, ever-malleable jurisprudence without any real rules other than one: that no matter the circumstance and no matter the extent to which existing rules must be distorted, a particular insured's interest at the moment of contribution must prevail and there can be no detriment to the insured's at-the-moment interests. (See SFB Amicus Brief, at 13-14, 17-18; UP Amicus Brief, at 13, 45-51.) But that is not, and cannot be, the law.

In fact, there already is precedent in this case rejecting such an approach. In *London Market Insurers v Superior Court* (2007) 146 Cal.App.4th 648, the Court of Appeal agreed with respondent carriers to reject Kaiser Cement's financial interest in a single occurrence approach that would have minimized the number of deductibles Kaiser Cement must pay. (*Id.* at p. 653, fn. 2.)

Contribution between carriers is "equitable" because no contractual relationship exists among the carriers; their only contract is with the insured. (*Signal*, *supra*, 27 Cal.3d at p. 369 ["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," cleaned up].) And, it is equitable not in some abstract sense but as between the obligations that the respective carriers have undertaken to the insured.

The amici want to interject the insured's particular views or interests at the time of contribution into this "equity" analysis. But the insured's relationship vis-à-vis its insurers rests *on contract*, not equity. The policies define the carrier's obligations and the insured's reasonable expectations and sets them at the time of contracting. The policy language, not any subsequent "equity" analysis, defines what is fair or equitable between the insured and carrier. Equity only applies to the obligations *between carriers*. In this Court's words, Kaiser Cement "and the insurers were generally free to contract as they pleased. They evidently did so. They thereby established what was fair and just inter se. [This Court] may not rewrite what they themselves wrote.... As a general matter at least, [appellate courts] do not add to, take away from, or otherwise modify a contract for public policy considerations." (*Aerojet*, *supra*, 17 Cal.4th at p. 75, cleaned up.)

At the time Kaiser Cement entered into the policies at issue here, its expectation necessarily had to be that every carrier which agreed to cover a particular loss would be covering that loss, not that it could saddle Truck or some other carrier with paying the entire amount notwithstanding other applicable

coverage.[4] Because the respondent carriers' coverage to Kaiser Cement has been triggered (by the exhaustion of the underlying scheduled policies), which allows Kaiser Cement to access that coverage if it wants, no contractual basis exists to deny Truck the right to seek contribution from those carriers.

Instead of simply interpreting the policy language as written, the amici contend that different rules should apply to interpreting the same policy language when determining an insured's rights to coverage versus determining carriers' rights to equitable contribution based on joint and several obligations to the insured shared with other carriers. (SFB Amicus Brief, at 17, 21; UP Amicus Brief, at 30-31, 37.) The amici cite no authority for such a rule, other than unsupported suggestions that an insured's interests must always prevail and insureds can never be prejudiced. But the starting point of any contribution analysis is what obligations the policy language triggers to the insured. That same language cannot mean different things in the hands of the insured than in the hands of a carrier seeking contribution. As Truck has pointed out, there is no rule that an insured's interests prevail over policy language. (See Truck's Reply Brief, at 38-39.)

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[4] Before the Court of Appeal's 2007 decision in *London Market Insurers*, *supra*, 146 Cal.App.4th 648, Kaiser Cement's expectation and position was that Truck only had one policy limit for asbestos losses per policy year. Its current position is an about-face from its pre-2007 actual expectation.

The amici point to dicta in *Signal* identifying the carriers' relationships with the insured as one of several equitable factors to be weighed. (UP Amicus Brief, at 16.) But, notably, *Signal* did not identify the insured's interests of the moment as a factor. The question, rather, was just the carriers' respective *status* vis-à-vis the insured. Here, upon exhaustion of the specified scheduled underlying policies, the respondent carriers stood in the same relation to Kaiser Cement as Truck—they were all in the first or primary position to respond to losses. Again, the policies define what is "fair" or "just" as between Kaiser Cement and its carriers. Equitable contribution does not afford insureds an ability to re-write or re-interpret the insurance policy based upon the insured's particular interests at the moment of contribution.

The amici's plea for ever-fluctuating policy interpretations based on an insured's at-the-moment preferences would create havoc. The identical language would mean different things from insured to carrier and from case to case, as insureds' interests in particular matters fluctuate. Indeed, the insured's interests here differ between the pre-Truck and post-Truck carriers. There is little, if any, chance of any claim being brought now arising out of injury that ceased before Truck's first 1965 policy or its first no-aggregate limit policy in 1971 (more than 50 years ago). Kaiser Cement should have no interest in whether those policies contribute in full to losses shared with Truck. It loses nothing if they do.

In the present instance, the concept that a policy with no-aggregate limits can never obtain contribution from a policy with

aggregate limits will be the death knell to no-aggregate policies. In the long run, that will not benefit insureds. Opinions which create outsized liability obligations will have the unintended effect of simply eliminating insurance from the market. That's what happened with asbestos claims. After 1984, Kaiser could not obtain coverage for asbestos claims. That's why it is in bankruptcy.

Creating a scheme whereby insureds years, or decades, after the fact can foist decades of losses and defense costs on only one of multiple carriers with triggered coverage will create such uncertainty that carriers will not be able to forecast, evaluate, or accurately price risk. Again, the result will simply be the exodus of coverage from the market. By contrast, the sharing of risk by all carriers which promised the insured to provide coverage for the particular period holds all carriers accountable. It spreads the risk across all insurers which promised to cover it and accepted premiums for doing so. A party which accepts the benefit (premiums) must share in the burden (paying losses). (Civ. Code, § 3521 ["He who takes the benefit must bear the burden"].) And it comports with the insured's *reasonable* expectations as defined by the insurance policies.

Finally, the hyperbolic parade of horribles that amici assert about coverage for Kaiser Cement and payments to claimants are irrelevant. (See UP Amicus Brief, at 46-56.) To begin with, they find no support in the present record and are not backed by citations to any evidence. That is especially true as regards the London Market policies with coverage in 1965 at the latest,

where there is little, if any, likelihood of further claims. Nor do the unsupported claims address the towers of insurance coverage that Kaiser Cement has.

Nor can the unsupported assertions change what the language of the various policies and the statutory right to contribution dictate. There is nothing unfair or inequitable in holding carriers to their policy language, in requiring all to share jointly covered losses, or in enforcing statutorily afforded contribution rights. It is not unfair or inequitable if Truck recovers some of the more than $400 million it has paid on Kaiser's behalf so far (based on a little over $100,000 in premiums) from others that received premiums to cover the same risk. Truck alone should not have to bear the burden.

CONCLUSION

The amicus briefs add nothing to the discourse here. If anything, they highlight the defects in respondent carriers' arguments.

This Court should reverse the judgment of the Court of Appeal and the trial court as regards the phase III equitable contribution issue on which this Court granted review. It should remand for the trial court to determine in the first instance the respondent carriers' appropriate equitable contribution to the losses that Truck, and Truck alone, has borne to date.

Date: February 27, 2023

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **TRUCK INSURANCE EXCHANGE'S COMBINED REPLY TO AMICUS BRIEFS** contains **7,097** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: February 27, 2023

/s/ Robert A. Olson
Robert A. Olson

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 6420 Wilshire Boulevard, Suite 1100, Los Angeles, California 90048, my email address is gwest@gmsr.com.

On February 27, 2023, I served the foregoing document(s) described as: **TRUCK INSURANCE EXCHANGE'S COMBINED REPLY TO AMICUS BRIEFS** 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 February 27, 2023 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/ Gwendolyn West
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Truck Insurance Exchange v. Kaiser Cement and Gypsum Corp.
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