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## **Excess Policies Can't Be Stacked Selectively**

By Andrew B. Downs

Now in its 28th year, the Montrose Chemical Corporation coverage litigation continues to be a rich source of coverage law in California. Late last week, in what is at least the fifth published appellate decision in this long-running saga, the California Court of Appeal rejected Montrose's effort to electively stack its excess policies for only some policy years. The court also reversed the trial court's summary judgment setting a horizontal exhaustion standard, requiring instead a policy by policy analysis. *Montrose Chemical Corp v. Superior Court*, No. B272387, 8/31/2017.

From 1960 to 1982, Montrose produced DDT at a plant in Torrance, California. Since 1990 it has been defending CERCLA claims as well as litigating with the multitude of insurers who issued it primary or excess liability policies from 1960 to 1986. The Montrose litigation has produced several noteworthy decisions, including establishing a standard for the duty to defend (*Montrose Chemical Corp. v. Superior Court*, 6 Cal.4th 287 (1993)), and adopting the continuous trigger rule for progressive property damage liability (*Montrose Chemical Corp. v. Admiral Ins. Co.*, 10 Cal.4th 645 (1995)).

This decision comes from Montrose's effort to build upon the California Supreme Court's 2012 decision in *State of California v. Continental Ins. Co.*, 55 Cal.4th 186, where the court allowed policyholders to stack primary and excess policies across multiple policy years. Here, Montrose sought a declaration that it could choose which of the 115 excess policies at issue to stack, so long as the lower layer policies for the particular policy year were exhausted. The insurers countered with a request that the court declare the policies must be exhausted horizontally—that is all applicable lower layer policies must be exhausted before any higher layer excess policy has a duty to pay.

The Court of Appeal rejected Montrose's attempt to let it pick and choose the years for which policies would be called upon. It characterized *Continental's* holding as permitting the policyholder to access policies across multiple triggered policy periods but concluded it had not addressed the order or sequence in which those policies may be called upon to pay.

Instead, the Court of Appeal looked at the policy language. It noted many policies had language providing they attached only upon exhaustion of all available insurance, not just lower layer policies within the same policy period. The court held that the policies' other insurance clauses must be given effect according to their terms—when those clauses required exhaustion of all other available coverage, selective stacking was not permitted. The court summarized its holding as follows: "*All we hold today is that insureds must exhaust lower layers of coverage before accessing higher layers of coverage if the language of the excess policies so requires.*" (emphasis in original). In doing so, it also concluded a blanket horizontal exhaustion rule was inappropriate because the language of each particular policy needed to be considered.

This decision reminds us that policy language matters. That said, this opinion is unlikely to be the last word on this subject. Montrose will almost certainly petition for review by the California Supreme Court. If the California Supreme Court grants review, this decision will not have precedential value and we'll simply have to wait a few more years for the Supreme Court to decide these issues.