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California Court of Appeal Rejects Insured's Request for Vertical "Elective Stacking" of Excess Policies in Long-Tail Claim

In the latest installment of the Montrose coverage litigation, a California court of appeal rejected the insured's attempt to vertically "electively stack" its excess policies, which it sought to do because it had purchased more excess layers with higher total limits for selected policy years. However, the court also declined to apply a blanket horizontal exhaustion rule. Instead, the court stated that the excess policy provisions regarding exhaustion would determine the order in which the insured could access policies. *Montrose Chem. Corp. of Cal. v. Superior Court*, -- Cal. App. 5th -- (2d Dist. Aug. 31, 2017). Both rulings are in line with existing California law on exhaustion, which provides that policy language governs the order in which excess policies apply. (Where policy language is silent, California applies horizontal exhaustion.)

The insured, Montrose Chemical Corporation of California, has sought coverage under more than 115 primary and excess CGL policies issued from 1960 to 1986 for underlying long-tail pollution claims. The insured purchased different numbers of excess layers and limits in different policy years. At issue in this decision was the insured's attempt to vertically "electively stack" its coverage towers for selected policy periods, so that it could access its higher limits before exhausting all horizontal policies. The insured sought to extend *State of California v. Continental Ins. Co.*, 55 Cal. 4th 186 (2012), which held that where policies contained "all sums" language and no anti-stacking provisions, an "all-sums-with-stacking" approach applied. That approach effectively created a single "uber policy" that allowed the insured to stack policies both horizontally and vertically.

The *Montrose* court held that, contrary to the insured's argument, *State v. Continental* does not entitle an insured to make a targeted tender under those policies it believes are most advantageous to it. Instead, the *Montrose* court confirmed that *State v. Continental* did not address the order in which an insured can access excess policies. That order depends on policy language.

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The following definitions were held to require horizontal exhaustion: A definition of "retained limit" that included the primary policy and "any other underlying insurance collectible by the insured," and a definition of "loss" that included the primary policy and "any other insurance (whether recoverable or not)." *Montrose*, slip op. at 28-30.

The excess policies' "other insurance" provisions did not supply a basis for allowing vertical exhaustion. The *Montrose* court explained that in the context of equitable contribution among insurers, "other insurance" provisions work the same way, regardless of whether the contributing policies are all primary or all excess. In this context, however, Montrose states that the "other insurance" cannot be read to require vertical exhaustion, because doing so would ignore the excess policies' provisions regarding underlying insurance.

Thus, the *Montrose* court affirmed denial of the insured's motion for summary adjudication on its "elective stacking" argument. The court partly reversed summary adjudication in favor of the insurers, because not all of the policies' language had been placed in the record.

Insureds are likely to continue to push for vertical "elective stacking" in California, seeking to turn California into a "targeted tender" state, similar to Illinois and Washington. California courts, however, appear committed on exhaustion questions to enforcing policy language as written.

A copy of the opinion is attached.

By Rina Carmel