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California – Supreme Court Decides Horizontal Exhaustion Is Not The Rule For Excess Insurance Policies In Continuous Injury Claims

BY:

In its third decision coming out of the long running insurance coverage litigation arising from Montrose Chemical Company's ("Montrose") handling and disposal of the chemical pesticide DDT, the California Supreme Court in *Montrose Chemical Corp. v. Superior Court* unanimously reversed the Court of Appeal in holding that Montrose is entitled to seek indemnification from any excess insurance policy on the risk during a period of continuous damage (in this case from 1961 to 1985), as long as the directly underlying excess policies for the same policy period have exhausted their available policy limits. The court said that any excess insurer which paid on such a loss could seek reimbursement from other excess insurers that would have been liable to provide coverage under an excess liability insurance policy issued for any period in which the injury occurred.

The insurers pointed to policy provisions in excess policies which require exhaustion of all underlying insurance, including but not limited to the liability insurance policies scheduled in the excess policies as underlying insurance. The court cited examples of that language in definitions of "loss" and "ultimate net loss," Loss Payable conditions, and in traditional "Other Insurance" conditions. Lumping them together as "'other insurance' clauses," the Court stated that the insurers' interpretation that such clauses require exhaustion of all underlying insurance on the risk before the excess insurance was triggered, including policies issued in different policy periods, was not unreasonable. The Court said, though, that the insurers' interpretation was not the only possible interpretation of those clauses. The Court said it was also reasonable to interpret other insurance clauses to only apply to policies for the same policy period, and cited authority, including the Restatement of the Law, Liability Insurance, and other policy language, for that interpretation.

The Court said that a rule of horizontal exhaustion might require litigation of more restrictive policy terms before coverage under less restrictive policies could be applied. It quoted a Wisconsin state court opinion for the proposition that "[h]orizontal exhaustion would create as many layers of additional litigation as there are layers of policies." Ultimately, the Court said that there was "no obvious unfairness" to insurers to require them to bear the burden of "the administrative task" of spreading the loss among insurers rather than to place that burden on the insured. The court also noted that parties to an insurance contract "are free, of course, to write their policies differently to establish alternative exhaustion requirements or coverage allocation rules if they so wish."