Supreme Court No. S170560

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

STATE OF CALIFORNIA,
Plaintiff, Cross-Defendant and Appellant

VS.

CONTINENTAL INSURANCE COMPANY, et al.,
Defendants, Cross-Complainants and Appellants;

EMPLOYERS INSURANCE OF WAUSAU,
Defendant, Cross-Complainant and Respondent;

From an Opinion of the Court of Appeal,
Fourth Appellate District, Division Two, Case No. Civil E041425

From a Decision of the Riverside County Superior Court Case No. 239784,
consolidated with Case No. RIC-381555
The Honorable E. Michael Kaiser

APPLICATION FOR PERMISSION TO FILE AND BRIEF OF *AMICUS CURIAE* THE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF STATE OF CALIFORNIA

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INTRODUCTION, INTEREST OF *AMICUS CURIAE* AND APPLICATION TO FILE

The issues presented in this appeal are extremely important to municipalities throughout the State because of the potential effect of this Court's decision on their ability to recover environmental cleanup costs from their insurers. An important function of municipalities is to develop public lands, some of which are commonly referred to as brownfields. Brownfields are abandoned or underused industrial and commercial facilities available for re-use. Redevelopment of these public lands may be complicated by real or perceived environmental contamination—which is why private entities are deterred from development. Municipalities must spend considerable money assessing the contamination on local brownfield sites, to quantify the cleanup costs and drive the redevelopment process forward. Sometimes, redevelopment is spurred by third party lawsuits claiming a public site is contaminated and demanding clean-up. Development of these lands for the public use, whether self-initiated or spurred by environmental lawsuits, is a vital service municipalities render to the public, as these lands can be made useful once again, whether through a new public park or a commercial area that creates valuable social and economic benefits.

Municipalities, like any other business or consumer, or like the State of California in this case, have purchased—often for substantial sums—comprehensive general liability (CGL) insurance coverage. The express purpose of this CGL coverage was to protect these municipalities against liabilities that might one day arise—such as third-party lawsuits for environmental remediation of public lands. Remediation is expensive and local governments have limited resources; without the availability of the

bargained-for and paid insurance, some of these public lands would not be developed and will, instead, remain unused. Truncating policyholders' rights to their contractual insurance benefits puts the public good at risk as these lands may never be remediated and redeveloped. And if they are developed, their development will be financed not by private insurers holding up their end of the bargain, but by the public through increasingly scarce tax dollars.

In short, reversal of the Court of Appeal would be not only a repudiation of the express language of the standard form language in the insurance contracts at issue, but would also adversely affect municipalities and their residents throughout the State.

The issues presented are of particular importance to the League of California Cities, an association of 480 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide—or nationwide—significance. The Committee has identified this case as being of such significance.

The League of California Cities' believe this appearance will aid the Court by elucidating certain key concepts which show why the Court of Appeal's "stacking" and "all sums" rulings are correct, and, in particular, why prior Supreme Court precedent controls the outcome. Accordingly, we respectfully request, pursuant to California Rules of Court 8.520(f), that the Court accept and file the attached *amicus* brief.

PROPOSED BRIEF OF *AMICUS CURIAE*

I. SUMMARY OF ARGUMENT

As noted in the State's Answer Brief On The Merits (AB 1),1 the issues for review are as follows:

> (1) When continuous property damage occurs during the periods of several successive liability policies, is each insurer liable for all damage both during and outside its period up to the amount of the insurer's policy limits?
>
> (2) Is the "stacking" of limits—*i.e.*, obtaining the limits of successive policies—permitted?

The answer to both these questions is, undoubtedly, yes.

The "all sums" rule, which provides that where a loss is continuous, each insurer that covered any part of the claim has an obligation to pay the entire claim (up to its policy limits), and then seek reimbursement from other insurers, is squarely supported by this Court's decisions in *Montrose Chem. Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645 and *Aerojet-General Corp v. Transport Indem. Co.* (1997) 17 Cal.4th 38. Insurers seek to distinguish that authority, arguing that cases like *Montrose* and *Aerojet* were limited to the duty to defend of primary insurers, and therefore have no bearing on the duty to indemnify of an excess insurer—the situation presented here. But in fact, the policy language and other factors that were relevant to the *Montrose* Court's analysis, and thus determinative of its recognition that multiple policies may be required to indemnify all sums paid on account of a single

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[1] We will refer to Insurers' Opening Brief as "OB"; the State's Answer Brief as "AB" and Insurers' Reply Brief "RB."

occurrence, have equal applicability to primary and excess policies alike. And *Aerojet*, applying *Montrose*, takes the issue head on, removing any doubt the "all sums" and "pro-stacking" rules are established California law. For these reasons, *Montrose* and *Aerojet* are the controlling authorities. The Court of Appeal was therefore correct in holding that, when continuous property damage occurs during the periods covered by several successive liability policies, each insurer is liable for all damage both during and outside its period up to the insurer's policy limits.

The second issue—the "stacking" of policy limits—should also be upheld, as such a result is compelled by the express terms of the insurance policies, and long standing California law, including *Montrose* and *Aerojet*.

As clearly stated in *Montrose*, where a loss is covered by multiple policies, but no single policy provides full recovery, the policyholder may seek to recover under more than one of its policies in order to obtain a more complete recovery. 10 Cal.4th at 689 ("Where, as here, successive CGL policy periods are implicated, bodily injury and property damage which is continuous or progressively deteriorating throughout several policy periods is potentially covered by all policies in effect during those periods."). Here, it is undisputed that property damage occurred throughout multiple years—Insurers stipulated as much. It is also undisputed that no single policy provided a full recovery for the loss, which exceeded several hundred million dollars. It follows, therefore, that the State may, by virtue of its contracts of insurance, and as those contract terms have been construed by California courts, recover from multiple excess policies until made whole. The Court of Appeal was correct in so holding.

By affirming both rulings, moreover, this Court can now put to rest two issues that have proven central to many insurance coverage disputes.

II. BACKGROUND: WHAT A TRIGGER RULE IS, WHY IT IS IMPORTANT, AND THE INTERRELATION BETWEEN DEFENSE AND INDEMNITY OBLIGATIONS

In *Montrose*, the Supreme Court evaluated standard form policy language in third party CGL policies and held that the continuous injury trigger of coverage should be adopted for claims of continuous damage. An explication of what a "trigger of coverage" is, and how it operates in practical terms, is essential to understanding why a policyholder may access all insurance policies that had contractually agreed to provide coverage—a process known as "stacking." *See Wagner v. State Farm Mutual Auto. Ins. Co.* (1985) 40 Cal.3d 460, 463, fn. 2 ("'Stacking' … has … been held to refer to 'the ability of the insured, when covered by more than one insurance policy, to obtain benefits from a second policy on the same claim when recovery from the first policy would alone be inadequate' to compensate for the actual damages suffered.").

A "trigger" rule is necessary because policyholders sued for third party property damage and/or bodily injury often need to quickly resolve the issue of which of its policies must defend (and thus potentially indemnify) the claim. By way of example, in groundwater contamination cases such as this one (and *Montrose* and *Aerojet*), a policyholder often looks to the insurers from which it purchased liability coverage from the date its operations began (the earliest possible time when any chemical releases could have contaminated groundwater) through 1985 (after which standard form liability policies incorporated the so-called "absolute" pollution exclusion). Under the *Montrose* continuous trigger rule, all primary insurers on the risk from the time the insured began operating (and

thus *may* have caused property damage) through the inception of the absolute pollution exclusion must defend the insured and may also be obligated to indemnify.

This comports with well-established rules of third-party liability insurance. A liability insurer owes a broad duty to defend its insured against claims which create a *potential* for indemnity, and must therefore defend any suit that *potentially* seeks damages within the policy coverage. *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 275. In contrast, a liability insurer need only indemnify claims that are actually covered, in light of the facts proved. *Aerojet*, 17 Cal.4th at 56.

With that background, consider a hypothetical policyholder whose operations began in 1966. While all insurers on the risk from 1966 through 1985 may be liable to defend, it is possible that only insurers from 1966 through 1971 will actually be required to indemnify. This is because the "sudden and accidental" pollution exclusion began appearing in standard form policies in the early 1970s. Croskey, *et al.*, Cal. Prac. Guide: Insurance Litigation (The Rutter Group 2006), Ch. 7H-H, 7:2060. If our hypothetical policyholder cannot escape the reach of this exclusion, then those policies from 1972 to 1985 would not be obligated to indemnify.

The upshot of the continuous trigger rule is that when seeking a defense, the insured is entitled to a presumption that damage occurred over time pursuant to a reasonable theory supported by the allegations in the complaint and any other facts known. *Pepperell v. Scottsdale Ins. Co.* (1998) 62 Cal.App.4th 1045 ("In a nutshell, the rule to be gleaned from *Montrose* ... is that continuing or progressive property damage is deemed to occur over the entire process of the continuing injury.") As long as the allegations of the third-party lawsuit and the facts known reasonably

establish the possibility of damage before discovery of the damage, the defense obligations of those policies are "triggered." The insured need not prove actual damage in any specific policy at an early stage in order to trigger that policy's defense obligation. *See Montrose, supra*; *Gray v. Zurich Insurance Co.*, 65 Cal.2d at 275.

Since it is within this subset of insurers whose policies are triggered for defense purposes (by the potentiality of damage or injury occurring within their policies' periods) that one finds all the insurers actually liable for indemnity, the trigger of coverage is a rule that necessarily encompasses both defense and indemnity obligations. And while excess policies do not typically promise to incur the same broad "duty to defend" obligation associated with primary policies, the policies do promise to indemnify covered claims. Thus, by operation of the continuous trigger of coverage rule, all of our hypothetical policyholder's excess insurers whose policies were in effect during the damage period would be potentially liable to indemnify it.

Thus, despite Insurers' assertions to the contrary, the trigger of coverage rule is directly applicable to both defense and indemnity, as well as to both primary and excess insurance. And, as is implicit in the hypothetical above, the applicability of the continuous trigger of coverage rule is important because the right of a policyholder to "stack" policy limits is part of this Court's rulings.

III. THIS COURT'S DECISIONS IN *MONTROSE* AND *AEROJET* REQUIRE AFFIRMING THE COURT OF APPEAL'S "ALL SUMS" AND "PRO-STACKING" RULINGS

Insurers' principal argument against the lower courts' "all sums" rulings is that *Montrose* and *Aerojet* "did not decide the issue under review here." (OB 8) Not only is this incorrect as to the "all sums" ruling, it is also

incorrect as to the "stacking" ruling. *Montrose* and *Aerojet* necessarily decided both issues. In the following sections, LOCC carefully delineates why this is so.

A. *Montrose* and *Aerojet* Provide The Relevant Analytical Framework, And Foreclose Insurers' "Pro Rata" Argument

Aerojet, decided two and a half years after *Montrose*, is the only California Supreme Court decision that extensively summarizes the holdings of *Montrose*.[2] We refer to these holdings as (1) the "all sums", and (2) the "pro-access to all coverage" rulings (which in simpler terms can also be called the "pro-stacking" rule). These two rulings are part of the overall holding in the case: the adoption of a continuous trigger of coverage.

Montrose evaluated an insurer's duty to defend where the third party claim implicated loss spanning several years. After evaluating the standard form policy language and drafting history, and surveying case law and authorities discussing trigger of coverage under liability policies where damage continues over successive policy periods, this Court adopted a continuous trigger of coverage. 10 Cal.4th at 689.

One of the findings integral to this holding is that the insurer is obligated to indemnify the policyholder for *all* sums the insured must pay on account of the damage or injury, even if only part of the damage or injury occurs during the insurer's policy period. *Aerojet*, 17 Cal.4th at 57, fn. 10, citing *Montrose*, 10 Cal.4th at 686 ("In *Montrose*, we noted, and reaffirmed, the 'settled rule' of the case law that 'an insurer on the risk when continuous or progressively deteriorating [property] damage or

[2] Counsel for *amicus curiae* is well familiar with *Aerojet*, having served as counsel for Aerojet in that matter and briefing and arguing its position before the California Supreme Court.

[bodily] injury first manifests itself remains obligated to indemnify the insured *for the entirety of the ensuing damage or injury.*'")(emphasis in original). This defines the *scope* of coverage and is commonly referred to as the "all sums" rule.

While this Court undoubtedly recognized the well-settled "all sums" rule in *Montrose*, it removed any doubt in *Aerojet* in its summary of the duty to *indemnify* (17 Cal.4th at 56-57):

> [The duty to indemnify] is triggered if specified harm is caused by an included occurrence, so long as at least some such harm results within the policy period. … It extends to all specified harm caused by an included occurrence, even if some such harm results beyond the policy period. … In other words, if specified harm is caused by an included occurrence and results, at least in part, within the policy period, it perdures to all points of time at which some such harm results thereafter.

Putting a finer point on it, the Court presented the following hypothetical (*id.* at 57):

> To illustrate by a hypothetical similar to the present case: Insurer has a duty to indemnify Insured for those sums that Insured becomes legally obligated to pay as damages for property damage caused by its discharge of hazardous substances, up to a limit of $1 million. Insured discharges such a substance. It thereby causes property damage to Neighbor's land, in the amount of $100,000 (determined by the cost of returning the soil to its original condition), within the policy period of year 1. It causes further damage of this sort as the substance spreads under the surface, in the amount of $100,000 annually, in year two through year thirty. Insured must pay Neighbor $3 million in damages under judgment. Insurer must pay

> Insured the limit of $1 million for indemnification.

Even in this hypothetical—one that supposes a factual basis for apportioning a specific amount of damages to each policy period[3]—the Court made clear that the insurer is liable to *indemnify* the insured for *all* damages on account of property damage, including damages for periods *outside* its policy period (up to the amount of its policy limits). This is a firm rejection of the flip side of the "all sums" rule—Insurers' "pro rata" rule. *Id.* at 57, fn. 10 ("[C]ommentators have soundly stated: 'Courts *reject* the argument that [an] insurer should only be responsible for [injury or] damage that took place during its policy period…'").

It could not be more plain that Insurers' proffered "pro rata" rule is contrary to this Court's well-established law.[4] Both the trial court and the Court of Appeal correctly assessed this issue.

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[3] In the vast majority of cases, the damage or injury is indivisible and thus the insured's damages cannot be readily or reasonably apportioned over each policy period.

[4] Insurers portray the issue as unsettled because both *Montrose* and *Aerojet* were both "duty to defend" cases. (See OB 8-18) But that is incorrect given the principles articulated and the fact that the *Aerojet* Court not only explicitly reiterated its "all sums" *Montrose* ruling in its reiteration of California law on the *duty to indemnify*, but also provided the hypothetical quoted in the text. 17 Cal.4th at 56-57. There can be no reasoned dispute that California follows an "all sums" rule of indemnity. Indeed, Insurers' re-argument of why their same policy language is inconsistent with an "all sums" rule was explicitly rejected in *Montrose* and *Aerojet*. 10 Cal.4th at 686-687; 17 Cal.4th at 57, fn. 10 ("Although a policy is triggered only if [bodily injury or] property damage takes place 'during the policy period,' once a policy is triggered, the policy obligates the insurer to pay 'all sums' which the insured shall become liable to pay as damages for bodily injury or property damage. The insurer is responsible for the full extent of the insured's liability ..., not just for the part of the [injury or] damage that occurred during the policy period."). For a further discussion as to why Montrose applies to indemnity as well as defense, see section III.C.

But this is not all. The *Aerojet* Court also affirmed that it had previously blessed the "stacking" of successive policies—*and it did so without limitation as to the primary or excess nature of the policies* (*id.*):

> In *Montrose*, we also made plain that "successive" insurers "on the risk when continuous or progressively deteriorating [property] damage or [bodily] injury first manifests itself" are separately and independently "obligated to indemnify the insured": "[W]here successive ... policies have been purchased, bodily injury and property damage that is continuing or progressively deteriorating throughout more than one policy period is potentially covered by all policies in effect during those periods."

The separate and independent indemnity obligation of successive insurers on the risk during continuous damage goes hand in hand with the insured's right to recover from multiple insurers for a single claim. This is the "pro-stacking" rule.

B. The Policy Language Relevant In *Montrose* Is Materially Identical To The Language In Insurers' Excess Policies

In the following sections, we show why even by sole examination of *Montrose*, it is evident that the stacking of excess policy limits as a general rule is mandated or at the very least supported by this Court authority. But unlike Insurers, we do not purport to advocate a one-size-fits-all rule. It is a basic principle of insurance law that all disputes must first be resolved by looking at the particular insurance contract terms.

The policy provisions considered relevant in *Montrose* were the Insuring Agreement, the Occurrence Definition, and the Property Damage and Bodily Injury Definitions (10 Cal.4th at 656, 668, emphasis in original):

> Admiral's policies obligate it to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of ... bodily injury, or ... property

> damage to which this insurance applies, caused by an occurrence....” “Occurrence” is defined as “an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.”
>
> …
>
> [P]roperty damage to which this insurance applies” is defined in Admiral’s policies as “(1) physical injury to or destruction of tangible property *which occurs during the policy period*, including the loss of use thereof at any time resulting thereform ....” “Bodily injury” to which the insurance applies is defined as “bodily injury, sickness or disease sustained by any person *which occurs during the policy period*, including death at any time resulting therefrom.”

The Court found “no ambiguity in this language; it clearly and explicitly provides that the occurrence of bodily injury or property damage during the policy period is the operative event that triggers coverage.” *Id.* at 668.

The provisions in *Montrose* are materially identical to those at issue here. Insurers’ policies contain this insuring agreement:

> To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of liability imposed by law...for damages, including consequential damages, because of injury to or destruction of property, including the loss of use thereof.

Second, their Occurrence definition states (*id.*):

> “Occurrence” means an accident or a continuous or repeated exposure to conditions which result in injury to persons or damage to property *during the policy period*…

The language central to the dispute is "during the policy period." In Insurers' policies this language is found in the Occurrence definition, while in the *Montrose* policies it was contained in the property damage and bodily injury definitions. Given the manner in which these two sections of the policy interrelate, it makes no difference whether the language is located in one provision or the other.

Unless Insurers make the case that other provisions unique to their policy should be read to limit their obligations under *Montrose* and *Aerojet*, the State is entitled to indemnity up to the combined limits of all liable policies. We respectfully submit that Insurers have not done so and cannot do so.

Insurers rely on only three additional provisions, at least with respect to their "all sums" argument, if not their anti-stacking argument (see OB 7):

- the policy limits on any given declarations page (*e.g*., the policy provides a limit of $5,000,000 for "*each occurrence*");
- the limits of liability provision which also uses the "each occurrence" language; and
- the "Policy Period, Territory" provision which states the policy applies "only to occurrences which take place during the policy period."

But these provisions add no basis for distinguishing *Montrose* or for arriving at a different result. The "Policy Period, Territory" requirement that an occurrence take place during the policy period is simply a restatement of the requirement that damage or injury occur during the policy period, the same as found elsewhere in Insurers' policies and in the policies examined by this Court in *Montrose*. Again, Insurers' argument that the policies compel the construction that they are only obligated to pay

for damages on account of property damage that *solely* occurs during the policy period has been explicitly rejected by this Court in both *Montrose* and *Aerojet*:

> In [*Armstrong*] the Court of Appeal observed that, in *Montrose*, we "relied upon existing case law holding that coverage for a manifested loss is not terminated by the expiration of the policy; coverage continues until the damage is complete." Citing such case law itself, it explained: "[T]he event which triggers an insurance policy's coverage does not define the extent of the coverage. Although a policy is triggered only if [bodily injury or] property damage takes place 'during the policy period,' once a policy is triggered, the policy obligates the insurer to pay 'all sums' which the insured shall become liable to pay as damages for bodily injury or property damage. *The insurer is responsible for the full extent of the insured's liability ..., not just for the part of the [injury or] damage that occurred during the policy period.*"

Aerojet, 17 Cal.4th at 57, fn. 10 (emphasis added).

Nor does Insurers' "each occurrence" mantra give them with any traction. Insurers' policies—like most every primary and excess CGL policy—provide both "each occurrence" limits and "aggregate" limits in the declarations page. (See, *e.g.*, 39AA 10172) The limits of liability provision functions similarly; these place a limit for each occurrence on the promise in the insuring agreement to pay "all sums" the State is obligated to pay on account of property damage. But Insurers do not dispute that the policies provide coverage for any number of occurrences; any policy with an aggregate limit like those here simply put a cap on the amount paid out under the policy even if there are multiple occurrences. Thus, it is not clear

why the policies' "each occurrence" language is supposed to limit the insurer's responsibility to pay only for that portion of continuing damage that occurs during the policy period on account of a covered occurrence, much less how it would impact the analysis as to whether the insured has the right to recover under each separate and independent policy purchased.

In sum, the policies simply do not contain any provisions that in the event that a single occurrence caused injuries in more than one policy year, the insurer would not be liable at all if there is other insurance available, or that coverage would be limited to a single policy period. If Insurers had wished to so limit their obligations under the contract they could have done so. Accordingly, *Insurers' policies contain policy language identical to that examined by the Supreme Court in* Montrose*, and no anti-stacking language*. (For more on this latter point, see section IV.B.)

C. *Montrose* Applies To Indemnity As Well As Defense

In concluding that the continuous injury trigger should be adopted, the Court reviewed not only the standard form policy language copied into Admiral's policies, but also relevant authorities that have construed that language. *Id*. at 685. The case it principally reviewed and approved was *California Union Ins. Co. v. Landmark Ins. Co*. (1983) 145 Cal.App.3d 462. *See* 10 Cal.4th at 678-685.

1. The Court's Reliance On *California Union* Shows That *Montrose* Applies to Indemnity

The *California Union* court, assessing two *successive* insurers' *indemnity* obligations, also did a two-step all-sums, pro-stacking analysis. That case involved a business owner's liability insurers in two successive policy periods; California Union insured the earlier policy period, and Landmark insured the later period. As stipulated, the insured's swimming

pool developed a crack and began leaking and damaging adjoining third party property in the first period. Damage to the adjoining property continued in the second policy period. In a classic game of hot potato, Landmark (second in time) said California Union must indemnify the insured for all damages flowing from the occurrence that happened in the first policy period. California Union, on the other hand, said Landmark was responsible for the entire loss because the "occurrence" first manifested itself during the second policy period.

The Court of Appeal disagreed with both insurers' formulations. Evaluating prior California law and the policy language, the court concluded that a coverable "occurrence" arose under their policy language at *all points in time* at which the complaining party was *actually damaged*, not the time at which the initial damage-causing act or conditions transpired. 145 Cal.App.3d at 470; *see also Montrose*, 10 Cal.4th at 679. Consequently, both California Union's policy and Landmark's policy were triggered, and since the insurers had no other defenses to coverage, both were obligated to indemnify their common insured for the damage. 145 Cal.App.3d at 478.

This two-step approach to both trigger and scope of coverage is best encapsulated in the *Montrose* Court's approval of this central aspect to the *California Union* court's decision (10 Cal.4th at 680):

> As stated in *California Union*: "[I]n a 'one occurrence' case involving continuous, progressive and deteriorating damage, the carrier in whose policy period the damage first becomes apparent remains on the risk until the damage is finally and totally complete, notwithstanding a policy provision which purports to limit the coverage solely to those

> accidents/occurrences within the time parameters of the stated policy term."

To be clear, both courts rejected the argument that standard form policy language which typically states "this insurance applies only to accidents which occur during the policy period ...." either requires proration of indemnity liability when multiple insurers are on the risk (the "pro rata" rule), or bars multiple insurers/successive policies from being liable for a loss (the anti-stacking rule). This is why Insurers' position in this case—advocating the rejection of the "all sums" rule and acceptance of an "anti-stacking" rule—is a bald-faced appeal for this Court to overturn its own precedent.

By these rulings, and the adoption and approval of the *California Union* line of cases, this Court has explicitly rejected Insurers' "pro rata" rule, and rejected the notion that there can never be "stacking" of policy limits. To propose—as Insurers do here—that although multiple primary policies may be triggered for defense and indemnity but *only one* excess policy may be found ultimately liable to indemnify the policyholder defies the reasoning of *Montrose* and *California Union*, the policy language, and the reasonable expectations of any policyholder.[5]

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[5] On a related note, Insurers also err in asserting that the "all sums" doctrine is contrary to the *Montrose* Court's limited disapproval of the *California Union* case. Specifically, Insurers seize on the statement that insurers are not "jointly and severally liable" to the insured. 10 Cal.4th at 681, fn. 19. However, the Court was merely observing that since the insurers issued separate policies, each insurer is separately and independently obligated to cover the insured's liability rather than "jointly and severally" liable with other insurers. See also *Aerojet*, 17 Cal. 4th at 57, fn. 10.

2. *Montrose* Adopted A Pro-Stacking Rule For Indemnity Purposes, As Shown By This Court's Discussion Rejecting A Manifestation Trigger In Third Party Liability Insurance Cases

The inextricable connection between the trigger concept, stacking, and the duty to indemnify is also illustrated by this Court's rejection of a manifestation trigger. A manifestation trigger would only implicate the one policy in place at the time that the damage or injury was discovered. 10 Cal.4th at 674. The Court had previously adopted a manifestation trigger in the context of first party property insurance. This Court agreed that to adopt such a trigger in the context of third-party liability insurance would essentially transform an occurrence-based policy into a claims-made one (at 688-89):

> [A]pplication of a manifestation trigger of coverage to an occurrence-based CGL policy would unduly transform it into a "claims made" policy. *Claims made policies were specifically developed to limit an insurer's risk by restricting coverage to the single policy in effect at the time a claim was asserted against the insured*, without regard to the timing of the damage or injury, thus permitting the carrier to establish reserves without regard to possibilities of inflation, upward-spiraling jury awards, or enlargements of tort liability after the policy period. The insurance industry's introduction of "claims made" policies into the area of comprehensive liability insurance itself attests to the industry's understanding that the standard occurrence-based CGL policy provides coverage for injury or damage that may not be discovered or manifested until after expiration of the policy period. That understanding is clearly reflected in the higher premiums that must be paid for occurrence-based coverage to offset the increased exposure.

If there is any ambiguity to the Court's use of "coverage" here (when stating it is not limited to a single policy in effect), reference to the Court's approval of *California Union* makes plain that the term is used broadly so as to encompass both an insurer's defense *and* indemnity obligations.

3. The *Montrose* Court's Analysis Of Drafting History Reveals That The Pro-Stacking Rule Applies To Indemnity

The *Montrose* Court approved of the use of drafting history as an interpretive tool and relied on it reaching its decision. 10 Cal.4th at 670-71. Here, the relevant drafting history involves the 1966 change from "accident"-based coverage to "occurrence"-based coverage. *Id.* at 671. In changing the standard form policy from an "accident-based" to an "occurrence-based" format, the drafters gave various presentations on the meaning and scope of the change. For instance, in "comments addressing the question of coverage under the new CGL policies for progressive personal injury or property damage resulting over an extended period of time, one of the drafters explained that '[i]n some exposure type cases involving cumulative injuries *it is possible that more than one policy will afford coverage*.'" *Id.* After evaluating further comments, this Court concluded (at 673):

> [T]he drafters of the standard occurrence-based CGL policy, and the experts advising the industry regarding its interpretation when formulated in 1966, contemplated that the policy would afford liability coverage for all property damage or injury occurring during the policy period resulting from an accident, or from injurious exposure to conditions. Nothing in the policy language purports to exclude damage or injury of a continuous or

progressively deteriorating nature, as long as it occurs during the policy period.

Thus, the drafters of the language themselves provide evidence of the meaning and intent of the relevant policy terms—that so long as damage or injury occurs within the policy period, (1) the insurer's defense duty is "triggered"; (2) the insurer's indemnity duty to pay "all sums" is potentially triggered; and (3) more than one policy can afford coverage.

4. If There Were Distinctions To Be Drawn Between Primary And Excess Insurance, Or The Duty To Defend And The Duty To Indemnify, This Court Would Have Done So Explicitly

As previously explained, the *Aerojet* Court affirmed that it had previously blessed access to successive policies—and without limitation as to the primary or excess nature of the policies. If there was a distinction to be drawn as between primary and excess, this Court would have done so either in *Aerojet* or *Montrose*. The Court's insurance decisions in this timeframe evidence a mindful care in drawing "critical distinctions" when evaluating coverage issues. In *Montrose*, in the first section of the analysis (entitled "*Preliminary considerations: distinguishing third party liability insurance from first party property insurance*"), this Court noted that "[u]nfortunately, some courts have failed to draw these critical distinctions when discussing coverage issues under first and third party insurance policies." *Id*. at 665. *See also Garvey v. State Farm and Casualty Co.* (1989) 48 Cal.3d 395, 398-99. Moreover, this Court lamented that some published decisions had "muddied the waters by seemingly failing to distinguish between disputes arising between an insured and insurer, and actions among several CGL carriers that seek a judicial declaration allocating a loss already paid out..." 10 Cal.4th at 665.

With that said, the Court would have surely been careful to draw

distinction in its analysis between primary and excess policies, or between defense and indemnity—had such distinctions been necessary.

And if the Court had meant to adopt the anti-stacking view of the D.C. circuit in *Keene Corp. v. INA* (D.C. Cir. 1981) 667 F.2d 1034, it surely would have done so—it was well aware of the case, and cited it for other reasons. 10 Cal.4th at 681, fn. 19, 692, fn. 20. On the contrary, though it adopted the same continuous trigger rule that *Keene* did, the Court has never pronounced that only one single insurer or policy period can be held liable to indemnify.6 On the contrary, as evidenced by the Court's approval of *California Union*—a case in which two successive policies were held liable for continuous property damage, and its conclusions regarding the drafting history, and by the Court's pronouncement in *Aerojet*

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[6] *Keene* involved thousands of underlying asbestos claims. The Supreme Court has acknowledged that while there is plenty of synergy between trigger of coverage principles in continuous injury cases whether they involve property damage in the form of groundwater contamination or asbestos-related bodily injury, the latter does involve "unique" issues that merit individual evaluation (10 Cal.4th at 677, n 16):

> Although the *Armstrong* court's trigger of coverage discussion appears largely consistent with our analysis of the applicable principles of third party CGL coverage in the present case, because we do not here face the unique facts of asbestos-related bodily injury claims, we deem it appropriate that trigger of coverage questions specifically involving asbestos claims be left for decision, in the first instance, on an appropriate record in a case in which they are squarely presented.

Thus, it is no surprise that the *Montrose* Court, like the *Keene* court, adopted a continuous trigger of coverage and the "all sums" rule, but declined to accept its anti-stacking rule. See also discussion of the *Town of Franklin* case at Section B, *infra*.

that "'successive' insurers 'on the risk when continuous or progressively deteriorating [property] damage or [bodily] injury first manifests itself" are separately and independently 'obligated to indemnify the insured'"—there can be no dispute that the policyholder is free to access the limits of the policies it had purchased (*viz.*, to stack) as mandated by this Court's precedent.

IV. OTHER CONSIDERATIONS POWERFULLY CONFIRM THE CONCLUSION THAT "ALL SUMS" AND "STACKING" APPLY TO INDEMNITY AS WELL AS DEFENSE OBLIGATIONS.

Several additional considerations confirm the conclusion that the "all sums" and "stacking" rulings in *Montrose* and *Aerojet* must apply to indemnity as well as defense obligations under a CGL insurance policy. These considerations make the Insurers' position here implausible.

A. This Court's Continuous Trigger and Pro-Stacking Rules Are Made Possible Because Each Insurance Policy Is A Separate And Individual Contractual Agreement

The first is the fact that each insurance policy is a separate contract. As the State has rightly observed (in its Reply Brief in the Court of Appeal at 8, emphasis in original), the insurers here are essentially asking the Court "to view their policies not as separate contracts for which they are individually liable," but instead to treat "the State's entire, twelve-year long insurance program as a single monolithic agreement under which insurers *collectively* agreed to pay only a *single* policy period's worth of coverage—no matter how long the damage continued, how many separate premiums were paid, or how many policies were triggered." But that is wrong. Liability policies generally do not require the insured to purchase any other insurance. While excess policies do generally require the insured to maintain its *underlying* insurance, they do not condition indemnity upon purchase or maintenance of any insurance in *prior or subsequent policy*

periods. Accordingly, the presence of other available insurance is a mere fortuity the insurer did not bargain for:

> [F]rom the perspective of the insurers, the existence of other insurance is purely fortuitous. One insurer cannot expect there to be another applicable policy covering the same risk; rather, in issuing its policy, each insurer has to assume that it will be liable for any loss to the full extent of the policy limits.

Cascade Corp. v. American Home Assur. Co. (Ore. App. 2006) 135 P.3d 450, 455. *See also Commercial Union Assur. Cos. v. Safeway Stores, Inc.* (1980) 26 Cal.3d 912, 919 (With respect to the purpose of excess insurance protection, "[t]he protection of the insurer's pecuniary interests is simply not the object of the bargain.").

Here, the State obtained primary and excess coverage over several years. By purchasing both primary and excess insurance, the State's *reasonable expectation* was that any individual excess policy would apply when the primary was exhausted. *Montrose*, 10 Cal.4th at 667 ("[W]e generally interpret the coverage clauses of insurance policies broadly, [in order to protect] the objectively reasonable expectations of the insured.") And that expectation was all the more reasonable in light of the settled rule that, to afford the insured the greatest possible protection, coverage provisions are interpreted broadly and exclusionary clauses are interpreted narrowly against the insurer. *MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 648.

Accordingly, it would *not* be the State's reasonable expectation to anticipate a forced election of one triggered policy period among many as contemplated by *FMC* since: (1) each policy states that it covers all

"damages" arising from an occurrence; (2) California law provides that where an occurrence continues in multiple policy periods, the policyholder can access the coverage in all those periods; (3) the policies do not in any way require the policyholder to choose one policy over the others; and (4) insurers had it within their power to include clear language to require such a choice. Therefore, the State would reasonably expect excess coverage during each of the respective periods.

Further, since the continuous trigger rule only makes sense if the policies are viewed as separate and individual contracts, the court should first examine the plain language of the individual contract before making a sweeping determination spanning several policy periods as did the court in the wrongly decided the *FMC* case. *See Montrose*, 10 Cal.4th at 666-667 ("If the *meaning a layperson would ascribe to the language* of a contract of insurance is clear and unambiguous, a court will apply that meaning.") Reading the "plain language" of each of the individual policies in its own context creates a reasonable expectation of coverage by the State in each period, and a concomitant acceptance of the risk by the carrier for the same period. Stacking of the excess policies would neither defeat the insured's expectations nor the policies themselves.

Other courts have reached the same result. For example, in an environmental contamination case directly analogous to this one, a Wisconsin court of appeal that had previously adopted a continuous trigger rule,[7] considered the "stacking" issue and held that both the language of the policies and case law (materially identical to California law), supported the insured's right under its separate and individual contracts of insurance to

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[7] Its adoption of the continuous trigger rule was later affirmed by the Wisconsin Supreme Court. *American Family Mutual Ins. Co. v. American Girl, Inc*. (Wis. 2004) 673 N.W.2d 65, 75.

aggregate coverage under multiple liability policies for an ongoing occurrence that causes continuous property damage for a period spanning several years. *Society Insurance v. Town of Franklin* (Wis. App. 2000) 607 N.W.2d 342.

At issue was the obligation of only *one* of The Town of Franklin's insurers, Society, who had issued policies each year from 1971 to 1986. The policies contained the same standard form language at issue here. (insuring agreement, and occurrence and property damage definitions).

Society claimed that because there was only one occurrence, it was on the risk up to only one policy's limit of liability. 607 N.W.2d at 345. The Town responded that Society must provide one policy limit's worth of coverage for each policy period in which property damage occurred. *Id.*

The court of appeal agreed with the Town. "Given the continuous trigger rule, policies in effect while the occurrence was ongoing were triggered and in each policy Society agreed to pay sums the insured was obligated to pay." *Id.* at 346. Thus, the policy language mandated stacking coverage. Moreover, the court noted that each contract of insurance was separate and individual and the Town should get the benefit of its bargain from each. *Id.* at 346-47. The court noted the sound outcome in another case where "the insured had paid seven separate premiums in exchange for seven discrete promises of coverage. Each premium was calculated to compensate the insurer for the risk. Thus, the insured could reap the benefit of each distinct promise. Due to the multiple contracts between the parties, stacking of coverage was proper."

Moreover, even though this same court had previously adopted a continuous trigger rule with reference to the *Keene* case (as this Court did in *Montrose*), it now specifically rejected *Keene*'s anti-stacking holding,

noting the highly extenuating circumstances of *Keene's* long-term loss (over 6000 asbestos lawsuits). *Id.* at 347.

The reasoning of the *Town of Franklin* court, in a case analogous to this one, is compelling.

B. California Law Mandates That An Insurer Must Make Any Exclusion Or Limitation To Coverage "Conspicuous, Plain And Clear" To Be Enforceable; But Insurers Here Provided No Anti-Stacking Clause.

The Insurer's position is implausible for another reason as well: Provisions that take away or limit coverage reasonably expected by the insured must be "conspicuous, plain and clear" to be enforceable. *See DeMay v. Interinsurance Exch. of Auto. Club of So. Calif.* (1995) 32 Cal.App.4th 1133, 1137; *Travelers Cas. & Sur. Co. v. Transcontinental Ins. Co.* (2004) 122 Cal.App.4th 949, 958.

As explained by this Court:

> An insurer cannot escape its basic duty to insure by means of an exclusionary clause that is unclear ... The burden rests on the insurer to phrase exceptions in *clear and unmistakable* language ... The exclusionary clause must be conspicuous, plain and clear.

State Farm Mut. Auto. Ins. Co. v. Jacober (1973) 10 Cal.3d 193, 201-202 (emphasis added); *Haynes v. Farmers Ins. Exch.* (2004) 32 Cal.4th 1998, 1204.

Moreover, this rule "applies with particular force when the coverage portion of the insurance policy would lead an insured to reasonably expect coverage for a claim purportedly excluded." *MacKinnon v. Truck Ins. Exch.*, 31 Cal.4th at 648.

There can be no dispute that the anti-stacking rule the Insurers

advocate is a drastic limitation of coverage. Had insurers wished to limit coverage so, it was incumbent on them to write it into the contract in "clear and unmistakable language." There is no doubt that insurers could have done so. Insurance companies have done so in other policies, limiting the policyholders' ability to combine the limits of policies issued by the same insurer. *See*, *e.g.*, *Roberts v. American Family Mutual Insurance Co.* (Colo. 2006) 144 P.3d 546 (anti-stacking provision stated: "With respect to any *accident* or *occurrence* to which this and any other auto policy issued to you by any member company of the Farmers Insurance Group of Companies applies, the total limit of liability under all the policies shall not exceed the highest applicable limit of liability under any one policy."); *Greenidge v. Allstate Insurance Co.* (2d. Cir. 2006) 446 F.3d 356 (court noted that the liability policy "contained an 'anti-stacking' provision"). Insurers did not write in any "anti-stacking" language here, and they are bound by that failure.

C. Insurers' Position Is Foreclosed By The Fact That Insurance Companies, When Seeking Equitable Contribution From Fellow Insurers On The Same Risk, Necessarily Seek To Stack Limits From Prior Or Subsequent Policies

The Insurers' position is even more implausible when one considers the practices of insurance companies themselves under the doctrine of equitable contribution. That doctrine apportions costs among insurers that share *the same level of liability on the same risk as to the same insured.* *Maryland Casualty Co. v. Nationwide Ins. Co.* (2000) 81 Cal.App.4th 1082, 1089. It arises when several insurers are obligated to indemnify the same loss or claim, and one insurer has paid more than its share of the loss without any participation by the others. *Id.* The right to equitable contribution does not arise from contract, because the multiple insurers who

may share responsibility for the same loss have not contracted with each other—only with their respective insureds. *Signal Companies, Inc. v. Harbor Ins. Co.* (1980) 27 Cal.3d 359, 369.

Thus, in California it is well established that the reciprocal contribution rights of coinsurers who insure the same risk are based on the equitable principle that the burden of indemnifying or defending the insured *with whom each has independently contracted should be borne by all the insurance carriers together.* Excess insurers providing successive policies to the same insured commonly seek contribution from their fellow excess co-obligors. This is the same as stacking successive limits of coverage. The Ninth Circuit has permitted the stacking of policy limits in an insurer v. insurer action. *See Employers Ins. of Wausau v. Granite State Ins. Co.* (9th Cir. 2003) 330 F.3d 1214, relying on *Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 Cal.App.4th 1810 (*Stonewall* is discussed at length in the State's AB at 60-62.)

As noted above, insurers providing coverage to the same insured do not have any direct contractual relationship with one another. It would be absurd to give insurance companies on the risk in different policy periods with respect to the same occurrence a right in equity to pursue each other to be made whole for their loss, while denying similar rights to the policyholder who *does* have contractual rights with each insurer. An insurance company cannot be allowed to artificially limit its contractual obligations to it policyholder by only being required to pay one policy's limits, and then turn around in the ensuing contribution action and seek relief from its co-obligors that provided coverage in other periods. Yet this is precisely the scenario advocated by Insurers here. This Court should affirm the Court of Appeal's rulings.

V. CONCLUSION

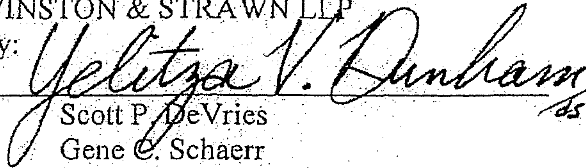
For the 12 years at issue here, the State of California responsibly purchased multiple layers of insurance worth several hundreds of millions of dollars, protecting itself against the possibility of a catastrophic liability. Yet at the end of this process, those insurers that waited it out and forced a jury trial were able to walk away without paying a dime, leaving the State unreimbursed for the vast bulk of its covered liability. This Court's precedent, the language of the policies, and the reasonable expectations of policyholders do not support this result. The Court of Appeal got it right when it ruled Insurers were responsible for "all sums" the State was liable for (up to the policy limits) and that "stacking" of limits is permitted. The League of California Cities urges this Court to affirm the Court of Appeal's rulings.

VI. CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.520(c)(1), I certify that this **BRIEF OF *AMICUS CURIAE* THE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF STATE OF CALIFORNIA** contains 8,168 words, not including the Tables of Contents and Authorities, the caption page, signature blocks or this Certification section.

Date: September 4, 2009

WINSTON & STRAWN LLP

By: 

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PROOF OF SERVICE

I am employed in the City and County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is Winston & Strawn LLP, 101 California Street, San Francisco, CA 94111-5894. On the date indicated below, I served the within document:

APPLICATION FOR PERMISSION TO FILE AND BRIEF OF *AMICUS CURIAE* THE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF STATE OF CALIFORNIA

X by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as set forth below.

☐ On 09/03, 2009, I sent such document(s) from facsimile machine 415-591-1400. I certify that said transmission was completed and that all pages were received and that a report was generated by facsimile machine 415-591-1400 which confirms said transmission and receipt.

☐ by causing to be personally delivered the document(s) listed above to the person(s) at the address(es) set forth below.

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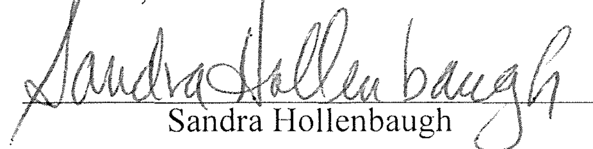
See Attached Service List

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

Executed on September 4, 2009, at San Francisco, California.



Sandra Hollenbaugh

SERVICE LIST

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