

California Appellate Court Rejects Policyholder's Attempt To "Electively Stack" Excess Policies

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A California appellate court ruled that a policyholder may not electively stack excess policies issued in a single policy year, finding that the policyholder's elective vertical exhaustion approach is not supported by policy language or common law. *Montrose Chemical Corp. of Ca. v. Superior Court of the State of Ca.*, 2017 WL 3772568 (Ca. Ct. App. Aug. 31, 2017).

Montrose, a DDT manufacturer, purchased layers of primary and excess liability policies from various insurers over a twenty-six year period. The number of layers and policy limits of each layer varied from year to year. In seeking coverage for underlying claims against it from its excess insurers, Montrose argued that it could select any policy to indemnify its liabilities, and need only show it had sufficient liabilities to exhaust the underlying policies in that particular policy period in order to access excess policies for the same period (*i.e.*, vertical exhaustion). In contrast, certain insurers argued that Montrose must exhaust all lower-lying excess policies in all triggered policy years (*i.e.*, horizontal exhaustion) before any particular excess policy could be reached. Ruling on cross-motions for summary judgment, a California trial court denied Montrose's motion and granted the insurers' motion. The trial court held that California law requires horizontal exhaustion unless policy language specifically provides otherwise, and that "other insurance" clauses in the excess policies preclude vertical exhaustion (even where excess policies explicitly referenced exhaustion of a particular underlying policy). The appellate court affirmed in part and reversed in part.

The appellate court ruled that Montrose's "elective stacking" is not supported by common law or policy language. In particular, the court deemed *State v. Continental Ins. Co.*, 55 Cal. 4th 186 (2012) (in which the court applied "all sums" allocation and allowed stacking) inapplicable, noting that both the policy language and legal issues presented in that case are distinguishable from the present case. The court expressly held that *Continental* does not stand for the proposition that insureds covered by multiple policies are entitled to select which policies to access "in the manner they deem most efficient and advantageous." Rather, the court explained, *Continental* reinforces the principle that policy language dictates issues of allocation and exhaustion. The court further held that here, policy language does not allow elective stacking because, among other things, many excess policies attach only upon exhaustion of all underlying insurance.

However, the appellate court ruled that the trial court erred in granting the insurers' summary judgment motion and holding that all

underlying limits across years of damage must be exhausted before any excess policy is triggered. Highlighting the “tremendous variation among the terms of the excess policies,” the appellate court held that it could not conclude, as a matter of law, that every excess policy requires horizontal exhaustion. Remanding the matter, the court noted that “the sequence in which policies may be accessed must be decided on a policy-by-policy basis, taking into account the relevant portions of each policy.”

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