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Calif. Long-Tail Ruling Continues Policyholder-Friendly Trend

By **Billie Mandelbaum and David Goodwin** (July 1, 2024, 1:22 PM EDT)


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Back in 1974, Truck Insurance Exchange issued a primary policy that had no aggregate limits of liability — i.e., no limits on the number of claims that Truck would cover — which was an almost unheard-of grant of coverage. As a result, Truck found itself responsible for tens of thousands of asbestos bodily injury claims subsequently asserted against Truck's insured, Kaiser Cement & Gypsum.

Fast-forward 50 years and, remarkably, within two weeks in June 2024, Truck prevailed in cases involving that insurance policy in both the U.S. Supreme Court and the California Supreme Court.

Others have written about the U.S. Supreme Court case, Truck Insurance Exchange v. Kaiser Gypsum Co. Inc., which concerned the rights of an insurer like Truck to object to its policyholder's proposed bankruptcy plan of reorganization. In this article, we focus on the California Supreme Court's ruling, where both Truck and California policyholders prevailed, at the expense of excess insurers.

The California Supreme Court's June 17 ruling in Truck Insurance Exchange v. Kaiser Cement & Gypsum Corp. was the latest in a string of California Supreme Court decisions involving insurance coverage for continuous or progressive injury claims, or what are often referred to as "long-tail" claims.[1]

While the dispute that was the subject of the ruling concerned a contribution claim between insurers, the court devoted most of the decision to a common insurance coverage issue arising when policyholders face long-tail liabilities that trigger liability policies across multiple policy periods, holding that policyholders may access their excess policies after exhausting the directly underlying policies.

In so holding, the court rejected a rule of horizontal exhaustion that would have required policyholders to exhaust all primary policies in all policy periods — sometimes referred to as "bathtub exhaustion" — before tapping into any first first-layer excess coverage.

Kaiser Cement adds to the court's case law yet another policyholder-protective decision involving continuous or progressive injury claims and reaffirms the care that the court has taken to ensure that policyholders facing long-tail liabilities are not left with less coverage than they paid for.

Rise of the Long-Tail Claim

More than four decades ago, California courts began to see a rise in the number of lawsuits involving continuous or progressive injuries caused by plaintiffs' past exposure to hazards such as asbestos and toxic pollutants.[2] To satisfy these so-called long-tail liabilities, corporate policyholders sought coverage from their commercial general liability, or CGL, insurers.[3]

Most insurers denied coverage, leading to a tide of insurance coverage litigation concerning the trigger of coverage (i.e., which policy or policies respond to a particular claim) and the scope of coverage (i.e., the coverage obligations of each triggered policy).[4]

In turn, California courts were faced with novel and complex questions of insurance policy interpretation. According to the California Supreme Court in its 2012 decision in State of California v. Continental Insurance Co., because "[t]raditional CGL insurance policies" were "silent as to" long-tail injuries, courts had to resolve whether, and to what extent, coverage was available for long-tail injuries that potentially triggered multiple insurance policies across several policy periods.[5]

In a series of decisions, the California Supreme Court developed a policyholder-protective body of case law that not only "acknowledges the uniquely progressive nature of long-tail injuries that cause progressive damage throughout multiple policy periods," but also ensures that the policyholder has "immediate access to the insurance it purchased" and not left "in the position of receiving less coverage than it bought."[6]

First, in 1995 in Montrose Chemical Corp. v. Admiral Insurance Co., the court adopted the "continuous injury trigger of coverage," which allows policyholders to seek coverage under all CGL policies in effect during the period of the continuous injury.[7]

Two years later, in Aerojet-General Corp. v. Transport Indemnity Co., the court held that a CGL insurer whose policy is triggered "remains obligated to indemnify the insured for the entirety of the ensuing damage or injury," that is, each triggered policy must pay up to its full limit of liability even if "some such harm results beyond the policy period."[8]

In California v. Continental Insurance, the court held that policyholders could "stack" the limits of all the policies triggered by the continuous injury.[9] And, in 2020, in Montrose Chemical Corp. of California v. Superior Court, known as Montrose III, the court held that a policyholder may select any year or years of coverage to pay a particular claim, and was not required to pursue coverage under every triggered primary policy.[10]

Montrose III, however, left open whether an insured may choose to seek coverage under a first-layer excess policy upon the exhaustion of the directly underlying primary policy or whether the insured must first exhaust all primary policies issued during the continuous period of damage before any excess policy may respond.

Moreover, because Montrose III involved an insurance coverage dispute between a policyholder and its insurer, the court did not address the implications of its ruling on disputes between insurers over contribution claims.

These open questions were at the forefront of Kaiser Cement.

The Decision

Kaiser Cement arose out of claims for insurance coverage for asbestos liabilities. Kaiser, a cement manufacturer, was named in tens of thousands of lawsuits brought by plaintiffs alleging that they had suffered bodily injury due to their exposure to asbestos in Kaiser's products. Kaiser tendered these claims to its liability insurers, including Truck Insurance Exchange, which had issued Kaiser primary coverage during the period of the alleged asbestos injuries.

Notably, the primary policy issued by Truck had a "per occurrence" limit of liability but the policy did not also include an aggregate limit for products liability claims, meaning that, unlike the primary policies issued by Kaiser's other insurers, there was no cap on the number of "occurrences" that Truck must cover under its primary policy.[11]

After unsuccessfully trying to get the lower courts to allow it to escape its extremely broad coverage obligations by characterizing all the asbestos claims as a single "occurrence,"[12] Truck invoked its Plan B, that is, it would pay the claims under its primary policy and then seek contribution from excess insurers in other years.

Both the trial court and California Court of Appeal, Second Appellate District, however, rejected Truck's Plan B, and refused to approve Truck's contribution claim. In so holding, both courts applied a rule of horizontal exhaustion, mandating that all triggered primary policies must be exhausted before a primary insurer, such as Truck, could seek contribution from any excess insurer, even if the underlying primary policy in a particular year had exhausted its policy limits.[13]

The California Supreme Court granted review to address the question left open in Montrose III, whether all triggered primary coverage in every year must be exhausted before any excess policy can respond to a claim.

In answering "no" to that question, the court carefully considered the language of the standard-form CGL policies that had been issued to Kaiser, and concluded that "the language of the first-level excess policies, when considered in conjunction with the insured's reasonable expectations … is most naturally read to mean that" a policyholder may access its first-layer excess policies "upon exhaustion of the directly underlying policies that were purchased for the same period."[14]

In reaching that conclusion, the court disapproved an often-cited Second Appellate District opinion from 1996, Community Redevelopment Agency v. Aetna Casualty & Surety Co., which had relied on "other insurance" clauses in standard-form liability policies to require "bathtub" exhaustion.[15]

According to the California Supreme Court, Community Redevelopment had erroneously relied on cases addressing noncontinuous injury claims and, therefore, did not recognize that CGL policies' "other insurance" provisions are ambiguous when they are applied to injuries that trigger multiple policies across different policy years.[16]

After an extensive discussion holding that a policyholder may access its first-layer excess policies upon the exhaustion of the directly underlying policies, the court was then left to consider Truck's claim for contribution from Kaiser Cement's excess insurers.

In a brief coda to the opinion, the court noted that, in contrast to disputes between a policyholder and an insurer, which turn on the language of the insurance policy, an equitable contribution claim involves principles of equity. On that issue, which was the focus of the parties' briefing in the appeal, the court

remanded the case to decide whether Truck's claim for contribution would "accomplish ultimate justice" between Kaiser and its insurers.[17]

As Kaiser Cement had argued, and the California Supreme Court noted in its decision, permitting Truck to pass some of its coverage obligations to Kaiser's excess insurers could allow Truck to pay less than it promised under its policy.

Further, permitting Truck to seek contribution could leave Kaiser, and by extension asbestos claimants, with less coverage for future asbestos claims since the excess policies in the years that were the subject of Truck's contribution claims had aggregate limits of liability.[18] It will be up to the Second Appellate District to grapple with these issues of equity.

Ultimately, although the California Supreme Court left unresolved the precise dispute at issue in Kaiser Cement — that is, whether Truck is entitled to equitable contribution from Kaiser's excess insurers — the court's lengthy opinion should prove useful for policyholders seeking coverage for long-tail liabilities.

While the court could have merely focused on the contribution dispute, it instead returned to first principles of California insurance law, and the court's commitment to interpreting liability insurance policies in a manner that honors policyholders' reasonable expectations and protects their interests in securing coverage.

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Disclosure: Covington filed an amicus brief on behalf of United Policyholders in support of Kaiser Cement.

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[1] Truck Insurance Exchange v. Kaiser Cement & Gypsum Corp., No. S273179 (June 17, 2024).

[2] See generally Kenneth S. Abraham, "The Long-Tail Liability Revolution: Creating the New World of Tort and Insurance Law," 6 U. Pa. J. L. & Pub. Affairs 346 (2021), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1079&context=jlpa.

[3] See Kenneth S. Abraham, "The Rise and Fall of Commercial Liability Insurance," 87 Va. L. Rev. 85, 96 (2001), https://doi.org/10.2307/1073895.

[4] See State of California v. Cont'l Ins. Co., 55 Cal. 4th 186, 196 (2012).

[5] Id.

[6] Id. at 201 (emphasis in original) (internal citation omitted).

[7] Montrose Chemical Corp. v. Admiral Insurance Co., 10 Cal. 4th 645 (1995).

[8] Aerojet-General Corp. v. Transport Indemnity Co., 17 Cal. 4th 38 (1997). 17 Cal. 4th at 57 & 57, n.10

(internal quotation and citation omitted).

[9] State of California v. Continental Ins. Co. 55 Cal. 4th 186 (2012).

[10] Montrose Chemical Corp. of California v. Superior Court, 9 Cal.5th 215 (2020) ("Montrose III").

[11] See Truck Ins. Exch. v. Kaiser Cement & Gypsum Corp., No. S273179, 2024 WL 3016941, at *3-4 (Cal. June 17, 2024).

[12] See London Market Insurers v. Superior Court, 146 Cal. App. 4th 648 (2007).

[13] See Kaiser Cement, at *19, n.14.

[14] Id. at *17.

[15] Community Redevelopment Agency v. Aetna Casualty & Surety Co., 50 Cal. App. 4th 329 (1996).

[16] Id. at *18. In addition to disapproving Community Redevelopment, the Court also disapproved language in Padilla Construction Co., Inc. v. Transportation Ins. Co., 150 Cal. App. 4th 984 (2007), and Stonewall Ins. Co. v. City of Palos Verdes Estates, 46 Cal. App. 4th 1810 (1996), which had "suggest[ed] that California law generally requires horizontal exhaustion of all primary insurance in cases of continuous loss."

[17] Id. at *18 (internal quotation and citation omitted).

[18] See id. at *19.