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October 27, 2017

Honorable Chief Justice Tani G. Cantil-Sakauye
and the Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102-7303

**Re: Letter of United Policyholders in Support of Petition for Review of *Montrose Chemical Corp. of Cal. v. Superior Court*, No. S244737 (Second Appellate District, Division Three, Case No. B272387)**

To the Honorable Chief Justice and Associate Justices of the California Supreme Court:

I write on behalf of amicus curiae United Policyholders to support the petition for review that Montrose Chemical of California filed in *Montrose Chem. Corp. of Cal. v. Superior Court (Canadian Universal)*, No. S244737. Review is amply warranted because that decision (1) contravenes or disregards decisions of this Court and (2) conflicts with a far better reasoned decision on the same issue from another appellate court.[1]

***Interest of the Amicus Curiae***

United Policyholders ("UP") is a non-profit organization based in California that serves as a voice and information resource for insurance consumers in the 50 states. The organization is tax-exempt under Internal Revenue Code §501(c)(3). UP is funded by donations and grants and does not sell insurance or accept money from insurance companies. UP's work is divided into three program areas: *Roadmap to Recovery*™ (disaster recovery and claim help for victims of wildfires, floods, and other disasters); *Roadmap to Preparedness* (insurance and financial literacy and disaster preparedness); and *Advocacy and Action* (advancing pro-consumer laws and public policy). UP hosts a

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[1] *See State of Cal. v. Continental Ins. Co.* (Sept. 29, 2017), No. B064518 ("*Continental II*").

library of tips, sample forms and articles on commercial and personal lines insurance products, coverage and the claims process at www.uphelp.org.

UP's Executive Director, Amy Bach, is currently in her seventh term as an official consumer representative to the National Association of Insurance Commissioners where she works closely with California Insurance Commissioner Jones on consumer issues, and has performed government service as a consultant to the California State Senate and on the California Earthquake Authority Product Enhancement Committee.

A diverse range of policyholders throughout California communicates on a regular basis with UP, which allows UP to provide topical information to courts via the submission of *amicus curiae* briefs in cases involving insurance principles that are likely to affect segments of the public and business community. This Court recently cited UP's amicus brief in *Association of California Insurance Companies v. Dave Jones, Insurance Commissioner* (2017) 2 Cal.5th 376, 383 and has adopted its arguments in *TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19 and *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815. The Court of Appeal likewise recently adopted UP's arguments in *California Fair Plan Ass'n v. Garnes* (2017) 11 Cal.App.4th 1276, 1285. UP has filed *amicus curiae* briefs in 400 cases throughout the United States.

UP seeks to fulfill the "classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Commissioner of Labor & Indus*. (9th Cir. 1982) 694 F.2d 203, 204. This is an appropriate role for amicus curiae. As commentators have stressed, an *amicus curiae* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." Robert L. Stern et al., *Supreme Court Practice 570-71* (6th ed. 1986) (citation omitted).

The undersigned is representing UP in this matter on a *pro bono* basis.

***Background to the Montrose IX Appellate Decision***

*Montrose Chem. Corp. v. Superior Court (Canadian Universal)*, which this letter will refer to as *Montrose IX*, is the latest in a long series of appellate decisions involving the efforts of Montrose Chemical Corporation of California to obtain insurance coverage for environmental liabilities that it faces as a result of releases of DDT from its facility in

Torrance, California.[2] The Respondents in this proceeding are excess liability insurers that are part of a "tower" of liability insurance that Montrose Chemical purchased over a period of 26 years.

The issue in *Montrose IX* arises when a policyholder like Montrose Chemical purchased a "tower" of liability insurance that was in effect for a number of years, and the policyholder wants to obtain coverage for a lawsuit alleging continuous or progressive injuries, such as environmental, asbestos, construction defect, or toxic tort cases. In those circumstances, the policyholder and insurers often dispute which underlying policy or policies in the "tower" must be exhausted before a particular excess policy may be called upon to contribute its limits:

- Must the policyholder exhaust only the limits of liability of the policies sitting immediately below the excess policy in the "tower" of insurance? That was the holding of the Court of Appeal in *Continental II*.

- Or must the policyholder exhaust the limits of liability of every insurance policy in every triggered year at every lower layer, even if the excess policy does not expressly and unambiguously require the policyholder to do so? That was the holding of the Court of Appeal in *Montrose IX*.

A prior *Montrose* decision by this Court, as well a decision in which Montrose Chemical was an *amicus curiae* and a decision in which UP was an *amicus curiae*, frame that issue.

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[2] The prior *Montrose* appellate decisions of which UP is aware are: *Montrose Chem. Corp. v. Superior Court* (1993) 6 Cal.4th 287 (rules governing primary insurers' duty to defend); *International Ins. Co. v. Montrose Chem. Corp.* (1991) 231 Cal.App.3d 1367 (affirming discovery sanctions imposed on insurer); *Montrose Chem. Corp. v. Superior Court* (1994) 25 Cal.App.4th 902 (standard for staying insurance coverage action to avoid prejudice to the defense of the underlying case); *Montrose Chem. Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645 (adopting a "continuous trigger" of insurance coverage); *Montrose Chem. Corp. v. Am. Motorists Ins. Co.* (9th Cir. 1997) 117 F.3d 1128 (Rule 11 sanctions on insured not appropriate); *Am. Motorists Ins. Co. v. Superior Court* (1998) 68 Cal.App.4th 864 (insurer bears burden of proving defense costs were unreasonable); *Home Ins. Co. v. Superior Court* (2005) 34 Cal.4th 1025 (all insurers combined can disqualify a judge only once under Code Civ. Proc. §170.6); *Montrose Chem. Corp. v. Century Indem. Co.*, No. B213919 (Sept. 15, 2010) (unpublished).

In *Montrose Chem. Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, this Court held that when a policyholder faces liability for an underlying claim involving continuous or progressive injuries, a "continuous trigger" of coverage applies. Specifically, for the environmental claims against Montrose Chemical, this Court held that every insurance policy in effect from the time that property damage began until final judgment was entered against Montrose Chemical in the underlying action was potentially triggered, i.e., all 26 years of Montrose Chemical's insurance program.

In *State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186 – in which Montrose Chemical appeared as an *amicus curiae* – this Court held that when a continuous injury claim triggers multiple years of liability insurance, each triggered policy is liable to pay up to its full policy limits to indemnify the insured. The Court described its decision as an "'all-sums-with-stacking' allocation rule." *Id*. at 191.

And in *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, this Court addressed "other insurance" clauses, that is, insurance policy provisions that affect an insurer's obligations when other insurance at the same layer of coverage applies to the same loss. *Id*. at 1078 fn.6. This Court held that "other insurance" clauses do not affect the policyholder's coverage rights vis-à-vis its insurers, and instead only apply to claims between insurers. This Court explained that the obligations of successive insurers "to cover a continuously manifesting injury is a separate issue from the obligations of the insurers to each other." *Id*. at 1080. Thus, the Court concluded, an "other insurance" clause "'has no bearing upon the insurers' obligations to the policyholder.'" *Id*. (quoting *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.* (1996) 45 Cal.App.4th 1, 105-06).

*Montrose IX* and *Continental II* address what happens when (a) a policyholder's primary policies are exhausted, (b) the policyholder wishes to obtain insurance coverage from one or more of its excess policies in the "tower" of insurance, and (c) the claim at issue is a continuing injury claim that triggers multiple years of insurance. Can the policyholder select a year or years of excess coverage in the "tower" of insurance, and ask the excess insurers in that year or years to pay "all sums" for the claim (without prejudice to whatever contribution or indemnity rights each paying excess insurer may have against other insurers in other years, after the policyholder has been made whole)? Or must the policyholder exhaust every excess policy in every year at one layer before any excess policy in the next layer up could owe a duty to pay?

In addressing the issue, *Montrose IX* acknowledged that it did not have before it the relevant policy language of most of the insurance policies at issue. (Op. at 31, 43-44.) Rather than remand the case to augment the record before addressing the issue before it,

however, the court created a general rule in the abstract. To do so, the court started with the following chart depicting a hypothetical "tower" of excess liability insurance:

| | **Year 1** | **Year 2** | **Year 3** | **Year 4** | **Year 5** |
|---|---|---|---|---|---|
| $50 mil<br>Layer 5 | | | | | |
| $40 mil<br>Layer 4 | | | | | |
| $30 mil<br>Layer 3 | | | | | |
| $20 mil<br>Layer 2 | | | | | |
| $10 mil<br>Layer 1 | | | | | |

(Op. at 8.) *Montrose IX* then examined the excess policies that happened to be in the record on appeal. They provide coverage only after exhaustion of the limits of liability of the insurance policies listed by name and number in the excess policy and "any other underlying insurance collectible by the insured." (Op. at 28-30.)

"Underlying insurance" in that context has two potential interpretations. One is that it refers to all insurance policies directly below the excess policy in the "tower" of insurance during that year, including policies not listed by name and number. Using the chart that *Montrose IX* included in its opinion, if the policyholder sought coverage from the excess policy in Layer 4 in Year 4 in the chart, it would need to exhaust the limits of the excess policies in Layers 1, 2, and 3 in Year 4 before Layer 4 in that year could owe a duty to pay under this interpretation of "underlying insurance." *Continental II* adopted this interpretation, which is sensible because the obligations of an excess insurer to its policyholder should not mean one thing if the policyholder only bought insurance in Year 4 and something very different if the policyholder happened to have bought insurance in

Years 1, 2, 3, and 5 as well. *See Armstrong World Indus. v. Aetna Cas. & Sur. Co.* (1996) 45 Cal.App.4th 1, 78 fn.31 ("As a general rule, insurance policies should be interpreted as if no other insurance is available.") (citations omitted).

The other interpretation, which *Montrose IX* adopted, is that "underlying insurance" refers to every policy at a lower layer purchased by the policyholder in every year that the policyholder bought insurance. Under that construction, the limits of liability of every excess liability policy in Layer 1 in every year must be exhausted before any excess liability policy in Layer 2 can have a duty to provide coverage; the limits of liability of every excess liability policy in every year in Layers 1 and 2 must be exhausted before any excess liability policy in Layer 3 can have a duty to provide coverage; and the limits of every excess liability policy in every year in Layers 1, 2 and 3 must be exhausted before the Layer 4 policy in Year 4 can provide coverage.

*Montrose IX* created this general rule by (a) adopting a coverage-minimizing reading of the term "underlying insurance," in contravention of California law; (b) improperly applying to excess insurance a case concerning the duty to defend under primary insurance; (c) using "other insurance" clauses to limit the policyholder's insurance coverage rights notwithstanding this Court's ruling in *Dart Industries, Inc. v. Commercial Union Ins. Co.* that "other insurance" insurance clauses only apply to inter-insurer disputes and do not affect the policyholder's rights as against any insurer; and (d) imposing unnecessary burdens on the Superior Courts and parties.

Because *Montrose IX* misapplies longstanding California insurance law and conflicts with or disregards a host of California cases as well as with the published decision in *Continental II*, which expressly rejects *Montrose IX* (*Continental II*, slip op. at 24 fn.5), review is warranted.

***Reasons for a Grant of Review***

(1) *The court of appeal ignored California's basic rules of insurance policy interpretation:* The key to any insurance coverage dispute is the language of the insurance policy. As this Court explained 27 years ago, whether an insurance policy provides coverage "is to be found solely in the language of the [applicable insurance] policies, not in public policy concerns." *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 818; *see also Cunningham v. Universal Underwriters* (2002) 98 Cal.App.4th 1141, 1148 (the court's "focus must be on "the language of the policy itself, not upon 'general' rules of coverage that are not necessarily responsive to the policy language'") (quoting *Am. Cyanamid Co. v. Am. Home Assur. Co.* (1994) 30 Cal.App.4th 969, 978).

But when it comes to the insurance policy language, *Montrose IX* does not identify any provision in any insurance policy that says, let alone says in the requisite clear and unambiguous language, "if you only bought one year of coverage, this excess policy will attach when the policy immediately below is exhausted; but if you bought insurance in successive years, including in years after this policy, the coverage you already paid for under this policy will be dramatically reduced, and you cannot get coverage under this policy until after you have exhausted every insurance policy at a lower layer in every year that this claim triggers," or words to that effect.

By limiting coverage in the absence of clear and unambiguous insurance policy language, *Montrose IX* erred egregiously. First, "underlying insurance" is, at best for the insurers, ambiguous: it could mean "underlying insurance in effect at the same time as the excess policy, whether or not specifically identified in the declarations page of the excess policy," or it could mean "insurance at a lower layer in the tower in every single year that the policyholder purchased insurance." But if "underlying insurance" is ambiguous, the court should have construed that language in favor of the insured, as this Court's longstanding precedent requires. *See, e.g.*, *State of Cal. v. Continental Ins. Co.*, 55 Cal.4th at 195 (reciting the fundamental rule that "ambiguities are generally construed against the party who caused the uncertainty to exist (i.e., the insurer) in order to protect the insured's reasonable expectation of coverage."); *Ameron Int'l Corp. v. Ins. Co. of the State of Pa.* (2010) 50 Cal.4th 1370, 1378 (same); *Minkler v. Safeco Ins. Co. of Am.* (2010) 49 Cal.4th 315, 321 (same); *Kazi v. State Farm Fire & Cas. Co.* (2001) 24 Cal.4th 871, 879 (same).

Second, *Montrose IX* disregarded the basic principle that a court must read insurance policy language in the context of the entire contract, giving meaning to every part and avoiding a reading that renders any part of the insurance policy superfluous. *See* Civ. Code § 1641. *Montrose IX* apparently never considered that if "underlying insurance" were interpreted to refer unambiguously to every insurance policy at a lower layer during every year in which the policyholder purchased insurance covering a loss, there would have been no need at all for the excess policy to identify the underlying policies in effect during the same year by name and number, as they would already be included within the term "underlying insurance." Thus, the reasoning of *Montrose IX* renders superfluous the provisions identifying specific underlying insurance by name and number, contravening the rules of insurance policy interpretation that this Court has adopted. *See, e.g., Safeco Ins. Co. of Am. v. Robert S.* (2001) 26 Cal.4th 758, 764 (refusing to interpret an insurance policy in a way that would render's the policy's contractual promises "illusory").

(2) *Montrose IX improperly applied to excess policies a rule unique to the duty to defend under primary policies.* The court of appeal attempted to justify its holding that every policy at a lower layer in every year must be exhausted before any policy at the next layer could owe a duty to pay by citing to *Community Redevelopment Agency v. Aetna Cas. & Sur. Co.* (1996) 50 Cal.App.4th 329. That case, however, addressed whether, in a construction defect claim triggering successive years of liability insurance coverage, an excess policy in one year could owe a *duty to defend* when the unexhausted primary policies remain available to fund the defense. Citing to the distinctions between primary and excess coverage, including the fact that primary insurers typically charge extra premiums in exchange for agreeing to defend, the court held that in the absence of insurance policy language providing otherwise, primary insurers must defend before any excess insurer defends. *Id*. at 337-38. Subsequent decisions have confirmed that "the horizontal exhaustion rule [applying to the defend duty in *Community Redevelopment*] only governs the relationship between primary and excess insurers." *State v. Continental Ins. Co.* (2009) 170 Cal.App.4th 169, 174.

*Montrose IX* offers only one reason to justify its unprecedented attempt to apply the *Community Redevelopment* rule to a dispute involving only excess policies: that Montrose Chemical failed to explain why the court shouldn't apply that rule. In fact, Montrose Chemical enunciated a valid – indeed, dispositive – reason why *Community Redevelopment* only applies to primary policies: primary policies typically owe a duty to defend and excess policies typically do not; and policies with defense duties should pay for the defense before policies with no defense duties. *Community Redevelopment*, 50 Cal.App.4th at 340. That is because primary insurers charge a higher premium in exchange for assuming a duty to defend. *See Legacy Vulcan Corp. v. Superior Court* (2010) 185 Cal.App.4th 677, 695.

By importing *Community Redevelopment* into the context of excess insurance, *Montrose IX* once again misapplied California law: if a court is faced with a choice between a coverage-maximizing and a coverage-minimizing interpretation of an insurance policy, and the insurance policy language does not unambiguously require the coverage-minimizing interpretation, a court must adopt the interpretation that maximizes coverage, consistent with the insured's reasonable expectations. *See, e.g., Reserve Ins. Co. v. Pisciotta* (1982) 30 Cal.3d 800, 807-08 ("If semantically permissible, the contract will be given such construction as will fairly achieve its manifest object of securing indemnity to the insured for the losses to which the insurance relates.") (citations omitted); *accord Fresh Express, Inc. v. Beazley Syndicate 6223/623 at Lloyd's* (2011) 199 Cal.App.4th 1038, 1052; *Fire Ins. Exch. v. Superior Court* (2004) 116 Cal.App.4th 446, 454 (same); *Desai v. Farmers Ins. Exch.* (1996) 47 Cal.App.4th 1110, 1117 (same).

Thus, the "default" is to favor coverage – not to limit coverage on the sole ground that the policyholder supposedly failed to prove otherwise.

(3) *Montrose IX Improperly Used An "Other Insurance" Clause To Limit Coverage*. *Montrose IX*'s third and final justification for its holding is that the sample excess policy it examined indemnifies for "loss" and defines loss to include the amounts paid to settle claims "after making deductions for . . . other insurances [in the plural] other than the underlying insurance and excess insurance purchased specifically to be in excess of this policy." *Montrose IX* at 31. The court looked at the "Other Insurance" clause in the excess policy to supply the meaning of "other insurances," noting that the "Other Insurance" clauses provided that the policies apply "in excess of" other insurance.

*Montrose IX* misapplied California's rules of insurance policy interpretation yet again. "[O]ther insurances" cannot have the same meaning as "Other Insurance" in the "Other Insurance" clause: that would (i) violate the rule that coverage limitations must be in "clear and unmistakable language" (*see MacKinnon v. Truck Ins. Exch.* (2003) 31 Cal.4th 635, 648); (ii) disregard the language in the insuring agreement providing that "other insurances" does not include "underlying insurance," a term that *Montrose IX* construed to mean insurance in any lower layer in any year; (iii) conflict with *Fireman's Fund Indem. Co. v. Prudential Assurance Co.* (1961) 192 Cal.App.2d 492, 495, a case that *Montrose IX* did not cite, which holds that "other insurances" is not the same as "Other Insurance" (*see also Advent, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.* (2016) 6 Cal.App.4th 443, 468 (agreeing with *Fireman's Fund*)); and (iv) contravene the rule that courts cannot insert into insurance policies language that an insurer knew about but failed to use (*see Safeco*, 26 Cal.4th at 763-64).

In holding that an "Other Insurance" clause limits coverage, *Montrose IX* also contravened this Court's holding in *Dart*, 28 Cal.4th at 1080, that "Other Insurance" clauses only apply to inter-insurance disputes and do not limit the policyholder's rights under its insurance policies. *Montrose IX* gives the back of the hand to *Dart*, saying that its holding only applies to primary policies. In one sense, *Montrose IX* is right: only primary policies were at issue in *Dart*. But this Court's reasoning was not so limited, and there is no rational basis for limiting *Dart* to primary policies. Moreover, other cases, not cited in *Montrose IX*, apply the same *Dart* rule to excess policies. *See, e.g., Armstrong*, 45 Cal.App.4th at 52 (allocation among excess insurers pursuant to an "other insurance" clause "does not affect the obligation of the insurers to respond in full: 'a policyholder may obtain full indemnification and defense from one insurer, leaving the targeted insurer to seek contribution from other insurers covering the same loss.'") (citation omitted).

*Montrose IX* also purported to follow *Carmel Dev. Co. v. RLI Ins. Co.* (2005) 126 Cal.App.4th 502, but that case was a dispute among two excess insurers with policies in effect at the same time. The issue in *Carmel* was which of two policies in effect at the same time pays first. But the policyholder had already been made whole and the case says nothing about the use of "other insurance" clauses to deprive the insured of coverage based on policies the insured purchased in different years.

Even worse, the rule that *Montrose IX* proposes would require an insured to seek insurance coverage from every single policy in its insurance program at a particular layer before going to the next layer. Assume, under the hypothetical tower of insurance on page 5 of this letter, that the insured is entitled to coverage under the policies in Year 4, but the policies in Years 1-3 and 5 have different language and coverage is debatable. Must the insured sue every insurer in Years 1-3 and 5, and litigate coverage to conclusion before going to the excess insurer in Year 4? That is the implication of *Montrose IX*, because until the insured litigates against every other insurer, the targeted excess insurer can argue that the insured has not proven exhaustion of every lower layer policy in every year. *Montrose IX* thus would impose huge burdens on the courts and parties and huge transaction costs on both policyholders and insurers (including the insurers in Years 1-3 and 5). Forcing an insured to litigate coverage under every policy in every year (which as the *Montrose* saga shows can take decades) before it can access a specific excess policy would also prevent the insured from obtaining immediate access to its coverage. *See Continental*, 55 Cal.4th at 200-01 ("The all-sums-with-stacking rule means that the insured has immediate access to the insurance it purchased.") *Montrose IX* makes no sense at all.

(4) *Continental II Got It Right: Continental II* analyzed the same issues as *Montrose IX*, and, in contrast to *Montrose IX*, properly applied California's rules of insurance policy interpretation, correctly limited *Community Redevelopment* to primary policies, correctly held that the reasoning of *Dart Industries* applies to excess policies, and correctly concluded that *Montrose IX* is contrary to the "all-sums with stacking" holding in *State v. Continental*, 55 Cal.4th 186.

The Court should review *Montrose IX* and leave *Continental II* undisturbed.

Respectfully submitted,

/s/David B. Goodwin
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