No. S273179

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

TRUCK INSURANCE EXCHANGE,
Plaintiff-Appellant-Petitioner,

v.

KAISER CEMENT AND GYPSUM CORP., ET AL.,

Defendants-Cross-Complainants-Appellants-Respondents.

After a Decision by the Court of Appeal
Second Appellate District, Division Four, Civil Case No. B278091
Los Angeles County Superior Court Case No. BC249550
The Honorable Kenneth Freeman, Presiding

APPLICATION OF UNITED POLICYHOLDERS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENT

David B. Goodwin (SBN 104469)
dgoodwin@cov.com
Breanna K. Jones (SBN 318597)
bjones@cov.com
Billie T.H. Mandelbaum (SBN 345488)
bmandelbaum@cov.com
COVINGTON & BURLING LLP
Salesforce Tower
415 Mission Street, Suite 5400
San Francisco, California 94105-2533
(415) 591-6000

Attorneys for Amicus Curiae
United Policyholders

APPLICATION OF UNITED POLICYHOLDERS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to California Rules of Court, rule 8.520(f), proposed amicus United Policyholders ("UP") hereby respectfully applies to this Court for leave to file the accompanying *Amicus Curiae* Brief in support of Respondent Kaiser Cement and Gypsum Corporation in the above-captioned appeal.[1]

United Policyholders is a non-profit organization based in California that serves as a voice and information resource for insurance consumers across the country. 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 library of tips, sample forms, and articles on commercial and personal lines insurance products, coverage, and the claims process at www.uphelp.org.

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[1] No party or counsel for any party authored any portion of the brief. No party or counsel for any party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than the *amicus curiae*, its members, and its counsel made a monetary contribution intended to fund the preparation or submission of the brief. (California Rules of Court, rule 8.520(f)(4).) The undersigned represents UP on a *pro bono* basis.

UP monitors the insurance sales, claims and law sectors, conducts surveys, and hears from a diverse range of individual and business policyholders throughout California on a regular basis. The organization communicates with state regulators in its capacity as an official consumer representative in the National Association of Insurance Commissioners. UP provides topical information to courts via the submission of *amicus curiae* briefs in cases involving insurance principles that matter to people and businesses.

UP's consumer surveys assisted this Court in *Association of California Insurance Companies v. Jones* (2017) 2 Cal.5th 376, and this Court has cited favorably to UP's arguments in *Pitzer College v. Indian Harbor Insurance Co.* (2019) 8 Cal.5th 93, *TRB Investments, Inc. v. Fireman's Fund Insurance Co.* (2006) 40 Cal.4th 19, and *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815. UP has filed *amicus curiae* briefs in hundreds of 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-Wahl Co. v. Commissioner of Labor & Indus.* (9th Cir. 1982) 694 F.2d 203, 204.) 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." (Stern et al., *Supreme Court Practice* (6th ed. 1986) 570-571 [citation omitted].)

UP is familiar with all the briefs that have been previously filed in this appeal. UP has experience with the issues presented by this appeal, and it believes its experience will make its proposed brief of assistance to this Court. UP has an interest in ensuring that all policyholders may freely and efficiently access the entirety of their insurance coverage portfolios to protect themselves and third party claimants against the risks of a long-tail loss triggering numerous liability insurance policies spanning several policy periods.

UP therefore respectfully requests leave to file the attached *amicus curiae* brief presenting additional authorities and discussion in support of Kaiser's arguments.

Dated: December 16, 2022

Respectfully submitted,

COVINGTON & BURLING, LLP

By: /s/ David B. Goodwin
DAVID B. GOODWIN

Counsel for *Amicus Curiae*
United Policyholders

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David B. Goodwin (SBN 104469)
dgoodwin@cov.com
Breanna K. Jones (SBN 318597)
bjones@cov.com
Billie T.H. Mandelbaum (SBN 345488)
bmandelbaum@cov.com
COVINGTON & BURLING LLP
Salesforce Tower
415 Mission Street, Suite 5400
San Francisco, California 94105-2533
(415) 591-6000

Attorneys for Amicus Curiae
United Policyholders

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INTRODUCTION AND SUMMARY OF ARGUMENT

When called upon to decide questions of insurance law, this Court takes care to protect the interests of the insured. As the Court has explained, because "'the object and purpose of insurance is to indemnify the insured in case of loss,'" the law makes "'every rational [effort] to give full protection to the insured.'"[2] The Court has applied this guiding principle not just in litigation between policyholders and their insurers but also when addressing allocation disputes among insurers.[3]

This policyholder-protective approach is reflected in the Court's decisions in cases, like the one here, involving long-tail mass tort liabilities that trigger multiple liability insurance policies across many policy periods. For example, in *Montrose Chemical Corp. v. Admiral Insurance Co.* (1995) 10 Cal.4th 645 ("*Montrose II*"), the Court adopted the "continuous injury trigger of coverage," confirming that policyholders may seek coverage under all occurrence-based liability insurance policies in effect when a continuous or progressive injury takes place. In so holding, the Court articulated several "equitable concerns," including "the fear that policyholders could be disadvantaged by" the insurers' alternative trigger proposal. (*Id.* at 688.) In subsequent decisions involving long-tail claims, from *Aerojet-*

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[2] *Pitzer College v. Indian Harbor Ins. Co.* (2019) 8 Cal.5th 93, 106-107 (quoting *Glickman v. New York Life Ins. Co.* (1940) 16 Cal.2d 626, 635).

[3] *See, e.g., Continental Cas. Co. v. Zurich Ins. Co.* (1961) 57 Cal.2d 27, 37; *Signal Cos., Inc. v. Harbor Ins. Co.* (1980) 27 Cal.3d 359, 369.

General Corp. v. Transport Indem. Co. (1997) 17 Cal.4th 38 to *State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186 to *Montrose Chemical Corp. of California v. Superior Court* (2020) 9 Cal.5th 215 ("*Montrose III*"), this Court has continued to adopt coverage-promoting insurance policy interpretations, rejecting insurer arguments that would otherwise put policyholders facing liabilities for long-tail claims "in the position of receiving less coverage" than they had bargained for. (*Cont'l Ins. Co.*, 55 Cal.4th at 201.)

The Respondent in this appeal, Kaiser Cement and Gypsum Corporation, was named as a defendant in tens of thousands of long-tail asbestos bodily injury claims.[4] Applying this Court's long-tail claim rules, Kaiser selected a 1974 primary comprehensive general liability ("CGL") policy, issued by Truck, to respond to the claims that trigger that year. The Truck policy has a limit of liability of $500,000 for each occurrence, but it has no aggregate limit. That means that if each asbestos bodily injury claim is a separate occurrence, as the courts below have held, Truck's 1974 policy must respond separately to each claim by fulfilling its duty to defend and paying up to $500,000 in

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[4] As discussed in the Background section below, Kaiser assigned rights under the liability insurance policies at issue in this appeal to an asbestos channeling trust formed under Section 524(g) of the Bankruptcy Code, the Kaiser Gypsum Asbestos Personal Injury Trust. Where appropriate, references to "Kaiser" in this *amicus brief* include both the Named Insured on the liability policies, Kaiser Cement and Gypsum Corporation, and also its assignee, the channeling trust.

indemnity for any settlement or adverse judgment. This was the bargain that Truck struck when it issued the policy.

Truck, however, is unhappy with the lower court rulings that allowed Kaiser to obtain coverage for most of the asbestos bodily injury claims under the 1974 policy. Truck argues that it should be entitled to transfer nearly all of its coverage obligations under the 1974 *primary policy* to other insurers' *excess policies* via claims for equitable contribution. On its face, this inter-insurer dispute does not implicate Kaiser's right to coverage. But *amicus curiae* UP highlights below how Truck's proposed equitable contribution scheme would effectively deprive Kaiser of insurance that it could otherwise use to pay injured claimants and threatens to leave claimants without compensation for their injuries.

As a threshold matter, Truck's proposed equitable contribution scheme conflicts with longstanding precedent requiring that all primary CGL insurance be exhausted before a primary insurer can obtain equitable contribution from an excess insurer. That precedent is based on the established principle that an insurer can obtain equitable contribution only from other insurers covering the same risk at the same level of coverage.[5] It also is based on the undisputed fact that primary insurers charge more, and accept greater and different risk, than excess

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[5] *See, e.g., RLI Ins. Co. v. CNA Cas. of Calif.* (2006) 141 Cal.App.4th 75, 84; *Reliance Nat'l Indem. Co. v. General Star Indem. Co.* (1999) 72 Cal.App.4th 1063, 1078; *Fireman's Fund Ins. Co. v. Maryland Cas. Co.* (1998) 65 Cal.App.4th 1279, 1300.

insurers—factors that should bear considerable weight in an insurer versus insurer equitable contribution analysis.

Truck attempts to circumvent this precedent by citing to language in some of Kaiser's excess policies providing that those excess policies will "continue in force as underlying insurance" after the primary insurer pays its limits. Truck argues that this language transforms an excess policy into a primary policy for purposes of equitable contribution. But Truck's reading of the "continue in force" provision is neither supported by the case law nor consistent with the language of the excess policies themselves. Moreover, that provision does not even appear in some of the excess policies from which Truck seeks equitable contribution. Thus, the Superior Court did not err in declining to hold that Kaiser's excess insurers had a duty to drop down and contribute to defense and indemnity payments as if they were primary insurers.

This is not a case in which equity compels a different result. While this Court has "decline[d] to formulate a definitive rule applicable in every case" involving claims for equitable contribution, it has emphasized that it is necessary to consider how the resolution of the inter-insurer dispute will affect the interest of *the insured*. (*Signal Cos.,* 27 Cal.3d at 369.) To that end, courts weigh "varying equitable considerations" including "the relation of the insured to the insurers," "the nature of the claim made," and "the particular policies of insurance." *(Id.*)

Recognizing that a "trial court has *discretion* to find the *equitable* result" in allocating defense and indemnity costs

between or among the insurers, the Superior Court correctly took those factors into consideration in rejecting Truck's equitable contribution claim. (Joint Appellants' Appendix ["JAA"] 1249 [emphasis in original].) The Court of Appeal carefully examined the Superior Court's ruling and affirmed. As with most equitable rulings, the Superior Court's equitable contribution determination is reviewed on appeal for abuse of discretion.[6]

The Superior Court did not abuse its discretion. The 1974 Truck primary policy has no aggregate limit of liability, only a "per occurrence" limit. Further, the policy's duty to defend is outside of the policy's "per occurrence" limits. Thus, if Truck pays sums under the 1974 primary policy to defend against and settle a claim, those payments do not reduce the insurance proceeds available to Kaiser to pay the next claim. In contrast, the excess policies from which Truck seeks equitable contribution provide that both defense and indemnity payments erode the policy limits and that their payment obligations are subject to *aggregate* limits of liability. If Truck were allowed to shift indemnity payments and defense costs to those excess insurers, the payments would reduce the excess policies' limits of liability and the funds available to Kaiser to pay future claims would be reduced accordingly. Put most simply, every dollar that an excess insurer pays to Truck by way of equitable contribution is one less dollar available to Kaiser to use to compensate asbestos claimants. The Superior Court acted well within its discretion when it declined

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[6] *See, e.g., Axis Surplus Lines Ins. Co. v. Glencoe Ins, Ltd.* (2012) 204 Cal.App.4th 1214, 1231.

to adopt a scheme that threatens to deprive individuals with asbestos-related disease of compensation for their injuries.

For the foregoing reasons, *amicus curiae* respectfully requests that this Court affirm the decision below and decline to adopt Truck's equitable contribution proposal.

BACKGROUND TO THE ISSUE BEFORE THIS COURT

The "Statement of Facts" sections in the parties' briefs are both short and limited in scope, omitting much of the background to both Kaiser and the claims against it. Because the Court may not be immediately familiar with that background, UP provides the Court with information that the Court may find useful in addressing the parties' arguments.

I. The Asbestos Bodily Injury Claims Against Kaiser

Kaiser—which has borne many names over its history—was formed more than 70 years ago from assets in the Henry J. Kaiser family of companies. (JAA-4197.) Kaiser and its predecessors are alleged to have sold products containing asbestos starting as early as the 1940s and continuing through the late 1970s. (*London Market Insurers v. Superior Court* (2007) 146 Cal.App.4th 648, 652 ["*Kaiser Cement*"].)

Beginning in the 1970s, individuals began to file claims against Kaiser alleging bodily injuries arising from exposure to asbestos in Kaiser products. (JAA-536 ¶ 7.) In the subsequent three decades, Kaiser was named as a defendant in tens of thousands of asbestos bodily injury lawsuits. (JAA-535 ¶ 1.) In 2016, Kaiser (by then renamed Hanson Permanente Cement, Inc.) and its subsidiary Kaiser Gypsum Company filed a Chapter 11 bankruptcy petition. (*See In re Kaiser Gypsum Company, Inc.,*

et al. (Bankr. W.D.N.C., Sept. 30, 2016, No. 16-31602).) As part of its Plan of Reorganization, which the Bankruptcy Court confirmed on August 12, 2021, certain of Kaiser's assets, including Kaiser's insurance assets and its asbestos-related liabilities, were transferred to a channeling trust formed pursuant to Section 524(g) of the Bankruptcy Code, 11 U.S.C., § 524(g).[7] Thus, for purposes of this appeal, the policyholder, by assignment, is the channeling trust (the Kaiser Gypsum Asbestos Personal Injury Trust), and the claimants seeking compensation for mesothelioma, lung cancer, lung impairment, and other asbestos-related disease.

II. Kaiser's CGL Insurance Program

Kaiser's insurance assets consist largely of CGL policies issued to Kaiser from 1947 through 1987. (JAA-535 ¶ 2.) The program included both primary and excess CGL policies. "Primary coverage is insurance coverage whereby, under the terms of the policy, liability attaches immediately upon the happening of the occurrence that gives rise to liability.... [¶] 'Excess' or secondary coverage is coverage whereby, under the terms of the policy, liability attaches only after a predetermined amount of primary coverage has been exhausted." (*Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.* (1981) 126 Cal.App.3d 593, 597-598 [citations and emphasis omitted].)

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[7] *See In re Kaiser Gypsum Company, Inc., et al.* (Bankr. W.D.N.C., Aug. 12, 2021, No. 16-31602, Dkt. No. 2751); *see generally Snyder v. Cal. Ins. Guar. Ass'n* (2014) 229 Cal.App.4th 1196, 1202 (discussing the purpose of section 524(g) asbestos channeling trusts).

Primary policies typically owe a duty to defend and often provide that defense costs are outside of policy limits. This means that the payment of defense costs does not reduce the insured's coverage. (Justice H. Walter Croskey, et al., *Cal. Prac. Guide: Ins. Litig.* (The Rutter Group rev. ed. 2022), ¶ 7:355 ["*Croskey*"].) Accordingly, primary policies typically are more expensive than excess policies and command a significantly higher premium. (*See Signal Cos.*, 27 Cal.3d at 365; *SantaFe Braun, Inc. v. Ins. Co. of N. Am.* (2020) 52 Cal.App.5th 19, 28-29.)

In contrast, excess policies typically do not owe a duty to defend. To the extent excess policies pay defense expenses, those payments are usually subject to, and erode, the policy limits. (*See Truck Insurance Exchange v. Kaiser Cement et al.* (Jan. 7, 2022, No. B278091) 2022 WL 71771 at *27 [unpublished] ["*Truck* Opn."]; *see also Signal Cos.*¸ 27 Cal.3d at 362-363; *Chubb/Pacific Indem. Group v. Insurance Co. of North America* (1996) 188 Cal.App.3d 691, 698.)

Kaiser's primary CGL policies were issued by Fireman's Fund (from 1947 through 1964), Truck (from 1964 through 1983), Home Indemnity Company (from 1983 to 1985), and National Union (from 1985 through 1987). (JAA-535-36 ¶¶ 2-6.) The primary policies had varying limits of liability for each occurrence. (*Id.*)[8] Moreover, most of the primary policies were

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[8] Insurance policies with "per occurrence" limits of liability pay up to the specified amount for each "occurrence" but the insurer's obligation to pay is not otherwise limited. (*Kaiser Cement*, 146 Cal.App.4th at 658.) The 1974 Truck primary policy defined "occurrence" as "an event, or continuous or repeated

also subject to an aggregate limit of liability for products liability claims. (*Id.*)[9] There was one critical exception: the Truck coverage in effect from 1971 to 1980 did not have aggregate limits of liability for products claims.

Each primary policy in effect from 1964 onward was subject to a deductible, which during the Truck era ranged from $5,000 per occurrence (1964-1967 and 1969-1975) to $15,000 per occurrence (in 1968) to $50,000 per occurrence (1976-1981) to $100,000 per occurrence (1981-1983). (JAA-538 ¶ 19.)

Kaiser notified its insurers of the asbestos claims, and all of its primary policies (with the exception of the years in which Truck coverage was in place) eventually exhausted their respective aggregate limits of liability. This left Truck's policies as the only primary CGL insurance still available to Kaiser. (JAA-537 ¶ 11; JAA-1279.)

Kaiser also purchased a program of excess CGL coverage that was in effect from the early 1950s to the 1980s. (JAA-276-280.) From 1974 to 1977, the first layer excess policies, issued by AIG affiliate Insurance Company of the State of Pennsylvania

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exposure to conditions which results in personal injury or property damage during the policy period." (*Id.* at 659.)

[9] Insurance policies with aggregate limits pay no more than the aggregate amount, no matter how many occurrences take place. (*See Kaiser Cement*, 146 Cal.App.4th at 671.) Asbestos bodily injury claims arising out of the alleged presence of asbestos in the insured's products are generally treated as products liability claims, which are subject, in most CGL policies, to an aggregate limit. (*See Employers Reins. Co. v. Superior Court* (2008) 161 Cal.App.4th 906, 920-21.)

("ICSOP"), provided up to $5 million in coverage for each occurrence, in excess of the Truck primary policy, which had a $500,000 per-occurrence limit. Like the underlying Truck primary policy, the ICSOP excess policies did not have an aggregate limit of liability. (*See Kaiser Cement & Gypsum Corp. v. Insurance Co. of the State of Penn.* (2013) 215 Cal.App.4th 210, 215-16, opn. ordered depub. July 17, 2013 ["*ICSOP*"].)[10] In contrast, Kaiser's other excess policies—including those issued by the Respondents in this appeal—are subject to aggregate limits of liability and provide that the payment of defense costs is subject to, and erodes, the policy limits. (*See, e.g.*, JAA-1074-1085; JAA-3014.)

III. This Insurance Coverage Action

Truck filed this insurance coverage lawsuit in 2001, seeking a declaration that all of its primary policies had paid their applicable limits of liability and that Truck has no further duty to pay. (*Kaiser Cement*, 146 Cal.App.4th at 652.) As to the primary policies, Truck took the position that all asbestos bodily injury claims are a single occurrence and argued that Truck had exhausted the limits of its policies by paying a single "per occurrence" limit. (*Id.* at 652-53.) However, the Court of Appeal rejected that argument in *Kaiser Cement*, holding as a matter of law that all asbestos bodily injury claims cannot be deemed a single occurrence. (*Id.* at 671.) Since then, the parties to this

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[10] Although this Court depublished *ICSOP*, it remains as law of the case in this proceeding under California Rules of Court, rule 8.1115(b)(1).

litigation have treated each asbestos claimant as involving a separate occurrence, subject to a separate $5,000 deductible as provided by the 1974 Truck policy. (*See Truck* Opn. at *28.)

On remand, Truck asserted two equitable contribution claims. First, Truck sought to spread its 1974 policy payments across its 19 years of primary coverage, most of which were subject to aggregate limits of liability for products claims. Truck would then require the excess insurers above its policies, all of which have aggregate limits, to "drop down and contribute pro rata as primaries" along with Truck's 1974 policy. (JAA-1254.) The Superior Court rejected that claim, explaining that in *ICSOP*, 215 Cal.App.4th at 303-04, Truck had obtained a ruling that only one year of Truck coverage can apply to any occurrence, and that Truck is bound by its *ICSOP* victory under the doctrine of law of the case. In addition, the Superior Court concluded that it would be unfair to Kaiser and the asbestos claimants for Truck to use equitable contribution to exhaust other primary policies' aggregate limits, as doing so would deprive Kaiser of the use of those policy limits for other claims. (JAA-1253-1256; *Truck* Opn. at *21.)[11] The Court of Appeal affirmed (*Truck* Opn. at *21-22), and this Court declined to review that ruling.

Second, Truck argued that the excess insurers sitting above the primary policies in the non-Truck years—specifically, the

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[11] While the Superior Court made this finding in the context of the 1974 Truck policy's equitable contribution claim against Truck primary policies in different years, the finding would apply equally to the 1974 Truck policy's claim against the excess insurers, discussed in the text below.

1953-1964 London Market Insurers excess policies, the 1983-1984 First State excess policy, and the 1984-1985 Westchester excess policy—should drop down, function as primary insurers, and be subject to equitable contribution claims by Truck. Building on its equitable contribution ruling on the Truck primary policies, the Superior Court concluded that Truck, as a primary insurer, is not entitled to seek equitable contribution from an excess insurer, and the Court of Appeal affirmed. (JAA-1299-1305; *Truck* Opn. at *22.) Those rulings were based in part on *Community Redevelopment Agency v. Aetna Cas. & Sur. Co.* (1996) 50 Cal.App.4th 329 ("*Community Redevelopment*"), which held that a primary insurer with unexhausted policy limits cannot obtain equitable contribution from an excess insurer in a different year even though the primary policy underlying that excess insurer's policy had exhausted its limits.

In *Montrose III*, this Court declined to extend the rule in *Community Redevelopment* to a dispute between a policyholder and an insurer. (9 Cal.5th at 237.) The parties have treated the present appeal as addressing, among other things, whether *Community Redevelopment* remains good law in an insurer versus insurer dispute.

ARGUMENT

I. The Legal Framework For The Issue On Appeal

A. The "Trigger" and "Scope" of Coverage

Like *Community Redevelopment*, the present appeal arises out of California decisions addressing CGL insurance coverage for claims alleging continuous or progressive injuries, such as the injuries that can arise from exposure to asbestos, environmental pollution, toxic substances, and certain construction defects. Those decisions have focused on two critical issues: (a) the "trigger" of coverage and (b) the "scope" of coverage.

As to the "trigger" of coverage, this Court held in *Montrose II* that each CGL policy in effect when an injury takes place is triggered and must respond to a claim, even if the injury has not yet manifested itself. (10 Cal.4th at 686-87.) The Court of Appeal applied that rule to asbestos claims in *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.* (1996) 45 Cal.App.4th 1. *Armstrong* explained that asbestos "produces quantities of asbestos dust composed of millions of tiny fibers which may be inhaled into the body … [and] are deposited in the human lung and remain there," sometimes causing continuous and progressive injuries, and resulting in "diseases [such as] … asbestosis, bronchogenic carcinoma, and mesothelioma." (*Id*. at 37.) Because asbestos-related injuries are continuous and progressive, *Armstrong* found that asbestos-related injury first "occurs upon exposure [to asbestos] and continues until death." (*Id*. at 47.) Applying that finding to the trigger of coverage, *Armstrong* held that under *Montrose II*'s "continuous trigger"

ruling, every insurance policy in effect from a claimant's first exposure to asbestos until the date of death is potentially triggered. (*Id.* at 63.) Thus, for example, if a claimant were first exposed to asbestos in 1968 and died in 2022, each insurance policy in effect from 1968 through 2022 would be triggered.[12]

The "scope" of coverage concerns the amount of coverage that each triggered insurance policy provides. This Court held in *Aerojet-General Corp. v. Transport Indemnity Co.* that a triggered CGL policy must respond to a continuous or progressive injury claim even if much of the injury occurred during other policy periods. (17 Cal.4th at 58.) The Court subsequently rejected a "no stacking" rule, that is, a rule that limits the insured to a single year of coverage even though the claim triggered multiple years of insurance. (*See Cont'l Ins. Co.*, 55 Cal.4th at 201-02.)

The Court also confirmed that the insured can select one or more triggered policy years to respond to a claim. The Court held that under the language of standard form CGL policies, the insured is not required to exhaust *all* triggered primary policies before seeking coverage from any excess insurer as long as the policy or policies beneath the excess insurer have exhausted their

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[12] Of course, whether a triggered CGL policy would owe a duty to defend and indemnify depends on the terms of the specific policy and the allegations against the insured. Moreover, after 1985, CGL policies were subject to exclusions for asbestos-related liabilities. (*See Stonewall Ins. Co. v. Asbestos Claims Mtg.* (2d Cir. 1995) 73 F.3d 1178, 1204 fn.8.)

limits. (*Montrose III,* 9 Cal.5th at 221; *see also SantaFe Braun,* 52 Cal.App.5th 19.)[13]

Under the rulings described above, Kaiser selected the 1974 Truck primary policy to respond to every claim that triggers that year. Also, for claims that exceed the primary policy's $500,000 limit, Kaiser selected the 1974 first layer excess ICSOP policy to respond. (JAA-541 ¶ 36.)

B. Indemnification, Subrogation, and Equitable Contribution

When a policyholder selects an insurer's policy to pay a continuous or progressive injury claim, the insurer is not necessarily required to bear the entire loss itself. As *Montrose III* indicates, the insurer, after making the policyholder whole, may be entitled to reimbursement from third parties such as other triggered insurers, principally by means of claims for indemnification, subrogation, or contribution. (*Montrose III*, 9 Cal.5th at 236.) While the panoply of potential remedies is complex—an appellate court referred to them as "ring[ing] of an obscure Martian dialect" (*Herrick Corp. v. Canadian Ins. Co. of Calif.* (1994) 29 Cal.App.4th 753, 756)—the appellate courts have

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[13] Six years before this Court's *Montrose III* ruling, the Court of Appeal construed the language of the Truck policy and held that only one year of Truck coverage will apply to any asbestos claim. (*See ICSOP*, 215 Cal.App.4th at 240.) While that decision is arguably inconsistent with *Montrose III*, and its construction of the 1974 Truck policy's language is subject to criticism, the decision is law of the case and, accordingly, its rejection of stacking is not at issue in this appeal.

distinguished between the theories of recovery in the context of insurer versus insurer disputes as follows:

- Indemnification applies when an insurer pays a claim and then is entitled to recover the entire payment from another insurer. A common example occurs when a primary insurer with a duty to defend declines coverage and an excess insurer assumes the duty to pay defense costs as an accommodation to its insured. (*See United Services Auto. Ass'n v. Alaska Ins. Co.* (2001) 94 Cal.App.4th 638, 644-645; *United Pac. Ins. Co. v. Hanover Ins. Co.* (1990) 217 Cal.App.3d 925, 937 [equitable indemnification is available to a party that pays "a debt for which another is primarily liable, which in equitable and good conscience should have been paid by the latter party"].)
- Subrogation is available when an insurer pays a claim and then "steps into the insured's shoes" and asserts the insured's claim against a third party who is primarily responsible for the loss. (*Herrick*, 29 Cal.App.4th at 765.) A common example is an automobile insurer that pays for damage to a car from a crash and then subrogates to the insured's claim against the driver who caused the accident.
- Equitable contribution applies when multiple insurers at the same level of coverage in an insurance program owe an equal and concurrent duty to pay,

> but a particular insurer has paid more than its fair share, and another less than its fair share, of the loss. (*Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal.App.4th at 1289; *id.* at 1293 [equitable contribution provides for "reimbursement to the insurer that paid on the loss for the excess it paid over its proportionate share of the obligation, on the theory that the debt it paid was *equally* and *concurrently* owed by the other insurers and should be shared by them pro rata in proportion to their respective coverage of the risk. The purpose of this rule of equity is to accomplish substantial justice by equalizing the common burden shared by coinsurers, and to prevent one insurer from profiting at the expense of others."] [emphasis in original].) For example, if a claim triggers two primary policies but only one insurer defends, the defending insurer may be entitled to obtain contribution from the other primary insurer for a portion of the defense costs. (*Id.*)

The present appeal does not involve indemnification: Truck does not contend that it is entitled to pass its entire coverage obligation off to another insurer. This appeal likewise does not involve subrogation, since no one alleges that the other insurers caused an injury "in excess of th[e] claim for which the insured was liable and for which [Truck] paid." (*Gulf Ins. Co. v.*

TIG Ins. Co. (2001) 86 Cal.App.4th 422, 432.) Instead, Truck's claim is for *equitable contribution*.

Truck correctly notes that "the starting point for equitable contribution has to be the parties' various obligations to the insured—obligations measured by each insurance policy's content." (Reply Brief at 9.) That is because, as discussed *infra*, the first step in an equitable contribution analysis is to examine the pertinent insurance policies to confirm that the insurer seeking contribution and the target of the claim provide coverage for the "*same risk* at the *same level*" of coverage and, thus, share an "*equal[] and concurrent[]*" obligation to cover the insured's losses. (Croskey, ¶ 8:66 [emphasis in original; citations omitted].)

Once the trial court has confirmed that prerequisite, however, a different analysis applies. Because the rights and duties that insurers owe one another "'do not arise out of contract, for their agreements are not with each other,'" equitable contribution actions between insurers are governed by "'equitable principles.'" (*Signal Cos.*, 27 Cal.3d at 369 [quoting *Amer. Auto. Ins. Co. v. Seaboard Surety Co.* (1957) 155 Cal.App.2d 192, 195-96].) Typically, the trial court will "weigh the equities seeking to attain distributive justice and equity among" multiple insurers and "consider numerous factors ... including the nature of the underlying claim, the relationship of the insured to the various insurers, the particulars of each policy, and any other equitable considerations." (*Axis Surplus Lines Ins. Co.*, 204 Cal.App.4th at 1231-32.) Ultimately, the trial court must determine whether and how to allocate costs among insurers in a manner that "will

produce the most equitable results"—a determination that "is necessarily a matter of its equitable judicial discretion." (*Centennial Ins. Co. v. United States Fire Ins. Co.* (2001) 88 Cal.App.4th 105, 110–12.)

Thus, this appeal concerns whether:

> (1) the Superior Court erred when it declined to allow Truck to obtain equitable contribution from excess insurers on the ground that Truck, as a primary insurer, is presumptively not entitled to seek equitable contribution from excess insurers; and (2) the Superior Court abused its discretion in declining to allow Truck to circumvent that presumption even though contribution would erode the policy limits of Kaiser's excess policies in different years, thereby reducing the insurance policy proceeds available to pay future asbestos claims.

C. The Standard Of Review

Truck assumes that the lower courts' rulings on whether Truck is legally entitled to sue are reviewed independently on appeal. That is not completely correct. Any interpretation of the insurance policy language is reviewed *de novo*. (*MacKinnon v. Truck Ins. Exch.* (2003) 31 Cal.4th 635, 647.)[14] But the rulings on

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[14] Truck also suggests that the rules of insurance policy interpretation that apply to a dispute between an insurer and a policyholder apply equally to insurer versus insurer disputes. That likewise is not completely correct. For example, insurers are typically unable to take advantage of *contra proferentem*, at least not when standard form insurance policies are at issue.

the application of that language to Truck's equitable contribution claim, including the relationship of the insurers to each other and to the insured in the tower of insurance, and the order in which each insurer must pay, are equitable considerations (*Axis Surplus*, 204 Cal.App.4th at 1231-1232), which are reviewed for abuse of discretion. (*Id.* at 1221.) Whether Truck's proposed contribution scheme is equitable likewise is reviewed for abuse of discretion. (*Id.*)

Under an abuse of discretion review, a Superior Court's ruling must stand unless "in light of applicable law" and consideration of "the nature of the claim, the relation of the insured to the insurers" and "the particulars of each policy," the court's ruling "exceeds the bounds of reason." (*Id.* at 1228, 1231; *see also Hartford Cas. Ins. Co.*, 110 Cal.App.4th 710, 724 (2003) [applying abuse of discretion standard to review trial court's order denying equitable contribution because such a determination is "an equitable matter for the trial court"].)

II. The Trial Court Acted Well Within Its Discretion When It Concluded That Truck Is Not Entitled To Seek Equitable Contribution From The Excess Insurers.

No one disputes that under *Montrose III*, Truck would be entitled to seek equitable contribution from Kaiser's other *primary* insurers as they would be covering the same risk at the same level as Truck. But all of the primary policies in Kaiser's program have exhausted their limits of liability apart from the

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(*See Hartford Acc. & Indem. Co. v. Sequoia Ins. Co.* (1989) 211 Cal.App.3d 1285, 1300.)

Truck policies and, as noted, Truck previously obtained a ruling that confined any occurrence to a single Truck policy. Truck, instead, directs its equitable contribution claim against certain first layer *excess* insurers in the Kaiser liability insurance program, those with coverage in effect from 1953 to 1964 (London Market Insurers), 1983-1984 (First State), and 1984-1985 (Westchester). (*See* JAA-276-280, JAA-1283-1292.)

The Superior Court and Court of Appeal focused on whether Truck, as a primary insurer, can assert a claim for equitable contribution against an excess insurer, and concluded that it cannot. That is because Truck's equitable contribution scheme conflicts with established precedent governing the obligations that primary and excess insurers owe one another: California courts have consistently held that a primary insurer cannot seek equitable contribution from an excess insurer.

Truck argues that this rule is subject to an exception. Truck asserts that the language in certain of Kaiser's excess policies, providing that they will "continue in force as underlying insurance" after exhaustion of the underlying limits, imposes a duty on the excess insurers to drop down and pay defense and indemnity expenses upon the exhaustion of any directly underlying policies. Truck is mistaken.[15]

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[15] Truck also suggests at the outset of its Reply Brief (at 9 fn.1) that the targets of Truck's equitable contribution claim are not really excess insurers because the excess policies in Kaiser's program attach after the respective underlying primary policies have paid their limits. That, however, is precisely the definition of excess insurance that this Court articulated in *Montrose III*: excess insurance "refers to indemnity coverage that attaches

A. The California Courts Have Consistently Held That Equitable Contribution Is Limited To Insurers At The Same Layer Of Coverage.

"[A]s a general rule, there is no contribution between a primary and an excess carrier." (*Reliance Nat. Indem. Co. v. Gen. Star Indem. Co.* (1999) 72 Cal.App.4th 1063, 1078; *accord Fireman's Fund*, 65 Cal.App.4th at 1294 fn.4.) This general rule is not a mere formalism but instead reflects the principle that "equitable contribution [is only available] from coinsurers *sharing the same level of liability on the same risk as to the same insured* …." (Croskey, ¶ 8:66 [emphasis in original; citations omitted].)

Primary and excess insurers do not cover the same risk at the same level of coverage. The "general object and purpose of" an excess policy is "to provide excess coverage over and above all other underlying insurance." (*Cont'l Ins. Co. v. Lexington Ins. Co.* (1997) 55 Cal.App.4th 637, 647.) But the "general object and purpose of" a primary policy is "to provide primary insurance." (*Id.*) Given these differing purposes, "premiums for excess insurance are lower on average than premiums" for primary coverage because primary insurers are much more likely to be "called on to pay judgments, settlements, or defense costs." (Rest., Law of Liability Insurance, § 39.)

To preserve this "layered structure and pricing" of excess and primary insurance policies, courts have typically required

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upon the exhaustion of underlying insurance." (9 Cal.5th at 222.) It also is the definition of "excess insurance" in the Croskey treatise: insurance that "provides coverage after other identified insurance is no longer on the risk." (Croskey, ¶ 8:177.)

that underlying primary policies be "exhausted" before the obligations of excess insurers are triggered. (*Id.* at § 39.) Under such a horizontal exhaustion rule, which California courts to date have applied to equitable contribution claims, "*all* primary insurance must be exhausted before a secondary insurer will have exposure" to an equitable contribution claim. (*Community Redevelopment*, 50 Cal.App.4th at 339 [emphasis in original].)

Truck argues that *Community Redevelopment* is no longer good law after *Montrose III*. But even if Truck were right, the Court of Appeal endorsed this reasoning from *Community Redevelopment* in *ICSOP*, 215 Cal.App.4th at 230, and that ruling is law of the case in this subsequent appeal in the same proceeding. (*See Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491.) That alone disposes of Truck's argument.

To the extent the Court chooses to revisit the issue notwithstanding the law of the case doctrine, the Court should reject Truck's argument. Based on the excess policy terms, *Montrose III* rejected the *legal* (contract interpretation) argument that *a policyholder* facing a continuous injury claim that triggers multiple years of coverage must exhaust every primary policy before it may *elect* to access one or more of its excess policies. (9 Cal.5th at 221, 229-230, 233-234.) Instead, the Court adopted a rule of vertical exhaustion after recognizing that such a rule is not only consistent with the insurance policy language but would also best promote the policyholder's "ability to access the excess insurance coverage it has paid for." (9 Cal.5th at 237.) *Montrose III* did not address equitable contribution claims *between*

insurers, which are governed by equity, not law. Instead, *Montrose III* declined to decide whether "*Community Redevelopment* was correct to apply a rule of horizontal exhaustion" in the "distinct context of a contribution action between primary and excess insurers," *id.* at 237, the issue presented by the present appeal. Accordingly, *Montrose III* does not require the application of the same rule in a contribution action between a primary insurer, whose own policy is unexhausted, and excess insurers, as here.[16]

Truck insists that "it makes no difference that *Montrose III* ... involved [a suit] between insureds and their carriers, rather than a carrier suing other carriers for contribution," suggesting that it would be "the land of Humpty Dumpty, not the rule of law" for this Court to adopt a rule of vertical exhaustion in *Montrose III*, and not here. (Opening Brief at 47.) Not so.

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[16] In its reply, Truck states that *Community Redevelopment* "involved an insured's claim, not an equitable contribution action." (Reply Brief at 26.) That is not correct. Although the dispute in *Community Redevelopment* "began among the several insureds and their multiple insurers," the claim on appeal involved a primary insurer's cross-complaint against an excess insurer "for declaratory relief and equitable contribution." (50 Cal.App.4th at 332 fn.1.) The primary insurer contested the trial court's ruling that the excess insurer "had no duty to defend the common insureds and therefore had no obligation to contribute to the very substantial defense costs which [the primary insurer] had expended in providing that defense." (*Id.* at 332.) Thus, *Community Redevelopment* presented an inter-insurer dispute concerning equitable contribution, not a claim by a policyholder for insurance coverage.

As this Court has made clear: "[e]quitable contribution applies *only* between insurers." (*Aerojet*, 17 Cal.4th at 72 [emphasis in original].) As noted, whether an insurer is entitled to equitable contribution is case-specific, requiring a judge to apply "varying *equitable* considerations" to the dispute at issue. (*Signal Cos.*, 27 Cal.3d at 369 [emphasis added].) In contrast, whether a policyholder is entitled to insurance coverage from an insurer is determined "solely from the written provisions of the contract" of insurance. (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822; *see Hartford Cas. Ins. Co. v. Travelers Indemnity Co.* (2003) 110 Cal.App.4th 710, 727 ["Equity should not be employed to override the terms of the insurance policies in this case."]; *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 770 [rejecting insurers' attempts to use equity to "override" policy terms or otherwise "alter the relationship between [the policyholder's] primary and excess insurers"].)

Thus, adopting one set of rules for insurer versus policyholder *contractual* coverage disputes, on the one hand, and finding that the Superior Court did not abuse its discretion in its *equitable* determinations in an insurer versus insurer case, on the other hand, should not invoke clichés from *Through the Looking Glass*. Instead, using different principles for resolving different types of disputes is entirely consistent with longstanding California law.

B. Truck Cannot Rely On The Excess Policies' "Continue In Force" Provision To Obtain Equitable Contribution From Excess Insurers.

Acknowledging that a primary insurer cannot obtain

equitable contribution from an excess insurer, Truck asserts that the excess insurers can effectively become primary insurers with a duty to pay a portion of Kaiser's defense costs because some of the excess policies provide that they will "continue in force as underlying insurance" upon exhaustion of the underlying primary policies. The Superior Court did not err in rejecting that argument.

(1) Five of the years of excess policies that are the subject of Truck's equitable contribution claim—the London Market Insurers policies in effect from 1953 through 1958—do not have any "continue in force" language. (JAA-1074-1075.) That limits Truck's claim to the London Market Insurers' 1958-1964 polices, the First State 1983-1984 policy, and the Westchester 1984-1985 policy.

(2) As to the latter excess policies, Truck fails to read the "continue in force" language in the context of the entire policy. For example, several of the excess policies containing the "continue in force" language also state that they shall not "be construed to" be made "subject to the terms, conditions and limitations of other insurance"; "be called upon to assume charge of the settlement or defense of any claim made or suit brought"; or "contribute with such other insurance." (*E.g.,* JAA-1077-85.) Because "[i]t is axiomatic that insurance policies must be interpreted as a whole" (*MacKinnon*, 31 Cal.4th at 647), these provisions must be read alongside the "continue in force" language. Doing so does not render the "continue in force"

provisions "surplusage," as Truck asserts. (*See* Reply Brief at 17.)

Rather, under the terms of their policies, Kaiser's excess insurers owe a duty to Kaiser, the insured, to drop down and "continue in force as underlying insurance" to prevent a gap in Kaiser's coverage once the primary policy pays its limits. This may include a duty on the part of the excess insurer to pay defense costs. But the "continue in force" language does not require the excess insurers to reimburse Truck for defense and settlement costs that Truck may pay under its 1974 primary policy, as that would negate the remaining terms of the excess policies, contrary to basic rules of insurance policy interpretation. (*See, e.g., Brandwein v. Butler* (2017) 218 Cal.App.4th 1485, 1507 [citing *Williston on Contracts* (4th ed. 2012), § 32.5]; *Carmel Dev. Co. v. RLI Ins. Co.* (2005) 126 Cal.App.4th 502, 512 [denying a primary insurer's request for equitable contribution on the ground that the record lacked evidence that "enforcement of [the other policy]'s insuring language [which provides that the other policy was excess] would intrude on the rights of the insured"].) As Truck acknowledges, a policyholder reasonably expects the insurer to "be responsible for losses that occurred in that carrier's policy period, including as primary insurance once scheduled underlying insurance exhausted." (Reply Brief at 38-39.)

(3) The treatment of defense costs in the Truck policy, as opposed to Respondents' excess policies, is different. As discussed above, Truck pays defense expenses outside of the policy limits. In contrast, defense costs erode the limits of liability of the excess

policies. This, in turn, implicates a critical concern, discussed in more detail in Section III below: that Truck's contribution scheme would enrich Truck while depleting the channeling trust's assets by eroding the limits of liability of the excess policies, thereby threatening to deprive the trust of funds needed to compensate individuals with asbestos-related disease.

(4) Truck raises "other insurance" clauses, which are provisions that purport to specify how insurers should share responsibility for a loss if multiple insurers provide coverage. (*Fire Ins. Exch. v. Am. States Ins. Co.* (1995) 39 Cal.App.4th 653, 659 fn.1.) However, "other insurance" clauses are limited in scope. They do not apply to disputes between an insurer and a policyholder or between primary insurers and excess insurers; they only apply to insurers at the same layer of coverage. (*Dart Indus., Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1079-1080; *Montrose III*, 9 Cal.5th at 232-233; *Travelers Cas. & Sur. Co. v. American Equity Ins. Co.* (2001) 93 Cal.App.4th 1142, 1150.)[17]

The "other insurance" clauses in the excess policies at issue do not provide that the excess insurers pay before Truck, or that the excess insurers drop down and provide primary coverage when unexhausted primary insurance remains available to the insured; instead, they provide that the excess policies apply in excess of, and do not contribute to, underlying insurance. (JA-

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[17] Truck also asserts that *Montrose III* held that "other insurance" clauses only apply to insurance policies in effect during the same year. (Reply Brief at 20.) *Montrose III* said no such thing.

1074-1086; *see Carmel Develop.*, 126 Cal.App.4th at 516-17 ["other insurance" clauses do not turn an excess insurer into a primary insurer when a primary insurer is still on the risk".)

(5) The Superior Court recognized that "it is apparent under California law that the excess obligations of the carriers in this case are not triggered until *all* of the primary policies horizontally exhaust," but it did not end the analysis there. (JAA-1298 [emphasis in original].) Rather, the Court looked to the language and content of the policies to determine whether the excess insurers nonetheless had a duty to drop down and "contribute to Truck's indemnity and defense obligations under the 1974 policy." (JAA-1293.) The Court concluded otherwise, finding that Truck's proposal would "undermine the very concept of excess insurance in a continuing loss situation." (JAA-1300.) Accordingly, Truck's proposal did not warrant "ignor[ing] the presumption that <u>all</u> primary coverage must exhaust before excess obligations are triggered." (JAA-1300 [emphasis in original].)

(6) While no published California decision of which UP is aware is fully on point, some decisions are instructive and support the reasoning of the courts below. For example, in *Transcontinental Insurance Co. v. Insurance Company of the State of Pennsylvania* (2007) 148 Cal.App.4th 1296, the Court of Appeal rejected a primary insurer's request for equitable contribution from an excess insurer whose policy stated that once "'underlying insurance(s) become exhausted ... [the excess] insurance will continue in force as underlying insurance.'" (*Id*. at

1301.) The primary insurer attempted to justify equitable contribution on the ground that the excess insurer "shared the same level of obligation on the same risk" as the primary insurer once the underlying policy had paid its limits. (*Id.* at 1304 fn.3.) But the Court of Appeal explained that even though the "excess insurance was triggered when the underlying policy was exhausted, [that] event did not change the fact the policy was written to cover different risks and parties" from the primary policy. (*Id.*) And because primary and excess policies cover different risks at different levels, the primary insurer cannot obtain equitable contribution from the excess insurer. (*Id.; see also Span, Inc. v. Associated Internat. Ins. Co.* (1991) 227 Cal.App.3d 464, 476-78 [rejecting the argument that "continue in force as underlying insurance" language in an excess policy obligated the excess insurer to "drop down" and fill the shoes of an insolvent primary insurer].)

The above authority suggests that Truck was incorrect when it told this Court that "the law across the country is that the 'continue in force as underlying insurance' language *includes* defense costs," (Opening Brief at 56 [emphasis in original]), at least insofar as insurer versus insurer disputes are concerned. In fact, none of the decisions that Truck cites is apposite.

The first, *Interstate Fire & Cas. Co. v. Auto-Owners Ins. Co.* (Minn. 1988) 433 N.W.2d 82, primarily addressed the interpretation of "other insurance" clauses appearing in an umbrella policy and a primary homeowner's policy. (*Id.* at 85 ["The heart of this dispute is the interpretation of the respective

other insurance clauses"].) *Interstate* suggested in a footnote that the umbrella policy's "continue in force as underlying insurance" clause "seem[ed]" to provide that the umbrella insurer would become the primary insurer once the first-layer primary insurer "paid up to its limits"—a principle that is certainly correct in a policyholder versus insurer dispute—but the court did not go on to consider whether that would also be sufficient to render the excess insurer a primary insurer for purposes of an equitable contribution action between insurers in different layers of coverage. (*Id.* at 86 fn.2.)

Sinclair Oil Corp. v. Allianz Underwriters Ins. Co. (Ill.Ct.App. 2015) 39 N.E.3d 570 likewise does not assist Truck. *Sinclair Oil* did not involve an equitable contribution claim but instead concerned a dispute between an insured and an excess insurer over whether the excess insurer had a duty to defend the insured upon exhaustion of the underlying insurance. (*Id.* at 580-81.) Truck suggests that *Sinclair Oil*'s holding—that the "continue in force" provision in an excess policy required the excess insurer to defend the insured in the event of exhaustion—supports the proposition that an excess insurer becomes a primary insurer for purposes of a claim for equitable contribution by another primary insurer. Certainly, it would provide support for such a claim if, for example, a primary insurer exhausts its policy limits and then continues to pay defense costs after exhaustion as an accommodation to its insured. But *Sinclair Oil*'s holding is irrelevant to the present appeal since Truck's primary policy remains in effect with unimpaired policy limits

and an intact duty to defend. Moreover, because "excess policies define the nature of the excess insurers' obligations to" Kaiser, any duty that the excess insurers had to "continue in force" as underlying insurance is owed to Kaiser, not Truck. (*See Flintkote Co. v. Gen. Acc. Assur. Co. of Canada* (N.D.Cal. Aug. 6, 2008, No. C04-01827-MHP) 2008 WL 3270922, at *19.)

Flintkote likewise is not "instructive" in supporting Truck's "continue in force" argument, as Truck contends. (Reply Brief at 19.) There, the court, citing to *Community Redevelopment*, recognized that "triggered *specific* excess policies would be liable for the amount apportioned to the unavailable underlying primary policy." (*Flintkote*, 2008 WL 3270922 at *19 [emphasis added].) But the court did not decide whether the excess policies at issue were specific or general, nor did its analysis have anything to do with "continue in force as underlying insurance" provisions.[18] Moreover, the court made "no determination as to which excess policies 'drop down'" and concluded that an insurer's drop down obligations "depends on the provisions of the excess policy." (*Id.* at 26.)

In other words, no support exists for using the excess policies' "continue in force" provisions to transform excess policies into primary policies for purposes of equitable contribution. Any such result "would be contrary to the reasonable expectations of all parties by obliterating the distinction between excess and

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[18] A "specific excess" policy provides that it is in excess of specifically identified underlying policies; a "general excess" policy is excess to all other "valid and collectible insurance." (Croskey, ¶¶ 8:236, 8:238.)

primary insurance." (*See Padilla Construction Co., Inc. v. Transportation Ins. Co.* (2007) 150 Cal.App.4th 984, 989 [rejecting the argument that an umbrella insurer has a duty to drop down and defend the insured in an underlying suit where a primary insurer's policy remain unexhausted].) While the "continue in force" provisions may trigger certain obligations that excess insurers owe their policyholders, it would be inappropriate to allow primary insurers to use those provisions to their own advantage at the expense of excess insurers, and by extension, policyholders.

In sum, the trial court's conclusion that a primary insurer like Truck cannot obtain equitable contribution from excess insurers was consistent with California law and the language of the insurance policies. As is discussed next, that conclusion also properly weighed the equities in light of the relevant facts and applicable law.

III. The Trial Court Acted Well Within Its Discretion When It Declined To Award Equitable Contribution To Truck Since Awarding Such Relief Could Adversely Affect The Policyholder, Kaiser.

Whether to allow a primary insurer to obtain equitable contribution from an excess insurer also turns on equitable considerations. (*Axis Surplus Ins. Co. v. Glencoe Ins. Ltd.*, 204 Cal.App.4th at 1221, 1231.) Thus, even if certain circumstances exist in which a primary insurer may seek equitable contribution from an excess carrier following vertical, as opposed to horizontal, exhaustion, that alone would not render the Superior Court's decision on Truck's claim for equitable contribution an abuse of discretion.

As a doctrinal matter, equitable contribution governs the rights and obligations that insurers owe one another, and this Court has recognized that the "relation of the insured to the insurers" is an important consideration that a court must weigh in determining what is *equitable* in an action for equitable contribution analysis. (*Signal Cos.*, 27 Cal.3d at 369.) But equity goes beyond that factor and also includes the effect of an equitable contribution scheme on the interest of the insured and claimants. (*Id.*; *see also In re Plant Insulation Co.* (9th Cir. 2013) 734 F.3d 900, 906, 912 [affirming ruling that precludes non-settling insurers from obtaining equitable contribution from insurers that agreed to contribute proceeds to an asbestos channeling trust to protect claimants].) Here, Truck proposes a contribution scheme that would undermine this principle by depriving Kaiser of coverage that it could use for future asbestos claims. Critically, in disputes like this one, which involve thousands of claims by individuals with asbestos-related disease, where the principal asset available to pay such claims is insurance, any depletion of coverage for other purposes (such as compensating Truck) would limit the recovery available to existing and future claimants. These factors provide ample support for the conclusion that the Superior Court below did not abuse its discretion when it rejected Truck's equitable contribution claim.

A. Truck's Proposed Scheme Would Prejudice The Insured By Transferring Payments To Excess Policies With Aggregate Limits.

Truck's proposed contribution scheme would reduce, and in some circumstances deprive, Kaiser of coverage for future claims and would allow Truck and other primary insurers whose policy limits have not yet been exhausted to "shift responsibility for payment of future claims from [themselves] to excess carriers or [their] insured." (*Truck* Opn. at 20.) It would also harm asbestos claimants who have already suffered grievous personal injuries. In effect, and as illustrated by the facts of this case, Truck's scheme would be unfair and inconsistent with this Court's precedent.

In *Aerojet-General Corp. v. Transport Indemnity Co.*, the Court made clear that a primary insurer may not obtain equitable contribution from its insured. (17 Cal.4th at 73.) There, the insured had purchased hundreds of policies across a number of decades, including a "fronting" policy that expressly placed the duty to defend and payment of defense costs on the insured. (*Id.* at 49-50.) Two of the insured's other primary insurers sought to "more broadly" allocate defense costs to the insured, arguing that had the insured not been issued a "fronting policy," equitable contribution would have been available from the insurer that issued a CGL policy for that year. (*Id.* at 71-72.) The Court rejected that argument and concluded that, even if equitable contribution might otherwise have been available in the absence of the fronting provision, the insured "should not be required to make such a contribution itself" because "equitable

contribution applies *only* between insurers." (*Id.* at 72 [emphasis in original].) Accordingly, "[a]n insured is not required to make such a contribution together with insurers." (*Id.* [emphasis in original]; *accord Truck Ins. Exch. v. Amoco Corp.* (1995) 135 Cal.App.4th 814, 827.)

Although this Court's precedent makes clear that an insurer may not seek equitable contribution from its insured, Truck's proposal, by shifting costs onto Kaiser's excess insurers, would effectively accomplish just that. Kaiser, pursuant to California's "all sums" approach to long-tail claims, has chosen to submit all asbestos bodily claims brought against it under Truck's no-aggregate-limit 1974 primary policy, to the extent the claims trigger that year. (*Truck* Opn. at *4; *see also* JAA-541 ¶ 36.) But not all claims trigger the 1974 Truck policy. For example, Kaiser continued to market products containing asbestos through most of the 1970s, which means that some claimants would have been first exposed to asbestos in Kaiser products after the expiration of the 1974 policy period and, indeed, after the expiration of the last Truck primary policy without an aggregate policy limit in 1980. If, through its equitable contribution scheme, Truck obtains equitable contribution from the excess insurers, the limits from those excess policies would be unavailable for future claims. (JAA-1253; *Truck* Opn. at *21.)[19]

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[19] This is not mere rhetoric. Truck represents that it has incurred more than $450 million in defense and indemnity payments. (Truck Opening Brief at 14.) If Truck were entitled to reallocate that payment on a prorata basis to the 13 years of

To see how Truck's proposal could harm policyholders and allow insurers to effectively recover costs from their insureds, consider the following scenario. Assume that an asbestos bodily injury claimant secures a $15 million judgment against Kaiser for an injury that arose when the claimant was first exposed in 1983 to an asbestos-containing product manufactured by Kaiser.[20] That injury would not trigger coverage under Truck's 1974 no-aggregate limit primary policy because bodily injury would have begun after the 1974 policy period. The injury, however, would trigger coverage under the Truck primary policy that was in effect in 1983, which has a $500,000 "per occurrence" limit (and a $1.5 million aggregate limit). (*Truck* Opn. at *5, *21.) Because the judgment would exhaust the "per occurrence" limit, and the 1983-1985 primary policies issued by Home have long since exhausted their aggregate limits (*id.* at *6), Kaiser would need to turn to its excess insurers for coverage for $14.5 million of the $15 million judgment. But, for the reasons explained above, that excess coverage may no longer be available if Truck exhausts the limits of the excess policies in effect from 1983-1985 through its 1974 policy's equitable contribution scheme. This is why Kaiser is unlikely to "change its views"

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excess coverage issued by the Respondents in this appeal, the total limits of liability of their coverage would be reduced by more than $400 million.

[20] Such a sizeable judgment is not merely hypothetical. In July 2022, a jury in New York awarded a $15 million verdict against Kaiser in a suit involving a mesothelioma claim. (Curley, *NY Worker's Family Gets $15M in Mesothelioma Verdict*, Law360 (July 19, 2022).)

concerning Truck's proposed contribution scheme as "asbestos claims age and only trigger Truck policies with aggregate limits," as Truck suggests. (*See* Reply Brief at 40.) Instead, Kaiser's concerns about Truck's proposal are shaped by the reality that, as asbestos claims age and only trigger policies with aggregate limits, and with inflation, Kaiser will need to rely on its excess coverage for larger claims. That coverage, however, may not be available if Truck's contribution scheme is adopted.

Truck's proposed scheme suffers from a further flaw. It could prevent Kaiser from accessing the coverage in excess of Truck's 1974 primary policy. As outlined in the Excess Insurers' Answering Brief, the 1974 ICSOP excess policy that sits above the 1974 Truck primary policy is only triggered if Truck pays its full $500,000 per occurrence limit for each claim. (Excess Insurers' Answering Brief at 40-41.) As noted, the ICSOP policy does not have an aggregate limit of liability for products claims. Thus, accessing that policy would not prejudice Kaiser's ability to obtain coverage for future claims.

However, assume that Kaiser must pay a $5.5 million asbestos judgment. As things currently stand, Kaiser would select the 1974 Truck primary policy and the 1974 ICSOP excess policy. Truck would pay $500,000 (and bill Kaiser back for the deductible) and ICSOP would pay its $5 million excess limit. Neither policy is subject to an aggregate limit, so the policy limits available to Kaiser for the next claim would be unimpaired. But if Truck were entitled to equitable contribution from the 1953-1964 and 1983-1985 excess insurers, Truck's 1974 payment

would be reduced below $500,000 since Truck would obtain contribution from those excess insurers for a portion of the $500,000. That means that the ICSOP excess policy would not attach since Truck's limits would no longer be fully exhausted. As a result, Kaiser could not look to ICSOP to pay the remaining $5 million of the judgment. Instead, under Truck's scheme, Kaiser would be forced to seek coverage for the portion of the judgment in excess of $500,000 from the excess insurers that are supposed to drop down and provide primary coverage, the 1953-1964 and 1983-1985 excess insurers. That would further deplete the aggregate limits of the excess policies in those years.

Kaiser's inability to access the ICSOP excess coverage would run afoul of an important principle of California insurance law: that the allocation of payments among insurers should have "no bearing upon the insurers' obligations to the policyholder" nor interfere with "[t]he insurers' contractual obligation to the policyholder ... to cover the full extent of the policyholder's liability (up to the policy limits)." (*Armstrong*, 45 Cal.App.4th at 106.) This Court has likewise made clear that the obligation of insurers to cover their insureds is a "separate issue from the obligations of the insurers to each other" and, therefore, that any allocation of costs between insurers cannot impede the insured's right to coverage. (*Dart Industries, Inc.*, 28 Cal.4th at 1080.) But if Truck were to secure contribution from Kaiser's excess insurers, Kaiser would not have "immediate access" to the non-aggregate-limit ICSOP policy for occurrences that exceed $500,000 and, instead, the excess portion of the loss would be

allocated to years of excess policies with aggregate limits, and the available coverage would be further reduced.

Leaving policyholders with less coverage is unfair on its face. It is also at odds with the "overall tendency" of this Court, and the majority of courts across the country, to adopt "coverage-favoring rather than coverage-denying" doctrines in insurance coverage disputes involving long-tail injuries, including asbestos-related harms. (Abraham, *The Long-Tail Liability Revolution: Creating the New World of Tort and Insurance Law* (2021) 6 U. Pa. J.L. & Pub. Aff. 346, 376.)

In asbestos insurance coverage litigation, this coverage-favoring approach makes "perfect sense" and is "justified not only by contract-based arguments ... but also [has] a sound basis under an insurance-policy-as-social-instrument theory." (Stempel, *The Insurance Policy As Social Instrument and Social Institution* (2010) 51 Wm. & Mary L. Rev. 1489, 1568-69.) Although "both policyholders and liability insurers failed to anticipate the asbestos mass tort, it was the insurers who took on this risk" and, therefore, it "was properly the insurers rather than the policyholders who shouldered the unexpectedly adverse consequences." (*Id.* at 1568.)

In short, Truck's proposed contribution scheme thus threatens to confer benefits on Truck "while potentially injuring [its] insured[s]"—a result that is antithetical to this Court's consistent efforts to protect policyholders. (*Truck* Opn. at 20.)

B. Truck's Proposed Scheme Would Substantially Harm Asbestos Claimants.

The inequity of Truck's proposed contribution scheme is

made especially evident in the context of asbestos-related insurance litigation to benefit an asbestos channeling trust.

Here, the recipients of insurance are not only Kaiser, a manufacturer that sold products containing asbestos and purchased programs of CGL policies to protect against liability from those sales, but also Kaiser's assignee, the Kaiser channeling trust, as well as the claimants that depend on insurance for compensation for their claimed injuries.[21] Truck proposes to enrich itself while depriving *both* Kaiser of its bought-and-paid-for protection against liability and tort victims of their source of recovery. Truck's scheme thus threatens to contravene the "'public policy objective of compensating tort victims….'" (*Pitzer College v. Indian Harbor Ins. Co.*, 8 Cal.5th at 102 [citation omitted]; *see also id.* at 104 ["The notice-prejudice rule promotes objectives that are in the general public's interest because it protects the public from bearing the costs of harm that an insurance policy purports to cover."].)

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[21] *See, e.g.*, Dixon, McGovern, and Coombe, RAND, Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts (2010) p. xi-5, https://www.rand.org/pubs/technical_reports/TR872.html (explaining how bankruptcy trusts, funded in part by "insurance payouts on insurance policies [the manufacturers] had purchased" play an "increasingly important role in the compensation of asbestos-related injuries").

C. The Trial Court Acted Well Within Its Discretion In Giving Truck's Purported Fairness Arguments Less Weight Than The Prejudicial Effects Truck's Proposed Scheme Would Have On Kaiser.

Finally, Truck's argument that it is entitled to equitable contribution out of fairness to itself is unpersuasive, and the lower courts did not abuse their discretion in declining to give that argument undue weight. Because "[t]here is no evident unfairness to insurers when their insureds incur liabilities triggering indemnity coverage under the negotiated policy contract," this Court has refused to allow insurers to rely on general "fairness" arguments when doing so undermines the rights of policyholders or disturbs the bargained-for relationship between the insured and its insurers. (*Montrose III*, 9 Cal.5th at 236; *accord Aerojet-Gen. Corp.*, 17 Cal.4th at 75-76.)

Truck argues that it should be entitled to contribution because otherwise it "must always bear all defense costs and the first $500,000 indemnity expense for all claims its policy concurrently covers." (Opening Brief at 11-12 [emphasis deleted].) But that argument "is not different in kind from arguments [this Court has] ... already considered and rejected in adopting" its coverage-favoring approaches "to the coverage of long-tail injuries." (*Montrose III*, 9 Cal.5th at 236.)

The 1974 primary policy "provide[s] what [it] provide[s]…." (*Aerojet*, 17 Cal.4th at 75.) In that policy, Truck agreed "'[t]o pay on behalf of [Kaiser] all sums which the insured shall become obligated to pay' for personal injury damages by a third party." (*Truck* Opn. at *18.) Because the 1974 primary policy has no

aggregate limit and thus remains unexhausted, Truck must, under the terms of the contract of insurance, continue to pay defense costs and the first $500,000 indemnity expense for claims against Kaiser that trigger that year, subject only to the policy's deductible.

As *Aerojet* counseled, the Court should "resist the temptation" to allow an insurer like Truck to rely on "vague" notions of "fairness" and "justice" to evade the obligations the insurer otherwise owes. (17 Cal.4th at 73, 75.) Although *Aerojet* and *Montrose III* involved insured versus insurer disputes, this Court has rejected similar "fairness" arguments in inter-insurer disputes such as the one here. For example, in *Signal Companies*, the Court rejected a primary insurer's argument that an excess insurer had an "equitable duty to contribute to defense costs," recognizing that "the defense costs at issue were incurred by [the primary insurer] in the performance of its contractual obligation to its insured to afford a defense." (27 Cal.3d at 364, 369.) The Court concluded that there was no "compelling equitable consideration" that required the excess insurer to contribute to the defense costs incurred by the primary insurer before the primary policy "was exhausted." (*Id.* at 365, 369.)

Similarly, here, Truck, "promised to '[i]nvestigate and defend any claim or suit against the insured'" under its 1974 primary policy (Excess Insurers' Answering Brief at 32), and further promised to defend and indemnify without any aggregate limit on that obligation. Meanwhile, Kaiser's excess policies "did not provide a duty to defend" (*Truck* Opn.at *18) and the

Respondents' excess policies provide that defense and indemnity payments both erode the policy limits and are subject to aggregates. Truck disregards these differences, contending that it "is not fair for one carrier ... to bear hundreds and hundreds of millions of dollars in losses, thousands of times its policy premium" without contribution from excess insurers. (Opening Brief at 60.) But no one forced Truck to issue the 1974 policy with the language that Truck chose to use. And California courts do not excuse insurers of their obligations merely because they subsequently came to regret the bargain that they struck. (*Aerojet*, 17 Cal.4th at 75-76.)

In sum, adopting Truck's position would lead to an inequitable result. In cases involving long-tail losses triggering successive policies and where excess coverage remains available, a primary insurer whose policy has not been exhausted could shift defense and indemnity costs onto excess insurers with aggregate limits, and could do so even if the excess policies expressly exclude a duty to defend. In effect, primary insurers like Truck would "benefit" at the expense of excess insurers and policyholders. (*Truck* Opn. at 20.) Because there is "no equitable basis" for accepting Truck's proposal and relieving it of "freely assumed" obligations (*Chubb/Pacific Indem. Group*, 188 Cal.App.3d at 699), the Court should give Truck's concerns little weight in the equitable contribution analysis.

CONCLUSION

For the foregoing reasons, the Court should affirm the ruling of the Court of Appeal.

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Respectfully submitted,

COVINGTON & BURLING LLP

By: /s/ David B. Goodwin
DAVID B. GOODWIN

Counsel for *Amicus Curiae*
UNITED POLICYHOLDERS

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.520(c), and in reliance upon the word count feature of the software used to prepare this document (Microsoft Word). I certify that the foregoing Brief *Amicus Curiae* of United Policyholders contains 10,989 words, exclusive of those materials not required to be counted under Rule 8.520(c)(3).

Dated: December 16, 2022 COVINGTON & BURLING LLP

/s/ Billie T.H. Mandelbaum
BILLIE T.H. MANDELBAUM

Counsel for *Amicus Curiae*
UNITED POLICYHOLDERS