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The Continuing Evolution of *Montrose*

Comment on *Kaiser Cement and Gypsum Corporation v. Insurance Company of the State of Pennsylvania*

Ever since the California Supreme Court's seminal ruling in *Montrose*, carriers and policyholders grappled with the issue of how to apportion coverage among multiple policies for continuing loss claims. *See Montrose Chemical Corporation v. Admiral Insurance Company* (1995) 10 Cal.4th 645. The issue is further complicated when an insured maintains both primary and excess coverage. An appellate court recently helped clarify coverage for these "uniquely complicated" claims.

The case is styled *Kaiser Cement and Gypsum Corporation v. Insurance Company of the State of Pennsylvania* [Cite as 2011 S.O.S. 3019]. Between the 1940s and 1970s, Kaiser manufactured various products which contained asbestos. Exposure to that asbestos resulted in over 24,000 bodily injury claims. Kaiser maintained primary insurance coverage with several carriers and excess coverage with Insurance Company of the State of Pennsylvania ("ISCOP"). The questions before the court were:

- When did the primary carriers' duty to defend and indemnify Kaiser end?
- When did the excess carrier's duty begin?

The court answered with a clear and categoric: "It depends." The court emphasized that its ruling depended on the precise language of the primary and excess insurance policies before it. Thus, the court's ruling is limited.

The court focused on the excess policy's schedule of insurance and that policy's insuring agreement. The schedule listed some, but not all of Kaiser's primary insurance. However, the schedule conditioned coverage on the exhaustion of the primary policies listed on the schedule *plus* the "applicable limit(s) of any other underlying insurance collectible by the insured." Similarly, the excess policy's insuring agreement stated that coverage was excess of "the limits of liability indicated [in] the schedule of underlying policies. . . . plus the applicable limit(s) of any other underlying [collectible] insurance." The court ruled that these terms expanded the scope of the primary policies that must exhaust before excess coverage arose. Thus, the court ruled that the policies underlying the excess policy exceeded both the primary policies listed in the excess policy's schedule of underlying coverage and the policy period of the excess policy. Instead, the policies underlying the excess policy included all of the triggered primary policies. In a case where as many as thirty or more primary policies may be triggered, the court's ruling significantly limits the excess carrier's potential exposure.

The court also addressed the issue of whether the primary policies at issue afforded coverage for claims which continued to occur over multiple years. In other words, whether the policies afforded coverage per occurrence, or both per occurrence and per year. The court looked to the terms of the primary policy. The primary policy stated that its limits applied per occurrence, but did not address whether successive policies afforded coverage for the same occurrence. The court noted that the policy did not characterize its per occurrence limits as annual limits or per policy limits. Thus, the court ruled that Kaiser could not "stack" the limits of its primary policies because only one per occurrence limit applied. As with the excess policy's terms, if the primary policy's terms differed, the court likely would reach a different ruling.

Rather than adopting a Solomonesque "split the baby" approach, or a zero-sum result, the court's ruling offers potential benefits to excess carriers, primary carriers, and ultimately to policyholders. Excess carriers are clear winners because they may owe no coverage obligation until many underlying primary policies exhaust. The court reaffirmed that the underlying policies are not merely those policies issued for the same year(s) as the excess policies or those listed in a schedule. Primary carriers win, too. The court limited per occurrence limits to a single policy rather than "stacking" multiple policy limits. Finally, policyholders may be the ultimate winners as the court's ruling limited the scope of both primary and excess coverage. To the extent that premiums are based on risk, this ruling limits risk to both primary and excess carriers, and so may ultimately lower premiums. Thus, policyholders lose nothing and may eventually see a benefit to their bottom line.

We at Braden, Hinchcliffe & Hawley are committed to helping our carrier and contractor clients navigate these issues and assure that all appropriate carriers are participating in our clients' defense.

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