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# Calif. Justices Set Montrose's Excess Enviro Coverage Path

By **Jeff Sistrunk**

Law360 (April 6, 2020, 9:30 PM EDT) -- California's highest court ruled Monday that former pesticide maker Montrose is not obligated to deplete all its lower-level insurance policies before it can tap into valuable excess policies to cover environmental damage claims, providing policyholders an easier path to accessing large insurance limits for losses spanning multiple years.

A unanimous California Supreme Court reversed a state appeals panel's ruling that terms found in many of Montrose Chemical Corp. of California's dozens of excess insurance policies mandate "horizontal exhaustion," whereby the company would have to exhaust all the lower-level policies it bought between 1961 and 1985 before it can obtain coverage from higher-level excess policies in any year.

Instead, the high court sided with Montrose and applied a "vertical exhaustion" method, which will allow the company to select any triggered excess policy to cover its losses, provided the underlying policies in that same year have been depleted. In turn, any excess insurers that are required to pay can seek reimbursement from other carriers whose policies were triggered, in what is known as a "contribution action," the court said.

The key question in the case, according to the justices, was whether Montrose or its insurance companies must shoulder the "administrative burden" of spreading multiyear losses among applicable policies, and a vertical exhaustion rule places the onus on the insurers.

"There is no obvious unfairness to insurers from a rule that requires them to bear this administrative burden," Justice Leondra R. Kruger wrote for the court.

Latham & Watkins LLP partner John M. Wilson, who represents Montrose, told Law360 the ruling will ease policyholders' path to recovering large insurance proceeds by eliminating the need for them to litigate the scope of coverage in all triggered policy periods. He noted that policy terms can vary widely over the years, and certain policies may be more restrictive than others.

"This opinion provides a more fair allocation of the burden and relieves policyholders from having to fight costly contribution actions," Wilson said. "The ruling will free up potentially billions in coverage that had been held in limbo and gives policyholders much more flexibility in these cases. This is a crucial reminder to policyholders to not accept insurance carriers' views about these key policy provisions."

However, Tressler LLP partner Linda Bondi Morrison, who represents Allstate Insurance Co. in the case, told Law360 that insurers are merely seeking to "enforce what we believe principles of insurance and our policies require — that everything below us must exhaust horizontally before our excess policies can be impacted."

Following the ruling, Morrison predicted that policyholders and insurers involved in similar cases will continue to focus on negotiating global settlements of coverage issues.

"As indicated by the court, this ruling will not impact insurers' rights of contribution against each other, and without some form of horizontal allocation among insurers, insurers will demand that

settlements with policyholders include indemnity provisions to protect themselves in the event of contribution claims," said Morrison, who serves as co-chair of the communications committee at the American College of Coverage Counsel, an organization of insurance attorneys.

The decades-old dispute centers on Montrose's requests for coverage of more than $100 million in damages it has incurred in connection with a Superfund action over environmental damage around Los Angeles Harbor, attributed to the company's production of the pesticide DDT in nearby Torrance from 1947 to 1982. More than three dozen of Montrose's primary and excess insurers have been roped in to the insurance litigation since it was launched in 1990, including Allstate and units of Travelers, Chubb Ltd. and CNA Financial Corp.

In 2016, a Los Angeles County trial court ruled that horizontal exhaustion would dictate the order in which Montrose could access its upper-level excess policies. However, in September 2017 a state appeals court **reversed the lower court in part**. While the panel found that some of the dozens of excess policies it analyzed appear to contain language supporting horizontal exhaustion, it declined to apply a blanket rule, saying a policy-by-policy analysis is warranted given the lack of uniformity among the policy terms.

The California Supreme Court agreed to take up the case later that year, and it **heard oral arguments** in January.

The insurers took the stance that so-called other-insurance provisions found in Montrose's excess policies — which generally provide that a policy only kicks in once the limits of any other valid, applicable insurance are exhausted — support horizontal exhaustion.

In Monday's opinion, the high court said the insurers' interpretation of the other-insurance provisions is "not an unreasonable one." But the clauses could also be reasonably construed to apply only to underlying insurance in the same policy period, as Montrose has urged, the court found.

Moreover, the justices said, other aspects of the policies "strongly suggest" that the other-insurance provisions' exhaustion requirements are not meant to apply to coverage purchased in other policy periods. For instance, the excess policies in question mention an "attachment point," or specific amount of lower-level insurance that must be exhausted before coverage kicks in. The high court opined that, if the policyholder were forced to exhaust lower-level policies across all triggered periods, the attachment point for a given excess policy would increase exponentially.

The high court also said horizontal exhaustion may not be as straightforward as the insurers have suggested, given that Montrose's policies "come in all shapes and sizes, each covering different periods of time, providing different levels of coverage, and setting forth distinct exclusions, terms, and conditions."

"Such a rule would put the insured to the considerable expense of establishing a right to coverage under the definitions, terms, conditions, and exclusions from policies in every policy period triggered by the continuous injury," Justice Kruger wrote. "Coverage under less restrictive policies would be delayed until more restrictive policy terms are adjudicated."

Attorneys who have been following the case told Law360 the California Supreme Court's adoption of vertical exhaustion continues its string of policyholder-friendly decisions in environmental cleanup and other "long-tail" cases involving property damage or bodily injuries occurring over multiple years.

In one of those seminal cases, California v. Continental Insurance Co. , the state high court ruled in 2012 that insurers can be required to cover damage occurring outside their policy periods and allowed policyholders to "stack" coverage limits from policies spanning multiple years to maximize recovery.

"The California Supreme Court continues to protect policyholder rights in permitting policyholders to access coverage for which policyholders paid precious premium dollars," said Anderson Kill PC managing shareholder Bob Horkovich, who represented the Golden State in the Continental case. "In this case and others, it will mean more money for environmental cleanups in California and elsewhere."

Covington & Burling LLP partners David Goodwin and René Siemens, who submitted an amicus brief supporting Montrose on behalf of the nonprofit advocacy group United Policyholders, said the California justices went to great lengths to issue a ruling that can apply broadly to long-tail coverage disputes.

"The insurers were arguing for various exceptions, carveouts and limitations, but the Supreme Court generally rejected those, issuing a decision intended to provide very broad guidance," Siemens said.

While Hinshaw & Culbertson LLP partner Scott Seaman said he was unsurprised by the high court's adoption of vertical exhaustion, he added that the justices appeared to gloss over substantial differences in the terms of Montrose's excess policies.

"As in other decisions, the California Supreme Court points out that the parties to insurance contracts are free to write their policies differently to establish alternative exhaustion requirements or coverage allocation rules," said Seaman, who represents insurers. "Yet, although the court discussed 'other insurance' clauses and insurance schedules, it did not adequately address the specific and differing language in the excess policies about exhaustion."

And although the decision may be favorable to policyholders overall, Farella Braun & Martel LLP partner and former ACCC President Mary McCutcheon said companies' road to recovering insurance proceeds may still be delayed by disputes among insurers during settlement negotiations.

"On paper, vertical exhaustion would seem to ease the burden on policyholders," she said. "As a practical matter, though, I often find that insurance companies want to work out inter-insurer disputes before committing to settlements, so there may still be hurdles for policyholders."

Montrose is represented by John M. Wilson, Brook B. Roberts, Drew T. Gardiner and Steven B. Lesan of Latham & Watkins LLP, and by retired Latham partner Kris Wilkes.

The excess insurers are represented by attorneys with Gibson Dunn & Crutcher LLP, Tressler LLP, Sinnott Puebla Campagne & Curet, Duane Morris LLP, Craig & Winkelman, Selman & Breitman LLP, Cozen O'Connor, Berkes Crane Robinson & Seal, Lewis Brisbois Bisgaard & Smith LLP, Barber Law Group, McCurdy & Fuller, Chamberlin Keaster & Brockman, Archer Norris PLC, Hinshaw & Culbertson LLP, O'Melveny & Myers LLP, McCloskey Waring & Waisman, and Simpson Thacher & Bartlett LLP.

The case is Montrose Chemical Corp. of California v. Superior Court of Los Angeles County, case number S244737, in the Supreme Court of the State of California.

--Editing by Breda Lund.

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