Filed 4/8/13 Opinion on remand from Supreme Court

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

KAISER CEMENT AND GYPSUM CORPORATION, Cross-complainant and Respondent, v. INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Cross-defendant and Appellant; TRUCK INSURANCE EXCHANGE, Plaintiff and Respondent.	B222310 (Los Angeles County Super. Ct. No. BC249550)

APPEAL from a judgment of the Superior Court of Los Angeles County, Carl J. West, Judge. Reversed and remanded.

Lynberg & Watkins, Randall J. Peters, and Wendy E. Schultz for Cross-defendant and Appellant.

Duane Morris, Brian A. Kelly, Paul J. Killion, Kathryn T.K. Schultz for Amici Curiae Certain London Market Insurers in Support of Cross-defendant and Appellant.

Jones Day, Philip E. Cook, J.W. Montgomery III, Pro Hac Vice, and Jason C. Wright for Cross-complainant and Respondent.

Gibson, Dunn & Crutcher, Scott R. Hoyt, Sarah Fleisig Powers; Pia, Anderson, Dorius, Reynard & Moss and Scott R. Hoyt for Plaintiff and Respondent.

INTRODUCTION

We are well acquainted with this case, having addressed it several years ago in *London Market Insurers v. Superior Court* (2007) 146 Cal.App.4th 648, 652 (*LMI*). There, we considered whether thousands of asbestos bodily injury claims brought against respondent Kaiser Cement and Gypsum Corporation (Kaiser) constituted a single annual "occurrence" within the meaning of comprehensive general liability (CGL) policies issued by respondent Truck Insurance Exchange (Truck). We concluded that they did not: Because under the relevant Truck policies "occurrence" meant injurious exposure to asbestos, the thousands of claims against Kaiser could not be deemed a single annual occurrence.

The present appeal concerns a separate but related coverage issue, which arises in part out of the Supreme Court's seminal decision in *Montrose Chemical Corp. v. Admiral Ins. Co*. (1995) 10 Cal.4th 645 (*Montrose*). In *Montrose*, the court adopted a "'continuous injury' trigger of coverage" approach to continuing injury claims. Under that approach, bodily injuries and property damage that occur in several insurance policy periods are potentially covered by *all* policies in effect during those periods. (*Id*. at pp. 654-655, 689.) *Montrose* provides no guidance, however, as to how to apportion liability among insurers in continuing injury cases.

That question of apportioning liability for continuing injuries is raised squarely by the present case. Between 1947 and 1987, Kaiser purchased primary insurance policies from four different insurers, including Truck. During many of the same years, Kaiser

also purchased excess insurance policies. For purposes of this litigation, Kaiser has selected the Truck CGL policy in effect in 1974 (the 1974 primary policy), which has a $500,000 per occurrence limit and no annual liability limit, to respond initially to all claims that allege asbestos exposure in that year. At issue here is who is responsible to indemnify Kaiser for asbestos claims that exceed the 1974 primary policy's $500,000 per occurrence limit. Kaiser and Truck contend that appellant Insurance Company of the State of Pennsylvania (ICSOP), which issued a first-level excess policy to Kaiser for 1974 (the 1974 excess policy), is responsible to pay claims over $500,000.[1] ICSOP disagrees: It contends that primary insurance limits must be "stacked," such that all available primary insurance policies—that is, *all* Truck policies issued to Kaiser between 1964 and 1983, as well as primary policies issued to Kaiser by three other carriers between 1947 and 1987—are exhausted before any excess insurer need indemnify Kaiser for asbestos bodily injury claims.

On June 3, 2011, we issued an opinion in which we concluded that under the language of the 1974 primary policy and principles of California law, Truck's maximum exposure for asbestos bodily injury claims was $500,000 per occurrence. We thus agreed with the trial court that, based on the policy language, once Truck contributed $500,000 per occurrence, its obligation to Kaiser ceased. We did not affirm the trial court's grant of summary adjudication, however, because there was no evidence in the record as to whether the policies issued to Kaiser by primary insurers other than Truck had been fully exhausted. We therefore could not determine whether ICSOP had a present duty to indemnify Kaiser. (*Kaiser Cement & Gypsum Corp. v. Insurance Co. of State of Pennsylvania* (2011) 196 Cal.App.4th 140, review granted Aug. 24, 2011, S194724.)

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[1] As in *LMI*, the "unusual alignment" of the parties is explained by the policies' per occurrence deductible provisions. Under Truck's primary policies, Kaiser's deductibles range from $5,000 to $100,000 per occurrence. (*LMI*, *supra*, 146 Cal.App.4th at p. 653, fn. 2.) There is no deductible due under ICSOP's excess policies. Accordingly, Kaiser's share of the total asbestos bodily injury liability increases if indemnity is provided by Truck's primary policies, rather than by the excess policies issued by ICSOP and others. (*Id*. at pp. 658-660.)

The California Supreme Court granted review on August 24, 2011. On October 31, 2012, the Supreme Court transferred the matter to this court with directions to vacate our decision and to reconsider it in light of *State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186 (*Continental*). Having done so, we again conclude that the policies Truck issued to Kaiser cannot be stacked, and we remand to the trial court to determine whether Kaiser therefore is entitled to summary adjudication of the fifth and sixth causes of action of the cross-complaint.

STATEMENT OF FACTS AND OF THE CASE

I. The Underlying Asbestos Litigation

Kaiser manufactured a variety of asbestos-containing products, including joint compounds, finishing compounds, fiberboard, and plastic cements, from 1944 through the 1970's. Kaiser manufactured these products at 10 different facilities at various times. (*LMI*, *supra*, 146 Cal.App.4th at p. 652.)

Truck provided primary insurance to Kaiser from 1964 to 1983, through four CGL policies covering 19 annual policy periods.[2] As relevant here, the policy in effect from January 1, 1974, through March 1, 1981, contained a $500,000 "per occurrence" liability limit and, in policy years 1974 and 1975, a $5,000 deductible for "each occurrence." Until April 1980, the policy did not contain an annual aggregate limit.

Kaiser apparently was also insured by three other primary carriers between 1947 and 1987: Fireman's Fund Insurance Company (Fireman's Fund) from 1947 through 1964; Home Indemnity Company (Home Indemnity) from 1983 through 1985; and National Union Fire Insurance Company of Pittsburgh (National Union) from 1985 through 1987. In 1993, Truck and Kaiser entered into agreements with Fireman's Fund,

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[2] In our prior opinion, we stated that two separate Truck policies were in effect between 1964 and 1983. (*LMI*, *supra*, 146 Cal.App.4th at pp. 658-660.) For purposes of the present opinion, we adopt the parties' contention that there were four separate policies during these years.

Home Indemnity, and National Union to share defense and indemnity costs until the aggregate limits of each primary policy were exhausted. According to Truck, by April 2004, all three primary carriers had given notice that their aggregate limits were exhausted; thus, after April 30, 2004, Truck was the only primary carrier continuing to pay defense and indemnity costs for asbestos bodily injury claims.

ICSOP issued a first layer excess policy to Kaiser from January 1, 1974, through January 1, 1977. That policy provided that ICSOP would indemnify Kaiser for its "ultimate net loss" in excess of its retained limit, up to the policy limit of $5,000,000 per occurrence. Other insurers, including amici curiae Certain Underwriters at Lloyd's, London, and certain London Market insurance companies, issued excess insurance policies to Kaiser in other years.

By 2004, more than 24,000 claimants had filed products liability suits against Kaiser alleging that they had suffered bodily injury, including asbestosis and various cancers, as a result of their exposure to Kaiser's asbestos products. Kaiser tendered these claims to Truck. By October 2004, Truck's indemnity payments for asbestos bodily injury claims exceeded $50 million and included at least 39 claims that resulted in payments in excess of $500,000. (*Ibid.*)

II. The Present Coverage Action

Truck filed the present action against Kaiser on April 30, 2001, seeking a declaration that its primary policies had been exhausted and it had no further obligation to defend or indemnify Kaiser for asbestos bodily injury claims. It filed a second amended complaint in August 2007, adding causes of action for equitable subrogation and contribution against Kaiser's excess insurers.

Kaiser cross-claimed against its excess insurers, including ICSOP, seeking a declaration that the excess insurers were obligated to defend and indemnify Kaiser for asbestos bodily injury claims once primary coverage was exhausted. As relevant to this appeal, the fifth and sixth causes of action in the operative third amended consolidated cross-complaint allege as follows:

"Fifth Cause of Action

"Declaratory Relief Against All Cross-Defendants

"66. A controversy and dispute currently exists between Kaiser, Truck and the Excess Insurers with Kaiser and Truck contending, and the Excess Insurers failing to acknowledge that the Excess Insurers are currently obligated under the Excess Policies to defend and to make liability payments in response to ABIC [asbestos bodily injury claims] asserted against Kaiser or to indemnify Kaiser for the costs of defending and making liability payments in response to ABIC asserted against Kaiser.

"67. Truck has alleged in its Second Amended Complaint that Truck has exhausted its policies by paying the full applicable limits of its insurance in response to ABIC and that Truck owes no further duties and obligations to Kaiser pursuant to its policies with respect to such ABIC. Additionally, those primary insurers with policy periods before and after Truck's policy periods have also exhausted their policies with respect to ABIC.

"68. Where, as here, Kaiser has excess insurance coverage extending through multiple consecutive policy periods and where, as here, insurance coverage in multiple consecutive policy periods covers Kaiser's liabilities arising out of the 'occurrence' or 'accident' that resulted in the ABIC asserted against Kaiser . . . , Kaiser is entitled to the protection of the full limits of such policies to the extent necessary to fully indemnify Kaiser. With respect to each individual ABIC, Kaiser is entitled to select, among the triggered policies, the policy or policies to pay the loss. Each Excess Insurer with an Excess Policy immediately in excess of Kaiser's primary policies for any given policy period is obligated to provide coverage upon the exhaustion of the primary policy for that policy period. The remaining Excess Insurers are obligated to provide coverage upon the exhaustion of each applicable underlying Excess Policy.

"Sixth Cause of Action

"Breach of Contract Against Cross-Defendant ICSOP

". . . . . .

"70. [O]nce the Truck policy incepting January 1, 1974 responds to an individual ABIC by paying its occurrence limit of $500,000, ICSOP is obligated under its Excess Policy incepting January 1, 1974 to indemnify Kaiser for the 'ultimate net loss' in excess of $500,000 for such claim up to $5,000,000 per occurrence.

"71. By correspondence dated July 3 and July 13, 2007, Kaiser confidentially notified the Excess Insurers, including ICSOP, of the existence of a number of claims that have been settled in excess of Truck's per occurrence limit of $500,000, and the amount paid to settle each such claim.

"72. [ICSOP] has breached the terms of its first layer Excess Policy incepting January 1, 1974 (Policy No. 4174-5841) by failing to pay to Kaiser all amounts that Kaiser has been forced to incur to make settlement payments for ABIC that exceed the Truck 'per occurrence' coverage limits for the primary policy incepting January 1, 1974. Kaiser has complied with all conditions precedent to obtain ICSOP's performance under its Excess Policy No. 4174-5841, or such performance has been excused.

"73. As a direct and proximate result of ICSOP's breach of its Excess Policy No. 4174-5841, Kaiser has been damaged in an amount which cannot be fully ascertained at this time, but which currently totals in excess of $15 million, and in an amount to be proven at trial."

III. Truck's Motion for Summary Adjudication

In October 2004, Truck moved for summary adjudication, seeking a declaration that its policies had been exhausted and it had no further duty to defend or indemnify Kaiser. According to Truck, under the plain language of its policies, all asbestos-related claims in any given year arose out of a single annual "occurrence" because all had the same underlying cause—"'the design, manufacture and distribution by Kaiser and its subsidiaries of asbestos-bearing products.'" Truck contended, therefore, that its total

liability for asbestos bodily injury claims for all policy years was $8.3 million and its policies were exhausted as of January 1999. (*LMI*, *supra*, 146 Cal.App.4th at pp. 652-653.)

The trial court initially denied the summary adjudication motion. Several months later, however, on its own motion the court ordered reconsideration and supplemental briefing. It then granted summary adjudication for Truck, finding that Truck and Kaiser reasonably intended to treat all asbestos bodily injury claims as a single annual occurrence under the policies. (*LMI*, *supra*, 146 Cal.App.4th at pp. 653-654.)

We reversed. We concluded that the plain language of the policies was not susceptible of the conclusion that Kaiser's design, manufacture, and distribution of asbestos products was an "occurrence." (*LMI*, *supra*, 146 Cal.App.4th at p. 672.) Rather, the relevant "occurrence" was injurious exposure to asbestos products. Thus, we held that the trial court erred in granting summary adjudication for Truck.

IV. Truck's Motion for Determination of Threshold Coverage Issues

Following our ruling, Truck moved for a determination of the number of "occurrences" at issue in the underlying asbestos bodily injury claims. Specifically, Truck asked the trial court to find that: (1) with regard to the "one lot" claims in Truck's policies from 1964 to 1974, all claims arising from exposures to products produced at the same Kaiser manufacturing facility could be aggregated and deemed a single occurrence; and (2) with regard to the "same general conditions" claims in Truck's policies from 1974 to 1983, all claims arising from exposures to products produced at the same Kaiser manufacturing facility could be deemed a single occurrence, or, alternatively, all claims resulting from the same corporate decision to place asbestos into products, or from multiple corporate decisions made at the same location, could be deemed a single occurrence. Truck stipulated that if the court denied all of the legal rulings it sought, then each asbestos bodily injury claim should be treated as a separate occurrence.

In a January 24, 2008 order, the court noted that Truck had stipulated to a number of key facts, including that there was no evidence proffered in support of any asbestos

bodily injury claim that connected any claimant's alleged injurious asbestos exposure to any particular asbestos purchase, manufacture, or sale. Claims, therefore, could not be aggregated by product line or manufacturing plant. The court concluded that for purposes of further proceedings in the case, "the claim of each asbestos bodily injury claimant shall be deemed to have been caused by a *separate and distinct occurrence* within the meaning of the Truck policies." (Italics added.)

V. June 30, 2008 Coverage Ruling

Following the January 24 ruling, pursuant to *FMC Corp. v. Plaisted & Companies* (1998) 61 Cal.App.4th 1132 (*FMC Corp.*), disapproved of in *Continental*, *supra*, 55 Cal.4th at page 201, Kaiser selected Truck's 1974 primary policy (which had a $500,000 "per occurrence" liability limit, a $5,000 "per occurrence" deductible, and no aggregate limits) to respond to each of the claims alleging injury during that year.[3] Kaiser then sought an order declaring that, "if an asbestos bodily injury claim alleged against Kaiser triggers the primary policy of comprehensive general liability insurance issued by Plaintiff Truck Insurance Exchange ('Truck') for the year 1974, and Kaiser selects that policy year to respond, then the first-level umbrella policy issued by Cross-Defendant [ICSOP] incepting January 1, 1974—and, if necessary, any excess policies directly above it—become liable for that claim once Truck has paid and exhausted its $500,000 per-occurrence limit for that year, and Kaiser has paid its $5,000 deductible for that year." Kaiser asserted that California law was unclear as to whether, in the case of an "occurrence" that triggers multiple successive primary policies, the policyholder is entitled to primary coverage of as much as the combined per occurrence limits of *all* the triggered policies (i.e., "stacking" of policy limits), or no more than the per occurrence

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[3] In *FMC Corp.*, the court held that if coverage for an occurrence is triggered in more than one policy period, the insured may select the policy period in which the policy limits are to be fixed. (61 Cal.App.4th at p. 1190; see also *Keene Corp. v. Insurance Co. of North America* (D.C. Cir. 1981) 667 F.2d 1034, 1049-1050 [same].)

limit of *one* such policy.[4] Kaiser urged that the better view "is that stacking is not appropriate. Consequently, if a claim triggers multiple primary policies, including the 1974 Truck policy, then once Kaiser has exhausted the per-occurrence limits of the 1974 policy year ($500,000), Kaiser will have fully exhausted all primary coverage available for that claim." Alternatively, Kaiser urged that if the court rejected an "anti-stacking" rule, the 1974 excess policy should not be construed to require horizontal exhaustion of all primary policies before triggering ICSOP's policy. Rather, "the ICSOP umbrella policy should be construed, in accordance with its express terms, to require only the exhaustion of a single primary policy limit listed in its Schedule of Underlying Insurances—namely, the single Truck per-occurrence limit of $500,000 available to Kaiser for the 1974 Truck policy period."

Truck agreed with most of the positions Kaiser articulated. As relevant here, it agreed that primary occurrence limits should not be "stacked" because stacking is: "(1) contrary to Truck's policy language, (2) contrary to California law . . . , (3) contrary to the law of the majority of jurisdictions that have addressed this issue, including many cases in the asbestos context, and (4) as Kaiser properly argues, contrary to the reasonable expectations of the insured."

ICSOP opposed Kaiser's motion in its entirety. It urged that under principles of "horizontal exhaustion," an excess insurer could not be required to indemnify an insured before the liability limits of all primary insurance policies were exhausted. ICSOP did not discuss Truck's policy language, but assumed that many of Truck's policies were not

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[4] "'Stacking policy limits means that when more than one policy is triggered by an occurrence, each policy can be called upon to respond to the claim up to the full limits of the policy. Under the concept of stacking . . . the limits of every policy triggered by an "occurrence" are added together to determine the amount of coverage available for the particular claim. Thus, for example, if an insured could establish that each of four consecutive $10 million policies were triggered by a particular claim, the insured could recover $40 million for a single occurrence, rather than the $10 million available under any single policy.' (Ostrager & Newman, Insurance Coverage Disputes (9th ed. 1998) Trigger and Scope of Coverage, § 9.04[c], p. 464.)" (*FMC Corp.*, *supra*, 61 Cal.App.4th at p. 1188.)

yet exhausted. Accordingly, it urged, "Kaiser's proposed tender of any claims in excess of Truck's $500,000 1974-1975 primary policy limit to the 1974-1975 ICSOP policy should . . . be denied until such time as there is full exhaustion of all applicable underlying primary coverage."

The court granted Kaiser's motion on June 30, 2008. It found that under the "clear and unambiguous" language of the 1974 primary policy, Truck was liable for only one per occurrence limit on each claim. If it were to rule as ICSOP urged it to—that is, to find that primary coverage for each insured year could be "stacked"—then "Truck would be required to pay multiple occurrence limits on each claim because it issued policies in multiple years; the language of the policy at issue does not permit such a result." After reviewing several relevant decisions, the court concluded: "[T]he issue comes down to the language of the Truck primary policy and the risk(s) Truck agreed to defend (when read in conjunction with the ICSOP excess policy). . . . [¶] . . . [R]ecognizing the following undisputed facts: 1) [Kaiser] selected the 1974 policy year for coverage of ABIC claims which arose during that year; 2) the Truck primary policy specifically spelled out a $500,000 per occurrence limit and contained no aggregate limit for 1974; and 3) this Court's January 24, 2008 determination that an 'occurrence' is defined as an individual ABIC; it is clear that ICSOP's excess coverage would 'drop down' once the $500,000 primary limit is exhausted for individual ABIC (since, aside from the $500,000 per-occurrence limit in the Truck primary policy, there is no 'other underlying insurance collectible by the insured' or 'valid and collectible insurance with any other insurer' under the ICSOP excess policy, once the $500,000 limit is exhausted)."

ICSOP and two other excess insurers filed a petition for writ of mandate and request for immediate stay on July 21, 2008. We summarily denied the petition on October 23, 2008.

VI. Kaiser's Motion for Summary Judgment

On July 14, 2009, Kaiser moved for an order summarily adjudicating that there was no defense to its cross-claims against ICSOP and that final judgment in the action as

between Kaiser and ICSOP should be entered. Specifically, Kaiser sought adjudication of the following two issues:

"Issue 1: There is no defense to the Fifth Cause of Action ('Declaratory Relief Against Cross-Defendant ICSOP') in Kaiser's Corrected Third Amended Cross-Complaint because: (1) Kaiser has selected the 1974 policy year to apply to all of those asbestos bodily injury claims ('ABIC') alleged against it that exceed $500,000 in settlement or judgment; (2) Truck has paid its 1974 policy year limit of $500,000 for such ABIC, subject to a deductible payable by Kaiser; and (3) Kaiser is entitled to a judicial declaration that ICSOP's policy is responsible to pay for all amounts paid for ABIC over the 1974 Truck policy year limit of $500,000. [Internal record reference omitted.]

"Issue 2: There is no defense to the Sixth Cause of Action ('Breach of Contract Against Cross-Defendant ICSOP') in Kaiser's Corrected Third Amended Cross-Complaint because: (1) Kaiser has selected the 1974 policy year to apply to all of those asbestos bodily injury claims ('ABIC') alleged against it that exceed $500,000 in settlement or judgment; (2) Truck has paid its 1974 policy year limit of $500,000 for such ABIC, subject to a deductible payable by Kaiser; and (3) ICSOP's policy is responsible to pay for all amounts paid for ABIC over the 1974 Truck policy year limit of $500,000, an amount which is confidential but known to all parties, including ICSOP. [Internal record reference omitted.]"

In support of its motion, Kaiser largely repeated the arguments it had advanced in support of its June coverage motion. ICSOP's and Truck's responses, too, largely tracked their responses to the June motion.[5]

The court granted the motion. It noted that Truck's 1974 primary policy stated that the "per occurrence" limit "is *the limit of the company's liability for each occurrence*." Thus, it found an apparent conflict between the language in Truck's

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[5] Although ICSOP urged in opposition that "the Court must examine the policy wording in *each* of the separate Truck primary policies to determine if there are other applicable underlying limits collectible by Kaiser with respect to ABIC exceeding the 1974 Truck policy limits," ICSOP did not discuss the language of either the 1974 policy or any other Truck policy.

primary policy and the rule articulated in *Community Redevelopment Agency v. Aetna Casualty & Surety Co.* (1996) 50 Cal.App.4th 329 (*Community Redevelopment*), requiring "horizontal exhaustion of *all* primary policies in effect on a risk stretched out over multiple policy periods before *any* excess insurance obligations arise." The court resolved this conflict by again looking to "the language of the Truck primary policy, the risk(s) Truck agreed to indemnify, and the excess language in the ICSOP policy." It noted that the language of the 1974 primary policy indicated "that Truck agreed to insure risks on a 'per occurrence' basis for the 1974 policy year, with a $500,000 per-occurrence limit" and no annual aggregate limit. Thus, "since 1) [Kaiser] selected the 1974 policy year for coverage of ABIC claims which partially arose during that year; 2) the Truck primary policy specifically spelled out a $500,000 per occurrence limit and contained no aggregate limit for 1974; and 3) this Court's determination that an 'occurrence' is defined as an individual ABIC, ICSOP's excess coverage would 'drop down' under its policy once the $500,000 primary limit is exhausted for individual ABIC (since, aside from the $500,000 per-occurrence limit in the Truck primary policy, there is no 'other underlying insurance collectible by the insured' or 'valid and collectible insurance with any other insurer' under the ICSOP excess policy, once the $500,000 limit is exhausted)."

The court concluded: "The motion for summary judgment is granted as to both issues. With respect to Issue 1, the Court determines there is no defense to the Fifth Cause of Action ('Declaratory Relief Against Cross-Defendant ICSOP') in Kaiser's Corrected Third Amended Cross-Complaint because: 1) Kaiser has selected the 1974 policy year to apply to all of those asbestos bodily injury claims ('ABIC') alleged against it that exceed $500,000 in settlement or judgment; 2) Truck has paid its 1974 policy year limit of $500,000 for such ABIC, subject to a deductible payable by Kaiser; and 3) Kaiser is entitled to a judicial declaration that ICSOP's policy is responsible to pay for all amounts paid for ABIC over the 1974 Truck policy year limit of $500,000. [¶] With respect to Issue 2, the Court finds there is no defense to the Sixth Cause of Action ('Breach of Contract Against Cross-Defendant ICSOP') in Kaiser's Corrected Third Amended Cross-Complaint because: 1) Kaiser has selected the 1974 policy year to apply

to all of those asbestos bodily injury claims ('ABIC') alleged against it that exceed $500,000 in settlement or judgment; 2) Truck has paid its 1974 policy year limit of $500,000 for such ABIC, subject to a deductible payable by Kaiser; and 3) ICSOP's policy is responsible to pay for all amounts paid for ABIC over the 1974 Truck policy year limit of $500,000, an amount which is confidential but known to all parties, including ICSOP."

"[A]ll of [Kaiser's] claims against ICSOP having been entirely adjudicated" by the summary adjudication motion, the court entered judgment for Kaiser and against ICSOP on Kaiser's cross-complaint. ICSOP timely appealed.

STANDARD OF REVIEW

The standard of review of a trial court's decision to grant summary adjudication is well established. "A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code Civ. Proc., § 437c, subd. (f)(1).) The moving party "bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850-851.) We independently review an order granting summary adjudication. (*Snatchko v. Westfield LLC* (2010) 187 Cal.App.4th 469, 476.)

CONTENTIONS OF THE PARTIES

ICSOP contends that the issue before us is whether its excess indemnity obligations "[are] conditioned on exhaustion of all available primary insurance or simply

exhaustion of the immediately underlying primary insurance policy" issued by Truck. As to this issue, ICSOP contends, the law is clear: Because the asbestos bodily injury claims potentially trigger up to 19 annual Truck policy periods, the policy limits for these 19 separate policy periods must be "stacked" such that "not only must the Truck $500,000 limit in the 1974 policy period be exhausted, but so must all of Truck's primary limits in its other eighteen annual policy periods." Thus, ICSOP urges, the trial court erred in concluding that its indemnity obligations attach now, because while the 1974 primary policy has been exhausted as to many claims that exceed $500,000, primary policies for other years remain unexhausted. ICSOP contends that it has no indemnity obligations with regard to any asbestos bodily injury claims until the per occurrence limits of *each* of Truck's annual policies, which ICSOP suggests total $8.3 million, have been exhausted.

Kaiser disagrees. It notes that ICSOP's indemnity obligation explicitly is conditioned on exhaustion of the primary insurance "'indicated [on] the schedule of underlying policies'" plus the "'*applicable limit(s) of any other underlying insurance collectible by the insured*.'" "*Underlying insurance*," Kaiser contends, means "insurance ***under*** the [ICSOP] policy—primary policies providing coverage during the same period covered by the ICSOP policy." Accordingly, Kaiser urges that "underlying insurance" for purposes of ICSOP's 1974 excess policy refers exclusively to the 1974 primary policy, and thus only the 1974 primary policy need be exhausted before ICSOP's indemnity obligations are triggered. In the alternative, Kaiser contends that under the plain language of the 1974 primary policy, occurrence limits cannot be "stacked."

Truck urges a somewhat different approach. While it concurs that ICSOP's excess indemnity obligation is conditioned on exhaustion of all "available" underlying primary insurance, it urges that the dispositive issue before us is whether a *single* primary occurrence limit per asbestos bodily injury claim constitutes the only "available" primary insurance, such that when one such limit is exhausted, the excess insurer must indemnify Kaiser for any additional loss. As to that issue, Truck contends that under the plain language of its policies, Kaiser may collect up to the policy limits of only *one policy* for each occurrence. Thus, Truck urges that the trial court correctly found that Kaiser may

collect only once for each "occurrence"—not once per occurrence *per year*, or once per occurrence *per policy*.[6]

In part I of our discussion, we consider whether, under the terms of the 1974 excess policy, ICSOP's indemnity obligation attaches as soon as the 1974 primary policy is exhausted, or only once *all* available primary policies have been exhausted. In part II, we consider whether primary policies can be "stacked" such that Kaiser can recover under more than one primary policy for the same claim. In part III, we discuss whether, in light of our resolution of these issues, the trial court properly granted summary adjudication of Kaiser's cross-claims against ICSOP.

DISCUSSION

I. Under the Language of ICSOP's 1974 Excess Policy, ICSOP's Indemnity Obligation Does Not Attach Until All Collectible Primary Policies Have Been Exhausted

ICSOP contends that under the plain language of its 1974 excess policy and the principle of "horizontal exhaustion," it is not responsible to indemnify Kaiser for losses until *all* primary policies have been exhausted. Kaiser urges, to the contrary, that the 1974 excess policy is excess to only the 1974 primary policy, and thus ICSOP must indemnify it once the 1974 primary policy is exhausted. We conclude ICSOP is correct.

A. Overview of Legal Principles

"'There are two levels of insurance coverage—primary and excess. Primary insurance is coverage under which liability "attach[es] to the loss immediately upon the

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[6] ICSOP contends that Truck's argument "raises an issue that was not before the trial court on the summary judgment proceedings below." Not so: The issue was raised both by Kaiser's motion and Truck's response. Further, Truck briefed the issue in response to Kaiser's earlier coverage motion, and the trial court was asked to—and did—take judicial notice of this and other earlier filed briefs in connection with the summary judgment proceeding.

happening of the occurrence." [Citation.] Liability under an excess policy attaches only after all primary coverage has been exhausted. [Citation.]' (*North River Ins. Co. v. American Home Assurance Co*. (1989) 210 Cal.App.3d 108, 112.)" (*Community Redevelopment*, *supra*, 50 Cal.App.4th at pp. 337-338.)

"Before coverage attaches under an excess or umbrella policy, the policy limits of the underlying primary policy or policies normally must be exhausted. [Citations.] [¶] Primary coverage is 'exhausted' when the primary insurers pay their policy limits in settlement or to satisfy a judgment against the insured." (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 1997) (Rutter, Insurance Litigation) ¶ 8:220, p. 8-52.1 (rev. #1 2010).) Where several primary policies are in effect, the issue arises whether the policy limits of one or all of such policies must be exhausted (or otherwise off the risk) before excess coverage applies. (*Id.*, ¶ 8:236, p. 8-54.) The issue is uniquely complicated where, as in the present case, damages are spread over an extended period of time. (*Id.*, ¶ 8:245, p. 8-54.1.)

Normal rules of policy interpretation apply in determining coverage under both primary and excess policies. (Rutter, Insurance Litigation, ¶ 8:180, p. 8-45.) "Although insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply. (*Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 868; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.) Thus, the mutual intention of the contracting parties at the time the contract was formed governs. (Civ. Code, § 1636; *Foster-Gardner, Inc.*, *supra*, 18 Cal.4th at p. 868.) We ascertain that intention solely from the written contract if possible, but also consider the circumstances under which the contract was made and the matter to which it relates. (Civ. Code, §§ 1639, 1647; *American Alternative Ins. Corp. v. Superior Court* (2006) 135 Cal.App.4th 1239, 1245.) We consider the contract as a whole and interpret the language in context, rather than interpret a provision in isolation. (Civ. Code, § 1641; *American Alternative Ins. Corp.*, *supra,* 135 Cal.App.4th at p. 1245.) We interpret words in accordance with their ordinary and popular sense, unless the words are used in a technical sense or a special meaning is given to them by usage. (Civ. Code, § 1644;

American Alternative Ins. Corp., *supra*, 135 Cal.App.4th at p. 1245.)" (*LMI*, *supra*, 146 Cal.App.4th at pp. 655-656.)

Although the primary policy may be consulted in interpreting an excess policy, each policy is a separate document and is interpreted separately. (Rutter, Insurance Litigation, ¶ 8:180.5 at pp. 8-45 to 8-46; *Northrop Grumman Corp. v. Factory Mut. Ins. Co*. (9th Cir. 2009) 563 F.3d 777, 785 ["Though the primary policy must be consulted in interpreting the excess policy, see Cal. Civ. Code § 1642, we decline to treat the two documents as only one contract."].)

B. Policy Language

We begin with the language of ICSOP's 1974 excess policy. It provides indemnity for Kaiser's "ultimate net loss in excess of the retained limit hereinafter stated," up to $5,000,000, "as the result of any one occurrence." "*Ultimate net loss*" is "the total sum which the Insured, or any company as his insurer, or both, become obligated to pay by reason of personal injury [or] property damage . . . either through adjudication or compromise[.]" Kaiser's "*retained limit*" is "an amount equal to the limits of liability indicated beside [*sic*] the schedule of underlying policies"—that is, primary comprehensive general liability insurance of $500,000 "C.S.L. [combined single limit]"—"*plus the applicable limit(s) of any other underlying insurance collectible by the Insured*." (Italics added.)

ICSOP urges that under the policy, its liability is excess to all other collectible primary insurance—whether for 1974 or any other year—and we agree. As the above-quoted provisions indicate, by its plain language the 1974 excess policy provides that Kaiser's retained limit is equal to the limits of liability indicated in the schedule of underlying policies, "plus the applicable limit(s) of *any other underlying insurance* collectible by the Insured." "Any" is a broad term that means "one or more without specification or identification" or "whatever or whichever it may be." (Random House Webster's College Dict. (1992) p. 63, col. 1.) Accordingly, we believe that the policy's reference to "any other underlying insurance" necessarily means "whatever" or

"whichever" primary insurance is available to Kaiser—not, as Kaiser suggests, only that primary insurance that expressly covers the 1974 policy year.

Kaiser suggests that "any other underlying insurance" must mean the 1974 primary policy because "underlying" means "'[l]ying under or beneath something.'" According to Kaiser, it would be "natural" to describe Kaiser's primary coverage for 1974, 1975, and 1976 as lying "'under or beneath'" ICSOP's policy for those years, but "it would be awkward to describe Kaiser's primary coverage for 1968, or 1972, or 1980 as lying 'under or beneath' the ICSOP policy covering the period from 1974 to 1976." We do not agree. We believe that in the context of ICSOP's excess policy, "underlying insurance" simply means *primary* insurance. In other words, we believe that the reference to "underlying insurance" clarifies the excess nature of the ICSOP policy—i.e., that the policy does not attach immediately upon a loss, but only after all available primary insurance has been exhausted.

Kaiser also suggests that the term "underlying" is used in other ways in the ICSOP policy "that *cannot* mean other Truck primary policies." Specifically, it notes the following two provisions:

"Maintenance of *underlying* insurances": "It is a condition of this policy that the policy or policies referred to in the attached 'Schedule of Underlying Insurances' shall be maintained in full effect during the currency of this policy . . . . Failure of the Insured to comply with the foregoing shall not invalidate this policy but in the event of such failure, the Company shall only be liable to the same extent as they would have been had the Insured complied with the said condition."

"*Underlying* insurance": "It is understood and agreed that, in the event coverage is afforded by primary policies listed on the Schedule of Underlying Insurances which is not otherwise afforded by this policy, the Company agrees to follow all the terms and conditions of said primary policies or renewals or rewrites thereof."

As to these provisions, Kaiser asserts that, "[t]hese uses of the word 'underlying' in the ICSOP policy show the parties' mutual intent when they used the phrase '*other underlying insurance collectible by* [*Kaiser*].' Without exception, all of these uses refer

to insurance that covers the same period of time, in whole or in part, as the ICSOP policy. Again, if ICSOP had intended '*other underlying insurance collectible by [Kaiser]*' to mean primary policies existing at the time the ICSOP policy was issued in 1974 (as ICSOP argues now), it could have eliminated any ambiguity by listing them."

Kaiser's argument proves too much. As used in these two provisions, "underlying insurances" appears to refer to only the primary insurance listed in the attached "Schedule of Underlying Insurances." But "underlying insurances" cannot mean *only* scheduled insurance, because the policy defines "Retained Limit" as an amount equal to the limits of liability indicated in the attached schedule, "*plus* the applicable limit(s) of *any other underlying insurance* collectible by the Insured." (Italics added.) Thus, the "retained limit" definition, considered with the other two provisions highlighted by Kaiser, makes clear that "underlying insurance" is not only scheduled insurance, but any other collectible primary insurance as well.

C. Our Analysis Is Consistent With Prior Appellate Opinions

Our analysis of ICSOP's policy is consistent with the analyses of other appellate courts that have interpreted similarly worded excess policies. In *Community Redevelopment*, *supra*, 50 Cal.App.4th 329, the court considered the indemnity obligations of primary and excess insurers in the context of a complex construction defect case. The insured was a developer who filled a redevelopment area on which it constructed residential housing developments. The fills and building pads were defectively designed and engineered, causing excessive subsidence and damage to the developments between 1977 and 1986. (*Id*. at pp. 333-334.) Between 1982 and 1986, the developer had purchased primary insurance policies from United Pacific Insurance Company and State Farm Fire and Casualty Insurance Company, each worth $1 million; for policy year 1985 through 1986, it had also purchased a $5 million excess policy from Scottsdale Insurance Company. The excess policy provided that Scottsdale would be liable for the developer's ultimate net loss in excess of its "underlying limit," defined as an amount "'equal to the Limits of Liability indicated beside the underlying insurance

listed in the Schedule of Underlying Insurance . . . plus the applicable limits of *any other underlying insurance* collectible by the Insured.'" (*Id.* at p. 335, some italics omitted.)

In litigation between the insurers, the primary insurers contended that Scottsdale was obligated by the terms of its policy to provide coverage once the 1985-1986 primary policy was exhausted. Scottsdale contended that it need not provide coverage until the primary policies for all years were exhausted. (*Community Redevelopment, supra*, 50 Cal.App.4th at p. 336.)

The Court of Appeal held that Scottsdale's policy was excess to all primary policies, and thus that Scottsdale need not indemnify the developer until all primary policies had been exhausted. (*Community Redevelopment, supra*, 50 Cal.App.4th at pp. 337-342.) It explained: "There is no dispute that Scottsdale's $5 million coverage was purchased as excess to the $1 million primary policy issued by State Farm. However, the express provisions of the policy further provide that Scottsdale's liability was also excess to 'the applicable limits of *any other underlying insurance* collectible by the [insured parties].' (Italics added.) . . . The policy also provided that the insurance afforded by the policy 'shall be excess insurance over any other valid and collectible insurance available to the [insured parties] whether or not described in the Schedule of Underlying Insurance' (which schedule listed State Farm's $1 million policy)." (*Id.* at p. 338.) This policy language, the court said, "could hardly be more clear" that Scottsdale's exposure was excess to all other primary coverage available to the insured. (*Id.* at pp. 338-339.)

Its conclusion, the court said, was consistent with the principle of "horizontal exhaustion"—the notion that "*all* primary insurance must be exhausted before a secondary insurer will have exposure."[7] (*Community Redevelopment, supra*, 50 Cal.App.4th at p. 339.) It noted that horizontal exhaustion raised particular problems in cases of continuous loss, because "[i]n such cases, primary liability insurers may have

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[7] This is contrasted with "vertical exhaustion," where coverage attaches under an excess policy when the limits of a specifically scheduled underlying policy is exhausted. (*Community Redevelopment, supra*, 50 Cal.App.4th at pp. 339-340.)

exposure to defend (and perhaps indemnify) claims arising before or after the effective dates of such policies. As a result of the Supreme Court's conclusion that a continuing or progressively deteriorating condition which causes damage or injury throughout more than one policy period will potentially be covered by *all* policies in effect during those periods ([*Montrose*], *supra*, 10 Cal.4th at pp. 686-687), the 'horizontal exhaustion' versus 'vertical exhaustion' issue will become an increasingly common one to be resolved. [¶] As we find to be the case here, primary policies may have defense and coverage obligations which make them underlying insurance to excess policies which were effective in entirely different time periods and which may not have expressly described such primary policies as underlying insurance." (*Community Redevelopment*, *supra*, 50 Cal.App.4th at p. 340.)

The court concluded: "Absent a provision in the excess policy *specifically describing* and *limiting* the underlying insurance, a horizontal exhaustion rule should be applied in continuous loss cases because it is most consistent with the principles enunciated in *Montrose*. In other words, all of the primary policies in force during the period of continuous loss will be deemed primary policies to each of the excess policies covering that same period. Under the principle of horizontal exhaustion, *all* of the primary policies must exhaust before *any* excess will have coverage exposure." (*Community Redevelopment*, *supra*, 50 Cal.App.4th at p. 340.) Thus, "Scottsdale's responsibility to respond was not triggered by State Farm's exhaustion; not until exhaustion of *all* primary policies, including United's, would Scottsdale have had any duty to provide a defense to the insureds." (*Ibid*.)

The court reached a similar result in *Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 Cal.App.4th 1810, also a continuing loss case with multiple primary and excess insurers. There, the court held that if the limits of liability in the available primary policies were adequate to cover the insured's liability, no excess carrier would be liable. It explained: "In substance we adopt the 'horizontal allocation of the risk' approach to liability as between primary and excess carriers, rather than the 'vertical' approach. To begin with, it seems clear from the [insured's] assertion that all of its

primary insurers covered its liability that the [insured's] reasonable expectations treated the excess policies as a secondary source. Moreover, the 'horizontal' approach seems far more consistent with *Montrose's continuous* trigger approach. That is, if 'occurrences' are continuously occurring throughout a period of time, all of the primary policies in force during that period of time cover these occurrences, and all of them are primary to each of the excess policies; and if the limits of liability of each of these primary policies is adequate in the aggregate to cover the liability of the insured, there is no 'excess' loss for the excess policies to cover." (*Id*. at pp. 1852-1853.)

We concur with the reasoning of these cases and conclude, for all the reasons discussed, *ante*, that the 1974 excess policy is excess to all collectible primary insurance, not merely to the primary insurance purchased for the 1974 policy year.

II. Under the Language of Truck's 1974 Primary Policy, Truck's Liability Cannot Exceed $500,000 Per Occurrence

Having concluded that ICSOP's policy is excess to all collectible primary insurance, we now turn to the second issue raised by ICSOP's appeal: What primary insurance is "collectible"? ICSOP contends that the 1974 excess policy "requires exhaustion of all primary insurance as a condition precedent to coverage," and it assumes that primary insurance is not exhausted until the primary insurer or insurers have paid policy limits for *each year* in which coverage exists. Truck and Kaiser disagree, urging that under the language of the 1974 primary policy, Truck is responsible to pay policy limits only once *per occurrence*, not once per occurrence *per year* or once per occurrence *per policy*. We conclude Truck and Kaiser are correct.

A. ICSOP's Policy Language Is Silent as to Whether the Underlying Primary Policies Must Be Aggregated Before Excess Insurance Is Available

As we have said, the 1974 excess policy provides that ICSOP is liable for Kaiser's "ultimate net loss" in excess of its retained limit, defined as "an amount equal to the limits of liability indicated [in] the schedule of underlying policies" (i.e., $500,000), plus

the limits of "*any other underlying insurance collectible by the Insured*." (Italics added.) The "other insurance" provision uses nearly identical language, providing that ICSOP's policy is in excess of the scheduled primary insurance policy plus "other *valid and collectible insurance* with any other insurer." (Italics added.) Thus, by the plain language of its policy, ICSOP's liability is in excess not of all primary insurance, but only of primary insurance that is both "*valid*" and "*collectible.*"

ICSOP contends—without analysis—that because under *Montrose, supra*, 10 Cal.4th 645, multiple Truck policies are triggered by the underlying asbestos bodily injury claims, each triggered policy necessarily provides "valid" and "collectible" coverage for each claim. In other words, ICSOP assumes that the policy limits of each primary policy can be "stacked" so that the available primary insurance for each occurrence is equal to the sum of the occurrence limits for each triggered policy year. ICSOP's contention, however, explicitly is not grounded in the language of the primary policies—indeed, ICSOP faults the trial court for examining the language of those policies, characterizing such examination "inexplicabl[e]." According to ICSOP, it is "axiomatic" that ICSOP's policy obligations "are located in its own insurance contract—not the underlying Truck primary policy—and that, as a matter of basic contract law, the ICSOP policy wording governs the determination of when ICSOP's obligations under the 1974 policy attach."

ICSOP's analysis is flawed. The 1974 excess policy expressly premises ICSOP's duty to indemnify on the *validity* and *collectibility* of underlying primary insurance. By its plain language, thus, the policy bases its coverage obligation on the coverage provided to Kaiser by its primary insurers—the more primary insurance available to Kaiser, the smaller ICSOP's indemnity obligation; the less primary insurance available to Kaiser, the greater ICSOP's indemnity obligation. Under these circumstances, we cannot determine ICSOP's policy obligations without first determining Truck's. Since Truck's policy obligations necessarily depend on the language of its policies, we therefore turn to those policies and the Supreme Court's recent analysis of "stacking" in *Continental, supra,* 55 Cal.4th 186.

B. Continental

In *Continental*, the California Supreme Court considered a variety of coverage issues in connection with a federal court ordered cleanup of the Stringfellow Acid Pits (Stringfellow site). The Stringfellow site was an industrial waste disposal site designed and operated by the State of California (State) from 1956 to 1972. The State had been advised prior to opening the Stringfellow site that there was no threat of hazardous materials migrating from it; however, contaminants escaped during periods of heavy rain, eventually contaminating the groundwater. (55 Cal.4th at p. 192.)

In 1998, a federal court found the State liable for, among other things, negligence in investigating, choosing, and designing the Stringfellow site, overseeing its construction, failing to correct hazardous conditions, and delaying its remediation. The federal court held the State liable for all past and future cleanup costs, which the State claimed could reach $700 million. The State then filed an indemnity action against five insurers. (*Continental*, *supra*, 55 Cal.4th at pp. 192-193.) Four of those insurers had issued the State single multi-year excess CGL policies; the fifth, Wausau, had issued four excess CGL policies, covering policy periods 1964-1967, 1967-1970, 1970-1973, and 1973-1976.

The policies issued by the five insurers contained nearly identical language. Under the heading "Insuring Agreement," the insurers agreed "'[t]o pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of liability imposed by law . . . for damages . . . because of injury to or destruction of property, including loss of use thereof.'" "Occurrence" was defined as "'an accident or a continuous or repeated exposure to conditions which result in . . . damage to property during the policy period. . . .'" Liability limits were stated as specified dollar amounts of the "ultimate net loss [of] each occurrence." (*Continental*, *supra*, 55 Cal.4th at p. 193.)

Among the issues considered by the Court was how to allocate liability among several insurers in a "long tail" injury, which it characterized as "a series of indivisible injuries attributable to continuing events without a single unambiguous 'cause.'"

(*Continental, supra*, 55 Cal.4th at p. 196.) The court noted that long-tail injuries "produce progressive damage that takes place slowly over years or even decades. Traditional CGL insurance policies, including those drafted before such environmental suits were common, are typically silent as to this type of injury. (Hickman & DeYoung, *Allocation of Environmental Cleanup Liability Between Successive Insurers* (1990) 17 N.Ky. L.Rev. 291, 292 (Hickman & DeYoung).) Because of this circumstance, many insurers are unwilling to indemnify insureds for long-tail claims. Their refusal to indemnify often causes insureds to sue for coverage. . . . [T]hese suits tend to be complex. Typically they involve dozens of litigants and even larger numbers of insurance policies covering multiple time periods that stretch back over many years." (*Continental, supra*, at p. 196.)

The court began its analysis of the allocation issues before it by discussing its holdings in *Montrose, supra*, 10 Cal.4th 645, 655, and *Aerojet-General Corp. v. Transport Indemnity Co*. (1997) 17 Cal.4th 38, 55-57 (*Aerojet*). In *Montrose*, the court adopted a "'continuous injury' trigger of coverage," pursuant to which a continuous condition "becomes an occurrence for the purposes of triggering insurance coverage when '"property damage"' results from a causative event consisting of 'the accident or "continuous and repeated exposure to conditions."'" (*Continental, supra*, 55 Cal.4th at p. 197.) The court adopted an "all sums" rule in *Aerojet*, pursuant to which "'"an insurer on the risk when continuous or progressively deteriorating [property] damage or [bodily] injury first manifests itself remains obligated to indemnify the insured *for the entirety of the ensuing damage or injury*."' . . . In other words, . . . as long as the property is insured at some point during the continuing damage period, the insurers' indemnity obligations persist until the loss is complete, or terminates." (*Ibid*.)

In *Continental*, the insurers advocated a "pro rata" rule for indemnity allocation, under which an equal share of the amount of damage is assigned to each year over which a long-tail injury occurred. (55 Cal.4th at p. 199.) But although the court acknowledged that some states had adopted a pro rata approach, it found itself "constrained by the language of the applicable policies here," which it said "supports adoption of the all sums

coverage principles." (*Ibid*.) It explained: "Under the CGL policies here, the plain 'all sums' language of the agreement compels the insurers to pay 'all sums which the insured shall become obligated to pay . . . for damages . . . because of injury to or destruction of property . . . .' (*Ante*, at p. 193.) As the State observes, '[t]his grant of coverage does not limit the policies' promise to pay 'all sums' of the policyholder's liability solely to sums or damage "during the policy period."'" (*Id*. at p. 199.) The court therefore concluded that the policies at issue "obligate the insurers to pay all sums for property damage attributable to the Stringfellow site, up to their policy limits, if applicable, as long as some of the continuous property damage occurred while each policy was 'on the loss.' The coverage extends to the entirety of the ensuing damage or injury [citation], and best reflects the insurers' indemnity obligations under the respective policies, the insured's expectations, and the true character of the damages that flow from a long-tail injury." (*Id.* at p. 200.)

Having so concluded, the court then turned to a related issue—whether the State could "stack" policy limits across multiple policy periods. It explained that stacking policy limits "'means that when more than one policy is triggered by an occurrence, each policy can be called upon to respond to the claim up to the full limits of the policy.' [Citation.] 'When the policy limits of a given insurer are exhausted, [the insured] is entitled to seek indemnification from any of the remaining insurers [that were] on the risk . . . .' [Citations.]" (*Continental*, *supra*, 55 Cal.4th at p. 200.)

The court concluded that allowing an insured to "stack" policies under the circumstances presented "properly incorporates the *Montrose* continuous injury trigger of coverage rule and the *Aerojet* all sums rule, and 'effectively stacks the insurance coverage from different policy periods to form one giant "uber-policy" with a coverage limit equal to the sum of all purchased insurance policies." (*Continental*, *supra*, 55 Cal.4th at p. 201.) It explained: "Instead of treating a long-tail injury as though it occurred in one policy period, this approach treats all the triggered insurance as though it were purchased in one policy period. The [insured] has access to far more insurance than it would ever be entitled to within any one period.' [Citation.] The all-sums-with-

stacking rule means that the insured has immediate access to the insurance it purchased. It does not put the insured in the position of receiving less coverage than it bought. It also acknowledges the uniquely progressive nature of long-tail injuries that cause progressive damage throughout *multiple* policy periods. [Citation.]" (*Ibid.*)

In adopting an all-sums-with-stacking rule, the Court rejected the court's analysis in *FMC, supra*, 61 Cal.App.4th 1132, which it said "'disregarded the policy language entirely'" and "resorted to 'judicial intervention' in order to avoid stacking." (*Continental, supra*, 55 Cal.4th at p. 201.) The court said that the policies at issue, "which do not contain antistacking language, allow for its application." (*Ibid.*)[8]

The court concluded that an all-sums-with-stacking rule "has numerous advantages. It resolves the question of insurance coverage as equitably as possible, given the immeasurable aspects of a long-tail injury. It also comports with the parties' reasonable expectations, in that the insurer reasonably expects to pay for property damage occurring during a long-tail loss it covered, but only up to its policy limits, while the insured reasonably expects indemnification for the time periods in which it purchased insurance coverage. All-sums-with-stacking coverage allocation ascertains each insurer's liability with a comparatively uncomplicated calculation that looks at the long-tail injury as a whole rather than artificially breaking it into distinct periods of injury. As the Court of Appeal recognized, if an occurrence is continuous across two or more policy periods, the insured has paid two or more premiums and can recover up to the combined total of the policy limits. There is nothing unfair or unexpected in allowing stacking in a continuous long-tail loss." (*Continental, supra*, 55 Cal.4th at pp. 201-202.) The court, noted, however, that there exists a "significant caveat" to all-sums-with-stacking indemnity allocation. That caveat "contemplates that an insurer may avoid stacking by specifically including an 'antistacking' provision in its policy. Of course, in the future, contracting parties can write into their policies whatever language they agree upon,

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[8] In so holding, the court disapproved *FMC, supra*, 61 Cal.App.4th 1132. (*Continental, supra*, 55 Cal.4th at p. 201.)

including limitations on indemnity, equitable pro rata coverage allocation rules, and prohibitions on stacking." (*Id.* at p. 202.)

C. Truck's Policy Language Does Not Permit "Stacking" of the Various Truck Policies

Although *Continental* adopted an "all-sums-with-stacking" rule in the absence of contrary policy language, it made clear that any "stacking" analysis must begin with the relevant policy language. Here, pursuant to the "Insuring Agreements" of the 1974 primary policy, Truck agreed "[t]o pay on behalf of the insured all sums which the insured shall become obligated to pay, as damages or otherwise, by reason of the liability imposed upon him by law, assumed by him under [the] contract as defined, or by reason of any other legal liability of the insured however arising or created or alleged to have risen or to have been created because of:

"1. Personal injury, sickness, disease, including death;

"2. Injury to or destruction of property

"including all loss resulting therefrom."

The "limit of liability" portion of the policy limits Truck's liability for personal injury or property damage to $500,000 "*Per Occurrence*."[9] (Italics added.) It further provides (part IV, "Policy Period, Territory, Limits"):

"The limit of liability stated in this policy as applicable 'per occurrence' is the limit of the company's liability for each occurrence.

"There is no limit to the number of occurrences for which claims may be made hereunder, however, *the limit of the Company's liability as respects any occurrence involving one or any combination of the hazards or perils insured against shall not exceed the per occurrence limit* designated in the Declarations." (Italics added.)

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[9] The policy defines occurrence as "an event, or continuous or repeated exposure to conditions which results in personal injury or property damage during the policy period."

Truck and Kaiser contend that the 1974 primary policy does not permit "stacking" of Truck's annual per occurrence limits, and we agree.[10] As the italicized language indicates, the policy contains a "per occurrence" limit—*not*, as Truck notes, a "per occurrence per policy" or "per occurrence per year" limit.[11] This language is facially inconsistent with permitting Kaiser to recover from Truck more than the occurrence limit for a single occurrence.

Further, the policy specifically provides that, "[t]he limit of liability stated in this policy as applicable 'per occurrence' is the limit of the company's liability for each occurrence" and "the limit of the Company's liability as respects any occurrence . . . shall not exceed the per occurrence limit designated in the Declarations." Notably, the policy does not say that the per occurrence limit is the limit of the company's *annual* liability for any occurrence, or that the per occurrence limit is the limit of the company's liability *under the policy*. Rather, it says that the per occurrence limit is the limit of *the company's* liability. We presume, as we must, that the parties intended this language to mean what it plainly says—that for any single occurrence, Truck is liable up to the per occurrence limit, and no more. We thus conclude that the trial court correctly determined that Kaiser may not "stack" the liability limits of Truck's primary policies, but rather may recover only up to the "per occurrence" limit of one policy.

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[10] We note that our holding is limited to the stacking of Truck's policies. Because the issue is not before us, we have not considered the separate question of whether Kaiser may stack Truck's 1974 primary policy and the policies issued by its other insurers.

[11] ICSOP contends that Truck has previously stipulated with Kaiser that "the Truck policies between 1965 and 1983 provide 'annual per occurrence limits,' a stipulation repeated in a binding Order of Judgment from another court." We do not agree that Truck has so stipulated. The "stipulation" to which ICSOP refers is a settlement agreement between Kaiser, Truck, and another insurer; it expressly provides that, "[i]f [Kaiser] chooses to dispute the issues of exhaustion or aggregate limits, it reserves the right to do so by way of the judicial process." The settlement agreement further provides as follows: "This Agreement and the negotiations for it are part of a settlement of disputed claims, are not an admission of liability and do not reflect the views of the Parties as to their rights and obligations under any insurance policy or policies."

Our conclusion that Kaiser may not "stack" Truck's annual liability limits is consistent with the Supreme Court's analysis in *Continental.* Although the court in *Continental* adopted an "all-sums-with-stacking" default rule, it made clear that rule applied only in the absence of contrary policy language and said that an insurer could avoid stacking "by specifically including an 'antistacking' provision in its policy." (*Continental*, *supra*, 55 Cal.4th at p. 202; see also *id*. at p. 199 ["we are constrained by the language of the applicable policies here"].) Although the court did not describe such a provision with any specificity, we believe Truck's limitation-of-liability term is exactly such a provision with regard to the stacking of Truck's own policy limits. As we have said, the 1974 primary policy expressly caps Truck's liability for each occurrence and provides that "the limit of the Company's liability as respects any occurrence involving one or any combination of the hazards or perils insured against *shall not exceed the per occurrence limit* designated in the Declarations." (Italics added.) We do not know what more Truck could have said when the policy was drafted in 1974 to make clear that its policy's limitation-of-liability term was an absolute cap on its per occurrence exposure—and, as such, it is fundamentally inconsistent with "stacking" the liability limits of the several Truck policies.

Further, our result satisfies the Supreme Court's stated goal in *Continental* of giving the insured "immediate access to the insurance it purchased" and avoiding "put[ting] the insured in the position of receiving less coverage than it bought." (*Continental*, *supra*, 55 Cal.4th at p. 201.) In *Continental*, stacking policies increased the insured's coverage because it "'effectively stack[ed] the insurance coverage from different policy periods to form one giant "uber-policy" with a coverage limit equal to the sum of all purchased insurance policies.'" (*Ibid*.) In contrast, in the present case stacking would *decrease*, not increase, the insured's coverage because it would potentially make Kaiser responsible for multiple deductibles per claim. (See fn. 1, *ante*.)

We note, finally, that the issue before us is somewhat different than that before the court in *Continental.* With the exception of Wausau, the insurers in *Continental* each had

issued the State a single CGL policy.[12] Thus, the court considered only whether any of the relevant policy language prohibited stacking of policies issued by different insurers. It did not consider the issue before us—whether an insured may stack multiple policies issued by the *same insurer*. This distinction is significant because the relevant language here—"[t]he limit of liability stated in this policy as applicable 'per occurrence' is the limit of *the company's* liability for each occurrence"—on its face prohibits stacking only of multiple Truck policies, not of policies issued by other insurers.

In its supplemental brief, ICSOP contends that the Supreme Court in *Continental* held that so-called "standard policy language" permits stacking, and it urges that the language of Truck's policy *is* "standard policy language." It thus would have us conclude that this language "cannot be interpreted as an anti-stacking provision so as to preclude stacking of available limits under Truck's other triggered primary insurance policies." The problem with this analysis is that *Continental* did not hold that *all* standard policy language permits stacking—it simply held that the standard policy language at issue permitted stacking. (E.g., *In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388 ["'It is axiomatic that cases are not authority for propositions not considered.'"].) Therefore, even if we were to conclude that the language at issue here is standard in the industry, it would not resolve the issue before us—whether that language permits stacking of Truck's policies.

ICSOP next contends that Truck's "company's liability" provision cannot be an antistacking clause because it is nearly identical to those at issue in *Continental*, which "clearly were not found to be anti-stacking provisions by the California Supreme Court." Assuming for the sake of argument that the relevant policy language is identical, the stacking issues are not. As we have said, the court in *Continental* considered whether policies issued by different insurers may be stacked, while here we are considering

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[12] The Court of Appeal noted that Wausau, the only insurer that had issued the state more than one policy did not argue that those policies were subject to just a single policy limit because they constituted only a single continuous contract that was repeatedly renewed. Thus, the court treated any such contention as forfeited.

stacking only in the context of Truck's own policies. Thus, while the policy language may be similar, the coverage issues are not. Moreover, contrary to ICSOP's contention, Truck's policy language differs from that at issue in *Continental* in an important way. Truck's 1974 primary policy states that "'the limit of the Company's liability as respects any occurrence . . . shall not exceed the per occurrence limit designated in the Declarations,'" while the *Continental* policies stated that "[T]he limit of the Company's liability *under this policy* shall not exceed the applicable amount [listed as the policy limit]." On its face, thus, Truck's policy purports to limit Truck's liability generally, while the *Continental* policies purported to limit the insurers' liability only under *the policy*.

ICSOP claims that the only policy provisions recognized by other courts as "anti-stacking" provisions are "very specific non-cumulation of liability provisions" and that the 1974 Truck primary policy "contains no reference to any of the earlier or later Truck primary policies." Perhaps so, but the fact that noncumulation clauses have been found in other cases to prohibit stacking generally does not suggest to us that the language at issue in this case should not preclude stacking of Truck's policies. As we have said, that is precisely what this language facially purports to do.

ICSOP contends finally that determining whether the Truck policies may be stacked "requires consideration of the language of each and every primary policy, not just the one primary policy selected by the policyholder." Because ICSOP did not make this contention either in the trial court or in its appellate briefs, the contention is forfeited. (E.g., *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes* (2010) 191 Cal.App.4th 435, 476 [appellant "forfeited this argument by failing to raise it in a timely manner"].)

For all of these reasons, we hold that Kaiser may not "stack" Truck's primary policy limits. Instead, having chosen the 1974 primary policy to respond to any claims triggered by that policy, Kaiser may recover from ICSOP to the extent that a claim exceeds that $500,000 per occurrence limit specified in the 1974 primary policy.

D. Our Analysis Is Consistent With the Principle of "Horizontal Exhaustion" Articulated in Community Redevelopment

ICSOP contends that the trial court's conclusion is inconsistent with the principle of horizontal exhaustion articulated in *Community Redevelopment*, *supra*, 50 Cal.App.4th 329. ICSOP notes that the wording of its 1974 excess policy is nearly identical to that of the excess policy in *Community Redevelopment*, and it urges that under *Community Redevelopment*, "not only must the Truck $500,000 limit in the 1974 policy period be exhausted, but so must all of Truck's primary limits in its other eighteen annual policy periods plus the limits of any other unexhausted primary insurers' policies."

We do not agree. *Community Redevelopment* held—and we agree—that in the case of a continuing loss, excess insurance is in excess of all collectible primary insurance, not merely the scheduled primary policy or policies. That holding does not imply, however, that policy limits of primary policies may be (or must be) "stacked," such that an insured recovers multiple policy limits for a single occurrence. Indeed, the *Community Redevelopment* court was never called upon to interpret the underlying primary policies, because the parties did not dispute that primary insurance remained collectible by the insured. (*Community Redevelopment*, *supra*, 50 Cal.App.4th at p. 340 ["Although State Farm's liability limits were reached and exhausted, United's clearly were not. Indeed, the underlying cases were all finally resolved by settlement on December 14, 1990, and, as of that time, United still had not exhausted its policy limits."].) Our analysis thus in no way conflicts with *Community Redevelopment's*—it simply addresses an issue that *Community Redevelopment* did not reach.

III. Issues on Remand

In the motion that is the basis for the present appeal, Kaiser sought summary adjudication of the cross-complaint's fifth and sixth causes of action. The fifth cause of action, for declaratory judgment, sought a declaration that, "[e]ach Excess Insurer with an Excess Policy immediately in excess of Kaiser's primary policies for any given policy period is obligated to provide coverage upon the exhaustion of the primary policy for that

policy period." The sixth cause of action, for breach of contract, alleged that once Truck paid policy limits of $500,000 per occurrence for an asbestos bodily injury claim, "ICSOP is obligated under its Excess Policy incepting January 1, 1974 to indemnify Kaiser for the 'ultimate net loss' in excess of $500,000 for such claim up to $5,000,000 per occurrence." It further alleged that ICSOP "has breached the terms of its first layer Excess Policy incepting January 1, 1974 (Policy No. 4174-5841) by failing to pay to Kaiser all amounts that Kaiser has been forced to incur to make settlement payments for ABIC that exceed the Truck 'per occurrence' coverage limits for the primary policy incepting January 1, 1974" and that "[a]s a direct and proximate result of ICSOP's breach of its Excess Policy No. 4174-5841, Kaiser has been damaged in an amount which cannot be fully ascertained at this time, but which currently totals in excess of $15 million . . . ."

We have concluded that under the language of Truck's 1974 primary policy, Truck's liability to Kaiser is limited to $500,000 per occurrence. Accordingly, once Truck has contributed $500,000 per asbestos bodily injury claim, its primary policies are exhausted and Truck has no further contractual obligation to Kaiser. This conclusion, however, does not by itself permit us to affirm the grant of summary adjudication because the fifth and sixth causes of action require a finding not only that Truck's policies have been exhausted, but also that ICSOP's obligations attach immediately upon the exhaustion of Truck's policies.

In our now vacated decision, we concluded that we could not determine whether ICSOP's obligation to indemnify Kaiser had attached or whether ICSOP had breached its insurance contracts with Kaiser. We noted that it appeared undisputed between Kaiser, Truck, and ICSOP that, in addition to the primary policies issued by Truck for the 1964-1983 period, other primary policies were issued to Kaiser by Fireman's Fund (for policy periods from at least 1947 to December 1964), Home Indemnity (for 1983-1985), and National Union (for 1985-1987), and that these policies potentially were triggered by the asbestos bodily injury claims at issue in this case. We noted, however, that there was no information in the record as to whether these policies had been exhausted. Therefore, we

could not find that there were no triable issues of fact relevant to the fifth and sixth causes of action.

In its supplemental brief, Truck notes that on October 31, 2011, the trial court entered a stipulated order that all non-Truck primary policies had been exhausted. Truck therefore suggests that we should now affirm the trial court's grant of summary adjudication of the fifth and sixth causes of action. We decline to do so. The trial court is in a far better position than we are to determine in the first instance the effect of its stipulated order in light of our conclusion that Truck's primary policies may not be stacked. Thus, we leave to the trial court on remand a determination of whether there remain triable issues of material fact as to the fifth and sixth causes of action.

DISPOSITION

We reverse the grant of summary adjudication and entry of judgment for Kaiser and against ICSOP and remand to the trial court for further proceedings consistent with this opinion. Each party shall bear its own costs on appeal.

CERTIFIED FOR PUBLICATION

SUZUKAWA, J.

We concur:

WILLHITE, Acting P.J.

MANELLA, J.