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**Appellate and Constitutional Law and
Insurance and Reinsurance Update**

June 18, 2024

California Supreme Court Holds That An Insured Can Access Its First-Level Excess Policy After Exhausting Only The Underlying Primary Insurance For That Policy Period

Truck Insurance Exchange v. Kaiser Cement & Gypsum Corp., S273179 –
Decided June 17, 2024

The California Supreme Court held that the standard language in commercial general liability policies allows an insured to access its excess insurance policy after exhausting its underlying primary insurance for the same policy period, not all primary insurance issued during the continuous period of injury.

“[T]he first-level excess policies do not require the insured to horizontally exhaust primary insurance issued during different policy periods.”

JUSTICE GROBAN, WRITING FOR THE COURT

Background:

Kaiser Cement and Gypsum Corporation manufactured asbestos-containing products from 1944 through the 1970s. During this period, Kaiser bought primary and excess commercial general liability insurance policies from various insurers. The first-level excess policies included language—standard in commercial excess insurance policies—stating that coverage would not attach until Kaiser exhausted its “other insurance” or “other underlying insurance.”

By 2004, Kaiser faced more than 24,000 suits for bodily injury allegedly resulting from exposure to asbestos. Truck Insurance Exchange, a primary insurer of Kaiser, filed an equitable-contribution claim against several insurers that had issued first-level excess policies to Kaiser. Truck argued that the excess insurers’ indemnity obligations were triggered immediately upon exhaustion of the directly underlying primary policies, and the excess insurers should therefore be required to contribute to Truck’s coverage costs. The excess insurers, in contrast, believed they had no duty to indemnify Kaiser until Kaiser had exhausted every primary policy issued during the decades of continuous asbestos-related damage.

The trial court issued an order denying Truck’s contribution request, agreeing with the excess insurers that the “other insurance” provisions in the excess policies required horizontal exhaustion of all primary insurance before Truck could obtain contribution from any excess insurer. The Court of Appeal affirmed, interpreting the “other insurance” provisions as unambiguously requiring Kaiser to exhaust all primary policies for all policy periods covered by the continuous injury.

The California Supreme Court granted review to determine whether “other insurance” clauses in commercial general liability policies require vertical or horizontal exhaustion.

Issue:

May a primary insurer seek equitable contribution from an excess insurer after the primary policy underlying the excess policy has been exhausted (vertical exhaustion), or must the insured exhaust all primary policies issued during the continuous period of damage first (horizontal exhaustion)?

Court's Holding:

The language in the first-level excess policies does not require the insured to horizontally exhaust primary insurance issued during different policy periods, but that alone does not resolve whether the primary insurer is entitled to contribution from the excess insurers.

What It Means:

- Under standard language found in commercial general liability policies, an excess insurer owes an indemnity obligation to the insured as soon as the directly underlying primary policy has been exhausted—even if primary insurance issued for an earlier or later policy period during which the insured was also harmed remains unexhausted.

- The Court clarified that its holding was based on the contractual language. As a result, “[e]xcess insurers . . . remain free to write their future excess policies in a manner that expressly requires horizontal exhaustion.”
- The Court’s conclusion does not alter the “well settled [rule] that an excess insurer [generally] has no duty to defend unless the underlying primary insurance is exhausted.” Thus, excess insurers have no indemnity obligations unless and until the insured exhausts the limits of the directly underlying primary policy.
- The Court’s decision did not resolve whether the primary insurer was entitled to *contribution* from the excess insurers because “the terms of the insurers’ policies comprise[d] only one of the factors courts may consider when evaluating whether contribution would ‘accomplish ultimate justice.’” The Court remanded the case to allow the Court of Appeal to analyze the remaining contribution factors.

Gibson Dunn Appellate Honors



The Court’s opinion is available [here](#).

Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding developments at the California Supreme Court. Please feel free to contact the following practice group leaders:

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