

# California Supreme Court Decision Removes Significant Obstacle To Coverage For Long-Tail Claims

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Insurance Recovery

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On April 6, 2020, the California Supreme Court handed down a major victory for corporate policyholders facing liability for “long-tail” claims involving continuous or progressive injuries that span multiple insurance policy years, such as environmental, asbestos, construction defect, product liability, toxic tort, and sexual abuse cases. *Montrose Chemical Corp. v. Superior Court*, Case No. S244737 (“[Montrose IX](#)”). We explain here what the court decided, and what the decision means to policyholders.

## What Did the Court Decide?

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The California Supreme Court held that a policyholder seeking to recover from its excess insurers for a long-tail claim has the right to select the insurance policy year(s) under which it will demand payment, without first exhausting all lower-level policies in every triggered year. The Court rejected the insurers’ argument that a policyholder must always “horizontally exhaust” its coverage, or deplete the limits of all successive years of applicable lower-level policies, before it can access any of its higher-level policies.

The decision affirms that even for long-tail claims a policyholder may seek coverage from any policy that by its terms covers the loss, provided that it exhausts any underlying policies in the same policy period. This will reduce the complexity and cost of recovery for many businesses facing these issues.

By way of context for the decision, the California Supreme Court had held in prior decisions that a claim involving continuous or progressive bodily injury or property damage will trigger every insurance policy in effect when the injury or damage took place. For example, if a plaintiff first suffered asbestos-related disease in 1970, every insurance policy in effect from that date onward could potentially respond. The Court also previously held that each triggered insurance policy that the insured selects to respond must pay up to its full policy limits.

*Montrose IX* applies those prior rulings to the type of insurance program that many commercial insureds purchase, *i.e.*, multiple layers of primary and excess insurance policies in effect over many years. Must the insured pursue insurance coverage from all lower-level policies before looking to any higher-level policy? Or can the insured pick one or more years of insurance and seek insurance coverage all the way up the tower from those years only, leaving it to those insurers to seek contribution from other insurers in other years if they are able? The Court chose the latter.

## Which Businesses Might Benefit from This Ruling, and How?

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Any business with long-tail liabilities that are potentially covered under successive years of a multi-layered liability insurance program will stand to benefit from the *Montrose IX* decision (where California law applies). This includes businesses with historic asbestos and environmental liabilities covered under pre-1986 general liability policies (*i.e.*, before absolute pollution and asbestos exclusions became standard). It also includes businesses with other, more recent long-tail liabilities including for allegedly injurious or defective products, construction-related property damage, toxic torts, and sexual abuse claims. The decision will help those policyholders because it allows them to select the particular year(s) in which they have the best coverage and collect from them, while leaving the insurers to battle with each other over how to reallocate equitably the loss afterward.

## What Policy Language Was at Issue in the Decision?

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Excess liability insurance policies almost always contain some form of “attachment” provision that specifies when the excess policy must start its coverage. While substantial variation exists among attachment wordings, excess policies commonly have what are known as “specific” attachment provisions. One type of “specific” attachment provision states that the excess insurer cannot be called upon to pay until certain, specifically identified underlying insurance policies have been exhausted. These underlying policies are typically identified on a “schedule of underlying insurance” appended to the excess policy. A second type of “specific” attachment provision specifies that an excess insurer will not become liable until a fixed dollar amount of losses has been incurred.

Even when the conditions identified in the “specific” attachment language of an excess policy have been satisfied, excess insurers will sometimes argue that other policy terms function as attachment conditions, relieving them of any obligation to pay, *e.g.*, until after additional, unspecified “other insurance” or “other underlying insurance” is exhausted. The legal effect of this “other insurance” language is what *Montrose IX* addressed. This language is often found in the “conditions” section of the policy, but it may also reside in the “limits” clauses, or be buried in the definitions of terms such as “loss” that appear in the insuring agreements. Some such provisions refer to “other insurance,” others to “other underlying insurance,” and some to other “valid and collectible” insurance or any other insurance “whether recoverable or not.” All of these varieties of “other insurance” provisions were before the Court in *Montrose IX*. No matter the particular formulation or location in the policy, the Court ruled that such provisions cannot have the restrictive effect urged by the insurers.

If you have any coverage-related questions, please contact one of the many experienced members of our [Insurance Recovery Practice](#) including the following members of our Insurance Recovery Practice:

**David Goodwin**  
**René Siemens**  
**Jeff Kiburtz**  
**Heather Habes**

+1 415 591 7074  
+1 424 332 4751  
+1 424 332 4760  
+1 424 332 4785

[dgoodwin@cov.com](mailto:dgoodwin@cov.com)  
[rsiemens@cov.com](mailto:rsiemens@cov.com)  
[jkiburtz@cov.com](mailto:jkiburtz@cov.com)  
[hhabes@cov.com](mailto:hhabes@cov.com)

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