

# Exhaustion, Your Work Exclusion, Warehouse Definition Coverage Update

September 15, 2017

**Californina, New York Coverage Cases**

*The e-POST*

## **Exhaustion – California**

### ***Montrose Chem. Corp. of California v. Super. Ct. of California***

--- Cal. Rptr. 3d ---, 2017 WL 3772568 (Cal. Ct. App. Sept. 8, 2017)

The California Court of Appeals determined that “the sequence in which policies may be accessed must be decided on a policy-by-policy basis, taking into account the relevant provisions of each policy.” Montrose Chemical Corporation (Montrose) manufactured a pesticide from 1947 to 1982, and during that same time, purchased primary policies as well as over 115 excess policies. Montrose argued that it was entitled to vertically stack its coverage, meaning that “it may access any of the more than 115 excess policies at issue so long as its liabilities are sufficient to exhaust the underlying policies for the same policy year.” Montrose's insurers argued that horizontal exhaustion applied, meaning that “higher-level excess policies could not be accessed until lower-level policies had been exhausted for all policy years.” The appellate court rejected both approaches, stating that “California law requires that insurance contracts be interpreted according to their terms, and there is tremendous variation among the terms of the excess policies at issue in this matter.” Accordingly, the appellate court held “because there is tremendous variation among the policies at issue, we decline to adopt a single exhaustion scheme that applies to Montrose's entire coverage portfolio, and instead direct that each policy be interpreted according to its terms.” Thus, the appellate court remanded the case to the trial court for further proceedings consistent with its opinion.

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## **“Your Work” Exclusion – California**

### ***Global Modular, Inc. v. Kadena Pacific, Inc.***

--- Cal. Rptr. 3d ---, 2017 WL 3948229 (Cal. Ct. App. Sept. 8, 2017)

The California Court of Appeals ruled that exclusion j(6) did not apply to preclude coverage in a construction claim. The U.S. Department of Veterans Affairs hired Kadena Pacific, Inc. (Kadena) to oversee construction of a rehabilitation center. Kadena hired Global Modular, Inc. (Global) to build, deliver and install 53 modular units that would comprise the rehabilitation center. Because Kadena

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hired a different subcontractor to install the roofing, Global agreed to deliver the units covered by plywood and tarps. The units were delivered, but the roofless units were exposed to the elements, causing water damage. The appellate court determined that the policy's exclusion that excluded coverage for that particular part of any property that must be restored, repaired or replaced because your work was incorrectly performed on it did not preclude coverage. The appellate court reasoned that, because the parts of the units that were damaged (i.e., the drywall, insulation, framing and ducting) were not defective and were not the subject of Global's incorrect work. Based on this, the appellate court "conclude[d] exclusion j(6) applies only to the particular component of the insured's work that was incorrectly performed and not to the insured's entire project."

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### **Warehouse Definition – Second Circuit (New York Law)**

***LaptopPlaza, Inc. v. Starr Indem. & Liab. Co.***

--- F.3d ---, 2017 WL 3833049 (2d Cir. Sept.1, 2017)

The U.S. Court of Appeals for the Second Circuit held that a storage trailer stolen from outside the insured's warehouse was not covered under the marine cargo insurance policy because a trailer did not fall within the dictionary definition of warehouse. The endorsement at issue covered "goods and merchandise ... while temporarily detained in warehouses." The insured argued that the trailer was a temporary storage measure during warehouse renovations, and that it was being used in a warehouse capacity. The appellate court, however, held that a trailer was neither a building nor designed for storage of merchandise, and thus did not fall within the definition of warehouse. The appellate court also ruled that another provision in the policy covering property that was not part of the warehouse was not triggered because it specifically excluded goods stored or warehoused at the insured's premises.

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