

Insurer Seeking Contribution From Another Insurer Must Prove it Paid More Than Its Share of Loss

When multiple insurers share the same defense obligation, the defense costs are typically allocated equally. When an insurance company refuses to defend, those insurers which do contribute to the defense may seek contribution from the insurer(s) that do not. Scottsdale Insurance Co. v. Century Surety Co., ___ Cal. App. 4th ___ (March 10, 2010) addresses such a situation.

In this case, Scottsdale Insurance Company (“Scottsdale”) brought suit against Century Surety Company (Century) seeking equitable contribution based on Century’s failure to participate in the defense of 17 common insureds in hundreds of actions in which Scottsdale, along with at least one other insurer, shared the costs of the defense of those insured parties. Scottsdale also sought equitable contribution with respect to indemnity of the common insureds in those underlying actions in which Scottsdale (and at least one other insurer) had paid amounts to settle the actions.

Three principal defenses were raised. In the unpublished portion of the opinion, the court discusses two of them and concludes that the trial court correctly decided both. Century argued that it was not required to defend or indemnify three of the common insureds because Century’s insurance policies did not provide coverage of the insureds for the actions alleged against them. Specifically, Century relied on a policy exclusion intended to exclude from coverage any action arising out of work which had been completed by the insured prior to the effective date of the policy (the prior work exclusion). The trial court concluded that Century’s prior work exclusion was not conspicuous, plain, and clear, and refused to enforce it. Century was therefore required to share equitably in the costs of the defense and indemnification of the common insureds, despite the presence of this exclusion.



In the published portion of the opinion, the Court also discussed the important issues of damages and burden of proof in an action for equitable contribution by one insurer against another. The trial court concluded that Scottsdale was entitled to equitable contribution from Century with respect to approximately 80 of the underlying actions. The amount of money that Scottsdale had contributed toward the defense and indemnity of the underlying insureds in those actions was not subject to dispute. With respect to many of the underlying actions, the parties also did not dispute: (1) the total number of insurers who participated in the defense

of the common insureds; and (2) that the defense costs were allocated among the participating insurers by means of an equal shares formula. Century argued, in order to calculate the amount which it owed Scottsdale for defense costs, the trial court should recalculate, under the equal shares method, the amount each insurer would have paid for defense costs had Century participated with the other insurers in the defense of the insured.

Thus, Century argued it should be ordered to pay Scottsdale the difference between the equal share Scottsdale paid without Century's participation, and the equal share it would have paid had Century participated. The trial court rejected Century's proposed method of calculation, and instead awarded Scottsdale *half* of all defense and indemnity payments it made with respect to the claims for which it was entitled to recover equitable contribution. This result, however, was in conflict with the general rule, applied in non-insurance cases, that in order to be entitled to equitable contribution a party must have first paid more than its share of the loss and it bears the burden of proving such circumstance.

The court applied those principles and concluded that they should have equal application in insurance cases. As a result, the court held that not only must Scottsdale prove that it had paid more than its "fair share" of the defense and indemnity costs for the common insureds but it also bears the burden of producing the evidence necessary to calculate such "fair share." Moreover, the court held that one insurer cannot recover equitable contribution from another insurer any amount that would result in the first insurer paying *less* than its "fair share" even if that means that the otherwise liable second insurer will have paid nothing. Because the trial court applied an incorrect standard, the court reversed and remanded for a redetermination of Scottsdale's equitable contribution damages.



By: Robert J. McKennon
Partner
McKennon | Schindler LLP
384 Forest Avenue, Suite 20
Laguna Beach, California 92651
877-MSLAW20
(877) 675-2920