



WEEKLY LAW RESUME™

Issue By: DAVID L. BLINN

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## Insurance – Contribution and Subrogation

*American States Insurance Company v. National Fire Ins. Co. of Hartford*  
Court of Appeal, Fourth District (January 6, 2012)

Equitable contribution by a carrier is generally subject to a two-year statute of limitation. In this case, the carrier sought to extend the statute by sounding a claim in subrogation.

American States Insurance Company (ASIC) and National Fire Insurance Company of Hartford (National) had both issued successive liabilities to the same insureds, Vision Systems, Inc. and S.D. Interstate Glass. Both insurers were named as defendants in an action brought by a homeowners association. The underlying action settled, and the action was dismissed in April of 2007. ASIC contributed \$965,666 on behalf of S.D. Interstate Glass and \$353,071.65 on behalf of Vision Systems, Inc. National did not contribute to fund the settlement on behalf of either insured. The insureds assigned to ASIC their rights against National for failing to defend or indemnify them.

ASIC filed suit against National in May of 2009, alleging it was entitled to equitable contribution for a portion of the amounts paid by ASIC. National demurred to the complaint on the grounds that the action commenced more than two years after accrual of ASIC's cause of action, and thus the matter was time barred under CCP Section 339(1). Before the scheduled hearing on the demurrer, ASIC filed a first amended complaint, this time pleading that the contribution action was subject to the four-year statute of limitations for written instruments under CCP Section 337 because (1) both carriers had issued written policies of insurance, and (2) the insureds had assigned their rights against National to ASIC in writing. National again demurred, noting that the action was still one for contribution, and was still subject to the two-

**San Francisco Office**

505 Montgomery Street, 7th Floor | San Francisco, CA 94111 | Phone: 415-981-6630 | Fax: 415-982-1634

**Monterey Office**

2 Lower Ragsdale Drive, Suite 120 | Monterey, CA 93940 | Telephone: (831) 655-8822 | Fax: (831) 655-8881

**Web:** [www.lowball.com](http://www.lowball.com)



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year statute of limitations. The trial court agreed and sustained the demurrer, but granted ASIC the opportunity to amend the complaint to plead equitable subrogation.

ASIC filed a second amended complaint purporting to plead a subrogation claim. National demurred, contending that despite the claim of subrogation, this was still just a claim for equitable contribution (barred by the two-year statute). National claimed that ASIC had not pleaded (and could not plead) the essential elements of a subrogation claim. The trial court sustained the demurrer without leave to amend and ASIC appealed.

The Court of Appeal upheld the sustaining of the demurrer, first agreeing with earlier case law that equitable contribution claims, since they were not “founded on an instrument in writing,” were subject to the two-year and not the four-year statute of limitations.

The Court disagreed with ASIC’s contention that the “principal thrust” of its complaint was for subrogation rather than contribution. The Court noted that the difference between the two was that in subrogation, one was attempting to recover from the party primarily liable for the loss, whereas a contribution action sought to recover from a co-obligor. Hence, the action here was clearly one for contribution not subrogation.

An insurer seeking subrogation must show that the insured suffered a loss for which the defendant was liable, either as the wrongdoer, or because the defendant was legally responsible to the insured for the loss caused by the wrongdoer. Secondly, they must show that the claimed loss was one for which the insurer seeking subrogation was not primarily liable. Thirdly, the insurer must have compensated the insured in whole or in part. Next, it must have done so to protect its own interests, rather than as a volunteer. The insured must then have an existing, assignable claim against the defendant, which it could assert had it not been compensated by the insurer. The insurer must have suffered damages because of the acts or omissions on which the liability of the defendant depends. Finally, justice must require that the cost of the loss be shifted entirely from the insurer to the defendant, and the insurer’s damages are in a liquidated sum, generally the amount paid to the insured.

According to the Court of Appeal, ASIC could not plead that it was not primarily liable for the loss. The defects alleged here were of a continuing nature, and thus the amounts paid by ASIC were sums for which ASIC was primarily liable itself (even though National may have been

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primarily liable as well). Thus, while the facts would support a claim for contribution (if timely) they would not support a claim for subrogation.

Lastly, the Court also noted that ASIC could not assert a subrogation claim on assignment from its insured, because its settlement on behalf of the insured left the insured fully defended and indemnified. Citing *Howard v. American National Fire. Ins. Co.* (WLR August 26, 2010), the Court pointed out that once the insureds were fully defended and indemnified by ASIC, they had no remaining claim for damages against any nonparticipating insurers including National.

The Court of Appeal affirmed the judgment in favor of National following the sustaining of the demurrer without leave to amend.

## COMMENT

This case provides a nice explanation of the differences between equitable subrogation and equitable contribution. Where two carriers have the same obligations, and one has defended and indemnified and the other has not, one will always have the right to file a claim for contribution, but not typically for subrogation.

For a copy of the complete decision see:

[HTTP://WWW.COURTINFO.CA.GOV/OPINIONS/DOCUMENTS/D057673.PDF](http://www.courtinfo.ca.gov/opinions/documents/D057673.pdf)

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