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# The California Court of Appeal Adopts a Notice-Inquiry Rule for Triggering of Equitable Contribution Claims Between Insurers

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**When an insurer pays defense costs for a claim that also triggers the duty to defend under another insurer's policy, it has a claim for equitable contribution against the other insurer. This happens, for example, when an insured has purchased overlapping coverage, or when there are multiple insureds being sued in the same action (say, a property owner and a contractor who are additional insureds under each other's coverage), or when there is a continuous injury (say, an expanding plume of pollution) that is deemed to trigger policies issued over a span of years.**

Because the coinsurers do not have any contractual relationship with each other, the court has wide latitude to apportion the costs among the carriers in any way that seems fair. That is, the court is not limited by any language in the insurance policies that purports to govern interaction with other policies, such as a clause stating that a policy is excess of other coverage. The court, however, may take such language into account, particularly where clauses in the different policies do not conflict (for example, where one policy states that it is in excess of any other coverage, and the other policy is silent on that point). Typically, the courts also take into account the relative time on the risk, the policy limits, and other factors that strike the court as relevant to the weighing of the equities.

One of these factors is the timing of notice to the other carrier. It would be unfair to make an insurer pay a portion of defense costs for a time period when it did not know, and had no reason to know, of the claim, and was therefore in no position to assert its rights with respect to the control of, or participation in, the defense of the claim. Imagine a case in which neither the insured nor any other person -- like another insurer, or the claimant -- sent the insurer from whom contribution is sought any form of

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communication relating to the claim. In other words, imagine that the insurer was completely in the dark about the existence of the claim. In that stark scenario, the rule has been fairly clear that contribution was not warranted, at least for that period where the insurer was in the dark.

But until last week it was not as clear what the rules were for less stark scenarios. Suppose the insurer from whom contribution was sought knew about the underlying action somehow, but the insured had not tendered the action to it. Or suppose the insured had "tendered" in the sense of sending a communication notifying the insurer of the action (enclosing the complaint, perhaps) but had not expressly requested a defense. Or suppose the insurer knew about the existence of the action, but did not know of its coverage obligations arising from the action (*e.g.,* did not know that one of the defendants was an additional insured under an old policy that had been lost).

On June 24, the California Court of Appeal articulated a rule governing these situations. In *OneBeacon American Ins. Co. v. Fireman's Fund Ins. Co.*, B209526, Division One of the Second Appellate District (in Los Angeles) stated: "[W]e adopt the rule that an insurer's obligation of equitable contribution for defense costs arises where, after notice of litigation, a diligent inquiry by the insurer would reveal the potential exposure to a claim for equitable contribution, providing the insurer the opportunity for investigation and participation in the defense in the underlying litigation."

In adopting this notice-inquiry rule, the court explained that it was building on rules established in two prior cases: *California Shoppers, Inc. v. Royal Globe Ins. Co.*, 175 Cal.App.3d 1 (1985) and *Truck Ins. Exchange v. Unigard Ins. Co.*, 79 Cal.App.4th 966 (2000).

In *California Shoppers*, the court adopted a notice-inquiry rule for tender of the defense by the insured to the insurer. The court held that sending a copy of the complaint to the insurer was enough to effect tender of the underlying action even though there was no cover letter and the envelope had the return name and address of an insured entity that was not named in the complaint. The court reasoned that the insurer would have learned that the tender came from the insured named in the suit had it made a diligent inquiry.

In *Unigard*, the court adopted a rule of constructive notice for equitable contribution claims between coinsurers. The court held that, while notice of a potential contribution claim should be given sooner rather than later, such notice need not consist of a formal tender of the defense. Also, the court held that the insured's failure to comply with notice requirements in the policy was not fatal to the coinsurer's equitable contribution claims.

The notice-inquiry rule articulated in *OneBeacon* obviously leaves a lot of

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room for argument in particular cases. Litigants will certainly have different views about what constitutes a "diligent" inquiry based on the facts known in a particular case, and about what such an inquiry would or would not have revealed.

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**Carlos E. Needham** Mr. Needham's practice focuses on insurance coverage, complex litigation matters involving product liability, science-related issues, mass tort claims, consumer class actions and environmental matters. He has a broad-based litigation and trial practice, primarily representing large companies in the defense of suits in the areas of insurance coverage, product liability, and commercial contracts.