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Florida Joins the 20th Century, Insurers Grab Your Wallets

I. The Rules (15 minutes)

A. The Former Rule: No Right of Contribution Between Co-Primary Carriers

Prior to the recent passing of § 624.1055, Florida Statutes (2019), Florida law did not provide for the right of equitable contribution among insurance carriers.

In Argonaut Ins. Co. v. Maryland Cas. Co., 372 So.2d 960 (Fla. 3d DCA 1979), the Florida Third District Court of Appeals emphasized the personal and contractual nature of the duty to defend existing between an insurer and its insured; in contrast, no similar contractual obligation existed among insurance carriers. Id. at 963-64. The Court ultimately declined to permit contribution among insurers for defense costs, as "[t]he duty of each insurer to defend its insured is personal and cannot inure to the benefit of another insurer." Id. at 963. The Court went on to address the role of public policy and legislative intent in its decision, as follows:

> The Legislature has not seen fit to allow contribution for costs or attorney's fees between insurance companies. If contribution for costs were allowed between insurance companies, there would be multiple claims and lawsuits. The insurance companies would have no incentive to settle and protect the interest of the insured, since another lawsuit would be forthcoming to resolve the coverage dispute between the insurance companies. This is contrary to public policy, particularly since the insured has been afforded legal protection and has not had to personally pay any attorney's fees.

Id. at 964.

Relying on Argonaut, the Florida Fifth District Court of Appeals in Continental Cas. Co. v. United Pacific Ins. Co., 637 So.2d 270 (Fla. 5th DCA 1994) similarly declined to find in favor of permitting a right of contribution among insurance carriers to recover the cost of defense expenses:

> As in this case, *Argonaut* was an action by one insurer against another insurer to recover a pro-rata share of attorneys' fees incurred in providing a defense to the companies' mutual insured in a prior lawsuit. The *Argonaut* court rejected Argonaut's claim, finding no contractual or quasicontractual duty and no basis to apply the doctrine of equitable subrogation. The Third District held that the duty of each insurer to defend its insured is personal and does not inure to the benefit of another insurer.

Id. at 271. The Court further opined that other remedies were available to discourage insurers' misconduct: "Several factors discourage such misconduct, including exposure to greater loss if the other insurer is ineffective in its defense, and the risk of suits by its own insured on theories of breach of contract and statutory and common law 'bad faith.' It is important to keep in mind that insurers have not only the duty to defend but often contractually reserve the right to defend. Insurers know the ability to control the defense of a liability case is the most effective way to limit their loss and protect themselves from extra-contractual claims." Id. at 273.

Nevertheless, the dissenting opinion authored by Judge W. Sharpe expressed dissatisfaction with the Argonaut holding, as it was unrealistic and penalized insurers who honored their contracts to defend without providing a remedy where unresponsive insurers can pay their appropriate expenses:

> Under *Argonaut,* insurers play the game of 'chicken,' forcing the other equally obligated insurer to undertake the defense first, while flirting around the edges of bad faith breach of their duty to defend. The insurer who is the most responsible and undertakes the defense is penalized by being forced to bear *all* the costs, expenses and attorney's fees for discharging not only its own contract to defend, but the co-primary insurer's obligation, as well. The insurer who honors its contract to defend its insured, under *Argonaut,* cannot force the other insurer to pay a prorate portion of its expenses, and the unresponsive insurer is saved from any bad faith suit by its insured, or any other third party, by the diligence and effort of the other insurer.

Continental Cas. Co. v. United Pacific Ins. Co., 637 So.2d 270, 276-77 (Fla. 5th DCA 1994) (Sharpe, J. W. dissenting).In support, the Dissent cited Appleman's treatise on insurance, taking a similar view of the Argonaut precedent:

> These holdings are indefensible. The courts are ignoring realities and encouraging insurers who are not concerned with their obligations to their insureds in the hope that someone else will step into the breach. It also ignores the fact that excess and other insurers are third party beneficiaries under the basic contracts of insurance and should be able to recover, either under a theory of equitable subrogation, contracts or torts, any expenses incurred under the circumstances. Further, as a matter of public policy, courts should be demanding that insurers give prompt defense of claims to policyholders rather than to tolerate the shifting of responsibility with such impunity. And that is the position taken either by statute or by decision in many states. [footnotes omitted].

Id. at 277 (quoting 7C Appleman, *Insurance Law & Practice* § 4691 at 278 (1979)).

Recently, in KB Home Jacksonville LLC v. Liberty Mut. Fire Ins. Co., No. 3:18-cv-371-J-34MCR, 2019 WL 4228602 (M.D. Fla. Sept. 5, 2019), the Middle District of Florida noted that although § 624.1055, Florida Statutes (2019) did not apply to the instant case, "the presence of multiple insurers has never excused any single insurer from fully defending the insured." Id. at *7 (citing Argonaut, 372 So. 2d at 963). As such, the Court recognized that while contribution has not always been permitted under Florida law, it has not allowed insurers to avoid contractual obligations by virtue of another insurer recognizing its duty to defend, citing back to Argonaut's emphasis on the personal nature of the duty to defend. Id. at *6 (citing Argonaut, 372 So. 2d at 963).

B. The New Rule: § 624.1055, Florida Statutes (2019)

1. Fla. Stat. §624.1055

Effective July 1, 2019, § 624.1055, Florida Statutes (2019) now allows a right of contribution among liability carriers for defense costs, providing in relevant part as follows:

> A liability insurer who owes a duty to defend an insured and who defends the insured against a claim, suit, or other action has a right of contribution for defense costs against any other liability insurer who owes a duty to defend the insured against the same claim, suit, or other action, provided that contribution may not be sought from any liability insurer for defense costs that are incurred before the liability insurer's receipt of notice of the claim, suit, or other action.
>
> **(1) Apportionment of costs.**--The court shall allocate defense costs among liability insurers who owe a duty to defend the insured against the same claim, suit, or other action in accordance with the terms of the liability insurance policies. The court may use such equitable factors as the court determines are appropriate in making such allocation.
>
> **(2) Enforcement of right of contribution.--**A liability insurer who is entitled to contribution from another liability insurer under this section may file an action for contribution in a court of competent jurisdiction.

Further, Laws 2019, c. 2019-108 §17 provides: "Section 624.1055, Florida Statutes, as created by this act, applies to any claim, suit, or other action initiated on or after January 1, 2020."

As such, the statute provides deference to courts in determining which equitable factors may be appropriate in determining allocation among insurers, applicable to actions initiated on or after January 1, 2020. Given the lack of case law, uncertainty remains as to how Florida courts will interpret the right of contribution and what equitable factors, they may rely on to do so. Nevertheless, looking to states such as California and Texas, where the right of contribution has been established may likely provide

guidance as to where Florida courts may ultimately fall in determining equitable factors and methods of allocation.

2. Retroactive Application of § 624.1055, Florida Statutes

Under Florida law, determining whether a statute should be applied retroactively is a two-prong test analyzing: (i) whether the legislature intended for the statute to apply retroactively; and if so, (ii) whether the retroactive application of the statute would violate constitutional principles. Florida Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc., 67 So.3d 187, 195 (Fla. 2011) (citing Menendez v. Progressive Ins. Co., 35 So.3d 873, 877 (Fla. 2010)). Generally, statutes are presumed to apply prospectively unless there is clear legislative expression (such as the plain language of the statute and legislative history) of retroactivity. "The general rule is that a substantive statute will not operate retrospectively absent clear legislative intent to the contrary, but that a procedural or remedial statute is to operate retrospectively." State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So.2d 55, 61 (Fla. 1995) (citations omitted). Nevertheless, even if legislative expression exists, courts have declined retroactive application of statutes when doing so would impair vested rights, create new obligations, or impose new penalties. Id. at 61 (citations omitted).

"The Legislature's inclusion of an effective date for an amendment is considered to be evidence rebutting intent for retroactive application of a law." Devon Neighborhood Ass'n, Inc., 67 So.3d at 195. As Laws 2019, c. 2019-108 §17 provides: "Section 624.1055, Florida Statutes, as created by this act, applies to any claim, suit, or other action initiated on or after January 1, 2020", it appears we can anticipate the prospective application of § 624.1055, Florida Statutes.

II. Principles of Contribution

A. The Right to Contribution

In Fireman's Fund Ins. Co. v. Maryland Cas. Co., 65 Cal.App.4th 1279, 1293 (1998) (emphasis in original), the Court explained the purpose of equitable contribution as follows:

> In the insurance context, the right to contribution arises when several insurers are obligated to indemnify or defend the same loss or claim, and one insurer has paid more than its share of the loss or defended the action without any participation by the others. Where multiple insurance carriers insure the same insured and cover the same risk, each insurer has independent standing to assert a cause of action against its coinsurers for equitable contribution when it has undertaken the defense or indemnification of the common insured. Equitable contribution permits reimbursement to the insurer that paid on the loss for the excess it paid over its proportionate share of the obligation, on the theory that the debt it paid was *equally* and *concurrently* owed by the other insurers and should be shared by them pro rata in proportion to their respective coverage of the risk. The purpose of this rule of equity is to accomplish substantial justice by equalizing the common burden shared by coinsurers, and to prevent one insurer from profiting at the expense of others.

Although insurers may be required to make equitable contribution to defense costs among themselves, the insured is not required to make such a contribution together with insurers. See Aerojet-General Corp. v. Transport Indem. Co., 17 Cal.4th 38 (1997).

Further, pursuant to Safeco Ins. Co. of America v. Superior Court, 140 Cal.App.4th 874, 880 (2006), recalcitrant insurers waive the right to challenge the reasonableness of defense costs and settlement payments, as providing otherwise would render the insured's right to settle meaningless.

B. Entitlement to Equitable Contribution

An insurer is only entitled to equitable contribution when it has paid more than its fair share of the loss. Scottsdale Ins. Co. v. Century Surety Co., 182 Cal.App.4th 1023, 1035 (2010).

In Signal Companies, Inc. v. Harbor Ins. Co., 27 Cal.3d 359 (1980), an excess liability insurer was not obligated to participate in defense of the insured as soon as it was notified of the claim and even though primary coverage was not exhausted, under the terms of the excess policy. Under the excess policy, liability would not attach until primary coverage had been exhausted and the obligation for contribution would arise only if insured obtained excess insurer's written consent to incur costs. As written consent was neither sought nor obtained, the primary insurer afforded protection to the insured. The Court reasoned:

> To impose an obligation on Harbor to reimburse Pacific in contravention of the provisions of its policy could only be justified, however, by some compelling equitable consideration. We find no such consideration here. Before seeking Harbor's contribution to the settlement, Pacific acted in all respects for its own benefit. The defense costs at issue were incurred by Pacific in the performance of its contractual obligation to its insured to afford a defense. The expenses were incurred almost entirely prior both to settlement of the litigation and exhaustion of Pacific's policy coverage. As we have noted, Pacific bore the primary obligation to defend and to protect both its insured and, through subrogation principles, the excess carrier from excess liability.

Id. at 369 (citations omitted).

C. Additional Insureds

The Court in Maryland Cas. Co. v. Nationwide Mutual Ins. Co., 81 Cal.App.4th 21, 33 (2000) emphasized the purpose of the additional insured endorsement as it relates to contribution:

> Viewing the totality of the circumstances, we are unpersuaded the premium cost establishes the insureds would have expected they were purchasing indemnity agreements without a duty to defend. First, as explained above, an insured would be entitled to reasonably rely on the policy language to conclude Nationwide had assumed a duty to defend Nielsen for potentially covered claims. Additionally, because the parties purchased the endorsements as protection against potential construction defect litigation, it is reasonable to assume they expected Nationwide to defend the general contractor. Since construction defect litigation is typically

> complex and expensive, a key motivation in procuring an additional insured endorsement is to offset the cost of defending lawsuits where the general contractor's liability is claimed to be derivative.

In Presley Homes, Inc. v. American States Ins. Co., 90 Cal.App.4th 571 (2001), the Court, relying on Maryland Cas. Co. held that although the additional insured endorsement of the policy limited indemnification to instances of vicarious liability, the duty to defend was not similarly restricted and required providing the insured with a full and complete defense.

III. Apportionment

A. Time on the Risk Method

The Court took a critical view of the various methods of apportionment in Stonewall Ins. Co. v. City of Palos Verdes Estates, 46 Cal.App.4th 1810, 1862 (1996), concluding that the time on the risk method of allocation "is the approach likely lead to the fairest result in most cases" and imposes contribution up to an insurer's policy limits. In contrast, the Court disfavored the policy limits method, as it subjects insurers with high policy limits to pay a greater portion of the loss. Further, while the apportionment based on premiums method can be superficially attractive, it does not consider various factors which create differences in insurance premiums. Id. at 1862-63. As to the equal shares' apportionment method, the Court remarked it was "so arbitrary that its potential for unfairness is patent." Id. at 1863.

In Clarendon Nat. Ins. Co. v. Nat'l Fire & Marine Ins. Co., 512 F.App'x 671 (9th Cir. 2013), the Ninth Circuit Court of Appeals rejected the argument that the terms of the policy relieved National from its contribution obligation. The parties previously allocated 70% liability to National using the time on the risk method; as such, the district court acted within its discretion in allocating 77% contribution of Clarendon's claim settlement to National under the same allocation method.

B. Pro Rata Method

"The duty to defend creates 'a debt which is equally and concurrently due by' all of its insurers." Trinity Universal Ins. Co. v. Employers Mut. Cas. Co., 592 F.3d 687, 695 (5th Cir. 2010) (quoting Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co., 236 S.W.3d 765, 772 (Tex. 2007)). Further, "determining what method should be used to apportion liability among insurers is a distinct issue from whether pro rata apportionment alters the insurer's duty to indemnify or defend its insured." Texas Prop. and Cas. Ins. Guar. Ass'n v. Sw. Aggregates, Inc., 982 S.W.2d 600, 616, n.12 (Tex. Ct. App. 1998). Accordingly, when a claim occurs partially within a policy period, the insurer must provide a complete defense, which is not reduced by its time on the risk or any other allocation method. Id. at 607. "This is because the contract obligates the insurer to *defend* its insured, not to provide a pro rata defense." Id. at 606 (citing CNA Lloyds of Texas v. St. Paul Ins. Co., 902 S.W.2d 657, 661 (Tex. Ct. App. 1995), writ dism'd by agr. (Nov. 16, 1995)).

In Continental Cas. Co. v. Zurich Ins. Co., 57 Cal.2d 27 (1961), the Court held that each obligated carrier (whether primary or excess) independently owed a duty to defend its insured, separate and distinct from its obligation to indemnify. "Under general principles of equitable subrogation, as well as pursuant

to the rule of prime importance that the policy is to be liberally construed to provide coverage to the insured it is our view that all obligated carriers who have refused to defend should be required to share in costs of the insured's defense, whether such costs were originally paid by the insured himself or by fewer than all of the carriers." Id. at 37 (citations omitted).

Distinguishing Continental, Signal Companies, Inc. v. Harbor Ins. Co., 27 Cal.3d 359, 369 (1980) differentiated obligations of co-primary carriers from those of excess carriers, as a result of the terms contained in excess policies:

> Unlike the situation in *Continental*, where the relative obligations of different carriers who have assumed the same primary risk must be adjusted, we are here concerned with the obligation of a carrier that is expressly designated as an excess insurer. In such a situation there is no reasonable basis for assuming that the reasonable expectations of either the insured or the primary carrier were that the excess carrier would participate in defense costs beyond the express terms of its policy.

C. Policy Limits and Premiums Paid

1. Policy Limits

The policy limits method of allocation was upheld in CNA Casualty of California v. Seaboard Surety Co., 176 Cal.App.3d 598 (1986). Here, CNA, INA, and Pacific had policy limits in the amount of $300,000, while Seaboard had policy limits of $100,000; accordingly, CNA, INA, and Pacific would each be responsible for 30% of defense costs, while Seaboard would be responsible for 10%. "We agree that in given cases, the true scope of an insured's 'coverage' might not be confined to the liability limits of a given policy; it may also include the period of time covered by the policy and the interrelation between the terms of the policy and the wrongs alleged against the insured by a claimant. In this case, however, the trial court did not abuse its discretion in assessing damages according to the formula followed by an overwhelming weight of authority." Id. at 620.

2. Premiums Paid

In Insurance Co. of Tex. v. Employers Liability Assur. Corp., 163 F.Supp.143 (S.D. Cal. 1958), as both plaintiff and defendant's comprehensive liability policies contained "Other Insurance" clauses with substantially the same language, the Court disregarded such clauses and instead apportioned the loss according to the premiums paid on each policy. The Court explained its reasoning in implementing such method of allocation as follows: "It is the opinion of this Court that it would be more equitable to require proration according to premiums paid rather than the limits of liability. It is common knowledge that after the first twenty-five or fifty thousand dollars of liability insurance the additional charge for five hundred thousand dollars or a million dollars of insurance is relatively small, and the rate on the larger amounts is considerably less than upon the smaller amounts." Id. at 147.

D. Equitable Factors in Apportioning Defense Costs

No bright-line rules exist as to the allocation of defense costs among carriers; instead, courts are given deference as to the method of allocation and equitable factors in determining same.

As the Court explained in CNA Casualty of California v. Seaboard Surety Co. 176 Cal.App.3d 598, 619 (1986), this is in part because contractual agreements do not exist among carriers:

> The costs of defense must be apportioned based on equitable considerations not found in the insurers' own contracts, since the insurance companies who must share the burden do not have any agreements among themselves. The courts have expressly declined to formulate any definitive rules for allocating defense costs among carriers, because of the "varying equitable considerations which may arise, and which affect the insured and the ...carriers, and which depend upon the particular policies of insurance, the nature of the claim made, and the relation of the insured to the insurers."

Because the facts of each case inevitably vary, different equitable considerations must be considered, which cannot be effectuated through a bright-line rule:

> Among other things, these considerations include the particular terms, exclusions and limits of the respective insurance policies in effect; the time each co-insurer is "on the risk"; the nature of the given claim; the relation of the insured to the several insurers; and the relative amount of premiums paid. In order to avoid the inequities that would inevitably result from application of a single rigid rule in all cases, the courts in California have consistently held that trial courts must maintain equitable discretion to fashion a method of allocation suited to the particular facts of each case and the interests of justice, subject to appellate review for abuse of that discretion. A single bright-line rule to be applied in every instance would be the very antithesis of such an equitable approach.

Centennial Ins. Co. v. United States Fire Ins. Co., 88 Cal.App.4th 105, 116 (2001).

Six varying methods of apportioning contribution among insurers were identified by the Centennial court as follows:

> **(1)** apportionment based upon the relative duration of each primary policy as compared with the overall period of coverage during which the 'occurrences' 'occurred' (the 'time on the risk' method) [citations];
>
> **(2)** apportionment based upon the relative policy limits of each primary policy (the 'policy limits' method) [citations];
>
> **(3)** apportionment based upon both the relative durations and the relative policy limits of each primary policy, through multiplying the policies' respective durations by the amount of their respective limits so that insurers issuing primary policies with higher limits would bear a greater share of the liability per year than those issuing primary policies with lower limits (the 'combined policy limit time on the risk' method) [citation];

(4) apportionment based upon the amount of premiums paid to each carrier (the 'premiums paid' method) [citation];

(5) apportionment among each carrier in equal shares up to the policy limits of the policy with the lowest limits, then among each carrier other than the one issuing the policy with the lowest limits in equal shares up to the policy limits of the policy with the next-to-lowest limits, and so on in the same fashion until the entire loss has been apportioned in full (the 'maximum loss' method) [citation]; and

(6) apportionment among each carrier in equal shares (the 'equal shares' method) [citation].

Id. at 112-13.

IV. The Statute in Practice

A. Multiple Defense Attorneys vs. One Agreed Attorney

B. Carrier Cooperation, Control and Choice of Counsel

C. Coverage Litigation