California Court of Appeal Establishes "Diligent Inquiry" Notice Rule for Equitable Contribution Claims Between Insurers

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How does one insurer get another insurer to contribute to the defense costs of a common insured? Until now, the issue under California law was murky. That murkiness dissipated with the June 24, 2009, decision of the California Court of Appeal in *OneBeacon America Insurance Company v. Fireman's Fund Insurance Company, et al.*

In *OneBeacon America*, the court concluded that one liability insurer's claim for equitable contribution for defense costs against another liability insurer arises once notice is provided to the latter insurer which, upon diligent inquiry by that latter insurer, reveals the potential for exposure to a claim for equitable contribution and provides the insurer the opportunity to investigate and participate in the defense in the underlying litigation.

The case arises out of an underlying lawsuit for environmental contamination involving a number of related insureds (a corporation and several individuals) filed in 1998. In 1999, certain of those insureds sent notice of the underlying action to OneBeacon America Insurance Company, which began defending the insureds at that time. Fireman's Fund Insurance Company and Insurance Company of the West (ICW) also provided insurance coverage to one or more of the insureds, and in early 1999, counsel for certain of the insureds, began sending notice letters and other correspondence to Fireman's Fund and ICW.

Neither insurer agreed to participate in the defense of any of the insureds at that time, but ultimately in 2002 or 2003 they agreed to share in the defense of the insureds with OneBeacon, but only from 2002 forward. OneBeacon filed an action for equitable subrogation in 2005, seeking to recover from Fireman's Fund and ICW a "time-on-the-risk" allocation of the defense costs OneBeacon paid for alone between 1999 and 2002.

While the precise facts involving "notice" and the communications with each insurer were convoluted and somewhat distinct, essentially Fireman's Fund and ICW contended that they did not have actual or constructive adequate notice that they has issued policies to the insureds providing coverage. The trial court found in favor of Fireman's Fund and ICW, but the Court of Appeal reversed.

In examining the somewhat unique nature of equitable contribution, the appellate court first reaffirmed the principle that the rights and obligations between two insurers that insure the same insured arise out of "equitable considerations" rather than from any contract between the insurers or from the language of their specific policies with the insured.

Then, relying on two prior California decisions addressing the nature of notice to insurers, on decisions from other jurisdictions, and on public policy grounds, the court adopted "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, thus providing the insurer the opportunity for investigation and participation in the defense in the underlying litigation."

In this case, the notice provided to both Fireman's Fund and ICW was sufficient enough to trigger that duty of diligent inquiry – and "knowledge of all information a diligent inquiry would have revealed" – so that they could have uncovered the policies they had issued to the insureds and commenced defending the litigation. Such notice is all that was required for OneBeacon to be entitled to obtain equitable contribution to the defense costs OneBeacon had incurred between 1999 and 2002.

Barger & Wolen was counsel for another of the insurers involved in the case, though that insurer resolved its claims with OneBeacon prior to the commencement of the coverage litigation.

Get a copy of the opinion here.