



Weekly Law Resume

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Edited by David Blinn and Mark Hazelwood



WEEKLY LAW RESUME™

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Coverage - Non-Participating Insurer Has Burden to Prove Absence of Coverage

Arrowood Indemnity Company v. Travelers Indemnity Company of Connecticut
Court of Appeal, Second District (October 6, 2010)

This case involves the situation where two insurers issued CGL policies to the same insured in different years. When the insured was sued for negligence several years later, one carrier agreed to indemnify the insured; the other did not. An equitable indemnity suit between the carriers ensued, leading to an issue of first impression: Which insurer bears the burden of proving the existence (or nonexistence) of coverage, where one insurer has participated in the defense/indemnity and the other has declined to do so?

Travelers issued a CGL policy to insured Five Star Services (Five Star), a general contractor, for the 2000-2001 policy period. Arrowood issued a CGL policy to Five Star for the 2002-2003 period. Both policies agreed to provide coverage for property damage caused by Five Star in their policy periods. In 2005, the Ashleys filed a complaint against the Dunsmores arising out of the purchase of an apartment complex in 2002. The Ashleys, purchasers of the complex, alleged that the Dunsmores failed to disclose substantial dry rot issues. The Dunsmores cross-complained against Five Star, who had been hired by the Dunsmores to remediate dry rot problems in or about 2002.

Five Star originally tendered defense to Arrowood. Arrowood agreed to defend Five Star under a reservation of rights. After discovery had taken place, Arrowood tendered Five Star's defense to Travelers, because there was evidence that some of Five Star's work had taken place during Travelers' policy period. Travelers agreed to defend under a reservation of rights. The underlying action proceeded to trial, and Five Star was held partially responsible for the Ashleys' damages of \$717,358. Travelers refused to indemnify Five Star for the damages awarded to the Ashleys. Arrowood paid the judgment and then filed an action for equitable indemnity and contribution against Travelers. Travelers cross-complained back against Arrowood for fees and costs incurred. The case proceeded to a court trial. The trial court ruled that Travelers had no duty to defend or indemnify Five Star. Arrowood appealed the judgment for Travelers. The Second District Court of Appeal reversed.

On appeal, Arrowood contended that Travelers owed both a duty to defend and indemnify. Further,

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because both carriers had equal time on the risk, Arrowood argued that Travelers should be responsible for 50% of the costs of defense and 50% of indemnity payments. The Court of Appeal determined that Travelers had both a duty to defend and a duty to indemnify. The question as to whether Travelers should be compelled to contribute was complicated by the fact that the jury's verdict in the underlying action was ambiguous. While some questions on the verdict form limited the time period to dates within the Arrowood policy period, other questions were broader in scope.

The critical question for the Second District was which carrier should have the burden of proof in this setting. The Court of Appeal held that in an action for equitable contribution by a settling insurer against a nonparticipating insurer, the settling insurer has met its burden of proof when it makes a prima facie showing of coverage under the nonparticipating insurer's policy. That burden is to establish that the non-participating insurer has a duty to defend. Once that showing is established, the burden of proof shifts to the nonparticipating insurer to prove the absence of actual coverage. Here, the Court held that Travelers had a duty to defend and that Arrowood had met its initial burden of proof. The burden then shifted. The Court held that there was sufficient evidence of Five Star's negligence during the Travelers policy period and that Travelers failed to meet its burden of proof. Travelers therefore owed defense and indemnity. The judgment was reversed and the matter was remanded so that the trial court could resolve allocation issues.

COMMENT

In this case of first impression, the Court of Appeal held that in an equitable contribution action between carriers, once a participating insurer establishes a duty to defend under the nonparticipating insurer's policy, the burden shifts to the nonparticipating insurer to prove the absence of actual coverage.

For a copy of the complete decision see:

[HTTP://WWW.COURTINFO.CA.GOV/OPINIONS/DOCUMENTS/B219491.PDF](http://www.courtinfo.ca.gov/opinions/documents/B219491.pdf)

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