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"Equitable Contribution" Must be Fair

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Equitable contribution is the legal vehicle under California law for allocating costs among multiple insurers with common obligations to the same insured. While the doctrine applies in other contexts, its most frequent use is in inter-insurer disputes, especially in construction defect cases. Countless attorney-hours and insurer-dollars have been spent fighting over the proper basis of allocation. In *Scottsdale Ins. Co. v. Century Surety Company*, (B204521, March 10, 2010), the California Court of Appeals rejected what is surely one of the most creative attempts by a paying insurer to recoup its expenses from a non-paying carrier.

Scottsdale and Century were two among many insurers that provided liability coverage to 17 common insureds, most of whom were construction subcontractors. Scottsdale, along with several other insurers, agreed to share the costs of defending and indemnifying these insureds in more than 300 lawsuits. Century, on the other hand, declined to participate and Scottsdale sued, seeking equitable contribution.

The court of appeal agreed with the trial court's determination that Century should have participated in approximately 80 of the underlying lawsuits. It then turned to the issue of calculating the *amount* of Century's obligation to Scottsdale. Scottsdale argued that regardless of how many other insurers had also participated in the defense and settlement, Century should be required to reimburse 50% of what Scottsdale had paid. Scottsdale's calculus did not consider what its share, or Century's, would be if the total participation of all of the insurers were taken into account. Thus, it stood to gain a substantial windfall. As the Court of Appeal explained:

"We utilize the device of a hypothetical example to assist in explaining the problem. Suppose that, with respect to a particular underlying claim, Scottsdale equally shared the defense costs with three other insurers. In such a scenario, each insurer would have paid 25% of the total defense costs. Scottsdale sought to recover half of what it had paid in defense costs from Century. In other words, under Scottsdale's theory of relief, Century and Scottsdale should equally split the 25% paid by Scottsdale (12.5% each), while the other three insurers would still have paid 25% each."

The court rejected Scottsdale's proposed calculation, recognizing that under the general rule of equitable contribution, Scottsdale had to prove that it had paid *more than its fair share* of defense and indemnity costs. Absent such proof, Scottsdale could not recover anything at all; and with such proof, its recovery could never exceed the difference between its fair share and the amount it actually paid. Thus, under the Court's hypothetical, Scottsdale's "fair share" with Century's participation would have been 20%, and it was entitled to recover no more than the 5% "overpayment." Implicit but not stated in the court's opinion was that Century's liability would be capped at its own "fair share" of the costs, regardless of how much Scottsdale had paid.

Fairness in the circumstances demanded consideration of all the insurance, not just the policies issued by the two litigants, so the court of appeal remanded the case to the trial court for further proceedings.