

May 21, 2008

Monticello Insurance Company v Essex Insurance Company

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Equitable Contribution; Duty to Contribute to Defense; Duty to Defend

Monticello insured Blumenfeld, a general contractor, retained for a project on the Goldman residence. Dana Drywall was a subcontractor on the job. Essex insured Dana Drywall and that policy contained an “**additional insured endorsement**” naming Blumenfeld. The endorsement was conditional, insuring Blumenfeld only for negligent acts of Dana and only for claims not otherwise excluded. Where no coverage applies to the named insured (Dana) no coverage shall apply to the additional insured.

The Goldmans sued Blumenfeld for **construction defects**. Dana was not named as a defendant. Monticello defended Blumenfeld. In turn, Blumenfeld cross-complained against, among others, Dana Drywall. Essex defended Dana. Later, Blumenfeld **tendered its defense** to Essex pursuant to the **additional insured endorsement** in the Essex policy. Essex declined to defend.

Monticello incurred \$641,498 in defense costs to defend Blumenfeld. The underlying action settled, and Blumenfeld (Monticello) contributed \$87,500 to the global settlement. The insurers of Dana Drywall, including Essex, paid a combined \$6,000 toward the settlement.

Monticello then sued Essex seeking **equitable contribution** for Essex’s share of all sums paid by Monticello to defend Blumenfeld. Monticello filed a **summary judgment** contending Essex had a **duty to defend** Blumenfeld, and a **duty to contribute to its defense**. Monticello argued the complaint in the underlying action, and the Defect List, contained allegations of consequential damage caused by the drywall work, including to the paint, custom interior finishes, and stucco at the residence.

Essex opposed, arguing Monticello had the **burden** of showing Blumenfeld’s liability rested on Dana’s negligence and the damages sought against Blumenfeld for Dana’s negligence were covered under the Essex policy. Because **the cost to repair an insured’s defective work is not covered** under the Essex policy, Monticello had to show the damages related to something other than Dana’s work. Nothing in the complaint alleged such damage. There was no evidence of resultant property damage. At best, there were only references to defectively installed drywall and expense to remedy that problem. Thus, Monticello was **unable to sustain its burden**.

The trial court **denied** the summary judgment brought by Monticello. Disagreeing with the ruling, Monticello entered into a **stipulated judgment** with Essex to enable an immediate appeal. The Second DCA agreed the stipulated judgment was a proper vehicle upon which to base an appeal. (*Norgart v Upjohn Co.* (1999) 21 Cal.4th 383)

Equitable contribution is “the right to recover, not from the party primarily liable for the loss, but from a co-obligor who shares such liability with the party seeking contribution.” 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.

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**. (*Fireman’s Fund Ins. Co. v Maryland Casualty Co.* (1998) 65 Cal. App. 4th 1279)

An insurer must defend any suit that **potentially** seeks damages within the coverage of the policy. (*Gray v Zurich Insurance Co.* (1966) 65 Cal.2d 263) The determination whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint with the terms of

the policy. Facts extrinsic to the complaint also give rise to a duty to defend when they reveal a possibility that the claim may be covered by the policy. (*Montrose Chemical Corp. v Superior Court* (1993) 6 Cal.4th 287)

Monticello cites claims in the complaint by the Goldmans which state there was “excessive cracking in the interior and exterior of the property,” “premature failure of painted surfaces,” and “water damage to structure.” The word “drywall,” however, is never mentioned. There are no allegations the “excessive cracking” is related to the work of Dana Drywall.

Essex was not required to speculate that the “excessive cracking” might be attributed to the work of Dana Drywall. (*Gunderson v Fire Ins. Exchange* (1995) 37 Cal. App.4th 1106) The Court concluded the complaint did not reveal a possibility to Essex that the action against Blumenfeld might be covered by Dana’s policy. Essex had no duty to defend the underlying action against Blumenfeld.

Monticello also relied heavily on the “List of Construction Deficiencies,” prepared for the Goldman’s counsel by experts. The list was introduced into evidence by counsel’s declaration for the summary judgment, but with no indication when the list was provided to Essex. The Justices noted that, to the extent Monticello claimed Essex’s improper refusal to defend was based on its receipt of the Defect List, Monticello had the burden to establish Essex actually had the List at a point in time when it could have decided to participate in the defense of Blumenfeld in the underlying action.

Here, Blumenfeld tendered its defense on July 12, 2001. Essex sought further documentation in support of the tender. The List was not compiled until 19 months later, on February 21, 2003. The case settled just before the trial date of November 3, 2003. When Monticello sought a “definitive response” from Essex on November 12, 2003, Essex responded on November 18, 2003, that it was denying the request for contribution based on the lack of evidence the damage was due to the work of Dana Drywall or that its work caused any damage to property. Only on May 18, 2004, did Monticello provide the Defect List to Essex.

The Appellate Justices concluded that Essex was never provided with the Defect List at any time while it still had the opportunity to participate in the defense of Blumenfeld in the underlying action. It first received the list 6 months after the underlying matter settled. Monticello attempts to argue it is “entitled to presume” Essex had a copy of the list simply by virtue of its defense of Dana Drywall. Also, Monticello notes the List was discussed with witnesses in depositions attended by Dana attorneys.

In the absence of evidence the Defect List was presented to Essex during the pendency of the underlying action, Monticello’s reliance on the List in its Motion for Summary Judgment must be rejected. Accordingly, neither the underlying Complaint nor the Defect List triggered a duty in Essex to defend Blumenfeld pursuant to the additional insured endorsement. Therefore the summary judgment motion was properly denied. The Judgment is affirmed.

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