



Insurance Coverage **ALERT**

Court Affirms Contribution Rights Against Nondefending Additional Insured Carrier Based on Shifting Burden of Proof

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In *St. Paul Mercury Insurance Company v. Mountain West Farm Bureau Mutual Insurance Company*, 210 Cal. App. 4th 645 (2012), the California Court of Appeal affirmed the contribution rights of plaintiff settling insurer for a general contractor against defendant nondefending additional insured carrier.

Plaintiff insured a general contractor under a series of general liability policies for a hotel project. Defendant insured the framing subcontractor through two commercial general liability policies, which added the general contractor as an additional insured. The general contractor was sued for construction defects related to the project, including defects related to the framing work, and defendant declined its tender as an additional insured. Plaintiff contributed more than \$2 million to the global settlement, and defendant paid \$100,000 solely on behalf of its named insured framing subcontractor.

Following a bench trial on plaintiff's equitable contribution lawsuit, defendant was ordered to contribute more than \$700,000 in defense costs and more than \$1.3 million to the settlement based on risk allocation. The trial court also awarded more than \$300,000 in pre-judgment interest under Cal. Civ. Code § 3287.

The court of appeal affirmed the allocation but reversed the award of pre-judgment interest. It rejected defendant's argument that plaintiff had to prove actual coverage and an occurrence during its policy. Applying the shifting burdens of *Safeco Ins. Co. of America v. Superior Court*, 140 Cal. App. 4th 874 (2006), plaintiff only had to prove the potential for coverage, which it had done based on the allegations in the complaint. Defendant had the burden to prove the absence of coverage under its policies, which it failed to do.

The court of appeal also explained that defendant owed a duty to defend the general contractor, a duty not eliminated by defendant's contribution to the settlement on behalf of the framing subcontractor. The court also rejected defendant's argument that it was a third-party beneficiary of the release in the settlement agreement, finding that the agreement only released the named parties and expressly excepted contribution claims relating to additional insureds.

Consistent with existing California case law, the court also interpreted the "arising out of" language in defendant's additional insured endorsement as requiring only a minimal causal connection, rejecting



defendant's claim that the language required plaintiff to prove the framing subcontractor's actual negligence.

Practice Note

The shifting burdens of *Safeco* make it easier for a settling carrier to establish its contribution rights against a nonparticipating carrier. This decision clarifies the heavy burden a nondefending carrier will face to affirmatively establish an absence of coverage under its policy. The decision reinforces the care and foresight a subcontractor's insurer must take to make the correct long-term coverage determination in complex construction defect matters.

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