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## INSIDE

**SUMMARY OF INSURER  
RELATED NEW CASES  
JANUARY 2007 - JUNE 2007**

Page 2

If you are interested in receiving the **Insurance Defense Tips Quarterly Report**, or have someone to whom you would like it sent, call (661) 322-3051, ext. 170 or e-mail [publish@bortonpetrini.com](mailto:publish@bortonpetrini.com) and leave your name, e-mail and/or mailing address to request a free copy.

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### ***“OTHER INSURANCE” CLAUSES AND ALLOCATING DEFENSE AND INDEMNITY COSTS***

**By Matthew J. Trostler**

Typically, the reciprocal rights of co-insurers are governed by equitable considerations and therefore there is no fixed rule for allocating defense and indemnity costs between and among co-insurers. However, many policies contain provisions explicitly stating that the existence of other valid and collectible insurance extinguishes an insurer’s liability to the extent of such other insurance. These types of clauses are enforceable in California. In other words, if there is other valid and collectible insurance, the insurer is liable only to the extent that the loss exceeds such other insurance.

“Other insurance” clauses are common in insurance policies. Such clauses attempt to control the manner in which each insurer contributes to or shares a covered loss. These clauses become relevant only when several insurers insure the same risk at the same level of coverage. In the case of *Travelers Casualty & Surety v. American Equity Insurance* (2001), a dispute arose between two carriers which were deemed primary insurers because

continued on page 3

### ***Matthew J. Trostler***



Matthew J. Trostler is a Partner in the Los Angeles office of Borton Petrini, LLP. He received his undergraduate degree from the University of Southern California earning a major in psychology and a minor in English, with an emphasis in expository writing. He earned his Juris Doctorate from California Western School of Law in 1991 where he was a contributing editor for the law school newspaper.

Matthew’s primary area of emphasis at Borton Petrini, LLP is insurance defense. His wide-ranging experience in the field of insurance has provided additional insight to insurance carriers through seminars defining and discussing insurer regulations in California.

Matthew has significant experience in arbitrations, mediations and jury trials. Some of his verdicts have been published statewide and nationally. His aggressive applicational style is tempered by his sense of fairness and compassion.

**SUMMARY OF INSURER RELATED NEW CASES JANUARY 2007 - JUNE 2007**

**By Matthew J. Trostler**

*Delgado v. Inter-Insurance Exchange of the Automobile Club of Southern California (ACSC)* (May 2007): Insured Reid assaulted and battered Delgado; ACSC denied a defense under a homeowners policy; Reid and Delgado entered into a stipulated judgment and assignment of all of Reid's rights against ACSC, Delgado sued ACSC for bad faith. The Court of Appeal held that the underlying complaint contained allegations demonstrating a potential for coverage under the ACSC policy and ACSC's refusal to provide its insured with a defense was without justification and constituted bad faith as a matter of law.

*Padilla Construction v. Transportation Insurance Co.* (May 2007): An excess insurer does not have a duty to defend an insured until all primary insurance and the self insured retention is exhausted, including cases of continuing loss, unless the excess insurance describes the underlying insurance and promises to cover a claim when the specific underlying insurance is exhausted.

*City of Watsonville v. Corrigan* (April 2007): Tender of defense not a prerequisite for reimbursement under indemnity agreement as Civil Code section 2778 did not require a tender.

*Pacific Business Connections v. St. Paul Surplus Lines Insurance Co.* (April 2007): Insurer required to rely upon the instruction by premium finance company to cancel insurance policy and return the unearned premium.

*Stonelight Tile v. CIGA* (April 2007): Court of Appeals affirms trial court's granting of summary judgment on behalf of CIGA when CIGA correctly argued that it was prohibited from contributing toward payment of a judgment plaintiff obtained against insured in an action for damages due to repeated exposure to dust on the ground that there was other insurance available to cover the judgment.

*Transcontinental Insurance v. Insurance Company*

*of Pennsylvania* (March 2007): Elements of equitable subrogation satisfied by a primary insurer seeking to subrogate its defense costs against excess insurer.

*Queen Villas Homeowner's Association v. TCB Property Management* (March 2007): Exculpatory clause in management contract construed against the "released" party and held not enforceable in subject case.

*Zenith Insurance Company v. Cozen* (March 2007): Law firm owed no duty of care to reinsurer; no attorney-client relationship exists independent of express agreement.



*Jordan v. Allstate* (March 2007): Before an insurer can be found to have acted in bad faith for its delay or denial in the payment of policy benefits, it must be shown that the insurer acted unreasonably or without proper cause. Where there is a genuine issue as to the insurer's liability under the policy as to a claim asserted by the insured, there can be no bad faith liability imposed

on the insurer for advancing its side of that dispute.

*Safeco Insurance v. Firemen's Fund* (March 2007): Primary insurer issued four successive policies that covered an "occurrence of property damage", including continuous exposure to the same conditions resulting in a claimed loss of use during the policy period. Each policy had limits of \$500,000 per occurrence. Excess insurer argued that because both property damage and personal injury occurred in all four policy periods, the primary insurer was liable for up to \$4 million. The Court of Appeals held that there was only one occurrence; further, under policy language, the continuation of any damage into subsequent policy periods (i.e., loss of use) did not give rise to multiple occurrences. The Court held that primary insurer was liable for only one occurrence or \$500,000.

*Golden Eagle Insurance v. Sen-Fed Ltd.* (March 2007): Commercial general liability insurer owed

neither a defense nor an obligation to indemnify insured in underlying action for breach of lease for commercial premises.

*Simon Marketing v. Gulf Insurance* (March 2007): Acts of dishonest employee do not equate to damage to “property” and therefore not a covered loss.

*Bostick v. Flexequipment* (January 2007): Proposition 51, which made liability for non-economic damages several rather than joint and several, does not apply in a strict products liability action involving a single indivisible injury because liability is imposed under strict products liability irrespective of fault.



#### “OTHER INSURANCE” CLAUSES AND ALLOCATING DEFENCE AND INDEMNITY COSTS

*continued from Page 1*

they afforded coverage to the insured at the same level. The Court of Appeals held that the doctrine of equitable contribution entitled plaintiff insurer to recover from defendant insurer the percentage of the cost that it expended in defense and indemnification of the party’s common insured. It did so, however, because the insured would have otherwise been deprived of protection. The aim of equitable contribution is to apportion the loss between two or more insurers that covers the same risk, so that each pays its fair share and one does not profit at the expense of the other’s. *Firemen’s Fund Insurance v. Maryland Casualty Co.* (1998).

However, courts in equitable contribution cases have generally heeded primary/excess provisions

in insurance contracts, so long as the rights of the policy holder are not adversely affected.

Historically, “other insurance” clauses have been designed to prevent multiple recoveries when more than one policy provided coverage for a particular loss. In *Firemen’s Fund Insurance v. Maryland Casualty Co.* (2001), the court noted:

“The courts will therefore generally honor the language of excess ‘other insurance’ clauses when no prejudice to the interests of the insured will ensue.”

In *Carmel Development v. RLI Insurance* (2005), a worker sued the company for personal injuries and was awarded damages. The first insurer provided coverage excess to a specifically described primary policy. The second carrier was excess to “any insurance available to the insured”, including the first insurer. It was determined that the second insurer was secondary to the first insurer and therefore the first insurer had to bear the entire loss up to its limits.

“ . . . ‘ o t h e r  
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b e e n d e s i g n e d t o  
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m o r e t h a n o n e  
p o l i c y p r o v i d e d  
c o v e r a g e f o r a  
p a r t i c u l a r l o s s ”

“Other insurance” clauses attempt to limit the indemnification and allocation of defense costs between insurers. Courts will typically enforce these provisions so long as the insured and/or the insured’s rights are not adversely effected. Further, rather than including a blanket exclusion for “other valid and collectible insurance” clauses, it might be helpful to specifically identify any other policies of insurance during the underwriting process to limit an insurer’s responsibility for defense

costs and indemnification.



**DISCLAIMER: THE INFORMATION PROVIDED IN THIS UPDATE IS NOT A SUBSTITUTE FOR LEGAL ADVICE. READERS SHOULD BE ADVISED THAT IF THEY HAVE QUESTIONS ABOUT THIS OR ANY OTHER AREA OF INSURANCE DEFENSE, THEY SHOULD SEEK THE ADVICE OF COMPETENT COUNSEL SPECIALIZING IN INSURANCE DEFENSE.**