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Insurance Law Update

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Equitable Contribution versus Equitable Subrogation: A Brief Overview

An accident occurs. An insured is sued. Multiple insurers have policies that apply or may apply. Disputes arise as to which insurer is primarily versus secondarily liable and to what degree each should contribute to the resolution of the claim. Litigation ensues among the insurers. Often, at this point, confusion occurs regarding the doctrines that apply. Many have heard of the terms "equitable contribution" and "equitable subrogation" but do not know much beyond that—such as the applicability of the doctrines and their elements. Luckily, in *Home Ins. Co. v. Cincinnati Ins. Co.*, 213 Ill. 2d 307 (2004), the Illinois Supreme Court provided a useful overview of these doctrines and how and where they apply.

Like many coverage cases, *Home Ins. Co.* starts with an accident at a construction site. Allied Asphalt Paving Company ("Allied") was a general contractor for a highway renovation project. *Home Ins. Co.*, 213 Ill. 2d at 309-10. Allied had two subcontractors: Aldridge Electric Company ("Aldridge") and Western Industries ("Western"). *Id*. at 10. One night at the jobsite, an intoxicated driver drove through the construction site and injured an Aldridge employee. *Id*. Following the accident, the injured employee brought suit against Allied and Western alleging that they breached their duty to provide a safe workplace, including failing to provide proper safety lights, traffic cones, and other traffic control devices. *Id*. The allegations of the injured employee's complaint alleged that Allied's liability would have arisen from both Western's work and Aldridge's work.

At the time of the accident, Allied was an additional insured under two commercial liability policies with limits of liability of $1 million: one issued by Home Insurance Company ("Home") to Aldridge and one issued by Cincinnati Insurance ("Cincinnati") to Western. Each of the additional insured endorsements only added Allied as an additional insured if Allied's liability arose out of "your work" as defined by the policy. *Id*. at 310. Therefore, Allied was only an additional insured under Home's commercial liability policy for liability arising out of Aldridge's work and only an additional insured under Cincinnati's policy for liability arising out of Western's work. *Id*. It was also undisputed that, for the coverage provided to Allied, Home's policy was excess to Cincinnati's policy. *Id*.

As Aldridge's injured employee's case proceeded, Cincinnati settled the claim against Western for $40,000. *Id*. However, a dispute arose concerning the settlement of the claim against Allied. *Id*. Aldridge's employee was willing to settle the claim against Allied for $600,000, but Cincinnati was only willing to contribute $100,000. *Id*. at 311. As such, Home contributed $500,000 to resolve the employee's claim under protest. *Id*.

Home then initiated litigation against Cincinnati, seeking recovery under theories of equitable contribution and equitable subrogation. *Id*. at 311. The trial and appellate courts both entered judgment in Cincinnati's favor. *Id*. at 313-15. The supreme court affirmed in part and reversed in part, finding that Home was entitled to a recovery under a theory of equitable subrogation but was not entitled to any relief under a theory of equitable contribution.

The supreme court noted that, while they are often used interchangeably, the terms "contribution," "indemnification," and "subrogation" have "distinct differences between them." *Id.* at 315-16. According to the supreme court, contribution

"applies to multiple, concurrent insurance situations and is only available where the concurrent policies insure the same entities, the same interests, and the same risks." *Id*. at 316. As such, "when two insurers cover separate and distinct risks there can be no contribution among them." *Id*.

Applying these principles, the court ruled that contribution was not available to Home. First, the court observed that "it is well settled that the doctrine of equitable contribution is not applicable to primary/excess insurer issues." *Id*. This is due to the fact that "by definition the policies do not cover the same risks – the protections under the excess policy do not begin until those of the primary policy cease." *Id*. at 317.

Second, even if Home's policy were not excess to Cincinnati's, the supreme court held that equitable contribution was still inapplicable because the policies still did not insure the same risk. Even though both policies potentially applied to the same *loss*, the "policies clearly covered different possibilities or degrees of probability for suffering harm or loss. The Cincinnati policy covered Allied only for liability arising out of Western's work, while the Home policy covered Allied only for liability arising out of Aldridge's work." *Id*. at 322. As a consequence, "[a]lthough it was possible that both policies would one day be triggered because Allied's liability for an accident arose out of both Western's *and* Aldridge's work, this is a different question than whether the policies set out to cover the same risk." *Id*. (emphasis in the original).

However, although it agreed with the lower courts that an equitable contribution claim was unavailable to Home, the supreme court found that Home could maintain an equitable subrogation claim. The court started by reciting the elements for equitable subrogation: "(1) the defendant carrier must be primarily liable to the insured for a loss under a policy of insurance; (2) the plaintiff carrier must be secondarily liable to the insured for the *same loss* under its policy; and (3) the plaintiff carrier must have discharged its liability to the insured and at the same time extinguished the liability of the defendant carrier." *Id*. at 323 (emphasis in the original).

In applying these elements to the case at hand, the supreme court focused on a key distinction between the doctrines that the appellate court overlooked. As the supreme court perceived, "[t]he elements necessary to maintain a contribution action focus prospectively on the 'risk' that the parties set out to cover." *Id*. As a consequence, "[f]or a coinsurer to recover, it must have insured the identical risk." *Id.* On the other hand, "a subrogation claim only requires that the secondary insurer insure the 'same loss' as the primary insurers." *Id*. "This requirement looks retrospectively at the loss suffered." *Id.*

Therefore, because Allied only suffered one loss that arose out of Western's work, Cincinnati would be "wholly liable for that loss as the primary insurer, and Home was only secondarily liable for that loss as the excess insurer." *Id*. Additionally, although the Aldridge employee's case was never tried, there was a presumption that the employee would have prevailed on all of his theories of liability because the case settled prior to trial. *Id.* at 325. Because the supreme court found that Cincinnati did not present sufficient evidence to rebut this presumption, it ruled that Home was entitled to judgment as a matter of law on its claim for equitable contribution. *Id*.

Finally, while under a theory of equitable subrogation, an insurer who is secondarily liable is typically entitled to recover the full amount of the loss from an insurer who is primarily liable, case-specific waiver issues limited Home's recovery from Cincinnati to $200,000. *Id*. at 326-327.

The doctrines of equitable contribution and equitable subrogation can be confusing. And there are multiple issues associated with the doctrines beyond those discussed in *Home Ins. Co. v. Cincinnati Ins. Co*. However, for those new to the doctrines, their elements, and their differences, this case provides a useful starting point for the evaluation of the doctrines and their potential applicability to a case at hand.

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