



California Insurance Law Alert

February
2016

California Court of Appeal Continues to Narrow "Other Insurance" Clauses

In a ruling that should help policyholders secure defense funding, the California Court of Appeal issued another opinion limiting the application of "other insurance" clauses in commercial general liability policies. In *Underwriters of Interest Subscribing to Policy No. A15274001 v. ProBuilders Specialty Insurance Co.*, 241 Cal. App. 4th 721 (2015) *review denied* (Feb. 3, 2016), the court refused to enforce an insurer's "other insurance" clause and permitted a co-insurer to seek equitable contribution of defense costs that it paid to defend a mutual insured.

In reaching this conclusion, *ProBuilders* explained that the trend among California courts is to prevent insurers from using "other insurance" clauses to "evade their obligations by shifting the entire burden associated with defending and indemnifying a mutual insured onto a coinsurer." *Id.* at 730. The court saw no reason to buck the trend here, particularly when the policies issued by ProBuilders--the non-defending insurer--and those issued by Underwriters--the defending insurer--covered different policy periods. The court explained that because the insured faced liability for a continuing and progressive injury, which potentially stretched over multiple policy periods, "giving effect to [ProBuilders'] 'other insurance' provision, in the nature of an escape clause, would result in imposing on Underwriters the burden of shouldering that portion of the defense costs attributable to claims arising from a time when ProBuilders was the *only* liability insurer" providing coverage. *Id.* at 732 (emphasis in original). The court also rejected ProBuilders' argument that its failure to defend was essentially harmless because the insured was not left defenseless. The court explained that the caselaw cited by ProBuilders did not stand for this proposition and any language to the contrary was dicta.

ProBuilders is an important opinion for policyholders. It demonstrates that policyholders should treat coverage denials based on "other insurance" clauses with heavy skepticism, since courts normally reject arguments that these provisions eliminate the duty to defend. Moving forward, *ProBuilders*--and the cases it draws from--should also help policyholders push back against insurers who refuse to defend simply because more than one insurer issued a policy that covers the policyholder for the same loss.

Finally, the court's suggestion that the non-defending insurer pay a pro-rata share of the policyholder's defense costs should not be read as a limitation on an insurer's duty to provide a complete defense under *Buss v. Superior Court*, 16 Cal. 4th 35 (1997) and *Presley Homes, Inc. v. American States Insurance Co.*, 90 Cal. App. 4th 571 (2001). This is because, under California law, each insurer that owes a duty to defend is responsible for 100% of the defense costs, even if other insurers owe that same duty. This rule is akin to joint and several liability and it should not be affected by the *ProBuilders* opinion.

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