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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SCOTTSDALE INSURANCE COMPANY, Plaintiff and Appellant, v. CENTURY SURETY COMPANY, Defendant and Appellant.	B204521 (Los Angeles County Super. Ct. No. BC311522)

APPEAL from a judgment of the Superior Court of Los Angeles County, Helen I. Bendix, Judge. Reversed and remanded.

Knopfler & Pazos, George Knopfler and James Pazos for Plaintiff and Appellant.

Woolls & Peer and H. Douglas Galt for Defendant and Appellant.

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts 1 and 2 of the Discussion.

When multiple insurance companies have the duty to defend the same mutual insured against the same legal action, the costs of the defense are to be allocated among the insurers equitably. When an insurance company which has the duty to defend declines to participate in the defense of the common insured, those insurers who contributed to the defense may pursue an action for equitable contribution against the non-participating insurer. In this case, Scottsdale Insurance Company (Scottsdale) brought suit against Century Surety Company (Century) seeking equitable contribution based on Century's failure to participate in the defense of 17 common insureds in hundreds of actions in which Scottsdale, along with at least one other insurer, shared the costs of the defense of those insured parties. Scottsdale also sought equitable contribution with respect to indemnity of the common insureds in those underlying actions in which Scottsdale (and at least one other insurer) had paid amounts to settle the actions.

Three principal defenses were raised. In the unpublished portion of the opinion we discuss two of them and conclude that the trial court correctly decided both. First, Century argued that it was not required to defend or indemnify three of the common insureds because Century's insurance policies did not provide coverage of the insureds for the actions alleged against them. Specifically, Century relied on a policy exclusion intended to exclude from coverage any action arising out of work which had been completed by the insured prior to the effective date of the policy (the prior work exclusion). The trial court concluded that Century's prior work exclusion was not conspicuous, plain, and clear, and refused to enforce it. Century was therefore required to share equitably in the costs of the defense and indemnification of the common insureds, despite the presence of this exclusion.

The second issue we discuss in the unpublished portion of the opinion is the one raised by Century's argument that the statute of limitations had run on Scottsdale's right to seek equitable contribution against it with respect to many of the underlying actions. Scottsdale attempted to rely on a tolling agreement which had been entered into between Scottsdale and Century with respect to a previous equitable contribution action Scottsdale had pursued against Century (the Orange County action). The trial court found that the tolling agreement applied *only* to the underlying actions at issue in the Orange County action; and that it did not apply to any of the underlying actions at issue in the instant action. The court therefore concluded that the statute of limitations barred Scottsdale's right to recover with respect to many of the underlying actions.

Finally, we consider, in the published portion of the opinion, the important issues of damages and burden of proof in an action for equitable contribution by one insurer against another. The trial court concluded that Scottsdale was entitled to equitable contribution from Century with respect to approximately 80 of the underlying actions. The amount of money that Scottsdale had contributed toward the defense and indemnity of the underlying insureds in those actions was not subject to dispute. With respect to many of the underlying actions, the parties also did not dispute: (1) the total number of insurers who participated in the defense of the common insureds; and (2) that the defense costs were allocated among the participating insurers by means of an equal shares formula.[1] Century argued, in order to calculate the amount which it owed Scottsdale for defense costs, the trial court should recalculate, under the equal shares method, the amount each insurer would have paid for defense costs had Century participated with the other insurers in the defense of the insured. Thus, Century argued it should be ordered to pay Scottsdale the difference between the equal share Scottsdale paid without Century's participation, and the equal share it would have paid had Century participated.[2] The trial court rejected Century's proposed method of calculation, and instead awarded Scottsdale *half* of all defense and indemnity payments it made with respect to the claims for which it was entitled to recover equitable contribution. This result, however, was in conflict with the general rule, heretofore applied in non-insurance cases, that in order to be entitled to equitable contribution a party must have first paid more than its share of the loss and it bears the burden of proving such circumstance.

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1 With respect to sharing the costs of indemnity, there was some evidence indicating that the settlement amounts were shared among a known number of participating insurers by means of a "time on risk" allocation. In other instances, however, the total amount of the settlement is known, as is the amount Scottsdale paid, but the record does not reflect the calculation which led to Scottsdale paying its particular portion of the total settlement.

2 Similarly, Century argued that Scottsdale's equitable contribution recovery for settlement payments made under a time on risk allocation should be calculated by the difference between the amount Scottsdale paid and the amount Scottsdale would have paid had Century been included in the time on risk allocation of the total costs of settlement.

We apply those principles here and conclude that they should have equal application in insurance cases. As a result, we will hold that not only must Scottsdale prove that it had paid more than its "fair share" of the defense and indemnity costs for the common insureds but it also bears the burden of producing the evidence necessary to calculate such "fair share." Moreover, we also hold that one insurer cannot recover equitable contribution from another insurer any amount that would result in the first insurer paying *less* than its "fair share" even if that means that the otherwise liable second insurer will have paid nothing. Because the trial court applied an incorrect standard, we will reverse and remand for a redetermination of Scottsdale's equitable contribution damages.[3]

FACTUAL AND PROCEDURAL BACKGROUND[4]

Scottsdale and Century had many insureds in common; most were construction subcontractors. When a lawsuit was filed against one of the mutual insureds, the claim would be tendered to all of the insured's insurers. Frequently, Century would decline to participate in the defense and indemnity of the insured, often relying on one of two endorsements to its policies. One such endorsement, the prior work exclusion, is relied

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3 Century also argued that the trial court erred in its determination that Century's prior work exclusion was unenforceable. Scottsdale countered that the trial court erred in its interpretation of the tolling agreement. As already noted, in the unpublished portion of this opinion we conclude the trial court was correct with respect to the prior work exclusion and tolling agreement.

4 Only a general outline of the factual and procedural history is necessary at this point; additional facts will be set forth as relevant to the particular issues in the "Discussion" section of this opinion.

upon in this appeal. The other, an endorsement which purported to render Century's coverage as excess to other insurance (the excess endorsement), is not.

While Century declined to participate in the defense and indemnity of the common insureds, Scottsdale and other insurers did so. They agreed to share the costs of defense equally,[5] and agreed to share the costs of settlement as well. There is no indication that any of the underlying cases is still pending.

Scottsdale alone brought suit against Century for equitable contribution. There is no evidence that any other insurer brought suit against Century for equitable contribution,[6] nor does it appear that any of the common insureds brought suit against Century for bad faith for its failure to provide them with a defense or indemnity with respect to the several underlying claims.

The instant action is not the first time Scottsdale pursued Century for equitable contribution. In 2000, Scottsdale brought the Orange County action against Century. The first amended complaint in that action sought equitable contribution with respect to 32 underlying actions – it alleged the same 3 causes of action (equitable contribution

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5 While there is no real dispute in this action that an "equal shares" allocation of defense costs was often used and is a reasonable method of allocating defense costs, there is some suggestion in the record that the defense costs were not *always* shared strictly equally. For example, the data indicate that, in one case, four insurers (including Scottsdale) equally shared in the defense costs, while a total of seven insurers shared in the settlement costs. It was suggested that four insurers shared the cost of one attorney while the other three insurers may have provided separate counsel; the record is simply unclear.

6 Century's counsel represented that Century has been pursued for equitable contribution by other insurers, but there is no evidence of this in the record.

toward defense costs, equitable contribution toward indemnity costs, and declaratory relief) with respect to each underlying action.[7] In the Orange County action, Century relied on the excess endorsement. Century and Scottsdale agreed to litigate the validity of the excess endorsement by means of a test case. They filed cross-motions for summary adjudication regarding the validity of the excess endorsement with respect to one of the underlying actions. Scottsdale prevailed. In order to enable Century to pursue its argument on appeal, Scottsdale dismissed the Orange County action without prejudice. A tolling agreement was executed, whereby it was agreed that Century would not assert a time bar if, after resolution of the appeal in the test case, Scottsdale refiled the Orange County action. The test case was never resolved on appeal; Century and Scottsdale settled the Orange County action while that appeal was pending.

On March 3, 2004, Scottsdale filed the instant action, seeking equitable contribution with respect to over 300 underlying actions involving 17 common insureds.[8] The complaint did not specify any particular measure of the damages sought; it simply alleged that Scottsdale had paid more than its equitable share and that Century should be required to pay "in an amount according to proof at trial, and in accordance with equitable principles."

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[7] The complaint actually alleged 99 causes of action. On appeal, the parties agree that 3 of the causes of action are duplicative, and that the complaint actually involves 96 distinct causes of action arising out of 32 underlying actions.

[8] None of these underlying actions had been at issue in the Orange County action.

By the time the case proceeded to a bench trial in 2006, the number of underlying claims had been reduced to 184. Century raised several defenses, such as the excess endorsement, the prior work exclusion, and the statute of limitations, which could apply to multiple underlying claims. As the trial proceeded, the trial court concluded that it would be efficient to proceed by means of phases, because a possible ruling in favor of Century on one of its defenses would dramatically reduce the number of underlying claims at issue and impact the amount of evidence that would be necessary for the calculation of damages. At the close of the evidence on the first phase, both parties rested. The trial court accepted post-trial briefs on several issues. It then issued a series of tentative statements of decision, heard argument, and followed with final statements of decision on each issue.[9] As already mentioned, the trial court concluded: the prior work exclusion did not apply; the tolling agreement did not apply; and Scottsdale could recover one-half of the amounts it paid on the approximately 80 underlying claims on which it could recover. Ultimately, judgment was entered in favor of Scottsdale for that amount, in addition to prejudgment interest and costs. Both parties filed timely notices of appeal.

ISSUES ON APPEAL

In Century's appeal, Century argues that the trial court erred in concluding its prior work endorsement was unenforceable.[10] Century also argues the trial court abused

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[9] Additional evidence was also submitted on an issue unrelated to this appeal.

[10] See footnote 3, *ante*.

its discretion in its calculation of the amounts owed. In Scottsdale's cross-appeal, Scottsdale argues that the trial court erred in concluding the tolling agreement did not apply to any underlying action which was not the subject of the Orange County action.[11]

DISCUSSION

1. *The Prior Work Exclusion Is Ineffective*

In the policies issued to three common insureds, Century relies on the prior work exclusion.[12] It is undisputed that the prior work exclusion was intended by Century to respond to case law which adopted a continuous trigger theory of liability. Under the continuous trigger theory, if there is a claim of continuous or progressively deteriorating bodily injury or property damage through several policy periods, the damage is potentially covered by all commercial general liability (CGL) policies in effect during the period of injury. (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2009) ¶ 7:175, p. 7A-86 (Rev. #1 2009).) Concerned that, under this theory, Century's CGL policies might have to respond to damages suffered during the policy period, although caused by work done before the policy came into effect, Century attempted to exclude from coverage damages arising from previously completed work.

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[11] See footnote 3, *ante*.

[12] The parties refer to this exclusion as the "1536" exclusion, based on its form number.

a. *The Language of the Prior Work Exclusion*

Century chose to exclude prior work by the use of an endorsement entitled "EXCLUSION OF SPECIFIC WORK OR LOCATION."[13] The endorsement is intended to exclude from coverage any bodily injury or property damage arising from specific work or locations. The endorsement was preprinted with a "SCHEDULE," which would enable Century to identify specific work or locations which were excluded from coverage. Across the top of the schedule is printed: " 'Location,' Address, Description." These headings presumably allowed Century to identify specific locations which would be excluded from coverage. Somewhat lower down, the schedule had headings stating, " 'Your Product' or 'Your Work' (Description)" and "Date of (Specify) Manufacture, Sale, Distribution, Disposal, or Completion." These headings presumably allowed Century to identify specific products or work which would be excluded from coverage.

The body of the endorsement provided, as to the locations and work identified in the schedule, as follows:

"**1.** **Coverages (Section I)** do not apply to 'bodily injury' or 'property damage' arising out of:

"**a.** The accident(s) or 'location(s)', if any, described above; or

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[13] The endorsement states that it modifies insurance provided under the CGL form, and, specifically, the products-completed operations liability coverage.

“**b.** The products or work, if any, described above, if the ‘bodily injury’ or ‘property damage’ is included in the ‘products-completed operations hazard’ even if other causes contribute to or aggravate the ‘bodily injury’ or ‘property damage’.

“**2.** The following additional definition applies:

“ ‘Location’ means premises involving the same or connecting lots, or premises whose connection is interrupted only by a street, roadway, waterway or right-of-way of a railroad.”

Several terms in the endorsement appear in quotation marks. Century’s CGL coverage form explains that “words and phrases that appear in quotation marks have special meaning,” and refers the reader to the definitions section of the policy. That section defines, in the usual manner, “bodily injury,” “property damage,” “products-completed operations hazard,” “your product,” and “your work.” While “location” appears in quotation marks in the endorsement, it is *not* otherwise defined in the policy. From the language preprinted on the endorsement, it appears that “location” is to be defined in the schedule itself – with Century completing the endorsement to identify locations, with addresses and descriptions, to which the endorsement’s language would apply. In other words, if Century identified any “locations” in the schedule, paragraph 1.a. would then exclude from coverage any bodily injury or property damage arising from the defined “locations,” and paragraph 2 would further define “location” to include connecting lots.

In none of the three policies at issue did Century identify *any* locations on this portion of the schedule. Century did, however, attempt to identify specific work to be excluded from coverage under paragraph 1.b. In each of the three policies at issue, Century wrote, in the schedule, " 'Your work' which was completed at any 'Location' prior to the effective date of this policy."[14] Century intended, by this language, to use an "EXCLUSION OF SPECIFIC WORK OR LOCATION" endorsement to exclude from the products-completed operations hazard coverage all work completed prior to the effective date of the policy.

b. *Applicable Law*

"[I]n an action for equitable contribution by a settling insurer against a nonparticipating insurer, the settling insurer has met its burden of proof when it makes a prima facie showing of coverage under the nonparticipating insurer's policy—the same showing of potential coverage necessary to trigger the nonparticipating insurer's duty to defend—and that the burden of proof then shifts to the recalcitrant insurer to prove the absence of actual coverage." (*Safeco Ins. Co. of America v. Superior Court* (2006) 140 Cal.App.4th 874, 877.) In this case, Scottsdale clearly met its prima facie burden. The burden of proof therefore shifted to Century to establish the absence of actual coverage.

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[14] The typeface varied among the three policies; there is no issue raised regarding the size or style of the type. In one policy, the above-quoted sentence was followed with, "It is further agreed 'your work' includes all work performed for Presley Homes." It is undisputed that no work performed by this common insured for Presley Homes is implicated in any of the underlying actions.

“ ‘[I]nterpretation of an insurance policy is a question of law.’ [Citation.] ‘While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply.’ [Citation.] Thus, ‘the mutual intention of the parties at the time the contract is formed governs interpretation.’ [Citation.] If possible, we infer this intent solely from the written provisions of the insurance policy. [Citation.] If the policy language ‘is clear and explicit, it governs.’ ” (*Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115.)

“In the insurance context, ‘we begin with the fundamental principle that an insurer cannot escape its basic duty to insure by means of an exclusionary clause that is unclear. As we have declared time and again, “any exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect.” ’ ” (*Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1204.) “[T]o be enforceable, any provision that takes away or limits coverage reasonably expected by an insured must be ‘conspicuous, plain and clear.’ [Citation.] Thus, any such limitation must be placed and printed so that it will attract the reader’s attention. Such a provision also must be stated precisely and understandably, in words that are part of the working vocabulary of the average layperson. [Citations.] The burden of making coverage exceptions and limitations conspicuous, plain and clear rests with the insurer.” (*Id.* at p. 1204.)

The rule that exclusionary language must be conspicuous, plain and clear applies only when the insured has a reasonable expectation of coverage. (*Haynes v. Farmers*

Ins. Exchange, supra, 32 Cal.4th at p. 1213.) Once an insured has a reasonable expectation of coverage, the court then must consider whether the limitation on that coverage is conspicuous. The issue is whether the entire policy adequately directs the reader to the terms of the relevant exclusionary language. (*Id*. at p. 1210.) Once the provision has been determined to be conspicuous, the provision must also be plain and clear in order to be given effect. " ' "This means more than the traditional requirement that contract terms be 'unambiguous.' Precision is not enough. Understandability is also required." ' " (*Id*. at p. 1211.)

c. *The Prior Work Exclusion Is Not Conspicuous, Plain and Clear*

The trial court concluded that Century had not established that its prior work exclusion was conspicuous, plain and clear. We agree.

Preliminarily, we note that there was clearly an initial expectation of coverage. The declarations pages of the relevant policies each indicate a limit of insurance of $1,000,000 for products-completed operations coverage. The first issue, however, is whether the exclusion was conspicuous. The exclusion is identified as "Exclusion of Specific Work or Location," not an exclusion of "prior work." Indeed, each policy also contains an "Exclusion – Pre-Existing Injury or Damage," (which excludes coverage for preexisting injury or damage known to the insured). One must read the exclusion in detail, based on the single sentence typed below the schedule, in order to have even the vaguest understanding that the exclusion is *not* an exclusion of specific work or location, as it is titled, but is instead an attempt to exclude all prior completed work from coverage. Thus, we have significant doubts regarding the exclusion's conspicuousness.

In addition, the exclusion is not plain and clear. To understand the true meaning of the exclusion, one must focus on paragraph 1.b. in combination with the sentence added beneath the schedule. Paragraph 1.b. excludes from products-completed operations coverage any bodily injury or property damage arising out of "The products or work, if any, described above." There are no products described above. As to "work, if any, described above," the policy states, " 'Your work' which was completed at any 'Location' prior to the effective date of this policy." As the policy elsewhere defines "Your work" as work or operations performed by the insured or on its behalf (as well as materials, parts or equipment furnished in connection with such work) the use of "Your work" in quotation marks is not ambiguous. The same cannot be said, however, as to Century's use of the descriptor "which was completed at any 'Location.' " Putting the word "Location" in quotation marks means that the word is defined in the policy. But "Location" is not defined in the policy. Paragraph 2 of the exclusion provides an "additional definition" of "Location" to include the same or connecting lots, but this "additional definition" is useless without an original definition. The schedule itself provides a place for Century to define the quotation-surrounded word "Location," and identify each specified "Location" by address and description, but the space is empty. An insured reading this exclusion, as filled out by Century, could conclude that it was meant to exclude damages arising from all work "completed at any 'Location' prior to the effective date of this policy," but could search in vain for any description of *which* locations were encompassed by the policy. Century argues that the language was intended to refer to any location on earth, but the term is not so defined.[15]

Finally, we note that the record contains what appears to be a later draft of an exclusion Century used to accomplish the same goal.[16] The document is properly titled "PAST LIABILITIES EXCLUSION." The body of the exclusion states, in full, "It is agreed that such coverage as is afforded by this policy for PRODUCTS/COMPLETED OPERATIONS shall only apply to claims arising out of PRODUCTS MANUFACTURED AND SOLD and/or COMPLETED OPERATIONS COMPLETED on or after the date shown below." There is a space for the date to be specified, as well as the insured's signature. This is a conspicuous, plain and clear exclusion; it is properly titled and expresses in easily-understandable language that prior work and products are excluded from coverage. In contrast, the prior work exclusion on which Century relies in *this* case is an apparent attempt to stretch an endorsement designed to exclude specific work or locations to instead exclude all work completed before a particular time, which does so with reference to a term in quotation marks which should be defined in the exclusion, and never is. We therefore conclude the exclusion is not effective, and that Century failed to meet its burden of defeating actual coverage.

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15 Indeed, Century might have been better off had it written only, " 'Your work' which was completed prior to the effective date of this policy." But we cannot read the "at any 'Location' " limitation out of the policy.

16 While the exclusion at issue in this case is numbered 1536, this revised exclusion is numbered 1536a.

2. *The Tolling Agreement Does Not Apply*

Scottsdale's argument regarding the tolling agreement actually encompasses two different arguments: (1) the tolling agreement applies to underlying actions outside the scope of the Orange County action as a matter of law; and (2) the trial court abused its discretion in refusing to allow Scottsdale to reopen its case to present extrinsic evidence of its interpretation of the tolling agreement.

a. *The Language of the Tolling Agreement*

The tolling agreement was entered into by Attorney Linda Hsu on behalf of Scottsdale and Attorney Brent Barnes on behalf of Century. While Attorney Barnes negotiated the agreement with Attorney Hsu, Attorney Hsu is the individual who drafted the agreement.

We set forth the terms of the agreement in some detail. The agreement begins with a series of recitals setting forth the circumstances of the Orange County action and the parties' intent to pursue a test case through appeal. In those recitals, the tolling agreement defines "underlying actions" as the "numerous underlying construction defect actions" which form the basis for the Orange County complaint.[17] The recitals go on to state that Century seeks to obtain a "final and binding" determination, on appeal, of the effect of its excess endorsement, and Scottsdale also "desires a final and

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[17] The sentence reads, "WHEREAS, the Complaint [defined as the Complaint in the Orange County action] alleges that in numerous underlying construction defect actions (hereinafter the 'underl[y]ing actions'), Century . . . failed to defend and indemnify and continues to fail to defend and indemnify various sub- and/or general contractors and/or developers which Scottsdale mutually insured (hereinafter the 'mutual insureds')."

binding, appellate determination with respect to the legal effect of Century['s excess endorsement] as it applies to all of the underl[y]ing actions." It then states that both parties "believe it would be more economical to pursue final determination of the Test Case before pursuing resolution of Century['s] obligation to defend and/or indemnify the mutual insureds in the remaining underlying actions."

The parties then agree that, in order to pursue the appeal of the test case, Scottsdale will "dismiss without prejudice all remaining causes of action against [Century] which have been pled in Scottsdale's Complaint and First Amended Complaint in the Indemnity Action (the 'Remaining Causes of Action[']')." The agreement states that it is the express intent of both parties that the "dismissal without prejudice of the Remaining Causes of Action will not prejudice, bias, harm, hinder or estop Scottsdale from re-filing the Remaining Causes of Action or from amending the complaint to include additional causes of action following final resolution of the Test Case by appellate process." (Underlining omitted.) The dispute on appeal surrounds the meaning of "additional causes of action." There are several other clauses of the tolling agreement which similarly provide that the agreement applies to the filing of "additional causes of action," as well as the refiling of the "Remaining Causes of Action,"[18] although the term "additional causes of action" is nowhere defined.

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[18] For example, the tolling agreement provides: "Under this Tolling Agreement, [Century] is prevented from arguing that statutes of limitations or other time restrictions have run or lapsed and thereby prevent Scottsdale from re-filing the Remaining Causes of Action or additional causes of action or to argue that Scottsdale is prevented from recovering under such Causes of Action, disputed monetary contribution from [Century] because of the tolling of time. [¶] [Century] explicitly acknowledges this provision and

b. *The Trial Testimony*

Attorney Barnes testified at trial. According to Attorney Barnes, the term "Remaining Causes of Action" in the tolling agreement referred to the 93 causes of action (relating to 31 underlying actions) in the Orange County action which were dismissed to enable the test case to proceed; and the term "additional causes of action" referred to any additional causes of action raising additional theories of relief *pertaining to those same 31 underlying actions*, which Scottsdale may seek to amend its complaint in the underlying action to pursue.[19] In response to the suggestion that "additional causes of action" might mean causes of action for equitable contribution arising out of any *other* underlying actions, Attorney Barnes testified that Attorney Hsu never suggested, during negotiations of the tolling agreement, that it would reach underlying actions outside of the Orange County case.

Attorney Hsu did not testify at trial. At the start of the case, during Scottsdale's opening statement, counsel for Scottsdale indicated that he would read from Attorney Hsu's deposition. Scottsdale's counsel represented that Attorney Hsu was unavailable; counsel for Century disagreed. Scottsdale's counsel stated, "I can't compel her to come down from San Francisco. She no longer works for [Scottsdale]." Counsel continued,

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expressly waives any and all rights to allege any such defenses should Scottsdale re-file such Causes of Action." It also provides that the five-year period for bringing an action to trial will start anew on the date of refiling, "should Scottsdale re-file the Remaining Causes of Action or additional causes of action after 'final resolution of the test case by appellate process.' "

[19] Specifically, Attorney Barnes indicated that Scottsdale might want to assert causes of action for unfair business practices.

"And she – we frankly had to go up there to get her deposition. She was reluctant to have the deposition taken. We went up there and got the deposition taken. She lives in San Francisco and is on vacation. I will attest to that on the record, and I couldn't serve her with a subpoena. Even if I did, it wouldn't be appropriate." Attorney Hsu's deposition was ultimately stipulated into evidence, with the exception of one objected-to portion.[20]

Both parties rested with respect to the phase of the trial which encompassed litigating the validity of the tolling agreement. The trial court indicated that the parties should provide further briefing on the tolling agreement issue, among others. Each party filed additional briefing as requested. Two months later, once the reporter's transcript had been prepared, the parties refiled their post-trial briefs with citations to the record. Although the record on appeal indicates that Scottsdale refiled its briefs on some issues to include citations to the record, there is no indication that it refiled its brief on the tolling agreement issue with citations.

c. *The Trial Court's Tentative Ruling*

On February 2, 2007, the trial court issued its tentative ruling on the tolling agreement. The trial court tentatively concluded that the "express language of the Tolling Agreement supports [Century]'s position that the Tolling Agreement applies only to the 'underlying claims' in the Orange County action and not to the underlying

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[20] Neither party has apparently found it necessary to include attorney Hsu's deposition transcript as part of the record on appeal.

claims in the instant action." The court also noted that Attorney Barnes's testimony was consistent with the express language of the tolling agreement.

At least twice in its tentative ruling, the court noted that Scottsdale had made an argument without identifying evidence in support of that argument. Specifically, the court noted that Scottsdale had argued that Attorney Barnes's interpretation of "additional causes of action" made no sense because there were no other theories of relief " 'available or contemplated.' " The trial court stated, "*[Scottsdale] does not cite to any evidence in support of this proposition. [Citation.] [Scottsdale] should be prepared at argument to provide such evidentiary reference(s).*" Later, the court noted that Scottsdale had argued that Attorney Hsu " 'always believed' " that the tolling agreement encompassed underlying causes of action outside of the Orange County action, but stated that "Scottsdale does not provide any reference to evidence for this argument."[21] Further argument was set for February 5, 2007.

d. *Scottsdale's Request to Reopen*

On Friday, February 2, 2007, the day the trial court issued its tentative order, Scottsdale immediately wrote the court, stating, "Based upon the Tentative Ruling itself as well as the Court's comments directed to the [Scottsdale], I have made arrangements to have Linda Hsu available to testify in Court on Monday morning. As the Court will

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[21] The trial court made a similar statement with respect to Scottsdale's representation that Attorney Barnes admitted that "he did not draft the Tolling Agreement, which was the work of [Attorney] Hsu." Attorney Barnes did, in fact, testify to this point. The trial court, however, was pointing out that Scottsdale did not "*provide any citation for this proposition*" in its post-trial briefing.

recall, Ms. Hsu was unavailable at the time of trial and portions of her deposition were offered by both sides. In light of the Court's comments regarding Mr. Barnes' testimony (as to what Ms. Hsu meant by the language contained in the Agreement she drafted), and what causes of action were available to Ms. Hsu at the time she filed the complaint (other than those she alleged), coupled with the fact that extrinsic evidence appears to be at issue or necessary to the resolution of this ambi[g]uity, it is imperative that [Scottsdale] have an opportunity to have Ms. Hsu testify on these issues (set forth in italics) referenced in the Tentative Ruling. [¶] Technically, I believe that [Scottsdale] is still within its rights to submit additional evidence; however, if I am incorrect in this assumption, I would request that [Scottsdale] be allowed to reopen its case, solely for the introduction of evidence in the form of testimony by Ms. Hsu related to the Tolling Agreement issue – and, more specifically, to the questions raised by the Court in its Tentative Ruling." Scottsdale stated that "good cause exists to reopen the case related to this issue, especially given the fact that the Court only decided **today** – on a tentative basis – that the Tolling Agreement may be ambiguous and extrinsic evidence is necessary to determine the parties' intent. Certainly there has been no delay in bringing this extrinsic evidence to the Court's attention, and to deny [Scottsdale] the right to reopen its case to submit this material testimony would be prejudicial and would irreparably damage [Scottsdale] on a significant portion of its claim."

At the hearing on February 5, 2007, a discussion was apparently originally held in chambers, and the trial court denied Scottsdale's request. Subsequently, the court placed on the record its denial of the request to reopen.[22] After argument, the trial court adopted its tentative ruling as its final ruling on the issue of the tolling agreement.

e. *The Court Did Not Err in Denying Scottsdale's Motion to Reopen*

"Trial courts have broad discretion in deciding whether to reopen the evidence. [Citation.] We review a court's denial of a motion to reopen evidence for an abuse of discretion. [Citation.] The appropriate test for abuse of discretion is whether the trial court's decision exceeded the bounds of reason." (*Horning v. Shilberg* (2005) 130 Cal.App.4th 197, 208-209.)

Here, the trial court did not abuse its discretion. Both parties had rested and fully briefed the issue of the tolling agreement. Scottsdale only sought to reopen when it learned the trial court's tentative ruling was going against it. This does not constitute good cause for reopening the evidence. Moreover, we cannot help but notice Scottsdale's complete 180-degree turn on Attorney Hsu's availability for trial. When

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[22] We set forth the procedural history in great detail because Scottsdale's cross-appellant's opening brief misstates it. First, Scottsdale states that the trial court issued its tentative ruling on the tolling agreement issue "**before** Century had completed putting on its defense case," and states that "Scottsdale was within its right to present a 'rebuttal' case since Century had not yet completed its defense." This contention is contradicted by the record. On August 25, 2006, Century rested on phase one of the trial, which indisputably included the tolling agreement issue. The court then asked counsel for Scottsdale if it was resting on phase one. Counsel replied, "Yes, I'm resting." The phase one trial had been completed and post-trial briefs had been filed well before the trial court issued its tentative ruling. Second, Scottsdale states that its letter was to alert the trial court that Scottsdale had arranged for Attorney Hsu "to provide the evidence supporting Scottsdale's response to Century's defense, which the trial court referenced as 'missing' in its tentative ruling." To the contrary, the court never stated that *evidence* was missing, it stated only that *citations to purported evidence* were missing, and that Century was to provide those citations at the hearing.

Scottsdale sought to present Attorney Hsu's deposition, Attorney Hsu was "unavailable," "reluctant," and it would have been inappropriate to serve her; when Scottsdale learned that the trial court's tentative ruling was against it, it was immediately able to guarantee Attorney Hsu's attendance on the next court date. There is no abuse of discretion in denying a motion to reopen when the failure to introduce the evidence earlier was the apparent product of trial tactics (*Horning v. Shilberg, supra,* 130 Cal.App.4th at p. 209), and the record supports an inference that the decision to proceed without Hsu's live testimony was just that.

f. *The Tolling Agreement Does Not Apply as a Matter of Law*

"It is . . . solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence." (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.) The question must be decided de novo by this court, unless the interpretation depends upon extrinsic evidence. (*Home Federal Savings & Loan Assn. v. Ramos* (1991) 229 Cal.App.3d 1609, 1613; *Broffman v. Newman* (1989) 213 Cal.App.3d 252, 257.) " '[I]t is only when the foundational extrinsic evidence is in conflict that the appellate court gives weight to anything other than its de novo interpretation of the parties' agreement.' " (*Medical Operations Management, Inc. v. National Health Laboratories, Inc.* (1986) 176 Cal.App.3d 886, 891.)

"The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." (Civ. Code, § 1644.) "We interpret the intent and scope of the agreement by focusing on the usual and ordinary meaning of the language used and the circumstances under which the agreement was made." (*Lloyd's Underwriters v. Craig & Rush, Inc.* (1994) 26 Cal.App.4th 1194, 1197-1198.) "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.)

In this case, the applicable standard of review is largely irrelevant, as our interpretation of the tolling agreement is in accordance with the extrinsic evidence the trial court found persuasive.[23] We consider the language of the tolling agreement.

First, we note that the tolling agreement defines "underlying actions," as the underlying actions for which Scottsdale sought equitable contribution in the Orange County action. Moreover, the tolling agreement separately defines "Remaining Causes of Action." The tolling agreement, negotiated and drafted by attorneys, recognizes the

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[23] On appeal, both parties indicate that the only extrinsic evidence admitted on the issue of the interpretation of the tolling agreement was the testimony of Attorney Barnes. In fact, there *was* evidence that Attorney Hsu believed the tolling agreement encompassed underlying actions outside of the Orange County action, although neither party appears to consider it significant for determining the standard of review. Four months after the tolling agreement was signed, Attorney Hsu sent a letter to Attorney Barnes, transmitting a draft further tolling agreement which would have encompassed additional underlying actions identified in two exhibits. In the letter, Attorney Hsu states that she "do[es] not believe that this agreement is necessary . . . given the language of the original tolling agreement." Attorney Barnes did not sign the further tolling agreement. While Attorney Barnes's refusal to sign the further tolling agreement suggests that he believed that original tolling agreement did not encompass the additional claims, Attorney Hsu's letter is some evidence that she believed that it did.

difference between an action and a cause of action. While the "underlying actions" are the (32) underlying actions on which the Orange County action was based, the "Remaining Causes of Action" are defined as the (93) causes of action in the Orange County complaint that were dismissed in order for the test case to proceed to resolution on appeal. The distinction is key; Scottsdale argues that later references to "additional causes of action," are actually a references to "additional underlying actions," but the definitions indicate that the attorneys who negotiated this agreement drew a distinction between a "cause of action" and an "underlying action."

Second, the recitals in the tolling agreement indicate that the parties sought a final appellate determination with respect to the validity of Century's excess endorsement "as it applies to all of the underl[y]ing actions." The language could not be more clear; the parties did not seek a final determination with respect to the validity of the excess endorsement as it applied to all of the claims Scottsdale may have against Century, but only as it applies to the underlying actions – which had been defined as the underlying actions at issue in the Orange County action. Similarly, the recitals indicated the parties believed that it was more economical to proceed by means of a test case before pursuing "resolution of Century['s] obligation to defend and/or indemnify the [common] insureds in the remaining underlying actions." Again, the reference was to the underlying actions in the Orange County action, not to any other underlying actions for which Scottsdale might seek equitable contribution.[24]

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[24] In its cross-appellant's opening brief, Scottsdale argues that the recital establishes that the parties determined it was more economical to litigate one test case

Finally, we reach the terms of the agreement, which indicate, in several different ways, that Scottsdale would not be barred "from re-filing the Remaining Causes of Action or from amending the complaint to include additional causes of action." We conclude that the term "additional causes of action" means only additional causes of action relating to the same underlying actions. Were this clause not included in the agreement, Century could conceivably argue that Scottsdale could pursue *only* those three causes of action already alleged with respect to each of the 32 underlying claims at issue in the Orange County action; this term forecloses that argument, and permits Scottsdale to pursue any cause of action relating to the 32 underlying claims, including causes of action raising additional theories of relief.

The term "additional causes of action" does not mean "additional causes of action arising from additional underlying claims." Surely, if the parties intended to encompass additional underlying claims (a fact which would be contrary to the recitals, which, as discussed above, indicate only an intention to encompass underlying claims at issue in the Orange County action), they could have used language permitting additional *underlying claims*, rather than additional causes of action. Indeed, the recitals indicate that Scottsdale once "amended its Complaint [in the Orange County action] to include additional underlying actions in which Scottsdale claims [Century] failed to defend and indemnify other mutual insureds." While the amendment technically included

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than "litigating all of the underlying actions in which Century refused to defend and/or indemnify a 'mutual insured.' " Scottsdale overlooks that the tolling agreement *defined* "underlying actions" to mean only the underlying actions that formed the basis for the Orange County complaint.

additional causes of action arising out of additional underlying actions, the use of "additional underlying actions" in the recitals confirms that the parties used "additional underlying actions" when they wished to refer to the practice of amending a complaint to add causes of action arising out of additional underlying actions.

Scottsdale's interpretation, that the parties intended the tolling agreement to encompass a potentially infinite number of additional underlying actions for which Scottsdale might seek to pursue Century for equitable contribution, strains credulity. There is no identification of any such underlying actions in the tolling agreement, and the recitals make no mention of their existence or an intention to preserve Scottsdale's right to pursue them.

Were we to conclude the tolling agreement was ambiguous and that "additional causes of action" could conceivably refer to additional causes of action arising out of additional underlying actions, we would nonetheless affirm the trial court's conclusion on the basis that it accepted Attorney Barnes's testimony that this was not, in fact, the mutual intention of the parties. Thus, under any standard of review, the tolling agreement did not apply to underlying actions not raised in the Orange County action, and the trial court was therefore correct in applying the statute of limitations.

3. *The Trial Court Erred in its Calculation of Damages*

Having concluded that the trial court did not err in its determination of the underlying actions for which Scottsdale could recover equitable contribution, we now turn to the calculation of damages. While the parties present the issue as a legal one, it is largely complicated by issues relating to evidence.

a. *Law of Equitable 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. Where multiple insurance carriers insure the same insured and cover the same risk, each insurer has independent standing to assert a cause of action against its coinsurers for equitable contribution when it has undertaken the defense or indemnification of the common insured. 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. The purpose of this rule of equity is to accomplish substantial justice by equalizing the common burden shared by coinsurers, and to prevent one insurer from profiting at the expense of others." (*Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1293.)

The right to equitable contribution "is predicated on the commonsense principle that where multiple insurers or indemnitors share equal contractual liability for the primary indemnification of a loss or the discharge of an obligation, the selection of which indemnitor is to bear the loss should not be left to the often arbitrary choice of the loss claimant, and no indemnitor should have any incentive to avoid paying a just claim in the hope the claimant will obtain full payment from another coindemnitor." (*Fireman's Fund Ins. Co. v. Maryland Casualty Co., supra,* 65 Cal.App.4th at p. 1295.)

"In choosing the appropriate method of allocating defense costs among multiple liability insurance carriers, each insuring the same insured, a trial court must determine which method of allocation will most equitably distribute the obligation among the insurers 'pro rata in proportion to their respective coverage of the risk,' as 'a matter of distributive justice and equity.' [Citation.] As such, the trial court's determination of which method of allocation will produce the most equitable results is necessarily a matter of its equitable judicial discretion. [Citations.]" (*Centennial Ins. Co. v. United States Fire Ins. Co.* (2001) 88 Cal.App.4th 105, 111.)

"In keeping with the fundamental principle that a trial court has discretion to select a method of allocating costs among insurers with the aim of producing the most equitable results based on the facts and circumstances of the particular case, the courts have adopted a number of different ways of apportioning the burden among multiple insurers. These various methods have included, among others, the following: (1) apportionment based upon the relative duration of each primary policy as compared with the overall period of coverage during which the 'occurrences' 'occurred' (the 'time on the risk' method) [citations]; (2) apportionment based upon the relative policy limits of each primary policy (the 'policy limits' method) [citations]; (3) apportionment based upon *both* the relative durations and the relative policy limits of each primary policy, through multiplying the policies' respective durations by the amount of their respective limits so that insurers issuing primary policies with higher limits would bear a greater share of the liability per year than those issuing primary policies with lower limits (the 'combined policy limit time on the risk' method) [citation]; (4) apportionment based upon the amount of premiums paid to each carrier (the 'premiums paid' method) [citation]; (5) apportionment among each carrier in equal shares up to the policy limits of the policy with the lowest limits, then among each carrier other than the one issuing the policy with the lowest limits in equal shares up to the policy limits of the policy with the next-to-lowest limits, and so on in the same fashion until the entire loss has been apportioned in full (the 'maximum loss' method) [citation]; and (6) apportionment among each carrier in equal shares (the 'equal shares' method) [citation]." (*Centennial Ins. Co. v. United States Fire Ins. Co., supra,* 88 Cal.App.4th at pp. 112-113.)

"The costs of defense must be apportioned on the basis of equitable considerations not found in the insurers' own contracts, since the insurance companies who must share the burden do not have any agreements among themselves. The courts have expressly declined to formulate any definitive rules for allocating defense costs among carriers, because of the 'varying equitable considerations which may arise, and which affect the insured and the . . . carriers, and which depend upon the particular policies of insurance, the nature of the claim made, and the relation of the insured to the insurers.' " (*CNA Casualty of California v. Seaboard Surety Co.* (1986) 176 Cal.App.3d 598, 619.) Questions as to whether the non-participating insurer breached the duty of good faith and fair dealing toward its insured or otherwise acted tortiously are not at issue in an equitable contribution action. (*Id*. at p. 621.) Equitable contribution does not depend on fault; it is based on an equitable apportionment of contractual undertakings. (*Harford Accident & Indemnity Co. v. Superior Court* (1994) 29 Cal.App.4th 435, 441.) We review a trial court's choice of a method of allocation for an abuse of discretion. (*Centennial Ins. Co. v. United States Fire Ins. Co., supra,* 88 Cal.App.4th at p. 111.)

b. *Scottsdale's Evidence and Method of Allocation*

Scottsdale's evidence of damages consisted largely of evidence that Scottsdale paid defense and indemnity costs for the common insureds (in connection with the underlying actions), in amounts to which Century stipulated, and that Century did not pay any such costs.[25] Scottsdale argued that it should receive equitable contribution in the amount of half of the amounts it had paid, regardless of whether any other insurers shared in the defense or indemnity of any of the common insureds. In other words, Scottsdale argued that Century should reimburse it for half of the amounts Scottsdale paid, whether Scottsdale had paid 1% or 100% of the costs of defense or indemnity, or any amount in between.

We utilize the device of a hypothetical example to assist in explaining the problem. Suppose that, with respect to a particular underlying claim, Scottsdale equally shared the defense costs with three other insurers. In such a scenario, each insurer

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[25] Scottsdale concedes that Century paid some funds in connection with one of the underlying actions.

would have paid 25% of the total defense costs. Scottsdale sought to recover half of what it had paid in defense costs from Century. In other words, under Scottsdale's theory of relief, Century and Scottsdale should equally split the 25% paid by Scottsdale (12.5% each), while the other three insurers would still have paid 25% each.[26]

c. *Century's Evidence and Method of Allocation*

Century combed through Scottsdale's files relating to the underlying actions, and determined, with respect to many of the actions, exactly *how many other insurers* were involved in the defense and indemnification of the mutual insureds. Century also inferred from the files the percentage of the total defense or indemnity costs paid by Scottsdale.[27]

Armed with this evidence, Century argued that the *total* costs of defense and indemnity could be recalculated, according to the methods Scottsdale and the other insurers had agreed to use, with Century in the mix. Taking the hypothetical described above, Century argued that if the evidence showed that Scottsdale equally shared the

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[26] We use defense costs in our hypotheticals rather than settlement amounts, as it appears that defense costs were frequently allocated by the equal shares method, while settlement amounts were allocated by time on risk. The time on risk analysis is similar, although the math is a bit more complex. In a time on risk allocation, if Scottsdale was on the risk for 40% of the total time, while other insurers combined to cover the other 60% of the risk, Scottsdale would have paid 40% of the total settlement cost, and therefore sought half of that amount, or 20% of the total settlement cost, from Century, *regardless of how much time Century was actually on the risk.*

[27] In some cases the evidence was better than others. For example, some files included letters transmitting settlement details and allocating the settlement amount among the insurers, specifically based on their time on risk. Others include attorney bills which indicate that the bill represents, for example, "your 1/6 portion split." In others, there is simply a handwritten notation on a bill stating "Ok to pay . . . 1/2 share."

defense costs with three other insurers, in amounts of 25% each, then if Century was included in the equal shares allocation, each of the five insurers would be responsible for 20% of the total costs. As Scottsdale had paid 25% of the defense costs when it should only have paid 20%, Century argued that Scottsdale's damages would be the difference between the two, or 5% of the total defense costs.[28]

Scottsdale disputed Century's evidence, however. While Scottsdale accepted Century's data for the *number of insurers* involved in the defense or indemnity of a mutual insured, Scottsdale argued that Century's failure to present evidence that the other insurers had paid the amounts allocated to them was a failure of proof which undermined Century's entire argument. In short, Scottsdale argued, Scottsdale had met its burden of proof by establishing that it had paid amounts on the underlying claims while Century had not – and Century failed in proving that its own share should be less than half of what Scottsdale had paid. This case thus presents issues regarding the respective parties' burdens of proof in an equitable contribution action.

d. *Burden of Proof on Equitable Contribution*

Before discussing the applicable law, we begin with an observation. Neither Scottsdale nor Century took steps to involve the other insurers in this equitable contribution action. This appears to have been because both stood to benefit financially in their absence. Consider our hypothetical example of four insurers who shared

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[28] Century could perform a similar calculation with respect to the indemnity allocation by adding its time on the risk to the total time on risk and recalculating the percentage time on risk for Scottsdale.

defense costs equally (25% each). If all four insurers were parties to this equitable contribution action against Century, the result would be that Century would be required to pay *each of those four insurers* 5% of the total defense costs, resulting in each of the insurers (including Century) paying 20% of the costs. But, in the absence of the other insurers, Scottsdale pursued a theory of allocation which would reduce its share of the defense costs down to 12.5%. Similarly, in the absence of the other insurers, Century pursued a theory of allocation which would result in its share of the defense costs being only 5%. Thus, both Century and Scottsdale stood to gain if the other insurers were not present, and stood to lose if they were.

The parties have not identified, and independent research has not disclosed, any authority directly dealing with an equitable contribution case in which the amounts paid by all participating insurers were *not* before the court. However, in equitable contribution cases outside the realm of insurance, courts have stated that a person who has paid *no more than his or her just proportion* of a debt cannot obtain equitable contribution, even from a party who has paid nothing. (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 650, fn. 7; *Jackson v. Lacy* (1940) 37 Cal.App.2d 551, 560.)

Scottsdale would have us disregard this authority on the basis of general language stating that "[i]n 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*." (*Fireman's Fund Ins. Co. v. Maryland Casualty Co.,* *supra*, 65 Cal.App.4th at p. 1293, italics added.) Scottsdale relies on this language to argue that, as it defended the underlying action while Century did not, it has satisfied its burden of proving that it is entitled to equitable contribution. We disagree. In fact, the quoted language can be fully reconciled with the above-quoted authority that a party cannot obtain equitable contribution unless that party has paid more than its fair share. *Fireman's Fund* did not state that an insurer could recover for equitable contribution if it participated in the defense of an action while another insurer did not, instead, it stated that "one insurer" could recover if it defended the action without *any* participation from *the other* insurers with a duty to defend. Clearly, a single insurer who bears the *entire defense burden* has paid more than its fair share of the defense costs. Thus, we see no conflict in the law, and conclude that the general rules governing equitable contribution apply in the insurance context. An insurer can recover equitable contribution only when that insurer has paid more than its fair share; if it has not paid more than its fair share, it cannot recover, even against an insurer who has paid nothing.

e. *Application of the Law to the Facts of This Case*

Scottsdale argues that it has established that it has paid more than its fair share. Indeed, the trial court concluded that Century had conceded – in light of the trial court's ruling on coverage issues – that Scottsdale paid more than its fair share on the claims as a whole. We agree with the trial court's analysis to a limited extent. Century agreed that Scottsdale had paid more than its fair share – but this agreement was based on Century's inferences from the evidence in Scottsdale's files regarding the allocation agreements and the percentage of total costs which Scottsdale had paid. If Century's evidence was wholly disregarded, there was *no* evidence that Scottsdale had paid more than its fair share. It cannot be disputed that Scottsdale paid more than Century did. But, unless Scottsdale also established that *some of the amount it paid was allocable to Century's fair share*, it did not meet its burden of proof.[29]

The question then arises if *Century's* evidence regarding the amounts paid by the other insurers is sufficient to meet *Scottsdale's* burden of proof. We believe that it could be, at least with respect to some of the underlying actions. Century and Scottsdale stipulated to the number of insurers participating in the defense or settlement of many of the underlying actions. Scottsdale's share of the total costs was often undisputed, and the method of allocation was also clearly demonstrated by the record. Thus, with respect to some of the underlying claims, the trial court could conclude that the evidence established that Scottsdale has paid more than its fair share.[30]

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[29] Suppose that Scottsdale had *refused to pay any costs which it believed Century should have paid*. In that case, the other insurers would have stepped in to cover the gap in defense and indemnity costs to avoid a bad faith action, and Scottsdale would not have paid a penny more than its fair share. Thus, evidence that establishes no more than that Scottsdale had paid and Century did not is insufficient to prove that Scottsdale had paid more than its fair share. Scottsdale needs to also show the amount of its fair share in order to meet its burden of proof.

[30] Scottsdale argues that there is no evidence that the other insurers paid the shares which were allocable to them. We question the need for such evidence. That Scottsdale, for example, paid 25% of total defense costs under an equal shares allocation agreement with three other insurers *demonstrates* that Scottsdale paid more than the 20% fair share it would have paid had Century been included – regardless of the amounts the other insurers paid. In any event, to the extent such evidence was required, we believe the trial court could have inferred that, in the absence of any evidence that the attorneys or claimants sought additional funds or complained to

The next question is whether the trial court's method of allocation, in which Century was charged with half of the amounts Scottsdale had paid, was within the court's discretion. We conclude that it was not. In the usual case in which the trial court is asked to choose a method of allocation, the insurers on the risk have not already agreed among themselves on the method of allocation. In this case, however, Scottsdale and the other insurers *did* agree; they generally selected equal shares for defense costs and time on risk for indemnification costs. These methods of allocation are patently reasonable, and Scottsdale should be bound by its choices. Scottsdale has presented no authority for the proposition that it can agree to one method of allocation with every other insurer on the risk, but obtain a different method of allocation of *its allocated share*, when seeking equitable contribution from a non-participating insurer.

We return to our hypothetical of four insurers initially on a risk. Under the method of allocation advocated by Scottsdale and adopted by the trial court, the ultimate allocation of defense costs is as follows: Each of three other insurers – 25% each; Scottsdale and Century – 12.5% each. This is true even though the "fair share" each insurer should pay is 20%. The other three insurers could now pursue Century *and Scottsdale* for equitable contribution; because the other three have paid more than their fair shares while Century and Scottsdale have *each paid less.*[31] The trial court does not

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Scottsdale, the other insurers paid as they had agreed. (Cf. Civ. Code, § 3529 ["That which ought to have been done is to be regarded as done, in favor of him to whom, and against him from whom, performance is due."])

[31] Scottsdale suggests that none of the other insurers can pursue Century for equitable contribution as the statute of limitations will bar their claims. We do not

do equity with a method of allocation that provides the other insurers with an equitable contribution action against Scottsdale.[32]

Putting it another way, Scottsdale can only recover based on evidence that it paid more than its fair share *under the allocation agreements* it made with the other insurers. It cannot recover an amount from Century that would result in it paying less than its fair share under those same agreements.

Scottsdale argues that the trial court's method of charging Century with half of the total amounts paid by Scottsdale was within the trial court's discretion. In particular, Scottsdale relies on a finding of the trial court that Century's claims handling processes were "less than impressive, and had the effect of discouraging other insurers from pursuing their equitable contribution rights." The trial court indicated that it selected its method of allocation as follows: "The fact that it is difficult now to gather accurate and competent information about other potential carriers, and what should have been their contribution, is a product of Century's above-described strategy. The court agrees that in determining equitable allocation, this court cannot take into account

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believe the equity of the trial court's choice of an allocation method depends on whether the other insurers are time-barred from bringing their own actions. Scottsdale should not receive a windfall from Century simply because the other insurers chose not to timely pursue their own actions.

[32] The inequity of the trial court's distribution is even more apparent in the indemnity scenario. If Scottsdale was on the risk for 50% of the time, the "half of Scottsdale's payments" allocation would require Century to pay 25% of the total settlement amount, even if Century had been on the risk for only 5% or 10% of the time. The trial court's method of allocation of settlement amounts charges Century with *more than its fair share* in any underlying action in which Scottsdale was on the risk for more than twice as long as Century.

punishment; this is not a bad faith case. However, equitable and legal principles support the conclusion that where someone's wrong has made it difficult to provide exact numbers as to loss or damage, plaintiff does not bear the burden of exactitude."

We do not question the trial court's findings, but its conclusion does not follow. If Scottsdale's records were so inadequate that they could not demonstrate that Scottsdale paid more than its fair share, Scottsdale did not meet its burden of proof and could not recover equitable contribution *at all*. If, on the other hand, Scottsdale's records establish that Scottsdale paid more than its fair share under the allocation methods it had voluntarily adopted with the other participating insurers, the trial court had no discretion to award Scottsdale damages under any other method of allocation. Century's lack of participation in the defense does not excuse Scottsdale's inadequate record-keeping or discovery.[33]

f. *Unusual Factual Circumstances Compel Reversal*

As we have explained, Scottsdale failed to meet its burden of proof of establishing that it paid more than its fair share of defense and settlement costs. Century, however, presented evidence which it believed established that Scottsdale had paid more than its fair share, and the trial court could have accepted that evidence, even though Scottsdale challenged its sufficiency.

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[33] We again note that, under Scottsdale's theory of the case, it could recover substantially *more* if evidence regarding the total payment amounts was not before the trial court than it could if such evidence was present. Scottsdale thus had an incentive to not obtain that evidence through discovery.

In other words, if the trial court accepts Century's evidence, it could conclude that Scottsdale is entitled to equitable contribution according to the allocation methods agreed to by Scottsdale and the other participating insurers. Indeed, Century offered to stipulate that certain allocation methods (and percentages) were used in many of the underlying actions – from which the amount of Scottsdale's excess payments attributable to Century's failure to participate can be easily calculated.

It is therefore necessary for the matter to be remanded back to the trial court to recalculate damages under the allocation methods agreed to by Scottsdale and the participating insurers, to the extent such damages are supported by the evidence.

DISPOSITION

The judgment is reversed and the matter remanded to the trial court for a redetermination of the amount of damages to be awarded Scottsdale, if any, in accordance with the views expressed in this opinion. The parties are to bear their own costs on appeal.

CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.