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SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES, NORTHWEST DISTRICT

FAIRWAY PHYSICIANS INSURANCE COMPANY, a Risk Retention Group, Plaintiff, vs. THE MEDICAL PROTECTIVE COMPANY, a business entity, form unknown, and DOES 1-10, inclusive, Defendants.	Case No. LC090723 [*Assigned for all purposes to the Honorable Bert Glennon, Jr., Department NWT*] [redacted] **STATEMENT OF DECISION** DATE: June 20, 2011 TIME: 10:00 a.m. DEPT: T **Case Filing Date:** August 4, 2010 **Trial Date:** June 20, 2011

Plaintiff Fairway Physicians Insurance Company (sometimes called "Plaintiff" or "Fairway") filed this action for equitable contribution and indemnity against Defendant, The Medical Protective Company (sometimes called "Defendant" or "MedPro"). Plaintiff seeks 50 percent of the total attorney's fees and costs it incurred in defending two of its insureds in an underlying medical malpractice action, and 100 percent of the settlement sum it paid to settle the underlying medical malpractice action against its two insureds. Only one of Fairway's two insureds was a co-insured with MedPro.

This matter came on for trial on June 20, 2011, and was tried to the Court based upon a written submission of stipulated facts, the presentation of one witness by each side, and approximately 82 exhibits, 78 of which were jointly submitted.

THE UNDERLYING MEDICAL PRACTICE CLAIM

Although the evidence in some respects is disputed, the parties stipulated to numerous facts concerning the underlying medical malpractice claim brought by Tom Fagan against Scripps Memorial Hospital, several of its nurses and doctors, and in particular, Dr. David Chao (sometimes called "Dr. Chao") and his physician's assistant, Anthony J. Durfee.

The parties stipulated that Fagan underwent a total knee replacement operation at Scripps Memorial Hospital in San Diego on February 9, 2007. The orthopedic surgeon in charge of the operation was Dr. Chao. Fagan was in the post-operative recovery room until approximately 5:30 p.m. on February 9.

At 5:30 p.m., he was transferred to the orthopedic floor of the hospital. The "Extremity Neurovascular Assessment Record" of Scripps Hospital for Mr. Fagan, which was admitted into evidence as Exhibit 5 shows that his right lower extremity was listed as having a "weak" pulse from approximately 9:00 a.m. when his surgery began, through midnight of February 9. The stipulated facts also concede that substantial post-operative pain is an expected result of the total knee replacement undergone by Mr. Fagan (Fact No. 8).

At approximately 8:50 p.m., Mr. Durfee was called by nurses at Scripps Memorial Hospital. Mr. Durfee's cell phone had been left on the "patient order chart" to be called by the nurses if there was a problem. The nurses requested that they be allowed to give Fagan additional pain medication to which Mr. Durfee agreed.

At approximately 9:25 p.m., the nursing notes state that Mr. Fagan was experiencing further pain and authority was requested to provide him with a low dose of morphine, which was approved. At 10:04 p.m., Mr. Durfee was called and approved a further increase.

There was a dispute in the underlying action concerning exchanges between Mr. Durfee and the nurses before midnight. The nurses' notes claim that at approximately 11:00 p.m., Mr. Durfee was called and provided with a report on Mr. Fagan's status. According to one version, Mr. Durfee told the nurses "not to worry" about Mr. Fagan because he had undergone an operation and "studies may have to be done tomorrow but do not worry tonight." (Fact 15). As acknowledged by Fairway's claim representative, Mr. Bischof, the nurses' notes were taken by a nurse being "mentored" and it was conceded in the underlying action and in this case (Fact 10) that the nurses' notes were not taken until 4 to 5 hours after the events in question. Mr. Durfee denied ever telling the nurses "not to worry" and that studies would have to be taken "tomorrow." It was pointed out in this action, moreover, that at 11:00 p.m., Mr. Fagan's neurovascular condition remained unchanged with his pulse classified as it had been throughout the day. (Fact 5, Exhibit 51).

At midnight on February 9, 2007, the nurses' notes reflect that a nurse was unable to "palpate a pulse" in the "RLE" (conceded by the parties to mean right lower extremity or the right leg in which Mr. Fagan's knee replacement occurred). The notes reflect that Mr. Durfee was called, and that at approximately 12:15 a.m., Mr. Durfee returned the call requesting, pursuant to Dr. Chao, that Mr. Fagan be given a "Stryker" test. A Stryker machine is used to test for something called "compartment syndrome," which is excessive swelling in one or more of the compartments of the knee joint, which can lead to a loss of circulation. It was testified to below by Dr. Chao and stipulated in this action that a test for compartment syndrome should not be performed by a nurse, but instead by a physician. (Fact 67).

Mr. Durfee was not at the hospital. Neither was Dr. Chao.

In the action below, plaintiff maintained that Dr. Chao had breached his duty of care to Mr. Fagan by not being at the hospital or by not assuring that another doctor had assumed responsibility for Mr. Fagan's care. Plaintiff below also pointed to the rules applicable to staff physicians by the Scripps Memorial Hospital requiring a doctor to

assure when leaving the hospital that another doctor was responsible for the patient's care. It was stipulated in this case that Dr. Chao had access to those rules (Facts 59 and 67). It was not disputed that Dr. Chao was responsible for assuring that a doctor was responsible at all times for Mr. Fagan's care while he was at Scripps.

At 12:30 a.m., the nurses' notes (Exhibit 3, "Notes" marked with control no. F00083) reflect that "AJ [Mr. Durfee] called back; asks RN to call downstairs to find ER or ortho MD on call to perform test." The notes reflect that at 12:35 a.m., the "ER charge nurse" stated that "MD will have to come in; no one is available or AJ must call down and speak to the ER doctor."

At 12:40 a.m., the Notes reflect that Mr. Durfee was "notified; transferred down to ER to speak to physician." The Notes next reflect that the nurse was "notified that ER physician will come up to perform test." At 1:00 a.m., 10 minutes later, the notes reflect that "ER calls floor to state that ER MD will be up in minutes." But at 1:30 a.m., the notes state "ER calls, MD unable to come due to trauma; AJ notified, given # to contact Dr. Chao; unable to get through."

Thus, the nurses' notes reflect that from 12:30 a.m., when Mr. Durfee asked the RN to call downstairs to the ER to find someone to perform the test up to approximately 01:45 a.m., when the ER MD came to see the patient, there was a delay of approximately one hour and 15 minutes in performing the Stryker test on Mr. Fagan.

At 1:50 a.m., the notes reflect "Dr. Chao called; given results of test; transferred to ER MD."

At 2:00 a.m., the notes reflect "ER MD Murakado calls; states she told Dr. Chao to come in; is worried about arterial thrombosis;..." At 2:10 a.m., the notes reflect "Chao calls in, states fasciotomy necessary; *unable to come in*, Dr. James Chao, his brother, his near the facility and qualified to perform procedure..."

The testimony reflects that some time at approximately 4:00 a.m., surgery was undertaken by another hospital doctor in an effort to restore circulation to Mr. Fagan's right lower extremity. Mr. Fagan was returned to hospital ward following the surgery.

The efforts to save Mr. Fagan's leg were unsuccessful. In May 2007, Mr. Fagan's right lower leg was amputated.

Mr. Fagan filed a malpractice action in the Superior Court of the State of California, County of San Diego, against Scripps Memorial Hospital, various nurses and Dr. James Chao (Dr. Chao's brother is a plastic surgeon and is referred to in here by his full name, Dr. James Chao). (Exhibit 10). (The "underlying action" or "Fagan case").

Prior to being served in the underlying action, Dr. Chao evidently notified his errors and omissions carrier, Fairway. Fairway appointed a San Diego medical malpractice defense lawyer named Dan Deuprey to defend Dr. Chao and Mr. Durfee. Mr. Dupree met with Dr. Chao and his physician's assistant, Mr. Durfee, in October 2007 (Fact 49).

On January 2, 2008, plaintiff Fagan entered into a tolling agreement with Dr. Chao and Mr. Durfee (Exhibit 8), and on May 21, 2008, revoked the agreement (Exhibit 11).

On May 23, 2008, plaintiff proposed that if Dr. Chao agreed to indemnify Mr. Durfee against any claims, no suit would be brought against Mr. Durfee. (Exhibit 12). That offer was not accepted and Dr. Chao and Mr. Durfee were subsequently brought into the complaint by way of Doe Amendments (Exhibits 14 and 15).

Numerous depositions were taken in the action, including those of Dr. David Chao (two volumes), Dr. James Chao, Mr. Durfee, several nurses at the hospital and others. Other percipient witness depositions were taken and copies of the face pages of those depositions were admitted as Exhibit 15.

Offers to settle the claim against Dr. Chao and Mr. Durfee were made in February 2009 (Exhibits 19 and 20), but were allowed to lapse.

Plaintiff's counsel asserted on March 6, 2009, that

> "...post op, Dr. Chao's failure to provide adequate coverage for Mr. Fagan was far below the requisite standard of practice and amounted to abandonment...Expert testimony will establish that the requisite standard of care required Dr. Chao

> to come to the hospital, or provide a competent specialist to cover for him in a timely manner in this regard. His failure to do so is below the standard of practice. His attempted transference of this duty on to an emergency room physician did not meet his standard of care to Mr. Fagan and did not meet the requisite standard of practice." (Exhibit 23, p. F00773).

From the time Dr. Chao and Mr. Durfee were served up until approximately April 2, 2009, the defense attorney engaged by Fairway to defend Dr. Chao and Mr. Durfee took depositions along with other defense counsel, engaged experts (some jointly retained), and conducted other activities.

It is stipulated that no notice of this lawsuit was given or obtained by Defendant MedPro in this case up until March 11, 2009, when Mr. Durfee, having evidently located his policy of insurance tendered the claim to MedPro. (Fact 63).

Upon tender of the claim by Durfee, MedPro contacted a San Diego medical malpractice firm it has used extensively called "Neil Dymott Frank McFall & Trexler APLC." Jill Mickelsen of MedPro contacted Robert Frank at that firm and determined that he had previously defended a party in the Fagan litigation, which had later been dismissed. The party was Dr. James Chao, the plastic surgeon who came to the hospital that evening (not Dr. David Chao, the surgeon who performed the knee replacement operation on Mr. Fagan). Learning that Mr. Frank was already substantially familiar with the case and had copies of the transcripts and other materials, he was engaged by MedPro to defend Mr. Durfee.

MedPro's appointed defense counsel appeared on or about April 2, 2009. Mr. Durfee was thus defended by Robert Frank of Neil Dymott appointed by MedPro, and continued to be defended by Mr. Deuprey, who had been appointed by Fairway to defend both Dr. Chao and Mr. Durfee.

In May 2009, another event occurred in the lawsuit, the effect of which is disputed. Dr. Chao had testified in his first deposition in 2008 that he was unable to return to the hospital to assist Mr. Fagan because he was "driving to Los Angeles" to see his mother. The nurses' notes, Exhibit 3, also reflect that he told the nurses at the time that he was "unable to come in" (*see* Exhibit 3, entry at 0210 a.m., control page no. F00082). Plaintiff's counsel had pressed, however, for exact details concerning Dr. Chao's location. Demands were made in 2008 that Dr. Chao produce evidence of his whereabouts on February 9 and February 10, through credit cards, gasoline company receipts and cell phone records. An email from plaintiff's counsel demanding corroboration of Dr. Chao's "alibi that he went to Los Angeles in the middle of the night" was introduced as Exhibit 63, p. 1. Those efforts were contested in 2008, but on or about May 2, 2009, the Arbitrator ruled such evidence would have to be produced including a "redacted" receipt from a nightclub in San Diego called "Belo." (Exhibits 45 and 26, p 3). The Arbitrator's order was admitted into evidence. It ordered the production of Dr. Chao's cell phone and office phone bills (p. 1), and other data including "any and all credit and/or debit card bills and/or billing statements..." for defined time periods on February 9 through February 10, 2007. (Exhibit 50, p. 2, lns. 11-14).

On May 28, 2009, Mr. Deuprey, counsel for Dr. Chao and Mr. Durfee (appointed by Fairway) emailed plaintiff's counsel "a redacted copy of the computer-printed credit card charge receipt for 2-10-07." The redacted receipt sent with the email and introduced as part of Exhibit 26 (at page F00975), reflects the name "David Chao," a print date of 2-10-07, and a time of 1:45 a.m. The items charged and the amounts therefore are redacted as is the tip and total.

It is stipulated in this action, however, that whatever else was on the card, was processed at 1:45 a.m. on February 10, 2007, for a bottle of vodka, and that a signature appeared on the signature line where Dr. Chao's signature was provided for by the imprint. (Fact 41).

Plaintiff's counsel promptly expressed that her client was "distraught" over discovery of the Belo receipt, suggested that Dr. Chao had abandoned his client to drink in a nightclub and threatened to amend her complaint to assert a claim for punitive damages against Dr. Chao. (Exhibit 42). Plaintiff's counsel also noted that the complaint currently contained a claim for elder abuse, and stated that treble damages would be sought against Dr. Chao. Plaintiff also suggested that Dr. Chao may have been intoxicated at the time he was speaking to Mr. Durfee between midnight on February 10 and approximately 2:00 a.m. (Fact 42).

On or about June 1, plaintiff settled with Scripps for approximately $1.4 million.

Plaintiff then demanded the "unredacted" Belo receipt to determine its exact contents. Plaintiff had not been given the unredacted receipt and did not know that, among other entries, a bottle of vodka had been charged to Dr. Chao's credit card at 1:45 a.m.

On June 11, 2009, plaintiff's counsel advised the lawyer appointed by Fairway to defend Dr. Chao and Mr. Durfee that

> "Mr. Fagan has been very distraught to learn of the contents of the Belo receipt..." which plaintiff's counsel stated "...directly contradicts Dr. Chao's earlier sworn testimony that he was in route to his mother's Los Angeles home at that time. Presumably, based on this receipt, it highly likely that Dr. Chao was in the nightclub for an appreciable period of time prior to closing out the tab. As you know, this is during a critical time for Mr. Fagan when he desperately required emergent medical care...An unredacted copy of the Belo bill will show what was consumed at the nightclub that evening." (Exhibit 63, p. 2).

Plaintiff stated that she would raise in a scheduled June 16 ex parte phone conference with the Arbitrator, the production of the unredacted receipt, and seek to

depose Dr. Chao concerning his attendance at the Belo nightclub and consumption of alcohol. (Exhibit 63, p. 2).

On June 18, plaintiff's counsel served new § 998 offers directed to both Dr. Chao and Mr. Durfee separately. Each demanded $250,000, and each provided that if it were accepted by the party to whom it was sent, the other party would be dismissed.

On or about July 10, Mr. Deuprey, counsel to Mr. Durfee and Dr. Chao, drafted a "consent to settle" for Mr. Durfee, which Mr. Durfee signed on July 11 (Exhibit 29). The "consent to settle" contains language referring to a waiver of conflicts, but Exhibit 29 does not discuss what those conflicts are. Mr. Bischof testified that he did not consider Durfee's consent to apply to MedPro (Fact 88).

Fairway then tried to settle the case for less than the $250,000 demanded. Several efforts were made to induce plaintiff to take $125,000, and $175,000. When neither effort was successful, Fairway settled the case on the last day, July 20, 2009, for the demanded $250,000. The § 998 offer accepted was that directed to Mr. Durfee. It was stated in this action by Mr. Bischof that Dr. Chao would not agree to settle.

Fairway's claims manager testified that Fairway had settled the matter on its own and without MedPro's consent or agreement. Stipulated Fact 68 states that prior to the settlement, Fairway did not demand contribution from MedPro.

It is stipulated that at the time Fairway settled the Fagan case, MedPro's defense lawyer, Mr. Frank, was defending Mr. Durfee, and that Dr. Chao was a defendant in another medical malpractice claim and also being investigated by the California Medical Board (Facts 93 and 94).

CLAIMS AND POSITIONS IN THIS ACTION

Fairway filed this claim for equitable contribution and indemnity against MedPro.

1. **Fairway's Claim For Pre-Tender Attorney's Fees And Costs**

Fairway maintains it is entitled to 50% of the fees and costs it spent defending the Fagan action. The exact amount claimed by Fairway is not clear, but the Court can resolve the claim despite the lack of a precise figure.[1]

Fairway seeks recovery of 50 percent of its fees and costs incurred or spent prior to tender to MedPro on March 11, 2009. Fairway represents that amount to be approximately $140,000. Fairway concedes that MedPro had no notice of the action prior to the tender on March 11, 2009.

Fairway maintains that it is entitled to 50 percent of the pre-tender fees and costs because they benefitted Mr. Durfee and ultimately were to the benefit of Mr. Durfee's appointed defense counsel, Mr. Frank.

It is undisputed that all of the fees and costs incurred by Fairway for which it seeks contribution were incurred while defending its two insureds, Dr. Chao and Mr. Durfee. Dr. Chao was not insured by MedPro. Fairway has not produced any evidence of how much of the total fees and costs it incurred were for the defense of Mr. Durfee, the only mutual insured. Fairway did not maintain separate files or fee billings for Mr. Durfee as opposed to Dr. Chao and cannot state the amount paid to defend only Mr. Durfee.

MedPro maintains that even if Fairway were entitled by law to pre-tender fees, it failed to meet its burden of proof to establish that it paid "more than its fair share" of the fees and costs. It is not clear, for example, that MedPro benefitted in any quantifiable way from any of the work done by Fairway's appointed counsel before tender was made. MedPro established at trial without dispute that Mr. Frank's firm had previously represented Dr. James Chao, who was not defended by Fairway, and that Mr. Frank's firm obtained, from its participation in the litigation, deposition transcripts and expert

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[1] Exhibit 80, titled "Summary of Deuprey & Associates Fee and Expenses" claims $150,817.16. Exhibit 39, titled "Claim Summary – Payments" shows a fee and expense total of $180,117.47 (at page F01330). On June 21, Fairway's counsel advised the Court that the amount in Exhibit 39 should be reduced by $8,122.25, which would leave a balance of approximately $171,995.22. Plaintiff's trial brief, however, states that the defense costs were $173,482.86 (Fairway's Trial Brief, p. 26, ln. 16).

reports, which it possessed at the time it was later retained by MedPro to defend Mr. Durfee.

MedPro also maintains that substantial portions of the fees and costs incurred prior to the tender date were for the sole benefit of Dr. Chao, who it did not insure. Examples are the fees and costs incurred in opposing plaintiff's effort to obtain Dr. Chao's credit cards, cell phone records and other data, which the Arbitrator ultimately ordered Dr. Chao produce. Mr. Bischof conceded on cross-examination that while he was unaware of the exact span of the dispute, he was aware that the efforts to reach Dr. Chao's credit card, cell phone and gasoline credit card data commenced in 2008, and continued "for quite awhile." The Arbitrator's order directing Dr. Chao to produce those documents was argued at a hearing on April 16, and later signed on May 2, 2009. Mr. Bischof conceded that the dispute over production of cell phone and credit card records resolved in the Arbitrator's ultimate ruling involved only Dr. Chao.[2]

MedPro also insists that Dr. Chao alone benefitted from experts such as a "cell phone record locater," an orthopedic surgeon and other persons consulted solely for Dr. Chao's benefit.

The Court finds that Fairway is not entitled to the pre-tender attorney's fees for two reasons.

First, the Court of Appeal case in One Beacon America Insurance Company v. Fireman's Fund Insurance Co., 175 Cal. App. 4th 183, 187 (2009), clearly holds that to be entitled to equitable contribution for pre-tender fees notice of the lawsuit must have been given to the carrier against which equitable contribution is sought. One Beacon America Insurance Co. v. Fireman's Fund Insurance Co., 175 Cal. App. 4th 183, 187 (2009):

> "As explained below, based on California Shoppers, Inc. v. Royal Globe Ins. Co. (1985) 175 Cal. App. 3d 1, (California

[2] Pre-tender billing entries and related documents confirm time devoted to the issue with Dr. Chao's credit card records and cell phone records. *E.g.*, October 7, 2008 (Exhibit 40, p. F01488); October 8, 2008 (Exhibit 40, p. F01489); November 24, 2008 and November 25, 2008 (Exhibit 40, p. F01482); November 26, 2008 (Exhibit 40, p. F01483); November 5, 2008 (Exhibit 40, p. F01477); November 5, 2008 (Exhibit 40, p. F01476);

> Shoppers) and our decision in Truck Ins. Exchange v. Unigard Ins. Co. (2000) 79 Cal. App. 4th 966 (Unigard), we hold that an insurer's obligation of equitable contribution for defense costs arising where, *after notice of litigation*, a diligent inquiry by the insurer would reveal the potential exposure to a claim for equitable contribution, thus providing the insurer with the opportunity for investigation and participation in the defense of the underlying litigation."

175 Cal. App. 4th 183, 187 (California Reporter citation omitted).

In Truck Ins. Exchange v. Unigard Ins. Co., 79 Cal. App. 4th 966 (2000), Truck Insurance gave notice to Unigard of its potential liability for equitable contribution, but only after the underlying litigation was resolved. The question presented in that case was "when does an insurer that is providing a defense have to raise the issue of contribution with potential co-insurers that are not participating in the litigation due to a lack of tender." Unigard, *supra*, 79 Cal. App. 4th at 978-979. As pointed in One Beacon:

> "We rejected Truck's argument that, regardless of when it learned the identity of potential and co-insurers, notice to potential co-insurers was not necessary until the underlying action had concluded. We determine that notice should be given sooner, rather than later."

One Beacon, at 201, citing to Unigard at 979.

As the court pointed out in One Beacon, late notice subjects a carrier to significant financial burdens even though it did not enjoy concomitant and benefits of the defense such as the right to participate and control the defense.

Unigard concluded that notice should have been made "promptly after Truck agreed to provide a defense." Unigard at 982. This was not to say that Truck had to tender the defense to Unigard, but a "simple notice regarding the possibility of

contribution would have been sufficient." Id. It is undisputed that Fairway provided no such notice in this case. (Stipulated Fact No. 63).

Based on these equitable considerations, the court in One Beacon reiterated the rule in Unigard and California Shoppers stating as follows:

> Pursuant to Unigard and California Shoppers, and the public policies articulated in Home Insurance and Cincinnati Cos., we opt for the rule that an insurer's obligation of equitable contribution for defense costs arises where, after notice of litigation, a diligent inquiry by the insurer would reveal the potential exposure to a claim for equitable contribution, thus providing the insurer with the opportunity for investigation and participation in the defense of the underlying litigation."

One Beacon, at 203.

Here, Fairway concedes that no such notice was given. Moreover, Fairway provided no reason for failing to give such notice. Mr. Deuprey met with Mr. Durfee and Dr. Chao in October 2007 (Fact 49). Mr. Deuprey was appointed by Fairway. Fairway thus had it within its reach to determine any other insurance available to Mr. Durfee.

Although MedPro maintains it was deprived of opportunities to settle and participate in the defense and there are exhibits indicating as much, the Court need not consider those, since it finds this issue to be a clear one of law: Fairway simply failed to give notice. It is therefore barred from recovery of pre-tender fees.

Further, the Court finds that Fairway failed to sustain its burden of proof imposed on it by Scottsdale Ins. Co. v. Century Surety Co., *supra*.

> "As a result, we will hold that not only must Scottsdale prove that it paid more than its 'fair share' for 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 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."

Scottsdale, at 1028.

> "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."

Fairway's witness, Mr. Bischof, stated that he came upon the proposed 50/50 division of attorney's fees and costs without accounting for expenses made solely to benefit Dr. Chao. He described the option as a "coin toss." Scottsdale, however, states that the party seeking equitable contribution has the burden of proof of establishing that it paid "more than its fair share." Scottsdale also states that a party that fails to meet that burden of proof may not recover against an insurer, even if the other insurer paid nothing. As already stated, Fairway has not proven how much of the pre-tender fees and costs were incurred solely for defense of Mr. Durfee.

As explained below, Fairway's effort to recover on an equitable indemnity or equitable subrogation theory does not change this result.

Accordingly, the Court denies pre-tender fees to Fairway.

2. Post Tender Fees And Costs

Fairway also seeks to recover fees and costs it incurred to defend Mr. Durfee following the appointment of defense counsel by MedPro. But MedPro appointed its own defense lawyer to defend Mr. Durfee. It was not required to pay the fees of Mr. Deuprey who Fairway had appointed to defend its co-insured, Mr. Durfee.[3] Although the

[3] Post tender fees devoted to Dr. Chao referred to on cross-examination of Mr. Bischof include those on April 1, 2009, 6.3 hrs. (Exhibit 40, p. F01405); April 15, 2009 (Exhibit 40, p. F01407); April 16, 2009 (Exhibit 40, p. F01407); April 20, 2009; April 23, 29 and 30, 2009 (Exhibit 40, pp. F01408-410). *See also* entries for May 1, May 4, May 5 and May 6, 2009, referring to production of debit and credit card information and "credit charge records of Belo restaurant" (Exhibit 40, pp. F01395 and F01396); May 13 and May 15, 2009 (p. F01398); May 22, 27, 28 and

two carriers could have entered into a sharing agreement, they did not do so. The cases also are clear in that equitable contribution is a remedy to be awarded against a carrier that refuses to defend its insured. California cases apply the equitable contribution remedy only against carriers which refuse to defend their insureds. Fireman's Fund Ins. Co. v. Maryland Cas. Co., 65 Cal. App. 4th 183, 187 (2009).

As the court described it in Scottsdale Ins. Co. v. Century Surety Co., 182 Cal. App. 4th 1023, 1035 (2010):

> "...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 the duty to defend.

Scottsdale Ins. Co. v. Century Surety Co., *supra* at 1035-36.

California cases applying the equitable contribution remedy have done so where one insurance carrier defends and another with an obligation to defend refused. Fireman's Fund Insurance Ins. Co. v. Maryland Casualty Co., 65 Cal. App. 4th at p. 1293; Scottsdale Insurance Co. v. Century Surety Co., 182 Cal. 4th 1023, 1029 (2010) ("Frequently, Century would decline to petition in the defense and indemnity of the insured, often relying on one of two endorsements to its policies...will Century declined to participate in the defense and indemnity of the common insureds, Scottsdale and other insurers did so."); Howard v. American Nat'l Fire Ins. Co., 187 Cal. App. 4th 498 (2010) (Carrier breached its duty to defend and was required to contribute to the defending insurers). "It is well

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29, 2009 (Exhibit 40, p. F01399-400).

established that an insurer that defends the insured is entitled to equitable contribution from a coinsurer that *fails* to defend." Howard v. American Nat'l Fire Ins. Co., 187 Cal. App. 4th 498, 522 (2010). (Emphasis supplied).

It is undisputed here that MedPro defended its insured and was doing so at the time the case settled (Fact 70). There was no evidence that the defense provided by MedPro through the Neil Dymott firm was anything else than satisfactory. There is no equitable basis to make MedPro pay for Mr. Durfee's entire defense or to relieve Fairway of its clear duty to defend Mr. Durfee.

Fairway's claim for equitable subrogation or indemnity does not alter this conclusion. Accordingly, the Court denies Fairway's request for post-tender attorney's fees.

3. The Settlement Sum

A. Fairway's Claim To Be "Excess"

Fairway first argues that the settlement payment should be 100% paid by MedPro because Fairway claims its policy is "excess" to MedPro's policy, rendering MedPro a primary carrier that would owe the full payment. Fairway rests this argument on Section 12 of its policy. The Fairway policy was introduced as Exhibit 1. But the language upon which Fairway relies, that makes other policies providing coverage under extended reporting and similar provisions, is expressly stated to apply only to "prior" policies (Exhibit 1, quoted in Fairway's Trial Brief, p. 21:4-5). Fairway cannot rely upon this provision because MedPro's policy (Exhibit 2) states that it "incepted" on January 3, 2008 (Fact 63). That was two days after the Fairway policy expired. Under no stretch of contract construction or common sense can MedPro's policy be deemed "prior" to Fairway's. There was no testimony on this issue from either witness at trial. The Court applies a common sense construction that would normally be used by any policyholder. No policyholder would conclude that a policy that came into existence after the Fairway

policy was a "prior" policy to Fairway's policy. Fairway's policy is therefore not excess.[4]

B. Fairway's Claim That 100% Of The Settlement Benefitted Mr. Durfee

Fairway contends MedPro should reimburse Fairway the entire settlement amount. Fairway, however, did not present anything less than a demand for 100% of the settlement (Fairway's Trial Brief, p. 26:14-15), and provided no proof as to what amount other than 100% would be MedPro's fair share.

The Court cannot speculate as to what the "fair share" might be. It was Fairway's burden of proof to establish that it paid "more than its fair share" on behalf of Mr. Durfee in settling the matter for $250,000 for the benefit of Dr. Chao and Mr. Durfee. Fairway conceded during closing argument that Dr. Chao was exposed to liability in the underlying medical malpractice case by Mr. Fagan. Accordingly, Fairway concedes that at least some of the settlement sum was for or on behalf of Dr. Chao. Fairway simply has provided no evidence proving how much that amount is.

In reviewing the conflicting positions of the parties, the Court notes that Mr. Bischof testified that he believed the evidence justified a settlement for both Dr. Chao and Mr. Durfee. Mr. Bischof is the claims manager for Fairway and acknowledged on cross-examination that he was the single employee of the company providing those claims services to Fairway other than clerical personnel. Ms. Jill Mickelsen has been a member of the California Bar since 1983, participated in some medical malpractice trials, and resolved medical malpractice claims against insureds of MedPro. She stated that she had been involved in cases involving lower extremity amputations prior to the Fagan case. Both Mickelsen and Bischof acknowledged receiving information from appointed defense counsel, but the attorney-client privilege had prevented the introduction of evidence of those direct oral and emailed communications. Similarly, although a

[4] Both policies also have "other insurance clauses" purporting to make each policy "excess" of other insurance. Those clauses cancel each other out. Fireman's Fund, 65 Cal. App. 4th 1279, 1304-05 (1998).

plaintiff's preliminary damage study was introduced, no expert reports from the defendants were introduced.

MedPro maintains that it is impossible for this Court to apply any equitable remedy in this action, because it was not a recalcitrant carrier, but was defending its insured, Mr. Durfee. The equitable contribution remedy, MedPro maintains, has no application to a case where an insurer is defending its insured. MedPro insists that Fairway is not entitled to "hijack" MedPro's right to defend its insured and handle its case as it deems appropriate.

MedPro points out, moreover, that the case settled with extraordinary celerity only after the production of the redacted "Belo Nightclub" receipt, plaintiff's threat to amend the complaint to sue Dr. Chao for punitive damages, and plaintiff's demand for the production of the unredacted receipt. That unredacted receipt would have disclosed the purchase on Dr. Chao's credit card of a bottle of vodka at 1:45 a.m., approximately when the Stryker test was being performed by the ER nurse after a one hour and 15 minute delay. It was conceded by Mr. Bischof on cross-examination that following the settlement, defense lawyer Dan Deuprey, who was appointed by Fairway to defend Dr. Chao and Mr. Durfee, exerted various efforts to try and keep the redacted receipt that had been produced "confidential."[5] MedPro also pointed out, and it was stipulated, that at the time of the settlement, Dr. Chao was facing another medical malpractice claim defended by the same lawyer, Mr. Deuprey, and that he was also currently under investigation by California Medical Board.

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[5] Three days before the settlement on July 20, Fairway's defense lawyer, Mr. Deuprey, shows activity concerning the need for a protective order and drafts of order for the Arbitrator on various subjects arising out of the hearing on April 16, 2009, where the credit card receipt was ordered produced (*see* Exhibit 40, entries for 7/16 and 7/17/2009, p. F01384); and after the settlement was consummated on July 28, 2009, discussing "confidentiality orders as to Dr. Chao's credit card" and 7/30/09 "telephone conference with Dr. Chao's attorney Lucas Pick regarding settlement agreement and confidentiality orders..." (Exhibit 40, p. F01386). These and other entries also establish to the Court's satisfaction that Fairway has not established that it paid "more than its fair share" in attorney's fees and costs for Mr. Durfee. Dr. Chao was of course not an insured of MedPro and MedPro had no responsibility for fees and costs paid solely for Dr. Chao's benefit.

There is no basis to find that Mr. Durfee was "more responsible" than Dr. Chao, if he was at all. Fairway concedes it never received a report comparing the strength of Fagan's case against Dr. Chao with that of Mr. Durfee. (Fact 72). The suggestion that Dr. Chao might not have returned to the hospital because he was told that the patient had a "weakening" pulse, for example, is unsupported and contrary to Dr. Chao's own stated reason for not returning. The nurses' notes relied upon by Fairway reflected Dr. Chao told the nurses he was "unable" to come in (Exhibit 3). Dr. Chao also testified at his deposition in 2008 that he was "driving to Los Angeles" to see his mother (Stipulated Fact No. 40). At no time did Dr. Chao testify that he failed to return to the hospital because he was misapprised of the situation. It was also stipulated that Dr. Chao had no criticisms of Mr. Durfee.

Although reasons may have existed supporting a liability claim against Mr. Durfee, the ones identified by Fairway at trial do not appear to be supported by the records. The claim that Mr. Durfee should have called Dr. Chao before midnight is inconsistent with the evidence. Fagan stated on July 17, 2009 that plaintiff did not contend the artery became obstructed before midnight on February 10, 2007, but only "on or shortly after midnight around 24:00 hours" (Exhibit 67, p. 5). Mr. Fagan's pulse was also unchanged as shown by the "Extremity Neurovascular Assessment Record."

Given the undisputed evidence, this Court must conclude that Dr. Chao obtained a substantial benefit from the settlement and knew he would do so notwithstanding the lack of his consent. This Court must also conclude that concern over the effect of the disclosure of the Belo Nightclub receipt was a substantial motivation for the settlement.

This does not mean that Mr. Durfee may not have benefitted from the settlement. But Fairway has not met its burden of proof in establishing that its settlement payment of $250,000 was "more than its fair share" for its insured, Mr. Durfee. Fairway did not produce proof identifying any discrete portion of the settlement that it contended constituted the settlement of Fagan's claims against Mr. Durfee. Accordingly, the Court is left to speculate as to what portion of the settlement benefitted Mr. Durfee, and what

portion benefitted Dr. Chao. It is clear that both obtained the benefit of a dismissal. It is not clear, however, that in paying the settlement and obtaining the dismissal of its insureds that Dr. Chao, was not primary beneficiary of the settlement.

The Court is no position to allocate the settlement as between the two insureds, and Fairway made no effort to do so. Accordingly, Fairway has failed to meet its burden of proof in establishing that it paid "more than its fair share" of the settlement of the claims against Mr. Durfee.

MedPro also notes that its policy prohibited settlement without its consent, and "absent compelling equitable reasons, court should not impose an obligation on an insurer that contravenes a provision of its insurance policy." One Beacon at 199, *quoting*, Unigard, *supra*, 79 Cal. App. 4th at 794. MedPro did not consent to the settlement.

C. Fairway's Equitable Subrogation Theory

Fairway points to Meritplan Insurance Company v. Universal Underwriters Insurance Co., 247 Cal. App. 2d 451 (1966) to sustain its position that it is entitled to contribution.

Unlike the present case, Meritplan involved a single driver sued for an accident and insured by two insurers. The Court of Appeal considered the claim to be based on an equitable subrogation theory (the "right of one insurer to be subrogated to its insured's claims against a co-insurer," at p. 464) and suggested that contribution to the settlement would be proper against the second insurer, which had no notice of the settlement. The court reasoned that failure to grant contribution under the equitable subrogation theory would enrich the "unknown as well as the recalcitrant carrier." Id. at 467.

Meritplan is not helpful to Fairway for several reasons.

First, subrogation claims place the insurer in the shoes of the insured, and allows MedPro to defend the claim as if it were pursued by the insured. Great American Insurance Companies v. Gordon Trucking, Inc., 165 Cal. App. 4th 445,451 (2008).

The MedPro policy specifically prohibited the insured (Mr. Durfee) from settling a claim without MedPro's consent (Exhibit 2). It was stipulated that Fairway settled the case without MedPro's consent or approval while MedPro was defending Durfee (Facts 69 and 70). Fairway did not demand contribution from MedPro before it settled the case (Fact 68). Fairway did not believe that Mr. Durfee's own consent even applied to MedPro (Fact 88). Fairway therefore had no right to settle without MedPro's consent, since Mr. Durfee had no such right. Great American Insurance Companies, Inc., *supra*, at 451: "...an insurer cannot acquire anything by subrogation to which the insured has no right, and can claim no right the insured does not have."

Since Mr. Durfee had no right to incur fees or settle without MedPro's consent, Fairway cannot recover under an equitable subrogation theory. The settlement by Fairway is thus a volunteer payment under the subrogation law, for which MedPro is not responsible, since MedPro's policy prohibited a voluntary settlement payment by the insured with MedPro's consent (Exhibit 2).

The same is true as to Fairway's demand for attorney's fees: the MedPro policy states that no such fees may be incurred by the insured (Mr. Durfee) and under a subrogation theory, Fairway stands in the shoes of Mr. Durfee under a subrogation theory and may not recover voluntary payments it made before tender. Nor may it recover post tender payments since MedPro appointed counsel to defend Durfee.

Second, even if Fairway could assert an equitable subrogation claim, it again provided no evidence as to the amount to which it would be entitled. Meritplan involved a single insured, where settlement contribution could be resolved based on objective indicators such as the varying sizes of the policies or time on the risk. Here, Fairway settled the Fagan case on behalf of the co-insured, Mr. Durfee, and also on behalf of Fairway's insured, Dr. Chao, who was insured only by Fairway. MedPro had no obligation to contribute to the settlement on behalf of Dr. Chao, whom it did not insure.

Fairway presented no proof of the amount of the settlement that was for the benefit of its insured, Dr. Chao, even though Fairway conceded that Dr. Chao faced a finding of some liability, and thus clearly benefitted from the settlement that dismissed him.

MedPro also argues that Fairway is prevented as a matter of law from settling a claim being defended by a participating carrier and then subsequently demanding equitable contribution for a settlement against a carrier that never consented to it. While this argument may have merit since equitable contribution is intended for use against a carrier that refuses to defend its insured, the Court need not reach the merits of this argument given its decision that Fairway failed in meeting its burden of proof.

Accordingly, Fairway's request for equitable contribution, indemnity and/or equitable subrogation is denied. Judgment will be entered in favor of MedPro and against Fairway.

DATED: 7/8/11

HONORABLE BERT GLENNON, JR.
JUDGE OF THE SUPERIOR COURT