ABJURING THE COLLATERAL INDEMNITY EXCEPTION TO INSURER CONTRIBUTION

JOSEPH LAVITT†

I. INTRODUCTION 1333
II. ORDERING CO-EXTENSIVE INSURANCE COVERAGE 1334
A. The Origins of Equitable Contribution by Co-Insurers 1334
B. Distinguishing Equitable Subrogation from Equitable Contribution 1344
III. THE COLLATERAL INDEMNITY EXCEPTION 1349
A. The Origins and Rationale for a Collateral Indemnity Exception to the Customary Rules of Insurer Contribution 1349
B. Dysfunctional Outcomes Promoted by the Collateral Indemnity Exception Arise From a Failure to Properly Distinguish Equitable Subrogation from Equitable Contribution 1353
IV. ABJURING THE COLLATERAL INDEMNITY EXCEPTION 1360
V. CONCLUSION 1364

I. INTRODUCTION

In recent years, courts throughout the United States have sought unsuccessfully to clarify whether a contract requiring one party (the promisor) to obtain liability insurance in favor of another (the promisee) supplants a liability insurance policy procured by the latter. This issue educes markedly divergent judicial opinions. A dominant approach turns on whether the promisor also agreed to indemnify the promisee. If so, courts in most jurisdictions will find the issuer of a liability policy procured by the promisor solely liable for sums owed co-extensively by the issuer of a liability policy procured directly by the promisee.

Drawing on the terms of an indemnity contract collateral to the operative insuring agreements to inform the reciprocal obligations of two (or more) insurers is an injudicious exception to the usual method of apportionment. Usually, coverage afforded by more than one policy of liability insurance is apportioned according to the doctrine of equitable

† Lecturer, University of California, Berkeley, School of Law. A.B., 1980, University of Georgia (Athens); J.D., 1984, University of California Berkeley School of Law (Boalt Hall). Lavitt teaches Torts and Insurance Law. The author wishes to acknowledge the contributions of his research assistant, Alexander Bandza, and the numerous instances of superlative work by the editors of the Wayne Law Review.

contribution. Courts, exercising jurisdiction in equity, generally require insurers to contribute to a co-extensively insured loss according to a loosely defined, but reasonably discernible, range of judicially-determined considerations. The conventional objective of such apportionment is to recognize and enforce the insurers' co-extensive obligations, not excuse them.

This Article provides a fresh perspective on a court's exercise of equitable powers to relieve an insurer entirely of its contractual obligation based on a co-extensive obligation contractually owed by another to its insured. The competing claims that arise in these circumstances can be resolved only by understanding principles of tort and contract law as malleable in equity into a fused amalgam. The so-called "collateral indemnity" exception to equitable contribution instead dwells outside these fitting restraints. Unstated but inherently flawed views about equitable jurisdiction have roused in these instances a misguided theory of exculpation that was doomed from the outset to fail on both theoretical and practical grounds.

II. ORDERING CO-EXTENSIVE INSURANCE COVERAGE

A. The Origins of Equitable Contribution by Co-Insurers

Liability insurance is an agreement by which one party, an insurer, commits to pay on behalf of another, its insured, sums of money the insured becomes legally liable to pay a third party as a result of a claim or suit.[1] The obligation of an insurer to pay such sums is nearly always accompanied by the obligation to furnish a defense on behalf of its insured.[2] When liability coverage with respect to the same suit is

1. Persons other than insurers can and do agree to "indemnify" or make good the loss of another suffered as a result of a claim against the other by an injured third party. *See, e.g.*, CALIFORNIA CIVIL CODE ANN. § 2778 (West 2010) (rules for interpretation of a contract of indemnity). A contract of indemnity need not be an insurance policy. *See generally, e.g.*, Rossmoor Sanitation Inc. v. Pylon, Inc., 119 Cal. Rptr. 449, 451 (Cal. 1975). This Article will refer to a promise to indemnify another (by a party other than an insurer) as an "indemnity contract;" a promise to indemnify another by an insurer will be referred to as a "liability insurance policy." Any payment made on behalf of an indemnitee (pursuant to either an indemnity contract or a liability insurance policy) is commonly known as "indemnification." 42 C.J.S. *Indemnity* § 1 (2011) ("In a contract of indemnity, the indemnitor, for a consideration, promises to indemnify and save harmless [the] indemnitee against [the] liability of [the] indemnitee to a third person or against loss resulting from such liability.").

2. The duty to indemnify is nearly always accompanied by a duty to furnish a defense against claims by a third party against the indemnitee. *See, e.g.*, Certain Underwriters at Lloyd's of London v. Superior Court (Powerine), 24 Cal. 4th 945, 958

available to the same insured pursuant to two or more or more equally applicable liability insurance policies, a question arises about how to allocate the co-extensive obligation of the insurers.

Uncertainty about the obligations of co-extensive liability insurers was rarely encountered prior to the widespread imposition of liability based on fault. In the United States, during the late nineteenth and early twentieth century, the prospect of sometimes ruinous liability, which arose out of ever more of the ordinary activities of daily life, drove the development and demand for liability insurance.[3] Owing to the *ad hoc* nature of this development, the co-extensive liability of insurers was not fully anticipated.

The co-extensive liability of insurers was first encountered with some frequency with respect to policies covering liability arising out of the use of automobiles.[4] An automobile driver might be covered under her own liability policy while operating the vehicle of another, but also covered under the vehicle owner's policy as a "permissive user."[5] Upon

---

(2001) (noting "[t]he duty to indemnify and the duty to defend are correlative" but not "coterminous" (quotation marks omitted)); English v. BGP Int'l, Inc., 174 S.W.3d 366, 370 (Tex. Ct. App. 2005). Some courts will not use the term "indemnity" to connote sums paid for the defense of claims. *See, e.g.*, Colonial Oil Indus. v. Underwriters Subscribing, 491 S.E.2d 337, 339 (Ga. 1997). These courts view the costs of defense as an expense for a service defrayed by the indemnitor and not as a "loss" of the indemnitee that must be paid by the indemnitor to a third party on behalf of the indemnitee. *See, e.g.*, *id.* at 339 ("The breach of the duty to defend . . . should not enlarge indemnity coverage beyond the parties' contract. This rule . . . recognizes that the duty to defend and the duty to pay are independent obligations."). This Article focuses on liability insurers' duty to indemnify.

3. *See generally* KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11 (2008). Professor Abraham observes that as the incidence of accidental injury increased in the industrializing economy of late nineteenth century America, tort claims became much more common and compensating victims was increasingly recognized as an independent and important function of tort law. As a consequence, the demand for liability insurance increased. *Id.* at 14.

4. *See, e.g.*, Fireman's Fund Ins. Co. of Newark v. Cont'l Cas. Co., 339 P.2d 602, 603 (Cal. Dist. Ct. App. 1959) (deciding an action by the liability insurer of a truck owner against the liability insurer of the truck owner's lessee that sought contribution to the amount the owner's insurer paid under a judgment arising out of the negligent operation of the leased truck by the lessee).

5. *See generally* 2 CALIFORNIA INSURANCE LAW DICTIONARY & DESK REFERENCE § 32 (2011). An "omnibus clause" in the typical automobile insurance policy extends liability insurance to individuals who use the covered vehicle with the permission of any person named in the policy. 7 AM. JUR. 2d *Automobile Insurance* § 224 (2011). By way of illustration, an "omnibus clause" might state that "anyone is an insured while using with your permission a covered auto you own, hire or borrow." *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. GTE Hawaiian Telephone Co., Inc., 915 P.2d 1336, 1345 (1996) (brackets and ellipses in original omitted). Today, extension of coverage under an

suit for negligently caused harm, the driver thus might claim a defense and right to indemnity from either of the two equally obliged insurers.[6]

Insurers quickly observed that co-extensive coverage was unnecessary so long as the interests of the insured were fully protected by at least one of the potentially applicable policies.[7] As a result, insurers began inserting "other insurance" provisions into liability policies.[8] These "other insurance" clauses were intended to limit or entirely

---

omnibus clause is mandated by statute in the majority of states. 1 AUTO. LIABILITY INS. 4th § 3:9 (2011).

6. *See, e.g.*, Fireman's Fund Ins. Co. v. Md. Cas. Co., 65 Cal. App. 4th 1279, 1297 (1998) (noting that "where there are multiple primary liability insurance policies covering the same risk[,] each insurance carrier has an independent obligation to indemnify . . . the insured"). An insured may not be aware of all potentially available insurance coverage. Or, an insured may purposefully single out one of several potentially responsible insurers for indemnity. For example, the insured may ask the insurer to which the insured paid a premium to cover a loss, or the insurer with the greater limits, or the insurer with a lower deductible. Or, an insured might prefer to tender the claim to an insurer to which it does not pay a premium (instead of its own insurer) to mitigate its loss history—and consequently its premiums. *Cf.* Gary D. Nelson, *"Additional Insured" Endorsements: Conflicting Expectations*, 24 THE BRIEF 29 (1995). The insured's choice may be for a good reason, or for no reason at all. Irrespective of the insured's choice to target one insurer only, upon discovery of any other applicable insurance, a targeted insurer may demand that the loss be shared by any other insurer that issued a policy equally obliged to indemnify the insured.

7. *See* Douglas R. Richmond, *Issues and Problems in "Other Insurance," Multiple Insurance, and Self-Insurance*, 22 PEPP. L. REV. 1373, 1379 (1995). ("If a single policy will cover a claimed loss . . . the potential involvement of two or more insurers matters little to the insured.").

8. "Other insurance" clauses were first included in property insurance policies in order to prevent over-insurance (and a consequent opportunity for fraud). State Farm Mut. Auto. Ins. Co. v. Bogart, 717 P.2d 449, 451 (Ariz. 1986). Dating precisely the advent of "other insurance" clauses has been the subject of some scholarly interest. See Robert B. Billings, *Other Insurance Provision of the Automobile Policy*, 1949 INS. L.J. 498, 499 (1949) (noting that "[t]he history of ["other insurance"] provisions is unchartered"). At least by 1947, the International Association of Insurance Counsel noted the inclusion of "other insurance clauses" in automobile liability insurance policies:

> At one stage in the development of the automobile policy it covered only the legal liability of the named insured. This bodily injury liability and the property damage liability insurance soon was extended to insure the legal liability of anyone operating the described automobile with the permission of the named insured. A few restrictions were incorporated in this extension, one of them being the provision that the insurance provided the additional insured would not apply if such insured had any other valid and collectible insurance.

Fletcher B. Coleman, *Interpretation Of Drive Other Car And Other Insurance Provisions In Automobile Policy*, 15 INS. COUNSEL J. 30, 31 (1948).

disclaim the obligation of an insurer to pay any sums owed co-extensively by another insurer.[9]

There are three general types of "other insurance" clauses.[10] One, known as a "*pro rata*" clause, is a relatively benign provision, which, at least in theory, promotes cooperation among co-extensive insurers. A "*pro rata*" provision requires an insurer to contribute with co-extensive insurers an objectively determined share of the total amount of loss.[11] The legacy of relatively ancient principles governing contribution by jointly and severally liable tortfeasors resonates in this type of "other

9. *See, e.g.*, Carriers Ins. Co. v. Am. Policyholders' Ins. Co., 404 A.2d 216, 218 (Me. 1979) (observing that "[t]he original purpose of other insurance clauses has little relevance, therefore, to automobile liability insurance other than to limit, reduce, or avoid an insurer's loss in those cases where there is multiple coverage"); *see also* Note, *Concurrent Coverage in Automobile Liability Insurance*, 65 COLUM. L. REV. 319, 320 (1965) (asserting that because "the temptation to over-insure is not present in the purchase of liability insurance, [other insurance] clauses function solely to reduce or eliminate the insurer's loss in the event of concurrent coverage of the same risk").

10. *See, e.g.*, St. Paul Fire & Marine Ins. Co. v. Am. Home Assurance Co., 495 N.W.2d 814, 816 (Mich. Ct. App. 1992) (discussing the three types of other insurance clauses).

11. *See, e.g.*, KENNETH S. ABRAHAM, INSURANCE LAW AND REGULATION CASE AND MATERIALS 683-88 (5th ed. 2010) (quoting from a common automobile liability insurance policy form as follows: "Other insurance. If there is other applicable insurance we will pay only our share of the loss. Our share of the loss is the proportion that our limit of liability bears to the total of all applicable limits."); *see also id.* at 466-76 (quoting from a common general liability insurance policy form as follows: "Other Insurance . . . . If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach, each insurer contributes equal amounts until it has paid its applicable limit of insurance, or none of the loss remains, whichever comes first."). The latter method is known as the "graduated maximum limits" approach. *See* H. Walter Croskey, Rex Heeseman, Susan M. Popik & Christina J. Imre, *Contribution Between Insurers*, CALIFORNIA PRACTICE GUIDE: INSURANCE LITIGATION, Ch. 8B, § 8:132 (2011) ("[the] graduated maximum limits [approach requires] all insurers on the risk [to] pay an amount equal to the lowest policy limits (exhausting the liability of the insurer with the lowest limits); they then pay an amount equal to the next lowest policy limits (exhausting that insurer's liability), etc."). Some courts have stated that this approach is the most logical and fair means to apportion co-extensive liability insurance. *See, e.g.*, *Carriers*, 404 A.2d at 221 ("The . . . rule adopted by the presiding Justice utilizes the best aspects of [the available] approaches without the limitations . . . . [I]t is easy to administer. It would simply require each company to contribute equally until the limits of the smaller policy were exhausted, with any remaining portion of the loss then being paid from the larger policy up to its limits . . . . [T]his Solomon-like approach comports with a most basic sense of justice. *See Exodus* 21:35 ('When one man's ox hurts another's ox so badly that it dies, they shall sell the live ox and divide this money as well as the dead animal they shall divide equally between them.')").

insurance" clause.[12] If possible, courts will usually eagerly enforce such clauses as written.[13]

The other two principal types of "other insurance" clauses are not as beneficent. Indeed, in practice both are quite pernicious. These are the so-called "excess" and "escape" clauses.[14] By means of these provisions, insurers disclaim, in whole or part, the obligation to pay if other insurance is available to the insured.[15] An "excess other insurance clause" provides that the insurer's obligation to pay will arise only after all other equally available insurance is exhausted.[16] An "escape other

---

12. *See generally* 7A AM. JUR. 2D *Automobile Insurance* § 560 (2012). Apart from joinder requirements, at first blush, the *pro rata* method of apportioning co-extensive liability insurance appears to be similar in effect to finding tortfeasors jointly and severally liable. Pursuant to classic tort doctrine, an injured party may obtain full compensation for an indivisible injury from any jointly and severally liable tortfeasor. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 10 (2000). Having paid more than its *pro rata* share, that tortfeasor may then obtain equitable contribution from any other jointly and severally liable party. *See id.* § 23. This time-honored exercise of judicial rule-making powers dates back to when the courts somewhat crudely, but simply, counted the number of jointly and severally liable defendants, and divided the judgment among them. *See, e.g.*, PROSSER, WADE & SCHWARTZ, TORTS 748 (12th ed. 2010) ("As jurisdictions recognized contribution among joint tortfeasors, they applied a rule of allocation, by analogy to contribution among sureties, on an equal division basis—half and half if there are two tortfeasors, by thirds if there are three, and so on. With the advent of comparative negligence, most jurisdictions have changed and make the division according to the relative fault of the parties." *Accord* UNIFORM COMPARATIVE FAULT ACT AND RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 23(b), cmt. (2000) (*pro rata* apportionment of tort judgment among responsible parties).").

13. *Id. See also* J. Stephen Berry & Jerry B. McNally, *Allocation of Ins. Coverage: Prevailing Theories and Practical Applications*, 42 TORT TRIAL & INS. PRAC. L.J. 999, 1006–08 (2006-2007) (discussing J.H. France Refractories Co. v. Allstate Insurance Co., 626 A.2d 502 (Pa. 1993), a "landmark precedent applying the joint-and-several approach"). Commentators have noted that a "several liability" approach to the allocation of co-extensive insurance affords the policyholder "control, allows less finger-pointing among potentially liable insurers, and permits an insured to avoid problematic terms in one insurer's policy (e.g., exclusions, conditions, and especially deductibles) by relying in full on another insurer's nonproblematic policy." *Id.* at 1006–07.

14. *See* Richmond, *supra* note 7, at 1385-87.

15. 7A AM. JUR. 2D *Automobile Insurance* § 565 (2012).

16. An "excess other insurance" clause that seeks to avoid any and all liability in the event other insurance applies to the loss is completely different from an "excess insurance policy." An "excess other insurance" clause is not a feature of an "excess insurance policy"—the latter is a type of insurance policy intended from the outset to pay on only an excess basis. *See, e.g.*, Century Sur. Co. v. United Pac. Ins. Co., 135 Cal. Rptr. 2d 879, 883-85 (Cal. Ct. App. 2003) (stating that "[t]here is a distinction between primary and excess insurance coverage that must be first understood. '*Primary* coverage is insurance coverage whereby, *under the terms of the policy*, liability attaches *immediately* upon the happening of the occurrence that gives rise to liability . . . . '*Excess*' or *secondary* coverage is coverage whereby, *under the terms of the policy*, liability attaches

insurance clause" vitiates entirely the coverage for which the insured paid if any other policy provides the same coverage.[17] Both of these "other insurance" provisions, in effect, deny "first-dollar" coverage to the insured if co-extensive insurance is applicable and available.[18]

Of course, if only one applicable policy contains an "excess" or "escape" clause, there is no impediment to enforcing the co-extensive policies as written.[19] But, if two or more policies with "escape" or "excess" clauses are enforced as written, then the co-extensive insurers' obligations will never arise.[20] As literal enforcement of two (or more) otherwise applicable insurance policies containing "excess" or "escape" provisions results in no first-dollar coverage under any of the policies, courts have strictly scrutinized attempts by insurers to enforce such clauses.[21]

---

only after a predetermined amount of primary coverage has been exhausted . . . . In short, excess insurance is insurance that is expressly understood by both the insurer and insured to be secondary to [other] coverage which will not begin until *after* that [other] coverage is exhausted and which does not broaden that underlying coverage . . . ."); Hanson v. St. Paul Fire and Marine Ins. Co., No. CV 10-1161-PK, 2011 WL 1086528 (D. Or. Mar. 22, 2011) ("'[E]xcess' liability policies are those 'classic' or 'true' excess policies that only provide coverage above the known limits of a primary policy purchased by the same insured."). Notwithstanding the foregoing, if enforced, an "excess other insurance" clause may indeed in effect convert a primary policy to secondary coverage if other insurance also provides primary coverage.

17. An escape clause seeks to avoid any and all liability in the event other insurance applies to a loss. *See, e.g.*, *Carriers*, 404 A.2d at 218 ("[A]n 'escape' clause, seeks to avoid all liability [if other insurance applies to the loss].").

18. *See, e.g.*, *Hanson*, No. CV 10-1161-PK, 2011 WL 1086528 ("[P]olicies containing . . . "other insurance" clauses ordinarily provide primary coverage from the first dollar of a loss, except when other collectible insurance exists . . .").

19. *See* Richmond, *supra* note 7, at 1388 (where one policy contains an other insurance clause (of any type) and the other does not, courts "generally give effect to the lone 'other insurance' clause."); 7A AM. JUR. 2D *Automobile Insurance* § 570 (2012) (provided that only one policy of two or more applicable policies contains an other insurance clause, the provision can be given effect "as written.").

20. *See, e.g.*, Federal Ins. Co. v. Atlantic Nat. Ins. Co., 25 N.Y.2d 71, 75-76 (N.Y. 1969) (noting "If we were to take the language literally and give effect to each of these 'other insurance' clauses, we would be required to conclude that neither policy provided primary coverage. But that would be a logical impossibility since, quite obviously, there can be no excess insurance absent a policy providing primary coverage and, in the absence of such other policy, each would be primary."); Richmond, *supra* note 7, at 1391 & n.71 (noting the judicial discomfort if "courts enforced competing escape clauses" because "insureds would be left without coverage").

21. Indeed, courts have been openly hostile to the enforcement of other insurance clauses in liability policies which, in effect, allow an insurer to avoid entirely the duty to indemnify owing to the fortuitous obligation of another insurer. *See, e.g.*, Richmond, *supra* note 7, at 1385; Penton v. Hotho, 601 So. 2d 762, 764 (La. Ct. App. 1992) (terming an "excess" clause a "self-serving provision"); CSE Ins. Group v. Northbrook Property &

When the issue of self-cancelling, co-extensive liability insurance coverage first came before them, principally in the context of motor vehicle coverage, judges sought to maintain a perceived bright-line distinction between contract and tort law.[22] Because liability under an insurance policy is strictly contractual, that liability is at least theoretically the product of the mutual assent of the contracting parties.[23] Thus, unlike obligations that arise in law as a result of wrongdoing, the obligations of co-extensive liability insurers were not, at least initially, thought by judges to be subject to remodeling. Remedies based on notions of fairness and obligation—such as equitable contribution among joint tortfeasors—were not thought to be the preferred solution to the problem that co-extensive insurance coverage presented.[24]

Accordingly, when first confronted by the issue of co-extensive insurance, courts attempted mightily to construe the terms of co-extensive liability policies using the traditional maxims of contract construction. These attempts sought principally to characterize one of the potentially applicable policies as the "primary" policy applicable to a loss, i.e., to identify the insurer obliged to pay first, solely and without contribution from other insurers, until the exhaustion of that insurer's limits of liability.[25] Subtle differences in policy language were said to permit judicial distinctions that would putatively support the pretext of enforcing the policies "as written."[26] Courts employed the maxims of contract construction to this end, to impose "primary" liability on the insurer: first in time,[27] with the more particular provisions,[28] or the less specific "other insurance" clause.[29]

Casualty Co., 23 Cal. App. 4th 1839, 1845 (Cal. Ct. App. 1994) (noting that "public policy disfavors 'escape' clauses, whereby coverage purports to evaporate in the presence of other insurance").

22. *See* Susan Randall, *Coordinating Liability Insurance*, 1995 WIS. L. REV. 1339, 1341 (1995) (noting that "concerns about the ease of [judicial] decision-making" in cases of co-extensive insurance coverage impelled courts to resort to a "conceptually inappropriate contract paradigm").

23. 17A AM. JUR. 2D *Contracts* § 19; 1A COUCH ON INS. § 17:1 (2011).

24. *See* Randall, *supra* note 22.

25. Marcy Louise Kahn, *The "Other Insurance" Problem*, 19 FORUM 591, 595–96 (1983-1984) ("[Pursuant to] the primary versus secondary coverage theory . . . full liability [is] imposed on the primary insurance carrier.").

26. *See* ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, *Understanding Insurance Law* 714 & n.243 (4th ed. 2007) (providing exemplar authorities).

27. *See, e.g.*, *Auto. Ins. Co. of Hartford*, 109 F.2d at 536 ("The policy in suit, when issued . . . constituted primary insurance . . . . Such, thereafter, it continued to be unless the policy later taken out by [by the insured] worked a change in the contractual obligations of [first insurer].").

28. *See, e.g.*, Trinity Universal Ins. Co. v. Gen. Accident, Fire & Life Assurance Corp., 35 N.E.2d 836, 838 (Ohio 1941) (stating that "[f]irst it must be observed that the

But the struggle to keep faith with contract principles proved to be impractical. For as soon as courts identified one aspect of a policy different from another thought to justify characterization of that policy as the primary policy, insurers rushed in response to amend the key language of future policies to avoid that characterization in later cases.[30] As courts engaged in ever more precise "semantic microscopy" to order the payment by co-insurers based on the language of their policies, the drafters of insurance policies responded by adopting ever more precise other insurance clauses.[31]

Recognizing the futility of the sort of "semantic microscopy" typified by its "other insurance" jurisprudence, one seemingly exasperated court declared:

> We perceive no methodology which is neither arbitrary nor utterly mechanical by which we could rationally resolve the enigma of which policy should be given effect over the other . . . . This goal can be achieved only by abandoning the search for the mythical "primary" insurer and insisting instead that both insurers share in the loss.[32]

---

coverage provided by the policy of the defendant company is general while that named in the policy issued by the plaintiff is specific. The latter is limited strictly to liability for bodily injury or death accidentally arising from operation of the truck. The former covers liability for any accidental bodily injury, including death, occurring anywhere on the premises of the insured. Hence, under the general rule the specific insurer is primarily liable.").

29. *See, e.g.*, Zurich Gen. Accident & Liab. Ins. Co. v. Clamor, 124 F.2d 717, 719 (7th Cir. 1941) (stating "[t]hat [whether] each of said policies was in force at the time of the accident is not questioned. It is also beyond dispute that either of said insurers would be liable except for the policy of the other . . . . The old controversy as to which came first, the hen or the egg, would be almost as easy of solution as the instant problem . . . . There are cases that have held or indicated, under somewhat similar circumstances, that the specific language is controlling over the general. We think that construction should be applied in the instant situation."). *See also infra* note 31.

30. *See, e.g.*, Schoenecker v. Haines, 277 N.W.2d 782, 786 (Wis. 1979) (declaring that "by the use of these [other insurance] provisos, insurance companies force courts into a game that ought not, and need not, be played").

31. *See, e.g.*, Ind. Lumbermens Mut. Ins. Co. v. Mitchell, 409 F.2d 392, 393-94 (7th Cir. 1969) (after lamenting that it was compelled by precedent to examine the language used in both insurance policies to determine apportionment of a co-extensive insurance obligation, court held that the policy that provided insurance coverage "but only if no other valid and collectible automobile liability insurance, either primary or excess . . . is available to such person" was excess to a policy that provided "excess insurance over any other collectible insurance" because the former clause included the words "either primary or excess").

32. *See Carriers*, 404 A.2d at 220.

As experience guided them, the greatest number of judges recognized that the canons of contract construction would never adequately resolve the problem of co-extensive insurance coverage. The readily available and viable method to resolve disputes among co-extensive insurers was found in the equitable powers of the courts. In equity, courts could declare other insurance clauses that operate to vitiate coverage "mutually repugnant" and refuse to enforce them at all.[33] The "mutual repugnancy doctrine" was an incredible boon. Once freed from the tethers of the canons of contract construction, courts could order equitable contribution to a loss by co-extensive insurers without any doctrinal restraints at all.[34]

Courts have deployed the equitable power to disregard the "other insurance" provisions of insurance contracts in order to justify nearly any allocation of co-extensive liability insurance coverage.[35] Trial court judges perhaps exceeded the bounds of reason when first experimenting with this newly found discretionary power. For example, some courts ordered contribution in shares measured by the amount of the premium paid for the respective polices, an often completely irrelevant criterion.[36]

---

33. *See, e.g.*, Cargill, Inc. v. Commercial Union Ins. Co., 889 F.2d 174, 178-79 (8th Cir. 1989); Shelter Mut. Ins. Co. v. Am. Family Mut. Ins. Co., 210 S.W.3d 338, 341-42 (Mo. Ct. App. 2006). "Mutual repugnancy" clearly is present if all co-extensive policies contain excess or escape other insurance clauses. 15 COUCH ON INS. §§ 219:47, 219:50 (2011); Randall, *supra* note 22, at 1351 & nn. 44-45. If all co-extensive policies contain pro-rata other insurance clauses, then generally courts do not find the clauses "mutual repugnant" because "[t]here is nothing irreconcilable per se about competing pro-rata other insurance clauses." 15 COUCH ON INS. § 219:45 (2011). The pro-rata-versus-excess or pro-rata-versus-escape clause scenario presents "one of the most controversial conflicts in this area." Jerry & Richmond, *supra* note 26, at 715. The majority approach holds that "the policy with the pro rata clause provide[s] primary coverage and the policy with the excess [or escape] clause provide[s] secondary coverage." *Id.*; Randall, *supra* note 22, at 1350 & nn. 40-42. The minority rule (the so-called Lamb-Weston rule) deems the clauses mutually repugnant and pro-rates the loss. *Id.* at 716-17; Randall, *supra* note 22, at 1351 & n. 43.

34. *See, e.g.*, Allan D. Windt, INSURANCE CLAIMS & DISPUTES: REPRESENTATION OF INSURANCE COMPANIES & INSUREDS, § 7:2 n.2 (2011) (collecting cases); Fireman's Fund Ins. Co. v. Md. Cas. Co., 77 Cal. Rptr. 2d 296, 303-04 (Cal. Ct. App. 1998) (stating that "the right to contribution [in] 'the insurance context' 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 . . . . Where multiple insurance carriers insure the same insured and cover the same risk . . . . [e]quitable 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 . . . .").

35. *Md. Cas. Co.*, 77 Cal. Rptr. 2d at 304.

36. *Compare* Rivere v. Heroman, 688 So. 2d 1293, 1295 (La. Ct. App. 1997) (ordering allocation based on "relative sizes of the premiums . . . .") *with* U.S. Fire Ins.

Other courts ordered contribution measured by the insurers' respective policy limits, which disadvantaged the issuer of a policy with higher limits.[37] And, in some jurisdictions and certain instances, judges chose from the myriad of "equitable" proration schemes, without even the pretense of consistency.

Amazingly, such decisions found (and find) acquiescence in the courts of appeal, even on *de novo* review, and even when recognized as excesses of "equitable jurisdiction."[38] Appellate courts often appear to be hamstrung by old rules of deference to a Chancellor sitting in a court of equity.[39] As discussed in Part III.A., *infra*, there is a discernible reluctance to upset on appeal verdicts allocating insurance coverage, however seemingly bizarre, owing to a fear that the delicate balances sensed in the compromised decisions below might be overturned in the process of reordering a trial court's allocation.

Ultimately, attempts by insurers to avoid the obligation to provide primary insurance if other insurance provides it have proved ineffectual. Though remaining in use today, "other insurance" clauses usually do not

---

Co. v. Fed. Ins. Co., 858 F.2d 882, 886-87 (2d Cir. 1988) (finding allocation by premiums inappropriate because disparity based on type of risks covered). *See also* St. Paul Mercury Ins. Co. v. Lexington Ins. Co., 888 F. Supp. 1372, 1383 (S.D. Tex. 1995) ("'[C]ourts [lack the capacity] to make valid legal determinations of policy intent by measuring the actuarial risks and the allocation of premiums to those risks.'" (quoting Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch., 444 S.W.2d 583, 589 (Tex. 1969))).

37. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Gen. Mut. Ins. Co., 210 So. 2d 688, 696 (Ala. 1968) (stating that loss is prorated "in the ratio which the limits of the policies bear to the total coverage, [so that] the burden imposed on each insurer is generally proportional to the benefit which he received, since the size of the premium is most always directly related to the size of the policy"); *see also* Lamb-Weston, Inc. v. Or. Auto. Ins. Co., 346 P.2d 643, 646 (Or. 1959) (same); *but see* Pac. Indem. Co. v. Federated Am. Ins. Co., 511 P.2d 56, 59 (Wash. 1973) (stating that "in determining that the appropriate method of distributing liability among joint insurers of the same insured is one of prorating liability according to policy limits, we constructed the framework for a simple, and we think appropriate, resolution . . . .") *overruled by* Mission Ins. Co. v. Allendale Mut. Ins. Co., 626 P.2d 505, 507 (Wash. 1981) (stating that "[w]e overrule those cases in which we approved the policy limit rule and now adopt the maximum loss rule.").

38. *See, e.g.*, Centennial Ins. Co. v. U.S. Fire Ins. Co., 105 Cal. Rptr. 2d 559, 565 (Cal. Ct. App. 2001) (stating that "trial courts must maintain equitable discretion to fashion a method of allocation suited to the particular facts of each case and the interests of justice, subject to appellate review for abuse of that discretion.").

39. *Id. See also* Paul M. Coltoff, et al., *In Equity-When Reversed or Set Aside*, 5 C.J.S. APPEAL AND ERROR § 955 n.1 (updated Dec. 2011) ("The fact-findings of the chancellor or equity court will ordinarily be reversed or set aside only where they are clearly wrong, without evidentiary support, against the weight or preponderance of the evidence, the result of legal error, or inconsistent with, or not properly deducible from, conceded, or established subordinate facts.").

accomplish much.[40] Courts embrace and understand the rules of equitable contribution to allow allocation of the duty to indemnify among co-extensive liability insurers in more or less any manner, but some semblance of order has been established. Many jurisdictions have settled on a somewhat logical method to apportion co-extensive coverage, leaving behind the *ad hoc* decisions of the past.[41] The carcasses of those unfortunate litigants whose cases were experimental fodder lie still on the field.

B. Distinguishing Equitable Subrogation from Equitable Contribution

Courts turned to the rules of equitable contribution to resolve the matter of co-extensive insurance coverage, however, with some adjusting, another equitable theory could plausibly have done the job. Conceptually, the doctrine of equitable subrogation—a deceptively simplistic theory—might have been (and to some extent inappropriately has been) re-fashioned to do the work of apportioning co-extensive liability insurance coverage.

By paying sums on behalf of an insured, an insurer is said to be "subrogated" to any rights of its insured to recover those sums from another.[42] The insurer acquires in equity the insured's claims vis-à-vis another (often known as a "third-party obligor") by reason of a constructive equitable assignment by the insured to the insurer.[43] Almost self-evidently, the equitable subrogee's (insurer's) rights in subrogation can "rise no higher" than those of the equitable subrogor (the insured),

---

40. *See* Richmond, *supra* note 7, at 1387-88.

41. The most enlightened approach is known as "graduated maximum limits" apportionment. *See* Croskey, et al., *supra* note 11, at § 8:132.

42. At the outset of any discussion about subrogation by insurers, it must be noted that reference to the "rights" of the insured to recover from another is completely notional, because the rights of a fully compensated insured generally are extinguished by reason of payment on its behalf by the subrogating insurer. *See, e.g.*, Interstate Fire & Cas. Ins. Co. v. Cleveland Wrecking Co., 105 Cal. Rptr. 3d 606, 615 (Cal. Ct. App. 2010) (rejecting claim that insurer's subrogation claim also extinguished by reason of insured's receipt of payment by the insurer); Bramalea Cal., Inc. v. Reliable Interiors, Inc., 14 Cal. Rptr. 3d 302, 305 (Cal. Ct. App. 2004) (stating that "[the insured] admits its attorney fees were entirely paid for by [its insurer] and it has suffered no out-of-pocket loss. Thus, any recovery it might receive from [another that would otherwise have been liable therefor] would be a prohibited double recovery . . . .").

43. 16 COUCH ON INS. § 222:99 (2011); CAL. PRAC. GUIDE INS. LIT. Ch. 8-B § 8:65.1 (2011) ("Unlike equitable contribution and equitable indemnity, equitable subrogation is not a separate cause of action. Rather, it results in the *transfer of a cause of action from one party to another.*").

and the third-party obligor may set up any defense that would have been available had the claim been brought by the insured directly. [44]

Insurer subrogation, as traditionally conceived, has been an all-or-nothing remedy; the loss is shifted entirely from the equitable subrogee to a third-party, or not shifted at all.[45] Thus, in its purest form, a court will permit equitable subrogation by an insurer only if it finds a complete reordering of the relevant obligations to be equitable.[46] Certainly, equity favors a blameless insurer to a third party who caused the insured loss;

---

44. *See, e.g.*, Randall L. Smith & Fred A. Simpson, *Excess Other Insurance Clauses and Contractual Indemnity Agreements Shifting an Entire Loss to a Particular Insurer*, 30 T. MARSHALL L. REV. 215, 217-18 (2004). Smith and Simpson explain the theory of equitable subrogation as follows:

> Although the doctrines of subrogation and contribution are both equitable remedies, they are each nevertheless distinct . . . . Subrogation is the substitution of one person in place of another person so that he/she who is substituted succeeds to the rights of the other in relation to a debt or claim. The "subrogee," or substituted person, is said to become equitably subrogated to the claimant (or "subrogor"), succeeding to the subrogor's rights against a true "obligor," or person primarily liable. The doctrine of equitable subrogation is broad enough to include every instance in which one person, not acting as a mere volunteer or intruder, honors a duty to pay the debt for which another obligor is primarily liable, and which in equity and good conscience should have been discharged by that obligor. The law of insurance subrogation allows insurers to assume their insureds' positions in order to pursue recovery from other third parties who are legally responsible for losses paid by insurers. The right of subrogation is purely derivative. Subrogation allows insurers to acquire nothing to which their insureds have no rights. Insurers entitled to subrogation are therefore in the same position and succeed only to the rights of their insureds. The subrogated insurers are said to "step into the shoes" of their insureds, with no greater rights than their insureds and subject to the same defenses that primary obligors may assert against their insureds.

Id.

45. *See, e.g.*, *Md. Cas. Co.*, 77 Cal. Rptr. 2d at 302-03 stating that:

> The elements of an insurer's cause of action for equitable subrogation are: "(a) the insured suffered a loss for which the defendant is liable . . . ; (b) the claimed loss was one for which the insurer was *not* primarily liable; (c) the insurer has compensated the insured in whole or in part for the same loss for which the defendant is primarily liable; (d) the insurer has paid the claim of its insured to protect its own interest and not as a volunteer; (e) the insured has an existing, assignable cause of action against the defendant which the insured could have asserted for its own benefit had it not been compensated for its loss by the insurer; (f) the insurer has suffered damages caused by the act or omission upon which the liability of the defendant depends; (g) *justice requires that the loss be entirely shifted from the insurer to the defendant, whose equitable position is inferior to that of the insurer;* and (h) the insurer's damages are in a liquidated sum, generally the amount paid to the insured.

Id. (citations omitted) (emphasis added).

46. *Id.*

the equities in the former can be easily said to be "superior," justifying shifting the loss to the latter.[47]

Equitable subrogation in this fashion complements the theory of equitable indemnity perfectly.[48] Equitable indemnity is also a "*loss-shifting procedure.*"[49] Upon discharge of its insured's liability to an injured party, an insurer "stands in the shoes" of its insured to assert any claims its insured might otherwise have brought to *shift* the loss to one who *wrongfully* caused the loss. An insured's claim therefore is not lost by reason of the purchase of insurance, and not extinguished by reason of its insurer's payment.[50]

The remedy of equitable subrogation, as traditionally conceived, thus blends elements of contract and tort law quite elegantly. Equitable subrogation is a quasi-contract theory based on a constructive equitable assignment to an insurer of its insured's notional chose in action against another.[51] Insofar as the theory of equitable subrogation is classically conceived, that notional chose in action in turn relies on an express finding that justice requires shifting a loss entirely to a party in an inferior equitable position, i.e., to a party who *wrongfully* caused the

---

47. *See, e.g.*, Patent Scaffolding Co. v. William Simpson Const. Co., 64 Cal. Rptr. 187, 192 (Cal. Ct. App. 1967) ("The insurer['s] loss was caused by the fire, the very risk which [it] assumed [in the insurance policy] . . . . [Therefore] payment . . . to [the insurer's insured did] not create in [the insurer] equities superior to [a third party] justifying subrogation, if the latter did not cause or participate in causing the loss.").

48. At common law, an equitable indemnity claim was "all or nothing." *See, e.g.*, Slocum v. Donahue, 693 N.E.2d 179, 182 (Mass. App. Ct. 1998) (internal citations omitted) ("Indemnity . . . allows someone who is without fault, compelled by operation of law to defend himself against the wrongful act of another, to recover from the wrongdoer the entire amount of his loss, including reasonable attorney's fees."). More recent authority recognizes that because implied equitable indemnity is a restitutionary doctrine, equitable indemnity need not be "all or nothing." *See, e.g.*, Prince v. Pac. Gas & Elec. Co., 90 Cal. Rptr. 3d 732, 742 (Cal. 2009) (stating that "[t]he basis for indemnity is restitution . . . ."). The contemporary view favors implied partial equitable indemnity. *See* Croskey, et al., *supra* note 11, at § 8:65.1 ("The doctrine of partial equitable indemnity allows liability to be apportioned among wrongdoers based on their relative culpability. For example, where one of several joint tortfeasors pays a judgment against all of them, that tortfeasor may seek partial equitable indemnity from the others so that each is required to bear his or her fair share of the loss on a comparative fault basis.").

49. *See, e.g.*, CAL. PRAC. GUIDE INS. LIT. Ch. 8-B § 8:65.1 (distinguishing equitable contribution as a "*loss-sharing procedure.*").

50. 46A C.J.S. *Insurance* § 1993 (2012) ("Subrogation prevents both unjust enrichment to the insured that would result from double recovery, . . . and unjust enrichment to the tortfeasor that would result if the tortfeasor were absolved from liability, despite its wrongful actions, just because the insured procured and paid for insurance.").

51. *See, supra* note 43.

injured party's loss.[52] In sum, classic equitable subrogation theory is an equitable remedy based on a legal fiction derived from principles of contract law that is meaningfully circumscribed by bedrock principles of tort law.

Based on these principles, co-extensive liability insurers owing obligations to the same insured find classic equitable subrogation theory as an alternative to the doctrine of equitable contribution of no utility. An insurer that pays on behalf of its insured may claim by reason of such payment to be equitably subrogated to claims by its insured against another insurer. However, a court will rarely, if ever, find that the other insurer was at fault for the loss and therefore "primarily liable" for such payment.[53] The theory of equitable subrogation as classically conceived thus fails to substitute for equitable contribution as a principled means to shift a co-extensively insured loss from one liability insurer to another.

A "bright line" can distinguish the theory of equitable subrogation from equitable contribution in these circumstances.[54] Equitable contribution should emerge as the sole means to apportion the several responsibility of co-extensive liability insurers to a single insured. Just as courts abandoned strained attempts to determine the "primary" responsibility of insurers when confronted with "other insurance clauses," courts can apply the principles of equitable contribution among co-extensive liability insurers *in pari passu* to avoid entirely the

---

52. *See, e.g.*, Hartford Fire Ins. Co. v. Riefolo Const. Co., Inc., 410 A.2d 658 (N.J. 1980) (stating that "Subrogation is an equitable doctrine designed 'to compel the ultimate discharge of an obligation by the one who in good conscience ought to pay it.' . . . In its absence, either the insured would collect twice or the third party wrongdoer would go free.").

53. *See, e.g.*, Meyers v. Bank of Am., 77 P.2d 1084, 1089 (Cal. 1938) (stating that "[equitable subrogation] is not an absolute right, [but rather] depends upon the superiority of equities . . . [and] 'will never be enforced when the equities are equal or the rights not clear' . . . Here, the [the putative equitable subrogee] has discharged its primary contract liability. It has paid what it contracted to pay, and has retained to its own use the premiums and benefits of such contract. It now seeks to recover from [another contractually obliged to pay] the amount thus paid . . . . Neither the [putative equitable subrogee] nor the [other] was the wrongdoer, but by independent contract obligation each was liable to [the putative equitable subrogor] . . . . We cannot say that as between [another contractually obliged to pay] and the [putative equitable subrogee], that [the other contractually obliged to pay] should stand the loss."); *Patent Scaffolding*, 64 Cal. Rptr. at 193 ("Where two parties are contractually bound by independent contracts to indemnify the same person for the same loss, the payment by one of them to his indemnitee does not create in him equities superior to the nonpaying [contractual] indemnitor, justifying subrogation.").

54. "Technically, contribution and indemnity are mutually exclusive remedies but they are often asserted as alternative causes of action in the same lawsuit." 3 LAW AND PRAC. OF INS. COVERAGE LITIG. § 42:10 (2011).

balancing of equities among them that equitable subrogation theory traditionally requires.[55]

Like any set of common law rules, however, an erosion principle has set to work on these rather clearly defined distinctions between equitable contribution and subrogation. Some courts still adhere to the traditional rules of equitable subrogation, reserving to the court a determination of superior equities based on fault in all cases, but others do not.[56]

Some courts have reasoned that insurer subrogation must be permitted whenever an insurer has reserved that right in its policy. In these courts, an insurer can contractually avoid the requirement that "superior equities" justify its right to equitably subrogate to its insured's claims against a third party.[57] Other jurisdictions allow an insurer to subrogate to its insured's claim against a third party whether or not the right is reserved in the policy and without regard to whether the insurer can demonstrate superior equities vis-à-vis the third party.[58] In these courts, distinctions between equitable subrogation and contribution become impossibly blurred, allowing in some instances the former to serve as a means to avoid entirely the latter.

As one court has stated: "[i]t is difficult to think of two legal concepts that have caused more confusion and headache for both courts and litigants than have contribution and subrogation."[59]

---

55. *See, e.g.*, *Patent Scaffolding*, 64 Cal. Rptr. at 194-95 (stating that the putative equitable subrogee should have sought equitable contribution (to share the loss) rather than all-or-nothing equitable subrogation).

56. *See, e.g.*, State Farm Gen. Ins. Co. v. Wells Fargo Bank, 49 Cal. Rptr. 785, 793-94, 800 (Cal. Ct. App. 2006) (noting the split of authority about whether an insurer should, in fairness, bear the loss where the liability of a third party obligor is solely contractual).

57. *See, e.g.*, Nat'l Union Pac. Fire Ins. Co. of Pittsburgh v. Riggs Nat'l Bank of Wash., D.C., 646 A.2d 966, 971 (D.C. 1994) ("We . . . are persuaded to follow the line of cases holding that the superior equities doctrine, although applicable to equitable subrogation claims, has no application in cases . . . based on contractual agreements between [the subrogor and subrogee] . . ."); Liberty Mut. Ins. Co. v. Thunderbird Bank, 555 P.2d 333, 336 (Ariz. 1976) ("We . . . agree [that] '[t]he problem . . . applying the rule enunciated in *Meyers* [see, *supra* note 53] is the assertion that the . . . [subrogation] claim must be founded in equity. As previously stated, this was historically true, but does that mean that merely because [a] principle of law had its origin in equity, [that] the parties as between themselves, cannot contractually make those principles legally binding.").

58. *See, e.g.*, *Hartford Fire Ins. Co.*, 410 A.2d at 662 ("While courts in earlier cases were somewhat reluctant to permit subrogation based on contractual obligations of a third party, '[i]t is now well settled generally that such an action in subrogation on the contractual obligation of the defendant to an insured exists in favor of the insurer.'"); Standard Ins. Co. v. Pellecchia, 104 A.2d 288, 296 (N.J. 1954) (providing that an insurer may subrogate to contractual claims of its insured, as well as tort claims).

59. *Md. Cas. Co.*, 77 Cal. Rptr. 2d at 302. *See also* Home Ins. Co. v. Certain Underwriters at Lloyd's London, 729 F.2d 1132, 1133 (7th Cir. 1984) ("Few areas in the

By opening the precedents governing equitable subrogation and contribution to extemporization, courts unleashed upon the world of insurance law the contents of a box of unknown ills. We now turn to one of those ills. The failure to keep the bases underlying the competing theories of equitable contribution and subrogation distinct, compounded by the weakening of impediments that traditionally circumscribed resort to the latter theory by co-extensive liability insurers, gave rise to the "collateral indemnity" exception to the rules of equitable contribution.

III. THE COLLATERAL INDEMNITY EXCEPTION

A. The Origins and Rationale for a Collateral Indemnity Exception to the Customary Rules of Insurer Contribution

In the seminal case of *Rossmoor Sanitation, Inc. v. Pylon, Inc.*,[60] the California Supreme Court developed a "collateral indemnity" exception to the rules of equitable contribution applicable to the issuers of co-extensive insurance.[61] This iteration of judicial rule-making has contributed to the rise of one of the most perplexing and unsound doctrines in insurance law.[62] Although ostensibly a limited and incremental advance of equitable principles, properly viewed the "*Rossmoor* rationale" was an evolution of much greater proportions.

In *Rossmoor*, a contractor agreed to indemnify the owner of a project, and agreed to cause the owner to be named as an additional insured by the contractor's liability insurer.[63] An accident caused by the negligence of the contractor resulted in injury to two of the contractor's

---

field of insurance law give courts and parties more difficulty than that of duplicating or overlapping insurance."); Herrick Corp. v. Canadian Ins. Co., 34 Cal. Rptr. 2d 844, 845 (Cal. Ct. App. 1994) ("[I]t is hard to imagine another set of legal terms with more soporific effect than indemnity, subrogation, contribution, co-obligation and joint tortfeasorship.").

60. 119 Cal. Rptr. 449 (Cal. 1975).

61. *Id.* at 456.

62. *See infra* Part III.B.

63. *Rossmoor*, 119 Cal. Rptr. at 450. An "additional insured" is entitled to coverage under a policy of insurance procured by another. The procurer is typically the "named insured" in the policy. Additional insured coverage is cogently described by Croskey, et al., *supra* note 11, at § 7:1407, in pertinent part as follows:

> [C]ontracts [may] require one party to obtain CGL insurance naming the other party as an "additional insured." The policy itself or a separate endorsement will provide that the person or firm named will be treated as an additional insured under the other's policy, [obligating the insurer to indemnify and defend the additional insured.] . . . It is immaterial that the additional insured paid no premium to the insurer; the cost of obtaining such coverage is a matter of contract between the insurer and its named insured.

employees.[64] The contractor's employees brought suit against the owner (unable to sue the contractor owing to the exclusive remedy of workers' compensation), and obtained a sizable judgment.[65]

The contractor's insurer was obliged to pay the judgment on behalf of the owner, owing to the owner's status as its additional insured.[66] The owner's "direct" liability insurer was equally obliged to pay the employees' judgment on behalf of the owner.[67] The contactor's insurer accordingly sought contribution from the owner's "direct" liability insurer, i.e., the insurer from which the owner obtained liability insurance as a "named insured" and to which the owner paid premiums.[68] The terms of the policies available to the owner required proration in case of other insurance, so the "other insurance" clauses presented no problem of mutual repugnancy.[69] Therefore, the contractor's insurer argued, the obligations of the insurers for sums paid on behalf of the owner were co-extensive and equal, compelling *pro rata* equitable contribution.[70]

Fatefully, the California Supreme Court disagreed.[71] On the claim by the contractor's insurer against the owner's insurer seeking an equitable allocation of the obligation to pay on behalf of the owner, the court held that the *contractor's* contractual obligation to indemnify the owner was more important than the plain terms of the two competing insurance policies.[72] The court reasoned that equitably apportioning the obligations of the owner's insurers would "effectively negate the indemnity agreement," and therefore held the contractor's insurer solely obliged to pay the judgment against the owner.[73] In the opinion of the court, the owner expressly bargained to avoid a claim against its own insurer for equitable contribution by the contractor's insurer by obtaining an overlapping indemnity agreement from the contractor.[74]

Key to this determination was the court's opinion that, upon any payment, the owner's direct insurer would become subrogated to the owner's right to obtain indemnification by the contractor.[75] The court

64. *Rossmoor*, 119 Cal. Rptr. at 451.
65. *Id.*
66. *Id.* at 450.
67. *Id.* at 451.
68. *Id.*
69. *Id.*
70. *Rossmoor*, 119 Cal. Rptr. at 451.
71. *Id.* at 456-57.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*

postulated a circularity that would be created if it ordered the owner's insurer to contribute to the payment on behalf of the owner by the contractor's insurer.[76] The court reasoned that any sums it ordered the owner's insurer to pay to the contractor's insurer in equitable contribution then could be recovered by the owner's insurer from the contractor by reason of equitable subrogation to the owner's claim against the contractor under the indemnity agreement.[77] On this basis, the court completely and entirely relieved the owner's insurer of its conceded co-extensive obligation to the owner under its policy, and held that the owner's insurer need not contribute anything to the sole payment of the judgment against the owner by the contractor's insurer.[78]

When the dust cleared, a contract extrinsic to the insurance policies excused the owner's insurer from its plain contractual obligation.[79] The California Supreme Court made no effort to avoid the conclusion that it had disregarded the terms of the insurance policies.[80] In fact, the court expressly acknowledged that both the owner's insurer and contractor's insurer calculated and accepted premiums with full knowledge that each might be called upon to satisfy a judgment against the owner.[81] There was no evidence that either insurer knew when the policies were issued that there was or that there would be other insurance.[82] More importantly, there was no evidence that the owner's insurer knew about the contractor's indemnity promise before it issued a liability insurance policy to the owner that would cover the same risk.[83]

Despite these acknowledged circumstances, the court made no real effort to explain the source of its authority to disregard the owner's insurer's obligation.[84] Instead, the court presupposed its authority to exercise discretion in equity to excuse the owner's insurer and let stand a declaration ordering sole payment by the contractor's insurer of the judgment against the owner.[85]

The *Rossmoor* rationale has been widely adopted.[86] The "collateral indemnity" exception plays a role in many if not most contemporary

76. *Rossmoor*, 119 Cal. Rptr. at 456-57.
77. *Id.*
78. *Id.*
79. *Id.*
80. *See id.*
81. *Id.*
82. *Rossmoor*, 119 Cal. Rptr. at 456-57.
83. *Id.*
84. *See id.*
85. *Id.*
86. *See, e.g.*, LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 218:19 (3d ed. 2011) (stating that "[i]n a variety of commercial relationships, such as . . .

cases presenting the same general issues.[87] Yet, despite the profound precedential impact of the *Rossmoor* decision, some courts reject the *Rossmoor* rationale entirely.[88] Courts do not even converge on an agreed-upon understanding of it. For example, in some jurisdictions that have adopted the *Rossmoor* rationale, including California, a court may accept the collateral indemnity exception to the rules of equitable contribution in one instance, but reject it in another.[89] The absence of even the

---

contractor-subcontractor, the contracts between the parties contain indemnification agreements in which one agrees to hold the other harmless for its own acts of negligence or that of its employees. Such contractual arrangements can nullify a right to contribution.").

87. *See, e.g.*, Wal-Mart Stores, Inc. v. RLI Ins. Co., 292 F.3d 583, 588 (8th Cir. 2002) ("[I]ndemnity agreements [do not] always govern insurance-allocation issues . . . . However, there are many more cases ruling that indemnity agreements determine the allocation of liability in an insurance dispute . . . . A leading commentator summarizes this situation by observing that 'an indemnity agreement between the insureds or a contract with an indemnification clause . . . may shift an entire loss to a particular insurer notwithstanding the existence of an 'other insurance' clause in its policy.'" (quoting RUSS & SEGALLA, *supra* note 86, at § 219:1)); *see also* St. Paul Fire & Marine Ins. Co. v. Am. Int'l Specialty Lines Ins. Co., 365 F.3d 263, 273 (4th Cir. 2004) (characterizing the *Rossmoor* rationale as the majority view); Am. Indem. Lloyds v. Travelers Prop. & Cas. Ins. Co., 335 F.3d 429, 436-41 (5th Cir. 2003) (collecting cases); Harleysville Ins. Co. v. Travelers Ins. Co. 831 N.Y.S.2d 625, 626-27 (N.Y. App. Div. 2007) (holding that general contractor's insurer may shift loss to subcontractor and its insurer by claiming subrogation to general contractor's right to indemnification by subcontractor); Scottsdale Ins. Co. v. Safeco Ins. Co. of Am., 111 F. Supp. 2d 1273, 1277, 1280-81 (M.D. Ala. 2000), *aff'd*, 254 F.3d 1084 (11th Cir. 2001) (unpublished table opinion) (holding that building owner's promise to procure insurance for the building manager justified relieving building manager's insurer of liability under its policy).

88. *See, e.g.*, Deerfield Mgmt. Co. v. Ohio Farmers Ins. Co., 529 N.E.2d 243, 247-49 (Ill. Ct. App. 1988) (holding that in a case where a lease required lessee to carry liability insurance and to have the lessor named as an additional insured therein, the loss should be apportioned based on the "other insurance" provisions in the policies); Travelers Prop. Cas. Co. of Am. v. Liberty Mut. Ins. Co., 444 F.3d 217, 225 (4th Cir. 2006) (stating that "[t]he fact that Ryland agreed to indemnify State Street under [a collateral agreement] does not absolve [State Street's insurer] of its independent contractual obligation to insure Ryland as . . . [an additional insured].").

89. *See, e.g.*, Lexington Ins. Co. v. Allianz Ins. Co., 177 Fed. App'x 572, 574 (9th Cir. 2006) (applying California law, the court did not apply the *Rossmoor* rationale: "[W]hen an insurance policy contains clear and unequivocal provisions, the only reasonable expectation to be found is that afforded by the plain language of the terms in the contract . . . . [R]esort to extrinsic evidence to support a different meaning is not legally permissible." (quoting Travelers Cas. & Sur. Co. v. Emp'rs Ins. of Wausau, 29 Cal. Rptr. 3d 609, 620 (Cal. Ct. App. 2005) (alterations in original))); *see also* Commerce & Indus. Ins. Co. v. Chubb Custom Ins. Co., 747, 89 Cal. Rptr. 2d 415, 421 (Cal. Ct. App. 1999) (stating that "extrinsic evidence such as . . . [a] lease agreement cannot constitute proof of intent unexpressed in the [insurance] policies.").

semblance of a uniform approach has resulted in a legal hodge-podge of baffling complexity.[90]

The "collateral indemnity" exception has promoted the sort of uncertainty and inconsistent outcomes that foment litigation and stymie underwriters. The pronounced and problematic lack of doctrinal foundation evident in the collateral indemnity exception doomed the *Rossmoor* rationale from the outset to depend too often on extemporizing by a court "sitting in equity" unguided by firm and established principles.[91] As explained in Section III-B below, insurers in many instances have been induced by the ambiguities the *Rossmoor* rationale entails to engage in a "race to the bottom": shirking their responsibilities in hopes that other parties will be held solely liable for what is, in fact, a co-extensive obligation.[92]

B. Dysfunctional Outcomes Promoted by the Collateral Indemnity Exception Arise From a Failure to Properly Distinguish Equitable Subrogation from Equitable Contribution

In *Rossmoor*, the court considered a four party dynamic—the intersection of two insurance policies equally available to the owner, one of which was obtained pursuant to a separately negotiated contract that required the contractor to indemnify the owner.[93] In the court's view, based on these facts, the contractor's obligation to indemnify the owner vitiated the contractual duties of the owner's direct insurer.[94] Yet, the intent to relieve the owner's insurer could not be inferred from the express terms of any one of the three contracts of indemnity available to the owner.[95] The court's focus on the promise by the contractor concerning the *procurement* of an applicable liability insurance policy could not serve as a legitimate basis to infer that intent.[96]

---

90. *Compare Lexington Ins. Co.*, 177 Fed. App'x at 574 *with Rossmoor*, 119 Cal. Rptr. at 456-57.

91. *See e.g.*, *Wal-mart Stores*, 292 F.3d at 588 ("[I]ndemnity agreements [don't] always govern insurance-allocation issues. [In] a case . . . on facts similar to these, the indemnity agreement was not given effect. . . . However, there are many more cases ruling that indemnity agreements determine the allocation of liability in an insurance dispute. . . . Our task is to determine if the present dispute should fall into this [latter] category.").

92. *See* discussion *infra* Part III.B.

93. *Rossmoor*, 119 Cal. Rptr. at 450-51.

94. *Id.* at 456-57.

95. *See id.* at 450-51 nn.1-2 (quoting portions of the employment and insurance contracts).

96. Indemnity agreements and agreements to procure insurance are different. *See* Duffy v. Poulos Bros. Constr. Co., 587 N.E.2d 1038, 1042 (Ill. App. 1991), *appeal*

The doctrine of equitable subrogation filled the void in the court's analysis.[97] By postulating that the owner's insurer could equitably subrogate to the rights of the owner against the contractor under the indemnity agreement, the court relieved the owner's insurer's obligation to indemnify the owner.[98] The theory of equitable subrogation—a legal fiction that presupposed the owner's loss when in fact the owner lost nothing—was an inapt reason to choose between the competing insurers' purely *contractual* obligations. The many ills that have been unleashed by the *Rossmoor* rationale can be attributed to that fateful flaw in the analysis by the California Supreme Court.

As between two parties contractually obliged to indemnify the owner—the owner's insurer and the contractor's insurer—the owner's insurer was not in an equitably superior position that satisfied traditional notions of subrogation theory. It is incontrovertible that the contractor's insurer, the party that actually paid the loss on behalf of the owner, was not in an equitably inferior position vis-à-vis the owner's insurer because the contractor's insurer did not cause the loss.[99]

Nor was the owner's insurer in an equitably superior position vis-à-vis the contractor by reason of equitable subrogation to the rights of the owner under the indemnity agreement. Although the *Rossmoor* court might have so found based on the view that the owner would have had a claim for equitable indemnity against the contractor (absent payment by the contractor's insurer), the court expressly allowed the fiction of equitable subrogation to justify the result based solely on its construction of the contractor's indemnity agreement.[100] In other words, insofar as the court was concerned, the liability of the contractor to the owner was purely contractual, and any liability of the contractor to the owner in tort (justifying a finding of superior equity in the owner) was incidental and immaterial.[101]

---

denied, 596 N.E.2d 627 (Ill. 1991). An agreement by one party to procure insurance for another party, without more, is not an agreement by the promisor to indemnify the promissee. *See, e.g.*, Zettel v. Paschen Contractors Inc., 427 N.E.2d 189, 191 (Ill. App. 1981).

97. *Rossmoor*, 119 Cal. Rptr. at 456-57.

98. *Id.*

99. *Id.*

100. *Id.*

101. *See id.* at 452. Although the court in *Rossmoor* distinguished between "active" and "passive" negligence, that analysis was incidental to its opinion that equitable subrogation theory justified the result. *Id.* The *Rossmoor* court specifically stated that the right of equitable indemnity was not determinative. *See id. Cf.* Interstate Fire and Cas. Ins. Co. v. Cleveland Wrecking Co., 105 Cal. Rptr. 3d 606, 621, 621 n.5 (Cal. Ct. App. 2010) (weighing the equities arising out of the performance by one of two co-extensive contractual obligors, court found that performance by one of the obligors established a

Dysfunctional outcomes haunt *Rossmoor*'s progeny owing to the court's misplaced reliance on the theory of equitable subrogation. The owner's insurer and the contractor's insurer were contractually bound to pay the same judgment. Thus, the doctrine of equitable contribution should have governed the result. The theory of equitable subrogation should not have been considered at all.

As the sprig was bent, so has grown the tree. Because the court abandoned the rules of equitable contribution that should have governed the co-extensive insurers' obligations in favor of equitable subrogation, all sorts of uncertainties have been unleashed.

For example, classic equitable subrogation theory permits a third-party obligor to assert any defense that would have been available had the equitable subrogor brought suit against it directly.[102] If, however, an insurer's claim as an equitable subrogee is based not on any superior equity (as determined by fault) but instead on a third-party obligor's mirror-image contractual indemnity obligation, then a court may reject the third-party obligor's defense that the comparative fault of the equitable subrogor contributed to the loss (a traditional bar to an equitable indemnity claim).[103] Uncannily, courts that adopt the *Rossmoor*

---

superior equity, requiring the other to pay the entire loss according to the rules of equitable subrogation: "[I]t must be emphasized—contrary to [the third-party's] protestations—that . . . allegations [by the insurer claiming subrogation] of [the third party's] negligence are not being used to assert an equitable indemnity claim. The only consideration of the extent to which [the third party] caused the underlying loss . . . is to determine whether the equities tip in [the insurer's] favor, so that [the insurer] may pursue in subrogation a contractual indemnity claim. In other words, [the insurer's] claim is based solely on [the third party's] contractual obligations (the indemnity provision), [the third party's] breach of contract (not providing or paying for a defense or the settlement of [subrogor's] liability [to the injured party], and the resulting contractual damages (the costs of defending against and settling [the injured party's] claims against [the subrogor] . . . . Nor are the allegations of [the third party's] negligence being used to ascertain the extent of [the third party's] duty of contractual indemnity, which must be determined from the contract rather than reliance on the doctrine of equitable indemnity . . . .").

102. Smith & Simpson, *supra* note 44, at 217-18.

103. *See, e.g.*, Pardee Constr. Co. v. Jeld-Wen, Inc., No. D038856, 2004 WL 542546, at *10 (Cal. Ct. App. Mar. 19, 2004) (unpublished opinion) (internal quotations omitted) ("Summit's express contractual indemnity obligation was controlled not by principles of comparative negligence or equitable indemnity, but instead by the language of the Indemnity Clause. Where, as here, the parties have expressly contracted with respect to the duty to indemnify, the extent of that duty must be determined from the contract and not by reliance on the independent doctrine of equitable indemnity . . . . Accordingly, in interpreting and applying the Indemnity Clause, the trial court properly declined to use the jurors' comparative negligence findings to reduce the amount the jury awarded . . . . on [the] express indemnity claim.").

rationale still do not agree on the proper resolution of this question.[104] Remarkably, forty years after the *Rossmoor* case was decided, the answer to this question remains unsettled.

Because private indemnity contracts are typically quite broad, providing for indemnification even if the indemnitee's or another's negligence contributed to the loss, a court may permit an indemnitee's contractual indemnity claim even if the indemnitee was negligent[105] and the indemnitor was not.[106] In other words, by employing the *Rossmoor* rationale, a court upends the traditional rules of equitable subrogation, by allowing a liability insurer to shift its entire obligation to indemnify its own negligent insured (the very risk for which the insurer accepted premiums) to a *blameless* contractual indemnitor, and by extension, in all likelihood to its insurer.[107]

---

104. *Id.*

105. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 22 (2000) cmt. f ("Contractual indemnity is determined by the terms of the contract. An indemnitee can recover contractual indemnity for his or her own legally culpable conduct . . . if the contract is clear on that point. If the contract is otherwise clear, it need not contain specific words, such as 'negligence' or 'fault.'")

106. In theory, a targeted subcontractor should be responsible for only that portion of the loss caused by that subcontractor. In practice, however, a court will find almost any subcontractor on the worksite at the time of an injury or damage to have played some role in causing invisible harm, potentially triggering the contractual duty to indemnify in full for any resulting loss whether the subcontractor was technically entirely "at fault" therefor, or not. *See, e.g.*, Fin. Pac. Ins. Co. v. W. Coast Fire Prot. Sys. Co., No. C048722, 2006 WL 1076756, at *14 (Cal. Ct. App. Apr. 25, 2006) (unpublished opinion) (finding subcontractor liable for entire loss despite fault of others); Acceptance Ins. Co. v. Syufy Enter., 69 Cal. App. 4th 321, 81 Cal. Rptr. 2d 557, 561 (Cal. App. 1 Dist. 1999) ("California courts have consistently given a broad interpretation to the terms "arising out of or 'arising from' in various kinds of [indemnity contract] provisions. It is settled that this language does not import any particular standard of causation or theory of liability . . . . Rather, it broadly links a factual situation with the event creating liability, and connotes only a minimal causal connection or incidental relationship [between the conduct of the indemnitor and the happening of the loss]."). *See also infra* note 109.

107. In most cases, the liability of the contractual indemnitor is in fact shifted to its liability insurer, pursuant to the so-called "insured contract" coverage of the typical commercial liability insurance policy. *See, e.g.*, ABRAHAM, *supra* note 11, at 466-76 ("'Insured contract' . . . means that part of any contract or agreement . . . under which you assume the tort liability of another . . ."). Courts adopting the *Rossmoor* rationale claim that this added element of circularity further justifies relieving the insurer of an indemnitee under a collateral indemnity contract. That is, if the insurer seeking contribution is the liability insurer of a contractual indemnitor (e.g., the contractor in *Rossmoor*), the court finds that any payment by the indemnitee's insurer by way of contribution may then be sought from the indemnitor, by way of subrogation to the indemnitee's rights under the indemnity contract, and then shifted back to the indemnitor's liability insurer, by reason of the insured contract provisions, thus creating a perfect circle of meaningless and pointless litigation. *See, e.g.*, *Wal-Mart*, 292 F.3d at 594

Further, non-standard, private indemnity contracts, more often than not drafted by the indemnitee, rarely contain "other indemnity" provisions that purport to limit the liability of an indemnitor to a *pro rata* share if other sources of indemnification are available to the indemnitee. Thus, where more than one party has agreed to procure insurance and indemnify a single promisee, the *Rossmoor* rationale creates yet another layer of complexity and uncertainty.

This circumstance frequently arises where numerous subcontractors have agreed to name a single general contractor as an additional insured in their own liability insurance policies, and to indemnify the general contractor as well.[108] Deploying the *Rossmoor* rationale, the issuer of a liability insurance policy to the general contractor may foist a loss entirely upon *any one* of the subcontractors (and by extension, that subcontractor's insurer) often without regard to fault.[109] The targeted subcontractor (or its insurer) may then argue, in turn, that "what is sauce for the goose is sauce for the gander," and seek to equitably subrogate to

---

("If Wal-Mart paid the judgment, it would sue Cheyenne to enforce the indemnity provisions in their vendor agreement. As discussed above, Wal-Mart would win this suit and obtain a judgment against Cheyenne. Cheyenne would then look to its insurer, RLI, to cover this loss because the policy covers contractual indemnity liability. The end result would be that RLI would have to pay out $10 million. A similar course of events would occur if National Union [Wal-Mart's insurer] satisfied the judgment, except that it would step into Wal-Mart's shoes and bring a subrogation action against Cheyenne asserting Wal-Mart's contractual right to indemnification.") The flaw in this analysis is that the postulated circularity is created not by settled law, but by hypothesizing a right to equitable subrogation in the first place.

108. *See*, Croskey, et al., *supra* note 11, at § 7:1408.5 (citations omitted) ("A general contractor . . . may require its subcontractors to maintain general liability insurance in which the general contractor is named an 'additional insured': 'Since construction defect litigation is typically complex and expensive, a key motivation in procuring an additional insured endorsement is to offset the cost of defending lawsuits where the general contractor's liability is claimed to be derivative.'").

109. *See, e.g.*, Fin. Pac. Ins. Co. v. W. Coast Fire Prot. Sys. Co., No. C048722, 2006 WL 1076756, at *14 (Cal. Ct. App. Apr. 25, 2006) (unpublished opinion). In 2004, the Insurance Services Office, Inc. ("ISO") (an industry-supported organization that develops standardized insurance policies) attempted to address this issue, at least insofar as liability insurance coverage is afforded to a general contractor as an additional insured by its subcontractor's insurer. The ISO introduced a revised version of its widely-used additional insured endorsements to provide coverage for an additional insured only with respect to liability for injury, caused in whole or in part, by the named insured's acts or omissions or the acts or omissions of those acting on behalf of the named insured. *See, e.g.*, Dale Corp. v. Cumberland Mut. Fire Ins. Co., No. 09-1115, 2010 WL 4909600, at *5 (E.D. Pa. Nov. 30, 2010) (memorandum opinion) (describing the ISO's revisions). These revisions neither vitiate the *Rossmoor* rationale, nor avoid the complications it engenders.

the rights of the general contractor to recoup payment from one of the other contractually-bound subcontractor-indemnitors.[110]

Despite the "hall of mirrors" nature of these actions, courts in fact have permitted an impressive array of cross-actions pursuant to the theories of equitable subrogation and contribution. In such cases, jurists draw elaborate diagrams and deploy strained reason and logic to reach what often appear to be bizarre results.[111] In these circumstances, it is not clear whether a court will adopt an "all or nothing" rule and reject a fault-based analysis entirely, apportion liability based on fault, or rely exclusively upon the theory of equitable contribution.

Courts are rarely able to identify any provisions of co-extensive private indemnity agreements that suggest the parties' intentions concerning the "primary" responsibility for indemnification of a single promisee-indemnitee.[112] Just as in *Rossmoor*, courts address this uncertainty by exercising discretion understood to lie within the unfettered "equitable jurisdiction" of the court.[113] In practical terms, as so understood, such discretion impedes uniformity and predictability in the outcome of like proceedings with nearly identical facts.

By signaling that the ordering of co-extensive liability coverage is solely within the equitable powers of the courts, and thus subject to *ad hoc* determinations, courts have stymied efforts by the insurance industry to amend standardized forms to address the intent, if any, of the procurers of their policies. Just as in the case of "other insurance"

---

110. *See, e.g.*, Zurich Specialties London, Ltd. v. Gemini Ins. Co., No. G033979, 2005 WL 1102650, at *9 n.9 (Cal. Ct. App. May 10, 2005) (unpublished opinion) ("Since the suit is between and among insurers, we need not explore the degree, if any, to which the painting sub [sic] or its insurer might have a contribution claim against the drywall and stairway subs [sic] themselves based on the separate defense and indemnity agreements they gave the general [contractor] . . . .").

111. *See, e.g.*, *Fin. Pac. Ins. Co.*, 2006 WL 1076756, at *1 (court diagramed the relationship of the multiple parties to aid comprehension); *Zurich Specialties*, 2005 WL 1102650, at *1 ("This insurance contribution case arises out of a common scenario, where a general contractor has obtained indemnity agreements from each of its subcontractors to defend (and if necessary indemnify) it in any construction defect suit 'arising out of' the individual subcontractor's work. Unfortunately, just keeping track of the parties in a case like this is a daunting task. While the lawyers who have lived with this case for literally years may know the players by name, few others do. We will therefore refer to the parties in this case by generic, 'stick figure' designations.").

112. *See id.* at *9 (noting that although the allocation of risk found in a subcontractor's agreement to indemnify a general contractor may trump the normal principles of equitable contribution as between their insurers (pursuant to the *Rossmoor* rationale), in the absence of any agreement between two subcontractors obliged to indemnify the same general contractor, primary responsibility for such indemnification cannot be likewise determined).

113. *Rossmoor*, 119 Cal. Rptr. at 456-57.

clauses, judicial ordering of the priority of payments by putatively co-extensive insurers pursuant to the *Rossmoor* rationale has steered the insurance industry toward an effort to "draft around" adverse decisions. More than *300 different contractual provisions* have been designed in recent years to address the problem of co-extensive insurance coverage issued to or procured by parties that have also contracted for indemnity *inter se*.[114]

Yet, just as in the case of "other insurance" provisions, courts without restraint have rejected these provisions, on sometimes seemingly flimsy bases.[115] The resulting miasma of confused and irreconcilable precedents has thwarted efforts to rationalize contribution in cases where collateral contracts putatively influence co-extensive insurer liability. These uncertainties demonstrate that *ad hoc* exculpation of an insurer severally liable for a loss, based on a contract extrinsic to the insurer's policy, can and should be avoided. The key to achieving more predictable results in the event of co-extensive liability coverage is to reject the *Rossmoor* rationale entirely and to focus again on the rules of equitable contribution.

Just because the construction of "other insurance" provisions failed to resolve the problem of mutual repugnancy does not mean that insurers cannot fashion enforceable provisions to take into account co-extensive

---

114. The International Risk Management Institute ("IRMI") is an organization that "helps risk and insurance professionals make wise decisions with a vast online risk and insurance library." *About IRMI*, INTERNATIONAL RISK MANAGEMENT INSTITUTE, http://www.irmi.com/about/default.aspx (last visited July 2, 2012). According to an IRMI report in 2009:

> A complicating factor that has arisen in the past 5 or so years is the advent of nonstandard endorsements that sometimes take drastically different approaches to granting or restricting the coverage provided to an additional insured in a commercial general liability (CGL) policy. Indeed we have collected nearly 300 hundred different nonstandard CGL endorsements that are used by insurers to add additional insureds to liability insurance policies.

Jack P. Gibson & W. Jeffrey Woodward, *Questions and Answers on Additional Insured Issues—Part 1*, INTERNATIONAL RISK MANAGEMENT INSTITUTE (2009), *available at* http://www.irmi.com/expert/articles/2009/gibson07a-insurance-law-additional-insured.aspx.

115. *See, e.g.*, Regal Homes, Inc. v. CNA Ins., 171 P.3d 610, 611-14, 619-21 (Ariz. Ct. App. 2007) (considering the fact that despite a subcontractor's promise to procure liability insurance naming a general contractor as an additional insured, the subcontractor's policy stated that the general contractor's coverage as an additional insured would be excess over any other valid and collectible insurance available to the general contractor, unless a contract specifically required the subcontractor-procured insurance to act as general's primary insurance; court disregarded the *Rossmoor* rationale and the policy language, and held general's insurer and the subcontractor's insurer to be co-primary insurers).

indemnity obligations owed by the procurers of their policies. Provisions of liability insurance policies designed to address the "other indemnity" issue may have failed to date, but enforceable revisions to address the *Rossmoor*-type scenario are still possible.[116] If such efforts demonstrably fail in particular cases, then the doctrine of equitable contribution provides a readily available, fair and settled means to resolve the issues presented by co-extensive duties of indemnification.

IV. ABJURING THE COLLATERAL INDEMNITY EXCEPTION

Because the Supreme Court of California in *Rossmoor*[117] failed to properly synthesize the hallmark principles of law and equity, that unfair decision portended the confusion it has produced. The exception to the ordinary rules of equitable contribution by co-extensive liability insurers that the court established in *Rossmoor* cannot be sustained by reference to contract and tort law. Moreover, the court's decision to adopt this exception was unsupported by established principles of equitable jurisprudence. The court should have drawn from all three sources to properly resolve the matter before it.

Recall that in *Rossmoor*, the contractor's insurer additionally insured the owner of the project upon which the contractor worked.[118] Upon suit against the owner, arising out of injuries caused by the contractor's operations, the contractor's insurer was required to pay a judgment against the owner, its additional insured.[119] Strictly construed, principles of contract and tort law would recognize no claim by the contractor's insurer against any other party by reason of such payment. As a unified court of law and equity, however, the *Rossmoor* court was not only permitted, but also obliged to consider the maxims of equitable jurisprudence.[120] To properly evaluate the claim by the contractor's

116. By appropriate policy provisions, insurers should be able limit coverage if an insured is also entitled to coverage under a policy procured by a party obliged by a contract to indemnify the insured. In the event that mutually repugnant provisions collide, or, where multiple indemnitors procure insurance to cover a single indemnitee, long experience with the problem of "other insurance" clauses should prove to be a cogent guide to adjudicators for both policy interpretation and apportionment pursuant to the rules of equitable contribution. The theory of equitable subrogation has no legitimate role to play in these circumstances.

117. 119 Cal. Rptr. 449 (Cal. 1975).

118. *Id.* at 451.

119. *Id.*

120. *See, e.g.*, Swetland v. Curtiss Airports Corp., 41 F.2d 929, 936 (N.D. Ohio 1930) (stating that "[m]axims are but attempted general statements of rules of law. The judicial process is the continuous effort on the part of the courts to state accurately these general rules, with their proper and necessary limitations and exceptions.").

insurer for equitable contribution by the owner's insurer, therefore, the court was obliged to consider the "fairest" means to apportion the loss.[121]

In *Rossmoor*, the Supreme Court of California paid scant attention to the maxims of jurisprudence that supported the claim by the contractor's insurer. The fault inherent in the *Rossmoor* decision necessarily began with that inattention.

The owner's insurer owed a reciprocal obligation to satisfy the same judgment against the owner that the contractor's insurer was required to pay in full. "Equity delights in equality," it is said.[122] In fact, "[i]t has frequently been stated that equality *is* equity."[123] This maxim "means that . . . in the absence of conditions requiring a different result equity will treat all members of a class as on an equal footing, and will distribute benefits or impose burdens and charges either equally or in proportion to the several interests, and without preferences."[124] The equitable maxim that burdens equally owed should be equally shared clearly favored apportioning equally the obligations of the two insurers that accepted compensation (premiums) to indemnify the same insured for the same sums.[125]

The *Rossmoor* court rejected the contractor's insurer's claim for equitable contribution despite these established principles of equitable jurisprudence. The court ostensibly was influenced by misplaced deference to the parties' "private ordering" of their respective obligations in the owner-contractor indemnity agreement. Yet, strict construction of the insurance contracts at issue disclosed only that the owner's insurer was as bound as the contractor's insurer to pay the judgment against the owner. No provision of the owner-contractor agreement provided, or could have provided, to the contrary.[126] Giving effect to the owner's insurer's promise would have worked no injustice to the owner's insurer.[127]

---

121. *See Rossmoor*, 119 Cal. Rptr. at 452.

122. *See, e.g.*, Ohio Edison Co. v. McElrath, 137 N.E.2d 642, 653 (Ohio Ct. Com. Pl. 1955), *aff'd*, 138 N.E.2d 323, 325 (Ohio Ct. App. 1956) (applying "the well-established maxim that 'Equity delights in equality.'").

123. *See, e.g.*, 30A C.J.S. *Equity* §135 (2011) (emphasis added) (footnote omitted).

124. *Id.*

125. *See, e.g.*, *Rossmoor*, 119 Cal. Rptr. at 456-57.

126. *Id.*

127. Arguably, upon payment of any portion of the judgment against the owner in excess of its pro rata share, the owner's insurer would have acquired a viable claim to equitable contribution from all other indemnitors contractually-bound to pay the same loss. *See, e.g.*, Croskey, et al., *supra* note 11, at § 8:65.1 (citing Bramalea Cal., Inc. v. Reliable Interiors, Inc., 14 Cal. Rptr. 3d 302, 307 n.5 (Cal. Ct. App. 2004)) ("Presumably, Developer's insurer could sue Subcontractors for equitable contribution 'as a coinsurer or coindemnitor.' i.e., where several parties share primary liability for a loss, one who

Moreover, giving effect to the owner's insurer's promise would have done no injustice to the owner. According to principles of contract and tort law, the owner would have had no legally cognizable claim against any other party by reason of a payment on the owner's behalf required by its contract with its insurer, whether as a result of court-ordered contribution to the contractor's insurer's payment or otherwise. No right of action on behalf of the owner against any other party for any sum would arise by reason of allocation among its insurers of payments on its behalf.[128] Thus, a court-ordered contribution by the owner's insurer would have produced no viable claims in law by the owner and no injustice to it, likely ending the matter.

Instead, the *Rossmoor* court excused entirely the owner's insurer's conceded contractual obligation.[129] The court theorized that the owner's insurer, upon payment of one-half of the judgment against its insured, could then recoup its payment from the *contractor*, by claiming in subrogation the owner's solely notional right to express contractual indemnification by the contractor pursuant to the owner-contractor agreement.[130] That conclusion was spectacularly inapt. The theory of equitable subrogation was inapposite on the facts.

The original conception of insurer subrogation can and should be viewed as an example of the nascent synthesis of contract and tort law.

---

discharges the debt may seek contribution from the other."); *see also* Zurich Specialties London, Ltd. v. Gemini Ins. Co., No. G033979, 2005 WL 1102650, at *1 n.9 (Cal. Ct. App. 2005) ("[W]e need not explore the degree, if any, to which the painting sub [sic] or its insurer might have a contribution claim against the drywall and stairway subs [sic] themselves based on the separate defense and indemnity agreements they gave the general.") In *Rossmoor*, any such claim for contribution by the owner's insurer against the contractor under the indemnity agreement would likely have been rejected, based on the court's implicit and correct conclusion that the indemnity obligations of the contractor and its insurer were analytically conflated.

128. This is so because absent a malicious prosecution, no right of the insured is infringed by reason of a suit against it by an injured party, and no right of indemnification putatively owed to an insured is left unsatisfied once an insured has been made whole, i.e., after an insurer has paid in full and on time any loss that would otherwise have been suffered by the insured as a result of a suit. *See* Bramalea Cal., Inc. v. Reliable Interiors, Inc., 14 Cal. Rptr. 3d 302 (Cal. Ct. App. 2004). The collateral source rule is inapplicable in these circumstances; that rule allows an injured party's claim against a *tortfeasor* to survive despite the receipt of *first-party* insurance benefits. *See, e.g.*, *Bramalea Cal.*, 14 Cal. Rptr. 3d at 305 (citation omitted) ("The collateral source rule allows an injured person to recover from the *wrongdoer* for damages suffered even if he has been compensated for the injury 'from a source wholly independent of the *wrongdoer*,' such as insurance.") (emphasis added). In *Rossmoor*, the only sums sought in subrogation were pursuant to the contractor's contractual obligation to indemnify the owner. *Rossmoor*, 119 Cal. Rptr. at 456-57.

129. *Rossmoor*, 119 Cal. Rptr. at 456-57.

130. *Id.*

Evolving notions about liability based on fault influenced the unified courts of law and equity to permit a liability insurer to recoup its payment from any party that negligently or intentionally caused its insured's loss.[131] As classically conceived, the theory of equitable subrogation blends perfectly contract and tort principles by permitting a performing insurer to recoup its payment from a "wrongdoer."[132]

The proper evaluation of a claim in subrogation thus requires a composite analysis that takes into account the insurer's consensual obligation and the wrongdoer's obligations imposed by law. Equity delights in the notion that for every wrong there is a remedy,[133] and thereupon finds the equities in the latter inferior to the former. Because the "wrongdoer" may assert in response to the insurer's claims in subrogation any defense that would have been available against the insured, the "wrongdoer" is in no worse position by reason of the insurer's subrogation.[134] Doctrinal distinctions in these circumstances matter far less than the nature of the rights infringed. An insurer's claim to equitable subrogation can be understood in these terms as an extraordinary amalgam of tort, contract and equitable principles; if the equities measured by these standards are equal, then the right of subrogation simply does not exist.[135]

---

131. *See, e.g.*, Ocean Accident & Guar. Corp. v. Hooker Electrochemical Co., 240 N.Y. 37, 47 (1925) ("[S]ubrogation is based upon principles of equity and natural justice . . . . An insurer who has been compelled by his contract to pay to or in behalf of the insured claims for damages ought to be reimbursed by the party whose fault has caused such damages.").

132. *Id.*

133. *In re* Pigg, 453 B.R. 728, 735 (Bankr. M.D. Tenn. 2011) ("The nature of equity is the 'correction of the law where, by reason of its universality, it is deficient.' (citing Aristotle 384–322 BC) In other words, equity is obliged to acknowledge rights not recognized at law and 'equity will never suffer a wrong without a remedy.' (citation omitted).")

134. *See, e.g.*, Walker v. Stein, 758 N.Y.S.2d 451, 453 (N.Y. App. Div. 2003), *aff'd sub nom.*, Allstate Ins. Co. v. Stein, 775 N.Y.S.2d 219, 224 (N.Y. 2004) (citation omitted) ("[A] subrogation claim is derivative of the underlying claim and the subrogee possesses only such rights as the subrogor possessed, with no enlargement or diminution . . . . [A] defendant in a subrogation action has against the subrogee all defenses that he would have against the subrogor, including the same statute of limitations defense that could have been asserted against the subrogor.").

135. Parties on an equal footing should be treated equally. *See, e.g.*, Castleman Constr. Co. v. Pennington, 432 S.W.2d 669, 675 (Tenn. 1968) (citation omitted) ("The doctrine of subrogation in insurance does not arise from, nor is it dependent upon, statute or custom or any of the terms of [a] contract; it has its origin in general principles of equity . . . . The right of subrogation rests . . . upon the principles of natural justice . . . . In fact, subrogation is not a matter of strict right . . . but is purely equitable in its nature . . . . Where equities are equal, there is no right to subrogation.").

In *Rossmoor*, the *contractual* obligations of the owner's insurer and the contractor were, to put it simply, on an equal footing. The contractor was not a "wrongdoer" (at least insofar as its liability under the indemnity contract was concerned). Moreover, the court permitted a hypothetical right to equitable subrogation by the owner's insurer to defeat the contractor's insurer's present and existing right to contribution—a consequence disfavored in equity.[136]

The court in *Rossmoor* thus missed the mark in two respects. First, the court failed to fit its decision to settled principles of equitable subrogation and contribution theory.[137] Second, it failed to accomplish the synthesis of otherwise rigid legal theory that is the hallmark of jurisdiction in equity.[138] Had the court in *Rossmoor* taken a holistic approach by blending the equitable assignment of a chose in action with traditional aspects of tort law to determine superiority in the equities of the parties, the result would have been more consistent with precedent, and more fair in the sense that an obligor would not have been entirely relieved from performance of a promise for which it accepted compensation. By abjuring the *Rossmoor* rationale and adhering to a clear distinction between contribution and subrogation, courts advance a "unification principle" that focuses more appropriately on primary rights and remedies.

V. CONCLUSION

It would be impossible to demonstrate that trial judges subconsciously strain against any structure that might unalterably favor predictability to unfettered predilection. But the signals are there. Trial courts appear to be always at the ready to discern priority in the payment by co-insurers that confounds rational extra-judicial resolution by the co-extensive insurers themselves, each eager to foist liability on the other.

The best way to redirect this tendency is to recognize the flexibility of equitable jurisdiction, but tether that discretion to a synthesis of the old doctrines upon which it is based. Exposing the collateral indemnity exception as an outlier will ease its abjuration. The key is better recognition that the remedies of equitable subrogation and contribution spring from roots in the common law of both torts and contracts. By

---

136. *See, e.g., Id.* ("[S]ubrogation . . . is purely equitable in its nature, and will not be enforced when it would work injustice to the rights of those having equal equities. To entitle one to subrogation, his equity must be strong and his case clear, since it will not be enforced . . . where it will prejudice the legal or equitable rights of others.").

137. *Rossmoor*, 119 Cal. Rptr. at 452, 456-57.

138. *See generally, id.* at 456-57.

insisting upon fusion whenever possible of doctrinal distinctions thought to be associated with purely separate branches of law, courts will achieve better and more predictable outcomes in cases of co-extensive obligations by liability insurers, and concomitantly will hasten the adoption of a unified canon of law.