STATUTE 624.1005 – CONTRIBUTION BETWEEN INSURERS FOR DEFENSE COSTS

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The Former Rule: No Right of Equitable Contribution

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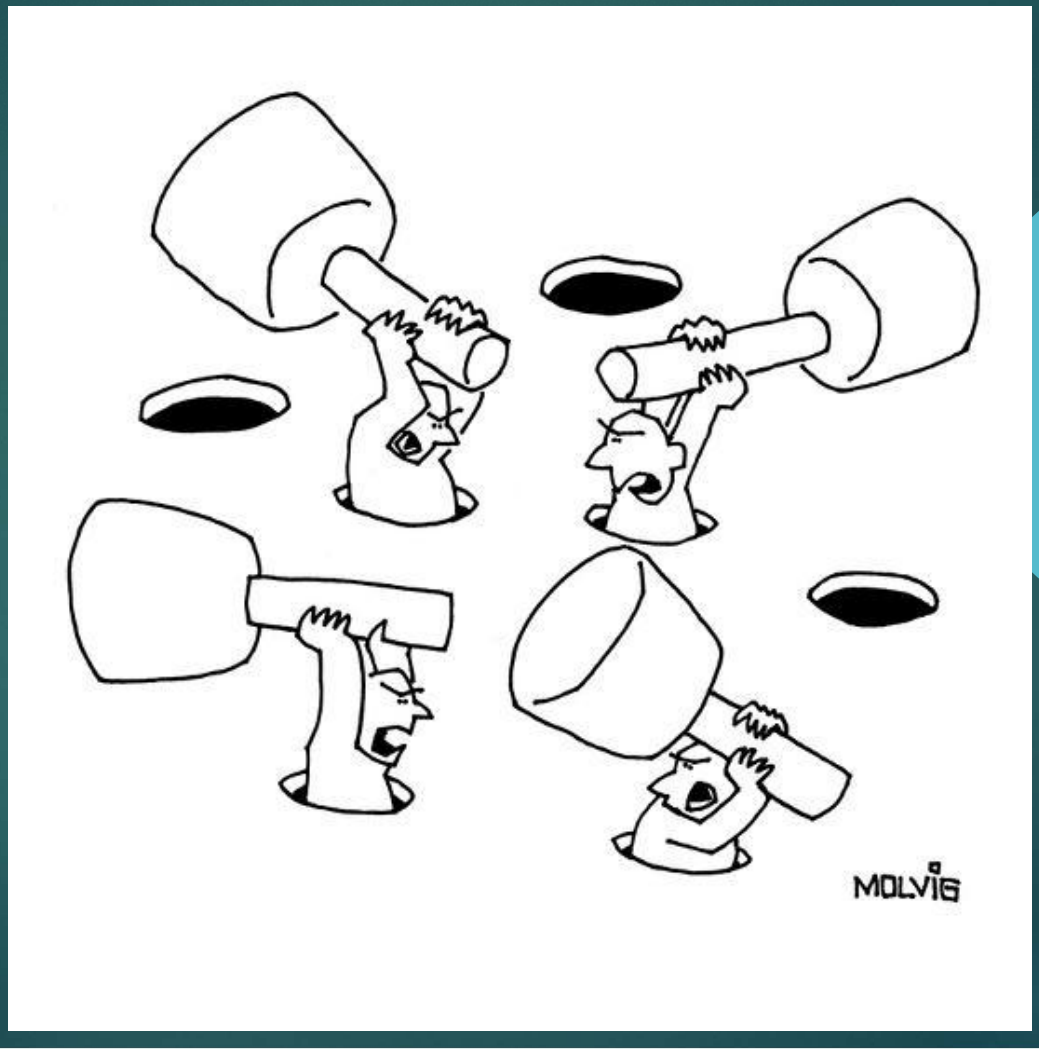
The Former Rule: Argonaut

Argonaut Ins. Co. v. Maryland Cas. Co., 372 So.2d 960, 964 (Fla. 3d DCA 1979)

- "The Legislature has not seen fit to allow contribution for costs or attorney's fees between insurance companies. If contribution for costs were allowed between insurance companies, there would be multiple claims and law suits. The insurance companies would have no incentive to settle and protect the interest of the insured, since another law suit would be forthcoming to resolve the coverage dispute between the insurance companies. This is contrary to public policy, particularly since the insured has been afforded legal protection and has not had to personally pay any attorney's fees."

The Former Rule: Continental



The Former Rule: Continental

Continental Cas. Co. v. United Pacific Ins. Co., 637 So.2d 270, 273 (Fla. 5th DCA 1994)

- "Several factors discourage such misconduct, including exposure to greater loss if the other insurer is ineffective in its defense, and the risk of suits by its own insured on theories of breach of contract and statutory and common law 'bad faith.' It is important to keep in mind that insurers have not only the duty to defend but often contractually reserve the right to defend. Insurers know the ability to control the defense of a liability case is the most effective way to limit their loss and protect themselves from extra-contractual claims."

The Former Rule: Continental (Dissent)

Continental Cas. Co. v. United Pacific Ins. Co., 637 So.2d 270 (Fla. 5th DCA 1994) (Sharpe, J. W. dissenting)

- "Under ***Argonaut***, insurers play the game of 'chicken,' forcing the other equally obligated insurer to undertake the defense first, while flirting around the edges of bad faith breach of their duty to defend. The insurer who is the most responsible and undertakes the defense is penalized by being forced to bear *all* the costs, expenses and attorney's fees for discharging not only its own contract to defend, but the co-primary insurer's obligation, as well. The insurer who honors its contract to defend its insured, under ***Argonaut***, cannot force the other insurer to pay a prorata portion of its expenses, and the unresponsive insurer is saved from any bad faith suit by its insured, or any other third party, by the diligence and effort of the other insurer."

The Former Rule: Continental (Dissent)

Continental Cas. Co. v. United Pacific Ins. Co., 637 So.2d 270, 277 (Fla. 5th DCA 1994) (Sharpe, J. W. dissenting) (quoting 7C Appleman, *Insurance Law & Practice* § 4691 at 278 (1979))

- "These holdings are indefensible. The courts are ignoring realities and encouraging insurers who are not concerned with their obligations to their insureds in the hope that someone else will step into the breach. It also ignores the fact that excess and other insurers are third party beneficiaries under the basic contracts of insurance and should be able to recover, either under a theory of equitable subrogation, contracts or torts, any expenses incurred under the circumstances. Further, as a matter of public policy, courts should be demanding that insurers give prompt defense of claims to policyholders rather than to tolerate the shifting of responsibility with such impunity. And that is the position taken either by statute or by decision in many states. [footnotes omitted]."

The Former Rule: KB Home

KB Home Jacksonville LLC v. Liberty Mut. Fire Ins. Co., No. 3:18-cv-371-J-34MCR, 2019 WL 4247269, at * 8 (M.D. Fla. Sept. 5, 2019)

- "From the record, the Court cannot determine how that dispute was resolved, if it was, when Del Webb accepted Liberty Mutual's offer, or when Liberty Mutual actually made the payment of the Policies' remaining funds. Moreover, Liberty Mutual has failed to present any evidence explaining how any settlement payments were allocated in relation to the Policies' limits. Indeed, Liberty Mutual never even explains in its Motion, or more importantly by pointing to record evidence, what the relevant policy limits are, or the precise amounts it has paid in order to exhaust them. While "[s]ettlement agreements are highly favored" by Florida courts, and they should be enforced "whenever possible," see State Farm, 781 So. 2d at 501-02, the Court is not being asked to enforce a settlement agreement in this case. Instead, Liberty Mutual is asking the Court to determine that the limits of the Polices at issue in this case were exhausted on a specific date —June 2, 2017—but Liberty Mutual has failed to carry its burden in demonstrating that to be true."

The New Standard: § 624.1055, Florida Statutes (2019)

§ 624.1055. Right of contribution among liability insurers for defense costs

Effective: July 1, 2019

A liability insurer who owes a duty to defend an insured and who defends the insured against a claim, suit, or other action has a right of contribution for defense costs against any other liability insurer who owes a duty to defend the insured against the same claim, suit, or other action, provided that contribution may not be sought from any liability insurer for defense costs that are incurred before the liability insurer's receipt of notice of the claim, suit, or other action.

(1) Apportionment of costs.--The court shall allocate defense costs among liability insurers who owe a duty to defend the insured against the same claim, suit, or other action in accordance with the terms of the liability insurance policies. The court may use such equitable factors as the court determines are appropriate in making such allocation.

§ 624.1055. Right of contribution among liability insurers for defense costs

(2) Enforcement of right of contribution.--A liability insurer who is entitled to contribution from another liability insurer under this section may file an action for contribution in a court of competent jurisdiction.

(3) Construction.--

(a) This section is not intended to alter any terms of a liability insurance policy or to create any additional duty on the part of a liability insurer to an insured.

(b) An insured may not rely on this section as grounds for a complaint against a liability insurer.

(4) Applicability.--This section applies to liability insurance policies issued for delivery in this state, or liability insurance policies under which an insurer has a duty to defend an insured against claims asserted or suits or actions filed in this state. Such liability insurance policies include surplus lines insurance policies authorized under the Surplus Lines Law, ss. 626.913-626.937.

Principles of Equitable Contribution

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Fireman's Fund Ins. Co. v. Maryland Cas. Co., 65 Cal.App.4th 1279, 1293 (1998) (emphasis in original)

- "In the insurance context, the right to contribution arises when several insurers are obligated to indemnify or defend the same loss or claim, and one insurer has paid more than its share of the loss or defended the action without any participation by the others. Where multiple insurance carriers insure the same insured and cover the same risk, each insurer has independent standing to assert a cause of action against its coinsurers for equitable contribution when it has undertaken the defense or indemnification of the common insured. Equitable contribution permits reimbursement to the insurer that paid on the loss for the excess it paid over its proportionate share of the obligation, on the theory that the debt it paid was *equally* and *concurrently* owed by the other insurers and should be shared by them pro rata in proportion to their respective coverage of the risk. The purpose of this rule of equity is to accomplish substantial justice by equalizing the common burden shared by coinsurers, and to prevent one insurer from profiting at the expense of others."

Principles of Equitable Contribution

Aerojet-General Corp. v. Transport Indem. Co., 17 Cal.4th 38, 72 (1997)

- Although insurers may be required to make equitable contribution to defense costs among themselves, the insured is not required to make such a contribution together with insurers.

Safeco Ins. Co. of America v. Superior Court, 140 Cal.App.4th 874, 880 (2006) (citations omitted)

- "On the more precise issue of just how much the nonparticipating coinsurer has to pay, the courts have held that, by its refusal to participate, the recalcitrant coinsurer waives the right to challenge the reasonableness of defense costs and amounts paid in settlement (because any other rule would render meaningless the insured's right to settle)."

Principles of Equitable Contribution

Signal Companies, Inc. v. Harbor Ins. Co., 27 Cal.3d 359 (1980)

- Excess liability insurer was not obligated to participate in defense of the insured as soon as it was notified of the claim and even though primary coverage had not as yet been exhausted where, among other things, excess policy explicitly stated that liability would not attach until primary coverage had been exhausted and provided that duty to contribute to costs would arise only if insured obtained excess insurer's written consent to incur costs and such was neither sought nor obtained and insofar as duty to defendant was concerned, the insured was protected by the primary insurer.

Scottsdale Ins. Co. v. Century Surety Co., 182 Cal.App.4th 1023, 1035 (2010)

- An insurer is only entitled to equitable contribution when it has paid more than its fair share of the loss.
- The right to equitable contribution is predicated on the commonsense principle that where multiple insurers or indemnitors share equal contractual liability for the primary indemnification of a loss or the discharge of an obligation, the selection of which indemnitor is to bear the loss should not be left to the often arbitrary choice of the loss claimant, and no indemnitor should have any incentive to avoid paying a just claim in the hope the claimant will obtain full payment from another coindemnitor. Id. at 1031 (citing Fireman's Fund, 65 Cal.App.4th at 1295).

Principles of Equitable Contribution: Additional Insured

Maryland Cas. Co. v. Nationwide Mutual Ins. Co., 81 Cal.App.4th 21, 33 (2000)

- "Viewing the totality of the circumstances, we are unpersuaded the premium cost establishes the insureds would have expected they were purchasing indemnity agreements without a duty to defend. First, as explained above, an insured would be entitled to reasonably rely on the policy language to conclude Nationwide had assumed a duty to defend Nielsen for potentially covered claims. Additionally, because the parties purchased the endorsements as protection against potential construction defect litigation, it is reasonable to assume they expected Nationwide to defend the general contractor. 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. [Citation.]"

Presley Homes, Inc. v. American States Ins. Co., 90 Cal.App.4th 571 (2001)

- Relying on **Maryland Cas. Co.**, the Court explained that although the additional insured endorsement of the policy limited indemnification to instances of vicarious liability, the duty to defend was not similarly restricted and required providing the insured with a full and complete defense.

Principles of Equitable Contribution: Additional Insured

St. Paul Mercury Ins. Co. v. Mountain West Farm Bureau Mut. Ins. Co., 210 Cal.App.4th 645, 663-64 (2012)

- "We reject Mountain West's further contention that the judgment requiring it to pay 43 percent of the total defense costs is inequitable because there is no evidence suggesting that the potential claims arising out of Teton's work was close to that amount. Mountain West argues that where there were 18 subcontractors on the entire project and allegations of defects unrelated to Teton's work, it should not be required to pay 43 percent of the defense costs. But, only St. Paul Mercury and Mountain West had a duty to defend Jacobsen and, as noted, St. Paul Mercury demonstrated what portion of the claims against Jacobsen arose out of Teton's work. The trial court's allocation of defense costs did not exceed the bounds of reason."

Equitable Factors in Apportioning Defense Costs

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CNA Casualty of California v. Seaboard Surety Co. 176 Cal.App.3d 598, 619 (1986) (citations omitted)

- "The costs of defense must be apportioned on the basis of equitable considerations not found in the insurers' own contracts, since the insurance companies who must share the burden do not have any agreements among themselves. The courts have expressly declined to formulate any definitive rules for allocating defense costs among carriers, because of the 'varying equitable considerations which may arise, and which affect the insured and the ...carriers, and which depend upon the particular policies of insurance, the nature of the claim made, and the relation of the insured to the insurers.' "

Equitable Factors in Apportioning Defense Costs

Centennial Ins. Co. v. United States Fire Ins. Co., 88 Cal.App.4th 105, 116 (2001) (emphasis added)

- "The reason for the courts' refusal to establish such a bright-line rule is the existence of differing factual circumstances varying from case to case, which unavoidably give rise to different equitable considerations that must be taken into account. Among other things, these considerations include the particular terms, exclusions and limits of the respective insurance policies in effect; the time each co-insurer is 'on the risk'; the nature of the given claim; the relation of the insured to the several insurers; and the relative amount of premiums paid. In order to avoid the inequities that would inevitably result from application of a single rigid rule in all cases, the courts in California have consistently held 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. A single bright-line rule to be applied in every instance would be the very antithesis of such an equitable approach."

Equitable Factors in Apportioning Defense Costs

Centennial Ins. Co. v. U.S. Fire Ins. Co., 88 Cal.App.4th 105, 112–13 (2001) (emphasis added)

"**(1)** apportionment based upon the relative duration of each primary policy as compared with the overall period of coverage during which the 'occurrences' 'occurred' (the 'time on the risk' method) [citations];

(2) apportionment based upon the relative policy limits of each primary policy (the 'policy limits' method) [citations];

(3) apportionment based upon both the relative durations and the relative policy limits of each primary policy, through multiplying the policies' respective durations by the amount of their respective limits so that insurers issuing primary policies with higher limits would bear a greater share of the liability per year than those issuing primary policies with lower limits (the 'combined policy limit time on the risk' method) [citation];

(4) apportionment based upon the amount of premiums paid to each carrier (the 'premiums paid' method) [citation];

(5) apportionment among each carrier in equal shares up to the policy limits of the policy with the lowest limits, then among each carrier other than the one issuing the policy with the lowest limits in equal shares up to the policy limits of the policy with the next-to-lowest limits, and so on in the same fashion until the entire loss has been apportioned in full (the 'maximum loss' method) [citation]; and

(6) apportionment among each carrier in equal shares (the 'equal shares' method) [citation]."

Applying Equitable Methods of Apportionment

Time on the Risk Method

Stonewall Ins. Co. v. City of Palos Verdes Estates, 46 Cal.App.4th 1810, 1861-63 (1996)

- Time on the risk method of allocation "is the approach likely lead to the fairest result in most cases" and imposes contribution up to an insurer's policy limits.
- Policy limits method subjects insurers with high policy limits to pay a greater portion of the loss.
- Apportionment based on premiums method is superficially attractive, but ignores various factors creating differences in insurance premiums.
- Equal shares apportionment method is "so arbitrary that its potential for unfairness is patent."

Clarendon Nat. Ins. Co. v. Nat'l Fire & Marine Ins. Co., 512 F.App'x 671, 673 (9th Cir. 2013)

- The Ninth Circuit rejected the argument that the terms of the policy relieved National from its contribution obligation.
- The parties previously allocated 70% liability to National using the time on the risk method; as such, the district court acted within its discretion in allocating 77% contribution of Clarendon's claim settlement to National under same allocation method.

Pro Rata Method

Continental Cas. Co. v. Zurich Ins. Co., 57 Cal.2d 27, 37 (1961) (citations omitted)

- Each obligated carrier (whether primary or excess) independently owed a duty to defend its insured, which is separate and distinct from its obligation to indemnify.
- "Under general principles of equitable subrogation, as well as pursuant to the rule of prime importance that the policy is to be liberally construed to provide coverage to the insured it is our view that all obligated carriers who have refused to defend should be required to share in costs of the insured's defense, whether such costs were originally paid by the insured himself or by fewer than all of the carriers."

Signal Companies, Inc. v. Harbor Ins. Co., 27 Cal.3d 359, 369 (1980)

- "Unlike the situation in *Continental*, where the relative obligations of different carriers who have assumed the same primary risk must be adjusted, we are here concerned with the obligation of a carrier that is expressly designated as an excess insurer. In such a situation there is no reasonable basis for assuming that the reasonable expectations of either the insured or the primary carrier were that the excess carrier would participate in defense costs beyond the express terms of its policy."

Pro Rata Method

Trinity Universal Ins. Co. v. Employers Mut. Cas. Co., 592 F.3d 687, 695 (5th Cir. 2010) (quoting Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co., 236 S.W.3d 765, 772 (Tex. 2007))

- "The duty to defend creates 'a debt which is equally and concurrently due by' all of its insurers."

Texas Prop. and Cas. Ins. Guar. Ass'n v. Sw. Aggregates, Inc., 982 S.W.2d 600 (Tex. Ct. App. 1998)

- ". . . an insurer's duty to indemnify its insured is not reduced when there is concurrent coverage among consecutive insurers, because there is nothing in the policies that provides for a reduction of the insurer's liability if an injury occurs only in part during a policy period." Id. at 605 (citing CNA Lloyds of Texas v. St. Paul Ins. Co., 902 S.W.2d 657, 661 (Tex. Ct. App. 1995), writ dism'd by agr. (Nov. 16, 1995))
- "In keeping with our reasoning in *CNA Lloyds,* we agree that when a claim falls partially within and partially outside of a coverage period, the insurer's duty is to provide its insured with a complete defense. This is because the contract obligates the insurer to *defend* its insured, not to provide a pro rata defense." Id. at 606 (citing CNA Lloyds, 902 S.W.2d at 661).

Policy Limits Method

CNA Casualty of California v. Seaboard Surety Co., 176 Cal.App.3d 598 (1986)

- Allocation of contribution was upheld based on policy limits: CNA, INA, and Pacific had policy limits in the amount of $300,000, while Seaboard had policy limits of $100,000; accordingly, CNA, INA, and Pacific would each be responsible for 30% of defense costs, while Seaboard would be responsible for 10%.
- "We agree that in given cases, the true scope of an insured's 'coverage' might not be confined to the liability limits of a given policy; it may also include the period of time covered by the policy and the interrelation between the terms of the policy and the wrongs alleged against the insured by a claimant. In this case, however, the trial court did not abuse its discretion in assessing damages according to the formula followed by an overwhelming weight of authority." Id. at 620.

Premiums Paid Method

Insurance Co. of Tex. v. Employers Liability Assur. Corp., 163 F.Supp.143, 151 (S.D. Cal. 1958)

- As both plaintiff and defendant's comprehensive liability policies contained "Other Insurance" clauses with substantially the same language, the Court disregarded such clauses and instead apportioned the loss according to the premiums paid on each policy.
- "It is the opinion of this Court that it would be more equitable to require proration according to premiums paid rather than the limits of liability. It is common knowledge that after the first twenty-five or fifty thousand dollars of liability insurance the additional charge for five hundred thousand dollars or a million dollars of insurance is relatively small, and the rate on the larger amounts is considerably less than upon the smaller amounts." Id. at 147.

Future Application of § 624.1055, Florida Statutes

Can § 624.1055, Florida Statutes, be applied retroactively?

Two-Prong Analysis:

(1) Did the legislature intend for the statute to apply retroactively?

(2) Would retroactive application violate constitutional principles?

See, e.g., State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So.2d 55 (Fla. 1995); Florida Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc., 67 So.3d 187, 195 (Fla. 2011); Menendez v. Progressive Ins. Co., 35 So.3d 873 (Fla. 2010); Pomponio v. Claridge of Pompano Condo., Inc., 378 So.2d 774 (Fla. 1979).

Can § 624.1055, Florida Statutes, be applied retroactively?

(1) Statutes are presumed to apply prospectively unless there is clear legislative expression of retroactivity

- Plain Language of statute
- Legislative History

(2) Substantive vs. Procedural Statutes

- Constitutional limitations on the impairment of contracts
- "[A] substantive statute will not operate retrospectively absent clear legislative intent to the contrary, but ... a procedural or remedial statute is to operate retrospectively." **Laforet, 658 So.2d at 61.**

Obstacles of Working with Multiple Parties

Obstacles of Working with Multiple Carriers

Establishing Time on Risk Allocations (attempts at multiple revisions should be avoided).

Scheduling and Completing Conference Calls (which ultimately results in a substantial amount of verbal and written communication).

Obtaining an agreement on:

- Litigation, Discovery, and Expert Strategy
- Reporting Format and Frequency

Securing the authority for:

- Motion Practice
- Settlement Authority (which may prove difficult, due to carriers' internal structures)

Obstacles of Working with Multiple Co-Counsel

Difficulty can arise in agreeing on litigation and discovery strategies, and delegating labor between co-counsel.

As a general matter, co-counsel **should agree** on:

- Legal Theories
- Experts
- Motion Practice
- Reports

Ultimately, Co-counsel **must agree** on:

- Facts
- Liability
- Causation
- Damages
- Exposure
- Settlement Values
- Future Client Recommendations

Obstacles of Working with Personal Counsel

How should counsel's use of improper or obstructionist methods be handled?

- Issues should be confronted head-on.
- Generally, asserting that counsel is not providing an adequate defense will result in corrected behavior.

The Benefits of Participation from Multiple Carriers

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The first carrier to participate will appoint its choice of counsel, who is generally accepted by subsequent participating carriers.

Although the total amount of defense fees and costs will increase, the defense fees and costs will generally be lower for each individual carrier due to:

- Creating additional work for multiple carriers; and
- Dividing fees and costs across a greater number of carriers (for instance, between three and seven carriers, rather than one or two).

While it may take multiple carriers longer to reach an agreement on issues such as litigation, discovery, resolution, and trial strategy, such efforts may ultimately lead to higher quality work product, as a result of numerous evaluations and input from multiple perspectives.

Billing Pitfalls when Multiple Carriers Participate

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Nonpayment by one or more carriers can result in problematic accounting and collections.

Carriers often differ in:

- **Rates**
  - Most carriers now require the attorney to accept the carrier with the lowest rate as the rate for a particular case.
- **Billing Cycles**
- **Electronic Billing Systems**
  - Some carriers do not permit electronic billing unless the agreed upon counsel is part of that carrier's panel counsel group.

Regardless of whether carriers agree to split fees and cost on a pro rata basis or based upon the time on risk, billing and collections will likely become increasingly more complex and time consuming, as a result of this new law.

- However, all is not lost; *compare with* the advent of electronic billing.

Fertile Grounds for Future Litigation

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Ultimately, how will Florida courts apportion carriers' contribution for defense costs?

- Recall § 624.1055(1), Florida Statutes, provides that ". . . [t]he court may use such equitable factors as the court determines are appropriate in making such allocation."

Will Florida courts follow the equitable methods of apportionment applied by courts of other states, such as California and Texas?

- Will Florida courts favor certain methods of equitable apportionment (such as time on the risk or pro rata allocation) over others? If so, why?

Fertile Grounds for Future Litigation

How will the new law affect pending Chapter 558 Notices?

Laws 2019, c. 2019-108 §17 provides:

- "Section 624.1055, Florida Statutes, as created by this act, applies to any claim, suit, or other action initiated on or after January 1, 2020."

See Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co., 232 So.3d 273, 279 (Fla. 2017)

- "Although the chapter 558 process does not constitute a 'civil proceeding,' it is included in the policy's definition of 'suit' as an 'alternative dispute resolution proceeding' to which the insurer's consent is required to invoke the insurer's duty to defend the insured."

A Changing Landscape for the Practice of Insurance Law?

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What future issues will arise for defense firms when representing carriers filing contribution suits against other carriers?

- How will defense counsel handle future conflicts, given that obtaining waivers from carrier clients may not be an option?
- Will defense counsel eventually become aligned with fewer carriers?
- Will carrier clients find the need to hire one defense firm to handle coverage matters and another defense firm to handle liability matters; *one to pay and one to chase?*

How will this new law impact plaintiffs' firms seeking coverage?

- Will the new law create fragmentation within the practice and result in a greater amount of smaller sized plaintiffs' firms?

Practical Impacts Seen Thus Far

- Settlement agreement terms
- Mediation bargaining chip
- Picking up the defense on old cases and expecting contribution from others
- Holding back the defense anticipating others will pick-up