



# NATIONAL CONSTRUCTION DEFECT CONFERENCE



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## Florida Contribution Statute Revisited



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# Florida Statute

## § 624.1055

Effective: July 1, 2019

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

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 a location.

**(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.

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

## (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.

(5) **Exception.**--Notwithstanding subsection (4), this section does not apply to motor vehicle liability insurance or medical professional liability insurance.

# § 624.1055. Reported Decisions

KB Home Jacksonville LLC v. Liberty Mut. Fire Ins. Co., No. 3:18-CV-371-J-34MCR, 2019 WL 4228602 (M.D. Fla. Sept. 5, 2019) (citing the statute and noting that it applies to any claim, suit or other action initiated on or after January 1, 2020).

Nat'l Builders Ins. Co. v. Conifer Ins. Co., No. 319CV01168HESJRK, 2020 WL 13882098 (M.D. Fla. Aug. 7, 2020) (statute is inapplicable because the claim was initiated prior to January 1, 2020 and NBIC alleged that it had no duty to defend so the statute was inapplicable for that additional reason because “a liability insurer *who owes a duty to defend an insured* and who defends the insured against a claim 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”).

Hartford Cas. Ins. Co. v. AIX Specialty Ins. Co., No. 23-20250-CIV, 2023 WL 5337528 (S.D. Fla. July 31, 2023), *report and recommendation adopted sub nom.* Hartford Cas. Ins. Co. v. Colony Ins. Co., No. 23-20250-CV, 2023 WL 5333128 (S.D. Fla. Aug. 18, 2023) (joinder of NI and AI to contribution action).

**2019: This Statute will  
Change EVERYTHING**

# No Contribution Among Co-Primary Insurers

## 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.”

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

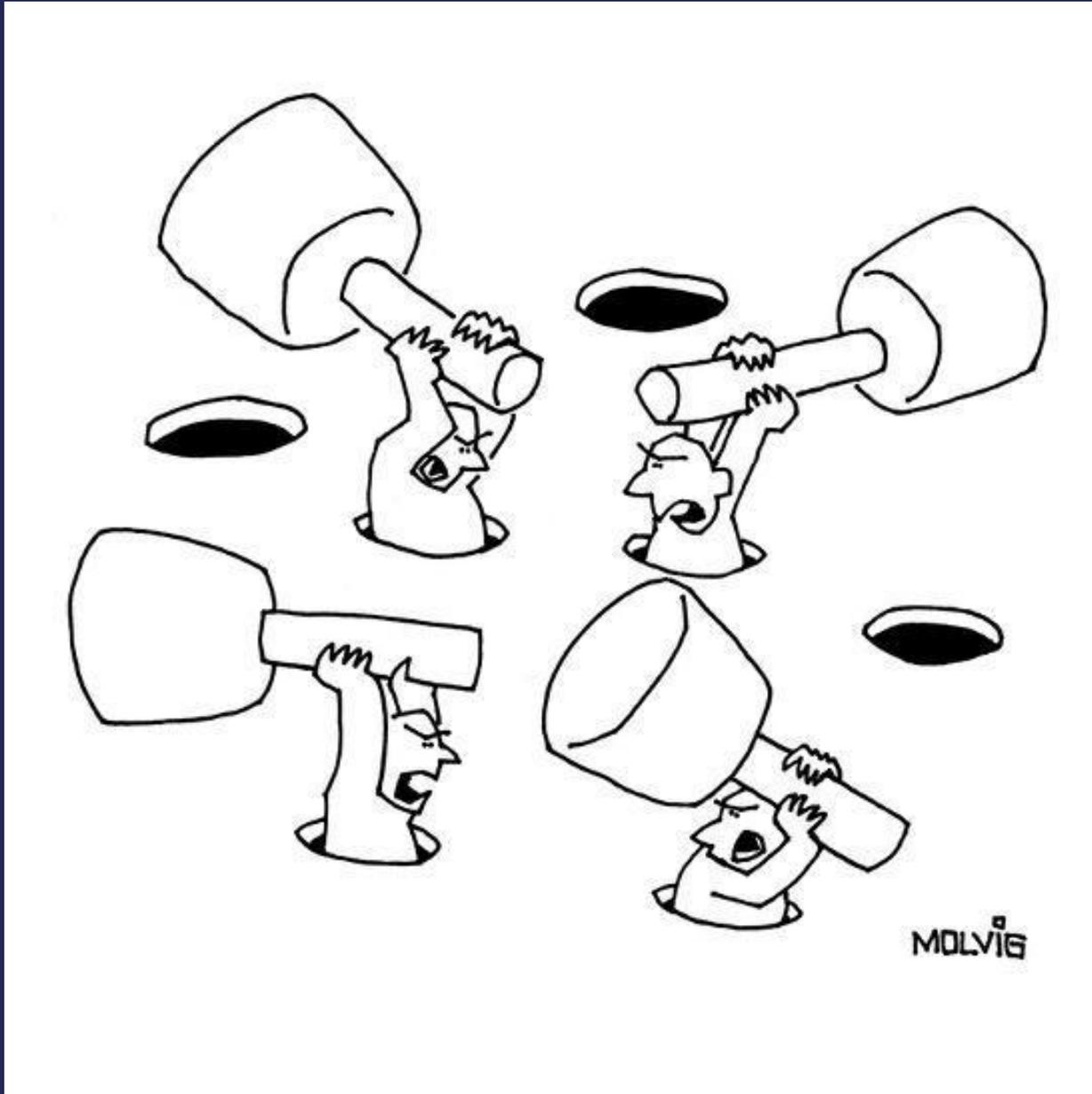
- ▶ “Several factors discourage such misconduct, including exposure to greater loss if the other insurer is ineffective in its defense, and the risk of suits by its own insured on theories of breach of contract and statutory and common law ‘bad faith.’ It is important to keep in mind that insurers have 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.”

# No Contribution Among Co-Primary Insurers

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.”

# No Contribution Among Co-Primary Insurers



# No Contribution Among Co-Primary Insurers

*Travelers Prop. Cas. Co. of Am. v. Amerisure Ins. Co.*, 161 F. Supp. 3d 1133, 1135 (N.D. Fla. 2015), *aff'd*, 674 Fed. Appx. 957 (11th Cir. 2017)

*FCCI Ins. Co. v. Island Pointe, LLC*, 309 F. Supp. 3d 399 (D.S.C. 2019)

# True Excess Insurance is not Co-Primary

*Signal Companies, Inc. v. Harbor Ins. Co.*, 612 P.2d 889 (Cal. 1980)

“Unlike the situation in *Continental Cas. Co. v. Zurich Ins. Co.*, 366 P.2d 455 (Cal. 1961) (citations omitted), 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.”



# Additional Insureds



# Equitable Contribution vs. Equitable Subrogation

Landmark American Ins. Co., v. Colony Ins. Co., No. 2:24-CV-06445-CAS-KSX, 2025 WL 257884, \*12 (C.D. Cal. Jan. 13, 2025)

As an initial matter, the Court differentiates between Landmark's claims of equitable contribution and equitable subrogation. '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.' ... Equitable subrogation, on the other hand, is the 'appropriate remedy for an insurer that has paid a claim or incurred defense costs to obtain reimbursement from ... other insurers who were primarily liable to pay the insured's claim or to indemnify and defend a third party claim against the insured.' ... 'Whereas subrogation requires that the party to be charged be in an equitable position ... inferior to that of the insurer such that justice requires the entire loss be shifted from the insurer to the party to be charged, contribution permits liability for the loss to be allocated among the various insurers without regard to questions of comparative fault or the relative equities between the insurers.'" (citations omitted).

# Equitable Factors in Apportioning Defense Costs

*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. 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].”

# 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.

# Additional Insureds: Vicarious Liability Only?

*The Cincinnati Specialty Underwriters Ins. Co. v. KNS Grp., LLC*, 561 F. Supp. 3d 1298 (S.D. Fla. 2021), *affirmed*, Case No. 21-13628, 2022 WL 5238711 (October 6, 2022)

The allegations in the complaint make clear that Cincinnati does not owe GM&P a duty to defend in the Underlying Action because GM&P is being sued for its own negligence, not vicariously for any negligent acts or omissions on the part of KNS ... There is a clear difference between “caused” and “caused in part by”: the latter term means that even if the complaint alleged KNS was only 1% responsible for causing the faulty workmanship, then Cincinnati would have a duty to defend GM&P.

*James G. Davis Const. Corp. v. Erie Ins. Exch.*, 126 A.3d 753, 762 (Md. Ct. App. 2015)

In our view, it is unreasonable to interpret the term “liability” as used in the 2004 version of the ISO standard form additional insured endorsement as referring to “vicarious liability” because vicarious liability is an all or nothing proposition and thus a party could not be vicariously liable ‘in part’ for [the named insured's] acts.

# Additional Insureds: Vicarious Liability Only?

Contractors Bonding & Ins. Co. v. AmTrust Int'l Underwriters Ltd. (AmTrust), No. 20-CV-03248-RS, 2021 WL 2355390, (N.D. Cal. June 9, 2021), aff'd sub nom. Contractors Bonding & Ins. Co. v. AmTrust Int'l Underwriters Ltd., No. 21-16157, 2022 WL 4481494 (9th Cir. Sept. 27, 2022)

Court finds GC was an additional insured under Amtrust policy but that the Amtrust policy's primary defense obligation was limited to the claims against the GC for liability caused in whole or in part by the subcontractor.

Because each policy was primary as to some portion of the underlying claims, and both policies contemplated contribution by equal shares where all other insurance so permitted, each insurer was required to fund half of the defense of the underlying matter. According to the court, the modern trend require[s] equitable contributions on a pro rata basis from all primary insurers regardless of the type of other insurance clause in their policies.

# Contractual Indemnity: Vouching In

Landmark American Ins. Co., v. Colony Ins. Co., No. 2:24-CV-06445-CAS-KSX, 2025 WL 257884 (C.D. Cal. Jan. 13, 2025)

- ▶ Landmark argues that the subcontracts constitute “insured contracts” under the insurance policies. ... because the contractual liability exclusion does not apply to insured contracts, it does not apply to Cal Select's subcontracts with ACF and Watertight. The Court finds that, because the subcontracts provide for indemnity, they may act as a bar to equitable contribution, which would excuse the indemnitee's insurer, Landmark, from contributing to a loss paid by the indemnitors' insurers, Colony and Country Mutual. The contract provision was a general indemnity clause (one that does not specifically address the indemnitee's active negligence (e.g., an agreement to hold the indemnitee harmless from “all claims or causes whatsoever”)) which ‘may be construed to provide indemnity for a loss resulting in part from an indemnitee's [p]assive negligence, [but] will not be interpreted to provide indemnity if an indemnitee has been [a]ctively negligent.’ ... Because the question of Cal Select's conduct as an indemnitee will determine whether the indemnity provision bars Landmark's equitable contribution claim, and thus whether Landmark is equitably subrogated to Cal Select's rights against the indemnitor subcontractors ... is better decided on a motion for summary judgment and therefore denies defendants' motions to dismiss Landmark's equitable contribution and equitable subrogation claims.

309 F.Supp.3d 399  
United States District Court, D. South Carolina,  
Charleston Division.

FCCI INSURANCE COMPANY, Plaintiff,  
v.  
ISLAND POINTE, LLC, et al., Defendants.

Case No 2:17-cv-1976-RMG

Signed February 22, 2018

On motion to dismiss for lack of subject matter jurisdiction, it is plaintiff's burden to prove jurisdiction, and court is to regard pleadings' allegations as mere evidence on issue, and may consider evidence outside pleadings without converting proceeding to one for summary judgment. [Fed. R. Civ. P. 12\(b\)\(1\)](#).

#### Synopsis

**Background:** Contractor's insurer brought action against subcontractors' insurers seeking declaratory judgment that contractor qualified as additional insured under policies issued to its subcontractors, and that it was therefore absolved of its duty under commercial general liability and umbrella policies to defend and indemnify contractor in underlying litigation. Subcontractors' insurers moved to dismiss.

**Holdings:** The District Court, [Richard Mark Gergel, J.](#), held that:

[1] contractor's insurer was not entitled to declaratory judgment compelling subcontractors' insurers to defend contractor, and

[2] contractor's insurer's claim for declaratory judgment that subcontractors' insurers had duty to indemnify contractor was not ripe.

Motions granted.

**Procedural Posture(s):** Motion to Dismiss for Failure to State a Claim; Motion to Dismiss for Lack of Subject Matter Jurisdiction.

West Headnotes (11)

[1] [Federal Courts](#) [Pleadings and motions](#)  
[Federal Courts](#) [Evidence; Affidavits](#)  
[Federal Courts](#) [Presumptions and burden of proof](#)

[2] [Federal Courts](#) [Pleadings and motions](#)  
[Federal Courts](#) [Evidence; Affidavits](#)

Motion to dismiss for lack of subject matter jurisdiction can arise in two contexts: (1) when moving party maintains that complaint fails to allege facts upon which subject matter jurisdiction can be based, or (2) when moving party asserts that complaint's jurisdictional allegations are not true. [Fed. R. Civ. P. 12\(b\)\(1\)](#).

[3] [Federal Courts](#) [Evidence; Affidavits](#)  
[Federal Courts](#) [Presumptions and burden of proof](#)

Where party seeking to dismiss complaint for lack of subject matter jurisdiction asserts that non-moving party has failed to allege facts establishing subject matter jurisdiction, court must assume all facts alleged in complaint to be true, but where moving party disputes validity of jurisdictional allegations in complaint, court may look beyond complaint and consider other evidence, such as affidavits, depositions, and live testimony. [Fed. R. Civ. P. 12\(b\)\(1\)](#).

[4] [Declaratory Judgment](#) [Necessity](#)

# FCCI Insurance Co. v Island Pointe, LLC, 309 F. Supp. 3d 399 (D.S.C 2018)

# What's Next?

