

FARMER SMITH & LANE LLP

CASE LAW UPDATE:
AXIS SURPLUS INSURANCE CO V. GLENCOE INS. CO.

204 Cal.App.4th 1214
California Court of Appeal, Fourth Appellate District
April 11, 2012

In *Glencoe*, the Court of Appeal held that the timing of an insured's satisfaction of its self-insured retention ("SIR") does not affect a nonparticipating insurer's obligations in a subsequent equitable contribution action by a participating insurer to recover for settlement payments made.

In the underlying suit giving rise to this equitable contribution action, the insured bought an apartment complex and converted it to condominium units subsequently sold to individual owners. The complex later formed a homeowners association and brought a construction defect suit against the insured. The insured tendered defense to its two insurers: Axis Surplus Insurance Company ("Axis") and Glencoe Insurance Company ("Glencoe").

Axis defended under a reservation of rights. Glencoe declined the tender, but issued a reservation of rights and requested that the insured provide proof that it had satisfied its \$250,000 SIR.

While Glencoe continued to monitor the underlying litigation, the homeowners association issued a \$1 million dollar settlement demand to the insured. The insured informed Glencoe of the demand and also noted the repair costs were estimated at \$1.5 million. Glencoe responded to the insured's request for approval of the settlement one day before the settlement offer expired by requesting an extension of the deadline to accept the offer. Glencoe claimed it needed more time to consider whether the facts warranted a contribution to the settlement. Glencoe, however, did not object to the insured's contributing its SIR to a settlement funded by Axis up to the \$1 million demand. Axis funded \$750,000, and the insured contributed its \$250,000 SIR to meet the association's demand.

Axis then sued Glencoe for equitable contribution to recover a portion of Axis's settlement payment. The trial court determined that Axis had met its burden of proof of coverage under the Glencoe policy and concluded that a 60/40 split of the settlement payment in favor of Axis was appropriate. Glencoe appealed.

The court of appeal considered two issues: (1) whether the trial court erred in finding that Axis met its burden of proof that there was a potential for coverage under the Glencoe Policy; and (2) whether the trial court erred in refusing to apportion the settlement payments equally amongst the two insurers according to “other insurance” clauses in both policies.

As to the first issue, Glencoe argued that there could be no potential for coverage at the time of settlement because the insured did not satisfy its SIR obligation until after Axis paid the \$750,000 settlement payment.

Glencoe relied on *Safeco Ins. Co. of America v. Superior Court*, 140 Cal.App.4th 874 (2006), to support its position. *Safeco* holds that an insurer seeking contribution from a nonparticipating coinsurer must prove that the nonparticipating coinsurer had a legal obligation to provide a defense or indemnity coverage prior to the date of settlement. (*Id.* at p. 879, citing *American Continental Ins. Co. v. American Casualty Co.*, 86 Cal.App.4th 929, 938 (2001).) The Court of Appeal reviewed *Safeco* and its cited authority, *American Continental*, and found that those cases did not specifically address the factual situation presented: the effect the timing of the SIR payment has on an equitable contribution action.

The court then reviewed equitable principles and concluded that the unique facts of the case warranted an exception to the general rule. “When the insured has tendered a claim to the nonparticipating insurer, the nonparticipating insurer’s duty to defend is subject to the insured satisfying an SIR, and the insured satisfies the SIR as payment of a settlement of which the nonparticipating insurer was aware, the timing of the insured’s payment of the SIR does not prevent the settling insurer from establishing the nonparticipating insurer’s legal obligation to cover the claim.” The court emphasized that equitable principles should control the situation and Glencoe could not escape its obligation simply because of the timing of the settlement; such gamesmanship would not give the nonparticipating insurer an advantage in an equitable action.

The court also considered whether the settlement was apportioned appropriately given that both insurance policies had clauses calling for equal payment amongst primary insurers on the loss. The trial court had taken into account various factors in determining the 60/40 split, including: the relationship between the insured and its insurers, the terms of the policies, and time on the risk. Under an abuse of discretion standard, the reviewing court found that “the allocation of liability did not exceed the bounds of reason” and affirmed the trial court.