
Supreme Court of Virginia Holds That Insurer is Entitled to Equitable Contribution From Another Covering Insurer and that Consent to Settlement Conditions Are Waived by Denial of Coverage on Other Grounds

28 Aug 2019

[Christopher P. Ferragamo](#)

In a decision issued on July 18, 2019, the Supreme Court of Virginia vacated a judgment entered in favor of a liability insurer seeking contribution against another liability insurer and remanded the case to the trial court on the grounds that the complaint had stated a claim for equitable contribution. *Nationwide Mut. Fire Ins. Co. v. Erie Ins. Exchange*, 829 S.E.2d 731 (Va. 2019). The insurance coverage action arose out of an automobile accident involving an employee of a construction company's subcontractor who died in a car crash while driving a vehicle lent to the subcontractor by the construction company. The lawsuit began as a declaratory judgment action involving the insurers of the driver, the construction company, and the subcontractor. In the coverage action, the trial court concluded that Nationwide had primary coverage for the first \$3 million in liability and that Erie's policies, which included a \$1 million commercial automobile liability policy and a \$5 million business catastrophe policy, provided excess coverage beyond that amount. While that case was on appeal, Nationwide accepted a \$2.9 million settlement demand after Erie refused to contribute toward the settlement.

In an August 2017 decision issued by the Supreme Court of Virginia, the Court decided the priority of insurance coverage for the crash (*Nationwide I*) and reversed the trial court's ruling holding that Nationwide's CGL policy did not provide coverage for the crash, that Erie's commercial auto policy provided primary coverage, that Nationwide's business auto policy provided excess coverage for up to \$1 million, and that Nationwide's commercial umbrella policy and Erie's business catastrophe policy shared coverage on a pro rata basis. Nationwide then filed a lawsuit against Erie seeking equitable contribution of \$1.75 million for Erie's share of the \$2.9 million settlement. Erie demurred, arguing that it had no common obligation with Nationwide to pay the settlement because Nationwide made a unilateral and voluntary settlement payment and because Erie's consent to settle provision in its policies had not been satisfied. The trial court sustained Erie's demurrer and dismissed Nationwide's complaint with prejudice.

Nationwide appealed and argued that its allegations were sufficient to state a claim against Erie for equitable contribution. The Supreme Court of Virginia agreed. In so ruling, the Court noted that the purpose of equitable contribution is to spread the ultimate liability in a fair proportion among the jointly liable obligors and that it is based on "broad principles of equity that where two or more persons are subject to a *common burden* it shall be borne equally." The Court concluded that Nationwide's complaint alleged facts that, if proven, justify an award of equitable contribution. With respect to Erie's argument that it did not owe a share of the settlement because it did not agree to the settlement, the Court disagreed. According to the Court, "Erie's refusal to contribute toward a settlement under \$3 million had nothing to do with Erie's right to agree to the settlement but was instead based upon Erie's then-existing right to refuse to pay anything toward a settlement exclusively within Nationwide's, not Erie's, coverage." The Court further noted that, under settlement principles, an insurer that denies coverage waives any contractual right to participate in a settlement of a claim and cannot later refuse to pay a covered claim on this basis. "For this reason, the conditions precedent to payment requiring consent to a settlement or judgment against the insured did not apply here." The Court vacated the trial court's judgment and remanded the case to the trial court to determine the reasonableness of the settlement (which the Court noted must be established by a settling insurer seeking equitable contribution) and an

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TAGGED: virginia supreme court, declaratory judgment action, Nationwide, commercial umbrella policy, business catastrophe policy, pro rata basis, equitable contribution