Not Reported in Cal.Rptr.3d, 2007 WL 2446967 (Cal.App. 2 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2007 WL 2446967 (Cal.App. 2 Dist.))

Court of Appeal, Second District, Division 2, California.
ZURICH SPECIALTIES LONDON LIMITED, Plaintiff and Respondent,
v.
CENTURY SURETY COMPANY, Defendant and Appellant.

No. B187762.
(Los Angeles County Super. Ct. No. SC082539).
Aug. 30, 2007.

APPEAL from a judgment of the Superior Court of Los Angeles County. John L. Segal, Judge. Affirmed in part and reversed in part.
Dunn **Koes** and Pamela E. Dunn; Sonnenschein Nath & Rosenthal and Paul E.B. Glad; Woolls & Peer, John E. Peer and H. Douglas Galt for Defendant and Appellant.

Horvitz & Levy, Andrea M. Gauthier and Kim L. Nguyen; Branson, Brinkop, Griffith & Stron, Harry A. Griffith, III and Joyce E. Clifford for Plaintiff and Respondent.

CHAVEZ, J.

***1** Appellant Century Surety Company appeals from a final judgment entered after a court trial on respondent Zurich Specialties London Limited's claim for declaratory relief, equitable contribution, and subrogation arising from several construction defect actions against two entities for which both appellant and respondent provided commercial general liability coverage. Appellant also appeals from a postjudgment order denying a motion to tax costs. We affirm the judgment, but reverse the order denying appellant's motion to tax costs.

CONTENTIONS

Appellant contends that the trial court erred in concluding that appellant was required to contribute to the defense and settlement of the underlying construction defect actions. Appellant's primary contention is that, under the language of its contract with the insureds, appellant's coverage on the underlying claims was excess, therefore appellant was not obligated to contribute until respondent had provided coverage to the limit of its liabilities. Appellant also contends that respondent had no right to recover expert fees because respondent's offer to compromise under Code of Civil Procedure section 998 (section 998) was prematurely withdrawn.

BACKGROUND

1. Exquisite Marble

In 1993, Exquisite Marble & Granite (Exquisite Marble) was hired to install travertine tile throughout the exterior walls of a condominium complex in Santa Monica, California. During the process, Exquisite Marble improperly applied a sealant to the tiles. As a result, the complex gradually sustained water damage because rain and other water began to soak through the exterior walls of the complex.

Appellant insured Exquisite Marble under a commercial general liability policy from December 31, 1996 through December 31, 1997. During that time, Exquisite Marble carried no other liability insurance policy. Respondent insured Exquisite Marble under a commercial general liability policy from January 1, 2001 through January 1, 2002.

In 2001, the condominium association filed a construction defect action (the 701 Ocean Avenue action) against the developer of the complex. The association alleged that the condominium complex had sustained continuous and progressively deteriorating water damage and rot due to the faulty sealing of the tile in 1993. The developer filed a cross-

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action against Exquisite Marble for indemnification and subsequently made a settlement demand in excess of $3 million.

Exquisite Marble tendered the defense of the 701 Ocean Avenue action to appellant and respondent. Respondent agreed to provide Exquisite Marble with a defense under a reservation of rights.[FN1] Appellant refused to defend and indemnify Exquisite Marble on the grounds that it had no duty to defend under the terms of the "Other Insurance" clause contained in the policy appellant issued to Exquisite Marble. Respondent paid $257,503 to defend and $1,000,000 to settle the cross-action filed against Exquisite Marble.

> FN1. The Supreme Court has stated that "[w]here ... successive CGL policy periods are implicated, bodily injury and property damage which is continuous or progressively deteriorating throughout several policy periods is potentially covered by all policies in effect during those periods." (*Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 689 (*Montrose*).)

2. Valley Pacific

***2** From 1995 through 2000, Valley Pacific Concrete (Valley Pacific) installed concrete flatwork at a residential development in Oceanside, California. From 1999 through 2000, Valley Pacific installed similar concrete flatwork at a second residential development in Riverside, California.

Appellant insured Valley Pacific under a commercial general liability policy from July 24, 1999 through July 24, 2000. During that time, Valley Pacific carried no other commercial general liability coverage. Respondent insured Valley Pacific under a commercial general liability policy from July 24, 2000 through July 24, 2001.

In 2000, a group of homeowners within the Oceanside residential development initiated a construction defect action against their developers, alleging ongoing and progressively deteriorating property damage stemming from the faulty installation of concrete flatwork (the Schmidt action). The developer filed a cross-complaint against Valley Pacific for indemnification, breach of warranty, breach of contract, and negligence.

In 2002, another group of homeowners within the same Oceanside residential development initiated a separate construction defect action against the developer based on the same allegations of faulty concrete flatwork (the Winterbottom action). The developer filed a cross-action against Valley Pacific for indemnification, breach of warranty, contribution, breach of contract, and negligence. In 2003, a group of homeowners within the Riverside residential development sued their developer for damages stemming from the faulty installation of concrete flatwork (the Komers action). The allegations made by these homeowners were similar to those made in the Schmidt and Winterbottom actions. The developer filed a cross-complaint against Valley Pacific for indemnification, breach of warranty, breach of contract, and negligence.

Valley Pacific tendered defense of the Schmidt action to appellant. Appellant initially accepted the tender and hired counsel to defend Valley Pacific in the underlying action. Valley Pacific subsequently tendered defense of the Schmidt action to respondent, and respondent also accepted the tender. Upon learning that respondent would participate in the defense and possible indemnification of Valley Pacific, appellant withdrew its defense, citing the "Other Insurance" clause in its policy, which was identical to the "Other Insurance" clause set forth in its policy with Exquisite Marble. After appellant withdrew, respondent continued to provide a defense for Valley Pacific. Respondent paid $9,401 to defend and $10,000 to settle the Schmidt action.

Appellant refused to defend or indemnify Valley Pacific in either the Winterbottom or the Komers actions, again citing the "Other Insurance" clause in its policy. Respondent, along with a third insurer, Claremont Insurance Co., accepted Valley

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Pacific's tender of the Winterbottom action. Respondent paid $12,795 to defend and $7,000 to settle the Winterbottom action. Respondent and two other insurers, Claremont Insurance Co. and INSCORP, accepted Valley Pacific's tender of the Komers action. Respondent paid $24,732 to defend and $3,430 to settle the Komers action.

3. Respondent's Action Against Appellant for Contribution

*3 Respondent sued appellant for equitable contribution and sought reimbursement, on a pro-rata basis, of the sums respondent paid to defend and settle the actions brought against Exquisite Marble and Valley Pacific.

On June 20, 2005, respondent served appellant with an offer to compromise pursuant to section 998. Under its express terms, the offer remained open for 10 days. Appellant did not accept respondent's offer, and trial commenced on July 11, 2005.

After a bench trial, the court concluded that respondent was entitled to equitable contribution from appellant for the sums respondent paid defending the actions against Exquisite Marble and Valley Pacific. In its statement of decision, the court explained:

> "A [representative of appellant] testified that there was a potential for coverage, and that the only reason [appellant] did not defend was because of the excess insurance clause. The Court of Appeal, however, has repeatedly rejected [appellant's] position on the application of this provision in cases involving precisely the same 'excess other insurance' clause, and has ruled adverse to appellant on this very issue. *See Century Surety Co. v. United Pacific Ins. Co.* (2003) 109 Cal.App.4th 1246; *Travelers Casualty & Surety Co. v. Century Surety Co.* (2004) 118 Cal.App.4th 1156. This court has neither the authority nor the inclination to rule otherwise, and finds that there are no factual or legal bases, equitable or otherwise, for not following binding appellate authority."

The court ordered appellant to contribute, on an equal basis, to the cost of defending and indemnifying Exquisite Marble in the 701 Ocean Avenue action; the cost of defending and indemnifying Valley Pacific in the Schmidt action; and the cost of defending Valley Pacific in the Winterbottom and Komers actions.

The court entered judgment in favor of respondent for $655,083, plus prejudgment interest and costs. The court subsequently awarded respondent expert witness fees in the amount of $8,271 pursuant to section 998. Appellant appealed from the judgment and the order awarding expert witness fees.

DISCUSSION

I. Respondent's Right to Contribution

Appellant's first argument is that it was not required to contribute to the defense of its insureds in the 701 Ocean Avenue, Schmidt. Winterbottom, or Komers actions. Appellant's position is grounded on its policies with Exquisite Marble and Valley Pacific which, according to appellant, "plainly state" that these policies are excess of other valid and collectible insurance. Thus, appellant argues, based on the plain language of the insurance policies, respondent has no right of contribution against appellant.

As set forth below, we conclude that appellant was a primary insurer of both insureds in the underlying actions. The law generally requires "equitable contributions on a pro rata basis from all primary insurers regardless of the type of 'other insurance' clause in their policies. [Citations.]" (*Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1079-1080.) We therefore find that the trial court did not err in requiring appellant to pay its equitable share of the costs respondent incurred in defending and indemnifying the underlying actions.

A. Standard of Review

*4 The parties disagree on the standard of review. Appellant argues that its appeal presents a

pure legal question regarding the interpretation of its insurance policies, and therefore should be reviewed de novo. (*Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1074.) Respondent contends that because the appeal involves the question of a trial court's allocation of defense and indemnification costs between two insurers, it rests on equitable considerations and is thus reviewed under an abuse of discretion standard. (*Hartford Casualty Ins. Co. v. Travelers Indemnity Co.* (2003) 110 Cal.App.4th 710, 724; see also *Centennial Ins. Co. v. United States Fire Ins. Co.* (2001) 88 Cal.App.4th 105, 110-111 .) In response to appellant's argument that the case turns on literal enforcement of policy language, respondent argues that equitable disputes between insurers " 'do *not* arise out of contract, for their agreements are not with each other.' " (*Signal Companies, Inc. v. Harbor Ins. Co.* (1980) 27 Cal.3d 359, 369, italics added.)

The question before us does not involve the formula of proration adopted by the trial court, which is a matter of discretion. (*Century Surety Co. v. United Pacific Ins. Co., supra,* 109 Cal.App.4th 1246, 1260 (*Century Surety*).) Instead, it involves "the proper interpretation and application to be given to the language in a policy of insurance and that is a question of law. [Citation.]" (*Id.* at p. 1254.) We therefore review the matter de novo.

B. Appellant P rovided P rimary I nsurance C overage to Exquisite Marble and Valley Pacific

The distinction between primary insurance coverage and excess insurance coverage is significant to this discussion, therefore we begin by reviewing these concepts. " ' *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. [Citation.] Primary insurers generally have the primary duty of defense. [¶] " *Excess* " or *secondary* coverage is coverage whereby, *under the terms of the policy,* liability attaches only after a predetermined amount of primary coverage has been exhausted.' [Citation.]" (*Century Surety, supra,* 109 Cal.App.4th at p. 1255, quoting *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.* (1981) 126 Cal.App.3d 593, 597-598, original italics.)

Excess insurance is therefore the " *secondary* insurance which provides coverage after other *identified* insurance is no longer on the risk." (*Century Surety, supra,* 109 Cal.App.4th at p. 1255, original italics.) "The identification of the underlying primary insurance may be as to (1) a particular policy or policies that are specifically described or (2) underlying coverage provided by a particular and specifically described insurer. In short, excess insurance is insurance that is expressly understood by both the insurer and insured to be secondary to specific underlying coverage which will not begin until *after* that underlying coverage is exhausted and which does not broaden that underlying coverage." (*Ibid.,* citing *Wells Fargo Bank v. California Ins. Guarantee Assn.* (1995) 38 Cal.App.4th 936, 940.)

***5** Under the definitions described above, we conclude that the insurance which appellant provided to Exquisite Marble from December 31, 1996 through December 31, 1997 and to Valley Pacific from July 24, 1999 through July 24, 2000, was primary insurance. Appellant's policy provided immediate coverage for any covered property damage that Exquisite Marble or Valley Pacific became liable to pay. In addition, Exquisite Marble and Valley Pacific had no other liability insurance during the time that appellant insured them. If appellant offered true excess coverage, then Exquisite Marble and Valley Pacific would have carried some underlying primary coverage with another insurer. (*Olympic Ins. Co. v. Employers Surplus Lines Ins. Co., supra,* 126 Cal.App.3d at p. 598 [" 'Excess' or secondary coverage is coverage whereby, under the terms of the policy, liability attaches only after a predetermined amount of primary coverage has been exhausted"].) Finally, appellant never expressly identified its policies as "excess" or

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"umbrella" in its general statements of coverage. Nor did appellant specifically identify any other policy to which it was purportedly excess. (*Commerce & Industry Ins. Co. v. Chubb Custom Ins. Co.* (1999) 75 Cal.App.4th 739, 743.) Thus, appellant's policies with Exquisite Marble and Valley Pacific bore all the hallmarks of primary coverage and none of the indicators of true excess coverage.[FN2]

> FN2. Appellant argues that its policies with Exquisite Marble and Valley Pacific were "hybrid" policies, providing primary coverage for all covered claims except those for which the insured has other valid and collectible insurance, and for those claims, appellant's policies provided excess insurance. In support of its argument that such "hybrid" policies are proper, appellant cites *Merrill & Seeley, Inc. v. Admiral Ins. Co.* (1990) 225 Cal.App.3d 624, 630.) In contrast to the matter before us, *Merrill* was an action between insureds and their insurer, thus the court limited its analysis to the language of the contract to which the parties had agreed. Further, the "hybrid" policy involved did not combine primary and excess coverage. Instead, it combined the coverage limitations of both "claims-made" and "occurrence" policies. Appellant has cited no authority which indicates that a "hybrid" primary/excess policy is considered proper. As we will discuss, policies such as the ones issued by appellant to Exquisite Marble and Valley Pacific are considered primary and, in continuous trigger cases involving the liability of multiple primary insurers, the excess coverage clause is ignored. (See *Hartford Casualty Ins. Co. v. Travelers Indemnity Co., supra,* 110 Cal.App.4th at p. 724; *Centennial Ins. Co. v. United States Fire Ins. Co., supra,* 88 Cal.App.4th at pp. 110-111, discussed in Section I.E, *infra.*)

C. The Continuous Trigger Rule

Another pertinent insurance concept is California's continuous trigger rule. As appellant explains in its opening brief, beginning in the 1980's and culminating with the Supreme Court's decision in *Montrose, supra,* 10 Cal.4th 645, California courts have held that, under standard "occurrence" insurance form language, property damage that is continuous or progressively deteriorating throughout several policy periods is potentially covered by all policies in effect during those periods. Thus, separate policies covering different time periods may be responsible for the same continuous loss. Appellant admits that, under California law, this rule, known as the continuous trigger rule, imposes liability on primary insurers on a pro rata basis for progressive damage claims such as the ones at issue in the underlying cases. Appellant also admits that it crafted its "other insurance" language with the specific intent of "mitigat[ing] the impact of California's adoption of the continuous trigger rule in ongoing damage cases by specifying the priority of otherwise duplicative coverage available to its insureds."

D. Appellant's "Other Insurance" Clause

" 'Insurance policies commonly include "other insurance" provisions which "attempt to limit the insurer's liability to the extent that other insurance covers the same risk." [Citation.] One subcategory is known as "pro rata" provisions, which look to limit the insurer's liability to "the total proportion that its policy limits bear to the total coverage available to the insured." [Citation.] There is another subcategory known as "excess only" clauses, which require the exhaustion of other insurance; in effect, this insurer does not provide primary coverage but only acts as an excess insurer. [Citation.] A final subcategory of "escape" clauses extinguishes the insurer's liability if the loss is covered by other insurance. [Citations.]' [Citation.]" (*Century Surety, supra,* 109 Cal.App.4th at pp. 1255-1256, quoting *Commerce & Industry Ins. Co. v. Chubb Custom Ins. Co., supra,* 75 Cal.App.4th at pp. 743-744.)

***6** Appellant's "other insurance" clause reads:

"If other valid and collectible insurance is available to any insured for a loss we cover under Coverage A or B of this Coverage Part, then this insurance is excess of such insurance and we will have no duty to defend any claims or 'suit' that any other insurer has a duty to defend." Thus, the clause purports to convert the insurance to "excess only" where other insurance is valid and collectible.

However, appellant's "other insurance" clause is considered an "escape" clause under the circumstances. " 'When "excess only" clauses are found in primary liability policies, they are treated the same way as escape clauses. [Citations.] ... [T]hese types of provisions are disfavored.' " (*Century Surety, supra,* 109 Cal.App.4th at p. 1256, quoting *Commerce & Industry Ins. Co. v. Chubb Custom Ins. Co., supra,* 75 Cal.App.4th at pp. 744-745.) In explaining the rationale for treating such clauses as disfavored, the *Commerce* court explained: " 'When two or more applicable policies contain such clauses, both liability and the costs of defense should be prorated according to the amount of coverage afforded.' [Citations.] The reason for this rule is that the conflicting provisions are deemed essentially irreconcilable; if given effect competing clauses would strand an insured between insurers disclaiming coverage in a manner reminiscent of Alphonse and Gaston. [Citations.] Courts have found for the pro rata solution when confronted by a variety of conflicts between differing types of 'other insurance' provisions. [Citations.]" (*Commerce & Industry Ins. Co., supra,* at pp. 744-745.)

As the Court of Appeal explained in *Century Surety, supra,* 109 Cal.App.4th at pages 1256-1257: "Whatever may be said about the merits of [appellant's] attempt to limit its liability to 'excess' coverage, it is clear that it was not, and it cannot claim to be, a true excess or secondary insurer as we have described that term. [Appellant] was one of [Exquisite Marble and Valley Pacific's] *primary* insurers on the claim[s] embodied in the underlying ... action[s]. What [appellant] seeks to do here is enforce its 'excess' other insurance clause to avoid the contribution and allocation claims of the other insurer[ ] that discharged [its] primary coverage duty to [Exquisite Marble and Valley Pacific]."

E. California Law Requires That Appellant Contribute to the Defense of its Insureds in This Matter

The Court of Appeal, Second Appellate District, Division Three, and the Court of Appeal, Fourth Appellate District, Division Three, have both considered and rejected appellant's claim that the "other insurance" clause at issue here serves to extinguish appellant's liability to contribute on an equitable basis to the defense and indemnity expenses of other primary insurers in defending a claim involving continuous or progressive damage. (*Century Surety, supra,* 109 Cal.App.4th 1246; *Travelers Casualty & Surety Co. v. Century Surety Co., supra,* 118 Cal.App.4th 1156.)

*7 In *Century Surety,* appellant was one of four successive insurers which had provided coverage to a common insured over a five-year period. When the insured tendered defense of a suit against it to the four insurers, three accepted, provided a defense, and ultimately settled the case on behalf of the insured. Appellant rejected the tender and refused to provide a defense, citing the same "other insurance" provision at issue here. When the other three insurers made a demand upon appellant for contribution, appellant filed a declaratory action seeking a judgment validating its position. (*Century Surety, supra,* 109 Cal.App.4th at p. 1250 .) The trial court granted summary judgment in favor of the three other insurers and ordered appellant to share the burden on a pro rata basis for the defense and indemnity of the underlying action. The Court of Appeal affirmed, concluding that "the proper resolution of this dispute is to ignore [appellant's] excess clause and compel an equitable proration among all four of the insurers." (*Ibid.*)

Appellant argues that *Century Surety* was wrongly decided. Appellant points to what it describes as "three analytic errors" made by the *Century Surety* court. The first error, according to ap-

pellant, was that the court characterized the excess "other insurance" clause as an escape clause and concluded that the " 'disfavored' policy should apply." (*Century Surety, supra,* 109 Cal.App.4th at p. 1260.) However, the *Century Surety* court had ample authority for its decision to treat the excess clause as an escape clause and therefore assign it a disfavored status. (See *Commerce & Industry Ins. Co. v. Chubb Custom Ins. Co., supra,* 75 Cal.App.4th at pp. 744-745; *Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1304-1305; *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co., supra,* 126 Cal.App.3d at p. 599.) The second error, according to appellant, was the court's "insistence that the Century policy was primary and, therefore, could not be excess." In support of this argument, appellant claims that the policy should have been designated as a "hybrid" policy. As explained in footnote 2, appellant has provided no authority that such a "hybrid" policy may be enforced under these circumstances. Finally, appellant argues that the *Century Surety* court erred in concluding that " 'to impose the entire liability on the issuer of the prorated policy would annul the proration clause.' " (*Century Surety, supra,* 109 Cal.App.4th at p. 1260.) Appellant explains that, because the Century policy was excess to United Pacific with respect to losses covered by both policies, United Pacific was unaffected by the existence of the Century policy, and the two were not "mutually repugnant." We disagree. The United Pacific policy, which provided that it would share with any other primary insurance on an equal or pro rata basis, could not be reconciled with Century's policy, which purported to provide primary insurance but contained language indicating that it would not share in the burden of defense and indemnification unless other insurance was exhausted. (*Century Surety,* at p. 1252.) In sum, we disagree with appellant's arguments that *Century Surety* was wrongly decided.

***8** *Travelers Casualty & Surety Co. v. Century Surety Co., supra,* 118 Cal.App.4th 1156 (*Travelers Casualty*) involved an action for declaratory relief and contribution between appellant and another insurer. Appellant and the other insurer provided successive primary insurance coverage to a framing contractor (the insured). Homeowners in a residential development for which the insured had provided carpentry and framing work sued the insured alleging continuing damage to their properties caused by defective construction work. The insured tendered the defense of the claim to three primary liability insurers who had provided general commercial liability during the relevant time period. Initially, all three insurers agreed to provide a defense. However, appellant later withdrew its tender, citing the same "other insurance" clause at issue here. The other two insurers defended and settled the underlying action against the insured, then one of the other insurers sued appellant for declaratory relief and equitable contribution. The trial court granted the other insurer's motion for summary adjudication against appellant, finding that appellant had a duty to defend the insured in the underlying action and ordering appellant to pay its pro rata share of the defense and settlement costs of that action. (*Id.* at pp. 1158-1159.) The Court of Appeal affirmed, concluding that "[g]iving effect to defendant's other insurance provision, which is in the nature of an escape clause, would result in imposing on plaintiff the burden of shouldering that portion of a continuous loss attributable to the time when defendant was the only liability insurer covering [the insured]." (*Id.* at p. 1162.)

In explaining its conclusion, the *Travelers Casualty* court noted that the Supreme Court has not yet directly addressed this issue. However, in *Dart Industries, Inc. v. Commercial Union Ins. Co., supra,* 28 Cal.4th at pages 1079-1080, the Supreme Court noted: " 'Historically, "other insurance" clauses were designed to prevent multiple recoveries when more than one policy provided coverage for a particular loss.' [Citation.] On the other hand, 'other insurance' clauses that attempt to shift the burden away from one primary insurer wholly or largely to other insurers have been the objects of judicial distrust. '[P]ublic policy disfavors "escape"

clauses, whereby coverage purports to evaporate in the presence of other insurance. [Citations.] This disfavor should also apply, to a lesser extent, to excess-only clauses, by which carriers seek exculpation whenever the loss falls within another carrier's policy limit.' [Citations.] Partly for this reason, the modern trend is to require equitable contributions on a pro rata basis from all primary insurers regardless of the type of 'other insurance' clause in their policies. [Citations.]" Thus, the Supreme Court has favorably acknowledged the trend reflected in *Century Surety* and *Travelers Casualty*.

***9** Appellant argues that *Travelers Casualty* suffers from the same analytical errors as *Century Surety*. As discussed above, we disagree with appellant's position that the Court of Appeal committed analytic errors in deciding *Century Surety*. We find that both *Century Surety* and *Travelers Casualty* are directly on point and provide well-reasoned and amply supported authority for rejection of appellant's position in this case, which is yet another attempt to enforce the same "other insurance" clause.[FN3]

> FN3. Appellant further argues that, even if the issue of reconciliation of the "other insurance" clauses was appropriately resolved in *Century Surety* and *Travelers Casualty,* a balancing of the equities involved requires a different result here. Appellant proceeds to discuss why all of the equities support enforcement of appellant's excess clause. We disagree with appellant's position that the interests of the insureds, appellant, and respondent are served by enforcement of appellant's excess clause. An insured benefits when its insurers are required to equitably contribute to its defense and indemnification. Further, California law provides that all primary insurers must share in the cost of defending and indemnifying their mutual insured regardless of their "other insurance" clause. The equitable interests of insurance companies are served when that rule of law is enforced consistently by the courts.

II. Recovery of Expert Fees

Appellant's second argument involves the trial court's decision awarding respondent expert witness fees pursuant to section 998. Section 998 provides, in part:

> "(b) Not less than 10 days prior to commencement of trial ... any party may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time....
>
> "[¶] ... [¶]
>
> "(2) If the offer is not accepted prior to trial ... or within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn, and cannot be given in evidence upon the trial....
>
> "[¶] ... [¶]
>
> "(d) If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award in any action or proceeding ... the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover postoffer costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the plaintiff, in addition to plaintiff's costs."

On June 20, 2005, respondent served an offer to compromise under section 998. By its own terms, the offer became ineffective 10 days later, on July 1, 2005. Trial did not commence until July 11, 2005. Thus the offer to compromise expired 10 days before the time period permitted under the statute. Under *T.M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 283-284, appellant argues that after this "revocation" on July 1, 2005, the of-

fer no longer constituted a section 998 offer but was merely a settlement demand with no cost-shifting effect. Because the offer lost its status as a section 998 offer, appellant argues, the trial court had no authority to award respondent expert witness fees pursuant to that statute.

A. Standard of Review

Citing *Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262, respondent argues that the standard of review on a trial court's award of expert witness fees under section 998 is abuse of discretion. In *Jones,* however, the issues were whether the offer to compromise was a reasonable, good faith offer and whether the claimed expert fees were properly recoverable by the relevant party. Here, the issue is whether the offer to compromise retained its status as a section 998 offer after it was withdrawn, and whether the trial court had the authority to rely on the statute at all. This is a question of law, and we will review it de novo. (See, e.g., *McKee v. Orange Unified School Dist.* (2003) 110 Cal .App.4th 1310, 1316 [" ' "Interpretation of a statute is a question of law. [Citations.] Further, application of the interpreted statute to undisputed facts is also subject to our independent determination. [Citation.]" ' [Citation.]"])

B. The Trial Court Erred in Awarding Expert Witness Fees Under Section 998

***10** Section 998, subdivision (b)(2) provides that an offer to compromise made pursuant to that statute may be accepted "prior to trial ... or within 30 days after it is made, whichever occurs first." In *T.M. Cobb Co. v. Superior Court, supra,* 36 Cal.3d at pages 283-284, the Supreme Court held that, under general contract principles, an offer to compromise pursuant to section 998 is revocable prior to the time period set forth in the statute. The dissent expressed a concern that, under the holding of the majority, parties would be permitted to "make offers, revoke them, and nevertheless gain the cost benefits of the statute." (*Id.* at p. 283, fn. 13.) In response to this concern, the majority stated:

"that anomalous result can be avoided simply by giving the word 'offer' a sensible construction. It should be apparent that an offer that is revoked prior to acceptance no longer functions as an 'offer' for purposes of the cost benefit provisions. [Citation.]" (*Ibid.*)

This language suggests that, where an offeror prematurely revokes its section 998 offer to compromise, the offeror should not be entitled to the cost benefit provisions of section 998.

A recent decision of the Court of Appeal, Fourth Appellate District, Division One, confirmed this interpretation of section 998. In *Marcey v. Romero* (2007) 148 Cal.App.4th 1211 (*Marcey*), plaintiff Marcey made a series of section 998 offers to defendant Romero prior to trial. On January 19, 2005, approximately one month before trial, Marcey made her final section 998 offer. On February 17, 2005, Romero's counsel telephoned Marcey's counsel and attempted orally to accept the January 19 offer. Marcey's counsel rejected the attempted oral acceptance, orally withdrew the offer, and immediately faxed a written notice of withdrawal to Romero's counsel. (*Id.* at pp. 1213-1214.) Marcey obtained a judgment in her favor at trial, and her cost bill included expert witness fees under section 998. Romero moved to tax the costs, on the grounds that Marcey's withdrawal of the January 19 offer before it statutorily expired nullified her right to recover expert witness fees under the statute. The trial court granted Romero's motion to tax costs and denied Marcey's request for expert witness fees. (*Id.* at p. 1214 .)

The Court of Appeal affirmed. The court alluded to the Supreme Court's language in *T.M. Cobb Co. v. Superior Court, supra,* 36 Cal.3d at page 283, footnote 13, quoted above, stating: "Although *T.M. Cobb* did not involve the effect of a revoked offer on section 998's cost-shifting provisions, the majority's response to one of the dissent's critiques of its holding foreshadows our approach to the issue." (*Marcey v. Romero, supra,* 148 Cal.App.4th at p. 1216.). The *Marcey* court concluded: "We agree with the *T.M. Cobb* court's ob-

servation that an offer revoked before the expiration of the period statutorily specified by section 998 forfeits its status as an 'offer' under the remaining provisions of section 998." (*Ibid.*) In sum, section 998 cannot be interpreted to "permit the offeror to shorten the legislatively prescribed period by unilaterally reducing the deadline that carries the legislatively prescribed consequences for unaccepted section 998 offers." (*Id.* at p. 1217.) [FN4]

> FN4. The *Marcey* case post-dates the decision of the trial court on the expert witness fee issue in this matter, therefore the trial court did not have the benefit of the *Marcey* court's interpretation of section 998 in rendering its decision.

***11** Respondent distinguishes *Marcey* on two grounds. First, respondent claims that, in contrast to the facts of *Marcey,* respondent never revoked the offer-instead, the offer expired on its own terms. We find this distinction to be insignificant. Regardless of the method that the offeror uses to take back its offer, the offer still loses its status as an offer under section 998 if it does not remain open for the full statutorily prescribed period. Second, respondent claims that, unlike the offeree in *Marcey,* appellant made no attempt to accept respondent's offer. This distinction is similarly unpersuasive. Section 998 reflects this state's policy of encouraging settlements, and should be applied "in a manner which best promotes its purpose." (*Guzman v. Visalia Community Bank* (1999) 71 Cal.App.4th 1370, 1375.) The Legislature has determined that a defendant should be permitted to consider such an offer up to the time of trial, or within 30 days after it is made, whichever occurs first. (§ 998, subd. (b)(2) .) [FN5] In this case, the trial would have commenced before the expiration of the 30-day period. We can only speculate as to whether appellant would have accepted respondent's offer had the offer still been open on the eve of trial. We cannot fault respondent for failing to attempt to accept an offer after the offer expired by its own terms.

> FN5. A trial or arbitration is deemed to be actually commenced at the beginning of the opening statement of the plaintiff, or, if there is no opening statement, then at the time of administering the oath or affirmation to the first witness, or the introduction of any evidence. (§ 998, subd. (b)(3).)

In sum, our opinion is aligned with the *Marcey* court in that "[w]e do not believe an offeror should be entitled to reap the full benefits afforded by the statute after diminishing the benefits afforded to the offeree by the statute." (*Marcey v. Romero, supra,* 148 Cal.App.4th at p. 1216.) This is true whether the offer is prematurely revoked by the offeror or is prematurely withdrawn by the terms of the offer. Therefore, we reverse the trial court's order denying appellant's motion to tax costs.

DISPOSITION

The judgment is affirmed. However, the postjudgment order awarding respondent expert witness fees under section 998 is reversed. Each party shall bear its own costs on appeal.

We concur: BOREN, P.J., and DOI TODD, J.

Cal.App. 2 Dist.,2007.
Zurich Specialties London Ltd. v. Century Sur. Co.
Not Reported in Cal.Rptr.3d, 2007 WL 2446967 (Cal.App. 2 Dist.)

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