



1 California initiated a lawsuit ("the Regents Action") against  
2 Howard S. Wright Construction Co. ("Wright Construction") for  
3 alleged defects and damages to buildings on the University of  
4 California--Davis campus. (Compl. (Docket No. 1) ¶ 11.) On  
5 October 31, 2012, Wright Construction filed a cross-complaint  
6 against Dura and various other subcontractors alleging claims for  
7 breach of contract and declaratory relief. (Id.) After  
8 receiving notice of the Regents Action, plaintiff agreed to  
9 intervene on behalf of Dura in the action. (Id. ¶ 12.) The  
10 Regents Action is now settled and has been dismissed. (Pl.'s  
11 Mot. for Leave at 5.)

12 Plaintiff and defendant had both issued Dura a  
13 Commercial General Liability insurance policy. (Decl. of Evan H.  
14 Stoller ("Stoller Decl.") (Docket No. 11-4) ¶ 4; Decl. of David  
15 H. Waters ("Waters Decl.") (Docket No. 11-3) ¶ 5.) Dura was  
16 suspended by the California Secretary of State on May 28, 2009  
17 for failure to comply with its obligations under the California  
18 Corporations Code. (Waters Decl. ¶ 7.) Dura was also suspended  
19 by the California Franchise Tax Board on August 1, 2011, for  
20 failure to comply with its tax obligations. (Id.) Dura remained  
21 suspended throughout the duration of the Regents Action, and was  
22 still suspended at the time this lawsuit was filed. (Id. ¶ 8.)

23 On November 21, 2016, Travelers filed this complaint  
24 against Liberty asserting claims for (1) Declaratory Relief Re:  
25 Duty to Defend; (2) Declaratory Relief Re: Duty to Indemnify; and  
26 (3) Declaratory Relief Re: Allocation of Fees and Costs.

## 27 II. Discussion

28 Defendant contends that it is entitled to summary

1 judgment on the issue of whether it had a duty to defend and  
2 indemnify Dura, or an equitable duty and responsibility to pay  
3 fees and costs incurred by plaintiff on behalf of Dura.

4 A. Duty to Defend

5 Throughout the Regents Action, Dura was suspended by  
6 the California Secretary of State and the Franchise Tax Board.  
7 Under the California Revenue and Taxation Code § 23301, a  
8 suspended company is barred from exercising its corporate powers,  
9 rights, and privileges. See Cal. Rev. & T. Code § 23301. The  
10 phrase "powers, rights, and privileges" has been interpreted to  
11 include a corporation's right to engage in litigation activities  
12 and defend itself. See, e.g., Palm Valley Homeowners Ass'n Inc.  
13 v. Design MTC, 85 Cal. App. 4th 553, 560 (4th Dist. 2000) (when a  
14 corporation is suspended, it is "disabled from participating in  
15 any litigation activities").

16 Although California Revenue and Taxation Code §  
17 19719(a) makes it a crime for any person "to exercise the powers,  
18 rights, and privileges of a corporation that has been suspended,"  
19 § 19719(b) specifically excludes "any insurer, or counsel  
20 retained by an insurer on behalf of the suspended corporation,  
21 who provides a defense for a suspended corporation" from coming  
22 within the scope of this statute. Cal. Rev. & T. Code § 19719;  
23 see also Kaufman & Broad Cmtys., Inc. v. Performance Plastering,  
24 Inc., 136 Cal. App. 4th 212, 219 (3d Dist. 2006). Accordingly,  
25 while the suspended corporation is legally barred from defending  
26 itself, an insurance company may provide a defense for said  
27 corporation, so long as the insurer does so "in its own name, []  
28 not in the name of the suspended corporation." El Escorial

1 Owners' Ass'n v. DLC Plastering, Inc., 154 Cal. App. 4th 1337,  
2 1350 (2d Dist. 2007), as modified on denial of reh'g (Oct. 3,  
3 2007). In fact, the purpose of this exemption is to "protect[]  
4 insurers that are obligated to defend suspended corporations."  
5 Id.

6           Accordingly, although Dura was unable to defend itself,  
7 both plaintiff and defendant could have defended Dura, albeit not  
8 in Dura's name. Therefore, because doing so was not illegal, the  
9 court turns to the language of the insurance policy to see if  
10 such defense was obligated. When analyzing the policy, there is  
11 no indication that defendant's duties were to be extinguished or  
12 modified in any way if the insured corporation were to become  
13 suspended. The California Supreme Court has stated that "any  
14 provision that takes away or limits coverage reasonably expected  
15 by an insured must be conspicuous, plain and clear." Haynes v.  
16 Farmers Ins. Exch., 32 Cal.4th 1198, 1204 (2004). In defendant's  
17 policy, no limitations related to a corporation's suspension are  
18 addressed at all. Thus the court cannot conclude as a matter of  
19 law that Dura's suspension relieved defendant of its duty to  
20 defend, and defendant's Motion for Summary Judgment on that  
21 ground must be denied.

22           B.     Duty and Responsibility to Pay Fees and Costs

23           Under California law, an insurer's right of equitable  
24 contribution arises when several insurers are obligated to  
25 indemnify or defend the same insured. Fireman's Fund Ins. Co. v.  
26 Maryland Cas. Co., 65 Cal. App. 4th 1279, 1293 (1st Dist. 1988).  
27 "One of the firm principles undergirding the doctrine of  
28 equitable contribution is that two or more insurers share an

1 obligation to the common insured." Am. Cont'l Ins. Co. v. Am.  
2 Cas. Co., 86 Cal. App. 4th 929, 937 (2d Dist. 2001). California  
3 courts have noted that "[i]t would be wholly capricious if some  
4 insurers could avoid liability for contribution by exploiting the  
5 corporate suspension of an insured . . . leaving other insurers  
6 to bear the loss, but barred from recovering equitable  
7 contribution." Truck Ins. Exchange v. Superior Court of Los  
8 Angeles, 60 Cal. App. 4th 342, 347 (2d Dist. 1997).

9 Here, because the court cannot conclude as a matter of  
10 law that plaintiff and defendant were not both obligated to  
11 defend Dura, the court cannot conclude there was not a "common  
12 obligation that is legally due from multiple insurers," which  
13 would provide a basis for contribution. Am. Cont'l Ins. Co., 86  
14 Cal. App. 4th at 937. Accordingly, defendant would have a duty  
15 to make contribution to plaintiff for the money it incurred in  
16 defense of the Regents Action, and the court must therefore deny  
17 defendant's Motion for Summary Judgment on that ground.

18 IT IS THEREFORE ORDERED that Defendant's Motion for  
19 Summary Judgment (Docket No. 11) be, and the same hereby is,  
20 DENIED.

21 Dated: February 22, 2018



22 **WILLIAM B. SHUBB**  
23 **UNITED STATES DISTRICT JUDGE**