

Padilla Construction Company, Inc. V. Transportation Insurance Company (Cal. Court of Appeal)
Decided May 14, 2007.

In California, the insurer must “horizontally exhaust” all primary insurance, that is, use up all the available primary coverage, before the excess insurer must “drop down” to defend an insured, unless there is a particular contractual provision to the contrary. In this case, the insured claimed the excess insurer had to defend it because parts of the damage (in a construction defect case) began *before* the policy period of the primary insurer. The insured argued that its primary insurer would have no duty to indemnify it for those early damages, and, therefore, there was no available insurance. The Court of Appeal disagreed, saying the primary insurer still had a duty to defend. The excess insurer had no duty to defend at this stage because the primary insurance was not exhausted.