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### **Construction Defect and the Multiverse of Subrogation**

#### **The Unique Nature of Equitable Subrogation in Construction Claims**

Over the years more insurance companies are pursuing Subrogation claims against settling and non-settling contractors and subcontractors. This panel will present an in depth look at recent appellate opinions from 2020 and 2021 which clarified the tone, scope, and applicability of subrogation lawsuits. The results mean more ways for counsel and carriers for contractors and subcontractors to address, analyze and litigate risk of loss transfers.

The panel will examine *Carter v. Pulte Home Corporation* (2020) 52 Cal.App. 5th 571, in which an appellate court denied an insurance carrier's equitable subrogation claim; and *Pulte Home Corp. v. CBR Electric, Inc.* (2020) 50 Cal.App. 5th 216, which reversed a denial of an equitable subrogation claim. While both opinions had different results, both opinions explained the subcontractor's obligations and an insurer's obligations. Further, there was more emphasis that contractors (and carriers for the contractors) must examine a contractual indemnity obligation. In 2021 *Berg v. Pulte Home Corp.*, (2021) 67 Cal.App.5th 277 also addressed the 2020 opinions and further discussed the right to a jury trial afforded to a subcontractor.

#### Practical tips

The panel will set forth the parameters available to a carrier or general contractor when dealing with certain subrogation thresholds necessary regarding the essential elements of a subrogation claim. Based on the above opinions, there is a better chance to recoup specific amounts related to the entire amount it paid to defend and settle any/all claims relating to the concrete work at the project. If a subcontractor's work at the subject project was limited, a can carrier establishes certain parameters that directly apply to a subcontractor's scope of work, and create certain issues available to a subrogation carrier that provide risk transfer options.

#### **Applicable Appellate Decisions**

Recent appellate decisions define carrier/contractor losses applicable to the claimed losses applicable to the defense of a construction defect litigation. Within subrogation claims, a subcontractor defendant's scope of work is key to allocation of claimed losses. The eight essential elements of a subrogation claim must be met for a defending carrier to prevail. Along with those elements are guidelines defining the extent of losses.

## **Current Status of Subrogation in Construction Claims**

As the appellate decisions now clarify the parameters of exposure non-defending parties, the panel will discuss certain subrogation approaches. If a carrier never separates or allocates its damages to the different parties, what can be expected? Are carriers prohibited from proving what portion, if any, of its damages are attributable to each subcontractor? Originally, certain trial courts opined that within construction defect cases it was impossible to strictly adhere to the essential elements of subrogation (given the multiple parties and the multiple conditions). Currently, appellate decisions discuss allocation, if a carrier parsed out or determined costs and damages specifically arising out of a subcontractor scope of work.

### Types of damages

Once the subrogation claim is established, examination is necessary to determine what is considered damages specific to a party's scope of work. Other damages can be equally allocated across the board, for certain fees that are mixed for the litigation, such as settlement payments, expert fees, investigation costs, and possibly attorney fees.

### Perspectives from claims and litigation side

The key is to evaluate and discuss the "Net Practical Effect" of Subrogation actions. Subrogation approaches affect the current action and future actions. Certainly, future negotiations will need review for all portions of the action, including additional insured obligations and contractual defense obligations.

### Summary

As subrogation defendants are becoming responsible for the costs of defending claims related to their work, the definition and pursuit of those costs are becoming an issue both in underlying litigation and subsequent subrogation claims.