Catastrophic Failures

Moving from the Minors to the Majors

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A discussion of what you need to keep in mind to make judicious decisions, with a forensic engineering expert, that will allow you to pursue the best options for your client.

Structures are awe-inspiring, magnificent things. They are designed and constructed from a variety of materials to accommodate their intended use and anticipated loads. How materials react when a structure is damaged play a significant role in determining whether a catastrophic failure will occur. For example, fires can consume roof trusses, water and termites can severely damage woodwall framing, and crashing vehicles can knock down steel and concrete columns. Analytically, we think that these kinds of events should result in catastrophic failure of significant portions of structures, if not entire structures. In reality, however, this rarely happens.

Structures tend to endure events that seemingly should result in catastrophic failures because of safety factors and redundancies in their design and construction. These safety factors are built into the building codes that establish the minimum design loads for a structure and into the allowable capacities of the materials used in their construction. When a catastrophic failure does occur, a forensic engineering expert must look beyond the obvious and determine why the failure occurred.

When a catastrophic failure occurs, typically someone with very little expertise has identified an "obvious" cause, a trigger, before a qualified, forensic engineering expert steps in. In identifying and documenting what made a structure susceptible to damage, a forensic engineering expert can move an evaluation "from the Minors to the Majors."

One primary focus of the expert is to identify all potentially responsible parties and avenues that may lead to subrogation, and in doing so, secure the site until all parties have been put on notice, as well securing all relevant physical evidence.

To communicate effectively with everyone involved in a catastrophic structure failure case an attorney must understand the theories of liability, defenses, and insur-

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ance issues, to name a few. Otherwise an investigation and defense of a case won't move from the Minors to the Majors. Without that understanding, you cannot help a client make timely decisions about securing a structure, identify parties that should receive notice, establish sampling criteria, or determine how to secure large building components.

This article will discuss many of the considerations involved in a catastrophic structure-failure case, such as the theories of liability that you will need to keep in mind to make judicious decisions with a forensic engineering expert so that you can make sure that you have everything that you need, for example, to pursue potential subrogation or contribution options later on behalf of a client.

Causation and Liability

The first task in a catastrophic failure after securing a site, preserving evidence, and taking measures to prevent spoliation, is to identify the cause. The theory or theories of liability advanced in a catastrophic failure case largely depend on the suspected cause or causes of a failure. Typically, the cause of a failure will rest in a design, construction, or product. Within the broad category of construction defects, courts have recognized multiple types of deficiencies, including design defects, construction defects, and material defects. Claims based on design defects arise when a structure's design makes it inherently unsuitable for its intended purpose, even if the design is executed correctly. Architects, engineers, and other consultants who participate in shaping a construction plan may share liability for a claim based on design issues. Claims based on construction defects often arise from poor quality or substandard workmanship, and may sometimes result from the negligence of any number of parties involved in the construction process, including developers, contractors, subcontractors, and supervisors.

Product liability issues arise when using a defective building material in a construction project contributes to a failure. In asserting a product liability claim, someone may allege that a design is defective or materials have manufacturing defects. A design defect is a defect inherent in the design of a product, whereas a manufacturing defect is an unintended flaw originating during the manufacturing process.

The second task in a catastrophic failure case is to identify all the responsible parties. These can include developers, architects, engineers, general contractors, construction managers or supervisors, an owner's representative, subcontractors, manufacturers, wholesalers, and retailers. The possible responsible parties in catastrophic structure-failure litigation are numerous. Crucial to a defense is identifying the nature and extent of a particular party's involvement with the construction project. The architects or engineers of a construction project may be liable for negligence based on a design defect. The traditional standard of care is almost always applied to a design defect, and architects and engineers are rarely held strictly liable. However, as discussed below, strict liability theory has gained some acceptance in lawsuits against home developers and builders.

General contractors, subcontractors, and developers most commonly face negligence claims for construction defects caused by poor quality or substandard workmanship. Construction managers or supervisors may also be liable for negligently supervising a structure's construction. If deficient building materials used in a construction project potentially contribute to a failure, manufacturers, retailers, or wholesalers of such materials may face product liability claims for design defects, manufacturing defects, or both. Finally, failed structure owners may face actions for nuisance and loss of lateral and subjacent support from other landowners whose use and enjoyment of land has been affected by structure failures.

Identify and Develop Theories of Liability

The third task after a catastrophic failure is to identify and develop appropriate theories of liability. Theories that you will want to keep in mind include strict product liability, strict liability, negligence, nuisance, and loss of lateral and adjacent support.

Strict Product Liability Applied to Design or Manufacturing Defects

Individuals or entities can pursue strict product liability claims against manufacturers, retailers, or wholesalers of defective building materials that have contributed to construction failures. For example, in *Pulte v. Parex*, 942 A.2d 722, 403 Md. 367 (Md. 2008), a residential corporation sued, among others, manufacturers and distributors of a synthetic, exterior stucco finish that failed to prevent water penetration. The corporation sought to recover losses incurred repairing 77 homes that had been built using the defective product. Similarly, in *Trustees of Columbia Univer. v. Skilling, Helle, Christiansen, Robertson, P.C.*, 109 A.D.2d 449, 492 N.Y.S.2d 371 (N.Y. App. Div. 1985), the court found that Columbia University had "a viable cause of action for property damage to its building" against the company that supplied allegedly defective precast, concrete panels and facing tiles for construction of a curtain wall. Because the defective material possibly contributed to imminent collapse of a wall located on a crowded university campus, it "constituted an unduly dangerous product for which damages under a strict liability theory may be maintained."

Strict Liability Applied to Builders and Developers

Although courts have applied negligence theory traditionally, strict liability theory has gained some acceptance in lawsuits against home developers and builders. In the seminal case of *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (N.J. 1965), the New Jersey Supreme Court applied strict liability theory to a designer of mass produced homes who also developed and built the homes for injuries to a child resulting from a defective design. A strict liability theory is most likely to succeed against a builder or developer if that party designs and constructs buildings that are mass produced and marketed to the public in a manner that resembles other consumer products.

Negligence

Architects, engineers, and other professionals involved in a construction project may be found negligent if they fail to meet the applicable standard of care, and such failures contribute to damages. Typically, the applicable standard of care requires a professional to perform his or her services with the same degree of skill and care exercised by others in the same profession in the same

area. For instance, in *Nicholson & Loup v. Carl. E. Woodward, Inc.*, 596 So. 2d 374 (La. Ct. App. 1992), the court found support to conclude that a defendant, an engineering company, "breached the standard of care applicable to geotechnical engineers" in preparing a deficient subsoil report. In that case, the subsoil report was relied on in the construction of a New Orleans supermarket later discovered to have a differential settlement in the floor slab that caused extensive damage to the building.

A "wrap" policy is a single insurance policy that is designed to insure most if not all parties involved in a construction project.

Various professionals involved in a construction project can be liable for negligence in carrying out their particular roles. For instance, in *Trustees of Columbia Univ.*, the structural engineer was "charged with negligence in the preparing or planning of the design and/or engineering work, while [the installers] [were] charged with negligence in failing to properly perform in adherence to the plans and specifications with respect to the actual installation of the "curtain wall" and tiles and in failing to exercise due care to discover any alleged defects in the course of the performance of their work." 109 A.D.2d at 453.

Nuisance

A property owner may have a cause of action in nuisance if the physical effects of a construction failure unreasonably interfere with his or her use and enjoyment of his or her land. If a property owner asserts a continuing nuisance claim, each repetition of harm to that owner's property may create further liability, which could affect tolling of a statute of limitations. *See*, *e.g.*, *Leaf v. City of San Mateo*, 104 Cal. App. 3d 398 (Cal. Ct. App. 1980) (involving a claim, among others, for continuing nuisance against the City of San Mateo for property damage caused by defective sewage and drainage systems).

Loss of Lateral and Subjacent Support

Someone owning land adjacent to another's land can pursue an action in strict liability when a catastrophic failure on one landowner's property results in damages to the other's property due to loss of lateral or subjacent support. This theory of liability is based on the common law tradition that adjoining landowners have a natural right to the support of each other's ground. When a landowner damages or withdraws the necessary lateral support of land in another's possession, he or she may be liable for the resulting subsidence of that land. *See*, *e.g.*, *Pecanty v. Miss. Southern Bank*, 49 So. 3d 114 (Miss. App. May 11, 2010) ("where a landowner has withdrawn lateral support from adjacent property, he or she remains liable notwithstanding the subsequent transfer of his or her land to a third person"). However, the plaintiff in *Pecanty* could not recover from *subsequent* owners of the adjoining land who did not play a role in either the excavation that caused erosion of the plaintiff's land or the later construction of a deficient retaining wall aimed to halt the erosion.

Damages Issues

The fourth task in a catastrophic failure case is to consider potential damages. The damages issues that you will want to keep in mind include legitimate costs and a legitimate scope of repair as opposed to "betterment," loss of rents, business interruption, and loss of use and enjoyment.

Legitimate Costs, Legitimate Scope of Repair, and Betterment

Generally, an owner is entitled to recover all loss actually suffered due to one or more construction defects. Damages aim to place an owner in the position that the owner should have experienced if a design or work had not been defective. However, an owner is not entitled to compensation that would improve on or "better" a design or work; the owner is only entitled to the costs associated with correcting a faulty design or faulty work. The term "betterment" refers to the concept of enhancing or adding value to something defective or faulty beyond that which is required *to correct* defective design or faulty work, which is universally rejected in tort law. An example of a construction case in which a "betterment" issue arose is *Grossman v. Sea Air Towers, Limited*, 513 So. 2d 686 (Fla. Dist. Ct. App. 1987). In that case, the deck of a high-rise building collapsed because its load-bearing capacity was too small as the result of negligent "underdesign" by the architect and structural engineer. The court found that the damage award should include costs necessary to restore the deck to its original condition, but that it should not include costs necessary to increase the load capacity. The latter costs "would have been the owners' responsibility even if there had been no negligence on the part of the defendants." *Id.* at 688.

Loss of Rents

In addition to damages for the cost of repairs necessary to convert a defective structure into a sound one or to remedy the structure, courts may also award damages for economic losses. When a construction defect causes a building owner to lose rental income, the owner is entitled to compensation for the amount of the loss. In *Grossman*, the collapse of the deck of a 357-unit, luxury high-rise rental apartment resulted in a $299,543.33 award for lost rents. 513 So. 2d 686 (Fla. Dist. Ct. App. 1987). Even though the appellants contested this figure as being based on gross rentals or speculation, the court was satisfied that the "losses were substantial and that the jury deducted operating costs in arriving at the amount." *Id.* at 688. On the other hand, the court in *Nicholson & Loup, Inc.*, denied damages for "lost rentals" because "damages may not be speculative," and the plaintiff failed to prove that its inability to lease the building was caused by the defective condition of the floor. 596 So. 2d at 395.

Business Interruption

Courts may also award damages for economic losses due to business interruption. Similar to proving loss of rents, a plaintiff may have difficulty showing that lost profits were directly attributable to a construction defect, especially if other factors clearly contributed. *See*, *e.g.*, *Nicholson & Loup, Inc.*, 596 So. 2d 374 (La. Ct. App. 1992) (factors such as families moving out of the area and competition of other

nearby supermarkets contributed to lost profits). In other cases, it may be clear that a construction defect is directly responsible for business interruption. *See*, *e.g.*, *Grossman*, 513 So. 2d 686 (Fla. Dist. Ct. App. 1987) (finding the deck collapse of high-rise apartment building prevented plaintiff from operating its business of collecting rent from tenants).

Loss of Use and Enjoyment

Courts may permit damages for loss of use and enjoyment when a construction defect proximately results in a plaintiff losing use of property and that use has value. Damages for loss of use and enjoyment "ordinarily are not susceptible to exact pecuniary computation," but they must be established with reasonable certainty. *Johnson v. Flammia*, 363 A.2d 1048 (Conn. 1975). In *Johnson*, a negligently installed swimming pool necessitated repairs that temporarily prevented a family from using the pool. The Connecticut court found that although the plaintiffs were entitled to all damages proximately resulting from the defendants' negligence, there was insufficient support for the amount that the jury awarded for loss of use and enjoyment. To properly arrive at a loss of use award, the plaintiffs needed to offer evidence allowing "the jury (1) to approximate the number of days that the pool was unusable, (2) to approximate the extent of actual or intended use made of the pool… when it was usable[,] and (3) to establish daily value use of the pool." *Id.* at 1054.

Defenses

The fifth task in a catastrophic failure case is to identify possible defenses. A number of defenses are available in litigation involving catastrophic structure failures that can eliminate or reduce liability. These include, among others, other parties are responsible, the "act of God" defense, the plaintiff seeks betterment, and the owner failed to prevent further damage or loss.

Other Responsible Parties

Catastrophic structure-failure litigation can involve numerous possible responsible parties. If a defense attorney can show that the acts of another party proximately caused some or all of the harm alleged, the attorney can potentially eliminate or reduce the defendant's liability. In *Simeon v. Colley Homes Inc.*, 818 So. 2d 125 (La. Ct. App. Nov. 14, 2001), for instance, the Louisiana court noted that the role played by third parties, such as builders and architects, in connection with water intrusion into the plaintiffs' home was "relevant to issues of liability, causation and comparative fault" on the part of a defendant who installed the exterior insulation finish system. *Id.* at 129. The court went on to write that the defendant was "clearly entitled to assert the fault of nonparties" to the litigation. *Id.* An independent contractor argument also is available in some states.

Act of God

If established, an "act of God" is a complete defense to allegations of liability for negligence, and it may also defend a client against strict liability. The "act of God" defense requires establishing that the harm sustained was solely and proximately caused by natural forces without human intervention and could not have been prevented by exercising reasonable care and foresight. The "act of God" defense applies only to natural events so extraordinary that the history of climatic variations and other conditions in particular localities would not afford reasonable warnings of them. *Bradford v. Stanley*, 355 So. 2d 328 (Ala. 1978). If a defendant's negligent act contributes to an accident along with an act of God, the defendant will likely be held liable for all of the damages sustained. For these reasons, it is difficult to prevail with an "act of God" defense. *See*, *e.g.*, *Verdugo v. Seven Thirty One Ltd.*, 70 A.D.3d 600 (N.Y. App. Div. 2010) (finding "act of God" affirmative defense to injury caused by airborne plywood should have been dismissed because claimed wind gusts were not sufficiently unexpected or severe).

Betterment

Sometimes a repair method or materials proposed by a plaintiff upgrades or "betters" a structure rather than simply replacing faulty materials or improperly implemented designed. An owner is generally entitled to damages for the costs of repairing defective construction. However, if the repair method or repair materials cost more than the work an owner originally paid for, the owner is not entitled to the additional cost of upgrading the construction. *See*, *e.g.*, *St. Joseph Hospital v. Corbetta Constr. Co.*, 21 Ill. App. 3d 925, 316 N.E.2d 51 (Ill. App. Ct. 1974) (finding a hospital was not entitled to recover extra costs and labor expenses for installing more expensive paneling, as required by city building code, than it had originally paid for). Depending on the particular construction project, this defense can significantly curb the amount of damages to which a plaintiff is entitled.

Failure to Prevent Further Damage or Loss by Owner

Most courts find that a property owner has a duty to prevent further damage or loss. The duty to mitigate damages arises after a party has suffered injury, loss, or damage. Once a duty to mitigate has been established, a defendant has the burden of proving that the plaintiff, with reasonable effort, could have mitigated his or her damages. There are also common law duties to maintain or to perform maintenance that can apply.

Preserving Evidence and Spoliation in Future Contribution or Subrogation Actions

Spoliation occurs when a party destroys or significantly alters relevant evidence. A court may sanction a party for failing to preserve evidence after examining it if that party has gained an evidentiary advantage by doing so. For instance, in *Miller v. Lankow*, 776 N.W.2d 731 (Minn. Ct. App. 2009), the court upheld a sanction imposed on a plaintiff, a homeowner, for providing insufficient notice to other parties that the plaintiff would remove the entire exterior of the home, including the stucco and underlying plywood, to remedy deficient work that had resulted in continued moisture intrusion and mold. The plaintiff later sued several parties, including contractors who allegedly failed to repair the moisture-intrusion problem. The defendants claimed that the plaintiff's spoliation of the evidence deprived them of a meaningful opportunity to inspect the premises. The court found that it was reasonable to sanction the plaintiff in this situation by excluding all physical evidence of the alleged damage and related expert reports. Further, spoliation of evidence is

likely to create difficulty in pursuing future contribution or subrogation actions against parties who did not have the opportunity to examine the spoliated evidence.

Insurance Issues

Insurance issues are important to consider throughout the life of a catastrophic structure failure case. You will need to analyze several insurance-related issues. Specifically you will need to determine the scope of the insured's insurance coverage, whether exclusions apply to the failure, if other potential insurers bear responsibility for the risk, and whether you can achieve equitable subrogation or contribution.

Scope of the Insured's Coverage

You will want to analyze your client's commercial general liability (CGL) insurance policy or policies to determine what your client can expect from the coverage. You will need to determine whether the failure meets the definition of an occurrence and if it occurred during the policy or policy periods. You will also need to determine if "bodily injury" or "property damage" resulted as defined in appropriate policies. Finally, you will want to determine which policy exclusions may apply.

Did an "Occurrence" Happen Within the Policy Period?

For an insurance policy to cover "property damage," the damage must have been caused by an "occurrence." An "occurrence" is defined in most CGL insurance policies as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." *See San Diego Housing v. Industrial Indem. Co.*, 95 Cal. App. 4th 669, 676 n.5 (Cal. Ct. App. 2002); *see also International Flavors & Fragrances, Inc. v. Royal Ins. Co. of America*, 46 A.D.3d 224, 227 (N.Y. App. Div. 2007). Generally, courts have broadly interpreted the meaning of an "occurrence." *See United States Fid. &Guar. v. Bonitz*, 424 So. 2d 569, 572 (Ala. 1982). Often, courts have interpreted the definition of an "occurrence" in conjunction with the "expected or intended" language in a GCL insurance policy. *See Universal Underwriters Ins. Co. v. Stokes Chev.*, 990 F.2d 598 (11th Cir. 1993) (holding that intentional torts can constitute "occurrences"). Courts have not considered an "occurrence" as merely constituting existence of harm. They have considered an "occurrence" as constituting an event or events that are relevant to determining if there is in fact coverage within a particular policy period. *FMC Corp. v. Plaisted & Cos.*, 61 Cal. App. 4th 1132 (Cal. Ct. App. 1998). Whether a series of losses or injuries is the result of a single or multiple "occurrences" under a CGL insurance policy is determined by the temporal and spatial proximity between the incidents giving rise to the harm. *International Flavors & Fragrances, Inc.*, 46 A.D.3d at 228.

Did Bodily Injury or Property Damage Result?

"Bodily injury" is often defined as physical injury, "sickness, or disease sustained by a person, including death resulting from any of these at any time." Most courts have determined that "bodily injury" includes mental anguish. *See American States Ins. Co. v. Cooper*, 518 So. 2d 708 (Ala. 1987).

"Property damage" is often defined as "physical injury to tangible property, including all resulting loss of use of that property" or "loss of use of tangible property, including all resulting loss of use of that property." The definition of "tangible property" is often "that which may be felt or touched; such property as may be seen, weighed, measured, and estimated by the physical senses." *See American States Ins. Co. v. Martin*, 662 So. 2d 245, 248 (Ala. 1995). Strictly economic losses, such as a lost profit, loss of an anticipated benefit of a bargain, and loss of an investment, most often do not constitute damage or injury to tangible property.

Which Exclusions May Apply?

Most CGL insurance policies exclude coverage for projects covered by an "owner-controlled insurance policy" (OCIP) or a "contractor-controlled insurance policy," (CCIP), often referred to as "wrap" policies. A "wrap" policy is a single insurance policy that is designed to insure most if not all parties involved in a construction project. If a wrap policy is underfunded, however, and does not contain adequate limits to resolve a claim, an insurance or coverage gap will likely result.

Most if not all CGL insurance policies contain some form of an exclusion for damage to "your product" or "your work." Several exclusions in a CGL insurance policy are collectively referred to as the "work-product exclusions." The courts usually define a contractor's work product as "the end result of the work performed by or on behalf of the [contractor]." *See United States Fid. & Guar. Co. v. Bonitz*, 424 So. 2d 569, 571 (Ala. 1982). Nevertheless, when a court finds damage to property other than an insured's, it is usually covered under a CGL insurance policy. *See also Garrett v. Auto-Owners Ins. Co.*, 689 So. 2d 179, 181 (Ala. Civ. App. 1997); *see Transcontinental Ins. Co. v. Ice Sys. of America, Inc.*, 847 F. Supp. 947 (M.D. Fla. 1994) (interpreting provisions to exclude coverage for economic loss resulting from the contractor's work). When a claimant files a claim solely based on damage due to faulty contractual work, the courts have often held that the insurance carrier was not required to provide a defense. *Garrett*, 689 So, 2d 179 (Ala. Civ. App. 1997). In one New York case involving an otherwise soundly built house that was improperly placed partially on an adjoining lot, however, the court held that the insured's work-product exclusion for damages did not apply. *Saks v. Nicosia Contr. Corp.*, 215 A.D.2d 832, 833–34 (N.Y. App. Div. 1995). The court reasoned that the "real property on which the house encroaches sustained damage" within the definition of the policy. *Id.* at 834.

The absolute pollution-exclusion clause in a CGL insurance policy that replaced the qualified pollution-exclusion clause can apply in some cases. Chinese drywall cases are litigating this exclusion now. The scope of the absolute pollution exclusion is an evolving area of law, subject to differing interpretations and is one of the most frequently litigated exceptions found in a CGL insurance policy.

Other exclusions, such as the intentional acts exclusions also can apply. The courts usually apply a subjective standard in interpreting whether these exclusions would apply. Instances involving ordinance or building-code violations can also fall under this type of exclusion. A complete review of a CGL insurance policy is always required.

In general, a court determines whether an insurer has a duty to defend based on the language in the insurance policy, as

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well as based on the allegations in a complaint. *Ajdarodini v. State Auto Ins. Co.*, 628 So. 2d 312 (Ala. 1993). As one court pointed out, "It is well settled [an] insurer's duty to defend is more extensive than its duty to [indemnify]. *United States Fid. & Guar. Co. v. Armstrong*, 479 So. 2d 1164, 1168 (Ala. 1985). Whether an insurance company owes its insured a duty to provide a defense in proceedings instituted against the insured is determined primarily by the allegations contained in the complaint: if the allegations of the injured party's complaint demonstrate that the injured party experienced an accident or occurrence as defined by and falling within the policy's coverage, then the insurer has an obligation to defend the insured, regardless of the insured's ultimate liability. *Ladner & Co. v. Southern Guar. Ins. Co.*, 347 So. 2d 100, 102 (Ala. 1977); *see also Hotel Des Artistes, Inc. v. General Accident Ins. Co. of America*, 9 A.D.3d 181, 187 (N.Y. App. Div. 2004).

The *Hotel Des Artistes* court explained when an insurer does not owe an insured a defense: "an insurer may escape its duty to defend under the policy only if it could be concluded as a matter of law that there is no possible factual or legal basis on which [the insurer] might eventually be held to be obligated to indemnify [the insured] under any provision of the insurance policy." *Id.* (internal citations and quotation marks omitted) (brackets in original quote).

Do Other Carriers Bear Responsibility for Insuring the Risk?

Whenever an "occurrence" happens within an insurance carrier's policy period, and the covered property is damaged within that carrier's particular policy period only, that carrier has responsibility for the risk. In most construction defect cases however, a property owner experiences loss continuously and progressively and the structure experiences deterioration continuously and progressively. So damage will happen over multiple policy periods. *See Montrose Chemical Corp. of Calif. v. Admiral Ins. Co.*, 10 Cal. 4th 645, 689 (Cal. 1995). In these cases, all carriers with polices in effect during those relevant periods potentially share the risk for insuring damage regardless of when the triggering event occurred or when the damage first became manifest.

Potential Equitable Subrogation or Contribution

The doctrines of "equitable subrogation" and "equitable contribution" are entirely different concepts. *See Maryland Cas. Co. v. Nationwide Mut. Ins. Co.*, 81 Cal. App. 4th 1082 (Cal. Ct. App. 2000).

> Equitable subrogation allows an insurer that paid coverage or defense costs to be placed in the insured's position to pursue a full recovery from another insurer who was primarily responsible for the loss. Because this doctrine shifts the entire cost burden, the moving party insurer must show the other insurer was primarily liable for the loss.

Id. at 1088–89.

Equitable contribution, on the other hand, apportions costs among insurers that share the same level of liability for the same risk for the same insured. It arises when several insurers are obligated to indemnify or defend the same loss or claim, and one insurer has paid more than its share of the loss or defended the action without any participation by the others. The purpose of this rule of equity is to accomplish justice by equalizing the common burden shared by coinsurers and to prevent one insurer from profiting at the expense of the others. *Id.* at 1089. As expressed by one court, "without [subrogation], the insured might be able to recover from both the insurer and the tortfeasor. The doctrine is liberally applied to protect its natural beneficiaries, the insurers. The insurer's right of subrogation is completely derivative and limited to the rights of the insured against the third party for its default or wrongdoing." *SR Intl. Business Ins. Co. v. World Trade Center Prop. LLC*, 2008 WL 2358882, at *3 (S.D.N.Y. June 10, 2008) (citations omitted).

Also, "[g]enerally, contractual subrogation trumps equitable subrogation and the made whole doctrine so long as the language giving priority of recovery to the insurer is clear and explicit." *Id.* at *11.

Requirements to Prevail

In an action by an insurer to obtain contribution from a coinsurer, the question is whether the nonparticipating insurer had a legal obligation to provide a defense or indemnity coverage for the claim or action, and the party claiming coverage has the burden to show that a coverage obligation in fact arose or existed under the coinsurers policy. *Safeco Ins. Co. of America v. Superior Court (Century Surety Co.)*, 140 Cal. App. 4th 874, 44 Cal. Rptr. 3d 841 (Cal. Ct. App. 2006).

Determining which insurance coverage is primary and which, if any, is excess or secondary depends on the exact language of the policy. When two or more insurance carriers have responsibility to provide primary insurance coverage of the same insurable interest, subject matter, and risk, most courts have determined that they share liability in proportion to the limits that each policy bears to the total limit of insurance applicable to the loss.

Risk of Nonparticipation

When an insurer definitely has a duty to defend, nonparticipating coinsurers are presumptively liable for both the costs of a defense and of a settlement. Courts have held that in refusing to participate a recalcitrant coinsurer waives the right to challenge the reasonableness of defense costs and the amounts paid in settlement. *Safeco Ins. Co. of America v. Superior Court (Century Surety Co.)*, 140 Cal. App. 4th 874, 44 Cal. Rptr. 3d 841 (Cal. Ct. App. 2006). Some courts have applied the rule that "if an insurer has paid the entire amount of a loss, that insurer may seek contribution from other insurers liable for the same risk." *Nationwide Mut. Ins. Co. v. Hall*, 643 So. 2d 551, 561 (Ala. 1994). This right to contribution is based on the principle that the paying insurer discharged a debt owed by another concurrently liable insurer. *Id.* at 562.

As mentioned, when two or more insurance carriers share responsibility as primary insurers of the same insurable interest, subject matter, and risk, they share liability in proportion to the limits that each policy bears to the total limit of insurance applicable to the loss. *See State Farm Mut. Auto. Ins. Co. v General Mut. Ins. Co.*, 282 Ala. 212, 210 So. 2d 688 (Ala. 1968).

Importance of Providing Notice of a Claim or Lawsuit

If an insurance carrier wants later to pursue a claim for equitable subrogation or contribution, it is important that the nonparticipating carrier receive notice of the claim or lawsuit before the settling insurer does

settle. In *American Intl. Specialty Lines Ins. Co. v. Continental Cas. Ins. Co.*, the court held that the settling insurers could not recover from an objecting insurer because they did not notify the objecting insurer of its potential liability for contribution before they settled their insured's underlying claim. 142 Cal. App. 4th 1342 (Cal. Ct. App. 2006). The court found that insurers of the risk with notice of a claim are in a position to protect their rights, whereas insurers on the risk without notice have no opportunity to protect their rights. Absent compelling equitable considerations to the contrary, it is unfair and inequitable to saddle insurers of the risk with contribution without notice. *Id.* at 1368. FD