

OVERVIEW OF COMMON ISSUES IN CONSTRUCTION DEFECT CLAIMS

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PREFACE

As its name implies, this book is intended to provide the user with a source for quick reference to particular issues which may arise when analyzing claims within the dynamic field of construction defect litigation. While its focus is primarily on California decisional and statutory law, many of the cases comment on out-of-state authorities dealing with the topics under consideration.

The cases cited in this source book provide a starting point for legal research on these issues. The user is cautioned that this manual is not intended to be an exhaustive treatise on or restatement of the law, or a comprehensive listing of all cases on the subject. When necessary, consultation with counsel is recommended.

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OVERVIEW OF COMMON COVERAGE ISSUES
IN CONSTRUCTION DEFECT CLAIMS

1. DISTINCTION BETWEEN “DEFECT” AND “PROPERTY DAMAGE”

A. In order to trigger coverage under a liability policy, an “occurrence” giving rise to “property damage” within the policy period must take place. “Property damage” has been defined as “physical injury to tangible property . . .”

B. The timing of an accident or other event causing the property damage (i.e., the negligent work of the insured) is largely immaterial to establishing coverage; it can occur before or during the policy period. Neither is the date of discovery of the property damage controlling; it might or might not be contemporaneous with the causal event. It is only the *effect* of that occurrence (i.e., the occurrence of property damage during the policy period) that triggers potential coverage.

Montrose Chemical Corp. v. Admiral Ins. Co. (1995) 10 Cal.4th 645;
Stonelight Tile v. CIGA (2007) 150 Cal.App.4th 19.

C. Continuing or progressive property damage is deemed to occur over the entire process of the continuing injury. Whether property damage is in fact “continuous” is a matter to be determined by the trier of fact.

Montrose Chemical Corp. v. Admiral Ins. Co., *supra*;
Pepperell v. Scottsdale Ins. Co. (1998) 62 Cal.App.4th 1045;
Stonelight Tile v. CIGA, *supra*.

D. The mere presence or incorporation of defective materials or “work” of the insured does not constitute “property damage” covered by policies of liability insurance issued to contractors.

Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co. (1996) 45 Cal.App.4th 1;

F&H Construction v. ITT Hartford Insurance Co. (2004) 118 Cal.App.4th 364;
Watts Industries, Inc. v. Zurich American Ins. Co. (2004) 121 Cal.App.4th 1029.

E. The phrase, “legally obligated to pay damages,” as used in the policy’s grant of coverage, does not necessarily preclude coverage for losses pled as arising from breach of contract. The focus of coverage is on the nature of the property, the injury, and the risk that caused the injury, rather than the form of action pled.

Shade Foods, Inc. v. Innovative Products Sales & Marketing (2000) 78 Cal.App.4th 847;

Vandenberg v. Superior Court (Centennial Ins. Co.) (1999) 21 Cal.4th 815;
Waller v. Truck Ins. Exchange (1995) 11 Cal.4th 1.

F. A homeowner may not recover the cost of repair of, or the diminished value attributable to, proven construction defects that have not caused property damage.

Aas v. Superior Court (2000) 24 Cal.4th 627;
Rosen v. State Farm General Insurance Co. (2003) 30 Cal.4th 1070.

G. California Civil Code Section 895, et seq., the so called “fix it” law effective 1/1/03 expressly provides that with respect to residential construction, defects are defined as set forth in Civil Code Section 896 and said defects do not require appreciable “property damage.” The holding in Aas is expressly superseded for construction completed on or after January 1, 2003.

1. The new Civil Code sections have three main impacts with respect to construction defect litigation. First, the statutes establish functionality requirements by defining what is a construction defect. The following are typical examples of the new code definitions:

(a) Foundations. Foundations will not allow water or vapor to enter the structure and damage another building component. Foundations shall be constructed to materially comply with design criteria set by applicable building codes, regulations, and ordinances for chemical deterioration or corrosion in effect at the time of the original construction.

California Civil Code Section 896(a)(7);
California Civil Code Section 896(b)(3).

(b) Framing / Structure. The building shall be constructed to materially comply with design criteria for earthquake and wind load resistance as set forth in the applicable government building codes, regulations and ordinances in effect at the time of the original construction.

California Civil Code Section 896(b)(4).

2. The new statutes provide meet and confer guidelines concerning the builder's right to fix alleged defects and specifically provides time limits in which to respond to a claim (14 days) and the time allowed for inspections and the repair of the property (14 days and 30 days, respectively). Under these new statutes, the builder maintains the right to offer alternative dispute resolution options such as arbitration and judicial reference.

3. The new statutes have significant procedural and legal modifications.

(a) Aas decision largely abrogated by Civil Code Section 896, there is no need to establish resulting property damage. Mere failure to comply with performance standards is enough to sustain a defect claim.

(b) The standards do not require breach of contract and may be enforced either by homeowners' associations or an individual homeowner of a single home.

(c) With respect to Statute of Limitations issues, the three year discovery statute and four year patent defect statute no longer apply to claims for violations

of the standards. All claims must instead be brought within ten years following substantial completion unless otherwise specified. There are, however, new statutes of limitations for various “minor components” such as inner-unit noise transmission, operation of electrical systems and the like. They are specified as one and two year statute of limitations.

California Civil Code Section 896.

2. THE DUTIES TO DEFEND AND INDEMNIFY

A. An insurer’s duty to defend an insured is broader than its duty to indemnify for a loss, but that duty is not unlimited. It extends beyond claims that are actually covered to those that are also potentially covered, in light of facts alleged or otherwise disclosed. It arises as soon as tender is made, and is discharged when the action is concluded.

Manzarek v. St. Paul Fire & Marine Ins. Co. (9th Cir. 2008) 519 F.2d 1025;

Montrose Chemical Corp. v. Superior Court (1993) 6 Cal.4th 287;

Buss v. Superior Court (1999) 16 Cal.4th 35;

Buena Vista Mines, Inc. v. Industrial Indemnity Co. (2001) 87 Cal.App.4th 482.

B. An insurer’s duty to indemnify runs to claims that are actually covered, in light of facts proved, and arises only after liability is established.

Montrose Chemical Corp. v. Admiral Ins. Co., supra;

Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co., supra;

Qualcomm, Inc. v. Certain Underwriters at Lloyds, London (2008) 161 Cal.App.4th 184.

C. In the recent California Supreme Court case of Crawford v. Weathershield Manufacturing, Inc. (2008) 44 Cal.4th 541, the court addressed the issue concerning the contractual duty to defend in a non-insurance context. In particular, the court considered whether the provisions of a pre-2006 residential construction subcontract obligated the subcontractor to defend its indemnitee - the developer-builder of the project - in lawsuits

brought against both parties, based on plaintiff's complaints of alleged construction defects arising from the subcontractor's negligence. Notwithstanding the fact that the jury ultimately found that the subcontractor was not negligent, and the parties accepted an interpretation of the subcontract that gave the builder no right of indemnity unless the subcontractor was negligent, the court concluded the subcontractor still had a contractual duty to defend the developer in this context.

Crawford v. Weathershield Manufacturing, Inc. (2008) 44 Cal.4th 541.

D. After the ruling in Crawford, certain subcontractors and their insurers sought to avoid the immediate duty to defend obligation in Crawford by arguing that a showing of negligence was necessary to trigger the defense obligation. Subsequently, a California Court of Appeal decision held a duty to indemnify is not dependent upon an allegation or a determination of negligence to trigger the duty. In the case, developer pursued its own cross-complaint for indemnity against an engineering firm after having tendered to that firm and the tender being rejected. The developer incurred its own defense costs and settled with the plaintiff HOA. At trial, the jury found that the firm was not negligent in the provision of its services. Nonetheless, the trial court ordered the firm to reimburse the developer for its defense costs related to defense of that firm's work. The Court of Appeal affirmed and expressly stated that a duty to defend arose when the developer's cross-complaint attributed responsibility for the plaintiff's damage to the firm's deficient provision of its services for the construction project. Specifically, the court held that if the indemnity language is clear and explicit on the point, and the appropriate tender is made, the indemnitee must either defend or proceed at its own caution within the framework of Civil Code Section 2778.

UDC Development, LP v. CH2M Hill (2010) 181 Cal.App.4th 10.

E. However, even assuming the general contractor's contractual right to indemnity from the subcontractor was triggered, the contractual indemnity clause does not control the payment obligations of the parties respective insurers. The obligations are determined by the language in the applicable policies of insurance.

JPI West Coast Construction v. RJS & Associates (2007) 156 Cal.App.4th 1448.

F. In a “mixed” action (i.e., where some of the claims are at least potentially covered and the others are not), the insurer has a duty to defend the entire action. However, an insurer may obtain reimbursement of those defense costs that can be allocated solely to the non-covered claims for which a defense was provided. To do so, it must carry the burden of proof of these costs by a preponderance of the evidence.

Buss v. Superior Court, *supra*;

Lyons v. Fire Ins. Exchange (2008) 161 Cal.App.4th 880.

G. In order to avail itself of its right to seek reimbursement of defense costs for non-covered claims, an insurer must:

1. Specifically advise the insured, in a Reservation of Rights letter, that it reserves its right to seek reimbursement of defense expenses paid for non-covered claims; and

2. Seek recovery of those defense costs by way of an action for “Declaratory Relief and Reimbursement,” specifically alleging its “implied-in-law” rights based on a claim of “unjust enrichment.”

Buss v. Superior Court, *supra*;

Scottsdale Insurance Co. v. MV Transportation (2005) 36 Cal.4th 643.

H. An insurer who defends an insured, while reserving its right to dispute coverage, may seek reimbursement from the insured for money it paid to settle a non-covered claim, even in the absence of the insured’s consent to such settlement. It may also seek reimbursement from other insurers on various equitable grounds.

Blue Ridge Ins. Co. v. Jacobson (2001) 25 Cal.4th 489;

Hartford Cas. Ins. Co. v. Mt. Hawley Ins. Co. (2004) 123 Cal.App.4th 278.

I. An insurer that properly reserved rights may later recoup defense costs if it is subsequently determined that no duty to defend arose.

Scottsdale Insurance Co. v. MV Transportation, supra.

J. In an action for equitable contribution by a settling insurer against a non-participating insurer, the settling insurer has met its burden of proof and it makes a prima facie showing of coverage by proving that there was merely a potential for coverage (the same showing necessary to trigger the duty to defend). Upon a prima facie showing, the burden of proof shifts to the non-participating insurer to prove the absence of actual coverage.

Safeco Insurance Company of America v. Superior Court (2006) 140 Cal.App.4th 874.

Limit on Defending Insurer Liability

K. Where liability insurer provides defense to a claim asserted against insured, and settles the case without cost to the insured, carrier has no liability to insured for attorney's fees incurred paid to private counsel hired to defend insured against claim.

Lazy Acres Market, Inc. v. Tseng (2007) 152 Cal.App.4th 1431.

Supplementary Payments

L. Most CGL policies include a "supplementary payments" provision. The clause generally requires insurers to pay the following types of expenses as a component of their defense obligations: (1) investigation expenses incurred by the insured at the insurer's request; (2) court costs awarded against the insured; and (3) pre-judgment and post-judgment interests.

Pritchard v. Liberty Mutual Ins. Co. (2010) 84 Cal.App.4th 890.

M. California courts construe the "costs taxed" language of most supplementary payments provisions to include attorney's fees awarded to the opposing party. However, the supplementary payments provision can only be utilized to pay "costs taxed," including attorney's fees, if the insurer actually owed a duty to defend.

Employers Mut. Cas. Co. v. Philadelphia Indemnity Ins. (2008) 169 Cal.App.4th 340;

Golden Eagle Ins. Corp. v. Cen-Fed, Ltd. (2007) 148 Cal.App.4th 976.

3. POLICY EXCLUSIONS

An insured cannot avoid policy exclusions by mischaracterizing the event causing loss.

Plaintiff's purchased an undeveloped lot intending to build a home and their lender required that they first obtain a Course of Construction insurance policy. During construction, a landslide occurred causing substantial damage to the property. The carrier denied the claim because it determined that the damage was caused by earth movement which was excluded from the policy. Plaintiffs conceded the earth movement was excluded, but they argued that the developer had negligently concealed evidence of a potential landslide and that this act of development negligence was covered. The court rejected the argument finding that the concealment by the developer was not a separate cause for the loss, but merely a separate explanation for the single cause of loss, i.e., earth movement.

Roberts v. Assurance Co. of America (2008) 163 Cal.App.4th 1398.

The following exclusions are those typically considered when determining whether an insurer has a duty to indemnify for a loss.

The "Loss In Progress" Exclusion

A. The “Loss In Progress” or “Known Loss” exclusion is in reality a rule which holds that once an insured becomes aware of damages which form the basis of a claim, that loss is no longer “fortuitous” and the damages not “unexpected.”

B. However, application of the “Loss In Progress” rule in third-party liability claims has been criticized and narrowly enforced.

1. For example, a developer’s knowledge of one defect or set of defects (plumbing leaks, cracks in unit slabs, and window leaks) in units of a development prior to sale was held not equivalent to knowledge of other, distinct defects discovered after sale of the units (slope and drainage problems, decaying stucco, and problems with exterior plumbing).

Chu v. Canadian Indemnity Co. (1990) 224 Cal.App.3d 86;

Pines of LaJolla Homeowner’s Association v. Industrial Indemnity (1992) 51 Cal.App.4th 714 (reversed on other grounds).

C. However, standard “known loss” provisions have not proven particularly helpful in construction defect actions, particularly given the broad duty to defend. Furthermore, in these types of actions, when the damage is “known” will not be clear as of the date of the tender, such that the “known loss” provisions are generally left to matters involving reservation of rights.

D. There is no published authority in California that interprets and applies the standard ISO “known loss” provisions. In certain out-of-state decisions addressing the scope and application of the “known loss provisions” the United States District Court in applying Florida and Georgia law has essentially stated that language of the known loss must be applied to each specific aspect of “property damage” and doesn’t generally encompass the global concept, i.e., based on individual defects “known” to the insured.

CEG Essex Insurance Co. v. H&H Land Development Corporation (MD Georgia 2007) 525 F.Supp.2d 1344.

The “Work Performed” and “Product” Exclusions

A. These two exclusions, commonly combined and referred to as the “work-product” exclusion, eliminate coverage for property damage to the insured’s own work or product, but will not preclude coverage for damage caused by the negligence of other subcontractors, or to other property not the work or product of the insured.

Hillenbrand, Inc. v. Insurance Co. of North America (2002) 104 Cal.App.4th 784;

Western Employers Ins. Co. v. Arciero & Sons (1983) 146 Cal.App.3d 1027;
Insurance Co. of North America v. National American Ins. Co. (1995) 37 Cal.App.4th 195.

1. Deficiencies in roofing, drainage systems, structural elements, water leaks, and inadequate foundations have been held to comprise part of the “work-product” of a developer and general contractor, thus precluding coverage for damages arising from those defects.

Diamond Heights Homeowners Association v. National American Ins. Co. (1991) 227 Cal.App.3d 563;

Baroco West, Inc. v. Scottsdale Insurance Co. (2003) 110 Cal.App.4th 96.

2. Coverage for a general contractor who built an apartment building, and furnished and installed allegedly defective roofs, hot water and electrical heaters, and windows, did not apply because the damage was due to “. . . work completed by or for the named insured, out of which the accident arises . . .”

Rafiero v. American Employers Ins. Co. (1970) 5 Cal.App.3d 799.

3. Allegations of inadequate structural design, defective soils beneath structures, defective doors, roofs and ceilings, and defective wall systems eliminated coverage for a developer/general contractor for “(o) . . . property damage to work performed

by or on behalf of the named insured arising out [of] the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith . . .”

Maryland Casualty Co. v. Imperial Contracting Co. (1989) 212 Cal.App.3d 712.

B. Whereas the usual Completed Operations coverage, with no Broad Form Property Damage endorsement attached, flatly excludes property damage to work performed *by or on behalf of the named insured* arising out of the work, the Broad Form Property Damage endorsement only excludes coverage for work performed *by the named insured*. In such cases, damages arising out of work performed on behalf of the named insured would be covered. Thus, where the named insured is the developer or general contractor who hires the subcontractors, and the subcontractors’ work causes damage, the named insured would be covered for the work performed on its behalf by its subcontractors.

Blackhawk Corp. v. Gotham Ins. Co. (1997) 54 Cal.App.4th 1090;
Maryland Casualty Co. v. Reeder (1990) 221 Cal.App.3d 961;
Prudential-LMI Commercial Ins. v. Reliance Ins. Co. (1994) 22 Cal.App.4th 1508.

C. The question whether a policy contains “Broad Form” coverage appears largely moot under policies comprised of the Commercial General Liability Coverage Form issued by the Insurance Services Office (ISO) after November, 1985, as amended. Standard Policy Form No. CG 00 01 01 04 states that the policy does not apply to:

* * *

“Property damage” to “your work” arising out of it or any part of it and included in the “products-completed operations hazard.” *This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.* (Emphasis added)

The “Impaired Property” Exclusion

A. The current ISO CGL form contains an exclusion for “. . . ‘property damage’ to the ‘impaired property’ or property that has not been physically injured, arising out of a defect, deficiency inadequacy or dangerous condition in your ‘product’ or ‘your work.’”

1. For example, if the insured installed stucco (its “product”) that cracked and flaked off, and which did not cause or contribute to other damage to the structure, coverage would be precluded under this type of exclusion.

2. The exclusion does not apply where other property has been physically injured.

Watt Industries, Inc. v. Zurich American Ins. Co. (2004) Cal.App.4th 1029.

B. A condominium project has been held not to be the “product” of the developer of the project, thus making the exclusion inapplicable where the insured was the developer or builder.

Maryland Casualty Co. v. Reeder, *supra*.

The “Incorrectly Performed Work” Exclusion

A. Under this exclusion, the policy does not provide coverage for property damage to “[t]hat particular part of any property that must be restored, repaired or replaced because ‘your work’ was incorrectly performed on it . . .”

1. For example, when a subcontractor returns to the project to perform repairs to or service on his prior work, damage caused by this subsequent work to the prior work would be excluded.

B. This exclusion is the successor to the “faulty workmanship” exclusion, and differs from its predecessor in two important aspects:

1. First, the new exclusion applies to work being performed either *on or off* the insured’s premises, whereas the old exclusion applied only to property *away from* the premises owned by or rented to the insured;

2. Second, the new exclusion makes clear it does not apply to property damage within the “products-completed operations hazard,” whereas it was unclear whether the “faulty workmanship” exclusion did or did not apply to the insured’s completed operations.

The “Owned Property” Exclusion

A. This exclusion precludes coverage for “. . . ‘property damage’ to . . . property you own . . .”

B. This exclusion is rarely applicable in construction defect cases, since a contractor does not usually “own” the property in question, and “ownership” of materials used or furnished by the contractor are generally transferred to the owner upon completion of the contractor’s work.

C. However, the exclusion may preclude coverage for a developer who “owned” the property if damage occurs before its sale to others. The exclusion has been upheld in cases involving pollution and environmental contamination issues.

D. No California case has interpreted the “Owned Property” exclusion in the context of a construction defect case.

E. The “owned property” exclusion comes up more frequently in the environmental claims area.

Shell Oil Co. v. Winterthur Swiss Ins. Co. (1993) 12 Cal.App.4th 715.

The “Alienated Premises” Exclusion

A. Standard general liability policies contain exclusions for property damage to “. . . premises alienated by the named insured arising out of such premises or any part thereof,” or, in later policies, property damage to “. . . [p]remises you sell, give away or abandon, if the ‘property damage’ arises out of any part of those premises. . . . This exclusion does not apply if the premises are ‘your work’ and were never occupied, rented or held for rental by you.”

B. As the exclusion makes clear, where an insured is not an owner of the property, the exclusion does not apply. Moreover, under the later exclusionary language, it does not apply to the typical completed operations of an insured developer or contractor, as those operations would qualify as the insured’s “work,” and the property was never intended to be “occupied, rented or held for rental” by the insured, but was built for resale.

Prudential-LMI Commercial Ins. Co. v. Reliance Ins. Co., supra.

The “Contractual Liability” Exclusion

A. The 1988 standard ISO CGL policy’s contractual liability exclusion provides that coverage will not apply to property damage “. . . for which the insured is obligated to pay as damages by reason of the assumption of liability in a contract or agreement.” However, the exclusion then states it does not apply to damages “(1) [a]ssumed in a contract or agreement that is an ‘insured contract’ . . .”

B. The term “insured contract” has been defined to include “. . . [t]hat part of any contract or agreement pertaining to your business . . . under which you assume the tort liability of another to pay for . . . ‘property damage’ to a third person or organization. . . . Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.” This would include a construction subcontract which obligates the subcontractor to indemnify, defend and hold harmless the general contractor and/or owner.

C. A recent California Supreme Court case has held that the phrase, “legally obligated to pay damages,” found in the insuring agreement of a CGL policy, provides coverage for damages arising from breach of contract, not just for damages based on tort.

Golden Eagle Ins. Co. v. Insurance Co. of the West (2002) 99 Cal.App.4th 837;

Vandenberg v. Superior Court (Centennial Ins. Co.), *supra*.

The “Joint Venture” Exclusion

A. This exclusion, usually contained in the policy’s definition of, “Who Is An Insured,” provides that coverage does not apply to property damage “. . . arising out of the conduct of any partnership or joint venture of which the insured is a partner or member and which is not designated in this policy as a named insured.”

B. There is scant California decisional authority on the application and interpretation of the “joint venture exclusion.” In one case, the court found that whether the insured built the condominium project as a joint venture which was not listed as such on the policy was a matter to be determined by the trier of fact.

Maryland Casualty Co. v Reeder, *supra*.

The “Subsidence” Exclusion

A. Neither the 1986 or later standard ISO CGL policies contain earth movement and/or subsidence exclusions, which are usually endorsed to the policy by way of manuscript language.

B. An endorsement which precluded coverage for property damage “. . . caused by, resulting from, contributed to or aggravated by ‘subsidence’ and arising out of or attributable to any ‘operations’ of the insured . . .” was upheld as eliminating coverage for a developer who constructed and graded unimproved lots which were later sold to building contractors. Subsidence was defined to include “earth movement, including but not limited to . . . earth sinking, earth rising or earth shifting.” The term “operations” was defined as

“any act, error or omission on the part of the insured, including but not limited to improper grading or site preparation, error in design, faulty materials or faulty workmanship.”

The exclusion applies to damage attributable to any “operations” of the insured. This is broad enough to include work by the insured’s subcontractors as well as its own employees. Thus, the independent contractors’ negligence in performing the grading operations for the developer were thus acts or omissions “on the part of the insured.”

Blackhawk Corp. v. Gotham Ins. Co. (1997) 54 Cal.App.4th 1090.

The “Montrose” Exclusion

A. In response to the California Supreme Court’s decision of Montrose Chemical Corporation v. Admiral Ins. Co., *supra.*, insurers have attempted to preclude coverage for damages commencing prior to the inception of a policy but arguably continuing through the policy period. Such exclusions are commonly known as “Montrose” exclusions.

B. Whether coverage exists for losses commencing before the current policy period and continuing into the policy period is subject to interpretation of the “Loss in progress” rules. California Insurance Code §§ 22 and 250 provide that only “contingent or unknown” risks are insurable. This phrase was interpreted by the Montrose Court to mean that insurance cannot be obtained for a known liability, but liability coverage may exist where there is uncertainty about the imposition of liability and no legal obligation to pay has yet been established.

C. Under the current CGL form, there is no coverage for bodily injury or property damage beginning before the policy period if “known to the insured,” even if such injury or damage continues during the policy period (e.g., pollution claims). [CG 00 01 12 04, Sec. I, Coverage A, ¶ 1.b.(3)] Bodily injury or property damage is “known” to the insured if the insured or any agent or employee *authorized* to give or receive notice of a claim:

1. reports the injury or damage to an insurer; or (2) receives a written or verbal demand or claim for damages because of bodily injury or property damage; or becomes aware by any other means that bodily injury or property damage has occurred or

has begun to occur. [CG 00 01 12 04, Sec. I, Coverage A, ¶ 1.d. This language does not appear in pre-2001 CGL forms.

D. For example, one endorsement entitled, “Pre-Existing Damage Exclusion,” eliminates coverage for “. . . [a]ny damages arising out of or related to . . . ‘property damage’ . . . [¶] (a) which first occurred prior to the inception date of this policy . . . ; or [¶] (b) which is, or is alleged to be, in the process of occurring as of the inception date of this policy . . . even if the ‘occurrence’ continues during this policy period. . .”

E. The current CGL provision redefines the “known loss rule” to exclude coverage for losses which existed before the policy period even if no liability or obligation to pay had yet been imposed. Policyholders may argue that Montrose cannot be avoided in California by a CGL policy provision because Montrose is an interpretation of California statutes (Ins. C. §§ 22, 250) defining the “known loss rule.” Courts have previously held that Policy provisions contrary to California statutes have been unenforceable. The more convincing argument is that insurers are free to limit coverage in any way they choose as long as the limitation satisfies the plain, clear and conspicuous standard under California law.

F. Another example of an attempted “Montrose” exclusion precludes coverage for “property damage” that was “. . . known to **you**, any additional insured, or anyone working on **your** behalf; and/or [] reported to **you**, any additional insured, or anyone working on **your** behalf, before the inception date of this policy . . .”

G. California courts have yet to determine the application and viability of any “Montrose” exclusion.

Nonstandard Exclusions and Limitations

Mold Exclusion:

Excludes coverage for bodily injury or property damage “caused by the invasions or existence of water or moisture including but not limited to mold, mildew, rot and deterioration of property.”

A. Mold exclusion applies to sudden and accidental release of water. When a homeowner filed a claim for water related damage for a home which had become contaminated with mold, the insurer denied the mold claim based upon the terms of the policy, specifically, the mold exclusion. The plaintiff homeowner asserted that the insurer could not rely on the mold exclusion in light of Insurance Code Section 530 which provides that an insurer is liable for losses proximately caused by insured risks, and sudden and accidental discharge of water was an insured risk. The Court of Appeal held the clear language of the mold exclusion applied.

De Bruyn v. Farmers Group, Inc. (2008) 158 Cal.App.4th 1213.

B. Typically, mold exclusions in cases involving construction defects are more likely to be a matter for reservation of rights than for an outright denial. Even in those cases where there is a standard fungi or bacterial mold exclusion that precluded coverage for injury or damage arising out of, or resulting from mold etc., the court held that the exclusion did not apply to preclude a duty to defend where it was alleged that the insured had constructed a building to allow moisture to enter into the interior causing damage and mold growth.

Schmidt v. Navigator’s Insurance Co.

Specified Projects or Operations Exclusion

Tract Housing/Condos/Townhomes Exclusion:

Excludes coverage “for any apartments, condominiums or townhomes or attached homes . . .”

Exclusion for Size of Project or Limitation to Single Family Homes:

Excludes coverage for “any apartment or condominium or any single-family or tract homes where the total project or development exceeds ____ homes and/or units.”

Exclusion for Work or Operations Prior to Policy Period:

Excludes coverage for “ ‘your work’ . . . prior to the policy period” or for “any pre-existing construction or preparation for construction . . . ”

4. INDEMNITY AGREEMENTS

A. A named insured’s assumption of another’s liability under a hold harmless or indemnity provision within an “insured contract” is considered “derivative liability” and is covered under the policy’s “contractual liability coverage/exclusion.”

Insurance Co. of North America v. National American Ins. Co., supra.

1. An indemnity agreement which expressly and unequivocally provides that the indemnitor will indemnify the indemnitee for the indemnitee’s negligence, regardless if that negligence is active or passive, is considered a “Type I” indemnity agreement. (Formerly typical agreement between subcontractor contractor. See below)

MacDonald & Kruse, Inc. v. San Jose Steel Co. (1972) 29 Cal.App.3d 413.

2. An indemnity agreement which provides that the indemnitor will indemnify the indemnitee for the indemnitee’s own acts of passive negligence, is considered a “Type II” indemnity agreement. An indemnitee’s active negligence is a bar to recovery under this form of indemnity agreement.

C.I. Engineers & Constructors, Inc. v. Johnson & Turner Painting Co. (1983)
140 Cal.App.3d 1011;

Guy F. Atkinson Co. v. Schatz (1980) 102 Cal.App.3d 351.

3. An indemnity agreement which provides that the indemnitor will indemnify the indemnitee for the indemnitor's negligence only is considered "Type III" indemnity agreement. Any negligence on the part of the indemnitee or others will bar enforcement of the agreement. This agreement is rare.

MacDonald & Kruse, Inc. v. San Jose Steel Co., supra.

B. The question of whether an Indemnity Agreement covers a given case turns primarily on contractual interpretation, and it is the intent of the parties that is expressed in the Agreement that should control. This requires an inquiry under the circumstances of the damage or injury in the language of the contract.

Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal.3d 622, 633.

C. California courts, when interpreting express indemnity agreements, generally have employed a three-type analysis, originally set forth in MacDonald & Kruse, Inc. v. San Jose Steel Co. (1972) 29 Cal.App.3d 413, which focus on the indemnitees' active or passive negligence.

MacDonald & Kruse, Inc. v. San Jose Steel Co. (1972) 29 Cal.App.3d 413.

D. Given the establishment of the Type I indemnity, the critical inquiry is whether or not the indemnity provisions at issue apply absent proof by the developer that subcontractor was at fault. Stated differently, the question to be decided is whether or not the indemnity provisions require the establishment of subcontractor fault (negligence plus causation) as a prerequisite to triggering the contractual obligations to indemnify under the subcontractor agreement.

1. An indemnity agreement in a commercial setting which provided that the indemnitor/subcontractor would indemnify the indemnitee/general contractor for a loss which “. . . arises out of or is in any way connected with” the subcontractor’s performance of its work under the contract, and “. . . shall apply to any acts or omissions, willful misconduct or negligent misconduct, whether active or passive, on the part of the Subcontractor . . .”, did not require a showing of fault on the part of the subcontractor by the general contractor to enforce indemnification.

Continental Heller Corp. v. Amtech Mechanical Services, Inc. (1997) 53 Cal.App.4th 500;

McCrary Construction Co. v. Metal Deck Specialists, Inc. (2005) 133 Cal.App.4th 1528.

2. In contrast, an indemnity provision (in a standard multiple party construction defect action) which provided that the subcontractor would indemnify the owner for “. . . damage to property arising out of or in connection with Subcontractor’s . . . performance of the Work and for any breach or default of the Subcontractor in the performance of its obligations . . .” required the developer to prove negligence on the part of the subcontractor to trigger its indemnity obligation to the developer.

Heppler v. J.M. Peters Co. (1999) 73 Cal.App.4th 1265.

3. An indemnity agreement which provided that all work performed by the subcontractor “shall be at the risk of [the subcontractor] exclusively,” and that the subcontractor would indemnify and hold harmless the general contractor from any claim or loss “resulting from [the general contractor’s] alleged or actual negligent act or omission, regardless of whether such act or omission is active or passive . . .,” did not require the general contractor to prove negligence on the part of the subcontractor to obtain indemnity.

Centex Golden Construction Company v. Dale Tile Co. (2000) 78 Cal.App.4th 992.

E. The California Supreme Court has clarified any issues with respect to defense obligations and indemnity agreements. In a recent case, the California Supreme Court concluded that a subcontractor had a duty to “defend” a developer against claims “founded”

upon damage or loss caused by subcontractor’s negligent performance of its work, as set forth in subcontractor’s subcontract agreement, and said duties were imposed on subcontractor as soon as the suit was filed against developer that asserted such claims, regardless of whether it was ultimately determined that the subcontractor was actually negligent (which the court determined they were not).

Crawford v. Weathershield Manufacturing, supra.

F. In residential construction contracts, any provision (or collateral agreement) by which a subcontractor agrees to indemnify the builder (as defined in Civil Code § 911 on construction defect or design claims is unenforceable to the extent the claim arises from the “builder’s” negligence (Civil Code § 2782 (c)). This code section, effective January 1, 2006, effectively eliminates Type I indemnity agreements for residential construction. However, this section expressly does not abrogate the holding of Presley Homes, Inc. v. American States Insurance Company (2001) 90 Cal.App.4th 571, which stands for the proposition that an insurer has to provide a full and complete defense to an additional insured, not just for claims related to the subcontractor’s work.

California Civil Code § 2782 (c);

Presley Homes, Inc. v. American States Insurance Company (2001) 90 Cal.App.4th 571.

G. Indemnity agreements which purport to indemnify the indemnitee for its “sole negligence” or “willful misconduct” are void under California law and unenforceable.

California Civil Code § 2782(a).

H. “Indemnity” for Attorney’s Fees

1. Under standard subcontract agreements, general contractors assert entitlement to indemnity based on, among other theories, a contractual indemnity agreement. Contracts have “prevailing party” clauses entitling a prevailing party to its attorney’s fees. Fees under such a contractual clause are allowable as costs under Code of

Civil Procedure §§ 1032 and 1033.5. Such costs would normally fall within the Supplementary Payments provision.

2. Agreements between contractors and owners which have attorney fee provisions, but not indemnity provisions, do not necessarily allow recoverable attorney's fees under the policy based on the fact the owner/contractor agreement is not an "insured agreement." This could impact settlement issues in these types of cases.

I. "Horizontal Exhaustion Rule" Trumps Indemnity Agreement Between Insured Parties

RJS was a subcontractor on an apartment construction project and carried primary liability insurance with Lloyds of London (\$1,000,000). It also carried excess coverage with Great American Insurance. JPI was the general contractor on the project and carried primary insurance with Transcontinental Insurance (\$1,000,000). The terms of the subcontract included a Type II indemnity agreement which extended indemnity by RJS to JPI for any claims arising out of RJS' work. In this action, Great American sought to recover from Transcontinental the amount it had paid out in settlement in settling the claim against JPI. Transcontinental argued that the indemnity agreement between the parties required under the principles articulated in Rossmor Sanitation, that the entire burden should fall on RJS' insurers and therefore it owed nothing. Great American, on the other hand, argued that, as an excess insurer, it had no liability until all of the primary insurance had been exhausted (the "Horizontal Exhaustion Rule"). The trial court agreed with Great American and entered judgment in its favor establishing that while an indemnity provision can impact the rights of the insurers of both the indemnitee and indemnitor, it will not be controlling in cases involving insurers that have different levels of exposure (primary versus excess).

JPI WestCoast Construction, Inc. v. RJS & Associates, Inc. (2007) 156 Cal.App.4th 1448.

J. Ten Year Statute of Limitations Applies to Cross-Complaints for Indemnity

Plaintiff, the buyer of an apartment complex, sued defendant developer-sellers after discovering that all of the windows of the complex lacked flashing which led to water damage. Developers filed a cross-complaint for indemnification against the cross-defendant subcontractors. The subcontractors moved for summary judgment on the grounds that the cross-complaint was barred by the statute of limitations and failed to allege a specific claim. The Court of Appeal held that the cross-complaint that asserted a theory of recovery was not barred under Code of Civil Procedure Section 337.15, and found that the exemption under 337.15(f) for actions based on willful misconduct applied to the cross-complaints for indemnity.

Pine Terrace Apartments, L.P. v. Windscape, LLC (2009) 170 Cal.App.4th 1.

K. A Standard Indemnity Clause Does Not Create a Reciprocal Right to Attorney's Fees

The City of Chowchilla contracted with Carr Business Enterprises to do improvement work on city streets. A series of problems arose delaying the work which caused Carr to incur additional costs. Carr sued Chowchilla for those extra costs and later moved for an award of attorney's fees arguing that the indemnity provisions included in the contract authorized the award of attorney's fees because the language in the provisions included within their scope of actions arising out of the performance of the work provided in the contracts. The Appellate Court disagreed and interpreted the provisions as standard indemnity provisions applicable only to third party claims. The court found that there was no express language authorizing recovery of fees in an action to enforce the contracts.

Carr Business Enterprises, Inc. v. City of Chowchilla (2008) 166 Cal.App.4th

25.

5. ADDITIONAL INSURED ENDORSEMENTS

A. Coverage may also be afforded by virtue of an “additional insured” endorsement. The three most common types of endorsements are as follows:

1. ISO CG 20 09

This standard endorsement, commonly referred to as a “20 09,” is also known as the “long form” or “Form A,” and grants coverage to the additional insured “. . . but only with respect to liability arising out of : [¶] A. [The named insured’s] ongoing operations performed for the additional insured(s) at the location designated above; or [¶] B. Acts or omissions of the additional insured(s) in connection with their general supervision of such operations.”

This form is the most limited, covering only the ongoing or current operations of the named insured, and does not confer “additional insured” status once the named insured’s work at the project has been completed.

The term “ongoing operations” in the endorsement is not defined and thus subject to interpretation. Many independent acts of the additional insured could reasonably fall within the scope of that term, such as coordination and scheduling of a subcontractor’s work, inspection of the work, or ordering changes to its subcontractor’s work.

2. ISO CG 20 10

The “20 10” endorsement, also known as “Form B,” confers additional insured status, but only with respect to “liability arising out of . . . ‘your work’ for that [additional] insured by or for you” (1985 version) or “. . . your ongoing operations performed for that [additional] insured.” (1993 version)

a. Acceptance Ins. Co. v. Syufy Enterprises (1999) 69 Cal.App.4th 321 (coverage for the additional insured/developer was found where an employee of the insured/subcontractor was injured on the job site, even though the employee’s injuries were not directly caused by the “work” of the subcontractor, since the injury “arose from” work he was performing on the building owned by the additional insured/developer.).

b. Pardee Construction Co. v. Ins. Co. of the West (2000) 77 Cal.App.4th 1340 (a pre-1993 20 10 endorsement provided the additional insured general contractor with coverage for liability arising from the named insured subcontractor's work even after the work had been completed, since coverage was afforded based on the named insured's "work" or "product," rather than its "ongoing operations" or "work in progress.").

c. St. Paul Fire & Marine Insurance Co. v. American Dynasty Surplus Lines (2002) 101 Cal.App.4th 1038 (subcontract did not require electrical subcontractor to indemnify general contractor for liability to subcontractor's employee who was injured by explosion of pipe during pressure testing by general contractor; the subcontract required indemnity for liability attributable to bodily injury arising out of or resulting from the performance of the work that was the subject of the subcontract, if the liability arose from any act or omission of the subcontractor, but the employee's mere presence at the job site was not a sufficient act or omission by the subcontractor, and the subcontractor performed no act or omission).

d. Hartford Casualty Insurance Co. v. Traveler's Indemnity Co. (2003) 110 Cal.App.4th 710 (coverage under tenant's commercial general liability insurance policy was not limited to liability directly caused by tenant and related to subjects much broader than mere operations or use of the interior of leased premises, including liabilities potentially imposed on landlord that were related to tenant's business presence in landlord's facilities, as well as specific events occurring during the actual performance of tenant's own work or operations).

e. No coverage for claim unrelated to named insured's work. Does not provide coverage for homeowner's claims against developer for negligent misrepresentation in its sales literature or breach of fiduciary duty.

Transcontinental Ins. Co. v. Insurance Co. of State of Penn. (2007) 148 Cal.App.4th 1296.

3. ISO CG 7634

Finally, this form provides slightly modified “Type I” coverage for the additional insured, and covers liability “arising out of” the named insured’s work, and liability “arising from” its supervision of the named insured, but excludes coverage for damages “arising out of the sole negligence or willful misconduct of, or for defects in design furnished by, [the additional insured].”

a. National Union Fire Ins. Co. v. Nationwide Ins. Co. (1999) 69 Cal.App.4th 70 (general contractor’s inadequate remedial measures to address hazards of ponding rain water and failure to properly coordinate its subcontractors’ work schedules were held to constitute its “sole negligence,” thus precluding the insurer’s duty to indemnify).

b. An additional insured endorsement in a policy issued to a subcontractor, which amended the policy to add the general contractor as an insured “. . . but only with respect to liability arising out of ‘your work’ for that insured by or for you,” required the insurer to provide the additional insured with a *full* defense, not just for the claims related to the subcontractor’s work.

Presley Homes, Inc. v. American States Ins. Co. (2001) 90 Cal.App.4th 571.

6. RULES FOR ALLOCATION OF DEFENSE COSTS

A. In general, once coverage of a policy potentially has been triggered, an insurer has an indivisible obligation to defend its insured, even if other insurers also cover the claim. The allocation of that burden is to be determined at a later date.

Aerojet-General Corp. v. Transport Indemnity Co. (1997) 17 Cal.4th 38;

Haskell, Inc. v. Superior Court (1995) 33 Cal.App.3d 963, 976, fn.9.

1. Where several liability insurers cover the same risk, each insurer's duty to defend must be assessed independently “since the duty of each is independent of whatever duty another might have.”

Wausau Underwriters Ins. Co. v. Unigard Security Ins. Co. (1998) 68 Cal.App.4th 1030, 1033, 80 Cal.Rptr.2d 688, 689.

B. There are no hard and fast rules which govern the allocation of defense costs among multiple insurers who have a duty to defend an insured. Costs of defense must be apportioned on the basis of *equitable considerations* not found in the contracts of insurance, since insurers who share the burden have no contractual agreement among themselves.

1. Where several insurers jointly cover the same risk, they must share defense costs. Even in the absence of a prior agreement to do so, the court will apportion costs “on the basis of equitable considerations ... which depend on the particular policies of insurance, the nature of the claim made, and the relation of the insured to the insurers.”

Centennial Ins. Co. v. United States Fire Ins. Co. (2001) 88 Cal.App.4th 105, 115–116, 105 Cal.Rptr.2d 559, 565–566.

2. Each of the insurers “on the risk” has a duty to defend the action in its entirety and the duty is separate and independent from the other insurers, each also has “a corresponding right” of some sort to require the others to share in discharging the duty or at least contribute to its costs.

Aerojet-General Corp. v. Transport Indem. Co. (1997) 17 Cal.4th 38, 70, 70 Cal.Rptr.2d 118, 138;

CNA Casualty of California v. Seaboard Surety Co. (1986) 176 Cal.App.3d 598;

Signal Companies, Inc. v. Harbor Ins. Co. (1980) 27 Cal.3d 359;

Centennial Ins.Co. v. United States Fire Ins. Co. (2001) 88 Cal.App.4th 105.

C. Courts have addressed and approved various ways to allocate indemnity payments, as well as defense costs, among multiple insurers for the same loss, given the specific facts and “equities” of each case:

1. Absent other considerations, where several insurers cover the same risk, “defense costs must also be shared between them pro rata *in proportion to the respective coverage* afforded by them to the insurance.

CNA Cas. of Calif. v. Seaboard Sur. Co., *supra*.

2. If one of the insurers on the risk has defenses the others lack (e.g., fraudulent misrepresentations by the insured in applying for coverage), to avoid its obligation to share defense costs, that insurer must establish there is no potential for coverage under its policy by obtaining an *adjudication of its coverage defense*.

Maryland Cas. Co. v. National American Ins. Co. of Calif. (1996) 48 Cal.App.4th 1822, 1831–1832, 56 Cal.Rptr.2d 498.

3. Because the duty to defend is determined at the time of tender a subsequent judicial determination that the claim was not covered under any of the several policies involved does not preclude a finding that there was a *potential* for coverage—hence, a duty to defend—when the claim was tendered. In that event, nondefending insurers who owe no duty to indemnify must nevertheless contribute to defense costs paid by the defending insurer.

Wausau Underwriters Ins. Co. v. Unigard Security Ins. Co., *supra*.

4. Apportionment based on relative policy limits (the “policy limits” method). (CNA Casualty of Calif., *supra*; Employers Reinsurance Corp. v. Phoenix 8Ins. Co. (1986) 186 Cal.App.3d 545); Argonaut Ins. Co. v. Transport Indemnity Co. (1972) 6 Cal.3d 496.

5. The “Loss in progress” rule applies to render each insurer providing occurrence-type liability coverage liable for all damages attributable to underlying defect manifested during policy period, though damage may have become progressively worse during other insurer’s tenure. (Pines of La Jolla Homeowners Association v. Industrial Indemnity (1992) 5 Cal.App.4th 714).

6. Apportionment based on the relative duration of each primary policy as compared with the overall period during which the “occurrences” “occurred” (the “time on

the risk” method). (Stonewall Ins. Co. v. City of Palos Verdes Estates (1996) 46 Cal.App.4th 1810; Centennial Ins. Co. v. United States Fire Ins. Co., *supra*); and

7. “Equal Shares” approach. Reliance Ins. Co. v. St. Paul Surplus Lines Ins. (4th Cir. 1985) 753 F.2d 1288.

8. Apportionment based on relative duration of each policy multiplied by the amount of the respective limits (the “qualified time on the risk” method).

Armstrong World Industries, *supra*.

9. There is no contribution from self-insured parties. Insurers that pay defense costs may seek contribution only from other *insurers*. They cannot obtain contribution from codefendants or other parties who are uninsured (self-insured) Equitable contribution applies *only* between insurers and has no place between insurer and insured, nor between insurer and uninsured or self-insured party.

Aerojet-General Corp. v. Transport Inc., *supra*.

D. Where multiple insurers share the same level of liability on the same risk for the same insured, the doctrine of *equitable contribution*, rather than equitable subrogation, will apply to apportion defense costs among equally responsible insurers.

Fireman’s Fund Insurance Company v. Maryland Casualty Company (1998) 65 Cal.App.4th 1279;

Hartford Casualty Insurance Company v. Travelers Indemnity Company (2003) 110 Cal.App.4th 710.

E. In contrast, an insurer, who had an obligation to defend its insured, the general contractor, for the general contractor’s own independent acts of negligence, was not entitled to seek *equitable subrogation* for defense costs from other carriers who insured the general contractor as an “additional insured” for derivative liability, arising out of the acts or omissions of the general contractor’s subcontractors.

Maryland Casualty Company v. Nationwide Mutual Insurance Company
(2000) 81 Cal.App.4th 1082.

F. A secondary insurer's coverage is triggered when the applicable limit of underlying insurance has been exhausted by payment of claims and only arises when neither the specifically identified underlying primary policy nor other insurance applies. Horizontal exhaustion of all triggered primary policies is required before the secondary insurer could owe a duty to defend.

Traveler's Casualty & Surety Co. v. Transcontinental Ins. Co. (2004) 122 Cal.App.4th 949;

Padilla Const. Co. v. Transportation Ins. Co. (2007) 150 Cal.App.4th 984.

Equitable Contribution

G. Where subcontractor's policy did not provide coverage for the "additional insured" general contractor, subcontractor's insurer had no liability for equitable contribution to the general contractor's insurer.

Monticello Insurance Co. v. Essex Insurance Co. (2008) 162 Cal.App.4th 1376.

H. Where insurer's policy period began after termination of the insurance contract, subsequent insurer has no duty to defend. Plaintiff's contracted with Hilmore Development to build its home. Insurer A insured the property for one year. Insurer B insured the property in the subsequent year. During Insurer B's policy period and prior to the completion of the home, plaintiff's terminated their contract with the insured/developer. Plaintiff subsequently filed an action alleging construction defects. Insurer A settled with plaintiffs and brought this action against Insurer B for equitable contribution. The Second District Court of Appeal held that Insurer B was not liable for equitable contribution as the policy excluded coverage for work that had not been completed, or abandoned, during its policy period.

Clarendon America Insurance v. General Security Indemnity Company of Arizona (2011) 193 Cal.App.4th 1311.

7. DEDUCTIBLES AND SELF-INSURED RETENTIONS

A. In general, a deductible provision in a policy acts as a partial offset of an insurer's indemnity obligation after the resolution of a claim. It may apply on a "per claim" or "per occurrence" basis, and an insurer's defense duties and other obligations are usually unaffected whether it is paid or not.

B. In contrast, the existence of a self-insured retention (SIR) endorsement operates to limit an insurer's obligations to the insured (i.e., defense and indemnity) until the insured has satisfied a previously-agreed upon limit of liability (called the "retained limit").

C. A number of cases have held that SIRs are equivalent to "primary coverage," and policies subject to SIRs are thus "excess policies" with no duty to defend or indemnify until the SIR is exhausted.

Pacific Employers Ins. Co. v. Domino's Pizza, Inc. (9th Cir. 1998) 144 F.3d 1270;

Padilla Construction v. Transportation Ins. Co., supra.

D. The absence of an "aggregate" retained limit in a SIR does not transform the SIR into a deductible, but requires application of the retained limit to each new claim before an insurer's duties arise.

General Star Indemnity Co. v. Superior Court (Hard Rock Cafe America, L.P.) (1996) 47 Cal.App.4th 1586.

1. Some policies provide that a separate deductible applies to each "occurrence," "accident" or "claim" made against the insured. Where numerous claims or claimants are involved, the number of **deductibles** chargeable to the insured depends on interpretation of the terms "occurrence," "accident" or "claim." Where the policy provides a deductible for each "claim" made, separate claims may result in separate **deductibles**, even though all claims arise out of the same "occurrence." To have this effect, however, the wording of the deductible must be clear and unambiguous.

2. To the extent that there is any ambiguity in the policy language, the California Supreme Court has required that any ambiguity should be resolved according to the insured's objectively reasonable expectations.

AIU Ins. Co. v. Sup. Ct. (FMC) (1990) 51 Cal.3d 807;

Bank of the West v. Sup. Ct. (Industrial Indemnity Co.) (1992) 2 Cal.4th 1254.

3. Any ambiguity as to the term "claim" is construed strictly against the carrier. Two insurance companies insured a developer under separate and consecutive General Commercial Liability policies. When the insured was sued for construction defects it tendered its defense to both carriers. The first carrier defended the insured under a Reservation of Rights, eventually settling the case. The second carrier, North American Capacity ("NAC"), argued that its duty to defend never arose because the insured never paid a self-insured retention for each home involved in the action. NAC argued that "claim" referred to each separate house. Insurer No. 1 argued that the SIR in North American Capacity's policy applied to the underlying action as a whole, not to each of the allegedly defective homes. The Fourth District Court of Appeal agreed and held that as the term "claim" was susceptible to both parties' proffered meanings, NAC had the burden of establishing "claim" existed on a per house basis and failed to meet that burden.

Clarendon America Ins. Co. v. North American Capacity Ins. Co. (2010) 186 Cal.App.4th 556.

E. Absent further definition, the term "occurrence," as used in a deductible clause, has been interpreted to mean a loss, and all claims due to the same *cause* were considered a single *loss* to which a single deductible and policy limit applied.

1. EOTT Energy Corp. v. Storebrand International Ins. Co. (1996) 45 Cal.App.4th 565 (where policy did not define the term "occurrence," the court held that 635 separate thefts of diesel fuel over an 11-month period were a series of *related* acts attributable to a *single* cause or *occurrence* (i.e., a systematic, organized scheme to steal fuel.))

2. Where a deductible is stated in terms of “per occurrence,” the term “occurrence” is subject to the same causation analysis as is applied to determine the “per occurrence” policy limits, i.e., it means the *underlying cause* of injury, rather than the injury or claim itself.

Chemstar, Inc. v. Liberty Mut. Ins. Co. (9th Cir. 1994) 41 F.3d 429, 433 (applying Calif. law).

(Plaster manufacturer (Insured) was sued for defective plaster walls in 28 different homes. Although multiple claimants were involved, the damage suffered by each resulted from the same cause. There was a single “occurrence” subject to only one deductible.)

3. Where the insured makes a claim under a single policy with adequate coverage limits, the insurer paying the loss *cannot* reduce its liability by “stacking” deductibles under other policies “triggered” by the continuing injury. The court’s rationale was that because the deductible is stated in terms of “occurrence” (cause of injury), and there is only a single occurrence, only a single deductible is chargeable to the insured.

California Pac. Homes, Inc. v. Scottsdale Ins. Co. (1999) 70 Cal.App.4th 1187.

Aggregate retention:

Under the provision quoted above, a separate SIR amount applies to *each* “occurrence.” But other policy forms may contain an *aggregate* retained limit amount (usually, at an additional cost). Such a provision *limits the insured’s risk* in the event of *several* covered claims: i.e., payments made by the insured are aggregated until the aggregate limit is exhausted; thereafter, the insurance company must cover any additional claims from the first dollar.

General Star Indem. Co. v. Sup. Ct. (Hard Rock Cafe America), *supra*, 47 Cal.App.4th at 1594, 55 Cal.Rptr.2d at 326.

The effect of a policy provision requiring the insured to retain the first portion of a loss is that the insurer is essentially providing *excess insurance*: i.e., no coverage attaches unless and until the insured becomes legally obligated for a loss in excess of the SIR. Until then, the insurer has *no duty to defend or indemnify*.

General Star Indem. Co. v. Sup. Ct. (Hard Rock Cafe America), supra, 47 Cal.App.4th at 1593, 55 Cal.Rptr.2d at 325;

Vons Cos., Inc. v. United States Fire Ins. Co., supra, 78 Cal.App.4th at 63–64, 92 Cal.Rptr.2d at 605.

F. In one case, in which five consecutive policies each contained an SIR endorsement with a retained limit of \$250,000 for any one occurrence, the court held that the insured need satisfy the SIR only once, where the damage constituted a single occurrence of continuous and progressive injury during all policy years.

California Pacific Homes, Inc. v. Scottsdale Ins. Co. (1999) 69 Cal.App.4th 1448. (“CPH”)

G. The CPH decision may be limited to its facts for a number of reasons:

1. First of all, the language of the policies in question was important to the court’s ruling. There, the policies did not contain “all sums” language, but instead required Scottsdale to pay the “. . .ultimate net loss [of any one occurrence] in excess of the retained limit . . . [for] which the Insured shall become legally obligated to pay as damages . . .;”

2. In footnote 3 of the decision, there is an inference the insured itself did not actually pay the retained limit (and was probably not obligated to do so, given the absence of such a specific requirement). Rather, that limit was deducted from the carriers’ agreed-upon contribution;

3. The parties had stipulated that the underlying claim against the insured arose from a single occurrence involving continuous or progressive property damage; and

4. The case involved an “insured vs. insurer” dispute, rather than one among the carriers themselves, and the issue of allocation for the loss among the insurers was therefore not before the court.

H Further, the court has recently held that self-insured retention limits are not “primary policies,” and the principle of “horizontal exhaustion” did not apply to require that

SIRs be exhausted before a number of “excess” insurers incurred obligations under their respective policies.

Montgomery Ward & Co., Inc., v. Imperial Casualty & Indemnity Co. (2000)
81 Cal.App.4th 356.

I. Where an SIR endorsement did not expressly require the insured to satisfy the retained limits, and the endorsement’s language made it “subject to” all of the policy’s other terms and conditions, including the “other insurance” clause, the court held payment of the SIR by other insurance was permitted. Had the carrier wanted to limit satisfaction of the SIR by payment from the insured only, it could have used specific language to that effect.

The Vons Companies, Inc. v. United States Fire Ins. Co. (2000) 78
Cal.App.4th 52.

1. Where a loss commences during one policy period and continues through several others (e.g., environmental pollution), coverage is triggered under all liability policies in effect during those periods Unless the policies provide otherwise, each insurer is liable up to its policy limits upon exhaustion of the SIR in its own policy.

J. Under policies containing a covenant to pay for “all sums for which the insured shall become liable to pay as damages . . . ” (emphasis added), where any portion of the continuing and progressive damage occurs within any of the policies, the insured may select one of those policies triggered by the loss to fully respond to the claim. Subsequent allocation of the loss among the insurers is subject to principles of contract law, the express terms and limitations of the policies on the risk, and equitable considerations.

Armstrong World Industries, Inc., supra.

K. An insurer providing a defense to an insured must “promptly” notify other non-defending insurers of its intention to seek contribution for indemnity and defense costs paid, or otherwise it may be later barred from obtaining contribution against those non-defending carriers.

Truck Insurance Exchange v. Unigard Insurance Company (2000) 79 Cal.App.4th 966.

8. **DUTY TO DEFEND AS BETWEEN PRIMARY AND EXCESS INSURERS**

A. The primary insurer owes the exclusive duty to defend (and the corollary right to control the defense) even where the third party claim against the insured is for more than the amount of primary coverage, i.e., the fact that the claim *may* invade the overlying excess coverage does *not* shift the duty to defend. The same principle applies where there is a *self-insured retention*. The liability insurer is treated as an excess insurer and has no duty to defend until the self-insured retention has been exhausted by defense costs or settlements.

General Star Indem. Co. v. Sup.Ct. (Hard Rock Cafe America) (1996) 47 Cal.App.4th 1586, 1593, 55 Cal.Rptr.2d 322, 325;

Signal Cos., Inc. v. Harbor Ins. Co. (1980) 27 Cal.3d 359, 368, 165 Cal.Rptr. 799, 804.

B. No reimbursement for defense costs. The primary insurer, being obligated to defend, may not seek contribution from the excess carrier even where its successful settlement or defense relieves the excess insurer from indemnifying the injured party.

Signal Cos., Inc. v. Harbor Ins. Co., supra,

C. Duty to defend shifts upon exhaustion of primary coverage. Once the primary limits are exhausted, the defense burden shifts to the excess carrier. This is true even if the excess policy does not expressly provide for a defense. The obligation to defend is *implied* from the obligation to indemnify the insured after the primary insurance is exhausted. However, if there is a dispute as to whether the primary coverage is exhausted, the primary insurer must continue to defend until a judicial determination is obtained.

Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyds (1976) 56 Cal.App.3d 791, 804, 129 Cal.Rptr. 47, 55.

1. The primary insurer *cannot* avoid its duty to defend before coverage is exhausted by tendering its policy limits to the excess insurer to settle the case.

Chubb/Pacific Indem. Group v. Insurance Co. of No. America (1987) 188 Cal.App.3d 691, 698, 233 Cal.Rptr. 539, 543.

2. The excess policy may specifically exclude any obligation to furnish a defense; e.g., provisions incorporating all terms of the primary coverage “except ... the obligation to investigate and defend”; or requiring the excess insurer’s “written consent before it shall be liable for defense costs.” To have this effect, the exclusion must be clear and specific. Doubts will be resolved against the excess insurer.

3. Even if the excess policy specifically excludes the duty to defend, there may be cases in which the excess insurer is *equitably* obligated to share defense costs with the primary insurer. If there is a risk that the insured would be left without a defense, “compelling equitable principles” may require the excess insurer to reimburse the primary insurer for defense costs, even in contravention of its policy provisions.

Signal Cos., Inc. v. Harbor Ins. Co. (1980) 27 Cal.3d 359, 165 Cal.Rptr. 799.

4. The insurer’s duty to defend continues until the third party litigation ends “unless the insurer sooner proves, by facts subsequently developed, that the potential for coverage which previously appeared *cannot possibly materialize*, or no longer exists.”

Scottsdale Ins. Co. v. MV Transp. (2005) 36 Cal.4th 643, 657, 31 Cal.Rptr.3d 147, 156.

D. Exhaustion of policy limits by payment of a settlement or judgment against the insured may terminate any further defense duty. Whether payment of policy limits to one of several claimants terminates the insurer’s duty to defend is unsettled. However, if the insurer pays its policy limits to one of several claimants in the same lawsuit, the insurer owes no further duty to defend the other claims against the insured in that lawsuit.

Johnson v. Continental Ins. Cos. (1988) 202 Cal.App.3d 477.

1. Where the policy limits are “self-consuming” (i.e., reduced by defense costs), the insurer's duty to defend terminates when it has paid out the full limits in defense even if no settlement or judgment has been reached. However, if a dispute arises over exhaustion of policy limits, the insurer must continue the defense until it obtains a judicial determination that it has exhausted its policy limits.

Hartford Acc. & Indem. Co. v. Sup. Ct. (Syntex) (1994) 23 Cal.App.4th 1774, 1778, 29 Cal.Rptr.2d 32, 36;

Aerojet-General Corp. v. Transport Indem. Co. (1997) 17 Cal.4th 38, 77, 70 Cal.Rptr.2d 118, 142.

E. CIGA is not required to assume liability if unexhausted excess insurance coverage exists to cover the claim. In an action brought by a homeowners association against the developer and subcontractors, the California Insurance Guarantee Association (“CIGA”) agreed to defend the subcontractors. The developer settled by exhausting its primary policy and a contribution by the excess insurer that did not exhaust the excess policy. CIGA took the position that the developer’s remaining excess policy constituted “other insurance” available to the HOA which must necessarily be exhausted before CIGA can be compelled to pay any settlements or judgments. The Court of Appeal held that the HOA’s claim was not “a covered claim” within the meaning of the CIGA statutes because there was other insurance available, namely the remaining limits of the developer’s excess policy. The case raises an important point that a claimant cannot “bootstrap” its claim against CIGA by releasing its right to recover under an available policy and then claim that there is no other insurance.

Park Woods Community Association v. California Insurance Guarantee Association (2006) 141 Cal.App.4th 1362.

9. TENDER AND WITHDRAWAL OF DEFENSE ISSUES

A. The duty to defend arises when the insured tenders defense of the third party lawsuit to the insurer: “Imposition of an immediate duty to defend is necessary to afford the insured what it is entitled to: the full protection of a defense on its behalf.”

Montrose Chem. Corp. v. Sup. Ct., *supra*.

B. The duty to defend is separate from the duty to indemnify. The insurer must pay defense costs before liability is established and apart therefrom; the insurer is “responsible for those costs whether or not there is ultimately any duty to indemnify the insured for the claim.”

Montgomery Ward & Co., Inc. v. Imperial Cas. & Indem. Co. (2000) 81 Cal.App.4th 356, 373, 97 Cal.Rptr.2d 44, 55.

C. A tender by the insured creates a duty to defend where the following conditions are met: (1) there is a policy in effect and if “Suit” has been filed against the insured: CGL policies typically provide that the insurer shall have the “right and duty to defend any *suit* against the insured ... and *may* make such investigation and settlement of any *claim* or *suit* as it deems expedient.” Current CGL policies define suit to include arbitrations, alternative dispute resolution proceedings [CG 00 01 12 04, Sec. V, ¶ 18] and administrative hearings.

Foster-Gardner, Inc. v. National Union Fire Ins. Co. (1998) 18 Cal.4th 857, 863, 77 Cal.Rptr.2d 107, 111.

1. Even though there is no duty to defend, insurers are authorized to “investigate and settle” pre-lawsuit “claims.” It is often in the insurer's interest to assist its insured in administrative proceedings that could lead to an award of damages in subsequent civil proceedings which they will ultimately have to indemnify. “(H)owever, this is a judgment call left solely to the insurer.”

Foster-Gardner, Inc. v. National Union Fire Ins. Co., *supra*, 18 Cal.4th at 883, 77 Cal.Rptr.2d at 125.

2. A tender of a claim simply requires the insured to provide some notice of the claim to the insurer in order to trigger its duty to defend the insured. No formal request that the insurer undertake the defense is required. The tender can either be formal or constructive. A defense is owed if the insurer has “constructive” notice“ of the tender, i.e., notice of facts that would put a reasonable person on inquiry. If the insurer fails to make inquiry in the face of such facts, and thus erroneously fails to defend, it will be liable for breach of contract.

California Shoppers, Inc. v. Royal Globe Ins. Co. (1985) 175 Cal.App.3d 1;
Truck Ins. Exch. v. Unigard Ins. Co. (2000) 79 Cal.App.4th 966, 979, 94 Cal.Rptr.2d 516.

3. Prejudicial delay by the insured in tendering the claim may excuse the insurer from liability on the claim (i.e., it may excuse not only the duty to defend but also the duty to indemnify). “(I)f successful, the insurers’ notice defense could prevent any recovery under the policy.” However, The *insurer* bears the burden of proving it was substantially prejudiced by the delay.

Select Ins. Co. v. Sup.Ct. (Custer) (1990) 226 Cal.App.3d 631, 639, 276 Cal.Rptr. 598, 603.

4. Similarly, an insurer must suffer actual and substantial prejudice to avoid default judgment following lack of notice from insured. Plaintiff filed an action against a general contractor (insured) for water leaks relating to the building, alleging causes of action for negligence and breach of contract. The insured did not tender the defense to the insurer and a default judgment was taken against the insured. The insurer denied coverage based on the failure of the insured to notify and failure to cooperate with the investigation. Plaintiff homeowner brought suit against the insurance carrier to recover the amount of the default judgment. The Court of Appeal held that when a default judgment results from lack of notice by the insured, the insurer is liable unless it suffered actual and substantial prejudice. The inability to investigate the claim or present a defense in the underlying suit does not satisfy the prejudice requirement. To demonstrate substantial prejudice, the insurer must show at the very least that if the notice clause had not been breached there was

a substantial likelihood that the insurer would have received a favorable judgment, settled the claim for less, or been able to reduce the insured's liability.

Belz v. Clarendon American Insurance Co. (2007) 158 Cal.App.4th 615.

D. An insured may incur investigation or legal expenses in connection with a third party lawsuit before tendering defense to the insurer. Whether the insured is entitled to recover such expenses from the insurer depends on the terms of the policy. Liability policies usually prohibit "voluntary" payments by the insured. For example: "No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent." [CG 00 01 12 04, Sec. IV, ¶ 2.d.]

1. Courts disagree whether liability insurers must reimburse an insured for investigation or legal expenses voluntarily incurred by the insured before tendering defense to the insurer. Several cases hold the insurer owes no duty to reimburse the insured for pre-tender expenses because it owed *no duty to defend* the insured until the defense was tendered. For example, a Developer (Insured) spent more than \$1.4 million to repair water intrusion defects in a residential development *before notifying* its liability insurer. The insurer had no duty to reimburse the insured for the costs incurred.

Jamestown Builders, Inc. v. General Star Indem. Co. (1999) 77 Cal.App.4th 341.

2. Other cases treat the matter as unsettled. "The (no voluntary payments) provision does not specifically refer to the costs of defense and there is a *question what a reasonable insured would understand* reading the provision."

Fiorito v. Sup.Ct. (State Farm Fire & Cas. Co.) (1990) 226 Cal.App.3d 433.

E. Recent cases have defined the concept of "suit" for defense purposes.

1. A homeowner's association has served a developer with a Notice of Commencement of Proceedings pursuant to the Calderon Act. Developer sued its additional insurers for defense costs. The insurers contended that the Calderon process did

not constitute a "suit" within the meaning of the defense agreement in its CGL policies. The Fourth District Court of Appeal held that the Calderon process is an integral part of construction defect litigation and therefore the carriers must provide a defense.

2. The California Supreme Court recently held that the definition of "suit" is a broad definition. The United States Department of Interior contracted with a general contractor to supply siphons for an aqueduct. The general contractor contracted part of the job to a subcontractor. The Department of Interior ultimately determined that the siphons were defective and the matter was settled through a payment of \$10,000,000. The subcontractor insurers refused to defend and indemnify the general contractor and subcontractor. The California Supreme Court held that a reasonable policyholder would believe that a policy providing coverage for a "suit" would provide coverage for Department of Interior proceedings. The Supreme Court defined the term "suit" in a comprehensive general liability insurance policy as a core proceeding initiated by the filing of a complaint, and held that the IBCA proceeding was a suit for the purposes of the duty to defend and the potential coverage, thus broadening the definition of "suit."

Ameron v. Insurance Company of the State of Pennsylvania (2010) 50 Cal.4th 1370.

F. Withdrawal.

1. If the insurer is defending under a reservation of rights and subsequently determines there is in fact *no potential* for coverage, it may withdraw by notifying the insured that it will no longer furnish a defense in the action. An insurer may "withdraw from defending a claim once it is able to demonstrate, by reference to *undisputed* facts, that the claim *cannot* be covered." If the termination is challenged by the insured, the insurer bears the burden of proving the absence of any potential for coverage

Ringler Assocs. Inc. v. Maryland Cas. Co. (2000) 80 Cal.App.4th. 1165.

2. One of the more interesting issues regarding withdrawal is based on the insured's failure to cooperate. Such withdrawal is justified, however, only if the insured's conduct has *substantially prejudiced* the insurer's ability to conduct the defense. "Substantially prejudiced" has not been defined by the courts in this context.

Hall v. Travelers Ins. Cos. (1971) 15 Cal.App.3d 304.

10. ARBITRATION AND SETTLEMENT ISSUES

A. Arbitration.

As noted above, under the new “fix it” law, arbitration is available to builders to resolve claims of homeowners. Similarly, arbitration is available in the commercial context with respect to construction issues. This presents several issues.

1. The law is well settled that a party to a contract which contains an arbitration provision cannot compel a non-party to arbitrate. The courts have repeatedly held that arbitration is consensual in nature and that a contract agreement between two parties cannot bind a non-party to the contract and, therefore, an insurer cannot be bound by that agreement.

Crowley Maritime Corp. v. Boston Old Colony Insurance Co. (2008) 158 Cal.App.4th 1061.

2. This comes up more frequently in the situations where a general contractor will have an arbitration provision in an agreement with an owner, but has no similar provisions in its subcontract agreements with the subcontractors. Under that scenario, the general contractor is left to defend the arbitration and has to bring a companion civil litigation against the non-arbitrating subcontractors. This can result in an additional time and expense in defense, and potentially inconsistent rulings. Where this matter routinely comes into play is cases involving pool contractors who generally have arbitration provisions in their agreements but have no subcontract agreements with their “long time” subcontractors such as the gunite supplier or deck coating subcontractors.

3. Plaintiffs have the right to have a statute of limitations issue heard before an arbitrator, and a trial court has no authority to decide that issue. The California Supreme Court recently ruled that an arbitration agreement obligates the parties to resolve their controversies, including disputes about the viability of potentially time-barred claims, before an arbitrator rather than a court.

Wagner Construction v. Pacific Mechanical Corp. (2007) 41 Cal.4th 19.

4. However, the question of whether or not a plaintiff has agreed to arbitrate its claims must be heard before the court who has the authority to determine the enforceability of the provision. In a recent Court of Appeal decision, the court noted that a party cannot be forced to arbitrate anything, including the arbitability of the claim until a court has made a threshold determination that the party did agree to arbitrate “the claim.”

Bruni v. Didion (2008) 106 Cal.App.4th 1272.

5. A party who obtains an order denying a petition to compel arbitration is a “prevailing party” in an action on the contract when this is the only issue before the court even though the merits of the underlying contractual dispute have not been resolved.

Otay River Constructors v. San Diego Expressway (2008) 158 Cal.App.4th 796.

6. Arbitration provisions that risk conflicting rulings on common issues are not enforceable. In a case brought by mobile home residents against a mobile home park owner for alleged failure to maintain the park's facilities, some of the leases, but not all of them, contained an alternative dispute resolution provision. The mobile home park owner sought to enforce the arbitration provision. The court ultimately determined that there was a possibility that resolution of some of the common questions in different forums (i.e., arbitration or superior court) presented the possibility that inconsistent rulings might occur, and pursuant to California Code of Civil Procedure Section 1281.2 (c) the court did not enforce the arbitration provision.

Abaya v. Spanish Ranch I, LP (2010) 189 Cal.App.4th 1490.

7. Unreasonable delay in seeking arbitration can result in waiving the right to arbitrate. Plaintiff brought a Superior Court action against defendant for claims relating to the sale of a vehicle. Defendant proceeded to litigate the matter in Superior Court, including filing demurrers and engaging in the discovery process. On the eve of trial, defendant sought to compel arbitration. The Court of Appeal held that the defendant had waived its right to arbitrate by using the court proceedings for its own purposes, and therefore the public policy argument for seeking arbitration (to take advantage of the efficiencies of arbitration) was frustrated, and therefore arbitration was denied.

Adolph v. Coastal Auto Sales, Inc. (2010) 184 Cal.App.4th 1443.

8. Arbitration clauses in homeowner's association's CC&Rs which seek to have home buyers give up their rights to a jury trial are not enforceable. Two separate cases have recently held that the arbitration provision in a CC&R document created by developers does not prevent individual homeowners from bringing actions in the Superior Court.

Pinnacle Museum Tower Association v. Pinnacle Market Development (2010) 187 Cal.App.4th 24;

Villa Vicenza Homeowners Association v. Nobel Court Development, LLC (2011) 191 Cal.App.4th 963.

B. Settlement Related Issues.

1. The “cooperation” action and “voluntary” payments clauses in liability policies generally, as a preliminary matter, allow an insurer to control a settlement of a claim, and courts have recognized an insurer’s right to settle a claim over an insured’s objections.

Maryland Casualty v. Imperial Contracting Co. (1989) 212 Cal.App.3d 712, 720-721.

2. While an insured has general discretion to control settlement decisions, evaluating a settlement demand, an insurer may not consider its own coverage beliefs. An insurer must act as if it alone were liable for the entire amount of any judgment or settlement.

Johansen v. Cal State Auto Association Inter-Insurance Bureau (1975) 15 Cal.3d 9.

C. Mediation.

In a case which has major implications for construction defect actions, a recent California Court of Appeal decision held that trial courts do not have the authority to order parties in a complex civil action to attend and pay for private mediation. The court ruled that the participation in the mediation is completely voluntary and the mediator must refrain from coercing any party into participating. Compulsory payment and attendance is not authorized by the mediation program, and is contrary to the voluntary nature of mediation. The case cited can be used for the proposition that a mediator cannot require the personal appearance of an adjustor unless the settlement conference is being held as a mandatory settlement conference. Under the California Rules of Court, there can be only one mandatory settlement conference in a case.

Jeld-Wen v. Superior Court (2007) 146 Cal.App.4th 536.

1. A settlement agreement prepared during mediation is not enforceable unless it states that it is intended to be enforceable. In a matter being mediated under Judicial Arbitration Mediation Services, the parties entered into an agreement which indicated that the document comprised the “settlement terms.” The parties were unable to finalize the settlement, and the plaintiff petitioned to compel arbitration pursuant to the JAMS rules. The California Supreme Court held that the settlement document was not admissible as it did not reflect an agreement. California Evidence Code Section 1123 provides that a settlement agreement prepared in the course of mediation is admissible if the agreement provides that it is admissible or enforceable or “words to that effect.” The court ruled that parties express such an intent only through a direct statement of intention to be bound by the signed document.

Fair v. Bakhtiari (2006) 40 Cal.4th 189.

2. Plaintiff, a beneficiary of her deceased husband, brought a claim alleging breach of contract against the executor of the decedent's estate. Plaintiff, along with two of the decedent's children, had executed a settlement agreement during the course of mediation. One of the decedent's children was not present at the mediation and did not sign the settlement agreement. At trial, plaintiff sought to introduce the settlement agreement and enforce its provisions. The court held that a mediation settlement agreement was inadmissible, and before an agreement can be enforced, it must first be admissible. The document prepared for purposes of mediation was inadmissible under Evidence Code Section 1119.

Rael v. Davis (2008) 166 Cal.App.4th 1608.

3. Section 998 Offer to Compromise must be interpreted as a contract and silence on an issue does not preclude its recovery.

Chin v. KMR Property Management (2008) 166 Cal.App.4th 366.

4. Mediation related communications between attorneys and their clients are confidential and are not admissible in a legal malpractice action. The California Supreme Court has recently held that all attorney-client communications throughout mediation, including pre-mediation, is protected speech and not admissible in legal malpractice actions.

Cassel v. Superior Court (2011) 51 Cal.4th 113.

5. Mediation privilege prohibits mediator from testifying to anything about a settlement agreement, including its number of pages. The Second District Court of Appeal recently held that mediation confidentiality statutes prohibit a mediator from discussing anything about the agreement including who executed the agreement, the number of pages and the like.

Radford v. Shehorn (2010) 187 Cal.App.4th 852.

D. Statutory Offers to Compromise.

Pre-judgment interest accrues from the date of the first rejected 998 settlement offer. In a situation where a plaintiff provided subsequent settlement offers (reducing the settlement demand) and obtains a jury verdict in excess of the settlement offer, pre-judgment interest runs from plaintiff's first settlement offer.

Ray v. Goodman (2006) 142 Cal.App.4th 83.

1. A party who accepts a Section 998 offer is entitled to costs and fees unless they are specifically excluded in the offer. A recent Court of Appeal decision held that despite broad release language in a settlement offer, the rule is that a Section 998 offer to compromise excludes fees only if it says so expressly.

Engle v. Copenbarger & Copenbarger (2007) 157 Cal.App.4th 165.

2. California Code of Civil Procedure Section 998 offer does not constitute general appearance under code. Plaintiff filed a complaint against two foreign defendants. The defendants filed motions to quash due to lack of personal jurisdiction, and shortly thereafter served plaintiff with a California Code of Civil Procedure Section 998 settlement offer. Plaintiff contended that service of the offer constituted a general appearance and that defendants waived their right to contest personal jurisdiction. The Fourth District Court of Appeal held that the "act" of serving the Section 998 Offer did not constitute a general appearance.

Air Machine Com SRL v. Superior Court (2010) 186 Cal.App.4th 414.

3. Costs under California Code of Civil Procedure Section 998 denied where early settlement offer precludes reasonable opportunity to evaluate the offer. In a personal injury action, the jury found defendant was the sole cause of the accident. Plaintiff claimed entitlement to expert fees and pre-judgment interest because defendant had allegedly failed to accept plaintiff's California Code of Civil Procedure Section 998 offer settlement which was served concurrently with the summons and complaint. The Fifth District Court of Appeal held that plaintiff's Section 998 offer was not reasonable or made in good faith because there was no special circumstance present to show that at the early juncture in the case defendant's counsel had access to information or a reasonable opportunity to evaluate the plaintiff's offer within the 30 day statutory acceptance.

Najera v. Huerta (2011) 191 Cal.App.4th 872.

E. Set-offs and Settlement Allocation.

In construction defect actions, subcontractors are entitled to an offset based on the pre-trial settlement by the defendants including the developer and other subcontractors. The right of offset is provided by statute under California Code of Civil Procedure Section 877 which expressly provides that settlement “is given in good faith before verdict or judgment to one or more of a number of tortfeasors claiming to be liable for the same tort . . . , it shall reduce the claims against the others in the amount stipulated by the . . .” settlement. Practically speaking, the issues of offsets and deductions are not determined by the jury, but determined by the trial court after an award of damages has been rendered to the plaintiff.

CACI 3926.

F. Good Faith Settlements.

Most construction defect actions, in terms of separate settlements, are undertaken subject to California Code of Civil Procedure Sections 664.7 and 887.6 involving the application of good faith settlement. The California Supreme Court has held that “while a good faith settlement cuts off the rights of other defendants to seek contribution or comparative indemnity from the settling defendant, the non-settling defendants obtain in return a reduction in their ultimate liability to the plaintiff.”

Abbott Ford, Inc. v. Superior Court (1987) 43 Cal.3d 858.

1. For the purposes of computing the setoff, California Code of Civil Procedure Section 887 does not require any defendant to prove that the settling co-defendants were in fact liable, only that they were “claimed to be liable” for the same tort.

Knox v. County of Los Angeles (1980) 109 Cal.App.3d 825.

2. In multiple party, multiple issue, cases such as construction defect actions, the settling parties are obligated to specify under the settlement agreement the allocation of settlement among parties and issues. However, the agreement of the settling parties is not

necessarily dispositive of the issue of the offset to which the non-settling parties are entitled.

Erreca's v. Superior Court (1993) 19 Cal.App.4th 1475.

3. When the settling parties have not stipulated to an allocation as part of their settlement agreement, the trial court must allocate in a manner which is most advantageous to the non-settling party.

Dillingham Construction, N.A., Inc. v. Nadal Partnership, Inc. (1998) 64 Cal.App.4th 264.

4. The trial court has the latitude to adjust good faith settlement allocations among joint tortfeasors. Where multiple defendants cause indivisible damage, their joint tortfeasors are entitled to reduce liability through credits from settling defendant's payments. This ensures that plaintiffs do not receive double recovery and that defendants do not bear a disproportionate share of liability. Particularly in multi-party construction defect litigation cases, the court must adjust credits as evidence is adduced at trial to ensure fairness to the parties.

El Escorial Owners Association v. DLC Plastering, Inc. (2007) 154 Cal.App.4th 1337.

5. The amount of the setoff is not just inclusive of the cash consideration, but also includes a non-cash component of such consideration such as an assignment of rights. If a settling defendant assigns indemnity rights to the plaintiff, the assignment may constitute valuable additional consideration for settlement and this added value would then be included in any offset to any judgment against a non-settling party.

Alcal Roofing & Insulation v. Superior Court (1992) 8 Cal.App.4th 1121.

G. Equitable Indemnity Versus Contractual Indemnity.

In certain situations, developer may elect to assign to the plaintiff their equitable causes of action as part of any settlement. If there is a contractual indemnity claim which

exists, the cases have uniformly held that the doctrine of equitable indemnity does not apply as the contractual indemnity clause is preemptive. Therefore, the assignment of such equitable indemnity rights has no value.

Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal.3d 622.

1. There can be no equitable indemnity absent apportionment of fault. The doctrine of equitable indemnity flows from the doctrine of comparative fault and therefore any such indemnity award must be based upon a finding by a trier of fact of a proportion of fault attributable to each tortfeasor, several tortfeasor or obligor.

Li v. Yellow Cab Co. (1975) 13 Cal.3d 804.

2. Modification of California Civil Code Section 2782 removing Type I indemnity agreements entered after January 1, 2006, substantially affect developer's contractual indemnity claims. Based on the foregoing, developer's may have to rely more heavily on equitable indemnity theories in the future in prosecuting their claims.

CONSTRUCTION BASICS FROM TOP TO BOTTOM

General Overview of Construction Terms and Typical Defects

I. Cast of Characters:

Typically, a construction project, whether it's a large scale development or a single family remodel, utilizes many distinct disciplines to complete the construction activities. We provide a brief summary description of each "unique" construction expert.

A. Architect:

Prepares the project plans and specifications (the "Bible") upon which the other construction professionals will rely in constructing the buildings. The Architect generally submits the project plans to governing agencies to show compliance with codes and standards of the industry and obtains approval for construction. In large scale developments, the Architect simply provides plans for the construction of various residences and serves in more of a clerical role, and overall management of the project is handled by the Developer. In commercial and smaller scale projects, the architect prepares a bid package for construction of the project and solicits bids from various general contractors to obtain reasonable construction costs. The architect may then oversee the construction of the project and processes documentation to insure timely and adequate completion of the construction by the general contractor for the owner.

B. Engineers:

1. **Geotechnical (Soil) Engineer:** Generally deals with site specific soils and soil features that affect the construction of buildings and foundation systems adjacent to and within soils. For multi-residential projects, a geotechnical engineer would study the topography of the land, the nature and type of soil, its composition and properties (i.e., highly expansive soil), and establish specific soil parameters to be used in the design of the construction components that interface with soils. These parameters would include the design of the foundation system, retaining walls and

other structural systems, in conjunction with the structural engineer. Typical soil issues would involve analysis of expansive capability of the soil, whether the soil is “cut” or “compacted fill” and whether there was the existence of any landslides.

2. **Civil Engineer:** The civil engineer prepares the tract map, which legally describes a project’s land and any easements thereon. The civil engineer also prepares the grading plan, which considers the topography of the land including site development of slopes, drainage systems, streets, water supply and waste systems and roadway design.
3. **Structural Engineer:** Designs the building and its foundation to the architectural requirements, including calculations for loads, including sheer and seismic requirements. The structural engineer works with the soils engineer with respect to foundation systems.
4. A mechanical engineer designs the heating and ventilation system and the insulation components of a building.
5. The Electrical Engineer designs the electrical needs for mechanical systems and occupant needs of a building.

C. Contractors

1. **General Contractor:** Typically oversees management of the project, coordinates with all subcontractors to ensure proper sequencing of the project, and interfaces with the owner. In large scale projects the general contractor, does not do any “construction work,” the general contractor simply manages subcontractors. In smaller jobs, the general contractor may do some of the work themselves (i.e., framing) pursuant to a B-1 license which allows the general contractor to do all construction activities, whether qualified or not.
2. **Subcontractor:** Engages in specific aspects of the construction, such as stucco, roofing or plumbing. The subcontractor has the responsibility to

interface with other scopes of work which “touch” their work (i.e., framing and roofing) but has no responsibility for overall management. Generally subcontractors have C specialty licenses (i.e., concrete). Problems can arise when the general contractor, without specific expertise, orders the subcontractor to undertake construction in a manner not consistent with good construction principles.

II. Geotechnical Terms And Typical Defects

Soils related claims present unique issues, not the least of which is determining the value of such claims in light of standard soil subsidence exclusions in general liability insurance policies. Homeowner’s counsel always attempt to establish soils claims as it “maximizes” the defects. For example, if a stucco crack can be tied to expansive soil or an issue with a cut/fill transition, then the repair is not only to fix the stucco crack, but also to stabilize the soil, which generally involves considerable expense and necessitates relocation of the homeowners. Soil claims can be broken down into discrete categories, but to understand the issues, one needs to examine the specific soil related activities which take place during construction.

A. Grading of Soils

In large development projects, raw land is ultimately converted to level pads for constructing houses. This involves mass grading, which is the term usually applied to grading which modifies existing landforms into engineered building lots and streets, including slopes. This can involve cutting hillsides to create level areas or alternatively filling in large canyons and valleys to create level areas. Both processes are fraught with potential problems.

After mass grading, rough grading is undertaken to establish finish grade elevations to within one-tenth of a foot for street elevations, lot drainage patterns, building pads and slopes. Finally, finish grading takes place and provides certified elevations for building construction, street improvements, hardscape, landscape and drainage patterns.

B. Typical Soils Issues

The issues which routinely arise in construction defect actions involving soils are related to cut/fill transitions, compaction problems, expansive soils conditions, and to some extent, landslides and slope creep. It should be noted that almost all of these conditions are caused by or exacerbated by the introduction of water, either through rain or irrigation. Different soils have different combinations of soil particles of varying sizes, from microscopic particles to larger aggregates. Soil is essentially composed of three discrete materials: soil particles, air and water. By the nature of the soil structure there are “voids” in the soil which allow the transmission of water and air. When water is added past the optimum water content of the soil, the soil becomes highly plastic with a quick loss of strength. Additional water causes the bond of adjacent soil particles to be “broken”, which causes a loss of friction between the particles, allowing slippage or movement of the soil and corresponding loss of strength. Controlling water by proper grading and drainage dramatically impacts the soil related issues.

1. **Cut/Fill Issues:** Most large scale developments have had some type of soil work done, either the soil is removed (cut) or soil is added (fill) to balance for the grading. If this process is not properly monitored and tested for compaction, the soil may fail with consequential land subsidence. “Cut” is the term used to describe the removal of existing landforms (i.e., hills) in order to create a building pad or other designed improvement. “Fill” is the term used to describe the installation of native or other soils to raise the grade elevation (i.e fill in valleys) to accommodate construction of a building pad or other improvement. If either of the soil methods are done incorrectly, there is a high probability that the soil will not be compacted properly and will suffer reduced strength and subsidence. If this occurs, the residence will likely evidence cracks in stucco, drywall, tile floors, concrete flatwork, and there may be interior distress to doors and windows which will cause them to be difficult to open. It is difficult to determine the exact cause of such distress without resorting to the testing methodologies discussed below. Cracking may also be indicative

of structural problems, concrete problems, or a defect in the product itself (i.e., stucco).

2. Compaction Principles

Fundamentally, the point of properly preparing the soil is provide a competent surface or “platform” for the construction of the building. The soil needs to be able to withstand the weight and loads of the building, as well as any influences from the environment, such as rain. The key is to have proper compaction of the soil with relevant design criteria for soil influences such as expansive soil conditions.

Competent soil is soil that is able to safely support the weight of the structure to be built with little compression of the soil material. Generally this is done through the placement of certified fill, which is placed in layers, and compacted to a specific relative compaction. Certified fill is soil. Competent soil can either be certified fill or natural soil of uniform soil properties and strength. Often times, in order to establish grades for level lots, fill is needed.

Developers and graders many times simply use “dirt” which was lying on site (generally from cutting of hills) to serve as fill. This creates two problems. Uncertified fill refers to native soil or soil placed and not compacted to a specific relative compaction density. Since the fill density is not controlled, the soil strength is not uniform and probably of low value. Second, fill is often placed to remedy expansive soil conditions (i.e., placement of three feet of fill over natural soil to mitigate expansive conditions). When “dirt” is used, this soil is also expansive which does not alleviate the condition, but in fact exacerbates the problem.

From a compaction standpoint, a soil’s maximum strength is directly proportional to its density, and a function of the optimum water content at a specific dry density. The makeup of the size of the particles, their uniformity and shape factor and their percentage of the soil mass, determines the maximum dry weight for any particular soil, and indirectly

impacts the soil's strength. A compaction test measures the moisture content of the soil and indirectly, the soil strength and the state of added water within the soil matrix. The optimum moisture content is determined in the soil laboratory for the determination of the maximum soil strength. The engineer advises during grading whether the appropriate determination of relative compaction has been reached, which is usually ninety percent relative compaction.

3. Expansive Soil

This is a significant issue, particularly in Southern California where most of the soil has a significant clay component. Clay tends to hold in water, which causes the soil to swell in an upward direction when excess water is present. When the water is removed (through normal drying processes) the soil “shrinks” back to its original volume. The continued movement of the soil causes significant movement in the building structure which is evident in cracks in the rigid building structure.

Soils engineers can undertake a swell test or an expansion index test which can tell them the expansive characteristics of the soil. General precautions can be taken such as to remove a certain amount of the expansive soil near the surface (three to five feet) and replace that soil with soil material which has a low expansion index. The foundations can also be designed to be post tension slabs which can handle vertical movement without showing deflection. Finally, systems to mitigate water from near the foundation, such as French drains, can be added.

4. Landslides

Landslides typically are caused by a slide plane that is created when the mechanics of dissimilar soils (such as a sandy soil layer over a clay layer) are modified through seismic trauma or saturation, with a resultant loss in friction and cohesion. In essence, one type of soil is moving on top of another type of soil, sliding along a crack. Again, such movement generally does not occur unless water has reached this slide plane causing

a loss in the friction of the soil materials. Landslides typically are referred as ancient landslides, which have existed for hundreds if not thousands of years. During grading, they are often completely removed, but they can be left in place and “buttressed” with appropriate design parameters. Usually, these left in place slides are the ones which fail. This is a dramatic event but not particularly common in terms of defect actions.

5. Slope Creep

More common is the phenomena of slope creep, which is the almost imperceptible movement of a slope in a downward direction. The movement is measured in terms of hundredths of an inch. Usually there is no evidence of slope creep other than the block fences and walls showing rotation or movement down slope. Depending on where the slope creep is manifesting (bottom of slope or near top of slope with pool), the repair may be as simple as replacing the wall, or might entail the placement of soldier piles (24 inch diameter pilings) placed deep into bedrock to stabilize the slope.

6. Soil Testing Methodologies

Popular testing methods for soils include *inclinometers*, *manometers*, *borings and corings*, and *piezometers*. The methods of use for each of these and determinations that can be made for each method are described below.

- a. **Inclinometers.** This instrument is used to investigate the stability of a slope over a period or increment of time by monitoring its movement. Inclinometers are instruments inserted into a drilled vertical shaft in the soil that measure any tilting of the drilled shaft or subsequent lateral movement within the soil profile. By drilling the shaft into competent stable bedrock, the movement of a slide and the depth of the sliding plane can be determined. Periodic measurements will indicate if a slope is moving and the rate of movement. This allows the engineer to determine the extent and

location of any localized soil movement. It is typically used to monitor landslide or slope creep movements.

- b. **Manometers.** This instrument is used to measure the relative flatness of a foundation slab. Manometers measure the vertical offset or the “ups” and “downs” within a plane by comparing the local elevation to a reference datum point. Manometers are used to determine if there are soil influences affecting the “levelness” of the slabs, which occurs with expansive soil or subsidence, due to improper compaction.
- c. **Borings and Corings.** Borings refer to holes drilled into the soil to explore either the soil’s properties or the profile of a soil. Corings refer to holes drilled into concrete to either create an opening in the concrete or to obtain a sample for laboratory analysis. Borings generally allow a soil engineer to “go down” hole (24 inches in diameter) to sample the soil for further laboratory analysis, and determine the visual characteristics of the soil. This visual analysis is somewhat subjective and leads to much debate among experts (i.e., clayey sandy soil vs. sandy clayey soil). The cores taken are generally tested for compressive strength (by breaking the core under pressure) which provides information as to the relative strength of the concrete, which is usually specified in the plans and specifications. The cores can also be examined under microscopes to determine whether the concrete has any voids or is being chemically attacked (the dreaded “sulfate attack”).
- d. **Piezometers.** Piezometers are instruments which measure the depth to an underground water level. Piezometers are inserted into a shaft in the ground similar to an inclinometer. Subsequent monitoring of a piezometer will show the time dependent change of the water level, which allows the engineer to determine if there are water influences affecting the soil.

- e. Laboratory Tests: Tests undertaken include compaction testing to determine appropriateness of grading, swell tests and expansion index tests to determine expansive characteristics of soil, as well as shear tests to determine the ability of the soil to withstand sheering or slide forces.

III. Foundation Terms and Typical Defects

Concrete foundations are the building component which is placed immediately on top of the prepared soil surface. Residential foundations are generally one of two types, either Slab-on-grade or a Post-Tension Slab.

A. Slab-On-Grade

A slab-on-grade foundation is a conventional concrete foundation slab that is poured or placed against the earth. This type of slab may be either plain concrete or reinforced concrete. Plain concrete is concrete that contains (pursuant to the Uniform Building Code) a minimum amount of steel and supports only vertical (gravity generated) bearing loads. Reinforced concrete slabs contain more steel or rebar reinforcement and are engineered to support both vertical and shear (lateral) loads. Conventional slabs are usually constructed on a flat uniform soil and are not engineered beyond the minimum requirements of the Uniform Building Code, except for determining the required depth or width of the footing.

B. Post-Tension Slab

Post-tension slabs are usually utilized where there are expansive soils conditions, or where additional stability of the slab is required to account for non-uniform foundation loads. Post-tension slabs are engineered slabs that are poured utilizing shielded tendons, which are essentially a braided wire rope covered with a lubricant such as grease. The tendon is placed at both ends of the concrete slab. After the concrete is poured and has obtained a certified minimum compressive strength, the tendons are tightened to a desired tension similar to tightening a guitar string. The difference between the two types of slabs is relatively simple. Conventionally constructed slabs cost less, but permit only certain sections of the concrete to be able to withstand upward or tensile pressures, while post-

tensioned concrete costs more, but allows the entire slab to move in a monolithic fashion with less evident stresses to the concrete.

C. Concrete Footings

The other component of the foundation system besides the slab is the Concrete footings. Footings are typically the concrete placed along the outside edge of the concrete slabs. They provide perimeter support for the slabs and vertical load bearing support for interior bearing walls (walls which are supporting the roof structure). A typical single-story residence with a standard truss roof usually only requires perimeter footings around the residence and garage. In normal soils conditions, a footing for a one-story residence would be 12 inches wide by 12 inches thick (measured from adjacent finish grade to bottom of the footing) with two steel re-bars placed in the footing. A typical two-story residence would contain perimeter footings, as well as interior bearing footings, to transfer vertical and lateral load from the second floor. A typical two-story footing would be 18 inches wide by 18 to 24 inches deep. Variations in footing size and reinforcement are based on structural or soils related issues. (i.e., footings that support shear walls usually require additional steel reinforcement).

D. Building a Slab

Regardless of the type of slab, construction of the foundation generally follows the same construction “blueprint.” (1) After the soil is fine graded, several inches of clean sand are placed to provide a uniform and consolidated bedding for the concrete slab. Sand allows water to migrate through without any expansive action and consolidates or compresses better than soil so there is no “flex” in the concrete. (2) After the first layer of sand is placed, a layer of Visqueen (polyethylene sheathing or a heavy plastic sheet) is laid down. In foundation construction, the primary purpose of visqueen is to act as a vapor barrier in order to prevent moisture and/or chemical salts such as sulfates from penetrating the concrete. Typically, visqueen is sandwiched between layers of clean sand. (3) The layering of visqueen and sand depends on the soil conditions, but normally two inches of sand is placed over the finish grade surface, followed by a layer of visqueen, followed by two more inches of sand. (4) Concrete is poured and allowed to “cure” for a specified number of days.

E. Typical Concrete Defects

The nature and type of defects generally correspond to each phase of the construction of the slab. Similar to soil defects, Plaintiff’s counsel like to allege these type of defects as they know there is “more bang for the buck.” For example, if it is alleged that the slab has a deformity (i.e., curling or edge lift), the typical repair is to remove all floor finishes on the first floor, remove drywall up to 18 inches on the wall, and saw cut out all the concrete, which is removed and replaced at a cost of approximately \$100,000 per residence. Defects are either defects in the concrete itself, or have caused other damage to the residence.

1. Defects in Concrete

Generally speaking, these defects primarily consist of claims that the concrete as placed is sufficiently “weaker” than intended. For example, claims have been made that concrete placed in a highly corrosive soil environment (i.e., sulfate) is chemically attacked by the sulfate salts which leads to a disintegration of the cement paste, which creates voids in the concrete, substantially weakening the slab. This particular defect has “morphed” into an argument that sulfate attack increases vapor transmission through the slab which causes mold in the areas of the building in contact with the concrete. The recommended Plaintiff “fix” is as noted above. A defense fix would be to remove the cabinets etc. in contact with the concrete, and apply a topical sealer to the concrete preventing any further vapor transmission.

Other defects asserted relate to the lack of compressive strength of the concrete (tested by coring), and the novel concept that the rebar placed in the concrete is too low (or too high) which has impacted the strength of the slab (all, of course, requiring replacement of the slab).

2. Concrete causing damage to other property

These defects are intimately tied to the soils issues, particularly subsidence and expansive soil. If the concrete is not strong enough to withstand the soil influences, you get the effect of an edge lift, where the

edges of the slab are higher than the middle. If the phenomena continues, eventually you achieve a doming situation where the center of the floor is higher than the edges. In either instance, there is generally corresponding damage to floor finishes, concrete cracking, an additional manifestation of cracked stucco, and visual observation that doors and windows are out of alignment.

IV. Structural Related Defects

Of all the areas of construction, structural issues are the most esoteric and confusing. We have found that juries (and mediators) usually don't understand the issues, and this gives plaintiffs' counsel another avenue to try to "maximize" their damage claims. While the concepts are confusing, we will try to simplify the issues to the basic "nuts and bolts."

A. Structural Basics

From a structural engineering standpoint, a building or structure must safely transmit the effect of all "loads" from the roof through the building components (i.e., walls) to the foundation, through what is called the "load path." Any design calculations must also take into consideration the relationship of all of the building's structural elements to form a stable and safe structure.

The goal of structural engineering is to transfer the "loads" or forces on the building into the ground (i.e., grounding the building). Any building must transmit two types of loads to its foundation: vertical loads and lateral loads. Vertical loads are simply the effect of gravity upon a building, which have the effect of trying to compress or "push down" lower supporting building components. Lateral loads are the effect of either wind or seismic activity upon a building, and have the effect of trying to push (horizontally), lift, and overturn the building.

For example, a vertical load on a building begins at the roof. The vertical load then gets transferred from the roof into the walls below, and ultimately to the foundation. In a normal bearing wall system of framing for a building, loads are transmitted through shear walls to the foundation.

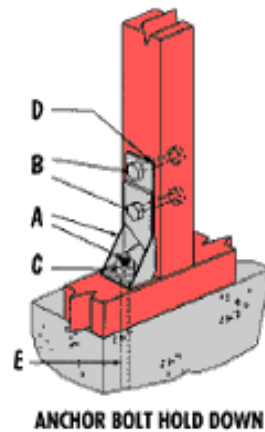
B. Specific Structural Elements

While vertical and lateral loads are transferred from the top down, for ease of convenience, we will sequentially deal with the structural components from the concrete slab up.

1. Anchor Bolts and Hold Downs

Anchor bolts connect the building's walls to the concrete foundation. A typical installation of anchor bolts is to place a threaded "L"-shaped rod into the newly poured concrete before it sets. After the concrete cures, a pre-framed wall with holes drilled into the sill plate (piece of wood which forms bottom of wall) can then be set down over the anchor bolts and attached with a washer and nut. Anchor bolts provide only a lateral shear resistance (i.e., resist overturning) to lateral loads placed upon the concrete foundation. Type, location and quantity of anchor bolts is specified by the Uniform Building Code, and is specifically indicated on the architectural plans. For example, each separate sill plate must contain at least two anchor bolts, one at each end within 12-inches.

As more fully discussed below, Shear walls are specially constructed walls that provide resistance to lateral shear forces and can provide resistance to uplift. A hold down is a special metal connector that provides uplift resistance for a shear wall, and is typically attached to the end wall stud with machine bolts, and is also connected to an embedded anchor bolt cast into the foundation slab (See Figure 1)



(Figure 1)

2. Shear walls

Shear walls are typically plywood sheathing on the frame of the building which are placed pursuant to specific structural requirements. The nailing of the shear wall is done pursuant to specific requirements of the building code and includes nature and type of nail, location of the nail in the outside of the shear wall, as well as the nail “schedule” or nailing on the interior of the plywood sheet. Typically shear walls are stacked on top of one another on successive floor levels and multiple story units. Shear walls are generally designed to collect lateral loads from above and transmit them through the story level to the next level below, and so on. Similarly, plywood shear walls transfer loads from the horizontal diaphragm. The horizontal diaphragm is typically understood to be the roof and floor systems with any building.

Generally, the “load path” that is followed has loads transmitted from the diaphragm through nails which have been inserted into blocking or roof rafters or floor joists. The load is then transmitted from roof to the top of the wall (known as top wall plates) usually by the use of manufactured metal anchorage such as Simpson A 35 framing anchors. The load then

travels from the top plate into the shear wall through the nails. The nails then transmit the load from the plywood shear wall into the bottom plate at the upper stories, or the steel plate (bottom of the wall) at the foundation.

In essence, all of the wood frame members work in concert, with the shear walls providing strength both from a vertical and horizontal standpoint.

The bottom line with respect to the shear walls and other structural components is that they are highly specified by the code as to the location, nature, extent and type of components that may be used. Plaintiffs' experts typically like to determine that shear walls were improperly nailed (i.e., not enough nails in the perimeter of the shear walls) or the wrong nails were used or otherwise. They use this argument to assert that the structural integrity of the building has been compromised such that the shear walls must be entirely replaced (which necessarily would require a removal of exterior and/or interior finishes greatly increasing the cost of repair). One of the issues which arises is whether or not the particular defect, (i.e., lack of nailing of the shear wall or missing anchor bolts), for example, actually has impacted to a significant extent the structural integrity of the building. Typically, structural engineers "over design" the buildings with relatively high margins of safety. Rather than simply assert that a particular component is defective and must be replaced, generally the better reasoned approach is to analyze the structural integrity of the building in total "as built," and determine whether there is any requirement for modification and repair of the particular component.

In terms of manifestations of damages, it is generally asserted that the improper structural elements have caused or contributed to excessive movement in the building so as to cause cracks in the exterior stucco or interior drywall thereby providing "property damage." A limited list of "plaintiffs' defects" would include the following: Improper sole plate anchorage (undersized or missing anchor bolts), improper nailing of plywood, missing or inadequate top plate straps, missing hold downs,

undersized hold downs, improper location of hold downs and anchor bolts etc., again, with the potential damage of there being cracked finishes.

V. Water Intrusion, the force that drives the Insurance Industry

As is evident in the industry, predominant claimed defects in any construction scenario always relate to water intrusion issues which have occurred in the building structure. While it is possible that water intrusion could manifest through the actual physical plane of the building (i.e., stucco), the predominant sources of and/or locations of water intrusions are generally related to openings such as doors and windows, and roof penetrations. We will deal with each of these sequentially.

A. Windows

Generally speaking two separate issues arise with respect to the installation of windows in a residence. Either the windows themselves have been manufactured defectively so as to allow window leaks, or the actual installation of the window and associated “flashings” have caused the problem. Window manufacturing defects generally manifest themselves in frame corner leaks, and unless the window is completely out of square, this repair generally involves a caulking repair to the frame corner.

More significant, both in terms of time and costs, are repairs associated with window installation.

1. Window Installation Basics

While windows may be manufactured from a variety of components including wood, vinyl, aluminum, or steel (with the predominant windows now being vinyl windows in tract residences) the installation of the windows is essentially the same. The framers have generally framed out a rough window opening to a specific window frame size. The window

frame (with complete window assembly) is usually attached to the rough framed opening with fasteners applied through a nail fin on the window frame. Typically, prior to installation of the window ledge frame, flashing paper (a water protective fiber reinforced heavy duty paper) usually referred to as sisalkraft, is placed around the perimeter of the rough opening at the window jambs (sides of window) and sill (bottom of window) in a specified method and procedure generally referred to as “shingling.” This paper overlaps at the various intersecting corners with the intention of shedding water away from the window. After installation of the frame itself, an additional piece of flashing paper is applied over the nailing fin at the top or head of the window. The nailing fin sticks out approximately an inch and a half to two inches from the opening of the window and allows the window to be securely attached to the building. Corners and intersections are then corresponding overlapped with the flashing paper.

Following the installation of this window flashing, a different type of flashing paper known as building paper, (generally the black asphalt paper you see wrapped around a building after framing) is again installed in a shingled fashion and tied into the window flashing paper. The entire assembly which has been put together is the primary means of protection from water intrusion into the building structure at the window location.

Generally, the window installation is undertaken by the framer and that is one of the sources of recovery to the extent there are window installation leaks. Often when these windows are deconstructed during litigation, it is determined that the method of placing the building paper or “lathing” the paper, has in fact been reversed by the workers in the field, causing water to migrate into the residence. This is particularly true in the situations where there is wind driven rain which is essentially applying water at a 90 degree angle to the window, and thus able to find any minute entry points for the water to penetrate the structure.

One of the ways that windows are tested to see if there are window installation issues, is to use a spray rack test under ASTM guidelines. This test is done under specific controlled environment and applies a certain pressurized spray of water pursuant to a rack 18 inches away from the window at a specified interval. The problem with this “standardized test” is that the amount of water applied pursuant to a spray rack test far exceeds any natural water which could ever be placed upon the window. Therefore, there are often times artificial readings that the window is defective when in fact there has been no physical observable evidence (i.e., any stains in the wall cavity or on the drywall) at the window location. These are issues which the defense experts have to deal with on a routine basis.

In addition to windows, homes typically have sliding glass doors as well. Sliding glass doors are manufactured with the same type of material as windows, and usually the design matches the window type. However, sliding glass doors are installed differently. A typical window frame is a one piece manufactured unit which is simply placed at the location. Sliding glass doors are usually frames which must be assembled at the location and include a separate jamb (side) head (top) and threshold (bottom edge) components. Like windows, paper perimeter flashings are installed at the jams and the head in a similar fashion. Typically, there are less leaks at sliding glass doors than windows, except that a number of leaks generally occur at the thresholds of the doors at the lower level, sometimes due to the fact that the thresholds are set “below grade” from the exterior of the residence, thus allowing water to migrate at that level.

B. Stucco

One of the tie-ins to the window installation flashing is the interface with stucco. Typically, in California stucco is the primary exterior product applied to a residence. Stucco is nothing more than a cementitious product containing cement, sand and water. In Southern California in particular, most stucco applications are known as a three coat plastering system. Prior to the initial application of any plaster or stucco, the entire exterior surface of the building is covered in building paper similar to the installation identified above under the window installation. The building paper is weather resistive and is again installed in a shingled fashion and tied into other paper flashing components and sheet metals. (See discussion below.) All the stucco must necessarily end or terminate into a

joint or device, be it a door frame, window frame, sheet metal flashing, screed, wood stop or trim. The stucco simply can't end in a vacuum, it must have a termination point.

In terms of the installation stucco, wire lath (sometimes referred to as chicken wire) is installed over the building paper. The first coat of plaster which is then applied is referred to as the scratch coat and it is usually 3/8th to 1/2 inch thick and is installed over the lath. This coat has a rough texture to allow for adhesion of the subsequent applications. After the appropriate drying time, a second or brown coat of stucco is then placed. This coat is smooth in texture and usually brings the total thickness of stucco to approximately 3/4 of an inch. The third coat of plaster is referred to as the color coat and primarily consists of cement with color integrated into it. This is material that is generally trolled over the brown coat and provides the final color and texture for the plastered finish.

The issue with water intrusion arises in connection with the building paper placed by the stucco subcontractor as it ties into window and door openings. Typically the building paper and the window flashing paper must be integrated so that there are no open avenues for water to enter. In any given situation involving membrane issues with windows, both the framers (windows and doors) and the stucco subcontractors are generally implicated in any water intrusion issues due to their joint involvement in the construction at or near the window and door locations.

C. Roofs

Other than windows, the single biggest water intrusion area in a residence is the roof, and its' associated penetrations and accessories.

1. Types

There are generally two types of roofs, flat roof and pitched roofs. Flat roofs generally involve having a built up roofing material consisting of multiple layers of sheet membranes or asphalt related products. The layers are installed with a hot tar, a technique known as hot mopping which covers the joints and seams. Built up roofing may have a finished surface known as a "cap sheet." Typically, flat roofs are more of a commercial design such as low story commercial buildings and apartment

buildings. Flat roofs by their very nature have limited slope and thus do not allow water to run off as readily as on a pitched roof. Under the Uniform Building Code, such roofing systems require the roofs to be sloped at a minimum of 1/4 inch per every 12 inches of positive drainage, and most manufacturers require the roofs to be free of ponding water 48 hours after rainfall. Water can not drain over the roof edge (in the situation where the roof walls are slightly higher than the roof itself) (again, apartment design.) The roofs are required to have roof drains and an overflow drain at the low point in the roofs. The asphaltic material generally must turn up the walls from the roof deck to allow for a continuous transition of roofing materials.

One of the issues which generally arises is that, the sloped wall must have a proper top to it or cap so that water does not come down into the structure. Properly sloped sheet metal coping or a piece at the top of the parapet wall will reduce the potential for water intrusion and will eliminate staining from the top of the wall runoff. Stucco capped parapet walls require a higher level of care and design and construction, as stucco itself is not waterproof.

Typically the problems you see with flat roofs are the fact that water is not drained properly and sits on the roof. The water then finds a seam which has separated and allows water to travel or migrate into the interior building units.

2. Pitched Roofs

Pitched roofs generally have two types of products. They either have shingle products which top nail the shingle to the underlayment into the roof sheeting, or they have a concrete tile which is typically nailed through a hole in the top of the tile and then through the underlayment and into the sheeting. Concrete tiles have been the predominant roofing tile in more recent construction.

Contrary to what most people think, the tile itself is not the waterproofing component of the roof. That component is referred to as the underlayment.

D. Underlayment

Underlayment is usually an asphalt sheet product that provides a weather resistant barrier for the roof sheathing and framing components. Underlayment is usually referred to in pounds per 100 square feet, therefore a 30 pound underlayment is material that would weigh 30 pounds per 100 square foot. Underlayment is placed directly over the roof substrate such as plywood sheathing or framing components. It may be installed in single or multiple layers. In any case, the underlayment is always installed in a “shingled” fashion, one layer laying on top of another layer to allow appropriate water runoff. The shingle fashion begins at the lower edge of roof eave and extends up to the top most termination referred to as the ridge. In some high slope conditions with concrete tile, the underlayment is the entire waterproofing element and the roof tile is simply a decorative covering.

E. Sheet metal

Sheet metal is an intricate part of preventing water intrusion. Frankly, if there were no penetrations through the roof and it was simply a solid surface with underlayment and tile, there would be very few roof leaks. However, penetrations for plumbing vents, electrical vents and the like are required to be placed through the roof and such penetrations must be properly “roofed in” to protect against the elements.

Sheet metal provides most of the finish material interfaces and terminations for the roofing material. Most of the sheet metal is preformed into specific shapes for intended uses. Typical examples are bird stops, valley flashing, eave flashing, tile pan flashing, and wall flashing. Bird stops are a pre-formed metal flashing that fits under and between concrete clay or tile to prevent intrusion by bird or rodents. Valley flashing is a piece of flat metal with a raised center used to cover the intersecting roof planes at valley conditions. This is essentially a piece of sheet metal that sits in the valley where the water flows, to keep the water flowing in a specific direction and away from the underlayment. Eave flashing is an L shaped metal with a bent drip edge which is placed at the edge of the roof along the eave lines. There is also specific sheet metal flashing, such as Z-bar flashing, which is utilized for siding or stucco termination.

Two specific types of sheet metal are crickets and saddles. A cricket is a formed piece of sheet metal that diverts water flow to a path that leads either to the roof edge or to a roof drain. The cricket may be a small piece of sheet metal behind a corner of a chimney on a sloped roof or could be a large piece of metal on a flat roof. A saddle is a custom piece of sheet metal that is typically found at the intersection of the sloping roof in the back of a chimney. This allows the water to flow in two directions but not into the chimney surface.

In discussing any “roof leaks,” one must necessarily consider the scope of work of each of the subcontractors involved. Sometimes the roofer installs all of the sheet metal pursuant to its subcontract. In other situations a separate sheet metal subcontractor fabricates the sheet metal and places it on site for final installation by the roofer. A third situation is where the sheet metal subcontractor actually places and installs the sheet metal. The determination of how this sheet metal work is actually undertaken is critical to an understanding of any roof issues, as typically any roof leaks generally manifest themselves in sheet metal/roofing transitions. Very rarely do you simply find a roof leak in the field of the roof through the underlayment unless there was a complete tear in the underlayment during construction. More likely than not, the leaks are manifesting themselves at sheet metal intersection locations or vent locations which required a sheet metal component which was not properly “roofed in.”

Typical plaintiff allegations regarding roof leaks are that there is improper and incomplete sheet metal flashing, there is missing or short cut roof underlayment felts, improper use of materials, improper slope to drain, and lack of gutters. With respect to the short roof underlayment felt, the underlayment generally needs to turn down from the roof a specified distance onto the eaves so that there is no possibility that water could land on the roof and “get under” the roof felt. Often, to save time, the roofer will cut the felt rather than turn it down the eave, creating this problem.

F. Balcony/Decks

A subset of the roofing/sheet metal issues is a balcony or a deck generally found on second story houses, or apartments or condos. A deck typically is constructed off of a sliding glass door. The decks are generally constructed with frame members or plywood,

over which an elastomeric type coating is placed (this is similar to an asphalt built up roof). It has been our experience that decks tend to generally be a problematic area, as they are constructed relatively quickly, and simple construction points are overlooked. If, for example there are a number of units with decks and each deck has been constructed improperly, the magnitude of the claimed repair can be significant.

Typically speaking, deck leaks occur for the following reasons: improper flashing, the threshold of the sliding glass door is not higher than the deck to prevent water intrusion, there is an improper deck to wall transition, there is improper slope drainage to drain (i.e., reverse drainage towards the house instead of away from the house), improper deck finishing or coatings, and/or improper installation of deck scupper drains. We have observed all of these conditions on a routine basis in connection with decks or balconies. The manifestation of damages can run the gamut from deck structural failure, to dry rot, to interior leaks and/or stucco staining and cracking as a result of water intrusion at the wall/door threshold. One of the most obvious defects generally observed is that the waterproofing material in the deck does not in fact extend up the vertical surface of the walls by any appreciable amount (i.e., ideally 1½ to 2 inches) to create a continuous waterproof membrane along the balcony sides. While the membrane may exist on the balcony “floor”, any water at the transition of the wall to the deck has not been waterproofed such that water is allowed to migrate into the interior wall spaces.

These are a few summary observations and analysis of common construction defects. For more detailed information or answers to specific questions, please don't hesitate to contact the firm.