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Status Report December 2020



Happy Holidays from all of us! President-Richard Kern SGD, Inc., San Diego; Executive Director/Editor- Kim Hickey, SGD, Inc., Chatsworth; Secretary/Treasurer -Jeff Caulkins, John S. Rickerby Company; Past President -John Ratto, Reliant Claims ; One Year Directors- Steve Washington ,Washington & Finnegan; Phil Barrett, Barrett Claims Service; Webmaster- Doug Jackson, SGD, Inc.; Counsel- Kevin Hansen, Attorney, McCormick Barstow,LLP

December 2020

The holiday season is now in full swing. Of course, it is not like any holiday season before with the pandemic affecting everyone. As an insurance professional who has spent his career in assessing liability, I find myself putting on my risk management hat for all kinds of things that at one time in the past would have been considered mundane. Things like going to the market, getting a haircut, sharing a meal with a colleague, all now come with a risk meter. If you have school age children, you now have to risk assess your children's schooling. As a business owner with field adjusters, risk management to keep the adjusters and the people they come into contact with safe from COVID-19 while working in the field, are now part of our daily routine. Adding to that, with many people isolated to varying degrees, mental health affects many. With Thanksgiving just past and Christmas, Hannukah, and Kwanzaa just around the bend, how do we assess the risks in get-togethers with family and friends? Everyone has a different answer and it certainly is a lot to think about.

For this December, I hope everyone can find something positive even if the normal routine is disrupted. We have technology that brings us closer together without having to be in the same room. As a fan of science fiction, video phones were always way in the future, and I never thought I would see them come to fruition. And now with Alexa and Google devices in our lives, we can all say "Computer" and then a question and it answers. Just like Star Trek. However, after participating in birthday parties, graduations, weddings, game night, all via computer or smartphone video, I have seen the future. So, if you cannot be in the same physical space with your friends and family this holiday, fire up the technology and we can all still celebrate together.

After a long look at the risk involved in what I am about to say, I decided the risk was low and the benefit high, so I will say it .... Happy Holidays to you and your loved ones!

Richard Kern

## *Carter v. Pulte Home Corporation* – A Look at Subrogation in California

Credit to Tyson & Mendes, La Jolla, CA

In the recent case of *Carter v. Pulte Home Corporation* (2020) 52 Cal.App. 5th 571, the 1st District Court of Appeal denied an insurance carrier's equitable subrogation claim, explaining an insurer's obligations under its insurance policy are not the same as an indemnitee's obligations under an indemnity provision. In other words, as aptly put by the Court of Appeal, while a "*subrogated insurer is said to 'stand in the shoes' of its insured, because it has no greater rights as the insured. . . [h]ere . . . [the insurer] was seeking to stand in a different, more advantageous set of shoes.*"

### Background

This was an action for alleged construction defects by the owners of 38 homes in two housing developments against the general contractor, **Pulte Home Corporation ("Pulte").** The general contractor then filed a cross-complaint for indemnity and defense against the subcontractors, many of which worked on projects under contracts requiring each subcontractor to indemnify the general contractor and name it as an additional insured on the subcontractor's commercial general liability insurance.

**Pulte's contracts with all of its subcontractors required each to indemnify Pulte against "all liability, claims, judgments, suits, or demands for damages to persons or property arising out of, resulting from, or relating to Contractor's performance of work under the Agreement ("claims") unless such claims have been specifically determined by the trier of fact to be the 'sole negligence of Pulte.'"**

The insurer for four subcontractors, **Travelers Insurance Company ("Travelers"),** provided a defense for Pulte, then filed an equitable subrogation complaint-in-intervention against other subcontractors who did not respond to the tender of general contractor's defense. As is typical, the general contractor settled homeowners' claims and its cross-claims against subcontractors.

**Travelers proceeded with its suit against seven subcontractors who did not respond to Pulte's tender of defense and whose insurance carriers denied the additional insured endorsements to their policies required the insurers to provide a defense. Travelers' position at trial was the defendant** subcontractors were each jointly and severally liable for the remainder of its costs for defending Pulte because each subcontractor had a contractual obligation to defend Pulte.

The trial court found that Travelers failed to prove three elements of its

claim for equitable subrogation because (1) it failed to establish the loss for which it compensated **Pulte was one for which any of the subcontractors was "primarily liable," (2) none of the subcontractors was in an equitable position inferior to Travelers,** and (3) Travelers failed to prove its damages because its proof included bills for work done for purposes other than Pulte's defense.

### Ruling

**The Court of Appeal affirmed the trial court's finding** in favor of the defendant subcontractors on the equitable subrogation claim by Travelers. Travelers, on behalf of four subcontractors it insured, agreed to a demand for defense from developer Pulte after Pulte was sued.

The Court of Appeal noted Travelers was seeking to shift to costs for defending Pulte against claims **unrelated to the scope of respondents' work**—claims for which the subcontractors did not promise to indemnify and defend Pulte. **The subcontractors' failure to comply with their contractual obligations**

to indemnify and defend Pulte for claims arising from their own work could not make them liable for losses due to the work of other independent subcontractors. (§ 2782.)

Equitable subrogation allows a loss to be shifted from one who was legally liable to another who is more responsible for the same loss. Here, Travelers was trying to shift the loss jointly and severally to subcontractors who were each liable for only a portion of the total loss. (*Maryland Casualty Co. v. Nationwide Mutual Ins. Co.* (2000) 81 Cal.App.4th 1082 [equitable subrogation not available to **insurer of general contractor seeking to shift cost of defense to subcontractor’s insurer, which refused defense; insurer entitled only to contribution, not entire cost of defense.**].)

The Court of Appeal further noted that in *Pulte Home Corporation v. CBR Electric, Inc.* 50 Cal.App5th 216 (2020), which, like the present case, involved an equitable subrogation claim by the **insurer that defended Pulte as an additional insured under a subcontractor’s policy, “subrogation entirely shifts the claimed loss, but the claimed loss does not have to be the entire loss the subrogee suffered.”** (*Ibid.* at p. 231.)

Since **“the amount of defense costs an insurer may seek depends on what the subrogor (here, Pulte) would be entitled to, ... [i]f Pulte could not recover the entire costs of defense from defendants, neither can [the insurer].”** (*Id.*) Pursuant to the subcontracts, **“Pulte’s recovery against defendants is defined by the duty to defend in the subcontracts. That duty renders defendants responsible not for the entire cost of defending the construction defect actions, but only for the costs of defending claims related to their work.”** (*Ibid.*)

Further, the Court of Appeal held CCP section 2778(4) limits a duty to defend to **“matters embraced by the indemnity.”** This provision places a duty to assume the indemnitee’s defense against claims embraced by the indemnity. Here, the contracts limited **the subcontractors’ obligations to defend Pulte only with respect to claims involving their scope of work.**

The Court of Appeal expressed no opinion as to whether damages could have been allocated proportionally among the subcontractors if Travelers had asserted a cause of action seeking such relief.

## DOI Press Release

### Orange County insurance agents arrested in \$4 million securities fraud scheme

ORANGE, Calif. — Robert Andrew Lotter, 63, of Newport Beach, and Charles Albert Major, 72, of Irvine, were arrested today on multiple felony counts of securities violations and burglary after allegedly defrauding more than 20 victims of over \$4 million.

An investigation by the California Department of Insurance alleges that between 2003 and 2018, Lotter and Major fraudulently solicited and sold victims more than \$4 million in stock certificates in **Lotter’s companies**, eAgency, Inc. and Mymobilewatchdog, Inc.

Lotter owns an insurance agency, R.A. Lotter Insurance Marketing, Inc., and Major is a licensed insurance agent. Lotter and Major contacted clients of R.A. Lotter Insurance Marketing and used various schemes **to fraudulently obtain victims’ private financial information in order to identify potential investors for Lotter’s high-risk investments.**

**Lotter's insurance agency led several victims to believe the agency was authorized or affiliated with the California State Teacher's Retirement System (CalSTRS) that provides retirement pension advice to California public school educators. Some victims did not discover it was not authorized or affiliated with CalSTRS until after they had invested substantial funds in eAgency, Inc. and Mymobilewatchdog, Inc.**

**“Even though these insurance agents had a fiduciary responsibility to represent their clients' best interest, they allegedly put greed above their clients' needs,” said Insurance Commissioner Ricardo Lara. “Their arrest shows The Department of Insurance will persist in investigating and stopping insurance professionals who put their clients at financial risk.”**

Between 2003 and 2018, Lotter and Major continued to lure victims with assurances that profits from **eAgency, Inc. and Mymobilewatchdog, Inc. were “just around the corner.” They claimed to have** partnerships with large internet companies and prominent mobile carriers. They showed clients newspaper articles and televised interviews featuring Lotter to cement **victims' confidence in their** investments and mitigate concerns victims had about their investments and the continued delays of their investment returns.

**Lotter's companies, eAgency, Inc. and Mymobilewatchdog, Inc., had poor financial statuses including** unpaid financial obligations to prior investors. Lotter and Major did not make their clients aware of the poor financial statuses of the companies and they did not notify victims when the alleged lucrative partnerships fell through. Victims were led to believe their investments in eAgency, Inc. and Mymobilewatchdog, Inc. were still viable.

Lotter and Major were booked into Orange County Jail. Bail was set at \$4 million for Lotter and \$2 million for Major. This case is being prosecuted by the Major Fraud Unit of the Orange County **District Attorney's office. The Department is also taking the** appropriate administrative action against the licensees and the various insurance agencies they managed.

Rear-ended: a biomechanical analysis

Credit to Garrett Forensics, Long Beach, CA

Garrett Forensics was assigned to perform a biomechanical analysis of the injury potential from an auto collision **when the claimant's Camaro was rear-ended by the insured's pickup truck. Based** upon the vehicle damage, the accident reconstruction consultant calculated the impact speed to be in the range of 6 to 7 mph.

This caused a change in velocity (Delta V) of the Camaro in the range of 3 to 4 mph resulting in **acceleration in the range of 1.3 to 1.8 g's. This minor, low-velocity impact** was consistent with the cost of repairs done on the Camaro (parts \$124, paint \$230, and labor \$1,117).

Per deposition statements, the claimant was wearing a three-point seat belt and consequently was **well restrained. Her deposition statement claimed that her body moved “forward and back,”** due to the impact. This was inconsistent with the laws of physics.

On impact, her head and thorax would tend to move backwards and her thorax would be pushed against the seat back. There was no evidence that due to impact, any of her body segments struck any interior parts of the car. **She claimed that she “held the steering wheel tightly.” In view of this, it was** clear that she did not suffer injury due to direct-impact of body segments.

**The g levels experienced by the claimant were in the range of 1.3 to 1.8 g's. These g levels fall** well within the range of g levels experienced by people during the course of their daily lives. It is noteworthy to compare the g levels experienced by the claimant to those measured by Szabo et al. (SAE 940532) in a study which subjected human volunteers (both male and female, ages 27 to 58 years old) with various degrees of cervical and lumbar spine degeneration, to impulsive loads.

**During the study, g levels in the range of 10 g's at the head, between 5 and 7 g's at the cervical spine and 3 to 5 g's at the lumbar spine were experienced by these volunteers. The impacts caused no injury** to any of the volunteers and caused no objective changes in the condition of their cervical or lumbar spines, which already displayed various degrees of degeneration, as documented by pre- and post-test MRI scans.

**A subsequent MRI of the claimant's cervical spine found a spur in** the anterior aspect of C-4 vertebral body and hypertrophy of the uncinata process of the vertebra. In addition, despite a 1 mm bulge of the disc, no central canal stenosis was found. The spur and hypertrophy (enlargement/growth) were manifestations of degenerative processes and were not attributable to the accident, both on account of the small magnitude of g forces, and the short duration of time between the accident and MRI date.

**The claimant later complained of right hand numbness and a "hand swelling like a balloon."** The cause may have been arterial blockage, vein blockage, or nerve compression. Blockages were ruled out, which left a mechanical compression of the nerve. A neurosurgeon, consulted some nine months later, diagnosed a compressive neuropathy and opined that the condition was due to fibrosis of scaleneous muscle, which causes a squeezing effect on the brachial plexus.

Formation of fibrous tissue on scaleneous muscle requires a cause and requires time for the effect (fibrous tissue formation) to develop. The cause and effect could not be attributed to the accident since her hands were maintained steady on the steering wheel and did not impact any object on the interior of the car during the subject accident. It was noted by later physical therapists that the claimant might be aggravating her symptoms by moderate to heavy household work at her home, and in the care of her young daughter, and her disabled parents. Despite rehabilitation education to **"pace herself," there was evidence of increased** arm use in unsupported positions, and prolonged forward head posture with increased cervical pain/sprain.

**The claimant's condition of heightened pain and discomfort was reasonable given her medical** condition of steadily evolving degenerative joint disease, coupled with her history of prior motor vehicle accidents. The subject rear-end accident, however, did not cause her symptoms or condition.

On the Lighter Side...

## **Parents, 2020 could be a time for new holiday traditions that outlast COVID-19 restrictions**

Credit to USA TODAY

Without a packed dinner table filled with family members from out-of-town and other loved ones, this holiday season will most certainly be lonelier than any in recent memory.

It may be especially dispiriting to children of all ages, who have already dealt with so much change and may not be prepared to handle more during a time typically intended for togetherness.

Melissa Whitson, an associate professor of child psychology at the University of New Haven, has been having these tough conversations with her own daughter, a first-grader.

**“Kids are pretty resilient,” she told USA TODAY, “but it does affect them.”**

**“Going into the holidays, we can all acknowledge that they will look different for most families,”** said Leah Orchinik, a child psychologist at the Nemours duPont Hospital for Children in Wilmington, Delaware.

Experts say that there are many ways to support your children — and keep the festive spirit alive — during the holiday season.

## Plan family events with your kids — and not just Zoom calls

**It’s not a bad idea to maintain years-**old traditions to keep a familiar, consistent pace during the holidays. And, in fact, many parts of the holiday season — gift exchanges, baking and religious customs — can be held over the comfort of FaceTime or Zoom. That said, it comes with its limits.

**“The fact that we have Zoom is amazing, but it can only go so far,” Orchinik said.**

Experts suggested having your kids help plan new holiday traditions, whether it be dropping off cards or care packages at nearby loved ones' homes, setting up virtual games and movie nights or setting up a scavenger hunt around the house for immediate family members.

**“This is a situation that is so out of control for so many,” Orchinik said. “We want kids and families to feel like there are things they can do to make a difference.”**

Zoom-ing for Thanksgiving? [Here's how to make the most of it](#)

It helps that children can be great problem solvers because of their "imagination and creativity," said Washington, D.C.-based psychotherapist and clinical social worker Rachel Bradley Williams.

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Not only does it help your children feel a sense of ownership over the holiday process — and control during a time where there is not much of it — it takes some of the pressure off of you to plan every part of the holiday.

"You may even end up starting new family traditions that outlive COVID restrictions," Williams said.

## Be honest with your kids — to an extent

There is no need to conceal the realities of COVID-19. In fact, it is good to be honest about the reasons behind holding more intimate holiday celebrations compared to years past.

But there's also no need to be unnecessarily grim.

"Kids can understand when things are getting a little bit more serious," Whitson said.

You may have had a conversation about the recent severity of the pandemic already, especially if, like Whitson, your child's school shut down due to a COVID-19 spike.

Orchinik says reminding your kids that "maintaining what we know to be the best practices" — wearing masks, social distancing — is sufficient. For younger children, it's also worth praising them for keeping others safe.

## Let your children be sad or upset

Your kid might not be on their best behavior, and that's perfectly OK.

"You have to go easy on your kids in terms of the stress and trauma and any regressions or outlashes you see," Whitson said.

'Feels like the world is against you': [Young people struggle with finding mental health support amid COVID-19 pandemic](#)

Especially now, [why it's so important to hope](#)

This is a great time, Williams said, to take stock of how your children are feeling "and really listening to their answers." Whether they feel confused, sad, worried or even apathetic, she said, it is vital to check in.

"This allows you to answer any questions, clarify any confusion and most importantly validate their feelings," she told USA TODAY.

## 'Don't feel any pressure to make the holidays perfect'

Even if you check in frequently with your kids, experts emphasized that they notice when you're not emotionally at your best.

A key part of ensuring that your children are emotionally healthy is by modeling healthy emotional behaviors.

"Oftentimes, how kids process trauma and deal with it is related to how their caregivers process it," Whitson said. "So if we're not in a good place about it, if it's really impacting us in a negative way, then kids will see that and affect how they process it.

You don't need to fake happiness and excitement during the holidays. In fact, Williams and Orchinik said, sharing how you feel about the holidays being drastically different can encourage your child to open up about their own feelings.

"It is OK to have negative reactions and show that parents aren't OK and to talk about that," Orchinik said. "Show some of those emotions, some of that vulnerability."

Most importantly, don't feel any pressure to make the holidays perfect. "There's a lot of parent guilt with having to cancel plans and knowing that this year is not the year to pull out all the stops," Orchinik said. "That's OK."