

Attacking and Supporting Subrogation Damages in Wildland Fire Cases

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- Introduction.
- Audience analysis.
- “The basics”
 - Property Insurance
 - Subrogation

ATTACKING AND SUPPORTING SUBROGATION DAMAGES IN WILDLAND FIRE CASES

- Settlement process
- Trial

CONFLICTING PERCEPTIONS



CONFLICTING PERCEPTIONS



WHAT IS RECOVERABLE IN SUBROGATION?

- The measure of damages in subrogation on real property damages varies from state to state.

ACV States	RCV States
Alabama, Arkansas, Connecticut, Florida, Hawaii, Indiana, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin	Alaska, Arizona, California, Colorado, Delaware, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, South Carolina, Wyoming

* ACV/RCV by state based on 2013 research and case law; not updated.

REAL PROPERTY DAMAGES

- California is an RCV state if certain conditions are met.

CACI 3903F, in part, provides for ACV:

To recover damages for harm to property, plaintiff must prove the reduction in the property's value [i.e., the diminution in value] or the reasonable cost of repairing the harm [to the property]. If there is evidence of both, plaintiff is entitled to the lesser of the two amounts...

IS REPLACEMENT COST RECOVERABLE?

- Real Property Exceptions - Genuine Intent to Repair the Property

CACI 3903F, in part, provides for RCV:

... However, if plaintiff has a genuine desire to repair the property for personal reasons, and if the costs of repair are reasonable given the damage to the property and the value after repair, then the costs of repair may be awarded even if they exceed the property's loss of value. (Emphasis added.)

IS REPLACEMENT COST RECOVERABLE?

- Real Property Exceptions
- Cal. Civ. Code § 660 explains that real property includes “that which is affixed to land” Cal. Civ. Code § 658(2). This includes items affixed by means of “...cement, plaster, nails, bolts or screws...”
- Payments made on a replacement cost basis for fencing destroyed by a fire caused by a third party are also recoverable against that responsible party.

IS REPLACEMENT COST RECOVERABLE?

- Real Property Exceptions
- Manufactured / Mobile Homes as Real Property

“Mobile homes” that have been affixed to a foundation are considered “real property” for the purposes of eminent domain. In *Escondido Union School Dist. v. Casa Suenos De Oro, Inc.*, 129 Cal.App.4th 944 (2005), the court held that two manufactured homes were “real property” for purposes of an eminent domain action. The Court reasoned that, under Civil Code § 660, a manufactured home that are affixed to a foundation by bolts is considered a “part and parcel of real property and thereafter assumes the status of real property.”

A manufactured home installed on a foundation is real property under § 18551(a).

IS REPLACEMENT COST RECOVERABLE?

- Real Property Exceptions
- California Insurance Code, Division 2. Classes of Insurance, Article. Measure of Indemnity, Section 2051 (CA Ins Code 2051).

... (2) In case of a partial loss to the structure, or loss to its contents, the amount it would cost the insured to repair, rebuild, or replace the thing lost or injured less a fair and reasonable deduction for physical depreciation based upon its condition at the time of the injury or the policy limit, whichever is less. In case of a partial loss to the structure, a deduction for physical depreciation shall apply only to components of a structure that are normally subject to repair and replacement during the useful life of that structure. [Emphasis added.]

ARE OVER LIMIT PAYMENTS RECOVERABLE?

- Department of Insurance Encouragement or Pressure
 - Payment of more than Coverage A limits when an insurer set the limit.
 - Payment of more than the contractual time period for ALE.
- Payment of damages in excess of actual RCV loss to settle and resolve “bad claim handling.”
- Distinguishing between types of extra-contractual payments to determine subrogation recovery.
 - Burden of proof.
 - Court vs jury issue.
- Payment in excess of coverage (i.e., where an insurer pays ALE when ALE coverage was not included in the policy.

VALUATION OF CONTENTS AND PERSONAL PROPERTY

- Depreciation as Applied by Adjusters at the Time of the Loss ($RCV - \text{Depreciation} = ACV \text{ Paid}$)
- Fair Market Value on personal property – Different interpretations:
 - Garage Sale Value
 - Willing Buyer / Willing Seller
- The opinions of the insured regarding the value of their own contents can also be relevant to establish value at trial.

COURT FLEXIBILITY RE: METHOD AND BURDEN OF PROOF IN LARGE SUBROGATION CASES

- Court's reluctance to require calling witnesses for each claim.
- Admission of claim files at trial.
- Limiting instructions re: claim file "testimony."
- Juror perception re: testifying plaintiffs as a proxy for all.
- Stipulation by defense on non-contested issues.
- Focus on contested issues.
- Extreme positions can backfire at trial.

DOCUMENTATION / INVESTIGATION AND THE VALUE OF THE SUBROGATION CLAIM

- What if there was no personal inspection of a loss before the insurance company paid for the claimed damages?
- Auditors will often disallow these claims, stating that there is inadequate documentation or evidence of the claim to justify payment.
- Generally, there is no rule requiring a personal inspection. Again, it is not the business of insurance companies to mail checks without some evidence that a claim occurred and damage is verified.
- Claims disallowed or reduced for lack of documentation in the claim file (receipts, photographs, etc.)
 - Examples: ALE Advances; Food Spoilage Claims; Undocumented Items Completely Consumed by Catastrophic Events

DOES THE HANDLING OF DEDUCTIBLES AFFECT THE VALUE OF THE SUBROGATION CLAIM?

- Deductibles are absorbed by the carrier when the insured's damages exceeded the policy limits.
- Total amount of covered loss less deductible, subject to the policy limit. If the amount of the damage-- minus the deductible-- is greater than the policy limit, the insurance company's liability is only the policy limit. The policy limit is the amount of coverage purchased.

Total ACV Damages:	\$60,000
Less Deductible:	(2,000)
Less Over Limit:	(8,000)
Due to Insured:	\$50,000 Policy Limit

- This calculation is in compliance the terms of the contract of insurance, industry standards and complies with the Unfair Claims Practices Act.
- The application or the absorption of a deductible in no way affects the bottom line subrogation claim of the carrier for the amount of dollars paid on the claim.

CONFIRMATION BIAS IN AUDITS

- Example: We are forced to find that the adjuster properly determined the actual cash value on the claim and can find no further reductions to the amounts paid by the carrier.

Confirmation bias, also called confirmatory bias or “my side bias,” is the tendency to search for, interpret, favor, and recall information in a way that confirms one’s preexisting beliefs or hypotheses, while giving disproportionately less consideration to alternative possibilities.

Other examples of unconscious bias that can affect an audit include:

Availability bias refers to the inclination to make decisions based on information that is most readily available. The more difficult information is to obtain, the less likely individuals are to bother seeking it.

Rush to judgment can come when there are tight deadlines and professionals unconsciously overlook important evidence, cluster differing facts under the same umbrella, or commit other errors of judgment, to save time and meet their deadline.

The Attack	The Counter-Attack
The insurance company paid too much to the insured	Insurance companies pay what is obligated under the contract
Replacement Cost (RCV) is never recoverable	RCV, if paid, is often recoverable
Fair Market Value (FMV) of Contents is always below ACV, and is equal to "Garage Sale" Value	FMV is often equal to and can exceed ACV, and is not the same as "Garage Sale" Value
If an adjuster did not personally inspect the loss (failure to investigate), the claim is non-recoverable	No personal inspection by an adjuster not an element of proof in the fire litigation
Lump Sum Advances on Additional Living Expenses (ALE) without documentation are never recoverable	ALE advances are necessitated by catastrophic circumstances and are 100% recoverable if reasonable
Deductibles that are absorbed by the carrier reduce the value of the carriers' claim	Absorbed deductibles have no impact on the value of the subrogation claim
Third party audits are a reliable method to determine reductions to a subrogation claim	Third party audits are often not objective and exhibit bias

