

# Timing is Everything: Subrogation Claims in the Context of a Construction Loss

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It is often perceived that subrogation claims are barred in the context of a construction loss. This is because typically the applicable construction policies will contain waivers of subrogation and list the various contractors as additional insureds. However, a very recent decision by the Ontario Superior Court demonstrates an example where subrogation was not precluded. In *Maio v. Mer Mechanical Inc.*, 2018 ONSC 4426, the Defendant brought a summary judgment motion to have a subrogation action dismissed due to the existence of a builder's risk policy. The Court dismissed the motion and found that the action was not barred.

## Facts

The Plaintiffs had their dream house built over the course of two years, and was completed in September 2009. They moved into the house on November 1, 2009. Nine days later, a faucet on the main floor became detached, resulting in a flood that caused over \$3 million in damages. The Plaintiffs made a claim under their homeowner's policy and their insurer subsequently commenced a subrogated action against the Defendant (the plumbing contractor who had installed the faucet). During the construction of the house, the Plaintiffs had taken out a builder's risk policy (the Plaintiffs acted as their own general contractor), and the same contained a waiver of subrogation. The Defendant was also an additional insured under the builder's risk policy, and the policy expired a few months before the loss date. The Defendant installed the faucet prior to the expiry of the builder's risk policy.

## The Court's Decision

The Defendant filed expert engineering evidence, which demonstrated that the faucet started to fail due to "creep/stress relaxation", soon after its installation and prior to the expiry of the builder's risk policy. The builder's risk policy defined an occurrence under the policy as "the *inception* of the event causing the loss occurs prior to the estimated completion date of the project". According to the Defendant, since the faucet began to fail prior to the expiry of the builder's risk policy, the action was barred.

The Court disagreed with the Defendant, and felt that they had confused "inception" with "cause". The Court held that the terms are not synonymous, and that the cause of an event is distinct from the event itself. Moreover, the Defendant's position was inconsistent with the purpose of a builder's risk policy. Specifically, the policy's primary purpose is to provide coverage *during* the construction project in order to ensure that the project is not interrupted by disputes and litigation between various contractors. Contractors and sub-contractors accordingly have an insurable interest in the property because of their common goal of completing the project. Once the project is completed, that insurable interest ceases to exist.

## Key Insights

As demonstrated by the Court's decision in *Maio v. Mer Mechanical Inc.*, in the context of a construction loss, it is critical to look at the policy wording. As well, the timing of the loss, and its cause and origin, may play a significant factor in determining whether

subrogation is permitted. The decision also highlights that the Court will likely analyze this factual matrix through the lens of the primary purpose of a builder's risk policy.

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