

Fla Bar RPPTL  
Insurance & Surety Law Committee  
&  
Construction Law Committee  
March 14, 2019

Examination of  
*Sebo v. American Assur. Home Co., Inc.*, 208 So. 3d  
694 (Fla. December 1, 2016):  
Is There Insurance Coverage for Construction  
Defects under a Homeowner's Insurance Policy?  
Where is the case today?

Debbie Sines Crockett, Esq.  
David A. Zulian, Esq.  
**CHEFFY PASSIDOMO**  
ATTORNEYS AT LAW  
Tampa & Naples, Florida

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**DAVID A. ZULIAN** is a graduate of Emory university (B.A., 1983) and received his law degree from the University of Miami School of Law (J.D., 1987). He was formerly associated with and a partner in the law firm of Ruden, McClosky, Smith, Schuster & Russell, P.A. in 2001, David joined Cheffy Passidomo as a shareholder and principal. David is a certified by the Florida Bar as a specialist in construction law, and is an experienced trial lawyer who concentrates his practice in the areas of construction, real estate and commercial litigation. His client base is diverse and includes the representation of manufacturers, suppliers, distributors, subcontractors, general contractors, developers, design professionals, owners, lenders, mortgage brokers, real estate brokers, condominium associations, mobile home associations and homeowners associations. David an has extensive experience in dealing with cases involving insurance for construction defects in first party settings, construction defects, Florida's construction lien law (chapter 713) and Florida's public bond law (chapter 255). In 1995, he was the first attorney in the state of Florida to successfully try and appeal a case involving Florida's Prompt Payment law in connection with a public project. In addition, David has lectured in the areas of construction, insurance coverage, and commercial law. In 1989, he became certified as a court arbitrator by the Florida dispute resolution center. Formerly, David was the president of the American Concrete Institute, Florida Gulf Chapter (ACI), and was the co-chairman of the Jim Dent Naples Golf Classic To Benefit Cystic Fibrosis Foundation. David was also formerly the chairman of the Major Emphasis Committee Of The Wilton Manors Kiwanis Club, and was a member of the Board of Adjustments of the City of Wilton Manors.



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Home Prior to  
Sebo's  
Purchase



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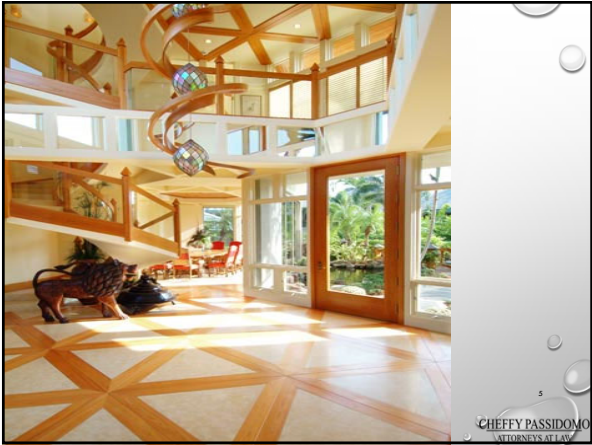
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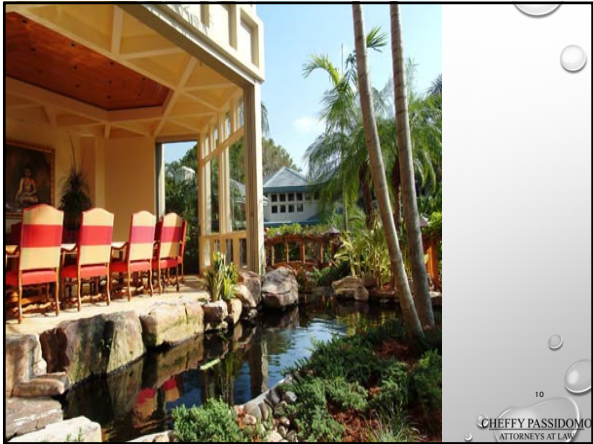
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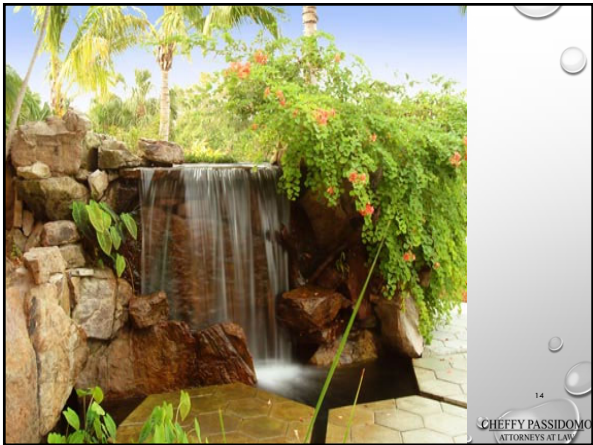
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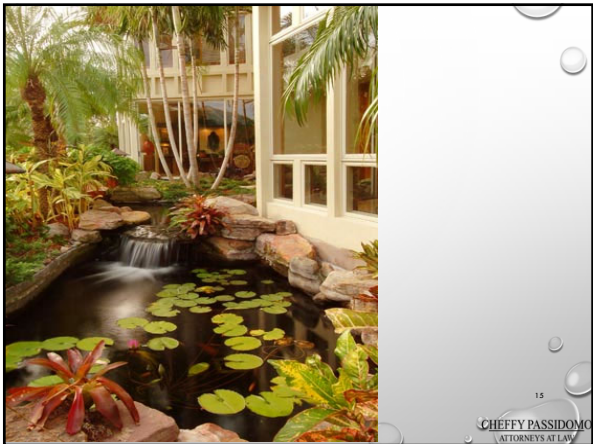
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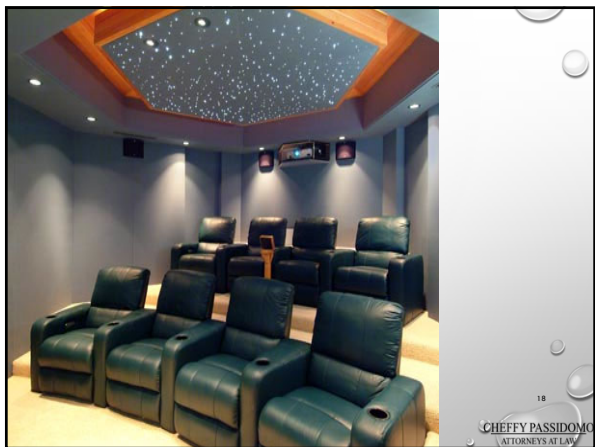
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### Relevant Property History

- 1/26/99 Building Permit Issued
- 9/21/01 Certificate of Occupancy (CO)
- 10/04 Seller lists home on the market
- 12/04-1/05 Sales Contract
- No disclosures by Sellers
  - (at closing or any time prior) of leaks &/or water damage
- Home Inspection ≠ reveal leaks or water damage
- 4/18/05 Closing
- Purchased Price \$11.2M
- 4/18/05-4/18/06 "All Risk" Homeowner's policy

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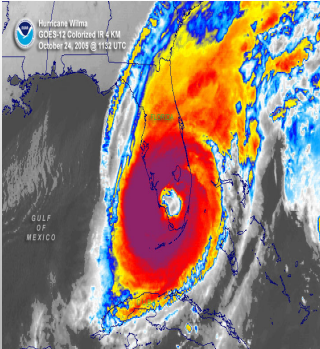
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### HURRICANE WILMA OCTOBER 24, 2005



- **HIGHEST WINDS**
  - 185 MPH (295 KM/H)
  - (1-MIN. SUSTAINED)
- **LOWEST PRESSURE**
  - 882 MBAR (A RECORD LOW IN ATLANTIC)
- **RAINFALL IN FL**
  - >9 INCHES
- **FATALITIES**
  - 25 TOTAL, 6 IN FL
- **DAMAGE**
  - \$20.6 BILLION (2005 USD)

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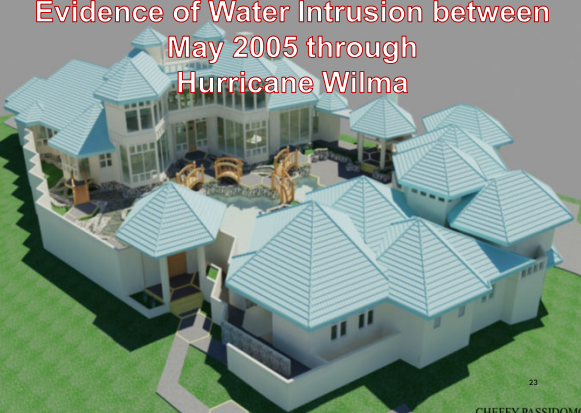
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### Evidence of Water Intrusion between May 2005 through Hurricane Wilma



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### Windows



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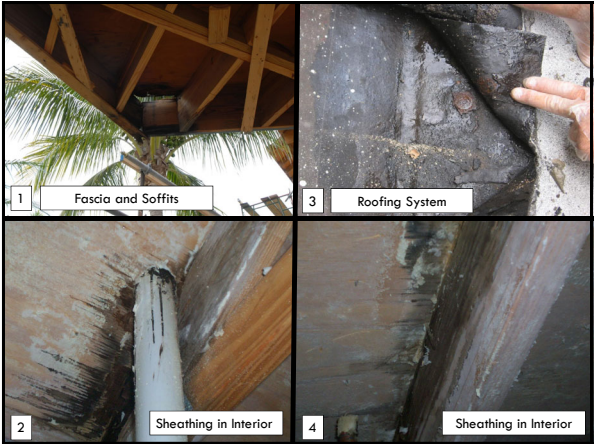
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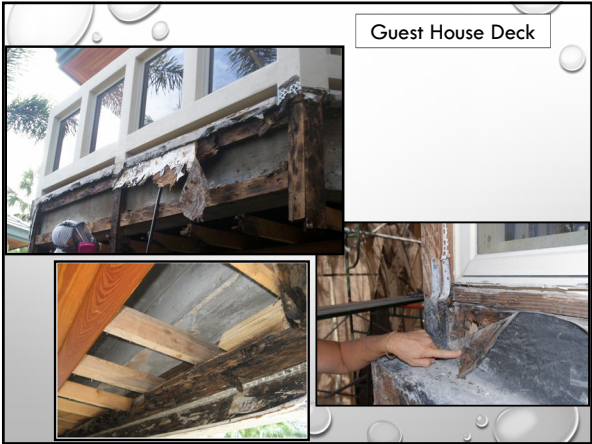
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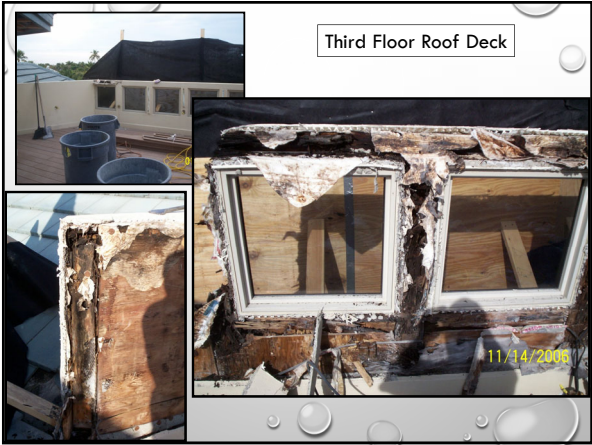
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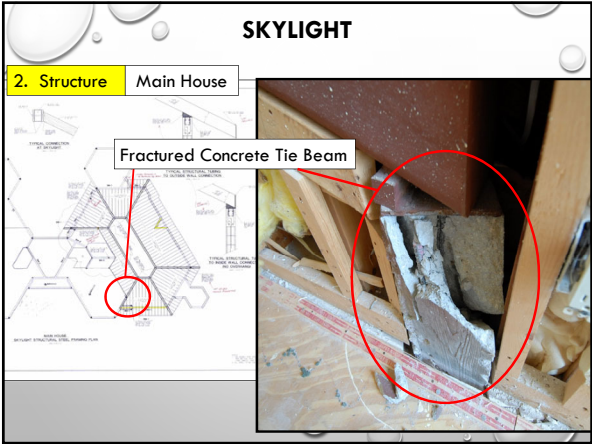
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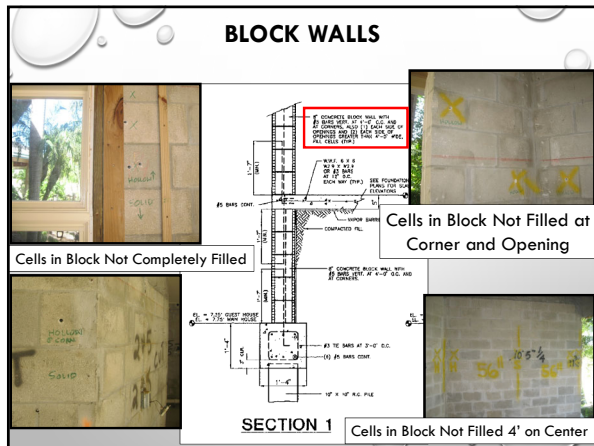
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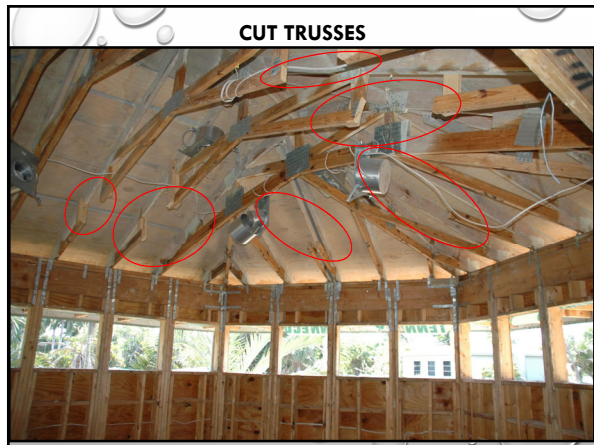
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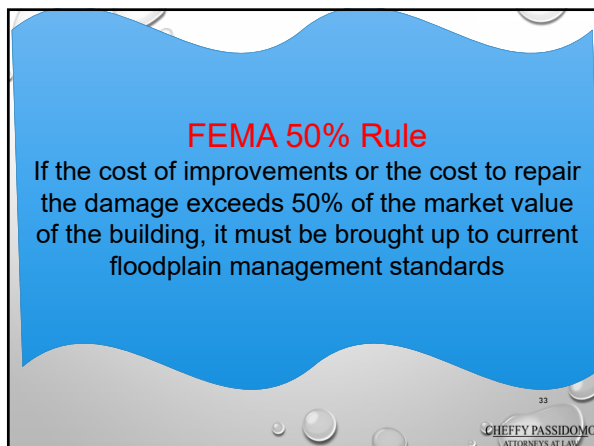
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### The 2007 Action

- **1/8/07: Sebo Files Suit Against:**
  - **Sellers**
  - **GC**
  - **Subs**
  - **Eventually, Sebo Brings in his HO Carrier (AHAC)**
- **By January 2011, Sebo Had Settled w/ All Except:**
  - **Sellers** (Sebo settled with Sellers in December 2014)
  - **AHAC**
- **February 2011: Trial Court Grants SJ to Sebo**  
**Applying Concurrent Cause Doctrine**
- **April-Mar 2011: Jury Trial b/w Sebo & Only AHAC<sup>35</sup>**

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### 3/3/11 Jury Verdict

**VERDICT FORM**

As to Plaintiff JOHN ROBERT SEBO's suit against Defendant, AMERICAN HOME ASSURANCE COMPANY, INC., the jury returns the following verdict:

1. Did the Plaintiff, JOHN ROBERT SEBO, establish a loss within the terms of the all risk homeowner's insurance policy?

YES ☒ NO ☐

If your answer to question 1 is YES, please continue to question 2. If your answer to question 1 is NO, your verdict is for the Defendant, AMERICAN HOME ASSURANCE COMPANY, INC., and you should not proceed any further except to sign this verdict form and return it to the courtroom.

2. Did the Plaintiff, JOHN ROBERT SEBO, submit a claim to American Home related to the initial rain-based water intrusion property damage?

YES ☒ NO ☐

3. Please identify the time period during which the initial rain-based water intrusion property damage occurred.

4. Specifically set forth those damages that Defendant, AMERICAN HOME ASSURANCE COMPANY, INC., must pay to the Plaintiff, JOHN ROBERT SEBO, as a result of physical damage from water intrusion that occurred during the time period referenced in your answer to Question Number 3:

(a) Repair/Reconstruction of house \$ 6,000,000.00

(b) Repair/Reconstruction of other permanent structures \$ 0.00

(c) Repair/Replacement Contents \$ 0.00

(d) Debris removal \$ 0.00

(e) Professional fees \$ 0.00

(f) Rebuilding to code \$ 0.00

TOTAL = \$ 6,000,000.00

5. Did the Plaintiff, JOHN ROBERT SEBO, submit a claim to Defendant, AMERICAN HOME ASSURANCE COMPANY, INC., related to any wind and/or water damage suffered as a result of Hurricane Wilma which occurred on October 24, 2005?

YES ☒ NO ☐

6. Specifically set forth those damages that Defendant, AMERICAN HOME ASSURANCE COMPANY, INC., must pay to the Plaintiff, JOHN ROBERT SEBO, as a result of physical damage from any wind and/or water damage suffered as a result of Hurricane Wilma that occurred on October 24, 2005:

(a) Repair/Reconstruction of house \$ 30,000.00

(b) Repair/Reconstruction of other permanent structures \$ 0.00

(c) Repair/Replacement Contents \$ 0.00

(d) Debris removal \$ 0.00

(e) Professional fees \$ 0.00

(f) Rebuilding to code \$ 0.00

TOTAL = \$ 30,000.00

7. What was the dollar amount of the FEMA threshold that represented 50% of the value of the insured premises?

\$ 2,700,000.00

8. What was the dollar amount of the FEMA threshold that represented 50% of the value of the insured premises?

\$ 2,700,000.00

Please sign and date the verdict form and return it to the bailiff 50 DAY or at this, 7<sup>th</sup> day of March, 2011.

**\$15,390,600.00**

*John Robert Sebo*  
Plaintiff

*Robert A. Passidomo*  
Defendant

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### 3/3/11 Jury Verdict

**VERDICT FORM**

As to Plaintiff JOHN ROBERT SEBO's suit against Defendant AMERICAN HOME ASSURANCE COMPANY, INC., we, the jury, return the following verdict:

1. Did the Plaintiff JOHN ROBERT SEBO establish a loss within the terms of the all risk homeowner's insurance policy?

YES ☒ NO ☐

If your answer to question 1 is YES, please continue to question 2. If your answer to question 1 is NO, your verdict is for the Defendant AMERICAN HOME ASSURANCE COMPANY, INC., and you should not proceed any further except to date and sign this verdict form and return it to the courtroom.

2. Did the Plaintiff JOHN ROBERT SEBO submit a claim to American Home related to the initial unexplained water intrusion property damage?

YES ☒ NO ☐

3. Please identify the time period during which the initial rain-based water intrusion property damage took place at the Plaintiff JOHN ROBERT SEBO's residence.

April 19, 2005 - OCT 23, 2005

4. Specifically set forth those damages that the Defendant AMERICAN HOME ASSURANCE COMPANY, INC., must pay to the Plaintiff JOHN ROBERT SEBO, as a result of physical damage from water intrusion from the initial rain-based water intrusion that occurred during the time period referenced in your answer to Question Number 3:

(a) Repair/Reconstruction of house \$ 6,600,000.00

(b) Repair/Reconstruction of other permanent structures 0.00

(c) Repair/Replacement Contents 0.00

(d) Property removal for safekeeping 0.00

(e) Debris removal 0.00

(f) Preliminary repairs 0.00

(g) Rebuilding to code 0.00

TOTAL = \$ 6,600,000.00

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→ From April 19, 2005 to October 23, 2005, initial rain based water intrusion property damage took place at Sebo's home;

→ As a result of Hurricane Wilma, which struck on October 24, 2005, physical damages from wind and/or water were suffered by Sebo's home.

### 11/10/11 Amended Final Judgment

**FINDINGS OF FACT**

4. The Plaintiff Sebo residence is deemed a constructive total loss.

**AMENDED FINAL JUDGMENT**

IT IS therefore ordered, adjudged, and decreed that the Plaintiff Sebo shall recover from Defendant American Home in damages, the sum of \$8,070,000 on principal which consists of \$6,600,000, based upon the constructive total loss of the house and \$1,470,000 for loss of use which shall accrue interest at the statutory rate from March 3, 2011, for which let execution issue forthwith.

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### 2d DCA Appeal

**Am. Home Assur. Co., Inc. v. Sebo,**  
**141 So. 3d 195 (Fla. 2d DCA 2013)**

- 2d DCA Reverses Trial Court
- Follows CA Case Law
  - Based Upon CA Insurance Code §

**Adopts The**  
**Efficient Proximate Cause Rule**

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## Efficient Proximate Causation (EPC)

2 or More Identifiable Causes

At Least 1 Is Covered  
&  
At Least 1 Is Excluded

Dependent on Each Other

Contribute to a Single Loss

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## EPC

- “Causes are **dependent** on each other when one peril instigates or sets in motion the other, such as an *earthquake which breaks a gas line that starts a fire.*”
  - *Empire Indem. Ins. v. Winsett*, 2008 U.S. Dist. Lexis 27695 (N.D. Fla. Apr. 3, 2008)
  - *Paulucci v. Liberty Mutual*, 190 F. Supp. 2d 1312 (M.D. Fla. 2002)
  - *Hartford Accident & Indem. Co. v. Phelps*, 294 So. 2d 362, 364 (Fla. 1st DCA 1974)
- If the cause that sets the chain of events in motion, the efficient proximate cause, is covered under the terms of the policy, the loss will likewise be covered.
  - 7 *Couch On Insurance* § 101:45 (Steven Platt, Et. Al., Eds., 2008).
- The EPC is “**The One That Sets Others In Motion ...** if the EPC is covered, then the Claim for damages will be covered even if the other causes are not covered.”<sup>41</sup>
  - *Hartford Accident & Indem. Co. v. Phelps*, 294 So. 2d 362, 364 (Fla. 1st DCA 1974)

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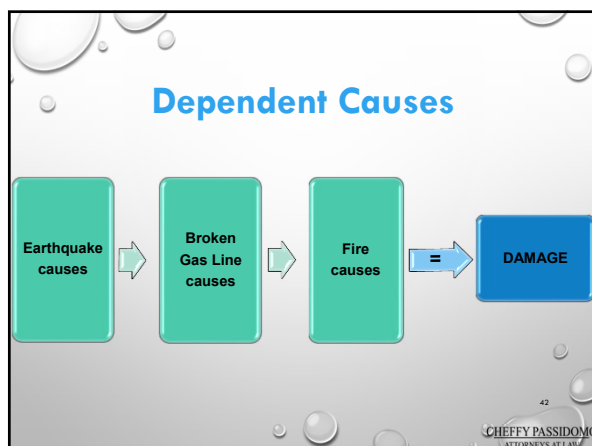
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**FL SC Appeal**

***Sebo v. Am. Home Assur. Co., Inc.***,  
208 So. 3d 694 (Fla. December 1, 2016)

- Quashes 2d DCA Opinion
- Follows *Wallach v. Rosenberg*, 527 So. 2d 1386 (Fla. 3d DCA 1988)

**Applies the  
Concurrent Causation Doctrine**

- 2/6/17: Mandate issued - remanded to the 2d DCA
- 7/19/17: 2d DCA remanded to the Trial Court

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**Concurrent Cause Doctrine (CCD)**

**2 or More Identifiable Causes**

**At Least 1 Is Covered  
&  
At Least 1 Is Excluded**

**Independent of Each Other**

**Contribute to a Single Loss**

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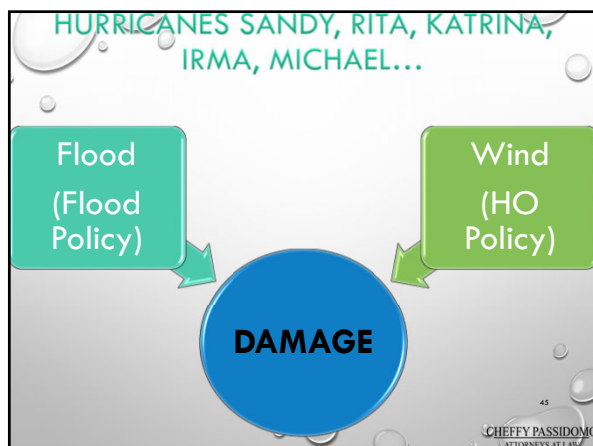
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**State Farm v. Rigsby,**  
137 S. Ct. 436 (Dec. 6, 2016)

- Hurricane Katrina
- Claims handlers filed suit against State Farm under False Claims Act.
- \$3.6M Jury verdict against State Farm, included treble damages award, plus fees.
- **Claims handlers allegedly instructed by State Farm to misclassify wind damage as flood damage in order to shift State Farm's liability onto the federal government – flood policies.**
- SCOTUS ruled district court did not abuse its discretion in not dismissing the action even though claimants violated the FCA by revealing the complaint against state farm to media while still under seal.

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**CCD in Florida**

- ❖ "Causes are **independent** when they are unrelated such as an earthquake and a lightning strike or a windstorm and wood rot."
- ❖ Where a policy expressly insures against direct loss and damage by one element, but excludes loss or damages caused by another element, coverage extends to the entire loss even though the excluded element is a contributory cause.
- ❖ **Paulucci v. Liberty**, 190 F. Supp. 2d 1312 (M.D. Fla. 2002)

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**CCD in Florida**

- ❖ FL's recognition of the CCD in all-risk first party policies was uninterrupted from the time of **Wallach v. Rosenberg**, 527 So. 2d 1386 (Fla. 3d DCA 1988) decision in 1988, **UNTIL** **American Home Assur. Co., Inc. v. Sebo**, 141 So. 3d 195 (Fla. 2d DCA 2014)
- ❖ See *Empire Indem. Ins. Co. v. Winsett*, 325 Fed. Appx. 849 (11th Cir. 2009); *Swire Pac v. Zurich Ins. Co.*, 845 So. 2d 161 (Fla. 2003); **Fayad v. Clarendon Nat'l Ins. Co.**, 899 So. 2d 1082 (Fla. 2005); *Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735 (Fla. 1961); **Hudson v. Prudential Prop. & Cas. Ins. Co.**, 450 So. 2d 565 (Fla. 2d DCA 1984); *General Am. Trans. Corp. v. Sun Ins. Office, Ltd.*, 239 F. Supp. 844 (E.D. Tenn. 1965); *Essex House v. St. Paul Fire & Marine Ins. Co.*, 404 F. Supp. 978 (S.D. Ohio 1975); *N-ren Corp. v. Am. Home Assur. Co.*, 619 F. 2d 784 (11th Cir. 1980); *Avis v. Hartford Fire Ins. Co.*, 195 S.E. 2d 545 (Tenn. 1973); *Kramer Bros., Inc. v. U.S. Fire Ins. Co.*, 278 N.W. 2d 857 (Wis. 1979).

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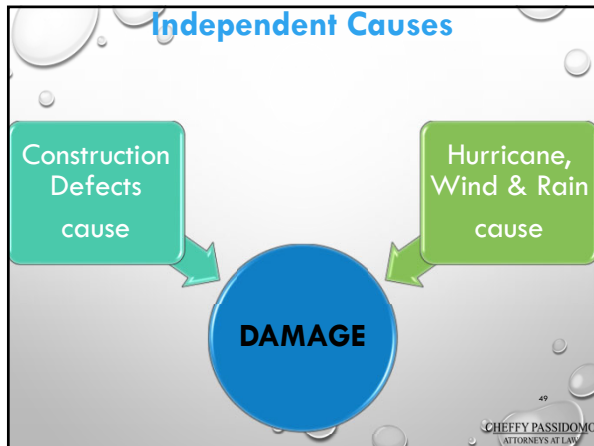
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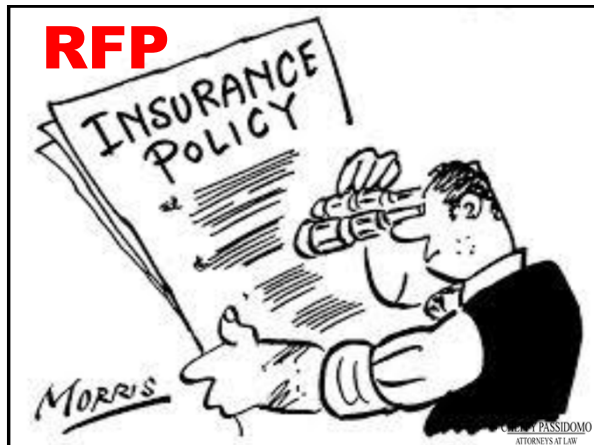
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All Risk Insurance Policies

The purpose of all-risk policies ... is to cover, unless specifically excluded by the policy's terms, losses from "fortuitous events" that are dependent upon chance.

10 Couch on Insurance 3d, §148:50

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## INTERPRETATION OF ALL RISK POLICIES

*State Farm v. Pridgen*, 498  
So. 2d 1245 (Fla. 1986);  
*Demshar v. Aaakon*, 337  
So. 2d 963 (Fla. 1976);  
*Fayad v. Clarendon*, 899  
So. 2d 1082 (Fla. 2005);  
*Sun v. Clay*, 133 So. 2d 735  
(Fla. 1961); *Phoenix v.*  
*Branch*, 234 So. 2d 396, 398  
(Fla. 4th DCA 1970);  
*Wallach v. Rosenberg*, 527  
So. 2d 1386; *Hudson v.*  
*Prudential*, 450 So. 2d 565  
(Fla. 2d DCA 1984);  
*Stonewall v. Emerald*, 388  
So. 2d 1089 (Fla. 3d DCA  
1980).

- ❖ Broad coverage grant provides “a special type of coverage extending to risks not usually covered under other insurance”
- ❖ Coverage is available for all fortuitous loss or damage not resulting from the insured’s willful misconduct or fraud, unless the policy contains “a specific provision expressly excluding the loss from coverage.”

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## 8. FIDP Exclusion

## 8. Faulty, Inadequate or Defective Planning

"We do not cover any loss **caused by** faulty, inadequate or defective ... design, specifications, workmanship, repair, construction, renovation, remodeling..."

**D. Exclusions**  
The following exclusions apply to the Part II - PROPERTY section of your policy:

Do not cover or cover any loss, directly or indirectly, and regardless of any cause or event contributing concurrently or in any sequence to the loss, including but not limited to, charge, disposal, seepage, migration or release or exclusion of pollutants. Nor do we cover the cost to extract pollutants from soil or water, or the cost to remove, replace or replace polluted or contaminated water. A "pollutant" is any solid, liquid or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and wastes. "Pollution" is an impurity, contamination or contact with any substance or "pollutant" in or upon the water. "Release" is the discharge of, or exposure to, radiation.

loss

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losses caused by rodents, insects, birds or vermin except loss to glass that is part of a building, storm door or window. However, we do insure ensuing covered loss unless another exclusion applies.

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## ≠ “Arising

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from” “having

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United States Fid. &amp; Guar.

5. Structural Movement

We do not cover any loss caused by bulging, expansion, shrinking or settling, including resultant cracking, of foundation, floors, walls, patios, pavements, ceilings or roofs. However, we do insure

6. Surface and Ground Water Damage

We do not cover any loss caused by:

- a. Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind; or
- b. Water below the surface of the ground, including water which exerts pressure on, or seeps or leaks through a building, site wall, driveway, foundation, swimming pool or other structure.

This exclusion does not apply to:

- a. **Contents** away from any residence you own or live at; or
- b. **Erasing** covered loss unless another exclusion applies.

**7. Water or Ice Damage to Certain Other Permanent Structures**

We do not cover loss to certain other permanent structures caused by freezing, thawing, or the pressure or weight of water or ice, whether driven by wind or not. However, we do insure erasing covered loss unless another exclusion applies. The other permanent structures to which this exclusion applies are swimming pools, fences, hot tubs, hot tubs, patios, porches, foundations, septic systems,

- a. Planning, zoning, development, surveying, siting;
- b. Design, specifications, workmanship, repair, construction, restoration, remodeling, grading, compaction;
- c. Materials used in repair, construction, renovation or remodeling; or
- d. Maintenance;

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Out Of”

or “resulted  
in origin in”

approximately

Co., 913 So. 2d

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## “Caused By” ≠ “Arising Out Of”

## “ARISING OUT OF”

- ❖ Is broader in meaning than “caused by” or “resulted from”
- ❖ Means “originating from”, “having its origin in”, “growing out of”, “flowing from”, “incident to” or “having a connection with”
- ❖ Means causally connected with, not proximately caused by

*Taurus Holdings, Inc. v. United States Fid. & Guar. Co.*, 913 So. 2d 528, 532-533 (Fla. 2005)

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### “Caused By”

- A single cause
- “Caused By” in a policy, limits the applicability of a policy provision to conditions solely occasioned by the event referenced.
  - See *Garcia v. Fed. Ins. Co.*, 969 So. 2d 288 (Fla. 2007).
- Thus, FIDP Exclusion, by its own terms, only **applies to the construction defects themselves but not resulting water damage.**
  - See *Buscher v. Economy Premier Ins. Co.*, 2006 WL 268781 (D. Minn. Feb. 1, 2006); *McGrath v. American Family Mut. Ins. Co.*, 2008 WL 4531373 (N.D. Ill. April 29, 2008)

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***Wallach v. Rosenberg*, 527 So. 2d 1386 (Fla. 3d 1988)**

- ❖ Where concurrent causes join to produce a loss and one of the causes of risk is excluded under the policy, coverage was available even if “the insured risk [is] not ... the prime or efficient cause of the accident.”
- ❖ “Where **weather perils combine with human negligence to cause a loss**, it seems logical and reasonable to find the loss covered by an all-risk policy even if one of the causes is excluded from coverage,” (citing *Safeco v. Guyton*, 692 F.2d 551 (9th Cir. 1982)(coverage was available where a covered risk, negligent maintenance of flood control structures, combined with an excluded risk, a flood, to cause a loss); *Mattis v. State Farm*, 454 N.E.2d 1156, 1160 (Ill. App. Ct. 1983)(“where a policy expressly insures against loss caused by one risk but excludes loss covered by another risk, coverage is extended to a loss caused by the insured risk even though the excluded risk is a contributory cause.”))<sup>56</sup>

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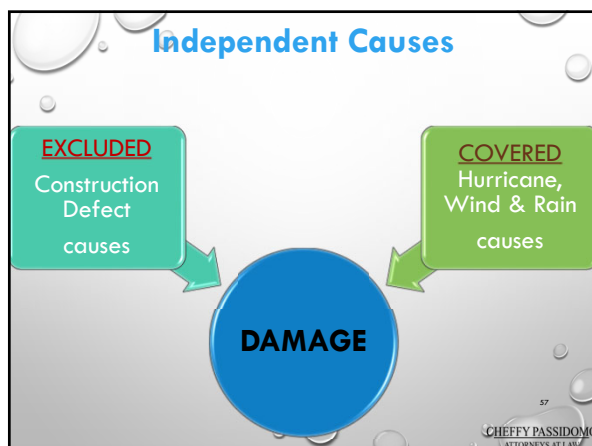
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**Sebo v. Am. Home Assur. Co., Inc.,**  
208 So. 3d 694 (Fla. December 1, 2016)

❖ CCD not EPC applied when determining causation of insured's loss regarding home, which sustained damage allegedly due to **wind, rain and defective construction**, and thus loss would be covered under all-risk homeowners insurance policy, even though policy contained defective-work exclusion, **where there was no reasonable way to distinguish proximate cause of insured's property loss and insurer did not explicitly avoid applying the CCD in language of the policy.**

❖ When two or more perils converge to cause a loss and at least one of the perils is excluded from an insurance policy, when independent perils converge and no single cause can be considered the sole or proximate cause, it is appropriate to apply the CCD, rather than the EPC.

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**Anti-Concurrent Causation (ACC) Provisions**

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**RFP**

**INSURANCE POLICY**

MORRIS

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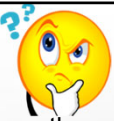
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Do I have construction defects plus another cause that combined to cause the loss/property damage?

Were they independent causes that combined to cause the loss/property damage?

**RFP!**

Review the HO or Commercial Property Policy.  
Is the other cause a covered cause/peril?  
Are there applicable ACC provisions?

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**Sebo v. Am. Home Assur. Co., Inc.,**  
208 So. 3d 694 (Fla. December 1, 2016)

**2/6/17**

Mandate issued - remanded to the 2d DCA

But what issues are left?

- Set Off
- Attys Fess & Costs

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**Sebo v. Am. Home Assur. Co., Inc.,**  
208 So. 3d 694, 699 (Fla. 2016)

**Set Off**

- "Last, AHAC argues that the trial court erred by prohibiting the introduction of the amount of the settlements Sebo received in connection with this case.
- The trial court excluded evidence of the settlements based on this court's decision in *Saleeby v. Rocky Elson Constr., Inc.*, 3 So. 3d 1078 (Fla. 2009).
- The Second District did not rule on this issue because "it is not completely clear whether this is a valued policy law case." *Sebo*, 141 So. 3d at 203. The court therefore left this question to be resolved at retrial, noting that the 2005 version of the statute applied. *Id.* We disagree with the trial court's determination that *Saleeby* precluded AHAC from presenting the settlement amounts to offset the judgment.
- *Saleeby* held that \$768,041, Florida statutes, which bars disclosure to the jury of settlement or dismissal of a joint tortfeasor, and \$90,408, which bars the disclosure of evidence of an offer to compromise to prove liability, are clear and unambiguous. We held that "[n]o evidence of settlement is admissible at trial on the issue of liability." *Saleeby*, 3 So. 3d at 1083.
- **Nothing in our decision affects the ability of a trial court to consider the amount of settlements as a post-judgment offset. We remand for reconsideration of this issue."**

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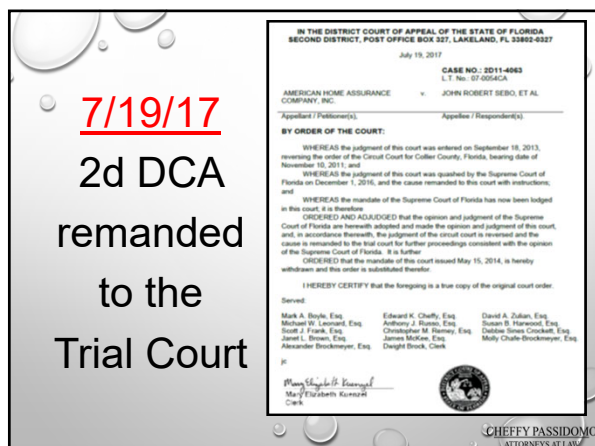
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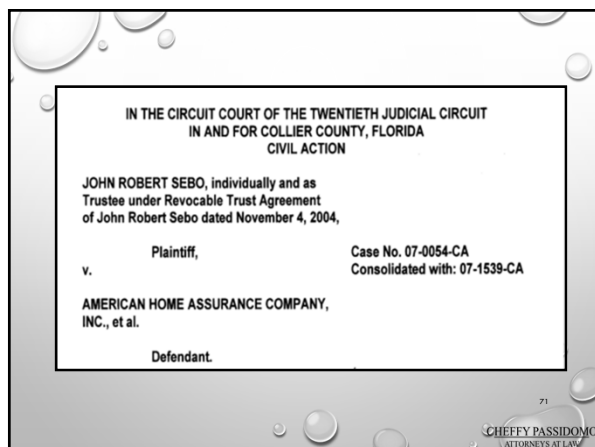
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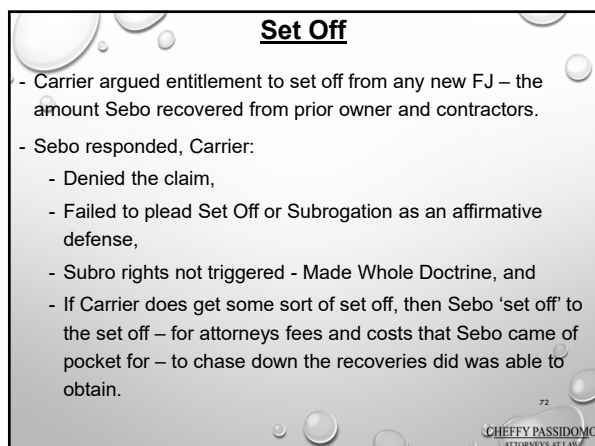
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**Set Off**

- Evidentiary Hearing set
- Court allowed hearing on legal arguments first
- Issued Order based on legal arguments

**\*\* Attorneys' Fees and Costs** – depositions, discovery, evidentiary hearing = 8 days!

Awarded =

- \$2.742M fees
- \$ 588K prejudgment interest on fees
- \$ 279K taxable costs
- \$ 40K prejudgment interest on costs

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IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT  
IN AND FOR COLLIER COUNTY, FLORIDA  
CIVIL ACTION

JOHN ROBERT SEBO, individually and as  
Trustee under Revocable Trust Agreement  
of John Robert Sebo dated November 4, 2004,  
Plaintiff,  
Case No. 07-0054-CA  
Consolidated with: 07-1839-CA

v.  
AMERICAN HOME ASSURANCE COMPANY,  
INC., et al.  
Defendant.

**ORDER ON RECONSIDERATION OF SET-OFF**

As a hearing on Wednesday, September 26, 2018, the Court considered issues related to American Home's "Motion to Apply Set-off." Filed on March 15, 2011 (the "Motion"). After considering the Florida Supreme Court's opinion in *Sebo v. American Home Assurance Co., Inc.*, 2018 So.3d 694 (Fla. 2d DCA 2018) (the "Opinion") the court file, all documents submitted by the parties, the argument of counsel, legal authority and all other relevant matters, it is **ORDERED AND ADJUDGED** as follows:

1. The Court finds that the Defendant, American Home Assurance Company, Inc., is not entitled to a set-off, since it is not entitled to subrogate its rights to the Plaintiff's insurance policy. The Court finds that the Plaintiff's insurance policy is an affirmative defense that must be pled or it is waived. *Federhauer v. Bonds*, 891 So.2d 1043 (Fla. 2d DCA 2004). In this case, Judge Phares in her Order dated July 18, 2011 denied Defendant's Motion to Apply Set-off. That ruling was not reversed on appeal.
2. In addition, the Court finds that American Home Assurance Company, Inc. should not be entitled to subrogation based on its denial of coverage and the

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Carrier not entitled to Set Off bc Set Off is an Aff Def that must be pled or waived. Carrier failed to plead it, trial judge denied carrier's Motion to Apply Set Off, and that ruling was not reversed on appeal

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IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT  
IN AND FOR COLLIER COUNTY, FLORIDA

JOHN ROBERT SEBO,  
Trustee under Revocable  
of John Robert Sebo  
Plaintiff,  
v.  
AMERICAN HOME ASSURANCE COMPANY,  
INC., et al.  
Defendant.

**ORDER**

At a hearing on Wednesday, September 26, 2018, the Court considered issues related to American Home's "Motion to Apply Set-off." Filed on March 15, 2011 (the "Motion"). After considering the Florida Supreme Court's opinion in *Sebo v. American Home Assurance Co., Inc.*, 2018 So.3d 694 (Fla. 2d DCA 2018) (the "Opinion") the court file, all documents submitted by the parties, the argument of counsel, legal authority and all other relevant matters, it is **ORDERED AND ADJUDGED** as follows:

1. The Court finds that the Defendant, American Home Assurance Company, Inc., is not entitled to a set-off, since it is not entitled to subrogate its rights to the Plaintiff's insurance policy. The Court finds that the Plaintiff's insurance policy is an affirmative defense that must be pled or it is waived. *Federhauer v. Bonds*, 891 So.2d 1043 (Fla. 2d DCA 2004). In this case, Judge Phares in her Order dated July 18, 2011 denied Defendant's Motion to Apply Set-off. That ruling was not reversed on appeal.
2. In addition, the Court finds that American Home Assurance Company, Inc. should not be entitled to subrogation based on its denial of coverage and the

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Carrier not entitled to Subrogation based on its denial of coverage and based on the jury finding of a material breach of the policy and paid nothing

10/2/18

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**11/9/18 FINAL JUDGMENT ENTERED**

- ❖ \$6,600,000 Constructive Total Loss of the Dwelling
- ❖ \$1,470,000 Loss of Use
- ❖ (\$50,000) Carrier paid previously per mold coverage
- ❖ \$3,058,866.10 Post-judgment Interest (jury verdict through 10/20/18)
- ❖ Prejudgment Interest – neither the 2d DCA nor the FLSC ruled on
- ❖ **Bad Faith Action pending... stay tuned!**

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**BUT BEWARE...**

**Addison Construction Corp. v. Vecellio,**  
**240 So. 3d 757 (Fla 4th DCA March 21, 2018)**

- Before trial, Buyers settled with ten of Subs = \$2.725M
- 10 week Jury Trial v. 2 remaining Subs and Swanson (principal of Addison Construction)
  - Jury - Special verdict = 2 Subs and Swanson did not violate FBC
  - Against Swanson on the fraud count, awarding Buyers \$78,984.60
- Bench trial vs. Sellers and GC
  - Trial Court = Sellers and GC did not violate FBC, FDUPTA, or Neg Failure to Disclose
  - Against Addison and Sellers on the fraud count, thus liable for Breach of K and Breach of Warranty, awarding Buyers \$3.5M (repairs and loss of use), but \$2.5M of that was against Addison for Breach of Warranty, \$3.3M under Addendum, \$2.3M against Sellers for Breach of K (damages overlapped).

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**BUT BEWARE...**

**Addison Construction Corp. v. Vecellio,**  
**240 So. 3d 757 (Fla 4th DCA March 21, 2018)**

- Post-trial, Swanson, Sellers and Addison moved for the court to apply the Sub Settlements as setoffs against each of the judgments.
- Looking at the scope of the sub settlement agreements in comparison to the damages requested and recovered by Buyers in their Breach of K claims against Addison and Sellers,
  - Trial Court = Buyers had not reduced their claims for damages at trial or removed claims for damages at trial related to the settled scopes of work.
  - As such, the trial court granted Addison and Sellers a setoff of the entire \$2.725M in Sub Settlements against the Breach of K awards.
- However, as to fraud, Trial Court = Setoff was not warranted bc "there were no allegations, evidence or arguments that Mr. Swanson, Addison, and Sellers could be liable [for] fraud based on the actions of the settled defendants."

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**BUT BEWARE...**

**Addison Construction Corp. v. Vecellio,**  
**240 So. 3d 757 (Fla 4th DCA March 21, 2018)**

- Addison, Swanson, and Buyers appealed Set Off.
- Addison and Swanson argued that the Trial Court should have extended the Sub Settlement setoff to the fraud judgments entered against them.
  - Rejected by 4th DCA rejected that argument.
- Buyers argued that the Trial Court erred in applying the entirety of the \$2.725M as a setoff bc none of the evidence of damage to the home presented at trial was encompassed by the Sub Settlements.
  - Rejected by the 4th DSC rejected that argument.
  - Held: **the law provides that if settlement proceeds are "not apportioned between (a) claims for which co-defendants are jointly and severally liable with the settling co-defendant, and (b) claims which were only asserted against the settling co-defendant, the entire amount of the undifferentiated recovery is allowable as a set-off."** citing *Escadote I Corp.*, 211 So. 3d at 1063. see also *Cornerstone Smr, Inc. v. Bank Of Am., N.A.*, 163 So. 3d 565 (Fla. 4th DCA 2015)

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**BUT BEWARE...**

**Addison Construction Corp. v. Vecellio,**  
**240 So. 3d 757 (Fla 4th DCA March 21, 2018)**

- Avoid duplicate payments/recovery for the same damages
- Settlement Agreements should allocate the settlement proceeds
  - By Claim/Count?
  - By Scope of Work?
  - By property damage that resulted from the specified Scope of Work?
  - By areas/location of damages?
  - For Attorneys' Fees/prevaling party Attorneys' Fees?
  - For Costs and Expenses?
  - However, the recipient wants??

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