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## ***Construction Law and Litigation***

### **In This Issue**

*Michael J. Faley is an associate at the law firm of Crisham & Kubes, Ltd. and former law clerk to Justice John J. Bowman of the Illinois Appellate Court. In his article, Mr. Faley discusses the waiver of subrogation clauses found in most form construction contracts and the effect of such clauses on an insurer's right of subrogation.*

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### **Waiver of Subrogation: A Shield to Legal Entanglements**

*By Michael J. Faley, Esq.<sup>1</sup>*

The relationship among individuals engaged in a construction project is unique. Good lawyers draft construction contracts to facilitate this relationship by helping to avoid legal entanglements, manage and allocate risk, and reduce costs. A waiver of subrogation provision is one of the most important tools available to a lawyer to help him or her accomplish this goal for his or her clients. This article discusses the waiver of subrogation and highlights an important recent development.

#### **A. Subrogation and Waiver**

Almost every construction project consists of a web of relationships. The owner or contractor enters into an agreement with the design professional and a litany of subcontractors. Thus, this complexity creates the need to limit legal entanglements and avoid the muck and mire that can ensue with litigation. This is where subrogation enters the scene and the necessity to limit it arises.

Generally speaking, subrogation allows one party to "step into the shoes" of another party to assert a legal right.<sup>2</sup> Most people are familiar with this concept in dealing with their auto insurance. For instance, if a driver's car is damaged in an accident caused by another driver, his or her insurance company may pay for the repairs. The insurance company then becomes subrogated and can sue the driver at fault to recover the cost of the repairs. The insurance company has succeeded to the rights of its insured driver. Simply stated, the insurance company can pursue the claim that its insured driver could have pursued.<sup>3</sup>

