

## **Five Steps to Maximize Subrogation Recoveries**

### **1. Follow the “24 Hour Rule”**

- Preserve the scene - [Mayes v. Black & Decker, 931 F. Supp. 80 (D.N.H. 1996) (rejecting a defendant’s motion to dismiss for failure to preserve a fire scene)]
- Preserve evidence and avoid spoliation - [Schmidt v. Milwaukee Tool Corp., 13 F. 3d 76 (3d Cir. 1994) (expert examination of evidence should be videotaped if practical)]
- Identify and interview witnesses [sparingly take recorded statements] - [United Coal Companies v. Powell Construction Co., 839 F. 2d 958 (3d Cir. 1988) (detailing discoverability of insurer’s claims file)]
- Place potential third parties on “notice” - [Schmidt v. Milwaukee Tool Corp., *supra* (placing potential defendants “on notice” of destructive testing of evidence is preferred)]

### **2. Retain the “Right” Expert**

- Identify areas of expertise needed [general expert/cause and origin expert v. specialized expert/engineer]
- Determine if experts require licenses - [People v. West, 636 N.E. 2d 1239 (Ill. 5<sup>th</sup> App. Dist. 1994) (precluding testimony from a cause and origin expert who was not licensed under state’s Private Detective Act)] and [Owens v. Payless, 670 A. 2d 1240 (R.I. 1996) (reversing trial court preclusion of an expert who was not licensed under Rhode Island Act)]
- Anticipate the Daubert challenge – [Daubert v. Merrell Dow Pharmacy, Inc., 509 U.S. 579 (1993)]

### **3. Identify Your Best Theories of Liability**

- Tort claims
- Contract claims
- Warranty [express and implied warranties of merchantability and fitness and workmanlike performance]
- 402A/product liability/strict liability claims

- Other “special” theories [strict liability for ultrahazardous activity; statutory causes of action; nuisance claims]

#### 4. **Understand “Defenses” That Will Be Raised**

- Statutes of Limitation, Statutes of Repose and notice requirements to governmental entities.
  - One year suit limitation in contracts is enforceable
- Waivers of subrogation - [Viacom International, Inc. v. Midtown Realty Company, 602 N.W.S. 2d 326 (1<sup>st</sup> Dept. 1993) (subro waivers may bar tort claims but not all contract claims)]
- Implied co-insured - [Sutton v. Jondahl, 532 P. 2d 478 (Okla. App. 1975)]
- Volunteer defense - [American Commercial Lines, Inc. v. Valley Line Co., 529 F. 2d 921 (Mo. 1976) (assignments from insureds defeat “volunteer defense”)]
- Presuit “releases” – [Republic Insurance Company v. Paul Davis Systems, Inc., 543 Pa. 186, 670 A. 2d 614 (1995) (first party policyholder “General Release” acts to preclude insurer from subrogation against tortfeasor)]
- Contributory/comparative fault
- Suing your own insured/anti-subrogation - [Home Insurance Co. v. Pinski, 500 P. 2d 945 (Montana 1972) (property insurer precluded from prosecuting claim against tortfeasor who insured under a separate liability policy issued by the same company)]

#### 5. **Understand How to “Measure Damages”**

- ACV/RCV v. “tort measures” [FMV] – [ Lakewood Engineering & Manufacturing v. Quinn, 604 A. 2d 535 (Maryland App. 1992)]
- Economic loss doctrine – [East River Steamship v. Delaval, Inc., 476 U.S. 858 (1986) and 2J’s v. Tice, 126 F. 3d 539 (3d Cir. 1997) (if a product fails, recovery for damage to the product may be limited to the terms of the contract warranty, but damage to “other property” may be recoverable in a tort action)]
- Special damages issues
  - Recovery of code upgrades – [Peluso v. Singer General Precision, Inc., 365 N.E. 2d 390 (Ill. App. 1977)]
  - Recovery of punitive/exemplary/93A damages

- Proration/apportionment agreement with insured – [Culver v. INA, 559 A. 2d 400 (NJ 1989) (parties may vary the common law “insured-made-whole” first rule)]
  - The majority rule, that an insured must be fully compensated for losses before an insurer can be reimbursed, is followed in Connecticut, Maine, Massachusetts, Rhode Island and Vermont.

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