COZEN O'CONNOR

SUBROGATION & RECOVERY OBSERVER

NEWS ON CONTEMPORARY ISSUES

Summer/Fall 2006

Dear Friends and Clients:

As we embark upon the busiest time of year for the subrogation industry, we thought it would be a timely opportunity to provide you with highlights and summaries of some of our most interesting trial successes and settlements over the past half year and several interesting new decisions affecting subrogation . We are hopeful that this will assist you in identifying potentially responsible parties and developing creative and viable theories of liability, beyond the obvious.

At Cozen O'Connor, we pride ourselves on conducting a prompt, comprehensive and in-depth evaluation of every potential source of recovery in every loss that we are asked to analyze. Unfortunately, subrogating insurers are not entitled to recover for every paid loss; there is a significant percentage of claims which simply will not give rise to third-party responsibility. However, it is imperative that all claims, even those without clear potential, should be investigated immediately and thoroughly, including exploration of all "spread" and secondary theories of liability, to ensure that no recovery dollars are left in the closed file storage room.

If our case summaries are helpful in uncovering any overlooked subrogation opportunity on your behalf, then this edition will have met its mark. We are available, of course, to consult with and represent you on any of these claims.

Very truly yours,

Elliott R. Feldman, Esquire
Chair, National and International
Subrogation and Recovery Department
Cozen O'Connor
1900 Market Street
Philadelphia, PA 19103
Telephone: 215-665-2071
Direct Fax: 215-701-2071
efeldman@cozen.com

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SUBROGATION & RECOVERY OBSERVER

NEWS ON CONTEMPORARY ISSUES

SPOTLIGHT ON.....

Erick Kirker's Double the Pleasure

While all trial victories are special, **Erick Kirker** of the Philadelphia Office in our Atlantic Region had a week that will be hard to top by almost any standard. On Monday, June 26, 2006, Erick started trial before Judge Jacob Hart in the United States District Court for the Eastern District of Pennsylvania in Philadelphia. At the time, Erick's wife Amy was pregnant with their second child but was not due until the end of July. With the trial at "home," and his wife not due for a month, Erick was focused on the trial.

The case, filed on behalf of **Sharon Roy and Celia Blue at Main Street America/National Grange**, involved water damage as a result of a pipe freeze. Main Street America/National Grange's insured had a wall removed in the insured's condominium as part of some renovations and piping in the wall was moved but never insulated. The general contractor insisted that it was the homeowner's responsibility to insulate the pipes.

On the morning of the second day of trial, Amy Kirker went into labor unexpectedly. Erick promptly informed the judge who apparently decided on his own that it was false labor and continued with the trial. Erick was more impressed with the judge's judicial abilities than his medical diagnosis, so he gave his cell phone to the judge's law clerk just in case.


Erick Kirker

When Amy called Erick around noon to inform him that this was not a drill, and baby number two was on the way, Judge Hart recessed the trial without telling the jury what was happening so Erick could get to the hospital. At approximately 3:00 p.m. on June 27, Madeline Amherst Kirker arrived early and healthy. Sensing he was on a roll, Erick also informed the judge that he would finish the trial that he thought was going well and came back the next day at 9:00 a.m., on three hours sleep.

On June 29, the jury awarded Erick and Main Street America/National Grange the full claim sought of $234,000. The offer prior to trial was $30,000. In the Subrogation Department's long history of outstanding results, a new baby and a jury verdict at the same time will be hard to beat.

To obtain additional copies, permission to reprint articles, or to change mailing information, please contact:

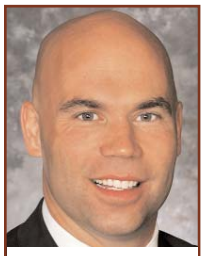
Lori J. Scheetz, Director of Marketing Operations, 800.523.2900 or 215.665.2123 or lscheetz@cozen.com

To suggest topics or for questions, please contact:

Mark T. Mullen, Esq., Co-Editor, 800.523.2900 or 215.665.2091 or mmullen@cozen.com
Kathleen P. Loughhead, Esq., Co-Editor, 800.523.2900 or 215.665.2144 or kloughhead@cozen.com
Elliott R. Feldman, Esq., Chairman, National and International Subrogation and Recovery Department, 800.523.2900 or 215.665.2071 or efeldman@cozen.com

RECENT VERDICTS

STORMY WEATHER


Jim Cullen

In early April of this year, **Jim Cullen** of the Philadelphia Office in the Atlantic Region obtained a verdict in excess of $831,000 after a four-day jury trial in Massachusetts Superior Court, Middlesex County. **OneBeacon's** insureds, George and Sharyn Neble, were having their home renovated in December of 2002. A temporary roof was placed on their home by the contractor. During a severe rainstorm that struck New England during the renovations, their possessions were severely damaged when the temporary roof failed.

Two years after the loss, the file was referred to Jim. Unfortunately, there was no evidence of the pre or post-loss condition of the roof system available. Jim nevertheless sued the involved contractor, RSC Corporation, and pieced together his case through discovery. Jim deposed the involved contractor and established that a temporary framing system had been constructed and that construction tarps were nailed and fastened around the framing. Jim also obtained an admission that the roof failed as a result of ponding, rather than uplift due to high winds, although the admission was qualified "due to the severe nature of the weather."

Jim was also able to retain an expert who testified that the "preferred" method of temporary protection required the installation of a solid substrate of plywood each night at the close of construction, and that the roof should have been monitored in light of the weather forecast. Defendant contended that the plywood method was totally impractical and not used in the field and further asserted the Act of God defense.

Several days prior to the trial, Jim secured favorable rulings on his motions in limine allowing for recovery of code upgrades, public adjuster's fees, and Mrs. Neble's lost wages incurred as a result of the loss. The Court also precluded the Act of God defense. Armed with these rulings, our clients, **Steve Seeber and David Maus,** elected to proceed to verdict, when the defense made settlement overtures prior to closing.

After only two hours of deliberation, the jury awarded the full amount of OneBeacon's claim, as well as the full amount of the insured's public adjuster fees of $37,000 and Ms. Neble's lost wages of $40,000. The total award was $831,000 with the mandatory pre-judgment interest in Massachusetts. The case is on Appeal.

SPARKS FLY


Jason Schulze

Jason Schulze of the Houston Office in the South Central Region prevailed in a three-day jury trial in one of the more conservative jurisdictions in Texas. After only 1½ hours deciding the case brought on behalf of **Sue Vanderhoef at Travelers**, the jury awarded the full amount of the claim, with four years of pre-judgment interest, for a total verdict of $216,000. The insured had filed suit for her uninsured losses in state court in Montgomery County and Jason intervened in the name of Travelers. The verdict was particularly satisfying as the defendant offered $0 before trial.

The case involved a welder performing work on the cross braces of an elevated home. The insured offered to move firewood near the area but the welder declined. Several hours after the welder departed, a fire alarm activated at the home. The welder's insurer contended the fire could have been electrical or incendiary, in short, that Jason did not prove how it started. Defense counsel also argued that the damages were increased because the fire department got lost on the way. The jury found the welder 100% liable and awarded the full amount claimed.

SWEET HOME ALABAMA

Jason Schulze's title as the King of Subrogation was short-lived and he was forced to pass the mythical crown


Al Nalibotsky

several days after his victory to **Al Nalibotsky** of our Charlotte Office in the Southeast Region. **Pat Tyrone** was the claim handler on this file. **Tim Blake** was the adjuster. Al tried the case for **Federal Insurance Company** of the **Chubb Group**, in the Middle District of Alabama. Al first had to survive a Daubert hearing where the defendant tried to strike his expert. Our expert was permitted to testify, but Al argued, successfully, that portions of the defense expert's opinions were unreliable. The Chief Judge for the Middle District struck a portion of the defense expert's testimony thereby allowing Al to argue that the defendant's affirmative defense of contributory negligence was not supported by the evidence. At the close of the defendant's case, Al moved for, and was granted, judgment as a matter of law on the contributory negligence defense. This was critical because Alabama is one of the contingent of states that holds fast to the doctrine of contributory negligence. If a plaintiff is even 1% contributorally negligent, it cannot recover for its losses. The defense was so confident in its position on contributory negligence that it offered nothing before trial.

The case involved water and mold damage to a bank. Al contended that a roofing company, a father and son outfit, improperly installed a new roof the year before. Defense counsel blamed other problems in the 50-year old building for the leaks and played up the local father/son business. The jury awarded $90,000 after ten days of trial.

DEEP FREEZE


Mike Sommi

Mike Sommi of our Northeast Region's New York City Office continued his winning streak by obtaining a plaintiff's verdict on behalf of State Farm in New York state court.

State Farm's insured owned an 11,000 square foot private residence. Water damage in excess of $400,000 was caused by a leak in the home's huge HVAC system which had frozen, ruptured, and failed causing water to damage the interior of the spacious home.

Mike brought suit against two companies responsible for the installation and maintenance of the HVAC system. Due to a number of significant legal and technical obstacles, defendants took a "no pay" position right up to closing arguments. Their tune probably changed somewhat after the verdict as it was 100% in favor of State Farm. Full damages were awarded, plus pre-judgment interest of 9%, totaling $471,000.

REVERSAL OF FORTUNE


Jim Fields


Larry Walker

Jim Fields and **Larry Walker** of the Philadelphia Office in the Atlantic Region were successful in prevailing in a very difficult motion: judgment notwithstanding the verdict. In August of 2006, Jim and Larry obtained judgment as a matter of law pursuant to the Federal Rule of Civil Proce-

* * * *

dure 50 on behalf of **Travelers** (St. Paul Fire and Marine Insurance Company) for **Tim Snyder** and **Wayne Bugasch** in the amount of $445,685 and an additional $100,000 in pre-judgment interest from the date of the fire of January 12, 2004. The extraordinary result came approximately one year after they had lost the trial before a jury in federal court in the Eastern District of Virginia. It was an extraordinary reversal of fortune.

On January 12, 2004, a home under construction in Loudon County exploded as a result of a gas leak. Travelers insured the company building the home and paid $445,685 in damages. Jim and Larry sued Whitman Mechanical Contractors, Inc., the heating, ventilation and air conditioning contractor.

One of the counts in the complaint was for breach of an express warranty by Whitman Mechanical. Even though the Court was required to consider all of the evidence in the light most favorable to defendant, which had prevailed with the jury, Jim and Larry convinced the Court that Whitman Mechanical breached certain express warranties as a matter of law when it failed to conduct a leak test before and/or after starting the furnace for the first time the morning of the explosion. In a well written 16-page opinion, the Court agreed with Jim and Larry that the defendant had breached its express warranty as a matter of law. Judgment was therefore entered on behalf of Travelers despite the jury verdict in favor of defendant. Such post-trial rulings in federal court are extremely rare after an adverse jury trial. The case is on Appeal in the Fourth Circuit.

THAT'S THE WAY THE COOKIE CRUMBLES


Mark Mullen

Mark Mullen of the Philadelphia Office of the Atlantic Region also obtained an outstanding result from a judge in the Eastern District of Virginia in late August of this year. In a case for **Kraft North America Foods, Inc**., for **Marco Flores** and **Pete Flaherty,** Mark obtained a verdict in a bench trial for $492,915.20 for a case tried to the court in early January with closing arguments in March of 2006.

In anticipation of new federal regulations mandating the disclosure of trans-fat oils on its products' packaging, Kraft installed oil lines for testing new low trans-fat oils in their food products. During the trials, a Chips Ahoy!© cookie had baked inside a piece of nitrile gasket on one of the food lines in the bakery. Kraft immediately shut down the lines, performed an investigation, and restarted those that were not affected. A Kraft investigation discovered that the piece of gasket came from an insulated pipe joint in the new oil line which used impedance heating to keep the oil flowing. Almost two dozen gaskets were affected. Due to safety concerns, Kraft had to destroy over $350,000 of product, approximately $50,000 worth of oil, and incurred in excess of $100,000 in related costs, for a total of $518,000 in damages.

Our experts determined that while nitrile gaskets supplied by Defendant Banner Engineering & Sales Company had deteriorated due to an incorrect torque specification provided to Kraft with a cut sheet. The gaskets had been installed by a local contractor according to the Banner cut sheet. Kraft proved at trial that the torque specification was an express warranty that defendant breached, causing Kraft's damages. After the first day of trial, defendant offered $300,000 to settle. Immediately following the trial, the defendant reduced its offer from $300,000 to $200,000 on the mistaken belief that Kraft had failed to prove its case or its damages. The trial judge issued a detailed 56-page opinion finding in Kraft's favor on virtually every aspect of its claim.

APPELLATE VICTORY

SMOKE FREE ZONE


Rob Caplan


Dan Luccaro

Just before our Fall/Winter 2005-2006 issue was published, **Rob Caplan and Dan Luccaro** of the Philadelphia Office in the Atlantic Region obtained an appellate victory for **Goldie Greenstein at Federal Insurance Company**, of the **Chubb Group,** in the United States Court of Appeals for the Fourth Circuit. The trial court had granted summary judgment to two former employees of Chubb's insured. The trial court determined that the employees were insured under a policy issued to Chubb's insured and thus were immune from suit under Virginia's anti-subrogation rule.

On September 9, 2003, Transworld Connection, Ltd.'s building in Lynchburg, Virginia caught fire. Chubb provided property and liability coverage to Transworld. The policy insured Transworld's employees when performing two classes of covered acts: "acts within the scope of their employment by Transworld" or "duties related to the conduct of Transworld's business." Transworld was paid in excess of $600,000 for its business property and personal property losses.

Rob and Dan filed suit against two employees of Transworld contending that their negligent disposal of smoking materials caused the fire. The employees filed individual motions for summary judgment based upon their assertions that they were insured under the policy and hence immune from suit under Virginia's anti-subrogation rule. The district court granted summary judgment in the employees' favor. On appeal, argued by Dan, we contended that the district court erred in interpreting the policy under Virginia's "course of employment" test and in awarding summary judgment to the employees on that basis. The Fourth Circuit agreed and reversed the grant of summary judgment in favor of the employees and held that they were not immune from suit and remanded the case for further consideration to the district court.

The case recently settled for $300,000 after being resuscitated by the appellate victory. This is a great recovery by Rob and Dan after an adverse ruling by the trial court.

COZEN O'CONNOR

ARBITRATION AWARD

HITTING PAY DIRT

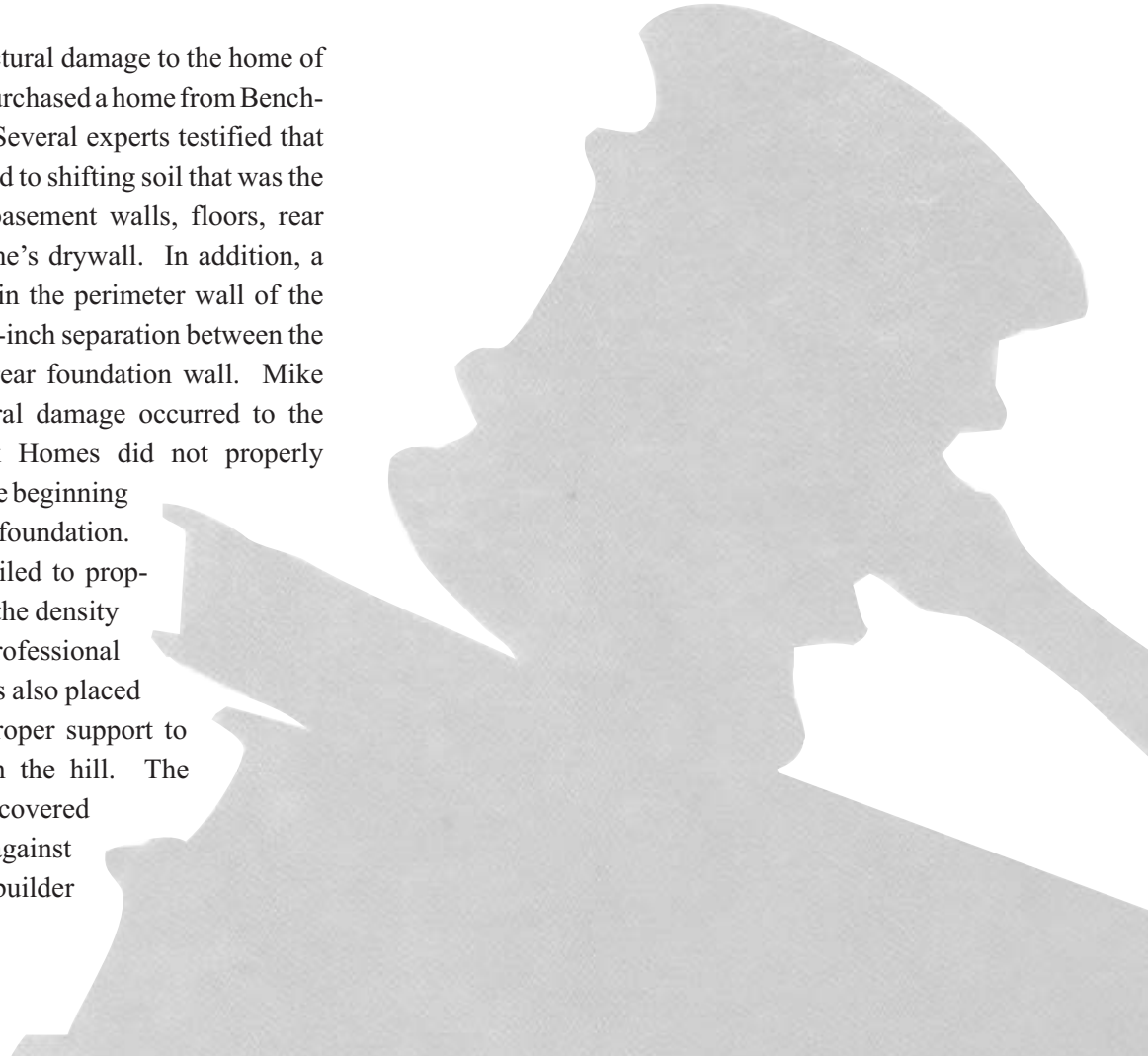

Michael Durr

Michael Durr of our Charlotte office in the Southeast Region was awarded $152,046.23, the entire claim, plus attorney's fees at a contested arbitration before the Construction Arbitration Services, Inc. The arbitrator heard argument from the attorneys, testimony from several witnesses, and considered numerous documents as evidence. Mike represented **National Home Insurance Companies** in a claim monitored by **Cathy Sweeney** in a warranty claim related to construction defects of a new home.

The claim arose due to structural damage to the home of Mr. and Mrs. Collins, who purchased a home from Benchmark Homes, the builder. Several experts testified that improperly placed fill dirt led to shifting soil that was the cause of cracking in the basement walls, floors, rear retaining wall, and the home's drywall. In addition, a large floor crack appeared in the perimeter wall of the garage and there was an one-inch separation between the garage floor slab and the rear foundation wall. Mike contended that the structural damage occurred to the home because Benchmark Homes did not properly prepare and test the lot before beginning construction of the home's foundation. Specifically, Benchmark failed to properly compact the fill soil to the density specified by a registered professional engineer. Loose fill soil was also placed in a steep slope without proper support to keep it from sliding down the hill. The damage to the home was covered under a ten-year warranty against structural defects. The builder refused to perform necessary repairs or repurchase the home. NHIC paid the homeowners $112,000 under the policy. Cozen O'Connor then pursued the subrogation claim.

The defendant contended that there was no evidence that the home contained a structural defect as defined by the warranty document. It was a technical defense based upon the definition of "structural defect" in the policy. There was evidence that the Collins family continued to live in the home for four years after making a claim with no evidence that any repairs had been made to it.

The arbitrator awarded full damages of $152,046 "because a fair preponderance of the credible evidence supports the existence of a structural defect as defined by the warranty."



NOTABLE SETTLEMENTS

DON'T SWEAT IT!

Mark Roth

Mark Roth of the Los Angeles office of our West Region obtained a $4.7 million settlement for **Jim Winters at AIG (Lexington Insurance Company)**, and **Dave Beck** at **Chubb (Federal Insurance Company)**. Mark filed suit against a plumber, building engineer, and a sprinkler contractor for substantial water damage caused by an unsoldered connection. The plumber was responsible for the unsoldered connection that failed on the 18th floor of an office building during a retrofit.

The loss occurred when the sprinkler contractor was repairing a plumbing line (without a plumbing license) in one of the restrooms when the unsoldered connection failed because the pipe was never "sweated." The plumber argued that the failure of the building engineer to observe the unsoldered connection while turning off the water in preparation for the repairs and the sprinkler contractor's negligence were superseding causes that cut-off the plumber's legal liability to us. In short, the plumber wanted to get off the hook because the other defendants' conduct was so bad that it trumped his.

In a bold move to gut our case, the plumber filed a motion for summary judgment contending that its responsibility for the loss was cut-off as a matter of law by the superseding negligence of the building engineer and sprinkler contractor. The sprinkler contractor had very little insurance coverage and the building engineer was protected by certain contractual limitations. In effect, if the plumber's motion was granted it would have thoroughly eviscerated the claim. The case only settled after the Court properly denied the plumber's motion.

A CAVALIER ATTITUDE

Kevin Hughes

Paul Bartolacci

Kevin Hughes and Paul Bartolacci of the Philadelphia Office in our Atlantic Region teamed up to achieve a $2.2 million settlement for **Lloyd's and AXIS** shortly after mediation stemming from the high profile arson fires on December 6, 2004 at the Hunters Brooke Housing Development under construction in Indian Head, Maryland. The case drew national attention both for being the largest arson in Maryland history (10 homes destroyed and 16 damaged) and because authorities originally suspected it to be racially motivated (almost all of the homes targeted were to be owned by African-American and other minority families).

Within six months of the loss, Kevin and Paul filed suit against a security guard company in federal district court in Maryland. Late last year, the Washington Lawyers Committee for Civil Rights and Urban Affairs and the Law Firm of Aiken Gump, following our lead and "borrowing" heavily from our complaint, filed a civil rights lawsuit on behalf of Hunters Brooke Homeowners against the six arsonists and the security guard company alleging that the arsons were racially motivated.

At first, subrogation prospects looked bleak as it was determined that the fires were started by a group of individuals who called themselves the "Unseen Cavaliers," a merry band of misfits named, believe it or not, for the compact car manufactured by Chevrolet rather than the noble knight that is also the University of Virginia mascot. However, Paul and Kevin diligently tracked down information that one of the uniformed security

guards at the development left his post an hour before he was scheduled and then lied about it. That guard was never implicated with the arsonists that were prosecuted but Kevin and Paul contended that his cavalier attitude amounted to negligence, and that of his company, which contributed to the loss.

PRESUMED LIABLE


Justin Wineburgh

Justin Wineburgh of the Philadelphia Office in our Atlantic Region obtained an excellent settlement on behalf of **Ohio Casualty**. The case arose out of an April 24, 2000 fire at the home of Christopher and Patricia Cellary who owned a home in the exclusive neighborhood of Allendale, New Jersey. The home had been used in the filming of the movie "Presumed Innocent" starring Harrison Ford based upon the best selling novel by author, Scott Turow, a former federal prosecutor.

Working extremely closely with the local officials who were on site while the fire was still burning, Justin developed a theory that there was improper installation of electrical wiring during the 1996 construction of an addition to the home. Once the area of origin was identified, electrical experts were promptly retained and were able to eliminate multiple electrical conductors located in the area of origin and, in turn, were able to precisely identify one specific conductor as being the cause of the fire.

Justin filed suit against the general contractor and the installing electrical contractor. After four years of discovery, and the taking of numerous fact and expert depositions, the general contractor was dismissed from the litigation following a motion for summary judgment. Working together, Justin and the Ohio Casualty team convinced the electrical contractor to settle for $450,000.

HIGH WATER PRESSURE


Michael Izzo


Larry Walker

Michael Izzo and Larry Walker of the Philadelphia office in the Atlantic Region settled a case for **Christina Loughlin** of **Chubb** and its insured, the West Chester County Healthcare Corporation against the County of West Chester and Dr. Rudolph Taddonio. The case was settled for $625,000 and arose out of the over pressurization of a city water line into the hospital and medical office complex. Subrogation against the county for damage to the main hospital buildings was barred by a subrogation waiver clause and a master ninety-nine year lease between the county and the West Chester County Healthcare Corporation. Damage to the office complex was not covered by the master lease. The case was based upon circumstantial evidence and the outcome was greatly influenced by the depositions of the county water department personnel and the records. The issue of the application of the waiver was ultimately decided by the New York Appellate Division in our favor.

THE BIG CHILL AND SPILL


Mark Anderson

Mark Anderson of our Seattle Office in the Northwest Region obtained an outstanding result for **Travelers**. The facts involved an oil spill at a remote Arctic construction camp in Chevak, Alaska. The defendant erected habitation pods for the pipe line workers and installed an oil supply line on the outside of the building. During the holidays in late

December, all of the workers went home and the area was hit with a monster snowstorm. Approximately fifteen feet of snow built up in drift on the lee side of the building and the weight of the snow eventually broke two of the fasteners which caused the pipe to bend and ultimately break at a "T" fitting. Approximately 4,000 gallons of diesel oil spilled onto the tundra. The total clean-up cost exceeded $1.3 million.

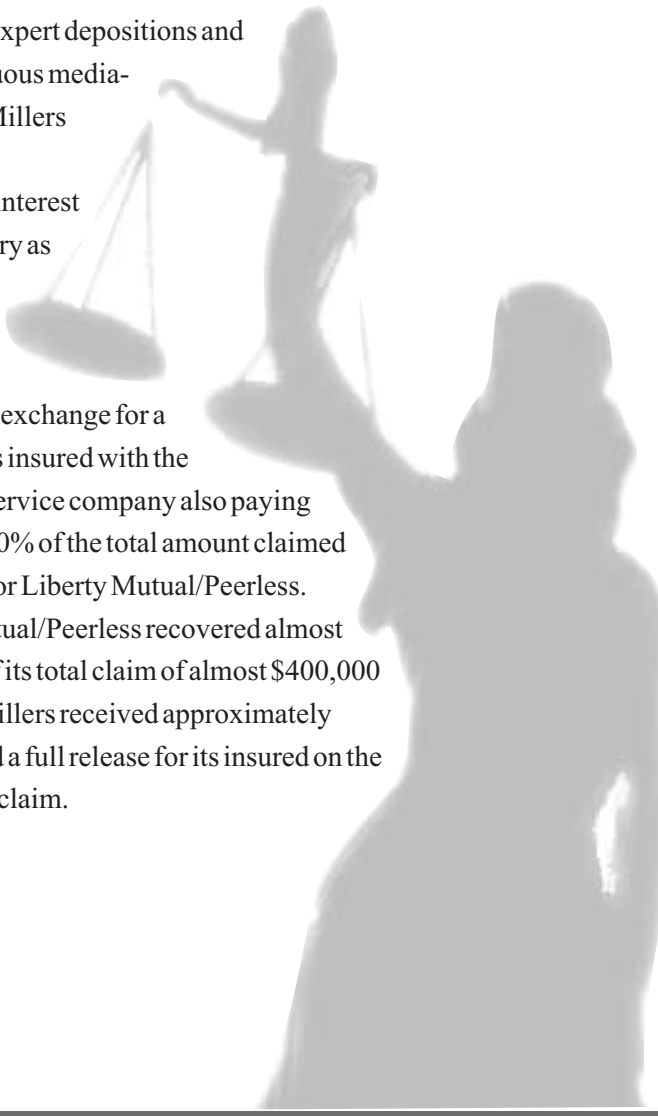
We sued the erection contractor for negligence for running the diesel pipe along side the building and for the method it used to fasten the pipes to the building. Inexplicably, the builder used plumber's tape and bailing wire. The defendant claimed our insured was negligent for abandoning the camp and for not removing the snow and inspecting the pipes on a daily basis. The case was settled for $750,000.

THE SERVICE CALL


Steve Gerber

Steve Gerber of the Philadelphia Office in the Atlantic Region obtained a great result for two clients in Connecticut federal court. Cozen O'Connor represented **Liberty Mutual/Peerless** and **Penn Millers** for a fire that caused damage to three separate properties in Connecticut. **Patrick O'Connor** of Liberty Mutual/Peerless handled the claim for the landlord and **Allan Joseph** was responsible for the claim Penn Millers received from the tenant restaurant owner where the fire originated. The investigation revealed that the fire originated behind a fifteen-year old beer cooler at the outlet into which the cooler and a credit card charging machine were plugged. The beer cooler had been serviced about six weeks before the fire. Steve sued the service contractor on the theory that the service technician who looked at the cooler in response to a call that the beer and wine was not staying cold, not finding any problem with the cooler, should have realized that the cooler was experiencing an intermittent power problem originating at the outlet and he should have disconnected the cooler with instructions not to use it until the outlet was checked. The restaurant had also been sued in two companion and consolidated cases initiated by insurers for exposure losses. The theory against the Penn Millers' insured was that the restaurant should have called an electrician to check out the outlet despite allegedly not being told anything by the service technician for the beer cooler.

Following expert depositions and after an arduous mediation, Penn Millers reduced its percentage interest in its recovery as to the defendant service company in exchange for a release of its insured with the defendant service company also paying more than 50% of the total amount claimed in the case for Liberty Mutual/Peerless. Liberty Mutual/Peerless recovered almost $200,000 of its total claim of almost $400,000 and Penn Millers received approximately $30,000 and a full release for its insured on the companion claim.



WELCOME ABOARD

RECENT ADDITIONS

Since our last issue, we have added four new associates and one new member to the Subrogation and Recovery Department throughout the country.

Philip T. Carroll, a very seasoned and experienced subrogation lawyer, joined our Chicago office in May of 2006 as a Member of the Subrogation & Recovery Department. Philip specializes in handling property damage subrogation claims. He previously was a Member with a firm where he handled national and international subrogation matters. Philip is active in the National Association of Subrogation Professionals ("NASP"), serving as a co-track leader for the 2006 Conference and as a lecturer.

Philip is admitted to practice in Michigan and before the U.S. District Court for the Eastern District of Michigan. He earned his undergraduate degree from the State of New York at Stony Brook in 1993 and his law degree from the University of Detroit Mercy Law School in 1997.


Heidi Van Steenburgh

The Philadelphia office welcomed two new attorneys – **Heidi Van Steenburgh** who has joined the Workers' Compensation Group and **Nicola Rochester** who has joined the Subrogation and Recovery Group. Heidi concentrates her practice in workers' compensation matters. She has experience litigating multi-jurisdictional property damage claims from initial investigation through post-trial motions. She handled matters affecting a WBE union construction firm and has defended employers in workers' compensation matters and insurance companies in bad faith lawsuits.

Heidi earned her law degree from the Dickinson School of Law of The Pennsylvania State University, where she was Symposium/Articles Editor of The Dickinson Law Review, and her undergraduate degree from Lafayette College, where she was a member of Phi Alpha Theta (History Honor Society). Following law school, Heidi served as a law clerk to the Honorable James C. Hogan of the Northampton County Court of Common Pleas. She is admitted to practice in Pennsylvania and New Jersey.


Nicola Rochester

Nicola Rochester was in our 2005 Summer Associate Program. She is also a graduate of the Dickinson School of Law of The Pennsylvania State University. She received her Bachelor of Arts from Emory University, in Atlanta, GA. During her tenure at Dickinson, Nicola served as the vice-president of the Minority Law Students Association, and the Managing Editor of the Dickinson Environmental Law Review. Nicola was also a participant in the Gourley Mock Trial Completion and she placed 3rd in the 2004 SBA Mock Trial Competition. Nicola has been an active volunteer with the Big Brothers Big Sisters Program for the past six years. While at Emory, she helped organize a similar program call "Emory Bigs."


Kyla McKelvey

Kyla McKelvey has joined the Seattle Office in the Subrogation and Recovery Group. She is a graduate of the Seattle University School of Law. She received her undergraduate degree from Santa Clara University where she earned a B.S., Psychology, and graduated cum laude. Kyla was born in Spokane, Washington. In law school, she was a member of the Moot Court Board. She is a member of the Access to Justice Institute and has previously volunteered at the UCSF Medical Center and at a home for

Continued on page 16

battered women and children. Between college and law school, Kyla worked for a commercial real estate firm. She loves to travel and has "lived" in France, Spain and Chile. Kyla spends much of her free time training for marathons, half-marathons and triathlons. She is fluent in French and Spanish.


Pamela Pengelley

Pamela Pengelley (Toronto), graduated from Osgoode Hall Law School, York University with a Bachelor of Laws (LL.B.), and the University of Toronto with a Bachelor of Science in Psychology, with High Distinction and a scholarship for academic excellence. Pamela is an accomplished writer, having received a creative writing award in 2002, and having received the Canadian Law Library Review's award in 2005 for the Feature Article of the Year. Pamela was called to the Bar of Ontario in July after having served as an articling student with Cozen O'Connor for the past year.

WHAT A DIFFERENCE A COURT MAKES

A West Virginia federal court and a West Virginia state court reached vastly different conclusions on the effect of discarding evidence on a "malfunction theory" case, a theory that relies on circumstantial evidence to prove that a product is defective. If the plaintiff cannot identify the precise defect, his products liability action may be sent to the jury as long as the evidence shows that the malfunction in the product would not ordinarily happen in the absence of a defect. Whereas the federal court refused to apply the state's products liability law, and ruled the expert testimony inadmissible, the state court allowed the case to proceed to trial.

A. BRYTE V. AMERICAN HOUSEHOLD INC., 4TH CIR., NO. 04-1051

In this case filed in federal court, a West Virginia fire marshal did not preserve any artifacts from the area of fire origin, including an electric blanket he believed to have caused the fire. The fire resulted in the death of a handicapped woman who had wrapped herself in the blanket before falling asleep in her chair.

The decedent's estate hired an expert, who sought to prove that the blanket was defective. Because there was no physical evidence, plaintiff relied solely on the fire marshal's and expert's testimony to establish the cause of the fire. "Too speculative," the court concluded, ruling that both the expert's testimony and the fire marshal's testimony were inadmissible.

Whereas the law of West Virginia acknowledges that a product defect can be proven by circumstantial evidence, the federal court held that the issue before it had to do with the admissibility of the expert's testimony, an issue involving the federal rules. Accordingly, the court refused to apply West Virginia common law of causation. ("State law, whatever it may be, is irrelevant.") Instead, the court

looked to the federal rules governing the admissibility of expert evidence.

B. BENNETT V. ASCO SERVICES, ET AL., JAN. 05-NO. 31947 (W.V. 2005)

When state law was applied to a similar dispute in West Virginia state court, discarding evidence had less drastic consequences. This case illustrates that circumstantial evidence may show a malfunction in the product.

In this case, Mr. and Mrs. Bennett awoke after midnight to find their Toyota Camry on fire in their garage. The fire resulted in a total loss of the home and its contents. The three-year-old house included a burglar and fire alarm system that did not trigger any audible or visual warnings on the night of the fire.

The Bennetts' homeowner's carrier and car insurance carrier investigated the fire. Before the investigation, Mr. Bennett informed the carriers that he saw the fire burning initially in the Toyota. He also told them that he believed it spread throughout the house because the fire alarm system failed to operate properly. None of the investigators examined or removed any portion of the alarm system, and the entire system was destroyed during debris removal a few weeks after the fire. The investigators conducted an inconclusive examination of the Toyota, and thereafter disposed of it.

Despite the total absence of physical evidence, the Bennetts brought suit against Toyota, the manufacturer of the fire alarm system and its installer. The trial court dismissed all products liability claims because the Bennetts were unable to identify the precise defects and/or causes of the fire.

On appeal, the issue was whether the Bennetts had produced enough evidence to permit a jury to decide whether a defect existed in the Toyota and/or the alarm system.

Mr. and Mrs. Bennett brought forth evidence that the Toyota was regularly maintained and serviced, was not previously exposed to neglect or abnormal use, and was not being misused at the time of the fire. Their expert reported that a gasoline can and gasoline-powered equipment in the garage lacked an ignition source and could not have been the cause of the fire. The burn patterns in the garage supported the theory that the Toyota was the origin of the fire. The appellate court held that this evidence was sufficient to allow the jury to decide whether the fire was caused by a defect in the Toyota.

With regard to the alarm system, the Bennetts' expert testified that the system should have alerted the homeowners to the fire in less than one minute, based on the proximity of the heat detectors to the garage. However, the fire was burning for twenty to thirty minutes before smoke detectors sounded. The alarm system did not alert the Bennetts and never issued any type of warning throughout the night of the fire. The court held that this evidence, too, was sufficient for jury consideration. The issue of whether a defect in the alarm system allowed the fire to spread throughout the house was one for the jury. Accordingly, the case was allowed to proceed to trial.

2. Two Cases Uphold Landlord/Tenant Subrogation

When a company insures a landlord, when may it pursue subrogation against a tenant who negligently caused the loss? The cases are fact-sensitive and involve a wide variety of lease provisions that define the relationship between the landlord and tenant. In the following two cases, the courts allowed subrogation against the tenant to go forward.

A. PHOENIX INSURANCE COMPANY V. STAMELL, 21 A.D.3D 118, 796 N.Y.S.2D 772 (A.D. FOURTH DEPT. 2005)

The Campus Candle Fire. A recent decision in New York allows a fire insurer to subrogate against a college dorm resident who caused a candle fire. New York's appellate court focused on public policy considerations as well as the provisions of a college handbook that imposed personal responsibility on the student for her own acts of negligence.

The facts of this case are all too recognizable: in her room in the residence hall after midnight, the student lit a candle and then fell asleep. The burning candle caused a fire in her room, and then spread to other areas of the dormitory.

The college's insurer brought a subrogation action against the student, who was insured under her parents' homeowners policy. The parents' insurer denied any responsibility for the loss, claiming that the student, as a tenant in the residence hall, should be covered by the college's policy, since she was a resident in a college dormitory. Comparing a resident in a dorm to a tenant in an apartment, the parents' insurer argued that the antisubrogation rule generally bars insurers of landlords from seeking subrogation from tenants.

The court was not convinced. In the landlord/tenant context, New York holds that a tenant will not be released from tort liability for a fire unless the lease clearly and unequivocally exempts the tenant from its own acts of negligence. The governing contract in this case was a Contract/Handbook issued to all students, which provided that the student would be responsible for any loss, damage, repair or replacement of property beyond normal wear and tear. It also provided that the student was financially responsible for damages in the residence halls that were caused by their "careless acts, willful, or malicious actions." There was nothing in writing exempting the student for the consequences of her own negligence.

In addition to the provisions in the student handbook, the court cited a broader concern that responsibility should be placed on the person who "in equity and good conscience" ought to pay for the loss. Accordingly, the court allowed the college's fire insurer to maintain a subrogation action against the student.

B. THE TRAVELERS INDEMNITY COMPANY OF AMERICA V. BRUCE DEGUISE, ET AL. 2006 VT. 87 (VT. 2006)

The Supreme Court of Vermont also focused on the explicit provisions of a residential lease that clearly outlined the tenants' responsibility to pay for damages caused by their negligence. In this case, tenants in a multi-unit building in a multi-building complex emptied smoldering materials from an ashtray into a trash can or wastebasket, causing a fire that damaged their apartment.

The landlord's insurer filed a subrogation action against the tenants, who argued that the lease obligated the landlord to obtain insurance for the tenants' benefit. They relied on a lease provision titled "Hazards," which stated that tenants "shall not undertake, or permit [their] family or guests to undertake any hazardous acts or do anything that will increase the development's insurance premiums." According to the tenants, this provision demonstrates the parties' implied expectation that the landlord would maintain an insurance policy.

The court rejected that argument, stating that it was based on an erroneous assumption that any mention of an insurance policy is enough to create a presumption that the tenants were covered by the policy. Other express provisions in the lease clearly outlined the tenants' personal responsibility to pay for damages caused by their negli-

gence. No public policy considerations overrode or contradicted those clear terms.

3. A Waiver of Subrogation Is Ineffective in a Water Loss Claim

A. DUANE READE V. REVA HOLDING CORP., ET AL, 818 N.Y.S.2d 9 (A.D. 1ST DEPT. 2006)

When the drug store, Duane Reade, suffered water leaks and frozen pipes, it filed a claim against its landlord, Reva Holding Corporation, for personal property and business interruption losses. Reva Holding had hired a contractor to add a second story on the building. The contractor, however, left holes in the roof that were open and unsealed, exposing Duane Reade's water pipes to weather.

Reva Holding moved for dismissal of Duane Reade's action, arguing that it was barred by a waiver of subrogation in the lease.

The lease obligated Duane Reade to obtain general liability and broad form personal property coverage, but not business interruption coverage. The waiver of subrogation clause stated that neither party would be liable to the other for "any business interruption or property losses occurring in the building," whether or not caused by the negligence or fault of either party.

The court held that the waiver of subrogation covered only losses that were covered by insurance. Since Duane Reade did not carry insurance against its business interruption losses, and since the lease did not require such coverage, the waiver was not applicable to those losses.

The waiver also did not bar Duane Reade's claim for personal property losses, as those losses were within the deductible under the policy. The lease allowed the personal property coverage to be subject to a deductible, therefore Duane Reade could maintain a subrogation action to recover the property losses up to the amount of its deductible. Under New York law, a waiver of subrogation does not bar recovery of a loss to the extent that such loss is not covered by insurance.

4. Conclusions Without Facts Are Fatal to a Case

A. GONZALES V. SHING WAI BRASS & METAL WARES FACTORY LTD., TEX. CT. APP., 4TH DIST., NO. 04-05-00235-CV, 12/28/05

Where an expert states that an electrical failure of a lamp caused an accidental fire, without specifying a defect, his testimony is insufficient to go before a jury. A residential fire originated in the area of a bedroom nightstand, on which a lamp stood. Plaintiff's experts submitted a report stating that the lamp "was defective because an electrical failure occurred at the socket base/switch assembly, causing ignition of the cardboard type sleeve around the terminal screws of same."

The court held that this expert opinion constituted no evidence at all, lacking any facts describing the nature of the electrical failure and the specifics of the defect. The opinion created a mere surmise that a defect existed when the lamp left its manufacturer. The experts were barred from testifying and summary judgment was granted to the defendants.

5. Lack of Expert Testing by an Expert Fails to Establish Reliability

A. J.D. AND KIMBERLY WRIGHT V. CASE CORP., NO. 1:03-CV-1618-JEC (N.D. GA. 2006)

Proving that the locking mechanism on a front end loader is improperly designed requires the right expert. He must have more experience with loaders than working in his

own backyard, he must compare loader designs from different manufacturers, and he must test the locking mechanism he recommends as a safer alternative. Anything less risks his dismissal from a federal court action.

Mr. Wright suffered severe head injuries when the loader moved as he tried to exit. Wright had raised the seat bar to activate the parking brake and lock the controls. He claimed that the seat bar malfunctioned, but the manufacturer claimed that Wright hit and activated a control as he slid out of the loader.

Plaintiffs retained a mechanical engineer in an effort to establish that there was a safer alternative locking mechanism. The engineer had no experience with loaders beyond working in his backyard. He examined the evidence, but did not compare the loader's design to other manufacturers'. He conducted no testing on the locking mechanism he recommended, and did not refer to any industry standard governing the design.

Because the engineer only "conceptualized" his proposed modification, the court ruled that he was not qualified to testify under the Daubert standard.

6. As Sanctions for Spoliation of Evidence, the Court Excludes the Only Expert Who Personally Inspected the Fire Scene

A. BRIAN AND ELIZABETH WAGONER V. BLACK & DECKER (U.S.) INC., COV/MP/05-1537 (D. MINN. 2006)

Black & Decker manufactured a toaster oven suspected of causing a fire in Mr. and Mrs. Wagoner's kitchen. During the fire suppression, firefighters aggressively overhauled the scene. They tore down the kitchen ceiling, removed it from the house, and removed most of the debris from the kitchen to the outside. The Wagoners' fire expert salvaged and retained the toaster oven, burnt cabinets, a can opener, a dishwasher and the duplex receptacle to which the toaster oven and can opener had been connected before the fire. He also comprehensively photographed the interior and exterior of the house, and instructed the Wagoners not to clean up the fire scene until potential defendants could inspect it.

On the weekend before Black & Decker's inspection was scheduled, Mr. Wagoner demolished the kitchen. As a result, Black & Decker asked the court to sanction the Wagoners for the destruction of evidence crucial to determining the cause and origin of the fire.

Defendant's experts testified that a fire investigator is severely disadvantaged if he has not personally inspected the fire scene. They cited NFPA 921 to persuade the court that the fire scene itself is the best evidence to determine origin and cause. They argued that in this case, the photographs did not adequately document the fire scene and did not sufficiently allow them to analyze heat, burn and smoke patterns or to identify characteristics of combustibles in the fire.

According to the defendant, plaintiff had the advantage of being able to take measurements at the fire scene, examine the wiring in the kitchen, personally observe smoke and burn patterns, examine the contents of the kitchen, examine the debris removed by the firefighters, examine circuit breakers, take photographs and samples, analyze the combustibles and attempt to reconstruct the kitchen before the fire.

The court agreed that sanctioning plaintiffs was warranted because Black & Decker was "clearly" prejudiced, but stopped short of ordering wholesale exclusion of all cause and origin evidence, as Black & Decker had requested. Instead, the court excluded from plaintiffs'

case in chief any testimony by plaintiff's fire investigator, the sole expert who personally inspected the fire scene, and any evidence obtained during that investigation.

RECENT RECALLS

In August of 2006, Apple and the Consumer Product Safety Commission ("CPSC") announced a recall of batteries used in IBook and PowerBook computers due to fire hazard. The product was a rechargeable, lithium-ion battery with cells manufactured by Sony for certain IBook G4 and PowerBook G4 notebook computers. Apple had received nine reports of batteries overheating, including two reports of minor burns from handling overheated computers and other reports of minor property damage. No serious injuries were reported.

The CPSC, in cooperation with Onward Manufacturing and John Deere, announced a voluntary recall of John Deere gas barbeque grills in September of 2006. The grills are manufactured by Onward Manufacturing of Waterloo, Ontario, Canada, imported by Mi-T-M Corporation of Peosta, Iowa, and sold at Deere & Company retail stores. Operating the grill in windy conditions can blow the flame under the control panel, causing the grill to overheat or cause flashbacks. Flames could damage the hose that supplies gas to the burner, causing an uncontrolled flame and a fire hazard.

The John Deer gas barbeque grills with Model Numbers HR-BG6203 and HR-BG5202 have been recalled.

The CPSC also announced in September, in cooperation with Canon, Inc., a voluntary recall of Canon desktop copiers manufactured by Canon, Inc. of Japan. An improperly fitted electrical connection inside the copiers can cause overheating, smoking and fire. Canon had received six reports of NP1020 Model copiers starting to smoke or catch on fire due to the problem with the electrical connection. The repair recall includes the following model Canon copiers: PC6, PC6RE, PC65, PC7, PC7RE, PC8, PC11, PC11RE, PC12, NP1010 and NP1020.

COZEN O'CONNOR ATTORNEYS

DIRECTORY OF OFFICES & CONTACT ATTORNEYS

Elliott R. Feldman, Esquire
Chairman, National and International Subrogation & Recovery Department
Cozen O'Connor, 1900 Market Street, Philadelphia, PA 19103
800.523.2900 or 215.665.2071 • Fax: 215.701.2071 • efeldman@cozen.com

ATLANTIC REGIONAL OFFICES

Regional Managing Attorney:
Kevin J. Hughes, Chairman
Atlantic Regional Subrogation Group
Tel: 215.665.2739 or 800.523.2900
Fax: 215.665.2013
Email: khughes@cozen.com

1900 Market Street
Philadelphia, PA 19103

200 Four Falls Corporate Center
Suite 400
West Conshohocken, PA 19428

Chase Manhattan Centre
1201 North Market Street
Suite 1400
Wilmington, DE 19801

1627 I Street NW, Suite 1100
Washington, DC 20006

457 Haddonfield Road, Suite 300
PO Box 5459
Cherry Hill, NJ 08002-2220

144-B West State Street
Trenton, NJ 08608

MIDWEST REGIONAL OFFICES

222 South Riverside Plaza
Suite 1500
Chicago, IL 60606
Tel: 312-382-3100 or 877-992-6036
Fax: 312-382-8910
Contact: James I. Tarman
jtarman@cozen.com

NORTHEAST REGIONAL OFFICES

John B. Galligan
Tel: 212-908-1276
Fax: 212-509-9492
jgalligan@cozen.com

45 Broadway Atrium, 16th Floor
New York, NY 10006

909 Third Avenue
New York, NY 10022

One Newark Center, Suite 1900
1085 Raymond Boulevard
Newark, NJ 07102

NORTHWEST REGIONAL OFFICES

Washington Mutual Tower,
Suite 5200
1201 Third Avenue
Seattle, WA 98101
Tel: 206.340.1000 or 800.423.1950
Fax: 206.621.8783
Contact: Mark Anderson
Email: manderson@cozen.com

ROCKY MOUNTAIN REGIONAL OFFICE

707 17th Street, Suite 3100
Denver, CO 80202
Tel: 877.467.0305
Fax: 720.479.3890
Contact: Brad W. Breslau
E-mail: bbreslau@cozen.com

SOUTH CENTRAL REGIONAL OFFICES

2300 BankOne Center
1717 Main Street
Dallas, TX 75201
Tel: 214-462-3005 or 800-448-1207
Fax: 214-462-3299
Contact: Stephen M. Halbeisen,
shalbeisen@cozen.com

One Houston Center
1221 McKinney Street, Suite 2900
Houston, TX 77010
Tele: 832-214-3916 or 800-448-8502
Fax: 832-214-3905
Contact: Jason Schulze
jschulze@cozen.com

SOUTHEAST REGIONAL OFFICES

SunTrust Plaza, Suite 2200
303 Peachtree Street, NE
Atlanta, GA 30308
Tel: 404.572.2000 or 800.890.1393
Fax: 404.572.2199
Contact: Samuel S. Woodhouse,III
Email: swoodhouse@cozen.com

One Wachovia Center, Suite 2100
301 South College Street
Charlotte, NC 28202
Tel: 704.376.3400 or 800.762.3575
Fax: 704.334.3352
Contact: T. David Higgins
Email: dhiggins@cozen.com

Wachovia Financial Center
200 South Biscayne Boulevard
Suite 4410
Miami, FL 33131
Tel: 800.215.2137 or 305.704.5940
Contact: T. David Higgins
E-mail: dhiggins@cozen.com

WEST REGIONAL OFFICES

501 West Broadway, Suite 1610
San Diego, CA 92101
Tel: 619.234.1700 or 800.782.3366
Fax: 619.234.7831
Contact: Thomas M. Regan
Email: tregan@cozen.com

777 South Figueroa Street, Suite 2850
Los Angeles, CA 90017
Tel: 213.892.7900 or 800.563.1027
Fax: 213.892.7999
Contact: Mark S. Roth
Email: mroth@cozen.com

425 California Street, Suite 2400
San Francisco, CA 94104
Tel: 415.617.6100 Fax: 415.617.6101
Contact: Philip A. Fant
Email: pfant@cozen.com

125 Lincoln Avenue, Suite 400
Santa Fe, NM 87501-2055
Tel: 505.820.3346 or 866.231.0144
Fax: 505.820.3347
Contact: Harvey Fruman
Email: hfruman@cozen.com

INTERNATIONAL OFFICES

9th Floor, Fountain House
130 Fenchurch Street
London EC3M 5DJ
Tel: +44 (0)20 7864 2000
Fax: +44 (0)20 7864 2013
Contact: Simon David Jones
Email: sdjones@cozen.com

1 Queen Street East, Suite 2000
Toronto, Canada M5C 2W5
Tel: 416.361.3200
Fax: 416.361.1405
Contact: Brett E. Rideout
Email: brideout@cozen.com
Contact: Christopher Reain
Email: creain@cozen.com

AFFILIATED COMPANIES

National Subrogation Services, LLC
350 Jericho Turnpike,
Suite 310
Jericho, NY 11753
Tel: 877.983.3600
Fax: 516.949.3621
Contact: Sherri Kaufman
Email: skaufman@nationalsubrogation.com
Contact: Jerry Nolan
Email: jnolan@nationalsubrogation.com

PLEASE CONTACT ANY OF OUR OFFICES FOR ADDITIONAL INFORMATION OR VISIT US ONLINE AT WWW.COZEN.COM