LEGAL UPDATE ON RELEVANT SUBROGATION ISSUES

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I. Introduction

As we continue in our efforts to aggressively pursue subrogation recoveries on your behalf, we are confronted with a multitude of legal impediments. Over the last several years, we have seen an increasing number of court decisions addressing significant issues such as spoliation, economic loss, exculpatory clauses and waivers of subrogation. Whereas these issues

received less attention by the courts in the past, courts today are more aggressively addressing these issues establishing limitations on legal recoveries. The following discussion seeks to update subrogation practioners on recent developments in the Mid Atlantic region effecting the practice.

II. The Spoliation Doctrine

Spoliation of evidence has traditionally been defined as the destruction or material modification of evidence by an act or omission of a party. Typically, in order to avoid sanctions in the form of dismissal, striking expert testimony or a negative inference charge to the jury, a party must establish that all material evidence with respect to its claims or defenses has been preserved and/or made available for inspection. Spoliation issues usually arise in the context of product liability claims where a plaintiff is alleged to have destroyed or modified evidence which the plaintiff claims caused the resulting harm. In those cases where a design defect is alleged, some courts have found no spoliation where the alleged design defect is common to all in the product line. However, where manufacturing defects are alleged and the plaintiff is unable to produce for inspection the product, Courts have sanctioned the plaintiff and, in some instances, dismissed the claim. As a result of these decisions, spoliation issues are arising more frequently with important ramifications to the subrogation practice.

A. Pennsylvania

The applicable test under Pennsylvania law for determining whether the spoliation doctrine should apply was originally stated in **Schmid v. Milwaukee Tool Corp.**, 13 F.3d 76 (3d Cir. 1994), and most recently adopted in **Schroeder v. Dept. of Transp. of Pennsylvania**, 710 A.2d 23 (Pa. 1998), and **Pia v. Perrotti**, No. 3549 Philadelphia 1997 (Pa. Super., Sept. 22, 1998).

In Schroeder, the Pennsylvania Supreme Court applied a three-factor test for determining the proper penalty for the spoliation of evidence. The factors to be considered are: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) the availability of a lesser sanction that will protect the opposing party's rights and deter future similar conduct. In Schroeder, the court dismissed plaintiff's product liability claim because the salvage company that stored the truck sold parts of the truck that were the subject of the plaintiff's claim. Notwithstanding that the plaintiff's action ultimately led to the loss of the truck parts, there was no evidence that the loss of the truck parts was undertaken negligently or in bad faith.

The Pennsylvania Supreme Court, addressing for the first time the issue of spoliation, held that since the plaintiff's claim was based on a design defect common to all trucks of its kind, the prejudice to the defendants was not great since they could test and examine other trucks for the alleged design defect. The court further held that although summary judgment was not warranted in this instance, a lesser sanction in the form of a jury instruction allowing a negative inference against the plaintiff was warranted. Schroeder adopts the Schmid test to be used in determining the appropriate sanction for spoliation of evidence which is the subject of the litigation.

In Pia, the Superior Court applied the three-factor test from Schmid and Schroeder and concluded that plaintiff failed to preserve evidence which was "collateral" to her theory of liability, therefore justifying an adverse inference charge to the jury. In Pia, plaintiff alleged that a fire originating in a metering cabinet located in the southwest corner of a produce warehouse, occupied by her tenant, occurred as a result of defendants' failure to adequately tighten electrical wires located inside the cabinet. After the fire, plaintiff and her experts removed and preserved the metering cabinet and related electrical wiring which she claimed caused the fire. Plaintiff did not remove certain property of her tenant, including an electrical forklift, pallet jack and battery chargers which were also located in the southwest corner of the warehouse. Plaintiff's tenant then proceeded to clean the premises and the above items were discarded. When defendants requested an opportunity to examine the electrical machinery, they were informed that it was no longer available. During trial, the lower court instructed the jury that it could draw an adverse inference against the plaintiff because of her inability to produce collateral evidence to the defendants for inspection.

The Superior Court held that the jury instruction was proper despite arguments from the plaintiff that she never had possession or control of the evidence complained of; that she did not dispose of the evidence complained of; that the defendants made no attempt to retrieve the evidence they claimed they were entitled to inspect; that plaintiff did not act in bad faith; and that all of the evidence relied upon by the plaintiff was properly preserved. The court, nevertheless, applied the three-factor test from Schmid and Schroeder and determined that the trial court's jury instruction was proper under the circumstances. Importantly, the Court properly acknowledged that a plaintiff has no obligation to preserve the entire fire scene. Pia is now on appeal to the Supreme Court through a request for allocatur filed on October 16, 1998.

Other recent decisions have clarified the parameters of the spoliation doctrine in Pennsylvania. In **Dansak v. Cameron Coca-Cola Bottling Co., Inc.**, 703 A.2d 489 (Pa. Super. 1997), the court held that the spoliation doctrine did not warrant summary judgment where the plaintiff was not directly responsible for disposing of a broken glass bottle. A factor in the court's decision was that the plaintiff could identify through circumstantial evidence the allegedly defective bottle that caused the injury. Moreover, in **Elias v. Lancaster General Hospital**, No. 3230 Philadelphia 1997 (Pa. Super. 1997), the court refused to recognize a cause of action for negligent spoliation of evidence in cases where a third party destroys evidence that is material to a potential civil action.

B. New Jersey

In **Aetna Life and Casualty Co. v. IMET Mason Contractors**, 707 A.2d 180 (N.J. Super. 1998), the appellate division affirmed a lower court's dismissal of the plaintiff's claim based on the spoliation doctrine. In Aetna, an insurer's subrogation claim was dismissed since the defendant in the action was not afforded an opportunity to inspect a truck that allegedly started a fire at a construction site. The court adopted a four-part test, originally stated in **Hirsch v. General Motors Corp.**, 628 A.2d 1108 (N.J. Super. 1997), for determining whether there is a duty to preserve evidence. Under this test, a duty arises where there is: (1) pending or probable litigation involving the defendants; (2) knowledge by the plaintiff of the existence or likelihood of litigation; (3) foreseeability of harm or prejudice to the defendants; and (4) evidence relevant to the litigation. The court held that the plaintiff had breached its duty to the defendant by failing

to preserve the truck as evidence. Moreover, the court held that, in this instance, the ultimate sanction of dismissal was, in fact, warranted.

The Court in **Proske v. St. Barnabas Medical Center**, (N.J. App. Div., June 23, 1998), held that negligent spoliation of evidence is not an independent tort. However, in **Callahan v. Stanley Works**, 703 A.2d 1014 (N.J. Super. 1997), the Court found a building supply store negligent for failing to preserve a pallet and doors that fell from a forklift and injured an employee where the employee had filed a claim against a third party. The court held that since the store voluntarily undertook to preserve the evidence but failed to do so, the store could be liable for the negligent spoliation of evidence.

C. Delaware

In **Lucas v. Christiana Skating Center, Ltd.**, 1998 WL 437141 (Del. Super. 1997), the court refused to recognize negligent and intentional spoliation of evidence as an independent tort. The plaintiff was allegedly injured when roller-skating at the defendants' skating rink with roller-skates that were rented from the defendants. The plaintiff then brought an action against the defendants for negligence. Approximately one year after the alleged injury, the plaintiff sought to obtain the roller skates that she was using when the injury took place. However, the plaintiff was informed that the particular skate that she sought was no longer available. At this time, the plaintiff filed a motion to amend her complaint to include counts for negligent and intentional spoliation of evidence. The court, however, denied the motion. The Superior Court held that Delaware does recognize the general rule that where a litigant intentionally suppresses or destroys pertinent evidence, an inference arises that such evidence would be unfavorable to the plaintiff's case. However, the court in Lucas refused to recognize an independent cause of action based on the defendants' negligent or intentional spoliation of evidence.

D. Maryland

In **Anderson v. Litzenberg**, 694 A.2d 150 (Md. App. 1997), the court upheld a trial court's jury instruction that an adverse presumption could arise against the spoliator of evidence. In Anderson, a traffic accident occurred after the tarp that had been covering the bed of a truck blew off of the truck and struck an oncoming vehicle which, in turn, collided into another vehicle. After the truck was inspected by the owner's insurance company, certain parts of the tarp system were discarded by the owner's employees. The court held that, even though the owner's negligence did not cause the absence of the parts of the tarp system that were discarded, an adverse presumption may arise against the owner. Moreover, the court held that although the spoliation of evidence causes an adverse presumption even in the absence of negligence on the part of the spoliator, there is no independent cause of action based on the negligent or intentional spoliation of evidence.

E. Legal Trends in the Spoliation Doctrine

Recent case law indicates several trends in the spoliation arena. Most notably, courts are taking the view that the spoliation of evidence is much more prejudicial to the defense when the plaintiff's claim is not based on a design defect common to all products of a single

type. The rationale behind this view is that where the plaintiff's claim is based on a design defect (not a defect of the particular item or product that allegedly caused harm), the defense can test theories and present evidence based on other similar items or products. The Pennsylvania Supreme Court's decision in Schroeder illustrates this trend.

Another trend is the courts' willingness to recognize the negligence or intentional spoliation of evidence where the spoliator of the evidence undertook a duty to safeguard the evidence and failed to perform that duty. Traditionally, courts have been unwilling to recognize the negligent or intentional spoliation of evidence by a third party as an independent tort. However, the decision in Callahan represents the possibility that third parties can be held liable for spoliation of evidence if they voluntarily undertake to safeguard the evidence but fail to do so.

III. The Economic Loss Doctrine

The purpose of the economic loss doctrine is to separate the spheres of tort and contract law. The application of the economic loss doctrine serves to limit the availability of tort claims based on negligence and strict liability to situations where the allegedly defective product has caused harm to property other than itself. The rationale underlying the doctrine is that where a product causes harm only to itself, there are adequate remedies in the sphere of contract law to redress the plaintiff's claims. Generally, in order to proceed under tort theories of negligence and strict liability, the plaintiff must prove that the defective product caused harm to "other property."

A. Federal Authority

In **Saratoga Fishing Co. v. J.M. Martinac & Co.**, 520 U.S. 875 (1997), the United States Supreme Court applied and clarified the East River doctrine under which an admiralty tort plaintiff cannot recover for physical damage that a defective product causes to the "product itself." As a reminder, the East River Court held that an injury to a defective product, even though physical, constituted an economic loss not properly recoverable under tort law. See **East River Steamship Corp. v. Transamerica Delaval, Inc.**, 476 U.S. 858 (1986). In Saratoga Fishing, the owner of a fishing vessel which caught fire and sank brought suit against the builder of the vessel and the designer of the vessel's hydraulic system. The Court held that the owner of the ship could recover for the loss of equipment (an extra skiff, nets and spare parts) that was placed on the vessel after the vessel was sold into the stream of commerce. Consistent with the East River doctrine, any equipment added to a product after the manufacturer or distributor, selling in the initial distribution chain, has sold the product to an initial user is not part of the "product itself," but is "other property."

In **Sea-Land, Inc. v. General Electric Co.**, 134 F.3d 149 (3d Cir. 1998), the court further clarified the East River doctrine. In Sea-Land, the court held that a commercial party purchases "one product" for purposes of the East River doctrine if all of the components of the product are purchased at one time, regardless of who assembled the components into a completed product. In Sea-Land, a vessel owner brought a tort claim against the manufacturer of a diesel engine for damage caused to the entire engine by a connecting rod in the engine. The court held that the engine, and not just the connecting rod, was the "product" under the economic

loss doctrine. Consequently, the plaintiff was limited to contract claims in recovering for damage to the engine.

B. Pennsylvania

In **2-J Corp. v. William E. Tice, III**, 126 F.3d 539 (3d Cir. 1997), the court held that, in Pennsylvania, the economic loss doctrine does not bar recovery in tort for damage that a product causes to other property simply because the damage to other property was foreseeable if the defective product were to fail. In 2-J, a commercial purchaser of a pre-engineered warehouse sued to recover in tort for damage caused to the contents of the warehouse when the warehouse collapsed. The court, citing Saratoga Fishing, held that the "product" is no more and no less than that which the manufacturer placed into the stream of commerce. Here, since only the warehouse was the "product," the court found that the plaintiff could recover for damage to property subsequently placed inside the warehouse.

In **White v. Patriot Homes**, 28 Mercer 411 (Pa. Comm. Pl., June 25, 1998), the court held that the economic loss doctrine barred recovery in tort where a plaintiff sought damages for a defective mobile home. Although the court held that recovery for damages to the mobile home itself were barred, the court held that the plaintiff could seek to recover under tort theories for damage that the mobile home caused to a driveway and a yard.

C. New Jersey

In **Alloway v. General Marine Industries**, 695 A.2d 264 (N.J. 1997), the New Jersey Supreme Court held that plaintiffs, who sued to recover for damages sustained when their boat sank while docked at a Manahawkin marina, were limited to contract remedies. The boat sank because of a defective seam in the boat's swimming platform. Since the plaintiffs did not allege any personal injury or damage to "other property," the court held that the plaintiffs could not bring claims based on negligence and strict products liability. Instead, New Hampshire Insurance Company, the subrogating insurer of the owner of the boat, was limited to recovery based on breach of warranty.

D. Delaware

In **Bell Helicopters Textron, Inc. v. Tridair Helicopters, Inc.**, 982 F. Supp. 318 (D. Del. 1997), a federal district judge held that the economic loss doctrine, under Delaware law, could not bar a plaintiff's trade secret misappropriation claim. The court noted that the Supreme Court of Delaware has not extended the economic loss doctrine beyond claims against suppliers of defective goods. In the present case, the court held that the misappropriation of trade secrets does not hurt the product itself. The court further held that, to date, the economic loss doctrine has only been applied by Delaware courts where the parties to the transaction have allocated the risk of product nonperformance through the bargaining process.

E. Maryland

Maryland cases have consistently limited the recovery of damages to contractual damages where the relationship between the parties is strictly contractual and the defendant's claim is essentially based on the defendant's failure to perform the contract. This rationale has

been based on two principles: first, where the parties' relationship is contractual, the parties have the opportunity to ensure against losses through the terms of the contract; and second, where the parties are sophisticated in business affairs, they may determine the allocation of risks between them through negotiation. See **Martin Marietta Corp. v. Int'l Telecommunications Satellite Organization**, 763 F. Supp. 1327 (D. Md. 1991); see also **Nixon Uniform Service, Inc. v. American Directory Service Agency, Inc.**, 693 F. Supp. 367 (D. Md. 1988).

The second principle stated above could have been erased in **Reliance Insurance Co. v. Carver Boat Corp.**, 1997 WL 714900 (D. Md. 1997). In Reliance, the court held that the East River doctrine, under which a plaintiff in admiralty is limited to recovery in contract for damage to the "product itself" and not to "other property," applies in a non-commercial context as well as a commercial context. Previously, this court had held in **Sherman v. Johnson & Towers Baltimore, Inc.**, 760 F. Supp. 499 (D. Md. 1990) that East River did not apply to consumer (non-commercial) transactions. However, in light of recent decisions in admiralty law, this court decided in Reliance that the East River doctrine limited a consumer's attempt to recover for damages resulting from a fire on board a yacht built by the defendant.

F. Legal Trends in the Economic Loss Doctrine

Two important trends have emerged from recent case law concerning the economic loss doctrine. First, courts have clarified their interpretation of the "product" as opposed to "other property." Pursuant to the United States Supreme Court's decision in Sea-Land, a product whose components were purchased at the same time is considered the "product" for purposes of the economic loss doctrine. Second, pursuant to the United States Supreme Court's decision in Saratoga Fishing, and the Third Circuit's decision in 2-J, a "product" for purposes of the economic loss doctrine is no more and no less than that which the manufacturer placed into the stream of commerce. Moreover, 2-J illustrated the trend that the economic loss doctrine will not bar recovery in tort merely because the property loss was foreseeable in the event of the failure of a defective product.

IV. Exculpatory Clauses

Exculpatory clauses, typically seen in documents such as alarm contracts, commercial contracts and lease agreements, are designed to eliminate or limit a party's liability for acts of ordinary negligence. Such clauses are typically enforced, and serve to exculpate a party from liability, where the party seeking to disclaim liability is not engaged in conduct that violates public policy or is considered grossly negligent.

A. Pennsylvania

Under Pennsylvania law, three conditions must be met in order for an exculpatory clause to be valid: (1) the clause cannot contravene public policy; (2) the contract must involve only the private affairs of the parties and not a public matter; and (3) the contract cannot be one of adhesion.

In **Schultz v. DeVaux**, 715 A.2d 479 (Pa. Super. 1998), the court held that an exculpatory clause in a lease agreement did not exculpate a defendant landlord from liability since the defendant's violation of the applicable Building Officials and Code Administrators (BOCA) code could constitute a violation of public policy. In this case, the plaintiff fell from the balcony of a duplex rented by his mother and sued the landlord under a negligence theory. The court held that since the BOCA code is reflective of public policy, the landlord should not be allowed to escape liability based on the exculpatory clause.

In **Horizon Unlimited, Inc. v. Richard Silva and SNA, Inc.**, 1998 WL 88391 (E.D. Pa. 1998), the plaintiff alleged that the defendant violated Pennsylvania's Unfair Trade

Practices and Consumer Protection Law ("UTPCPL") when an airplane kit did not perform as represented in the brochure. The defendant attempted to avoid liability under an exculpatory clause in the contract between the parties. The court held that the exculpatory clause, which purported to release the defendants from any and all liability, did not bar the plaintiffs' action based on a separate statutory remedy for illegal activity inducing the contract. The court refused to read into the exculpatory clause language barring an action under UTPCPL when the parties did not expressly contract for such a provision. Although the court dismissed the plaintiffs' claims for breach of warranty, negligent misrepresentation, and fraud and deceit, the court refused to dismiss the claims based on violation of UTPCPL.

B. New Jersey

In **Marbro v. Borough of Tinton Falls**, 688 A.2d 159 (N.J. Super. 1996), the court held that a limitation of liability provision in a contract between a municipality and an engineering firm limited the engineering firm's liability for professional negligence. The court affirmed that courts should generally enforce contracts as made between parties. The court further held that the express language in the limitation provision, which referred to the engineering firms' "professional negligent acts, errors, or omissions" served to exculpate the engineering firm from liability in excess of the amount specified in the limitation provision.

In **St. Paul Fire and Marine Insurance Co. v. Wells Fargo Alarm Services**, 1995 WL 306642 (D.N.J. 1995), the court held that a defendant alarm company was not liable for fire damage pursuant to a limitation of liability provision in the contract between the parties. In this subrogation action, the insurer sought to recover from the alarm company for fire damage that occurred when the fire alarm system was not operating due to the absence of a back-up battery. The court, in granting partial summary judgment for the alarm company, held that the alarm company's liability was limited by the clause in the contract unless the plaintiff could prove "willful and wanton misconduct" on the part of the alarm company.

C. Delaware

Generally, exculpatory clauses have been held valid in Delaware. However, an exculpatory clause will be deemed invalid if it is unreasonably non-specific. In **The Tandy Corp. v. Fusco Properties, L.P.**, 1996 WL 280774 (Del. Super. 1997), the court construed a contract that contained a "hold harmless" exculpatory provision as well as a "waiver of subrogation" provision. The court held that generally clauses in a lease seeking to exonerate a party from the consequences of its own negligence are looked upon with disfavor. The plaintiff, Tandy (Insurance of North America had a subrogated interest), operated a store in a property owned by the defendant, Fusco. When the roof of the property leaked, Tandy suffered losses due to destroyed equipment. The court held that the hold harmless clause did not preclude liability on the part of the defendant for negligence since the clause did not specifically reference the landlord's negligence.

D. Maryland

While exculpatory clauses are generally presumed valid in Maryland, exceptions exist, and strong public policy will void such a clause if it attempts to excuse reckless, wanton, or gross conduct, results from unequal bargaining power, or results from transactions affecting the public interest.

In **Cornell v. Council of Unit Owners Hawaiian Village Condominiums, Inc.**, 983 F. Supp. 640 (D. Md. 1997), the owner of a condominium unit sued the condominium's governing body after he slipped and fell on a patch of ice and was injured. The court held that the condominium's governing body was released from liability by provisions in the condominium council's bylaws. The bylaws provided that the council would not be liable for injury or damage to persons or property caused by the elements. The council argued, and the court agreed, that the council's bylaws exculpated the condominium council from liability arising from the council's own negligence.

In **M. Adloo v. H.T. Brown Real Estate, Inc.**, 696 A.2d 298 (Md. 1996), Maryland's highest court addressed whether clauses in a real estate listing contract and in a related lock-box authorization are exculpatory clauses which absolve the real estate company from liability for its future negligence. In this case, homeowners who had entered into an exclusive listing agreement for the sale of their home with a real estate company and a lock-box agreement allowing prospective buyers and their agents to enter their home brought an action against the real estate company after personal property was stolen from their home. The court held that the exculpatory clause in the lock-box agreement was not sufficient to exculpate the respondent from liability resulting from its own negligence. The court held that because the clause did not clearly, unequivocally, specifically, and unmistakably express the parties' intention to exculpate the real estate company from liability, the clause was insufficient for that purpose.

E. Legal Trends Related to Exculpatory Clauses

Recent case law reflects the continued willingness of the courts to enforce

contractual provisions drafted between parties in equal bargaining positions. However, as seen in Schultz, exculpatory provisions can be circumvented if the clause violates public policy. Moreover, courts have been willing to enforce clauses exculpating parties for their own negligence as long as the exculpatory language specifically refers to negligence. The courts in Marbro and Cornell reflect this view. However, as seen in Adloo, courts will not construe an exculpatory clause to apply to negligence unless the language of the clause specifically refers to negligence.

V. Waiver of Subrogation Provisions

Waiver of subrogation provisions, typically seen in commercial lease agreements and construction contracts, limit an insurer's ability to assume the rights of its insured by bringing an action against a tortfeasor after it has paid its insured's claim. Since an insurer that assumes the rights of its insured is subject to contracts entered into by its insured, it is necessary

to examine whether contracts contain waiver of subrogation provisions, and how courts treat such provisions.

A. Pennsylvania

In **Federal Insurance Co., et al. v. Richard I. Rubin & Co., Inc.**, 1993 WL 489771 (E.D. Pa. 1993) a fire occurred at the One Meridian Plaza building owned by defendant and leased to various tenants. The lease agreements at issue contained language purporting to waive subrogation. In equating the waiver clause to an exculpatory clause, the court rejected the defendants' argument that the waiver of subrogation clause was not exculpatory in nature and therefore not subject to the strict scrutiny applied by Pennsylvania courts. The court applied the following three-part test to determine whether such clauses are valid: (1) the clause must not contravene public policy; (2) the contract must be between persons relating entirely to their own private affairs; and (3) each party must be a free bargaining agent to the agreement so that the contract is not one of adhesion. The court denied the defendants' motion for summary judgment and held that there was a genuine issue of fact as to whether the defendants violated any statute or regulation that would constitute a violation of public policy. Importantly, the court acknowledged that such clauses are not enforceable if the defendants violated any applicable codes or statutes.

B. New Jersey

In **Continental Insurance Company v. Boraie**, 672 A.2d 274 (N.J. Super. 1995), the court held that a tenant's fire insurer was barred from bringing a subrogation action against the tenant's landlord based on the landlord's alleged negligence. The lease agreement between the landlord and tenant provided that all insurance policies maintained by the landlord and the tenant were to contain mutual waiver of subrogation provisions. The court held that, notwithstanding the fact that the policy at issue did not contain a waiver of subrogation clause, the tenant's fire insurer was barred from bringing a subrogation action against the landlord by virtue of the clause in the lease agreement.

C. Delaware

In **The Tandy Corp. v. Fusco Properties, L.P.**, 1996 WL 280774 (Del. Super. 1997), the court construed a commercial lease agreement that contained a "waiver of subrogation" clause, as well as a "hold harmless" clause. As previously mentioned, the plaintiff, Tandy (Insurance of North America had a subrogated interest), operated a store in a property owned by the defendant, Fusco. When the roof of the property leaked, Tandy suffered losses due to destroyed equipment. The court held that the waiver of subrogation clause waived Tandy's and INA's right to recover for that portion of Tandy's losses that were covered by INA. In the end, Fusco was liable to Tandy to the extent Tandy's losses were not covered by the INA policy.

In **Lexington Insurance Co. v. Raboin**, 712 A.2d 1011 (Del. Super. 1997) the court held that a landlord's property insurer was barred by the "anti-subrogation rule" from bringing a subrogation action against tenants to recover for damages resulting from a fire loss. The insurance company alleged that the fire originated in the electrical wiring of an apartment occupied by students at the University of Delaware who installed a ceiling fan in the apartment in violation of the landlord's rules and regulations. The issue in the case was whether, under a lease agreement, a residential tenant is a "co-insured" under the landlord's general fire insurance policy for the limited purpose of shielding the tenant from a subrogation action by the landlord's insurer where the tenant's alleged negligent conduct caused the fire. The court held that, notwithstanding a lack of clear exculpatory language waiving the insurer's subrogation rights, in the absence of an express agreement in the lease that places liability on the tenant for the tenant's negligence in causing the fire, the landlord's insurer could not recover against the tenant.

D. Maryland

There are no recent Maryland cases that deal with waiver of subrogation clauses. However, the law as stated in **Brodsky v. Princemont Construction Co.**, 354 A.2d 440 (Md. App. 1976), is still valid and applicable. In Brodsky, the owner of an apartment building and its insurer brought an action against a contractor for damages that resulted from the alleged negligence of the contractor's employee which resulted in a fire. Specifically, the contractor's employee allegedly attempted to remove a skunk from an apartment by inserting propane gas into a partition in the wall which resulted in a fire in the apartment building. The contract between the owner and the contractor contained a clause purporting to waive all rights against each other caused by fire or anything else to the extent covered by insurance. The court held that the waiver of subrogation clause waived the owner's insurer's right to bring a subrogation action against the contractor for the negligence of its employee. The court held that since the contract between the parties contemplated that the risk of damage to the property by fire would be covered by insurance and not by either of the parties, the waiver clause was effective to bar a subrogation claim by the owner's insurer.

E. Legal Trends Related to Waivers of Subrogation

As is apparent from the above, the law does not favor an insurer in the waiver of subrogation context. Importantly, facts establishing violations of public policy will often render

such clauses unenforceable at least at the summary judgment stage. Beyond that, the language of the waiver clause must be closely analyzed to determine its enforceability.

VI. Miscellaneous Cases

In **Hornberger v. Commonwealth Security Systems, Inc.**, No. 3050 - 1998 (Pa. Comm. Pl. 1998), the trial court dismissed a subrogation action against an alarm company pursuant to a one-year statute of limitation in the contract. In this case, the home of the insureds was damaged as the result of a fire. The insureds had contracted with Commonwealth Security Systems in order to obtain a fire monitoring system. However, Commonwealth's central system did not receive an alarm signal when the fire originated. The contract between the insured and Commonwealth provided that all claims against Commonwealth had to be commenced within one year after the cause of action had accrued, or the act, omission, or event leading to the claim had occurred. The court held that since the claim was filed one year and eleven months after the fire, the insurer's action was time-barred.

In **Pavlik v. Lane Limited/Tobacco Exporters Int'l**, 135 F.3d 876 (3d Cir. 1997), the administrator of the estate of Stephen Pavlik brought a products liability action after Stephen Pavlik died as a result of self-administered butane inhalation. The plaintiff brought a products liability suit, based on failure to warn, against a manufacturer and distributor of butane fuel which is primarily used as a fuel for cigarette lighters. Significantly, the court predicated that, in failure to warn cases, the Pennsylvania Supreme Court would hold that a rebuttable presumption exists that if adequate warning had been provided, an injured consumer would have heeded the warnings. The court remanded the case after holding that an issue of fact existed as to whether the decedent was aware of the risk of bodily harm posed by the inhalation of butane.

VII. Conclusion

The above cases amply demonstrate the importance of prompt notice and investigation so as to ensure the preservation of your subrogation rights and the maximization of recoveries. The aggressive pursuit of these legal issues by the defense bar necessitates that you take control and direct the case immediately following the occurrence. The identification and preservation of physical evidence, relevant contracts and agreements must be done in a prompt and expeditious fashion so that potential legal hurdles are identified, analyzed and aggressively defended.

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