REGIONAL SUBROGATION PRACTICE UPDATE
LAW AND PROCEDURE:

NEW JERSEY, NEW YORK AND CONNECTICUT

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I. INTRODUCTION [*]

This paper outlines recent developments under New Jersey, New York and Connecticut law concerning four particularly important topics in insurance subrogation law. The viability of subrogation actions may depend upon interpretation of underlying agreements, such as construction contracts and lease agreements, which may contain exculpatory or indemnification provisions and waivers of subrogation. Therefore, recent New Jersey, New York and Connecticut decisions interpreting exculpatory clauses and waivers of subrogation are discussed. Statutes in New Jersey, New York and Connecticut significantly impact upon the enforceability of exculpatory agreements, especially when included in contracts concerning construction and real property.

This paper also addresses recent developments regarding the economic loss doctrine, which may impact recovery in subrogation actions involving products or commercial contracts. Several important exceptions to and variations of this rule have arisen under New Jersey, New York and Connecticut law, which are discussed in the following sections.

Finally, recent developments in the area of spoliation of evidence are considered, including whether insureds or third parties may maintain a tort action for alleged destruction of or failure to retain evidence. This topic is particularly significant for property insurance professionals, who may be in possession of or responsible for maintaining important evidence and artifacts from the loss site.

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[*] This is a condensed version of a comprehensive update of New Jersey, New York and Connecticut insurance subrogation law. Please contact Elliott R. Feldman, Esquire at (215)-665-2000 for a copy of the comprehensive update.

II. EXCULPATORY, HOLD HARMLESS AND INDEMNIFICATION PROVISIONS

A. New Jersey

1. Contracts With or For: Construction, Alteration, Repair, Maintenance or Security of Buildings; Architects and Engineers

New Jersey statutes provide that certain hold harmless agreements and indemnification clauses are void and unenforceable as being against public policy. See Appendix A. Agreements for "construction, alteration, repair, maintenance, servicing or security of a building," indemnifying or holding the promisee harmless from liability for damages arising out of bodily injury to persons or property damage caused by or resulting from the sole negligence of the promisee, are against public policy, void and unenforceable. See N.J.S.A. §2A:40A-1 (emphasis added).

In Ryan v. Biederman Industries, 223 N.J. Super. 492, 538 A.2d 1324 (1988), the court upheld a lease provision requiring the tenant to indemnify and hold the landlord harmless for costs arising out of maintaining the leased premises. A slip and fall victim sued the tenant for personal injuries sustained, and the tenant filed a third-party action seeking contribution and indemnity from the landlord. Under the lease, the tenant was responsible for maintenance of the premises and agreed to indemnify and save the landlord harmless from costs or expenses arising from claims by third parties. The court held that this indemnification clause did not indemnify the landlord for its own negligence, and therefore was valid under N.J.S.A. §2A:40A-1 and not contrary to public policy.

Indemnification clauses in contracts involving architects, engineers and surveyors may be unenforceable pursuant to N.J.S.A. §2A:40A-2. In Carvalho v. Toll Bros. Developers, 143 N.J. 565, 675 A.2d 209 (1996), the Supreme Court of New Jersey held that a construction agreement, in which a township and general contractor agreed to hold an engineer harmless, was contrary to public policy and would not be enforced. The court held, in a contractual situation

involving public works, that the parties' "financial arrangements and understanding do not overcome the public policy that imposes a duty of care and ascribes liability to the engineer in these circumstances." Id. at 579. The engineer could not avoid liability based on the exculpatory agreement for alleged negligence resulting in the death of a subcontractor's employee.

New Jersey courts have upheld indemnification or hold harmless clauses which do not indemnify against an architect or engineer's own negligence. In Marbro, Inc. v. Tinton Falls, 297 N.J. Super. 411, 688 A.2d 159 (1996), the court upheld a clause limiting an engineering firm's liability for professional negligence, noting that the clause was not void as against public policy pursuant to Section 2A:40A-2. The clause was enforceable notwithstanding Section 2A:40A-2, because the statute applies to indemnity and hold harmless provisions only, not to true limitation of liability clauses. Id. at 163-64.

2. Non-Construction Contracts

For agreements not encompassed by these statutes, under New Jersey law, contractual limitations on liability for negligence "are frowned upon and will not be enforced unless they are bargained for." Consumers Power Co. v. Curtiss-Wright Corp., 780 F.2d 1093, 1096 (3d Cir. 1986) (citing Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 396-97, 161 A.2d 69 (1960)). "Such limitations in contracts are read strictly, "with every doubt resolved against the party seeking the protection." Id. Those liability limitations upheld by courts usually have been the subject of extensive negotiations between the parties." Id. (citations omitted).

The validity of exculpatory clauses in New Jersey generally depends upon consideration of four factors:

(1) circumstances surrounding formation of the exculpatory agreement (e.g., equal bargaining power, awareness and negotiation of the agreement);

(2) the nature of the goods or services provided;

(3) extent to which the agreement clearly and unambiguously expresses the parties' intentions; and

(4) whether the party seeking to avoid liability owes a public duty, under which circumstances an exculpatory clause may be against public policy;

a. Provisions Held Unenforceable

In Consumers Power Co. v. Curtiss-Wright Corp., supra, a public utility sued a repair company for defective repair of a gas turbine owned by the utility. A jury found the repair company liable on strict products liability and negligence counts. The court held that a limitation of liability contained in the company's sales brochure was not the subject of negotiation: there was no evidence that the utility ever had received the brochure, much less that it had read and consented to its contents.

In Berrios v. United Parcel Service, 265 N.J. Super. 436, 627 A.2d 701 (N.J. Super. 1992), aff'd, 265 N.J. Super. 368, 627 A.2d 665 (1993), the court refused to enforce an exculpatory sign in a parking lot stating that the employer would not be liable for damage to or theft of vehicles from a parking lot. The plaintiff sued her employer United Parcel Service for damages arising out of vandalism of her car, which was parked on the employer's lot. A sign posted at the entrance to the lot stated that United Parcel would not be liable for any damage to or theft of vehicles or their contents. In this case of first impression, the court held that the employer's attempt to exculpate itself from liability was void, because the plaintiff was unaware of the sign and could not be said to have contracted away her right to hold the defendant liable. Moreover, even if the plaintiff had been aware of the sign, the defendant owed a public duty to the plaintiff, and unequal bargaining power existed between the parties.

b. "Public Use" Exception

In a case of first impression on a related topic, the United States District Court for the District of New Jersey recently held that an out-of-possession commercial landlord could be liable for property damage pursuant to the public use exception in a subrogation action involving warehouse facilities. Richard Bailey and Sean Carter of Cozen and O'Connor's Subrogation Department, representing the plaintiff Belmont Yarn Corporation, prevailed and defeated summary judgment for the defendant in this important decision, Belmont Yarn Corp. v. Page Realty Corp., Civ. No. 96-1994 (DRD) (D.N.J. Oct. 2, 1998) (unreported decision).

Generally, absent a special arrangement (such as a covenant to repair or voluntary undertaking of repairs), an out-of-possession, commercial landlord is not liable for damage caused by defects on the property. Exceptions to this rule exist, including the public use exception, regarding property which is leased for a purpose involving admission of the public. Under this exception, if the lessor knows or should have known that a condition exists on property which poses an unreasonable risk to harm, and the lessor has reason to expect that the lessee will admit members of the public to the property before the condition is remedied, the lessor may be liable for failure to repair the dangerous condition.

The public use exception has been applied in New Jersey in a case involving personal injuries sustained on commercial property. In the present case though, the federal court decided New Jersey state courts would extend the public use exception to cover property damage sustained by commercial parties at warehouse facilities.

c. Exculpatory Provisions Enforced

Recently, in Chemical Bank of New Jersey v. Bailey, 296 N.J. Super. 515, 687 A.2d 316, certif. denied, 150 N.J. 28, 695 A.2d 671 (1997), the court held that a limitation of liability or exculpatory clause may be upheld provided that the limitation does not violate public policy or adversely affect public interest. The court upheld an exculpatory provision set forth in

the title insurance underwriting agreement specifying the allocation of losses between a title guaranty company and a title search company.

Also recently, in MRO Communications, Inc. v. American Telephone & Telegraph Co., 1999 WL 1178964 (9th Cir. Dec. 13, 1999)(an unreported decision) the Court of Appeals for the Ninth Circuit applied New Jersey law regarding limitations of liability.[1] In MRO, the court held that a "take it or leave it" form contract drafted by AT&T, without more, was not unenforceable; the fact that the party seeking to avoid the limitation was a start-up company did not mean that party was disadvantaged or powerless in the negotiation process. Absent willful misconduct, the provision was enforceable. See also Metal Processing, Inc. v. Hamm, 56 F.Supp. 455 (D.N.J. 1999)(upholding provision in private maritime freight contract requiring shipper to indemnify and hold harmless tug and barge owner for its own negligence in the loss of cargo; no showing of unconscionable disparity in bargaining power).

In Tessler & Son, Inc. v. Sonitrol Security Systems, 203 N.J. Super. 477, 497 A.2d 530 (1985), the court upheld a contractual exculpatory/limitation of liability provision contained in a burglar alarm service contract. Following an undetected break-in at its auto body repair shop, the plaintiff sued the defendant, which had installed and serviced a burglar alarm system, alleging breach of contract, negligence and gross and wanton negligence. The court held

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[1] The court noted:

(1) New Jersey courts generally will enforce limitations of liability in private contracts.

(2) Private parties may agree to limit liability provided the limitation is not unconscionable or contrary to public policy [for example, a party was disadvantaged in the bargaining process; was powerless to negotiate the terms of the contract; or had a justified expectation that the limitation of liability clause would not be enforced; also a limitation may not be used to exclude willful or wanton misconduct.]

(3) The party challenging a contractual limitation of liability bears the burden of proving its nonenforceability.

(4) The reasonableness of a contractual limitation of liability is a question of law.

"that an exculpatory clause may expressly excuse or limit liability for negligent contract performance, but that such a clause does not operate to bar a claim of willful and wanton misconduct." Id. at 533. Nevertheless, the court held that an exculpatory clause which bars suit for negligent performance of contractual duties also may bar suit for grossly negligent behavior, and upheld the exculpatory clause where the alarm company was, at worst, negligent or grossly negligent. Id. at 534 (disagreeing with prior New Jersey decisions).

B. New York

1. Contracts With or For: Construction, Alteration, Repair, Maintenance of Buildings, Leased Property; Architects and Engineers; Contractors; Garages

Numerous New York statutes govern the enforceability of exculpatory clauses and hold harmless/indemnification agreements, particularly with respect to real property, as is set forth in Appendix B.[2]

Essentially, these statutes preclude indemnification with respect to a party's own negligence, rendering such agreements contrary to public policy and void under New York law.

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[2] Further treatment of these important statutes (and their interaction with other statutes, such as the Labor Law or Uniform Commercial Code) is available upon request. Selected significant sections are summarized below:

(1) Section 5-321. Agreements exempting lessors from liability for negligence may be void and unenforceable.

(2) Section 5-322.1. Agreements exempting owners and contractors from liability for negligence may be void and unenforceable in certain cases.

(3) Section 5-323. Agreements exempting building service or maintenance contractors from liability for negligence may be void and unenforceable.

(4) Section 5-324. Agreements by owners, contractors, subcontractors or suppliers to indemnify architects, engineers and surveyors from liability caused by or arising out of defects in maps, plans, designs and specifications may be void and unenforceable.

(5) Section 5-325. Garages and parking places.

Other indemnification agreements -- for example, agreements between sophisticated parties who negotiate an indemnity clause at arm's length or agree to obtain insurance -- may be upheld.

In Santamaria v. 1125 Park Ave. Corp., 238 A.D.2d 259, 657 N.Y.S.2d 20 (1st Dept. 1997), the court held that Section 5-321 of the General Obligations Law did not invalidate indemnification agreements when coupled with a provision allocating the risk of liability to a third party through the use of insurance, and upheld an indemnification agreement contained in a construction contract.

In two recent decisions, though, courts struck down indemnification provisions contained in lease agreements, based upon the General Obligations Law, Section 5-321. See A to Z Applique Die Cutting, Inc. v. 319 McKibbin St. Corp., 232 A.D.2d 512, 649 N.Y.S.2d 26 (2d Dept. 1996) (A lease provision, which held a landlord harmless for injury to a tenant's property when sprinkler pipes froze and broke, was unenforceable under the statute; the landlord could not avoid the statute by requiring in the lease that the tenant obtain insurance, and because the lease did not provide a mutual obligation to obtain insurance, the mutual waiver of subrogation was unenforceable); Leone v. Leewood Service Station, Inc., 212 A.D.2d 669, 624 N.Y.S.2d 610 (2d Dept. 1995) (An indemnification agreement which purported to shift sole negligence of the lessor of a gasoline station to the lessee was against public policy and unenforceable pursuant to Section 5-321.).

2. Exculpatory and Hold Harmless Agreements in Contracts Not Involving Construction or Real Property

In Asian Vegetable Research & Development Ctr. v. Institute of Intern Education, 944 F. Supp. 1169 (S.D. N.Y. 1996), the federal district court set forth general rules regarding construction of exculpatory agreements under New York law:

(1) The law frowns upon contracts intended to exculpate a party from consequences of its own negligence.

(2) Therefore, such clauses are strictly construed and will not be held to insulate a party from liability for its own negligence unless such an intention is clearly expressed in unequivocal terms.

(3) A more liberal rule may be applied if an indemnification agreement is negotiated at arm's length between sophisticated business entities who intend to allocate the risk of liability to third parties through insurance.

(4) Nevertheless, an agreement will not be extended to include damages which are neither expressly within its terms nor of such character that the parties do not intend to be covered or assumed under the contract.

Id. at 1175 (citations omitted). The court upheld an agreement between a scientific research organization and a contractor indemnifying the contractor from any and all losses relating to the performance of the contract.

3. Exculpatory Agreements in Alarm Contracts

Numerous New York decisions discuss exculpatory clauses in the context of burglar alarm contracts. Typically, courts have enforced such provisions in contracts for the installation, leasing and servicing of alarm systems if they comply with the general requirements for exculpatory clauses under New York law, discussed above. See, e.g., Sue & Sam Mfg Co. v. United Protective Alarm Systems, Inc., 119 A.D.2d 664, 501 N.Y.S.2d 102 (2d Dept. 1986) (exculpatory clause could be enforced where the defendant was alleged to have breached the alarm contract at its inception by failing to install motion detectors as required by the contract).

The issue is often whether the complaint alleges gross negligence, sufficient to preclude enforcement of exculpatory provisions. See Sommer v. Federal Signal Corp., 79 N.Y.2d 540, 593 N.E.2d 1365, 583 N.Y.S.2d 957, 961 (1992) ("[F]ire alarm companies … perform a service affected with a significant public interest," i.e. the personal safety of citizens. Exculpatory and limitation of liability clauses in alarm monitoring company's contract with building owner were enforceable against claims of ordinary negligence, but not against claims of

gross negligence which, in a commercial setting, must smack of intentional wrongdoing or evince reckless indifference).

a. Exculpatory Clauses Upheld

- Aprhrodite Jewelry, Inc. v. D & W Central Station Alarm Co., Inc, 256 A.D.2d. 288, 681 N.Y.S.2d 305 (2d Dept. 1998) (The court held that an exculpatory clause would not be enforced to exempt a party from liability for its gross negligence, defined as conduct evincing a reckless disregard for the rights of others or intentional wrongdoing. Where the complaint did not sufficiently allege gross negligence, the court enforced a contract provision between a retailer and an alarm company holding that the exculpatory provision precluded an action for negligence and breach of contract).

- Colnaghi U.S.A. v. Jewelers Protection Services, Ltd., 81 N.Y.2d 821, 611 N.E.2d 282, 595 N.Y.S.2d 381 (1993) (Plaintiff's complaint did not sufficiently allege gross negligence, i.e. reckless disregard for the rights of others or intentional wrongdoing in connection with alarm company's failure to wire a skylight; defendant alarm company was entitled to summary judgment based on contract provision exonerating the defendant from liability for negligence).

b. Exculpatory Clauses Held Unenforceable

- Amica Mut. Ins. Co. v. Hart Alarm Systems, Inc., 218 A.D.2d 835, 629 N.Y.S.2d 874 (3d Dept. 1995) (The court held that the exculpatory clause in the alarm service agreement would be enforceable against negligence, but would not defeat an action for gross negligence. The court granted a motion allowing the plaintiff to amend the complaint to allege gross negligence where the alarm company withheld information regarding a low temperature signal which resulted in substantial property damage).

- Williamsburg Food Specialties, Inc. v. Kerman Protection Systems, Inc., 204 A.D.2d 718, 613 N.Y.S.2d 30 (2d Dept. 1994) (Factual issues precluded summary judgment regarding the enforcement of a liquidated damages clause contained in an alarm services contract. The court held that a party may not insulate itself from damages caused by grossly negligent conduct, nor may a party limit damages to a nominal sum pursuant to a liquidated damages provision where gross

negligence is alleged. In this case, the plaintiff raised a triable issue of fact with respect to the issue of whether the defendant alarm company's delay in responding to an alarm system was so great as to constitute gross negligence).

C. Connecticut

1. Certain Exculpatory Agreements Unenforceable by Statute

Certain exculpatory agreements are unenforceable pursuant to statute in Connecticut. See Appendix C, which contains the pertinent text of selected Connecticut statutes regarding exculpatory or hold harmless agreements applicable to construction and lease agreements.

Section 52-57k of Connecticut General Statutes provides that certain hold harmless agreements in connection with construction, alteration, repair or maintenance of a building indemnifying against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from sole negligence of the promisee, his agents or employees are against public policy and void. In Sandella v. Dick Corp., 53 Conn. App. 213, 729 A.2d 813 (1999), the court held that Section 52-572k was inapplicable because the agreement in question, between a wastewater treatment plant designer and the employer of the interim plant manager, was not related to construction, but rather was a contract for managerial services.

Section 47a-4 of Connecticut General Statutes provides that a rental agreement wherein the tenant agrees to exculpate the landlord or limit the landlord's legal liability is unenforceable. Section 47a-4(a)(3) applies only to residential, rather than commercial, lease agreements. In Palace Oriental Rug Gallery, Inc. v. Assurance Co. of America, 1999 WL 203774 (Conn. Super. Mar. 29, 1999), the court held that the statute, passed to aid residential apartment dwellers, was inapplicable to leases involving commercial property which are entered into freely between presumably sophisticated parties. In Palace Oriental Rug v.

Assurance Co., supra, the court upheld a "hold harmless" provision in favor of the landlord noting that the lease was 15 pages in length, appeared to be the product of negotiation by sophisticated parties and required the tenant to obtain insurance for property damage

2. Other Exculpatory Agreements

The Connecticut Supreme Court has held that Connecticut law does not favor contractual provisions which relieve a person from his or her own negligence. Griffin v. Nationwide Moving & Storage Co., Inc., 187 Conn. 405, 446 A.2d 799 (1982) (citing Restatement (Second) Contracts §195). Such provisions may be upheld in "proper circumstances," though the Supreme Court has left it to lower and appellate courts in Connecticut to flesh out "proper circumstances." Generally, a party may not exempt itself from liability for gross negligence. Also, exculpatory clauses are strictly construed against the party attempting to relieve itself of negligence. "[A]greements exempting parties from liability for their own negligence are not favored by the law and, if possible, are construed so as not to confer immunity from liability." Maryheart Crusaders v. Barry, 1998 WL 203407 (Conn. Super. Apr. 10, 1998). Finally, the provision must specifically and conspicuously identify the precise acts which the parties intend to except from liability.

In Mattegat v. Klopfenstein, 50 Conn. App. 97, 717 A.2d 276 (1997), certif. denied, 247 Conn. 922, 722 A.2d 810 (1998), the parties agreed that a property inspection would include a probe for wood-destroying insect infestation. On the basis of the defendant's inspection report, plaintiff purchased the property, which was later found to be infested and had extensive, visible evidence of wood-destroying insect damage. The defendant raised the "Company Liability" provision in defense of plaintiff's $17,000 claim for repair damages, and offered to refund the inspection fee.

On appeal, the court decided that the "Company Liability" provision did not limit defendant's damages to the $225 inspection fee. The contract in this case was on a preprinted form and had not been discussed by the parties. Connecticut courts hold that disclaimers of liability of this type are "against public policy when entered into by professional service providers in the course of dealing with the general public," except under certain circumstances, such as agreement of both parties. Id. (footnote omitted). Absent any discussion, much less agreement between the parties as to the provision, the provision was held unenforceable.

In Western Alliance Ins. Co. v. Wells Fargo Alarm Services, Inc., 965 F. Supp. 271 (D. Conn. 1997), the district court considered a lease provision stating that the parties "specifically understand and agree that Landlord shall not be liable to Tenant…for any damage to, or loss (by theft or otherwise) of, any property of Tenant of any kind or nature…" The court decided that this provision, so broadly written that it could be read as exonerating the landlord from grossly negligent, reckless and intentional conduct, would not be upheld to limit liability where the complaint alleged gross negligence.[3]

III. WAIVER OF SUBROGATION

Courts have held that an insurer's subrogation rights may be waived, either expressly or impliedly, prior to a loss. Certain insurance contracts, particularly commercial policies, expressly permit an insured to hold a wrongdoer harmless in advance of a loss ("before-the-loss" waiver clause). See Cozen, "Insuring Real Property" §41.05[1] at 41-36.11 (1999).

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[3] On a related issue, in two recent memorandum decisions, the Superior Court of Connecticut upheld liquidated damages clauses contained in alarm contracts. See Hartford Ins. Co. v. ADT Sec. Systems, Inc., 1999 WL 259688 (Conn. Super. Apr. 22, 1999); U.S. Fidelity & Guar. Co. v. Sonitrol Services Corp., 1996 WL 456327 (Conn. Super. July 29, 1996). The three requirements for a valid liquidated damages provision are: damages must be uncertain in amount or difficult to prove; the parties must have intended to liquidate damages in advance; and the amount stipulated must be reasonable.

This type of waiver is commonly found in construction contracts and lease agreements. Id. at 41-36.12. As is discussed in the following sections, the precise wording of the underlying construction, lease or other contract is particularly significant in determining whether subrogation is waived with respect to all or only certain types of claims. Id.

A. New Jersey

1. Lease Agreements

A leading New Jersey decision regarding waiver of subrogation is Mayfair Fabrics v. Henley, 48 N.J. 483, 226 A.2d 602 (1967), where the court held that a subrogated insurance carrier was barred from recovery by an exculpatory lease provision relieving the landlord from liability for damages to the tenant's property. The court held that subrogation is barred "when its enforcement would be inconsistent with the terms of a contract or where the contract, either expressly or by implication, forbids its application."

More recently, in Continental Insurance Co. v. Boraie, 288 N.J. Super. 347, 672 A.2d 274 (1995), the court held that a lease provision requiring a tenant to obtain insurance policies containing waivers of subrogation barred a subrogation action by the tenant's fire insurer against the landlord although the policy obtained by the tenant did not contain such a waiver. Noting that in some jurisdictions, the carrier, as an innocent subrogated insurer, is not bound by the waiver of its insured, id, at 277 (citations omitted), the court held that under New Jersey law commercial parties have the right to determine that the risk will be borne by insurance. The court reasoned that, had the tenant obtained the required waiver of subrogation, this action by the tenant's insurer could not be sustained. The insurer could not profit from its insured's failure to abide by its contract, and therefore granted summary judgment in favor of the landlord.

2. Construction Contracts

In Commercial Union Ins. Co. v. Bituminous Cas. Corp., 851 F.2d 98 (3d Cir. 1988), the Court of Appeals considered an American Institute of Architects ("AIA") contract provision between the owner and the general contractor providing:

> The owner and contractor waive all rights against each other and the subcontractors…, for damages caused by fire or other perils to the extent covered by insurance obtained pursuant to this paragraph…or any other property insurance applicable to the Work.

Id. at 100. The court held that this provision should be interpreted effectively as abrogating any subrogation claim by the property owner's insurer against the subcontractor. Nevertheless, in this important decision argued by Vincent R. McGuinness, Jr. of Cozen and O'Connor the court concluded that this provision did not bar an action by the owner's insurer against the insurer for the subcontractor based on a direct and independent right of action for contribution or indemnity, under the "Other Insurance" provisions in the policy.

B. New York

1. Lease Agreements

Kaf-Kaf, Inc. v. Rodless Decorations, Inc., 90 N.Y.2d 654, 687 N.E.2d 1330, 665 N.Y.S.2d 47 (1997), is a leading New York decision regarding waiver of subrogation. The court decided that a waiver of subrogation contained in the parties' lease agreement precluded negligence claims brought by the parties' subrogated insurance carrier arising out of fire damage to the lessee's personal property. The issue was whether the waiver was limited to damage to the demised premises or included all losses, including damage to the lessee's personal property and the business interruption losses. The court decided, based upon the terms of the provisions which referenced furniture and improvements, that the waiver of subrogation clause extended to the lessee's personal property as well as to the leased premises.

The court also held that a lease provision, specifying that the landlord would not be liable for damage to the tenant's property unless caused by the landlord's negligence, was not inconsistent with the waiver of subrogation contained in the lease. "The broad applicability of the waiver of subrogation clause contained in the parties' lease precludes the negligence claims of both parties' subrogated insurance carriers." Id.

In Farmington Cas. Co. v. 23rd Street Properties Corp., 1999 WL 734935 (S.D.N.Y. Sept. 20, 1999), the court interpreted a similar lease provision as precluding waiver of subrogation by the lessee's insurer against not only the landlord but also against the managing agent, despite allegations that the waiver of subrogation clause in the lease did not apply to the managing agent.

In Cresvale Intern., Inc. v. Reuters America, Inc., 257 A.D.2d 502, 684 N.Y.S.2d 219 (1st Dept. 1999), the First Department considered a waiver of subrogation provision contained in a commercial lease agreement regarding claims for loss or damage to the tenant's property. The court held that the waiver was not limited to claims for property damage, but extended to losses covered under the tenant's property insurance policy, including business interruption losses.

In General Acc. Ins. Co. v. 80 Maiden Lane Associates, 252 A.D. 2d 391, 675 N.Y.S.2d 85 (1st Dept. 1998), the court held that a subrogation action brought by the insurer of a commercial tenant against the building owner and property manager was precluded. The tenant's computer equipment was damaged due to an electrical fire, resulting in property damage and business interruption losses. Under the heading "Destruction Fire and Other Casualty," the commercial lease agreement entered into by the parties provided that in the event of any fire or other casualty, the parties would look first to their own insurance before making claim against each other, and also that owner and tenant released and waived "all right of recovery against the

other or anyone claiming through or under each of them by way of subrogation." The court held that the lease provision applied to any recovery for loss or damage, and was sufficiently broad to cover the losses suffered by the tenant in this case.

2. Construction Contracts

S.S.D.W. Co. v. Brisk Waterproofing Co., Inc., 76 N.Y.2d 228, 556 N.E.2d 1097, 557 N.Y.S.2d 290 (1990) is a leading decision regarding waivers of subrogation under New York law in the context of construction contracts. The court held that a building owner's waiver of rights against a contractor hired to perform corrective work for damages caused by a fire did not bar a subrogation claim by the owner's insurer for damages caused by the contractor in areas of the building outside the limits of the contractor's work.

In Fireman's Fund Ins. Co. v. Krohn, 1993 WL 299268 (S.D.N.Y. Aug. 3, 1993), the court held that a subrogation action on behalf of a property owner against the defendant construction manager and development corporation was not precluded. A subcontractor had failed to seal holes cut in the building roof, resulting in extensive water damage to the building contents. Under the contract between the construction manager and the owner, the construction manager agreed to obtain insurance against claims for damage other than to the Work itself because of injury to tangible property. The owner insured against damage to the Work. The contract also included a provision waiving all rights between the owner and construction manager for damages covered by any property insurance during construction. The owner's insurer filed a subrogation action against the construction manager and development corporation for damages. The court held that the waiver barred subrogation only for damage to the Work itself, and did not preclude subrogation for damages caused by the contractor in areas of the building outside the limits of the Work. Elaine M. Rinaldi of Cozen and O'Connor represented Fireman's Fund in this significant decision.

C. Connecticut

1. Lease Agreements

In a recent unreported decision, Great American Insurance Co. v. Cahill, 1997 WL 375099 (Conn. Super. June 24, 1997), the Superior Court of Connecticut concluded that the plaintiff-insurer had no right of subrogation against a tenant in connection with a fire caused by the negligence of the tenant's fifteen-year old son. The lease did not expressly provide that the tenant would be liable to the landlord's insurer for fire damage caused by the tenant's negligence, nor did the lease contain any provision relative to a fire insurance subrogation claim in the event of a fire. Also, the landlord stated that he did not intend that the lessee would be liable for such a claim. These facts, taken together, precluded subrogation based on the implied-coinsured doctrine.

2. Construction Contracts

In Maryland Casualty v. Trane Co., 46 Conn. Supp. 172, 742 A.2d 444 (1999), the Superior Court of Connecticut considered whether a waiver of subrogation clause contained in a contract entered into between a contractor and subcontractor barred a subrogation action by the insurer of the general contractor. The provision stated that the parties waived all rights against each other for damages covered by property insurance and commercial general liability insurance. The court held that this provision, as a matter of law, precluded a subrogation action alleging products liability and breach of contract in connection with repair and replacement of fan coil units installed in the property

IV. ECONOMIC LOSS DOCTRINE

Under the economic loss doctrine, a commercial buyer generally has no tort remedy for damage arising out of a product's failure to perform, where no physical injury or damage to other property occurs. In such cases, the buyer may be relegated to contract remedies. The United States Supreme Court applied the economic loss doctrine in East River Steamship

Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986), where the court held that a commercial buyer cannot recover in tort for physical damage to a product itself, because such damage (i.e. failure of a product to function properly) is covered by warranty remedies.

Many state courts have interpreted the economic loss rule to preclude tort recovery for damage which is confined to a commercial buyer's product. Often the issue centers around an important exception to the economic loss doctrine: whether the damaged property constitutes property of the plaintiff other than the seller's product (i.e. "other property"). A second related and hotly-contested issue is the definition of "product" for purposes of determining whether the loss is merely economic. As is discussed in the following sections, these are often fact-sensitive inquiries to be determined on a case-by-case basis.

A. New Jersey

The New Jersey Supreme Court first adopted the economic loss rule in Spring Motors Distributors, Inc. v. Ford Motor Co., 98 N.J. 555, 489 A.2d 660 (1985), where a commercial restorer of vehicles sought to recover repair cost, lost profits and decreased market value of trucks due to difficulties with the vehicles' transmissions. The court decided that neither negligence nor strict products remedies were available between commercial parties for these economic losses.

The New Jersey Legislature also approved the economic loss rule by adopting the Product Liability Act in 1987. The statute provides, in pertinent part, that, with respect to products liability actions in New Jersey, "harm" means physical damage to property, other than to the product itself." N.J.S.A. § 2A:58C-1.

In Easling v. Glen-Gery Corp., 804 F. Supp. 585 (D.N.J. 1992), the purchasers of a large apartment complex sued the manufacturer of allegedly defective bricks used in the apartment construction for strict products liability. The federal district court dismissed the claim,

holding that the plaintiffs, as commercial purchasers, could not recover in tort without more than economic loss. The plaintiffs had alleged that the bricks were deteriorating, caused substantial damage to the apartment and also presented a hazard to apartment residents. The court reasoned that it should look to the product purchased by the plaintiff, and accepted the argument that the "product" purchased was the apartment complex rather than the bricks.

Recently, in Alloway v. General Marine Industries, L.P., 149 N.J. 620, 695 A.2d 264 (1997), the New Jersey Supreme Court held that the subrogated insurer of the purchaser of a luxury boat that sank while docked, but caused no personal injury or damage to other property, was limited in a suit against the manufacturer to breach of warranty remedies under the UCC. The plaintiff-buyer was not a commercial party, but, according to the court, the parties' relative bargaining power was not greatly disproportionate. Therefore, the court held that the parties' contractual allocation of risk would decide recovery of economic losses, including cost of repair and lost trade-in value of the boat.

1. Exception for Fraud and Misrepresentation

In Coastal Group, Inc. v. Dryvit Systems, Inc., 274 N.J. 171, 643 A.2d 649 (1994), the court held that the economic loss rule did not preclude a commercial buyer's claim for fraud and misrepresentation. A condominium project owner and developer filed a breach of contract action against the contractor who installed a well system and the materials supplier alleging negligence, breach of contract and fraud. The Appellate Division held that the negligence claim had been properly dismissed, but that the plaintiff could pursue claims for fraud and misrepresentation under the New Jersey Consumer Fraud Act.

2. "Sudden and Calamitous" Events and "Other Property" Exceptions

In Naporano Iron & Metal Co. v. American Crane Corp., 1999 WL 1276733 (D.N.J. Dec. 30, 1999), the federal district court recently discussed two proposed exceptions to the economic loss doctrine. The plaintiff sought recovery of damages for products liability and attorney's fees and costs stemming from three collapses of a crane that the defendants had manufactured. In each instance, the crane itself and property belonging to the plaintiff's customers sustained damage, but no person or other property of the plaintiff had been injured. The plaintiff alleged, first, that the crane failed in a "sudden and calamitous manner," and also that other property had been damaged during the crane collapse, such that the New Jersey Products Liability Act provided a remedy for the losses sustained.

The district court determined that the New Jersey Superior Court had rejected the sudden and calamitous exception. Id. at *6. Second, the court held that the plaintiff had failed to state a claim because the property of third parties does not fall within the "other property" exception to the economic loss doctrine. The court reasoned that a third party injured by a defective product is able to recover under tort law from the manufacturers of defective products, but the fact that the plaintiff, a party to a commercial agreement, had reimbursed its customers for the harm did not preclude application of the economic loss doctrine.

3. New York

In Bocre Leasing Corp. v. General Motors Corp., 84 N.Y.2d 685, 645 N.E.2d 1195, 621 N.Y.S.2d 497, (1995), the Court of Appeals of New York adopted the economic loss rule set forth in East River v. Transamerica Delaval, Inc., supra. In Bocre Leasing, the court held that a purchaser in a commercial transaction may not recover in tort under a strict products liability or negligence theory from the manufacturer, where only the product itself is damaged and there is no allegation of physical injury or other property damage.

Bocre Leasing, supra, dealt with a remote purchaser of a product. Recent New York decisions have extended the economic loss rule in cases involving more immediate purchasers as well. See, e.g., 7 World Trade Co. v. Westinghouse Electric Corp., 256 A.D.2d 263, 682 N.Y.S.2d 385, 387 (1st Dept. 1998) (two workers for an electrical subcontractor could not bring negligence or products liability actions against the manufacturer of the building's bus ducts which exploded during building renovation, where plaintiffs alleged losses only of an economic nature).

Generally, where courts have deemed the underlying transaction to be a sale of goods, and no damage to other property or physical injury are alleged, New York courts have ruled that the plaintiff is limited to contractual remedies and typically may not maintain tort causes of action. In numerous recent decisions, courts applying New York law have precluded tort recovery for economic losses.[4]

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[4] Travelers Insurance Cos. V. Howard E. Conrad, Inc., 233 A.D.2d 890, 649 N.Y.S.2d 586 (4th Dept. 1996), (A subrogation action alleging negligence and strict products liability to recover for economic loss arising out of sinking of a yacht was precluded).

Suffolk Laundry Services, Inc. v. Redux Corp., 238 A.D.2d 577, 656 N.Y.S. 2d 372 (2d Dept. 1997) (The economic loss rule precluded plaintiff's action to recover a Department of Environmental Conservation penalty imposed when a recycling system sold by the defendant failed to adequately reduce contaminants already present in the plaintiff's groundwater. The court ruled that such losses were the consequence of a failure of the recycling system to perform as expected rather than the result of any accidental occurrence independently causing injury).

Bristol-Myers Squibb, Indus. Div. v. Delta Star, Inc., 206 A.D.2d 177, 620 N.Y.S.2d 196 (4th Dept. 1994) (A pharmaceutical manufacturer, who sued the installer of an electrical transformer to recover the price of a batch of penicillin lost due to failure of an electrical transformer could only recover economic loss in contract, and could not pursue tort damages for negligence).

Wecker v. Quaderer, 237 A.D.2d 512, 655 N.Y.S.2d 93 (2d Dept. 1997) (Homeowners who sued a contractor arising out of breach of a home improvement contract, though alleging negligence, sought "the benefit of bargain recovery for the cost of repairs and diminution of value." The court held that, "[t]he mere potential for physical injury or property damage did not suffice to create a duty independent of the contract warranting recovery in tort." Id.).

4. Exception For Abrupt, Cataclysmic Occurrences

Certain important exceptions to the economic loss rule have developed under New York law. In State Farm Fire & Casualty Co. v. Southtowns Tele-Communications, Inc., 245 A.D.2d 1028, 667 N.Y.S.2d 157 (4th Dept. 1997), the court permitted a subrogation action against a contractor that had installed a music-on-hold system. The owners alleged that the system resulted in a fire causing extensive damage to the building and its contents. The court rejected the defendant's argument that plaintiffs were limited to breach of contract remedies, holding that the plaintiffs had asserted a valid tort claim for negligent installation, "because the damages allegedly sustained by the plaintiff do not arise from the failure of the music-on-hold system to perform as intended, but arise instead from an 'abrupt, cataclysmic occurrence' allegedly caused by defendant's negligence." Id. at 158 (citations omitted).[5]

5. Exception For "Other Property"

New York courts also have held that the economic loss rule does not apply where the defective product causes damage to "persons or property other than the product itself." Arkwright Mut. Ins. Co. v. Bojoirve, Inc., 1996 WL 361535 at *3 (S.D.N.Y. June 27, 1996) (citations omitted). In that case, the plaintiff alleged that a defective component part damaged not only the generator in which it was housed, but also adjacent generators, floors, ceilings,

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Loudon Plastics, Inc. v. Brenner Tool & Die, Inc., 74 F.Supp.2d 182 (N.D.N.Y. 1999) (Holding that New York law does not allow recovery of economic loss. The plaintiff alleged negligent contractual performance in the sale of molds for above-ground pool ladders which did not meet specifications).

[5] See also, LaBarre v. Mitchell, 256 A.D.2d 850, 681 N.Y.S.2d 653 (3d Dept. 1998) (holding that a defectively designed fire alert system may be considered an inherently dangerous product and its failure to perform can have catastrophic consequences, therefore permitting plaintiffs' cause of action for damage to real and personal property and lost income); Village of Groton v. Tokheim Corp., 202 A.D.2d 728, 608 N.Y.S.2d 565 (3d Dept. 1994) (regulator in underground fuel dispensing system failed to operate, leading to fuel leak; the court noted the potential for fire or explosion, notwithstanding that no actual cataclysmic event occurred, and permitted tort recovery).

furniture and other real and personal property. Thus, because "other property" beyond the product itself was damaged, the plaintiff could recover in tort.

B. Connecticut

1. Economic Loss and Connecticut Products Liability Act

In Scap Motors, Inc. v. Pevco Systems International, Inc., 25 Conn. L. Rptr. 283 (Conn. Super. 1999), an action for breach of a settlement agreement, the defendant sought to dismiss claims alleging breach of the implied covenant of good faith and fair dealing, fraud and trade practices act violations based on the economic loss doctrine. No property damage or personal injury was alleged. The court declined "to recognize the economic loss doctrine as a bar to the plaintiff's tort causes of action . . . where the relationship between the plaintiff and the defendant is contractual and the only losses alleged by the plaintiff are economic." Id. See also, Darien Asphalt Paving, Inc. v. Town of Newtown, 1998 WL 886507 (Conn. Super. Dec. 7, 1999).

In the context of defective products, the Connecticut Products Liability Act (CPLA) provides as follows:

> "Harm" includes damage to property, including the product itself, and personal injuries including wrongful death. As between commercial parties, "harm" does not include commercial loss.

CGLA §52-572m (1998 Supp.). The CPLA also provides:

> As between commercial parties, commercial loss caused by a product is not harm and may not be recovered by a commercial claimant in a products liability claim. An action for commercial loss caused by a product may be brought only under, and shall be governed by, title 42a, the Uniform Commercial Code.

Id., §52-572n(c).

In Connecticut General Life Insurance Co. v. Grodsky Service, Inc., 781 F. Supp. 897 (D. Conn. 1991), the district court held that the phrase "commercial loss" in the CPLA includes all economic loss either direct or consequential. Under the statute, the court decided that a commercial tenant could not recover for economic losses arising out of a water pipe rupture and subsequent flooding of the premises. The court characterized these damages as commercial losses, and therefore barred recovery of: employee salaries and fringe benefits, taxes, rent, and the cost of expedited computer work. Other cases applying the economic loss rule include:

- McKernan v. United Technologies Corp., 717 F. Supp. 60 (D. Conn. 1989) (The district court held that the buyer of a helicopter could not recover in tort against the seller for economic damages arising out of the recall of the helicopter when no injury to persons or property other than to the helicopter itself were alleged).

- Bosek v. Valley Transit District, No. CV92039674 (Conn. Super. Dec. 10, 1993), (The Superior Court of Connecticut held that the plaintiff's claims for damages under the Connecticut Products Liability Act were barred. The action involved commercial parties, and alleged loss of profits, interruption of business and damage to business arising out of damage to machinery and a building).

- Flagg Energy Dev't Corp. v. General Motors Corp., 244 Conn. 126, 709 A.2d 1075 (1998) (The Connecticut Supreme Court upheld the trial court's order granting the defendant's motion to strike misrepresentation and unfair trade practices claims. The plaintiff alleged that gas turbine engines manufactured by the defendant were defective, and defendant failed to cure the defects. The court held that these claims between commercial parties were inconsistent with and precluded by breach of warranty claims).

2. Actions for Contribution and Indemnity

In American Nat. Fire Ins. Co. v. A. Secondino & Sons, 1995 WL 253085 (D. Conn. Apr. 28, 1995), the district court held, in a subrogation action arising out of flood damage, that the economic loss doctrine contained in the Connecticut products liability statute did not preclude claims for contribution and indemnification as between commercial parties. The court rejected the defendants' argument that actions for contribution and indemnity are, as a matter of law, actions for recovery of commercial loss for purposes of the CPLA.

V. SPOLIATION OF EVIDENCE

A. Generally

Traditionally, spoliation has been defined as the destruction of property or evidence, or the significant and meaningful alteration of a document or instrument. See Black's Law Dictionary 1257 (5th ed. 1979). Recent decisions also have included within the definition of spoliation the failure to retain or preserve items or property for use by a third party as evidence in current or future civil actions. See, e.g., Kirkland v. New York Housing Authority, 236 A.D.2d 170, 666 N.Y.S.2d 609, 611 (1977).

As is discussed in the following section regarding emerging trends, spoliation of evidence as an independent tort has been recognized in numerous states. For example, in Alaska, California, Florida, Illinois, Kansas, New Jersey, North Carolina, and Ohio, courts have adopted an independent civil cause of action for spoliation of evidence, either intentional or negligent. See generally J. Rivlin, "Recognizing an Independent Tort Action Will Spoil A Spoliator's Splendor," 26 Hofstra L.Rev. 1003 (1998). In many jurisdictions, criminal statutes also proscribe the destruction of evidence. E.g., N.J.S.A. §2C:28-6 (West 1999); N.Y. Penal Law §215.40 (McKinney 1988) (imposing penalties for intentional tampering with physical evidence, a felony under New York criminal law); see also, Hirsch v. General Motors Corp., 266 N.J. Super. 222, 628 A.2d 1108, 1114 (1993).

B. Review of Selected Federal Rules of Civil Procedure and Evidence

Federal courts may impose sanctions for spoliation or evidence tampering in the context of discovery disputes pursuant to the Federal Rules of Civil Procedure. Federal courts also have inherent, discretionary power to exclude evidence or testimony or authorize an adverse inference as a sanction for spoliation. See Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991). Many states have similar rules of civil procedure authorizing sanctions for misconduct in the course of discovery.

The Federal Rules of Evidence also provide certain remedies for spoliation of evidence. For example, the Federal Rules of Evidence permit the introduction of evidence that a party has attempted to obstruct justice, and provide that hearsay evidence, otherwise inadmissible, may be admitted when the declarant becomes unavailable due to spoliation by an adverse party. See Byrnie v. Town of Cromwell, 73 F. Supp. 2d 204, 207 n. 8 (D. Conn. 1999) (noting that Second Circuit law is unsettled regarding the level of fault necessary to justify an adverse inference arising out of destruction of evidence).

C. New Jersey

Courts have imposed the extreme sanction of dismissal of the plaintiff's complaint as a remedy for spoliation of evidence under New Jersey law. In addition, as discussed in more detail in the following section, the New Jersey Appellate Division has recognized a cause of action analogous to an intentional tort for spoliation of evidence. The New Jersey Supreme Court has not ruled on this issue to date, though at least one federal district court very recently predicted that the New Jersey Supreme Court would not adopt either negligent or intentional spoliation of evidence as an independent cause of action in tort.

1. Discovery Sanctions and Dismissal of Action

In Aetna Life & Cas. Co. v. Imet Mason Contractors, 309 N.J. Super. 358, 707 A.2d 180 (1998), the court dismissed the subrogation complaint filed by a property insurer on spoliation grounds. The plaintiff provided property insurance for the general contractor at a construction project. A van owned by one of the defendants, Imet Mason Contractors, caught fire, igniting siding on a townhouse unit. The fire spread to three condominium units resulting in property damage. The local fire department determined that the fire had originated in the van. The van's insurer inspected the van, as did an investigator hired by the plaintiff-property insurer. The van's insurer subsequently removed the van and arranged for storage at a body shop, but the van ultimately was destroyed on an unknown date.

The property insurer filed a subrogation action against the company which had performed work on the van prior to the fire, and the van manufacturer, Ford. Both defendants sought summary judgment, contending that they had had no opportunity to inspect the van prior to its destruction. The trial court granted the motion for summary judgment, noting that the property insurer had sufficient control of the van and failed to fulfill its obligation to preserve the van. The court also held that the defendants had been prejudiced in their defense due to lack of opportunity to inspect the van. The trial court dismissed the property insurer's subrogation action.

The Appellate Division upheld this ruling. The court held that the property insurer knew that subsequent litigation involving the van was likely and it was foreseeable that disposal of the van would prejudice the defendants, who were denied an opportunity an inspect the van (which was central to the litigation) and to dispute reports prepared by the property insurer's investigator. In permitting disposal of the van, the property insurer breached its duty, "irreparably interfering" with the defendants' discovery process.

In Hirsch v. General Motors Corp., supra, the court precluded introduction of an expert's report about a vehicle fire as a sanction for spoliation of evidence. While parked in the insureds' driveway, the insured's vehicle burst into flames. It later was declared a total loss. An agent for the vehicle's insurer inspected the vehicle and submitted a report concerning the cause of the fire. The vehicle later was sold to a salvage company, then to an automobile sales shop, and finally the whereabouts of the vehicle became unknown.

The vehicle insurer contacted the defendant vehicle dealership, notifying it that the dealership was responsible for the vehicle damage. The vehicle insurer subsequently filed a subrogation action against the dealership and G.M. The defendants served Notices to Produce the now missing vehicle. The defendants moved for dismissal based on spoliation of evidence. The court decided that, by allowing the vehicle to become unavailable for the defendants' inspection, the vehicle insurer had interfered with civil discovery. The vehicle insurers' discarding of the vehicle "frustrated any possibility for a Request for Inspection." Id. The insurers had a duty to allow defendants reasonable time and access to inspect the vehicle once the insurer had received the report identifying the vehicle as the cause of the fire. Thus, the report prepared by the vehicle insurer's agent and any testimony about the findings and conclusions in it were precluded as a sanction for spoliation of the vehicle.

D. New York

In Kirkland v. New York Housing Authority, 236 A.D.2d 170, 666 N.Y.S.2d 609 (1997), a leading New York decision on spoliation, the court held that spoliation includes intentional and non-intentional destruction of evidence. New York courts have discretion to impose sanctions under CPLR 3126 for intentional or negligent spoliation of evidence. Under New York law, the court may impose sanctions where: a litigant, either intentionally or even

negligently in certain circumstances, disposes of a crucial items of evidence, before the adversary has an opportunity to inspect the evidence.

Courts applying New York law have imposed various sanctions as a remedy for spoliation of evidence. In Tietjen v. Hamilton-Beach/Proctor-Silex, Inc., 1998 WL 865586 (N.D.N.Y. Nov. 25, 1998), the court explained:

> Courts, however, can utilize a number of remedies in dealing with situations where the plaintiff is found responsible for spoliation of evidence. These include: "(1) an adverse inference jury instruction; (2) issue preclusion; (3) dismissal; (4) summary judgment for defendant; and (5) criminal penalties."

Id. at *3 n.2. (citation omitted).

1. Discovery Sanctions and Dismissal of Action

a. Sanctions Imposed

Sanctions have been applied for willful or intentional spoliation in the course of litigation. In Austin v. Coin Devices Corp., 234 A.D.2d 155, 651 N.Y.S.2d 33 (1st Dept. 1996), the court upheld the trial court's granting of a motion to strike defendant's answer as a sanction for the defendant's willful and evasive conduct in destroying documents. The court held that the defendant's failure to advise the court and the plaintiff of its routine destruction of documents that the defendant had been ordered to produce, or to offer any excuse for failure to comply with discovery -- particularly when the documents were available when first demanded -- warranted the striking of defendant's answer.

Similarly, in DiDomenico v. C&S Aeromatik Supplies, Inc., 252 A.D.2d 41, 682 N.Y.S.2d 452, (2d Dept. 1998), the court upheld striking an answer and counterclaim based on spoliation of evidence. An employee of a parcel delivery firm, who was injured when a box he was moving caved in and caustic liquid sprayed on him, sued the delivery firm and shippers of

the box. The delivery firm "willfully" failed to preserve and turn over the box, and therefore its answer properly was struck.

Sanctions also have been imposed for negligent spoliation. In Kirkland, supra, the court held that dismissal of an action, considered the most severe sanction for spoliation of evidence, was the proper remedy for the defendant's unintentional spoliation of evidence. The plaintiff brought a wrongful death action against the New York City Housing Authority (NYCHA) and a stove manufacturer in connection with the death of the decedent as a result of a fall from her apartment window while trying to light a stove in her apartment. Plaintiff alleged that the stove was defective. Defendant NYCHA filed a third-party complaint against the installer of a gas line. Prior to filing the initial action, the plaintiff requested NYCHA to remove the stove, which later was destroyed. The third-party defendant sought an opportunity to inspect the stove, and later moved for dismissal of the action due to NYCHA's spoliation. On appeal, the court dismissed the third-party complaint, despite the unintentional destruction of the stove, noting that the stove was the crucial piece of evidence, and the third-party defendant had been prejudiced insofar as it was deprived of its ability to present a defense due to no fault of its own. See also:

- Puccia v. Farley, 699 N.Y.S.2d 576 (3d Dept. 1999). In this subrogation action, the court held that the plaintiff - homeowner's complaint against a contractor arising out of negligent installation of a woodstove was properly dismissed as a sanction for the negligent destruction of evidence by the homeowner's investigative agent. The homeowner's agent had arranged for a demolition contractor to dispose of fire debris following investigation by the insurer. The homeowner knew that a potential claim existed against the contractor, and moreover, the contractor's expert was unable to determine the cause of fire, despite the existence of photographs. On appeal, the court held that the complaint was properly dismissed.

- Klein v. Seenauth, 180 Misc. 2d 213, 687 N.Y.S.2d 889 (N.Y.City Civ. Ct. 1999). The court ruled that a "spoliation hearing" was necessary to decide whether monetary sanctions to avoid dismissal of the complaint were appropriate under New York rules of procedure, where defendants alleged a willful failure on the part of the plaintiffs' attorney to produce the bicycle which gave rise to the plaintiff's injuries; defendants alleged that the plaintiffs' attorney advised defendants that the bicycle was available for inspection when in fact it had been discarded.

b. Sanctions Not Imposed

In Conderman v. Rochester Gas & Electric Corp., 262 A.D.2d 1068, 693 N.Y.S.2d 787 (4th Dept. 1999) the court overturned the trial court's order, which sanctioned the defendant utility by allowing plaintiff to rely upon res ipsa loquitur and restricted the introduction of evidence by the utility. The utility had no notice of a specific claim, and had discarded utility pipes in good faith following a vehicle accident involving the utility poles. Thus, it had no duty to preserve the poles.

E. Connecticut

1. Adverse Inference Permitted

Connecticut courts have permitted an adverse inference to be drawn against a spoliating party. In Beers v. Bayliner Marine Corp., 236 Conn. 769, 675 A.2d 829 (1996), a leading decision, the Supreme Court of Connecticut addressed intentional spoliation of evidence in a products liability action. Plaintiffs contended that they sustained personal injuries as a result of the defective condition of the defendant's product, an outboard motor boat, and alleged manufacturing and design defects, failure to warn of the product's hazards, and failure to adequately test the boat. The defendant-manufacturer moved for summary judgment on grounds that one of the plaintiffs, after having had the boat inspected by an expert, had removed and disposed of the boat's motor before filing its products liability action. The trial court granted summary judgment against the plaintiffs, and plaintiffs appealed.

In its first opportunity to address spoliation of evidence in a civil case, the Supreme Court of Connecticut rejected a "blanket approach" to intentional spoliation of evidence, which would require dismissal of the case in order to punish the spoliator; such an approach would be inapplicable in any event against the non-spoliating plaintiff in this case. Rather, the court held "that the trier of fact may draw an inference from the intentional spoliation of evidence that the destroyed evidence would have been unfavorable to the party that destroyed it." Id., 236 Conn. at 775 (citations omitted). An adverse inference is warranted if the party seeking the adverse inference proves:

> (1) Spoliation was intentional (not necessarily that the spoliator intended to perpetrate fraud, but that the evidence was disposed of intentionally and not merely inadvertently destroyed).
>
> (2) The destroyed evidence was relevant to the issue or matter for which the party seeks the inference (e.g., spoliation of a machine may give rise to an adverse inference as to a manufacturing defect, but not with respect to a design defect when the destruction does not hinder the defense).
>
> (3) The party seeking the inference has acted with due diligence with respect to the spoliated evidence by, for example, putting the spoliator on notice that the evidence should be preserved.
>
> (4) Finally, the jury or trier of fact must be instructed that it is not required to draw the inference that the destroyed evidence would be unfavorable, but that it may do so upon being satisfied that the above conditions have been met.

Id., 236 Conn. at 777-79. The Supreme Court held that the trial court improperly granted summary judgment in this case, noting that summary judgment may be appropriate in other cases under different facts, e.g., if plaintiffs' claim had been limited to a defect in the motor that could be supported only by expert, visual inspection.

VI. EMERGING TRENDS: SPOLIATION AS AN INDEPENDENT TORT AND POTENTIAL LIABILITY OF INSURERS FOR SPOLIATION OF EVIDENCE

As is discussed above, sanctions may be imposed under federal rules, as well as New Jersey, New York and Connecticut state law, to remedy spoliation (whether intentional or negligent) by a party in the context of litigation. Certain courts have adopted an independent cause of action for damages based upon spoliation of evidence. This trend bears close scrutiny, particularly by property insurance professionals and their agents (e.g., adjusters and investigators) who often find themselves in possession of potentially significant and valuable evidence. In such circumstances, courts may find a duty to preserve evidence on behalf of the insured or injured third parties, such that negligent loss, alteration or destruction of the evidence may lead to a claim for damages against the insurer and its agents.

Cooper v. State Farm and Casualty Co., No. 93 L. 3893 (Cook County Cir. Ct., Ill. 1/19/99) illustrates this emerging responsibility in the context of a common factual scenario. The plaintiff suffered burns as a result of an apartment building fire. The building insurer identified a tenant's gas range as a probable cause of the fire, but failed to preserve the range, which later was destroyed. The plaintiff's son sued the insurer for damages arising out of the insurer's spoliation of evidence. The case, which eventually was settled, is factually significant in that intentional conduct does not appear to have been alleged, but rather a negligent breach of duty to preserve the evidence.

In other recent cases, courts have held that a property insurer's intentional destruction of evidence warranted a finding of bad faith. In Weiss v. United Fire & Casualty Co., 197 Wis.2d 365, 541 N.W.2d 753 (1995), the court held that expert testimony was not required to establish insurer bad faith for faulty investigation and refusal to pay the insured's fire claim. The insurer's investigator had failed to report that he had taken electric wires from the

fire scene. The court held that based upon this and other facts, a juror could find bad faith on the part of the property insurer.

In UptheGrove Hardware, Inc. v. Pennsylvania Lumbermans Mut. Ins. Co., 146 Wis.2d 470, 431 N.W.2d 689 (1988), the court held that the evidence supported a jury award of punitive damages for bad faith handling of a fire claim. The insured alleged that a lamp and cord could have caused the fire at the insured premises. The insurer's investigators found the lamp and cord, lied about whether the cord was unplugged and later allegedly intentionally destroyed the lamp and cord. The court held that punitive damages, therefore, were supported by this evidence.

As is discussed in the following sections, two decisions of the Appellate Division of the New Jersey Superior Court have recognized a cause of action for intentional and negligent spoliation of evidence, though later decisions have retreated from recognition of an independent tort. New York and Connecticut state courts have refused to recognize an independent tort for spoliation of evidence.

A. New Jersey

The Appellate Division of the New Jersey Superior Court recognized the closely analogous tort of fraudulent concealment of evidence in Viviano v. CBS, Inc., 251 N.J. Super. 113, 597 A.2d 543 (1991), certif. denied, 606 A.2d 375 (N.J. 1992). In Viviano, an employee injured in a work-related accident involving a press sued her employers for fraudulently concealing evidence relating to the employee's products liability suit against the manufacturer. The plaintiff alleged that her employer, CBS, had unreasonably impeded her discovery and failed to furnish her with relevant information regarding the press and other potentially-liable parties. The employee later discovered that CBS had withheld a memorandum specifying the identity of a component-part manufacturer of the press as well as the fact that a timing mechanism probably

caused the press to malfunction. Immediately following the accident, CBS had removed the timing mechanism for the press and discarded it.

The court ruled that the plaintiff's cause of action was analogous to the "recently recognized cause of action for destruction of evidence which has been dubbed spoliation of evidence." Id. at 549. The court held that the defendants had willfully concealed evidence in the face of probable litigation involving the plaintiff, which was designed to disrupt the plaintiff's case. Additionally, the plaintiff suffered damages as a result of the defendant's wrongdoing, and the court upheld an award of punitive damages in light of the substantial evidence of intentional wrongdoing by the defendant.

Very recently though, the federal district court for the district of New Jersey cast doubt upon recognition of the tort of intentional spoliation of evidence. In Kolanovic v. Gida, 77 F. Supp. 2d 595 (D.N.J. 1999), the court held that the New Jersey Supreme Court has not recognized spoliation of evidence as an independent tort, and further predicted that the New Jersey Supreme Court would not adopt the new tort of spoliation of evidence set forth by the Appellate Division of the Superior Court in Viviano v. CBS, supra.

In Kolanovic v. Gida, the plaintiff, a ship employee, suffered personal injuries arising out of a ladder accident. The ladder had been photographed, but eventually disappeared. Plaintiff sued the defendant shipowners, alleging, in part, negligent and intentional spoliation. Defendants sought summary judgment on these counts which the court granted. The court held that, even in the unlikely event that the New Jersey Supreme Court would adopt the tort of intentional spoliation of evidence, the plaintiff could not satisfy the elements outlined in Viviano.

In Allis-Chalmers Corp. Product Liability Trust v. Liberty Mutual Insurance Co., 305 N.J. Super. 550, 702 A.2d 1336 (1997), a forklift manufacturer defending a wrongful death action filed by its employee's widow sued a workers' compensation insurer, claiming that the

insurer was liable for spoliation of evidence by failing to purchase (or consenting to destruction of) the forklift that had overturned and caused the employee's death. The forklift later was destroyed by its owner. The court rejected the tort claims, holding that the manufacturer had failed to show intent to destroy the forklift, a necessary element of the tort of concealment of evidence. Moreover, the insurer had no affirmative duty to acquire and preserve the forklift. See also Marinelli v. Mitts & Merrill, 303 N.J. Super. 61, 696 A.2d 55 (1997) (employees' claim against their employer for intentional spoliation of evidence, assuming such a claim would be recognized in New Jersey, was dismissed, where the plaintiffs, who claimed they were injured in a work-place explosion caused by shredding of hairspray cans, were not prejudiced by destruction of the compactor, shredder and cartons of hairspray).

Negligent spoliation of evidence has been recognized as an independent tort in only one New Jersey Superior Court decision, Callahan v. Stanley Works, 306 N.J. Super. 488, 703 A.2d 1014 (1997). The court held that an injured employee could bring a claim against his employer alleging negligent spoliation of evidence. The employee contended that the employer's misplacement or destruction of evidence -- namely a pallet loaded with doors which fell from a forklift and struck him -- disrupted or interfered with the employee's ability to pursue a third-party negligence claim against the door manufacturer which had loaded the pallet. The court denied the defendant's motion to dismiss on grounds of negligent spoliation of evidence. The court remanded the matter to a jury to determine: whether the defendant voluntarily assumed the duty; whether destruction of the pallet by the defendant disrupted the plaintiff's ability to prove its negligence claim; and damages to compensate the plaintiff for any lost value of his personal injury claim.

Subsequently, courts have refused to recognize a claim under New Jersey law for negligent spoliation of evidence.

- Proske v. St. Barnabus Medical Center, 313 N.J. Super. 311, 712 A.2d 1207 (1998), certif. denied, 158 N.J. 685, 731 A.2d 45 (1999). The court refused an opportunity to create a new tort for negligent spoliation of evidence, noting that "a new cause of action should be created by legislative enactment or by the Supreme Court rather than by an intermediate appellate court." Id. at 1209. The court held, "New Jersey appellate courts have not recognized the tort of negligent spoliation of evidence." Id. (quoting Allis-Chalmers Corp. v. Liberty Mutual Insurance Co., supra).

- Kolanovic v. Gida, supra. The federal district court observed that the New Jersey Appellate Division has not yet recognized the tort of negligent spoliation of evidence, and the New Jersey Supreme Court implicitly declined to recognize such a tort in Hewitt v. Alan Canning Co., supra. The federal court predicted that the New Jersey Supreme Court would not recognize the tort of negligent spoliation of evidence, and the court declined plaintiff's invitation to create a new cause of action for either negligent or intentional spoliation of evidence.

B. New York

New York currently does not recognize an independent cause of action for spoliation of evidence. See Black Radio Network, Inc. v. Nynex Corp., 44 F.Supp. 2d 565, 584 (S.D.N.Y. 1999). In Weigl v. Quincy Specialties Co., 158 Misc.2d 753, 601 N.Y.S.2d 774 (1993), the plaintiff sued the manufacturer of a laboratory coat and her employer for injuries sustained when her lab coat caught fire. The plaintiff alleged that her employer had discarded the lab coat, and alleged negligent and intentional spoliation of evidence. The employer moved to dismiss the action on grounds that these causes of action were not recognized in New York. The court agreed, stating that New York courts follow the majority view and do not recognize spoliation of evidence as a cognizable tort action. The Court observed that other common-law tort claims were available to remedy spoliation of evidence, if proven. See also, Tietjen v. Hamilton Beach/Proctor-Silex, Inc., supra, 1998 WL 865586 at *2 (N.D.N.Y. Nov. 25, 1998) (setting forth the elements of cause of action for spoliation of evidence, but holding independent tort claims for negligent and/or intentional spoliation of evidence could not be sustained).

C. Connecticut

The Superior Court of Connecticut has had several occasions to review a proposed cause of action for spoliation of evidence, and in all instances has refused to expressly recognize an independent tort. In Fontanella v. Liberty Mut. Ins. Co., 1998 WL 568728 (Conn. Super. Aug. 26, 1998), the Superior Court of Connecticut, presented with the question whether negligent spoliation of evidence is an actionable tort, decided the issue on narrower grounds. The court held that spoliation is appropriately addressed by an adverse inference when a party is the spoliator. In this case, the plaintiff had sold the evidence to the defendant after the accident with no restrictions on the sale, and the defendant, thus, was under no duty to preserve the evidence. Noting a split of authority in other states regarding negligent spoliation by a third party as an actionable tort, and also that the Connecticut Supreme Court had not decided this issue, the court declined to establish a new tort.[6]

D. Conclusion and Recommendations

Insurance professionals and their agents must strive to avoid allegations of spoliation. Often it is impractical, if not impossible, to preserve and retain every pertinent artifact from a fire scene or loss site. Nevertheless, certain specific steps must be taken by insurance professionals to preserve evidence, including:

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[6] See also, Moisei v. Pilkington Barnes-Hind, Inc., 1997 WL 539784 (Conn. Super. Aug. 21, 1997) (noting the Supreme Court of Connecticut refused to punish the spoliator in Beers v. Bayliner Marine Corp., supra, and therefore holding there is no cause of action for spoliation of evidence); Reilly v. D'Errico, 12 Conn. L. Rptr. 457, 1994 WL 547671 (Sept. 22, 1994) (The Superior Court outlined the elements of torts of intentional and negligent spoliation of evidence, but held that Connecticut law does not recognize a cause of action for tortious interference with a civil action by spoliation of evidence. The court noted: (1) a remedy in the form of sanctions already exists; (2) such a tort would be inherently speculative in nature; and (3) certain judicial policies, such as finality of judgments, would be violated). Regency Coachworks, Inc. v. General Motors Corp., 1996 WL 409339 (Conn. Super. June 26, 1996). (The defendant discarded a vehicle transmission which the plaintiff alleged had caused personal injuries to the plaintiff, the lessee of the vehicle. Reviewing the law in various jurisdictions, the court decided that Connecticut authority did not support recognition of a separate tort).

(1) Conduct an investigation with the goal of preserving evidence relating to the cause of the loss, and also items which were ruled out, thus preserving evidence both of determined as well as eliminated causes;

(2) If practical, provide potentially adverse parties with an opportunity to investigate the scene and to designate additional physical evidence to be preserved;

(3) Identify, label and preserve all pertinent physical evidence at the scene to ensure a clear chain of custody and to avoid allegations of tampering;

(4) If possible, avoid engaging in destructive testing of evidence prior to notification of adverse parties. However, if destructive testing is necessary to identify responsible parties and/or to determine the cause of the loss, it should be photographed and videotaped. Preserve all remains of the evidence which has been tested;

(5) Insure that the investigation is supervised by experienced and qualified insurance professionals, investigative consultants and/or legal counsel.

See Cozen, "Insuring Real Property" §20.04[7] at 20-26 (1999).

APPENDIX A

SELECTED NEW JERSEY STATUTES

2A:40A-1. Construction, alteration, repair, maintenance, servicing or security of building, highway, railroad, appurtenance and appliance; invalidity

A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract, agreement or purchase order, relative to the construction, alteration, repair, maintenance, servicing, or security of a building, structure, highway, railroad, appurtenance and appliance, including moving, demolition excavating, grading, clearing, site preparation or development of real property connected therewith, purporting to indemnify or hold harmless the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agents, or employees, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workmen's compensation or agreement issued by an authorized insurer.

2A:40A-2. Architect, engineer, surveyor or agents for damages, claims, losses or expenses arising out of preparation or approval of maps, opinions, change orders, designs or specifications, or giving of or failure to give directions or instructions; invalidity

A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract, agreement or purchase order, whereby an architect, engineer, surveyor or his agents, servants, or employees shall be indemnified or held harmless for damages, claims, losses or expenses including attorneys' fees caused by or resulting from the sole negligence of an architect, engineer, surveyor or his agents, servants, or employees and arising either out of (1) the preparation or approval by an architect, engineer, surveyor or his agents, servants, employees or invitees, of maps, drawings, opinions, reports, surveys, change orders, designs or specifications, or (2) the giving of or the failure to give directions or instructions by the architect, engineer, surveyor or his agents, servants or employees; provided such giving or failure to give is the cause of the damage, claim, loss or expense, is against public policy and is void and unenforceable.

APPENDIX B

SELECTED NEW YORK STATUTES

§ 5-321. Agreements exempting lessors from liability for negligence void and unenforceable.

Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable.

§ 5-322.1. Agreements exempting owners and contractors from liability for negligence void and unenforceable; certain cases

1. A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer. This subdivision shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent.

2. The provisions of this section shall only apply to covenants, promises, agreements or understandings in, or in connection with or collateral to a contract or agreement, as enumerated in subdivision one hereof, entered into on or after the thirtieth day next succeeding the date on which it shall have become a law.

§ 5-323. Agreements exempting building service or maintenance contractors from liability for negligence void and unenforceable

Every covenant, agreement or understanding in or in connection with or collateral to any contract or agreement affecting real property made or entered into, whereby or whereunder a contractor exempts himself from liability for injuries to person or property caused by or resulting from the negligence of such contractor, his agent, servants or employees, as a result of work performed or services rendered in connection with the construction, maintenance and repair of real property or its appurtenances, shall be deemed to be void as against public policy and wholly unenforceable.

§ 5-324. Agreements by owners, contractors, subcontractors or suppliers to indemnify architects, engineers and surveyors from liability caused by or arising out of defects in maps, plans, designs and specifications void and unenforceable.

Every covenant, agreement or misunderstanding in, or in connection with any contract or agreement made and entered into by owners, contractors, subcontractors or suppliers whereby an architect, engineer, surveyor or their agents, servants or employees are indemnified for damages arising from liability for bodily injury to persons or damage to property caused by or arising out of defects in maps, plans, designs or specifications, prepared, acquired or used by such architect, engineer, surveyor or their agents, servants or employees shall be deemed void as against public policy and wholly unenforceable.

§ 5-325. Garages and parking places.

1. No person who conducts or maintains for hire or other consideration a garage, parking lot or other similar place which has the capacity for the housing, storage, parking, repair or servicing of four or more motor vehicles, as defined by the vehicle and traffic law, may exempt himself from liability for damages for injury to person or property resulting from the negligence of such person, his agents or employees, in the operation of any such vehicle, or in its housing, storage, parking, repair or servicing, or in the conduct or maintenance of such garage, parking lot or other similar place, and, except as hereinafter provided, any agreement so exempting such person shall be void.

2. Damages for loss or injury to property may be limited by a provision in the storage agreement limiting the liability in case of loss or damage by theft, fire or explosion and setting forth a specific liability per vehicle, which shall in no event be less than twenty-five thousand dollars, beyond which the person owning or operating such garage or lot shall not be liable; provided, however, that such liability may on request of the person delivering such vehicle be increased, in which event increased rates may be charged based on such increased liability.

APPENDIX C

SELECTED CONNECTICUT STATUTES

CONNECTICUT GENERAL STATUTES ANNOTATED
TITLE 47a. LANDLORD AND TENANT
CHAPTER 830. RIGHTS AND RESPONSIBILITIES OF LANDLORD AND TENANT

§ 47A-4. Terms prohibited in rental agreement

(a) A rental agreement shall not provide that the tenant: . . . (3) agrees to the exculpation or limitation of any liability of the landlord arising under law or to indemnify the landlord for that liability or the costs connected therewith;

* * *

(b) A provision prohibited by subsection (1) of this section included in a rental agreement is unenforceable.

CONNECTICUT GENERAL STATUTES ANNOTATED
TITLE 52. CIVIL ACTIONS
CHAPTER 925. STATUTORY RIGHTS OF ACTION AND DEFENSES

§ 52-572k. Hold harmless clause against public policy in certain construction contracts

(a) Any covenant, promise, agreement or understanding entered into in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of any building, structure or appurtenances thereto including moving, demolition and excavating connected therewith, that purports to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of such promisee, his agents or employees, is against public policy and void, provided this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement is sued by a licensed insurers' compensation or agreement issued by an authorized insurer.

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