COZEN O'CONNOR

REGIONAL SUBROGATION PRACTICE UPDATE

MIDWEST LAW AND PROCEDURE

- Spoliation of Evidence
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- Exculpatory and Hold Harmless Agreements
- Waiver of Subrogation Provisions

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I. SPOLIATION OF EVIDENCE

Spoliation is the destruction of or failure to preserve evidence for another's use in pending or future litigation. See Minn-Chem, Inc. v. Richway Indus., Inc., No. C1-99-1963, 2000 WL 1066529 (Minn. App. Aug. 1, 2000). Spoliation issues may arise in products liability cases when evidence has been lost, altered, or destroyed during testing, and in fire cases when a party to a lawsuit (or third party) fails to preserve or intentionally destroys fireground artifacts. Sanctions vary, but may include: an adverse instruction or adverse inference at trial, preclusion of evidence or testimony, or dismissal of the claim or part of a claim. Criminal sanctions may also be available. See, e.g., Ohio Rev. Code §§ 2921.32(A)(4), 2921.12 (obstructing justice, tampering with evidence). "A court need not have issued an order barring evidence destruction for sanctions to be imposed." See Lawrence v. Harley-Davidson Motor Co., Inc., No. 99C 2609, 1999 WL 637172 at *2 (N.D. Ill. Aug. 12, 1999). See also American States Ins. Co. v. Tokai-Seiki (H.K.), Ltd., 94 Ohio Misc.2d 172, 704 N.E.2d 1280 (1997).

A. Cause of Action for Spoliation

Illinois

Illinois courts recognize a cause of action for negligent and intentional spoliation under existing tort law. In Boyd v. Travelers Ins. Co., 166 Ill. 2d 188, 652 N.E. 267 (1995), the Supreme Court of Illinois upheld an action by a plaintiff injured in an explosion by a propane catalytic heater against the workers' compensation carrier for the plaintiff's employer. The plaintiff alleged negligent and intentional spoliation of evidence based upon the carrier's loss of the heater before it could be inspected and tested. The court held a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action. See also Stinnes Corp. v. Kerr-McGee Coal Corp., 309 Ill. App. 3d 707, 722 N.E.2d 1167 (2000).

Indiana

The Indiana Court of Appeals recently upheld an independent action for spoliation of evidence in Burton v. Estate of Davis, 730 N.E.2d 800 (Ind. App. 2000). The decedent's estate filed wrongful death and spoliation of evidence claims and sought punitive damages against the defendant motorist and the defendant's employer, who moved the vehicle involved in the accident. The court upheld the claim, noting the defendants' "effort to deceive and mislead the accident investigation and cover up important potential evidence of the collision, i.e., the initial point of impact and final rest position of the vehicles."

Iowa

Iowa does not recognize negligent spoliation of evidence as an independent cause of action. See Meyn v. State of Iowa, 594 N.W.2d 31 (Iowa 1999) (Supreme Court of Iowa dismissed plaintiff's claim for spoliation arising out of disposal of a prosthesis, which the plaintiff alleged was relevant evidence in a lawsuit against the defendant state university hospital).

Michigan

Michigan courts have not recognized spoliation as an independent cause of action. See Panich v. IronWood Products Corp., 179 Mich. App. 136, 445 N.W. 2d 795 (1989) (plaintiff failed to state a claim against employer for destruction of an electrical box which plaintiff alleged caused injuries; even if intentional interference with prospective action by spoliation of evidence were recognized as a tort, the facts did not support a claim because the employer had no motive in destroying the box).

Minnesota

Minnesota courts reject spoliation as an independent tort. In Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc., 456 N.W.2d 434 (Minn. 1990), the plaintiff fire insurer contended that its subrogation action arising out of a fire damage claim involving

property at a storage facility was nullified when the owner of a fire damaged facility or its insurer discarded evidence from the fire site. Without first pursuing the subrogation claim, the insurer sued the owner of the facility and the law firm for the owner's insurer, alleging intentional or negligent spoliation of evidence. The court noted there is no Minnesota precedent for a spoliation tort separate from existing negligence law, but even assuming spoliation of evidence were recognized as an independent tort, the claims were premature because any harm to the plaintiff's subrogation action was speculative.

Ohio

Ohio has recognized the tort of intentional spoliation, holding that a cause of action requires the following elements: pending or probable litigation; knowledge on the part of the defendant that litigation exists or is probable; willful destruction of evidence to disrupt the plaintiff's case; disruption of the plaintiff's case; and damages proximately caused by the defendant's acts. See Drawl v. Cornicelli, 124 Ohio App. 3d 562, 706 N.E. 2d 849 (1997). A cause of action for spoliation is recognized between the parties to a primary action, as well as against third parties. See Smith v. Howard Johnson Co., Inc., 67 Ohio St. 3d 28, 615 N.E.2d 1037 (1993).

Wisconsin

Wisconsin courts do not recognize spoliation as an independent tort or cause of action. See Ely v. St. Luke's Hosp., 182 Wis. 2d 510, 514 N.W. 2d 878 (Wis. App. 1994) (unpublished decision).

B. Insurer Liability for Spoliation

Increasingly, insurers face liability to policyholders for spoliation of evidence relating to uninsured losses, either in the form of a tort action or bad faith liability. Liability arises out of insurers' (or their agents') possession, investigation or testing, and the consequential loss or destruction of evidence essential to the policyholder's claim.

Cooper v. State Farm Fire & Cas. Co., No. 93 L 3898 (Ill. Cir. Ct., Cook Cty. Jan. 19, 1999) involved an action for spoliation of evidence filed by the son of a building tenant who was seriously burned in an apartment fire against the building insurer. The insurer identified a gas range as the cause of fire, but failed to preserve the range, which subsequently was destroyed. The case resulted in the payment of a settlement by the insurer to the plaintiff.

In Thompson v. Owensby, 704 N.E.2d 134 (Ind. App. 1998), the Indiana Court of Appeals permitted a claim filed by dog-bite victims against the liability insurer of the dog owner for breach of the duty to preserve a dog-restraining cable in the insurer's possession during investigation. The insurer's knowledge of the plaintiffs' claims and possession of the cable (a key piece of evidence in the plaintiffs' action against the dog owners, landlords, and cable manufacturer) created a relationship between the insurer and the plaintiffs sufficient to find an actionable duty on the part of the insurer to maintain the evidence it possessed. The court explained:

> A liability carrier has a duty in the ordinary course of business to investigate and evaluate claims made by its insured. In carrying out this duty, carriers take possession of documents and things that must be authenticated and tested to evaluate claims. These same documents and things will be key items of evidence in the event that the claims are denied and litigation ensues. This conduct by necessity gives rise to a relationship with the third-party plaintiff.

Two Wisconsin decisions held insurers liable for bad faith arising from spoliation. In Weiss v. United Fire & Cas. Co., 197 Wis. 2d 365, 541 N.W.2d 753 (1995), the plaintiff policyholder sued his homeowner's insurer for bad faith failure to investigate and declination of his fire claim. The Supreme Court of Wisconsin upheld the claim and further decided that the insured was not required to introduce expert testimony to prove bad faith. In Upthegrove Hardware, Inc. v. Pennsylvania Lumbermans Mut. Ins. Co., 146 Wis. 2d 470, 431 N.W. 2d 689 (Wis. App. 1988), the court affirmed a jury verdict in favor of the insured against a business

insurer for intentional spoliation. The evidence supporting a bad faith verdict and punitive damages showed that the insurer's investigator discovered a lamp and cord that the insured believed caused the fire, lied about the condition of the cord, and discarded it.

C. Adverse Inference and Testimony/Evidence Preclusion as a Spoliation Sanction

Federal Cases

Federal courts apply various sanctions for spoliation of evidence, including adverse inference and evidence preclusion, based on the Federal Rules of Civil Procedure and Evidence. See, e.g., Smith v. Borg-Warner Auto. Diversified Transmission Products Corp., No. IP98-1609-C-T/G, 2000 WL1006619 (S.D. Ind. Jul. 19, 2000).

Illinois

Illinois courts have imposed various discovery and trial sanctions to remedy spoliation, including preclusion of evidence and adverse inferences. In Shimanovsky v. General Motors Corp., 181 Ill. 2d 112, 692 N.E. 2d 286 (1998) the Illinois Supreme Court held that destructive testing of the power-steering component of a vehicle prior to the commencement of the lawsuit warranted preclusion of evidence regarding condition of the component, but dismissal was an abuse of discretion and unreasonable, because the testing was done in good faith and only partially altered or destroyed the evidence. Moreover, the manufacturer was aware of the testing and did not diligently seek to obtain the vehicle parts.

Indiana

Indiana courts permit an adverse inference as a sanction for spoliation. In Cahoon v. Cummings, 734 N.E.2d 535 (Ind. 2000), the Supreme Court of Indiana held that alteration of documentary evidence was admissible to show the defendant's consciousness of guilt, and may permit an inference that production of the evidence would be against the interest of the spoliating party. See also Porter v. Irvin's Interstate Brick & Block Co., Inc., 691 N.E. 2d 1363 (Ind. App. 1998).

Iowa

Iowa courts preclude evidence and permit adverse inferences as sanctions for spoliation of evidence. See Gamerdinger v. Schaefer, 603 N.W. 2d 590 (Iowa 1999). But in Hendricks v. Great Plains Supply Co., 609 N.W.2d 486 (Iowa 2000) the Supreme Court of Iowa recently ruled that a homeowners' insurer did not spoliate evidence by removing remnants of a home seven weeks after it was destroyed by fire, absent intent to destroy evidence. The insurer's agent had extensively photographed the fire scene, preserved portions of the fireplace located in the area of the fire origin, and made this evidence available for examination by the defendants.

Michigan

Michigan courts have precluded testimony in spoliation cases. In Hamann v. Ridge Tool Co., 213 Mich. App. 252, 539 N.W. 2d 753 (1995), a case of first impression, the court held that the plaintiff's expert in a products liability action, who examined pieces of the cable hoist in question before the pieces were inadvertently lost by another of plaintiff's experts, should not have been allowed to testify based on magnification observations he made during the examination, but could testify based on photographs of the product to which the defendant's experts also had access.

Minnesota

Minnesota courts have precluded evidence or testimony and permitted adverse inferences to remedy spoliation. See Hoffman v. Ford Motor Co., 587 N.W. 2d 66 (Minn. App. 1998) (testimony and evidence from fire investigation was excluded as a sanction); Hines v. Woodings-Verona Tool Works, Inc., 565 N.W. 2d 469 (Minn. App. 1997) (precluding testimony and report of plaintiff worker's expert regarding railroad track bolt wrench which subsequently was lost). In Patton v. Newmar Corp., 538 N.W. 2d 116 (Minn. 1995), the Supreme Court of Minnesota held that the trial court did not abuse its discretion by disallowing testimony of the plaintiff's expert witness and other evidence derived from the expert's investigation as a sanction

for spoliation of evidence by the plaintiff, whose motor home was destroyed by fire. The plaintiff's products liability action alleged defective design against the manufacturer of a motor home. The plaintiff admitted the location of the motor home was unknown, and unidentified components removed and retained by the plaintiffs' experts also had been lost.

Ohio

Ohio courts have precluded evidence and permitted adverse inferences in proper cases. See Travelers Ins. Co. v. Dayton Power & Light Co., 76 Ohio Misc. 2d 17, 663 N.E. 2d 1383 (1996) (insurer's failure to retain transition cabinet involved in fire for inspection by defendant electric company warranted preclusion of testimony of expert who examined cabinet). In Aerosol Sys., Inc. v. Wells Fargo Alarm Serv., 127 Ohio App.3d 486, 713 N.E.2d 441 (1998), an action by a customer against a fire alarm monitoring company to recover for fire losses, the court held evidence of spoliation by fire investigators for customer's insurer was relevant to the issue of whether the fire cause could be determined.

Wisconsin

In Sentry Ins. v. Royal Ins. Co. of America, 196 Wis. 2d 907, 539 N.W.2d 911 (Wis. App. 1995), the court prohibited evidence regarding the condition of a refrigerator allegedly involved in a fire as a sanction for destructive testing and subsequent disposal of the refrigerator by the plaintiff and the plaintiff's agent, although this sanction resulted in dismissal. The defendant was prevented from conducting tests to determine if the refrigerator was the cause of the fire, ascertaining the serial or model number, and examining wires. Photographs taken by the plaintiff's expert were inadequate for purposes of the defense.

D. Dismissal of Claim as a Sanction for Spoliation

Dismissal is the ultimate sanction, usually imposed only in cases of severe prejudice or egregious behavior. See, e.g., Transamerica Ins. Group v. Maytag, Inc., 99 Ohio App. 3d 203, 650 N.E.2d 169 (1994); Garfoot v. Fireman's Fund Ins. Co., 228 Wis.2d 707, 599

N.W.2d 411 (1999). In China Ocean Shipping (Group) Co. v. Simone Metals Inc., No. 97 C 2694, 1999 WL 966443 (N.D. Ill. Sept. 30, 1999), the federal district court dismissed an action for damages arising out of a train derailment, holding that the plaintiff exercised poor judgment in losing a critical piece of evidence, although the evidence was not in the plaintiff's control. See also Fed. R.Civ.P. 37(b).

Several midwest courts have dismissed claims in response to spoliation. In Allstate Ins. Co. v. Sunbeam Corp., 53 F.3d 804 (7th Cir. 1995), the court dismissed a subrogation action as a sanction for spoliation. The insurer, subrogee of the insured whose house was damaged by fire, sued a gas-grill manufacturer alleging products liability. The insurer disposed of the gas grill parts and remains of a spare tank found among the grill's remains, preventing the defendant from proving its defense that the fire was caused by tank overpressurization. See also Lawrence v. Harley-Davidson Motor Co., Inc., No. 99C2609, 1999 WL637172 (N.D. Ill. Aug. 12, 1999) (dismissing tort action against motorcycle manufacturer in response to plaintiff's alteration of the motorcycle).

II. ECONOMIC LOSS DOCTRINE

The economic loss doctrine provides that there is no recovery in tort for economic losses, such as the product's failure to perform as expected, or for lost profits, absent physical harm to the person or to other property. See East River S. S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986). A majority of jurisdictions follow this rule, though numerous exceptions exist. For example, certain courts have held that the economic loss rule applies only in commercial contexts, not to consumers who purchase goods for personal, residential use. See, e.g., Richards v. Midland Brick Sales Co., Inc., 551 N.W. 2d 649, 651 (Iowa 1996). Other courts hold that fraud claims are excepted from the economic loss doctrine. See Cunningham v. PFL Life Ins. Co., 42 F. Supp. 2d 872, 887 (N.D. Iowa 1999) (noting fraud exception in Illinois and

Iowa).

Illinois

Illinois law bars tort recovery for purely economic losses, including damages for inadequate value, cost to repair and replace the defective product, loss of profits, and diminution in product value due to inferior quality or failure to work for the general purposes for which it is manufactured and sold. See Nabisco, Inc. v. American United Logistics, Inc., No. 99 C 0763, 2000 WL 748131 at *3 (N.D. Ill. Jun. 1, 2000). Under Illinois law, it is insufficient to avoid the economic loss rule merely to allege damage to other property or a sudden or dangerous occurrence. Rather, to recover in tort, "[a] plaintiff must allege damage to other property that was caused by a sudden or dangerous occurrence." Id., 2000 WL 748131 at *3 (dismissing plaintiff's tort claims arising out of contamination of its food products stored in a warehouse which was improperly constructed and contained aromatic hydrocarbons).

The economic loss rule applies in Illinois to claims involving negligent performance of services, but negligent misrepresentation by a defendant in the business of supplying information for the guidance of others in business transactions is excepted. See Tolan and Son, Inc. v. KLLM Architects, Inc., 308 Ill. App.3d 18, 719 N.E.2d 288 (1999) (architect or engineer could come within negligent misrepresentation exception to economic loss doctrine if providing information for guidance of others). In Stinnes Corp. v. Kerr-McGee Coal Corp., 309 Ill. App.3d 707, 722 N.E.2d 1167 (1999), the court held that the economic loss rule did not prevent a tort action alleging spoliation.

Indiana

Claims that are economic in nature, not arising from physical harm to the plaintiff or his personal property, are not recoverable in tort under Indiana law. In Choung v. Iemma, 708 N.E. 2d 7 (Ind. App. 1999), the court upheld summary judgment against the purchaser of a home who alleged that the defendants failed to disclose that the home had been relocated onto a newly constructed foundation. The court ruled that damage to the home, including flooding, cracking, bulging, and inadequate drainage, was essentially loss of value or cost to repair, and therefore not compensable in tort. See also Progressive Ins. Co. v. General Motors Corp., 730 N.E.2d 218 (Ind. App. 2000) (subrogated insurer plaintiffs could not recover under Indiana Products Liability Act, Ind. Code §33-1-1.53(a), for damage to vehicle which spontaneously caught fire, where no physical harm to users or consumers or their property occurred). But see Reed v. Central Soya Co., Inc., 644 N.E.2d 84 (Ind. 1994) (fact issues existed as to whether property damage was sudden and major for purposes of products liability claim).

Iowa

In Richards v. Midland Brick Sales Co., 551 N.W. 2d 649 (Iowa App. 1996), the Iowa Supreme Court rejected the plaintiff homeowner's strict liability and negligence claims arising out of the sale of chipping, cracking bricks used in her home. The court held that the plaintiff's remedy was contractual, rejecting the argument that the bricks caused damage to other portions of the home, and holding that the damage was limited to the bricks themselves. See also Determan v. Johnson, 613 N.W. 2d 259 (Iowa 2000) (dismissing home purchaser's tort claims against vendor absent sudden and accidental occurrence, where the only harm was to home itself, despite plaintiff's expert opinion that the roof could collapse at any time); Friedlein v. E.I. DuPont de Nemours & Co., 68 F. Supp. 2d 1061 (N.D. Iowa 1999) (dismissing plaintiff farmer's products liability claims against herbicide manufacturer for crop damage resulting from failure of herbicide to perform as expected). But see American Fire & Cas. Co. v. Ford Motor Co., 588

N.W. 2d 437 (Iowa 1999) (Iowa Supreme Court noted that the nature of the defect, type of risk, and manner in which injury arose affect whether a claim alleges products liability damages or contract damage, and upheld a subrogation claim against an automobile manufacturer seeking recovery for loss of an automobile and its contents when the automobile spontaneously caught fire).

Michigan

Under Michigan law, "where a plaintiff seeks to recover for economic loss caused by a defective product purchased for commercial purposes, the exclusive remedy is provided by the UCC." See MASB-SEG Prop./Cas. Pool, Inc. v. Metalux, 231 Mich. App. 393, 586 N.W.2d 549, 553 (1998) (insurer's subrogation claim against a fluorescent light manufacturer/seller for fire damage was contractual). See also Citizens Ins. Co. v. Osmose Wood Preserving, Inc., 231 Mich. App. 40, 585 N.W.2d 314 (1998) (economic loss doctrine applied to insurer's subrogation action against manufacturer of flame-retardant chemicals used to treat wood roofing materials which allegedly caused roof of restaurant to collapse). The economic loss doctrine also precludes fraud claims unless they arise out of a matter outside the contract. See AGA Gas, Inc. v. Wohlert Corp., No. 5:98-CV-155, 2000 WL 1478466 (W.D. Mich. Jul. 21, 2000); Dinsmore Instrument Co. v. Bombardier, Inc., 199 F.3d 318 (6th Cir. 1999).

Minnesota

Economic losses are not compensable in tort under Minnesota law. See, e.g., AKA Distributing Co. v. Whirlpool Corp., 137 F.3d 1083 (8th Cir. 1998) (economic losses arising out of commercial sales transactions are not recoverable in tort); Agristor Leasing v. Kramer, 640 F. Supp. 187 (D. Minn. 1986) (failure of a grain storage structure to perform as expected did not support negligence and strict liability claims, despite unequal bargaining power and alleged negligent installation or repair of silo). As in many jurisdictions, the economic loss doctrine in Minnesota is partly governed by statute. See Minn. St. Ann §604.10.

Ohio

Absent injury to the person or damage to other property, economic losses cannot be recovered in tort under Ohio law. See Picker Interim, Inc. v. Mayo Foundation, 6 F. Supp. 2d 685 (N.D. Ohio 1998); City of Cincinnati v. Beretta U.S.A. Corp., Nos. C-990729, C-990814, C-990815, 2000 WL 1133078 (Ohio App. Aug. 11, 2000) (an unreported decision, subject to limitation and restrictions on use, rejecting the City's products liability claims against firearms manufacturers, holding costs such as police, emergency, and health expenses were unrecoverable economic loss). Economic loss is not "harm" under the Ohio Products Liability Act unless the injured party has separately suffered from death, physical injury to person, serious emotional distress, or physical damage to property. See also Ohio Rev. Code §§ 2307.71(B)(G), 2307.79). In Westfield Ins. Co. v. HULS America, Inc., 128 Ohio App. 3d 270, 714 N.E. 2d 934 (1998), the court dismissed a subrogation action brought on behalf of mall tenants for business losses sustained in a roof collapse, holding that the damages did not arise from physical injury to person or tangible property damage.

Wisconsin

The Wisconsin Supreme Court recently defined economic loss as loss in product value which occurs because the product is inferior in quality and does not work for the purpose

for which it was manufactured and sold. See Wausau Tile, Inc. v. County Concrete Corp., 226 Wis. 2d 235, 593 N.W. 2d 445 (Wis. 1999). In that case the manufacturer of concrete paving blocks sued a cement supplier and its liability insurer for breach of contract and tort. The court dismissed the tort claims alleging that the blocks buckled, curled, expanded, and cracked. See also General Gas Co. of Wisconsin v. Ford Motor Co., 225 Wis. 2d 353, 592 N.W. 2d 198 (1999) (Wisconsin Supreme Court applied the economic loss doctrine to a consumer transaction, precluding a subrogation claim alleging fire damage to a vehicle which burst into flames while parked, and rejecting the sudden and calamitous exception to economic loss rule); Prent Corp. v. Martek Holdings, Inc., No. 98-3552, 98-3553, 2000 WL 1230655 (Wis. App. Aug. 31, 2000) (software buyer's tort claims alleging negligent misrepresentation were barred by the economic loss doctrine); Cooper Power Systems v. Union Carbide, 123 F.3d 675 (7th Cir. 1997) (economic loss rule barred recovery by non-purchaser third party alleging misrepresentation in sale of paint).

III. EXCULPATORY AND HOLD HARMLESS AGREEMENTS

Leases, bailment or alarm contracts, and construction agreements often contain exculpatory or hold harmless provisions. Generally, contractual provisions protecting a party from the consequences of his or her own negligence are enforceable, with certain exceptions. State statutes, particularly in the context of lease agreements or architectural and construction contracts, may effect the enforceability of exculpatory provisions.

Illinois

Exculpatory agreements are generally valid and enforceable in Illinois, provided they do not violate public policy and there is no unique relationship between the parties (such as common carrier/passenger or employer/employee) which precludes enforcement. See Maness v. Santa Fe Park Enterprises, Inc., 298 Ill. App.3d 1014, 700 N.E.2d 194 (1998). Clauses

exculpating a party from its own negligence are not favored, strictly construed, and must use clear, explicit and unequivocal language indicating the parties' intent. See LaSalle Nat. Trust, N.A. v. Board of Directors of 1100 Lake Shore Drive Condo., 287 Ill. App.3d 449, 677 N.E.2d 1378 (1997).

Indiana

Parties are generally permitted to agree in advance that they will not be liable for consequences of negligent conduct, and exculpatory agreements are not against public policy in Indiana. See U.S. Auto Club, Inc. v. Smith, 717 N.E. 2d 919 (Ind. App. 1999). Specificity is required, and an agreement which fails to refer to negligence is void to the extent it purports to release a party from liability for its own negligence. See Marsh v. Dixon, 707 N.E. 2d 998 (Ind. App. 1999). Exceptions to enforceability exist for : unequal bargaining power, Shumate v. Lycan, 675 N.E. 2d 749 (Ind. App. 1997) (where party did not knowingly and willingly agree to release other from liability); where the public interest is affected, Pigman v. Ameritech Pub., Inc., 650 N.E. 2d 67 (Ind. App. 1995); and fraud, Dawson v. Hummer, 649 N.E. 2d 653 (Ind. App. 1995).

Iowa

Contracts exempting parties from liability for their own negligence are generally enforceable. The party seeking to enforce the agreement bears the burden of proving the terms of the contract and agreement to the provision. In Aetna Cas. & Sur. Co. v. Leo A. Daly Co., 870 F. Supp. 925 (S.D. Iowa 1994), the district court decided that a provision in a construction contract between an architect and construction company was not against public policy nor statutorily prohibited because the harm did not involve physical injury or death, and no third party injury was alleged. See also Laverty, Inc. v. Mel Jarvis Constr. Co., Inc., 513 F.2d 1307 (8th Cir. 1975) (upholding contractual provision absolving contractor from negligence in connection with building owner's fire loss, although word "negligence" was not used). See also Iowa Code Ann. §562A.11 (1979) (precluding certain exculpation, indemnification, and limitation of liability clauses in rental agreements).

Michigan

A party may contract against liability for harm caused the party's own ordinary negligence, but not gross negligence, under Michigan law. See Michigan Nat. Bank v. St. Paul Fire & Marine Ins. Co., 223 Mich. App. 19, 566 N.W.2d 7 (1997). A liquidated damage clause is enforceable where both parties deal at arm's length. In St. Paul Fire & Marine Ins. Co. v. Guardian Alarm Co. of Michigan, 115 Mich. App. 278, 320 N.W.2d 244 (1982), the court upheld a liquidated damages clause in a standardized, preprinted burglar alarm contract where the limitation was reasonable, not a premium for theft insurance, nor a contract of adhesion. The exculpatory clause must clearly and unequivocally express the parties' intent to disclaim liability for negligence, and is strictly construed against the drafting party and indemnitee. See American Empire Ins. Co. v. Koenig Fuel & Supply Co., 113 Mich. App. 496, 317 N.W.2d 335 (1982).

Minnesota

Contractual provisions limiting liability are disfavored and strictly construed under Minnesota law. See Honeywell, Inc. v. Ruby Tuesday, Inc., 43 F. Supp. 2d 1074 (D. Minn. 1999). A party cannot exculpate itself from liability for intentional or grossly negligent acts. In Honeywell the district court held that an exculpatory clause in a contract for sale and monitoring of an alarm system precluded claims alleging negligence, but did not shield the alarm manufacturer from liability for willful or intentional acts. See also Arrowhead Elec. Co-op, Inc. v. LTV Steel Min. Co., 568 N.W. 2d 875 (Minn. App. 1997). Courts also refuse to enforce exculpatory agreements where disparity of bargaining power exists, or in the context of services offered to the public or providing essential service. See In re Trusteeship of Williams, 591 N.W. 2d 743 (Minn. App. 1999).

Ohio

Exculpatory clauses are not void as against public policy in Ohio, but are strictly construed and given effect only if the exculpatory intent is clearly and unambiguously expressed. See Nationwide Mut. Fire Ins. Co. v. Sonitrol, Inc. of Cleveland, 109 Ohio App. 3d 474, 672 N.E. 2d 687 (1996) (upholding limitation of damages provision in security alarm contract); Nationwide Mut. Fire Ins. Co. v. T&J Transp. & Warehouse, No. L-90-097, 1991 WL 7274 (Ohio App. Jan. 25, 1991) (upholding exculpatory provision titled "Waiver of Subrogation" in lease agreement); but see Braden v. Honeywell, Inc., 8 F. Supp. 2d 724 (S.D. Ohio 1998) (fire alarm system contract clauses waiving right to damages or limiting liability were unenforceable against homeowners). Statute prohibits certain indemnification clauses in the context of construction contracts, but other exculpatory provisions may be enforced to the extent they do not purport to indemnify for parties' own negligence, e.g., Kemmeter v. McDaniel Backhoe Serv., 89 Ohio St.3d 409, 732 N.E.2d 385 (Ohio 2000), or are limited to indemnification for costs and expenses, see Moore v. Dayton Power & Light Co., 99 Ohio App.3d 138, 650 N.E.2d 127 (1994). See also Ohio Rev. Code Ann. §2305.31 (prohibiting subcontractor from indemnifying general contractor for general contractor's negligence).

Wisconsin

Exculpatory agreements are disfavored under Wisconsin law, and strictly construed. See Rose v. Nat. Tractor Pullers Ass'n., Inc., 33 F. Supp. 2d 757 (W.D. Wis. 1998) (upholding release and waiver of liability where defendants did not engage in reckless conduct and plaintiffs were not fraudulently induced to sign the contract). The exculpatory provision must be specific regarding the tortious conduct being disclaimed to be enforceable for that type of conduct. See Chapman v. Mut. Serv. Cas. Ins. Co., 35 F. Supp. 2d 699 (E.D. Wis. 1999) ("as is" clause in purchase offer did not bar claims for negligent hiring, supervision or inspection). An exculpatory clause may not relieve a party from intentional or reckless conduct. See

Werdehoff v. Gen'l Star Indem. Co., 229 Wis. 2d 489, 600 N.W. 2d 214 (Wis. App. 1999). See also Wis. St. Ann. §895.49 (1997) (certain agreements to limit or eliminate tort liability in construction contracts are void).

IV. WAIVER OF SUBROGATION PROVISIONS

Generally, following the insurer's payment to the insured for a loss, an insurer is subrogated to the insured's right of action against a thirty party who caused the loss. In a subrogation action, the insurer stands in the shoes of its insured, and is subject to the same defenses (such as hold harmless or exculpatory agreements) applicable to the insured. A common defense to a subrogation action is the express or implied waiver of the insurer's subrogation rights. See, e.g., American Institute of Architects, AIA Document A201 (1987 edition) (¶11.3.7 "Waivers of Subrogation").

Illinois

In Home Ins. Co. v. Bauman, 291 Ill. App.3d 834, 684 N.E.2d 828 (1997), the court held that a waiver contained in a construction contract, providing that the homeowner and contractor waived rights to the extent the perils were covered by insurance, precluded a subrogation action by the homeowner's insurer alleging subcontractor negligence, although the subcontractor was not a party to the construction contract. The construction contract between the homeowner and general contractor required the general contractor to obtain "waivers."

Indiana

In Indiana Erectors, Inc. v. Trustees of Indiana Univ., 686 N.E.2d 878 (Ind. App. 1997), the court held that a subcontractor was not a "contractor" under a prime contract, and accordingly not an intended insured under a builder's risk insurance policy. Therefore a builder's risk insurer for the landowner could pursue a subrogation action against the subcontractor to recover for fire damage. Similarly, in LeMaster Steel Erectors, Inc. v. Reliance

Ins. Co., 546 N.E.2d 313 (Ind. App. 1989), the subcontractor failed to establish either that it was an intended insured under the contract between a general contractor and premises owner or an insured under a builder's risk policy; the policy covered only property owned by the insured or in the insured's care, custody, and control and for which the insured was responsible. Therefore, the plaintiff property insurers could pursue a subrogation action against the subcontractor for fire loss.

Iowa

In Hendricks v. Great Plains Supply Co., 609 N.W.2d 486 (Iowa 2000), the court held that a homeowner's insurer was not precluded from pursuing a subrogation action against a contractor for fire destruction of the home following construction, despite the fact that the homeowners agreed in their construction contract to maintain builder's risk insurance during construction. The homeowners were not required to name the contractor as an insured and the builder's risk coverage ended when the home was completed.

Michigan

In Indiana Ins. Co. v. Erhlich, 880 F. Supp. 513 (W.D. Mich. 1994), the federal district court held that waivers of subrogation in design and construction contracts are valid under Michigan law, but do not apply to claims alleging gross negligence. The court ruled that a subcontractor was a beneficiary of a waiver provision in the prime construction contract, but fact-issues were raised as to the subcontractor's alleged gross negligence in connection with collapse of a library during renovation.

Minnesota

In Rahr Malting Co. v. Climatic Control Co., Inc., 150 F.3d 835 (8th Cir. 1998), the federal court upheld the waiver of subrogation clause contained in the standard AIA contractor agreement as a bar to subrogation by the property owner's insurer provided that the owner has complied with the insurance obligations under the agreement, regardless of whether

the damaged property was classified as "work" or "nonwork." Thus a subrogation action by the insurer of a malt processing plant damaged by explosion, allegedly due to a process control system installed by a contractor, was precluded.

Ohio

In Nationwide Mut. Fire Ins. Co. v. Sonitrol, Inc. of Cleveland, 109 Ohio App.3d 474, 672 N.E.2d 687 (1996), the court enforced a waiver of subrogation clause contained in the owner's contract with a security alarm company as clear and reasonable. The agreement provided that the alarm company was not an insurer and the owner should purchase insurance to cover any losses which might occur for any reason. Moreover, the fact that the owner did purchase insurance demonstrated its awareness of the clause and understanding of its terms.

Wisconsin

In Heritage Mut. Ins. Co. v. Truck Ins. Exch., 184 Wis. 2d 247, 516 N.W. 2d 8 (Wis. App. 1994), the court held a lease provision, stating that lessor "shall not be liable to the lessee for damage caused by fire, explosion, elements and act of God or any other casualty and the parties shall respectively secure from the insurance carriers waivers of subrogation to any claim of one against the other which has been compensated by insurance," clearly manifested the parties' intent to indemnify each other and precluded subrogation by the lessee's insurer against the lessor. See also Harley's Inc. v. Citizens North Shore Bank, 135 Wis. 2d 542, 401 N.W. 2d 27 (Wis. App. 1986) (lease agreement unambiguously waived subrogation rights). Similarly, in Continental Cas. Co. v. Homontowski, 181 Wis. 2d 129, 510 N.W. 2d 743 (Wis. App. 1993), the court decided a salvage contract provision, waiving all rights of parties against each other for damages caused by fire or other perils to the extent covered by property insurance, precluded a negligence action by the building owner's insurer against the salvage contractor.

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