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2006 Charlotte Subrogation Seminar

Subrogation Strategies: Increasing Your Batting Average

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2006 Charlotte Subrogation Seminar

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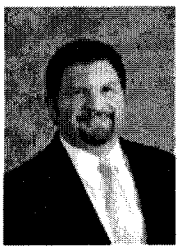

Peter F. Asmer, Jr.

Member
Charlotte Office
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pasmer@cozen.com

AREAS OF EXPERIENCE

- Subrogation & Recovery
- Arson & Fraud Defense
- Bad Faith Litigation
- Casualty Defense
- Professional Liability
- Medical Malpractice Defense
- Construction Litigation
- Products Liability

EDUCATION

- J.D. University of South Carolina, School of Law, 1991
- Research Editor, *ABA Real Property, Probate and Trust Journal*
- B.A. Wofford College, *magna cum laude*, 1988
- Phi Beta Kappa

MEMBERSHIPS

- North Carolina Bar Association
- South Carolina Bar Association
- American Bar Association - Section of Litigation
- Mecklenburg County Bar Association

Peter F. Asmer, Jr. joined the firm's Columbia, South Carolina office in May 1991, where he gained significant trial and litigation experience handling a variety of cases including those involving bad faith, medical malpractice defense, casualty and products liability defense, commercial disputes and subrogation and recovery. In June 1996, Peter transferred to the firm's Charlotte, North Carolina office, where he became a full time member of the subrogation unit.

Peter has litigated claims and obtained recoveries for the firm's clients in matters as far ranging as:

- The destruction by fire of two mixed use historic buildings in historic Charleston, South Carolina on behalf of multiple insurance carriers who insured the owners of the buildings, the buildings' commercial tenants and several of the residential tenants
- A severe flood caused by a failure in the building's water supply lines at the production facilities of a major appliance manufacturer
- Fire damage to residential homes caused by product failures or construction defects
- The failure of roofing systems and external envelopes on high-rise condominiums and hotels throughout the Southeast
- The explosion and resulting fire at a manufacturing facility that resulted in the destruction of the subject building and a shutdown of the manufacturing operations

Peter regularly speaks at seminars on issues regarding fire related litigation and subrogation recovery for institutions such as the North Carolina and South Carolina chapters of the International Association of Arson Investigators, the North Carolina Insurance Crime Information Exchange and the South Carolina Bar Association. Peter also conducts training seminars on subrogation and recovery for the firm's insurance clients.

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Peter is active in his local community and church. For several years he served on the parish council for St. Patrick's Cathedral in Charlotte, N.C., and he currently works on several of the cathedral's operational and fund raising committees. In October 2005, The Roman Catholic Church invested Peter as a Knight of the Equestrian Order of the Holy Sepulchre of Jerusalem, a major Catholic Order of Knighthood dating back to 1099 A.D.

Peter received his bachelor of arts degree, *magna cum laude,* from Wofford College, where he was inducted into *Phi Beta Kappa,* in 1988. He earned his law degree at the University of South Carolina School of Law in 1991, where he was inducted into the Order of the Coif and the Order of the Wig and Robe. He is admitted to practice law in both North and South Carolina state and federal courts.

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AREAS OF EXPERIENCE

- Subrogation & Recovery
- Construction Liability
- Products Liability
- Commercial Litigation

EDUCATION

- J.D., Wake Forest University School of Law, 1993
- B.S.B.A., Appalachian State University, 1982

BAR ADMISSIONS

- North Carolina
- South Carolina

COURT ADMISSIONS

- U.S. District Court, Eastern, Western and Middle Districts of North Carolina
- U.S. District Court, District of South Carolina

MEMBERSHIPS

- North Carolina Bar Association
- South Carolina Bar Association
- National Association of Subrogation Professionals (NASP)
- International Association of Arson Investigators (IAAI)

AWARDS

- Dean's Award of Excellence, Wake Forest University School of Law, 1993

F. Douglas Banks is a Member of the firm and practices in the Subrogation and Recovery Department of the Charlotte office. He concentrates his practice in construction liability, products liability and commercial litigation. Prior to rejoining the firm, Doug was a partner at Poyner Spruill, LLP in Charlotte where he participated in the development of national subrogation programs for insurance carriers and represented closely held businesses in litigation and employment matters.

Doug received his bachelor of science and bachelor of arts degrees in marketing and management from Appalachian State University in 1982, and his law degree from Wake Forest University School of Law in 1993, where he was president of the Student Bar Association, a member of law review, a member of the National Moot Court Team, and a participant in the Zeliff Trial Bar and Prince National Evidence Competitions.

Doug received his designation as a Certified Subrogation Recovery Professional (CSRP) from the National Association of Subrogation Professionals (NASP) in 2004. He is admitted to the Bars of North and South Carolina.

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B. Elizabeth Gast

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AREAS OF EXPERIENCE

- Subrogation & Recovery

EDUCATION

- J.D. Pepperdine University School of Law, cum laude, 1992
- B.A. University of Colorado, magna cum laude, 1985

BAR ADMISSIONS

- California
- North Carolina

COURT ADMISSIONS

- California Superior Court
- United States District Court for the Central District of California, the Eastern District of North Carolina and the Western District of North Carolina

MEMBERSHIPS

- Mecklenberg Bar Association
- North Carolina Bar Association
- American Bar Association

B. Elizabeth Gast joined the Firm in June, 1997 and concentrates her practice in insurance litigation and subrogation and recovery. Elizabeth has thirteen years experience as both plaintiff's and defendant's litigation counsel. Prior to joining Cozen O'Connor, she served as defense counsel for a national elevator company as well as hospitals, doctors, and nurses in medical malpractice actions.

For the last eight years, Elizabeth has concentrated her practice in subrogation and recovery matters. In most recent years, she has made recoveries against banks for mishandled checks in employee-dishonesty claims; against power companies for improperly buried electrical and gas lines that were struck and caused fires; against roofers for improperly installed roofs that were damaged during storms; and against manufacturers and distributors for defective products that caused fire and property damage.

Elizabeth received her bachelor of arts degree, magna cum laude, from the University of Colorado in 1985 and earned her law degree, cum laude, at Pepperdine University School of Law in 1992. During law school, Elizabeth served as a summer extern to Judge William J. Rea in the Federal District Court for the Central District of California.
Prior to attending law school, Elizabeth was employed as a technical writer in the California Shuttle program for Lockheed Space Operations Company and the F-14D program for Hughes Aircraft Company.

Elizabeth was admitted to practice in California in 1992 and in North Carolina in 1997.

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Daniel L. Hessel

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AREAS OF EXPERIENCE

- Subrogation and Recovery

EDUCATION

- J.D., The College of William and Mary, 1996
- B.S., The College of New Jersey, with honors, 1993

BAR ADMISSIONS

- Pennsylvania
- New Jersey

COURT ADMISSIONS

- United States Court of Appeals: Third Circuit
- United States District Court: District of New Jersey, Eastern, Middle and Western Districts of Pennsylvania

MEMBERSHIPS

- Pennsylvania Bar Association
- New Jersey Bar Association

Daniel Lloyd Hessel is Vice Chair of the firm's Workers' Compensation Subrogation and Recovery Group. He concentrates his practice on prosecuting tort lawsuits arising out of workplace accidents. Typically, Dan handles cases involving defective products, construction accidents, wrongful death, premises liability, and negligent security.

Dan joined Cozen O'Connor in 1996 and has been the lead attorney in hundreds of cases, involving combined verdicts and settlements in the millions of dollars. Dan has tried a wide array of cases to juries, involving medical malpractice, slip and falls, car accidents, premises liability, government immunity, and other issues. Several of his jury verdicts and cases have been featured in journals such as *The Legal Intelligencer, Yahoo! Biz, New Jersey Verdict Reporter, Pennsylvania Damages, Pennsylvania Verdict Reporter* and the *Florida Verdict Reporter.*

Dan was recently recognized as a "Rising Star" by *Law & Politics,* an honor that goes to 2.5 percent of all Pennsylvania lawyers.

Dan is on the board of directors of the Legal Clinic for the Disabled, Inc., a non-profit corporation dedicated to providing free legal services to low-income persons with physical disabilities in Philadelphia and the surrounding counties. He also devotes numerous hours each year to pro bono work.

Dan earned his bachelor's degree in law and justice, with honors, at the College of New Jersey. While in college, Dan won the New Jersey State Mock Trial Competition, sponsored by the New Jersey Bar Association. Dan earned his law degree from William & Mary School of Law in Williamsburg, Virginia, where he was selected for membership to *The William and Mary Law Review,* the mock trial team and the moot court team, which placed in a national moot court competition.

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AREAS OF EXPERIENCE

- Subrogation & Recovery
- Construction Liability
- Premises & Security Liability
- Commercial General Liability

EDUCATION

- J.D., Wake Forest University School of Law, 2000
- B.A., Boston College, 1996

BAR ADMISSIONS

- North Carolina

COURT ADMISSIONS

- U.S. District Court: Eastern, Middle and Western Districts of North Carolina

MEMBERSHIPS

- North Carolina Bar Association
- Mecklenburg County Bar Association, Past Co-Chair, Ask A Lawyer Program hosted by Young Lawyers Division

Megan A. Lammon joined the firm in March 2004 as an Associate in the Subrogation and Recovery Department of the Charlotte office. Prior to joining Cozen O'Connor, Megan was an associate at Poyner & Spruill, LLP in Charlotte.

Megan received her bachelor of arts degree from Boston College in 1996 and her law degree from Wake Forest University School of Law in 2000, where she was elected by her peers to Honor Council and the Student Bar Association. While in law school, Megan served as a clerk for the Mecklenburg County District Court Judge's Office under the Honorable Elizabeth D. Miller and H. William Costangy.

Megan is admitted to practice in North Carolina, and the U.S. District Court for the Eastern, Middle and Western Districts of North Carolina.

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John W. Reis

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AREAS OF EXPERIENCE

- Subrogation & Recovery

EDUCATION

- J.D. University of Miami School of Law, *cum laude*, 1992
- B.A. Duke University, 1988

BAR ADMISSIONS

- Alabama
- Florida
- North Carolina
- Tennessee

COURT ADMISSIONS

- U.S. District Court: Western, Eastern, Middle Districts of North Carolina
- U.S. District Court: Southern, Middle, Northern Districts of Florida
- U.S. District Court: Northern, Middle Districts of Alabama
- U.S. District Court: Western District of Tennessee

MEMBERSHIPS

- North Carolina Bar Association
- Mecklenburg County Bar Association

John Reis joined the Charlotte office in 1998, moving from Miami where he had been a prosecutor and trial attorney. Licensed to practice in four states, John has extensive experience litigating product liability and construction related claims throughout the Southeast. He frequently writes and lectures on complex property damage issues. He is also committed to pro bono and community work.

John earned his bachelor of arts degree at Duke University in 1988 and his law degree, *cum laude*, at the University of Miami School of Law in 1992, where he was a *Law Review* editor, Moot Court Board member, winner of the Advanced Moot Court Competition and an inductee of the Order of the Barristers.

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INTERCOMPANY ARBITRATION

presented by: Megan Lammon, Esq.
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INTERCOMPANY ARBITRATION

Elizabeth J. Herre, Esq.

I. When is Arbitration Appropriate?

A. Is Arbitration Required?

(i) Arbitration between member carriers: Is arbitration mandatory pursuant to the Rules?

(ii) Arbitration between non-members. If a non-member agrees to arbitrate, Arbitration Forums can hear the case; otherwise the non-member cannot be compelled to arbitrate.

B. The Damages Limitation

(i) $100,000 for auto and property cases; $250,000 for special arbitration.

(ii) Consider reducing the amount of your claim to come within the jurisdictional amount.

II. Different Intercompany Arbitration Programs – Selecting a Forum

A. Property Subrogation Arbitration Forum

This arbitration program binds participating companies to arbitrate disputes arising out of property subrogation claims that do not exceed $100,000. AF administers the compulsory arbitration of all subrogation claims under fire, extended coverage, additional extended coverage and inland marine policies.

B. Personal Injury Protection (No-Fault) Arbitration Forum

(i) This forum resolves intercompany disputes arising from personal injury protection (PIP) subrogation claims under No-Fault laws and statutes. This forum has expanded to several states with PIP recovery provisions. The Agreement's jurisdiction relates directly to the subrogation rights created under the applicable state's statutes.

(ii) Currently, there are many states, including the District of Columbia, with No-Fault statutes permitting intercompany subrogation. The Agreement is applicable in all states having a No-Fault Law, except New York.

(iii) Insurers and self-insureds who have signed the PIP agreements must submit disputes to arbitration if the following conditions exist:

a. the dispute arises from the pursuit of direct *action* recovery rights created through claim or benefit payments to insureds or other parties under a state's No-Fault law;

b. the amount in subrogation is within the limits established under the law of the state;

c. the parties to the dispute are insurers or qualified self-insurers under the state's No-Fault law; and

d. the dispute does not involve a claim to which a disputing insurer asserts a coverage defense on any grounds.

C. Uninsured Motorists' Arbitration Forum

The Applicant company may challenge the validity of a Respondent's liability coverage disclaimer when an Applicant's insured claims injuries under the Uninsured Motorists part of the policy. If both carriers are signatories to the Agreement, they must submit their differences on the coverage question to a panel established under this Agreement. An advantage of this forum is the rapid determination of the respective carrier's obligations under their insurance contracts. The insureds of both are also beneficiaries through arbitration's expense reduction and prompt claim disposition.

D. Special Arbitration Forum

(i) This forum focuses on controversies arising when participating companies insure actual or potential codefendants involved with a *third party.* The involvement results in a dispute about which company is to pay the third-

party's claim. When this occurs, both companies settle with the third party and submit the differences to a Special Arbitration panel. Through this program, the arbitration panel can promptly resolve third party claims or suits where the insurers have a difference of opinion. This program also permits arbitration concerning overlapping first party coverage.

(ii) Jurisdiction. This Agreement also brings within its compulsory jurisdiction disputes between participating companies when there is a dispute on the overlapping of their liability coverages. The normal monetary limit of this compulsory program is $250,000. However, the parties can agree to arbitrate any issue in any amount. The Special Arbitration Forum's range allows for arbitration under many types of casualty insurance coverage.

E. Executives' Arbitration Forum

The Executives' Arbitration Forum draws upon the knowledge and understanding offered by retired and current executives, attorneys and others closely associated with the insurance industry. There is no written agreement and there are no signatories. The program is entirely voluntary. Arbitration is only by consent of the parties. Consent to arbitrate may encompass any controversy, including claim disputes between or among parties.

III. How to Get Started

A. Membership Requirements

(i) Each forum contains a separate agreement and rules that the arbitration panels must use in deciding liability and damages. An insurer must sign an agreement and follow the rules for a particular forum to participate in it.

(ii) There are no fees for becoming a signatory to a forum. The only cost is a filing fee which is essentially a user's fee. The fee is reasonable when compared to litigation expenses.

B. Procedure

(i) Application. The procedure starts with an *Applicant* completing an *Application Form* which provides pertinent information relating to the companies, representatives, insureds and the file numbers. Each forum has its own application form.

(ii) Allegations and Contentions. The Applicant also includes its *allegations* on a *Contentions Sheet* and signs the application form. The signature attests to the fact that the information is true and the Applicant has sent copies to the *Respondent* and the proper AF field office. An Applicant also submits pertinent *evidence* supporting the contentions. The Applicant has burden of proof.

(iii) Respondent's Allegations. The Respondent answers by completing the Respondent's Allegations section of the form. The form is signed and submitted with applicable evidence to support the Respondent's allegations and defend against the Applicant's contentions.

C. Default Judgments

There are no default judgments rendered in intercompany arbitration, but failure to complete an application or answer correctly and thoroughly will considerably reduce a party's chances of recovery. Therefore, each party should include all statements, photocopies, diagrams and applicable briefs of law for review by the panel.

IV. The Arbitration Itself

A. Contentions

(i) Be Specific – Be Thorough. Don't risk not having evidence/facts considered because they were not included in your contentions. Think of it as a motion for summary judgment.

(ii) Applicant has the burden or proof. Make sure you can make your prima facie case, i.e., Negligence – duty, breach of duty,

causation and damages – highlight those each element in your contentions.

(iii) Cite statutes. Arbiters are still required to follow the law in making their decision – if there are applicable statutes, you have a negligence per se scenario, a product liability case – provide those as a part of your evidence.

(iv) Cite industry standards – for property damage cases, cite any applicable building codes, plumbing codes, mechanical codes, electrical codes – these will help you establish a duty and breach of that duty.

(v) City jury instructions – These are instructions given to a jury that are also law, i.e., instructions on burden of proof, comparative negligence, damages, etc.

(vi) Cite case law – these also set out the law; cite the specific language of a holding that supports your case; be prepared to distinguish the cases you cite from any that respondent might cite.

(vii) Damages – make sure you provide support for your damages, don't just say it; submit the evidence necessary to show the damages alleged were incurred/paid; ACV vs. RCV.

B. Evidence

(i) Provide copies of statutes, codes, jury instructions and case law. Don't just tell them respondent violated §303(b) of the Uniform Plumbing Code, show them what the code says and how it was violated.

(ii) Physical evidence. While you don't want to send the failed pipe that froze and burst, put in your contentions that you or your expert will bring it or an exemplar if that helps you show what happened.

(iii) Documentary evidence. Photographs, property/contents appraisals, repair estimates/billing, affidavits – if you don't have them, see if you or your expert can get them. Photographs can help support both your liability and damages case.

(iv) Your expert. Provide his/her report and CV/qualifications; state why he is qualified to given an opinion and more qualified than respondent's expert.

C. Hearings

(i) Personal appearance. Appear in person, if at all possible; it gives you an opportunity to emphasize your strong arguments and answer any questions.

(ii) Bring your expert. If needed, he/she can show or explain their finding, opinions and bases therefore.

(iii) Generally Informal. But time for hearings can be limited. Are you planning a formal presentation of witnesses and exhibits? If so, discuss logistics before the hearing.

D. Other Considerations

(i) 1 Panelist or 3 Panelists? Are you really getting 3 panelists if they are all with the same carrier; dynamics of 3 panelists – not unlike a jury; New Rule 3-3 – as of November 1, 2004, when you can have 1 or 3 panelists (rules revised as of November 1, 2004).

(ii) Condition precedent. Set out in the preamble of Arbitration Forums' Rules and Regulation for all its programs; make a point of non-compliance – argue it in your contentions if you are an applicant and assert it as an affirmative defense if you are respondent.

(iii) Training. Arbitration Forums provides training to personnel; Arbitration Forums workbooks are great resources with explanations behind the rules and case studies.

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FIRE'S FROM FORD'S CRUISE CONTROL DEACTIVATION SWITCH: OUT OF CONTROL?

written and presented by
John W. Reis, Esq.

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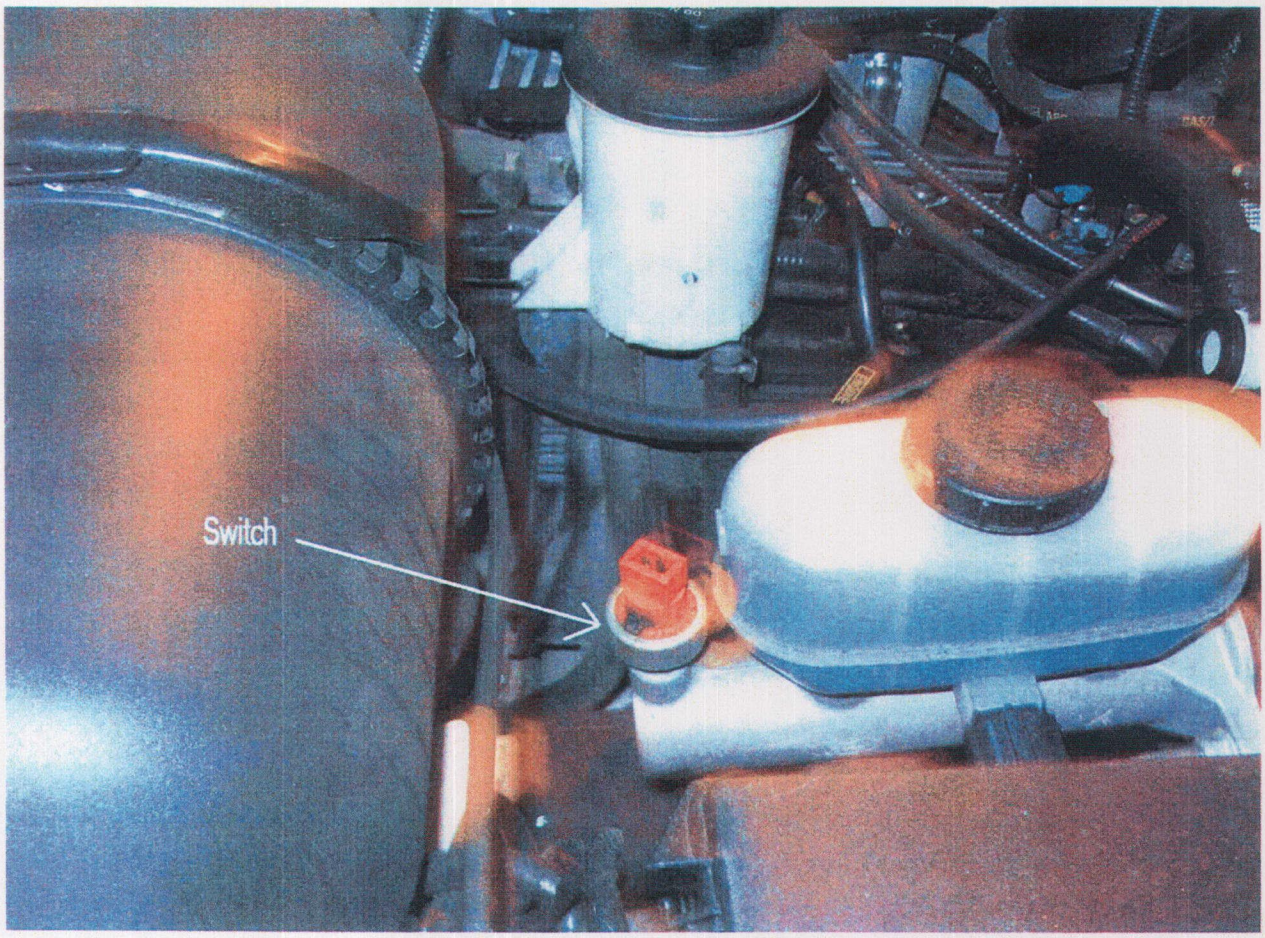
Fires from Ford's Cruise Control Deactivation Switch: Out of Control?

By John W. Reis

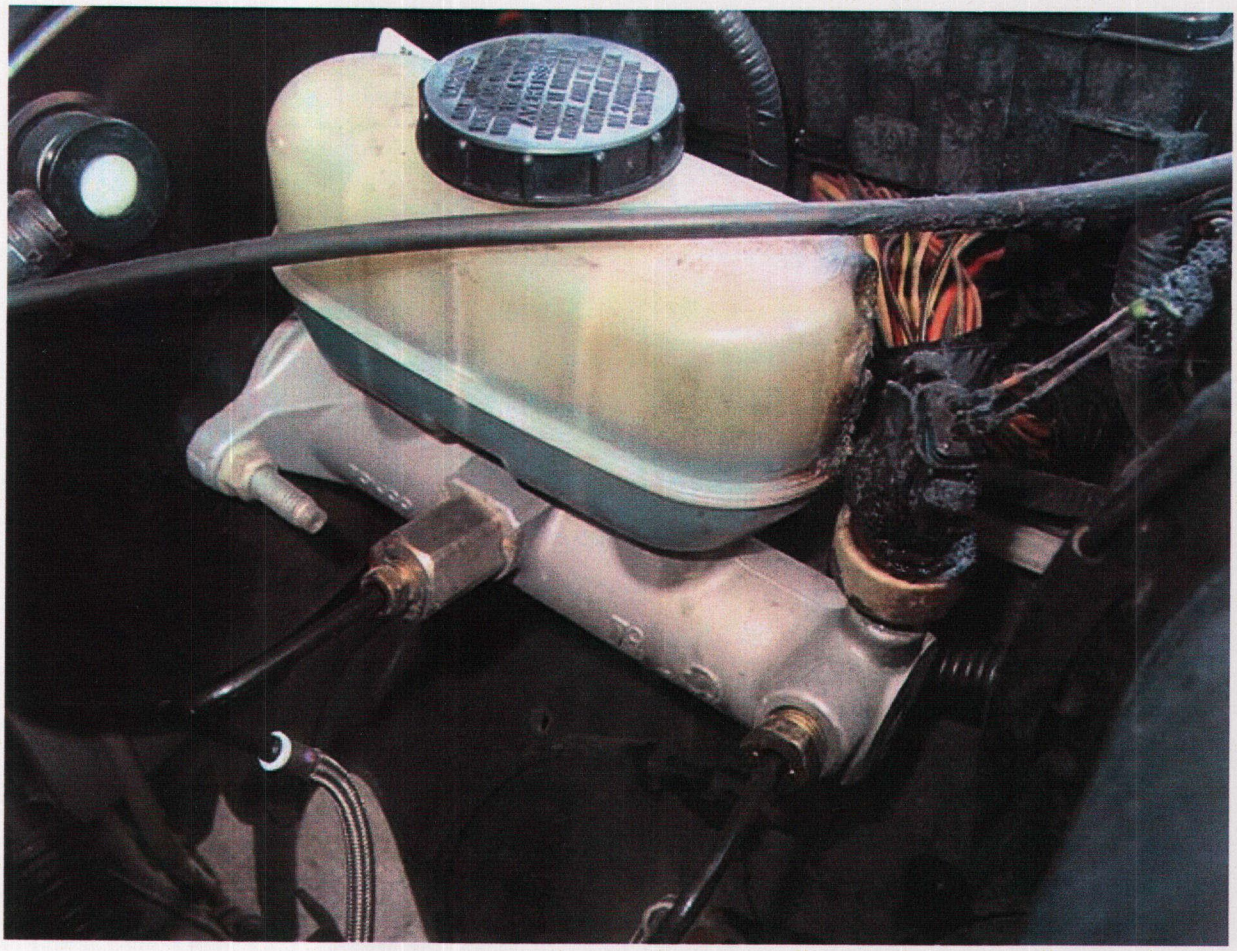
To most homeowners, a car turned "off" with no key in the ignition is safe just sitting in the garage. It is the last thing most homeowners think will burn down their house. Those who are familiar with the latest rash of Ford recalls, however, know otherwise. Indeed, since May 1999, Ford has issued no less than three separate recall campaigns on a tiny component part, not much bigger than a sparkplug: the speed control deactivation switch. The latest recall, issued September 7, 2005, is the fifth largest recall in the history of motor vehicles.

I. WHAT IS A SPEED CONTROL DEACTIVATION SWITCH?

The speed control deactivation switch turns off the cruise control automatically when the driver steps on the brake pedal. The problem has to do with the positioning of the switch, its particular component parts, and the fact that it is constantly energized – or "hot."



A speed control deactivation switch atop the brake master cylinder with signs of overheating (Front of vehicle is to the left, driver's seat to the right)



Another speed control deactivation switch in the early stages of fire beginning to burn the plastic brake fluid container

II. HANDLING SWITCH FIRE CASES AGAINST FORD

Those familiar with handling subrogation claims against major manufacturers like Ford know they rarely simply "roll over," even when the product or vehicle at issue is clearly subject to a recall. On the other hand, Ford and other manufacturers will sometimes honor a claim even when the car is not yet subject to a recall so long as there is sufficient proof of defect in the particular car. In either event, success in handling such a claim requires understanding the defect, identifying the defect, documentation, notification, and often, litigation.

A. Understanding the Defect

The $20.57 switch, which is manufactured by Texas Instruments, is adjacent to the brake master cylinder on the driver's side of the engine – in proximity to dripping brake pressure fluid. Its outside consists of a plastic housing. On the inside, it has many tiny working parts, including a pin, disc, gasket, washer, converter, movable terminal, stationary contact, and sheets of plastic to separate the exterior brake pressure fluid from these components.

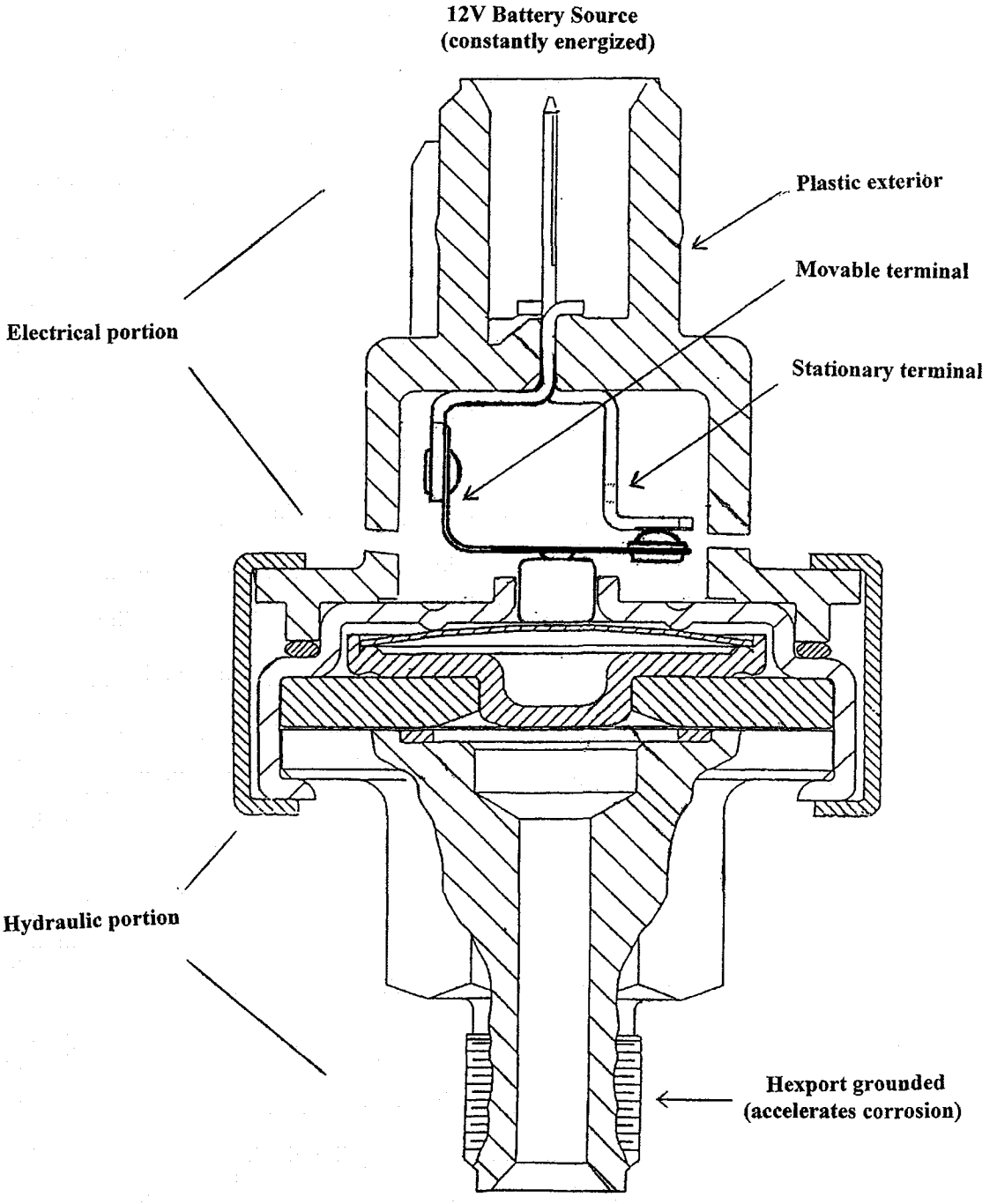


Diagram of switch

The tiny plastic sheets form a seal intended to prevent brake fluid and other corrosive agents from entering the switch cavity. If contaminants break through the seal, the internal components can corrode. Because the movable terminal and the stationary contact always are energized, build-up of corrosive by-products between the movable terminal and the stationary contact can

cause the two to come into contact with increasing current flowing between them and generating heat. Eventually, sufficient heat will be generated to melt the switch housing, allowing entry of air which fuels a fire. The fire then attacks the wiring harness located above the switch and spreads throughout the engine compartment.

In sum, the switch has the following problems: (1) constant energy flow; (2) proximity to brake fluid; (3) and a plastic, as opposed to a non-combustible, exterior. Contributing factors include external heat, humidity, and salinity, which explain the predominance of fires during the summer months in the South, Southeast and other regions with high heat and/or humidity. Vehicle symptoms that sometimes appear before the fire include: cruise control not functioning; brake lights not functioning; brake warning lamp illuminating; vehicle getting stuck in "park"; battery losing charge; and blown fuse number 12 and/or improper fuse in number 12 position. However, the absence of such symptoms does not mean the switch is not defective.

B. Identifying the Defect

Just because the vehicle in question has not yet been the subject of a recall does not mean that it is not defective. Indeed, given the history of Ford's increasing expansion of the recall, vehicles which are the subject of current claims may later be included in subsequent recalls, as is demonstrated by the following brief history lesson.

Ford's May 1999 recall on the switch was limited to 1992-1993 Lincoln Town Cars, Mercury Grand Marquis, and Crown Victoria models – the "Panther Platform" series of vehicles. Yet Ford continued to install the same switch in future lines of vehicles all the way up through 2004.

Ford's January 2005 recall included approximately 800,000 vehicles in the following categories: 2000 Ford F-150 trucks, 2000 Ford Expedition, 2000 Lincoln Navigator; and some 2001 Ford F-Series Supercrew Trucks (built through August 7, 2000).

Ford's September 7, 20205 recall of 3.8 million vehicles includes model-years 1994-2002 F-150 pickup trucks, Ford Expeditions, Lincoln Navigators and Ford Broncos. However, the same switch, or equivalent versions, have been installed in a total of 16 million Ford vehicles, including: 1994-1998 Lincoln Mark VII/VIII, 1993-1995 Ford Taurus/Mercury Sable and Taurus SHO 2.3 L, 1992-2003 Ford Econoline vans, 1993-2003 Ford F-Series trucks, 1994-2003 Ford Windstar, 1995-2003 Ford Explorer without IVD, 2002-2003 Ford Explorer Sport/Sport Trac, 1997-2003 Ford Expedition, and 1995-2003 Ford Ranger. Ford has offered no explanation why some of these vehicles are subject to recall and some are not.

Below are excerpts from two actual recall notices that went to vehicle owners whose cars caught fire. The first was received by the owner of a 2000 Ford Expedition on February 18, 2005, a mere two days before the date of the fire of February 20, 2005:

> Ford Motor Company has decided that a defect which relates to motor vehicle safety exists in certain 2000 model year F-150, Expedition, Navigator, and 2001 F-150 SuperCrew vehicles equipped with speed control. We apologize for this situation and want to assure you that, with your assistance, we will correct this

condition. Our commitment, together with Ford and Lincoln Mercury dealers, is to provide you with the highest level of service and support.

What is the issue: On your vehicle, the underhood speed control deactivation switch may overheat, smoke, or burn, which could result in an underhood fire. This condition may occur either when the vehicle is parked or when it is being operated, even if the speed control is not in use.

What will Ford and your dealer do? Parts to your vehicle will not be available until April or May 2005, and as a result, we are implementing a two-stage repair process. ....

Obviously, the owner could not get to a dealer in time. The next excerpt comes from an actual recall notice sent by Ford in September 2005, approximately two weeks *after* the owner's vehicle in fact caught fire:

Ford Motor Company has decided that a defect which relates to motor vehicle safety exists in certain 1994-1996 model year Bronco, 1994-2002 F-150/250 (Under 8500 GVW), 1997-2002 Expedition, 1998-2002 Navigator, and 2002 Blackwood vehicles equipped with speed control. We apologize for this situation and want to assure you that, with your assistance, we will correct this condition. Our commitment, together with Ford and Lincoln Mercury dealers, is to provide you with the highest level of service and support.

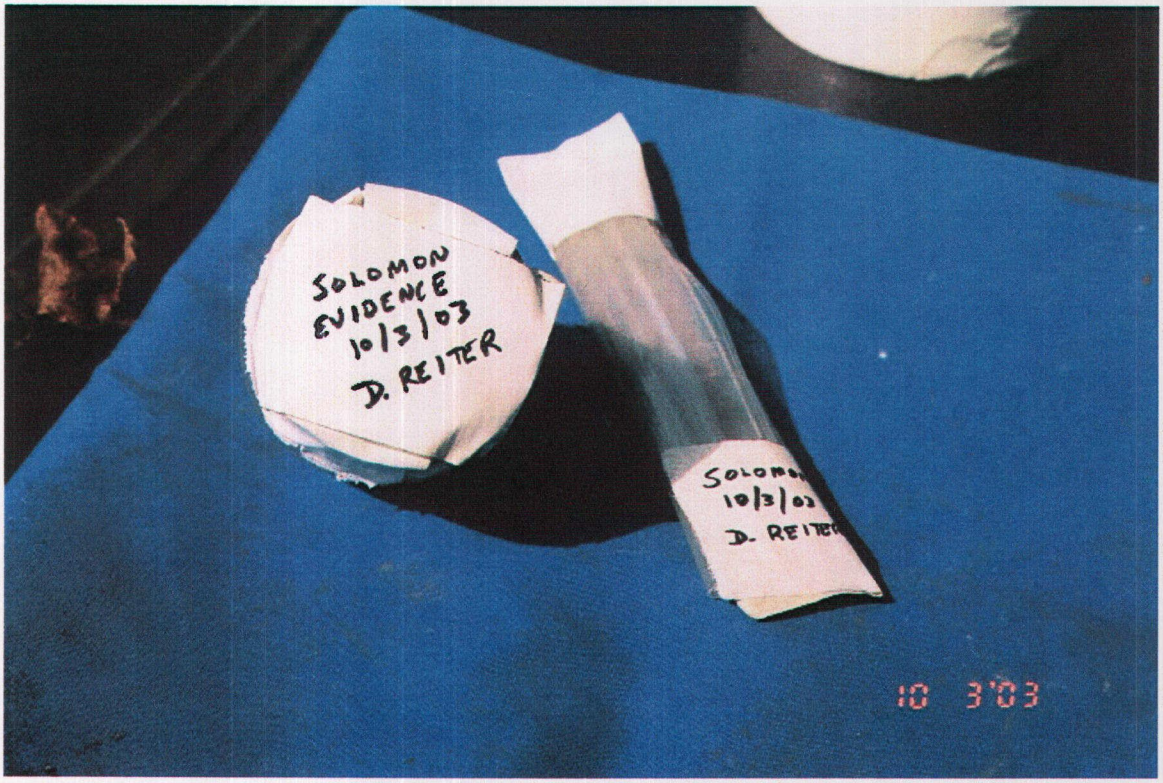
What is the issue: On your vehicle, the underhood speed control deactivation switch may overheat, smoke, or burn, which could result in an underhood fire. This condition may occur either when the vehicle is parked or when it is being operated, even if the speed control is not in use.

C. Documentation

The vehicle must be well photographed and, if circumstances permit, it should be preserved for Ford's independent analysis. In particular, the vehicle should be examined for remains of the switch itself.

Remains of damaged switch found at scene

If the vehicle is to be transported from the fire site, all parts under the engine compartment should be photographed and retained. Because the parts of the switch can be brittle, they should be protected if they are to be moved.



Switch parts tagged, reinforced and bagged.

Ideally the vehicle should be shrink-wrapped, though sometimes this is impracticable.

Shrink-wrap the vehicle before transporting where feasible

Even when the switch is found in its original position, it can break away if the vehicle is relocated.

The hydraulic portion of the switch found in debris on the garage floor

D. Notification

Ford's primary designated claims handler on these losses is Ms. Shawn L. Norton, Claims Analyst, Ford Motor Company, Office of the General Counsel, Suite 400, Three Parklane Boulevard, Parklane Towers West, Dearborn, Michigan 48126, phone no.: 313-322-3269, fax.: 313-390-2107, email: snorton1@ford.com.

E. Litigation

If you are not prepared to litigate, do not expect Ford to negotiate. On the other hand, Ford is in no position to take every case to trial, especially after the adverse decision in *State Farm Mutual Automobile Insurance Company v. Ford Motor Company*, in which the Louisiana Court of Appeals held that the switch was defective in design, stating:

> The trial court found that a defectively designed and manufactured speed control deactivation switch, utilized in the vehicle's cruise control system, had caused the vehicle fire and resultant damage. We affirm on the basis that the switch is unreasonably dangerous in design.

1. Experts

The above case highlights the importance of retaining experienced counsel and a highly qualified expert. Key to the decision was that State Farm's expert was found more convincing than Ford's expert and was able to offer on opinion on a safer alternative design.

This case arose out of a fire in September 1999 involving a 1992 Lincoln Town Car owned by Emery Stephens. The car had been driven approximately 91,000 miles by the time of the fire. Even though the damages were under $10,000, both State Farm (Stephens' subrogated insurer) and Ford treated this as a test case with much at stake in its outcome. The case was hotly litigated. The lengthy opinion details a classic "battle of the experts" between State Farm's expert, Ted Kaplon, and Ford's in-house electrical engineering expert, Mark Hoffman. The court accepted both Mr. Kaplon and Mr. Hoffman as experts in the field of electrical engineering and fire origination and cause. Mr. Kaplon testified that the switch caused the fire. Mr. Hoffman testified that the switch did not cause the fire, but that an after-market alarm system caused the fire. After a lengthy discussion of the two experts' opinions, the court affirmed the trial court's view that Mr. Hoffman was unconvincing while Mr. Kaplon was convincing "beyond any doubt" – a devastating blow to Ford.

The court's discussion of why the switch is defectively designed was even more devastating:

> Kaplon testified that Ford had designed the electrical system in the 1992 Town Cars such that the vehicle's battery provided twelve volts of power to the speed control deactivation switch whether the ignition switch was turned "on" or "off." He explained that the Stephens' Town Car fire would not have occurred if the switch had not been energized, and that the switch could "most definitely" have been designed so that it did not remain constantly energized when not in use.
>
> Kaplon described the speed control deactivation switch as an exemplar switch with two sides, one side being hydraulic and one side being electrical. He explained that Ford's investigation of the underhood fires revealed there was a crimping problem in the band that secured the two portions of the switch together. The design was susceptible to brake fluid leaking from the hydraulic side into the electrical side of the switch, which contaminated the electrical side of the switch and caused a corrosive ground fault and a conductive path within the switch. Kaplon explained that over a period of time, the switch generated sufficient heat to ignite the switch enclosure and the wiring harness surrounding it. Because the switch failure occurred over time, he explained that the mileage and age of the car were significant factors. Kaplon explained that the switch design was inherently dangerous due to its potential leakage problem and because it was constantly energized. He explained that the constant engergization expedited the switch failure.
>
> Kaplon further opined that a speed control deactivation switch should be designed such that it will last safely for the life of the vehicle. Alternatively, he stated that the switch should have been designed to fail in such a way that would not cause a fire. He further testified that a mechanical switch, used subsequently by Ford, presented a safer alternative. He explained that Ford's more recent design does

not allow for brake fluid leakage; it is a mechanical switch activated by the brake pedal, which activates an electrical switch.

According to Hoffman, prior to using the hydraulic/electrical switch, Ford had used a vacuum-actuated speed control system in its Town Cars that preceded the 1992 model line. He explained that that speed deactivation in this previous system was accomplished by opening a valve, and the system did not involve electricity. He described it as being "very unlikely" to have caused a fire.

The record before us establishes that the constantly-energized hydraulic/electrical switch presented a risk of fire that Ford could have easily prevented. At the time Stephens' 1992 Town Car left Ford's control, there existed one or more safer, alternative designs for the speed control deactivation switch which were available and could have been implemented by Ford and which would have prevented the risk of fire. Hoffman, Ford's own expert, testified that a vacuum-actuated speed control system, which had been previously implemented in earlier model Town Cars, did not present a risk of fire. The danger of the risk of fire and the serious damages that might result clearly outweighed any benefit any benefit that may have resulted from the use of the constantly energized, hydraulic/electrical switch in the vehicle's speed control system. The evidence revealed no adverse effects that might have resulted from the use of an alternative design. Accordingly, we find that the trial court reasonably concluded that Ford should have employed an alternative design for the switch and that the switch was unreasonably dangerous in design.

2. Anticipate Legal Defenses

a. The Economic Loss Doctrine

The economic loss doctrine is a principle of law limiting recovery for product liability damages pursued under tort theories (*e.g.*, negligence or strict liability claims) where the only thing damaged is the product itself.

The economic loss doctrine was created by the courts as a way of making warranty claims more meaningful. The rationale behind the doctrine is that products are typically sold with either an express or implied warranty and the terms of such warranty should control the remedies available to the purchaser. The doctrine varies from state to state. Some states have not expressly recognized the doctrine. Many states have expanded the doctrine beyond the product liability setting, barring tort claims not just for product damages but for any claims that arise from transactions between contracting parties, including service transactions.

In vehicle fires where the only thing damaged is the vehicle itself, this is the most-often cited legal defense by Ford. In many cases, the defense is valid. In others, the defense is misplaced and/or there are ways around the defense.

Ways Around the Economic Loss Doctrine in Car Fire Cases

"Other Property"

This exception is built in to the general rule. The general rule precludes recovery of economic losses caused from the product itself where the only thing damaged is the product itself. However, this allows for recovery of either personal injury damages or damages to property other than that product itslef. However, in many cases, it is difficult to separate the "product" from other property. For example, if a component of a vehicle – an engine, for example – malfunctions and causes fire to the entire vehicle, most states would hold that the "product" that malfunctioned was the entire vehicle, not just the engine. However, most states would consider the property outside the vehicle and the contents within it to be "other property" and thus recoverable in tort.

Sudden and Calamitous Event

In some states, the economic loss rule will not apply if the damage was the result of a "sudden and calamitous" or "sudden or calamitous" event. Other similar terms include "sudden and dangerous" or "sudden or dangerous" or "abrupt, cataclysmic occurrences." In those states recognizing this exception, the courts will often distinguish between a loss that relates to a consumer or user's disappointed expectations due to deterioration, internal breakdown or non-accidental cause from a harm that is a sudden or dangerous occurrence, frequently involving some violence or collision with external objects, resulting from a genuine hazard in the nature of the product defect.

Consumer Transaction

Some courts only apply the economic loss rule to commercial transactions, *i.e.*, a purchase by a merchant or other commercial entity, but will not apply the doctrine to a purchase by an individual consumer.

Service Transactions

The economic loss doctrine as originally announced was only intended to apply to product liability damages. Courts which continue to limit the doctrine to such actions will allow tort claims for breaches of duty arising from service transactions. However, there is a growing trend that expands the doctrine to service transactions pertaining to a product or construction project.

Lack of Privity

Privity is a contractual relationship between a purchaser and buyer. Because many product liability cases involve failure of a product that the plaintiff did not purchase (or even own), some courts recognize that there is no warranty or contract theory available to such a plaintiff and will allow the plaintiff to sue in tort. In states that have expanded the economic loss rule to service transactions, some courts will only apply the "lack of privity" exception to service transactions but not to product liability cases. For example, in Florida, lack of privity is not an exception to the economic loss doctrine when plaintiff claims a defect to a product caused by a manufacture,

but is an exception to the doctrine when plaintiff claims damages from the negligence of a third-party service provider who worked on that product.

Fraud or Misrepresentation

Many states allow tort recovery if there has been fraud or misrepresentation involved in the sale of the product. However, several court make a distinction between "actual" fraud or "constructive" fraud. In some states, both types of fraud are exceptions. In other states, only actual fraud is an exception.

Torts Independent of Contractual Duties

Some courts recognize an exception to the doctrine where plaintiff shows that the tort in question is not a breach of the duty to manufacture a non-defective but is a breach of an independent duty. For example, if a product manufacturer after selling the product later realizes that is has become defective but fails to issue a warning – either in the form of a recall or otherwise – the plaintiff in some states may have an independent tort claim for breach of post-sale duty to warn.

Statutory Violations and/or Public Safety

In some states, plaintiff can recover in tort if the defendant violated a statute that involves public safety or otherwise impacted the safety of the public.

Warranty Claims

Although most car fires occur some years after the initial purchase, many of the truck and SUV fire cases have occurred within two to five years of the sale to the first retail purchaser. Ford generally provides a 3-year/36,000-mile bumper-to-bumper warranty and a 5-year warranty for corrosion. Typically, the warranty does not state that it is limited to the first retail purchase but applies to the "owner." Nor typically is there a disclaimer against implied warranties although there is language that the implied warranties "are limited, to the extent allowed by law, to the time period covered by the written warranties, or to the applicable period provided by state law, whichever period is shorter."

Some buyer also purchase extended warranties, especially when buying the vehicle used. This issue should be explored with the vehicle's owner in the initial stages of the investigation.

In cases where the vehicle is over three-years old or had over 36,000 miles to it, one possibility use of the corrosion warranty should be considered. The corrosion warranty coverage provision typically last for five years regardless of miles driven and covers body sheet metal panels against corrosion "due to a defect in factory-supplied materials or workmanship." The speed control deactivation switch problem arguably amounts to a "defect in factory-supplied materials or workmanship" that caused corrosion to the body sheet metal panels.

It should be noted, however, that there is a section in most Ford warranties entitled, "What Is Not Covered," that lists "fire or explosion" as a thing that is not covered. However, it can be argued

that this is insufficient to negate the express language covering defective parts or workmanship, especially where the fire in question is caused by such defective parts or workmanship.

In cases where the warranty was in effect but where Ford outright denies liability without discussing the warranty provisions at all, another remedy to consider is a count for violation of the Magnuson-Moss Warranty Act. This is a federal law enacted in 1975 that governs consumer product warranties. The Act is intended, among other things, to assure that companies honor their warranty obligations in a manner that is timely, thorough, and convenient and inexpensive to consumers. A consumer who invokes the protections of the act may be required to engage in pre-suit procedures. However, if Ford outright denies the claim and refuses to engage in pre-suit resolution, a count for violation of the Act is an option to consider. One of the benefits of the use of this act is the entitlement to fees and costs if the consumer prevails.

b. Statute of Repose

A statute of repose establishes the outer-time frame in which any lawsuit may be filed, regardless of when the injured party discovers the injury. Statute of repose begins to run upon a certain defined occurrence. For products, the statute in most states deems the time period to begin running from the date of the first sale to the first retail customer.

Assume, for example, that a state has a ten-year statute of repose running from the date of the first sale to the first consumer purchaser. If the fire occurs ten years and one day later, it is already too late to file suit. If the fire occurs nine years and 360 days after that initial sale date, the claims handler has five days to file suit. It is critical, therefore, that the sale date be determined immediately upon assignment of the claim and that the statute of repose for the state in question be complied with in timely fashion. The following is a summary of the statute of repose for states in the Southeast, where many of the switch fires occur:

Alabama

Alabama has on the books a 10-year statute of repose contained in Code of Alabama Section 6-5-502 (c). Section 6-5-502 (c) was declared unconstitutional by the Alabama Supreme Court in *Lankford v. Sullivan, etal.*, 416 So. 2d 996 (Ala. 1982). Pursuant to the nonseverability clause of Section 6-5-504 and *Ridling v. Armstrong World*, 627 F. Supp. 1057 (S.D. Ala. 1986) the Code of Alabama Sections 6-5-500 through 6-5-502 and the remainder of 6-5-503 are also void. This would include abrogation of 6-5-502 (a) which provided a one year statute of limitations for product liability actions against an original seller for personal injury, death or property damage.

Alabama also has a 20-year "rule of repose," described in Morgan v Exxon, 869 So. 2d 446 (Ala. 2003), as follows:

> I. The Rule of Repose and § 9658 Preemption
>
> "Application of [Alabama's] rule of repose has only one element -- the passage of twenty years time from the moment that the actions giving rise to the claim occurred -- and, if that time has elapsed, no claim can be pursued." Moore v.

> Liberty Nat'l Ins. Co., 108 F. Supp. 2d 1266, 1275 (N.D. Ala. 2000) (applying Alabama law) (emphasis added), aff'd, 267 F.3d 1209 (11th Cir. 2001). See also Tierce v. Ellis, 624 So. 2d 553, 554 (Ala. 1993). "In some instances, this point in time may be the same as the date of the 'accrual' of a claim. However, ... repose does not depend on 'accrual,' because the concept of accrual sometimes incorporates other factors, such as notice, knowledge, or discovery." Ex parte Liberty Nat'l Life Ins. Co., 825 So. 2d 758, 764 n.2 (Ala. 2002). See also Merrill v. Merrill, 260 Ala. 408, 411, 71 So. 2d 44, 45-46 (1954). It is undisputed that the Companies' activities at the well sites had ceased by the early 1970s, that is, more than 20 years before the commencement of this action. Thus, the Morgans' claims against the Companies are barred by the rule of repose, unless § 9658 provides relief from the operation of the rule.

Florida

Florida's statute of repose for products liability claims, section 95.031, Fla.Stat. (1999), requires that a lawsuit be filed within 12 years after a product is "delivered" to the "first purchaser." The statute creates a conclusive presumption that products have useful life of 10 years, unless the product is specifically warranted for longer than 10 years. The repose period is extended to 20 years for aircraft, railroad equipment, large vessels, or improvements to real property. The only exception is if there is "substantial factual support" for a claim of concealment.

Georgia

Georgia subscribes to a ten-year statute of repose for products under OCGA § 51-1-11. However, the statute has built into it language that recognizes and exception for breach of a post-sale duty to warn of a problem of which the manufacturer later comes to learn. The pertinent parts of the statute state:

> (b) (2) No action shall be commenced pursuant to this subsection with respect to an injury after ten years from the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the injury.
> (b) (3) A manufacturer may not exclude or limit the operation of this subsection.
> (c) The limitation of paragraph (2) of subsection (b) of this Code section regarding bringing an action within ten years from the date of the first sale for use or consumption of personal property shall also apply to the commencement of an action claiming negligence of a manufacturer as the basis of liability, except an action seeking to recover from a manufacturer for injuries or damages arising out of the negligence of such manufacturer in manufacturing products which cause a disease or birth defect, or arising out of conduct which manifests a willful, reckless, or wanton disregard for life or property. Nothing contained in this subsection shall relieve a manufacturer from the duty to warn of a danger arising from use of a product once that danger becomes known to the manufacturer.

The case of Parks v. Hyundai Motor America, Inc., 258 Ga. APP. 876, 575, S.E.2d 673 (Ga. App. 2002) held that the ten-year statute of repose did not bar a claim against the automobile manufacturer for negligent failure to warn of the alleged defect in the vehicle. The court found

that the above cited language from §51-1-11(c) "removes negligent failure to warn claims from 'the ambit of the statute of repose.'" (citing Chrysler Corp. v. Batten, 264 Ga. at 727(4), 450 S.E.2d 208 (1994)). In addition, in the case of Hunter v. Werner Company, 258 Ja. App. 379, 574 S.E.2d 426 (Ja. App. 2002), the court cited the same language in stating that a negligent failure to warn claim may arise "from a manufacturer's post-sale knowledge acquired months, years, or even decades after the date of the first sale of the product."

Kentucky

Kentucky does not have statute of repose but does have a time-based statute that creates rebuttable presumption of non-defectiveness after a period of either five years from the sale to the first consumer or eight years after manufacture.

> In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the subject product was not defective if the injury, death, or property damage occurred either more than five (5) years after the date of sale to the first consumer or more than eight (8) years after the date of manufacture.

Kentucky Revised Statute Annotated § 411.310.

Mississippi

Although Mississippi does not have a statute of repose, under Mississippi Code Annotated Sec. 75-2-725 (UCC), a party has six years to file suit after the cause of action has accrued, i.e., after tender of delivery. Section 75-2-725 specifically states:

> (1) An action for breach of any contract for sale must be commenced within six (6) years after the cause of action has accrued.
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made . . .

North Carolina

North Carolina's six-year statute of repose applies not only to products but also to improvement to real property. N.C.G.S. § 1-50(6) ("no action for the recovery of damages shall be brought more than six years. . . ."). The only recognized exception to this rule is if the defendant committed wanton and wilful misconduct. Cacha v. Montaco, 554 SE2d 388 (Ct App 2001).

North Carolina recognizes a continuing, post-sale duty to warn. Smith v. Selco Prods., Inc., 385 S.E.2d 173, 176-77 (N.C.Ct.App.1989). However, this duty is not an exception to North Carolina's six-year statute of repose, as noted below, unless there was wanton and wilful misconduct. Cacha v. Montaco, 554 SE.2d 388 (N.C. Ct App 2001).

In Mills v. General Motors Corporation, WL 414338 (4th Cir. July 23, 1997) (unpublished opinion), the court stated, squarely and succinctly, as follows:

> Although North Carolina recognizes that a manufacturer has a continuing post-sale duty to warn consumers of dangerous defects that it later discovers, *see* Smith v. Selco Prods., Inc., 385 S.E.2d 173, 176-77 (N.C.Ct.App.1989), this duty to warn of hidden defects does not extend beyond the six-year limit imposed by the Statute of Repose, *see* Davidson v. Volkswagenwerk, A.G., 336 S.E.2d 714, 716 (N.C.Ct.App.1985). As stated in § 1-50(6), no claim for injuries "arising out of ... any failure in relation to a product" may be brought where the injury occurred more than six years after the product's manufacture. Mills's failure to warn claim relates to the sale and manufacture of the RTS-II bus. As a result, the claim is barred by § 1-50(6).

See also Davidson v. Volkswagen Werk, 336 S.E.2d 714 (NC Ct. App. 1985), in which the North Carolina Court of Appeals dismissed claims for negligence, breach of implied warranty, breach of express warranty, tortious concealment, negligent failure to warn, strict liability and unfair trade practices. There, the Court stated:

> Plaintiff contends that certain of his claims against Defendant are viable even if our statute of repose is held to be constitutional. Plaintiff bases this contention upon the theory that an extraordinary post-manufacture duty arises under certain circumstances and that a claim arising from the breach of this duty is beyond the purview of GS 1-50(6). We disagree. The language of the statute is clear. "No action for the recovery of damages for personal injury . . . shall be brought . . ." [emphasis added]. GS 1-50(6) is intended to be a substantive definition of rights which sets a fixed limit after the time of the product's manufacture beyond which the seller will not be held liable. . . . To accept the plaintiff's theory would defeat the purpose of the statute. Therefore, we affirm.

This case was denied review by the North Carolina Supreme Court.

South Carolina

South Carolina does not subscribe to a statute of repose for products.

Tennessee

Tennessee subscribes to a ten-year statute of repose for products liability actions. *See* T.C.A. § 29-28-103(a), a part of the Tennessee Products Liability Act of 1978 (TPLA). The resolution of this case depends upon the proper interpretation of T.C.A. § 29-28-103(a). That statute provides, in pertinent part, as follows:

> Any action against a manufacturer or seller of a product for injury to person or property caused by its defective or unreasonably dangerous condition must be brought within the period fixed by §§ 28-3-104, 28-3-105, 28-3-202 and 47-2-725, but notwithstanding any exceptions to these provisions it must be brought

> within six (6) years of the date of injury, *in any event, the action must be brought within ten (10) years from the date on which the product was first purchased for use or consumption* or within one (1) year after the expiration of the anticipated life of the product, whichever is the shorter, except in the case of injury to minors whose action must be brought within a period of one (1) year after attaining the age of majority, whichever occurs sooner. . . .

(Emphasis added).

Virginia

Virginia does not subscribe to a statute of repose for products.

III. CONCLUSION

Just because a car falls within the recall does not mean Ford will pay for the resulting damage. On the other hand, just because the car is not subject to the recall does not mean there is no recovery potential. In all cases, the claim will need to be substantiated and well-presented to Ford. The more prepared you are to litigate, the less you will need to do so.

John W. Reis is a member of the Cozen O'Connor Subrogation and Recovery Department and chair of the firm's SCDS Task Force. He has litigated Ford switch fire cases across the country since 1998.

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EVALUATION OF LOSSES FOR SUBROGATION: THRESHOLD ISSUES, EFFICIENCY AND COST CONTAINMENT

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EVALUATION OF LOSSES FOR SUBROGATION: THRESHOLD ISSUES, EFFICIENCY AND COST CONTAINMENT

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Expert, investigative and litigation expense are a significant part of the cost of recovery efforts. When companies are looking for every opportunity to contain costs and to use available resources more efficiently, it is only common sense to engage in a form of "triage" with new claims to determine what matters offer a sufficient potential return on investment to make recovery efforts beneficial to the carrier. Just as recovery prospects are enhanced by early analysis and investigation, cost containment and efficiency are more readily achieved when the threshold recovery issues are examined thoroughly and efficiently at the outset of a claim. Claims and recovery personnel can certainly participate in this process, and the input of recovery counsel will also be necessary in complex or close decisions. When factors that preclude viable recovery from solvent targets are identified at the outset, insurers can avoid investment of money and time into matters that are "dead ends" for subrogation efforts.

A recovery action may be precluded if:

- the cause of action is time barred.
- the potential defendant is a actual co-insured (by virtue of contract or endorsement) or an implied co-insured (by virtue of the relationship of the defendant to the damaged insured).
- subrogation is waived by contract or implication.
- experts cannot identify instrumentality or action that caused loss.
- significant fault lies with your insured.
- the amount of the loss makes it economically unreasonable to expend the sums for expert analysis and investigation required to make a sound determination as to recovery prospects arising from the loss.
- the amount of recoverable damage, as compared to indemnity obligation, makes recovery economically unreasonable.

- the recovery target has neither assets nor insurance coverage available, rendering a recovery action economically unreasonable.

- evidence is spoliated, whether negligently or intentionally.

Most of these factors can be addressed early on in the claim if the analysis of recovery potential is undertaken promptly and carefully. In many instances, insurmountable obstacles to recovery can be identified before significant expense is incurred for recovery purposes. The discussion below addresses the questions that need to be asked and the early investigation that needs to be undertaken to ensure that a recovery matter does not incur large expense and investment of time, only to be derailed by legal or factual problems that could have been identified at early stages of the loss adjustment process.

I. Initial Loss Report

A. What type of property

1. Residential
2. Commercial / Agricultural
3. Realty versus personalty

B. What are the interests in the property?

1. Landlord
2. Tenant
3. Owner
4. Contractor

C. How are these interests defined:

1. Leases
2. Deeds
3. Mortgages
4. Oral agreements
5. Implied tenancies
6. By other contract pertaining to the property

C. Who has what risk insured?

1. First party property coverage
2. Builders risk coverage

3. Tenant's policy
4. Fire legal liability coverage (for potential target)
5. General liability insurance (for potential target)

II. Continuing Investigation

A. Who is an insured under your coverage?

1. Named insureds
2. Additional insureds
3. Mortgagees / loss payees
4. Implied co-insureds

B. Identification of potential recovery targets

1. What device, fault or instrumentality caused fire / flood / collapse, etc.
2. What is age of the improvement to real property involved in loss
3. What is age of device or product that caused loss, or when was work or service performed that caused loss?
4. What recent work, maintenance, etc. has been done to device or product?
5. Who is responsible for work, maintenance, *etc.* of device or product?
6. Who made and/or sold device or product?
7. Was product purchased new or used?
8. Are there issues of damage aggravation (*i.e.*, fire spread, tardy response to alarm, *etc.*) to consider?

C. Identification of applicable limitations / repose periods

1. When does cause of action accrue?
2. When does repose period expire?
3. When does limitation period expire?
4. Other barriers to recovery
    a. Contractual waivers of subrogation
    b. Limitations of liability in contracts
    c. Liquidated damage clauses
    d. Reciprocal indemnity provisions

D. Retention of experts

1. Who do I call
    a. Fire cause and origin
    b. Electrical engineer
    c. Mechanical engineer

d. Other disciplines

2. Scope of initial assignment
    a. Establish facts described in I(B), above
    b. Identifying parties who should be placed on notice if claim is viable
    c. Develop protocols and coordination of inspections and testing
    d. Reporting
    e. Coordination with recovery counsel
    f. Preservation of relevant evidence
    g. Documentation of loss scene by photography, notes, video, etc.

E. Damage issues

1. Replacement cost versus ACV or FMV for personal property
2. Replacement cost versus ACV or FMV or repair cost for real property
3. Economic loss rule—did the product damage anything besides itself?
4. Waivers of subrogation by contract
5 Implied waivers of subrogation
6. What is the gap between the insurer's indemnity obligations and the amount recoverable under applicable measures of damage?
7. Contributory and/or comparative negligence
8. Salvage

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I. Legal liability of motor carriers.

Liability of a carrier is dependent upon whether it can be classified as a common carrier or a private carrier. All carriers are either common carriers or private carriers. The liability varies greatly depending upon which classification the carrier fits into. The liability of a common carrier is often spoken of as that of an insurer. This is not quite the case--the common carrier's liability is not absolute but is more in the nature of a strict liability. A common carrier is strictly liable for loss or damage to the goods from any cause whatsoever except

1. act of God;
2. act of the public enemy;
3. act of public authority;
4. act of the shipper;
5. the inherent nature or inherent vice of the goods. In order for a common carrier to be excused from liability for loss due to one of these five exceptions, the excepted cause must be the proximate cause of the damage to the goods and, more importantly, the carrier must prove itself free from negligence.

Thus, all that the plaintiff need prove is delivery of the goods to the common carrier in good condition and the failure of the carrier to deliver the goods at destination, or the delivery of the goods in damaged condition. This is sufficient to establish a prima facie case.

The Carmack Amendment, 49 U.S.C. §11707, codifies the common law rule which imposes liability upon a common carrier without proof of negligence. A prima facie case is established against a common carrier by proof of delivery of the subject shipment in good

condition to the carrier and the failure of the carrier to deliver the goods, or their delivery in damaged condition, at destination. Missouri Pac. R.R. v. Elmore & Stahl, 377 U.S. 134, 84 S.Ct. 1142, 12 L.Ed.2d 194 (1964). Proof of this prima facie case creates a conclusive presumption of negligence against the carrier. Hall & Long v. Nashville & C.R.Cos., 80 U.S. (13 Wall.) 367, 372 (1872). The burden then shifts to the carrier to prove that it was not negligent and that the sole cause of the injury was one of the five common law exceptions to carrier liability; namely, Act of God, inherent vice, public enemy, act of public authority, or act or omission of the shipper. Joseph Schlitz Brewing Co. v. Transcon Lines, 757 F.2d 171 (7th Cir. 1985).

A. How does one distinguish between a common carrier and a private carrier?

The concept of a common carrier requires that the carrier holds itself out to the public to provide transportation services to anyone wishing to pay it, rather than to a particular part or parties. The essential characteristics distinguishing common carriers from private or contract carriers is the presence or absence of an offer to serve the public generally.

A private carrier only operates for itself or for a particular shipper or group of shippers. Contract carriers do not offer their services to the public.

It is especially important to remember that the failure of a common carrier to issue a bill of lading does not make it a private carrier and does not change its liability from that of a common carrier.

B. When does the liability of a common carrier begin?

The liability of a common carrier begins when the goods are delivered to it for transportation, i.e., as soon as the delivery is complete and possession has been transferred from the shipper to the carrier. The traditional rule is that there must be an acceptance of the goods by the carrier for transportation and physical transfer of possession of the goods.

The liability of the carrier does not merely begin with the giving of shipping instructions and the signing of a bill of lading if the goods have not been delivered to the carrier for transportation.

Keep in mind that delivery does not necessarily require that the goods be physically placed in the hands of the carrier if the parties have agreed on "constructive delivery". In other words, if the dealings of the parties over a period of time treat the placing of the goods on the carrier's premises as a delivery to the carrier for immediate shipment, this can create common carrier liability.

Another customary situation in which common carrier liability could commence is where the carrier spots its vehicle at the shipper's platform and accepts the shipper's load and count. You can have carrier liability once the vehicle is loaded by the shipper and the carrier is notified that the goods are ready to be transported. The delay in moving the vehicle could be held to be for the convenience of the carrier.

When one who is engaged in business both as a warehouseman and a common carrier accepts instructions from the owner of the goods to ship the goods being stored in the warehouse, this relationship changes. In Rohr v. Logan, 206 Pa. Super. 232 (1965), the court held that where the warehouseman accepted oral instructions to ship the goods at the earliest practical opportunity in the usual course of his business, his status with relation to the goods became that of a common carrier. This case was interesting in that the shipping instructions were given by the customer on August 6 or 7, 1962. On August 8, 1962, a fire occurred in the warehouse and destroyed the goods. Thus, even though the goods had never left the warehouse, the court held that defendant was acting as a common carrier. As a common carrier, defendant attempted to avoid liability by showing that the fire was caused by lightning, (i.e., act of God).

However, even though there was evidence that a lightning strike started the fire, because the warehouse was not properly maintained in terms of fire protection, lightning rods, etc., it was held that the defendant did not meet his burden of showing freedom from negligence as a common carrier in the construction and maintenance of the warehouse.

C. Can the relationship of the claimant and the carrier change from that of shipper-common carrier to that of bailor-bailee?

Yes. The general rule is that the liability of a common carrier for possession of a shipper's goods (1) prior to receipt for purposes of immediate transportation or (2) after completion of transportation and tender of delivery and until delivery to the consignee, is that of a warehouseman or bailee who is liable only if negligent. For instance, if a carrier receives goods from a shipper which are not intended for immediate transportation, such as not in final condition for shipment or awaiting further instructions from the shipper, common carrier liability is not created.

On the other hand, merely because the goods arrive at their destination, the carrier's liability is not changed to that of a warehouseman if anything remains to be done to effectuate delivery. For instance, if a carrier attempts to make a delivery at a time when the consignee's business is closed, this in itself does not constitute a sufficient tender of delivery to make the carrier into a warehouseman.

D. Can a common carrier limit its liability?

The Carmack Amendment specifically provides that a common carrier may not limit or be exempt from liability as imposed by the statute except as permitted by the Carmack Amendment. 49 U.S.C. §11707(c)(1). 49 U.S.C. §10730 authorizes common carriers to limit

their liability for loss or injury to property under released rate provisions prior to January 1, 1996. 49 U.S.C. §10730(c) provided that:

> "A rail carrier. . .may establish rates for transportation of property under which the liability of the carrier for such property is limited to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier, and may provide in such written declaration or agreement for specified amounts to be deducted from any claim against the carrier for loss or damage to the property. . ."

The ICC Termination Act of 1995 terminated the existence of the Interstate Commerce Commission effective January 1, 1996. The Termination Act contains the following provision concerning the limitation of liability of rail carriers at 49 U.S.C. §11706(c) (1995):

> "(3) A rail carrier providing transportation or service subject to the jurisdiction of the [Surface Transportation] Board under this part may establish rates for transportation of property under which - (A) The liability of the rail carrier for such property is limited to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier; or (B) specified amounts are deducted, pursuant to a written agreement between the shipper and the carrier, from any claim against the carrier with respect to the transportation of such property."

Whether or not the carrier is negligent does not increase its liability beyond a legally valid limitation. The courts have held that the Carmack Amendment, 49 U.S.C. §§11707 and 10730, preempts state common law remedies for negligent damage to goods shipped by common carrier. Underwriters at Lloyds v. North American Van Lines, 890 F.2d 1112 (10th Cir. 1989). In that case, citing numerous precedents, the court specifically held that negligence of the common carrier does not avoid the limitation of liability contained in the carrier's tariff and bill of lading under Carmack. Many other courts have held that Carmack preempts state and common law remedies, such as negligence claims. See cases cited in Hughes v. United Van Lines, 829 F.2d 1407, 1412-1415 (7th Cir. 1987).

As indicated, negligence of the carrier does not avoid the limitation of liability pursuant to a tariff, bill of lading or written agreement with the shipper. The only cases which avoid the limitation of liability are those when the carrier actually converts the goods to its own use and gain. Even if the theft of the goods is by the carrier's own employees, the carrier may properly limit its liability. Glickfeld v. Howard Van Lines, 213 F.2d 723 (9th Cir. 1954); Quasar Co. v. Atchison, Topeka & Santa Fe Ry. Co., 632 F. Supp. 1106, 1108 (M.D. Ill. 1986). Even gross negligence or proof that an employee of the carrier actually stole the goods does not render the tariff limitation inapplicable. Tishman & Lipp, Inc. v. Delta Airlines, 274 F. Supp. 471, 480 (S.D.N.Y. 1967), aff'd 413 F.2d 1401 (2d Cir. 1969).

II. What is the liability of a bailee or warehouseman?

The liability of a warehouseman under Pennsylvania law is governed by Section 7204(1) of the Uniform Commercial Code which states:

> "A warehouseman is liable for damages for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonable careful man would exercise under like circumstances but unless otherwise agreed he is not liable for damages which could not have been avoided by the exercise of such care."

In other words, if the defendant is acting as a bailee or warehouseman, he is generally only liable for negligence. The fact that a bailee impliedly agrees to return the goods in the same condition in which they were received does not create a bailee's liability as an insurer. If a bailee establishes that he exercised reasonable care and that the damage to the property occurred anyway, he is not liable.

The claimant's prima facie case against a bailee is somewhat similar to that against a carrier. All he first has to show is a bailment, i.e., delivery of the goods to the bailee and the failure of the bailee to return the goods in the same condition. Then the bailee must go forward

with proof explaining how the damage occurred. After the claimant establishes delivery of the goods and the failure to return them in the same condition in which they were delivered, the warehouseman then has to explain how the goods were lost or damaged. It is sufficient merely to show that the goods were destroyed by fire, or were stolen, for example. Then it is up to the claimant to establish negligence of the bailee or warehouseman in order to recover. Again, a bailee, as opposed to a carrier, only has to exercise ordinary care.

III. Exception to common carrier liability of act or omission of shipper (improper packing or loading).

The general rule is that in order to absolve the carrier from liability for loss or damage arising from the act or default of the shipper, that act or default must not be readily apparent. Practically all of the reported cases on this issue concern incidents or concealed damage. The exception is based on the policy that even though improper packing or loading may result from the act of the shipper, the carrier is to be the ultimate judge of whether the packing or loading is properly done. If the improper packing or loading is readily apparent upon delivery to the carrier, the carrier should not accept the goods for transportation until the defect is corrected. In other words, as with the other exceptions to common carrier liability, the common carrier must not only prove that the excepted cause was responsible for the damage, but must also prove that the common carrier was itself free from negligence. When the shipper assumes the responsibility of loading, he becomes liable only for the defects which are latent and concealed and cannot be discerned by ordinary observation by the carrier. If the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper.

With respect to concealed loss and damage claims, the practices of the members of the American Trucking Association require that a claim for hidden loss or damage be made immediately upon discovery of it by the consignee and must be made within 15 days after

delivery. If not made within 15 days, the carrier will not pay the claim unless it can be proven conclusively that the carrier was at fault. The obvious problems with concealed loss and damage claims are that the loss could have occurred either prior to delivery of the goods to the carrier or subsequent to receipt by the consignee of the goods.

Often carriers take the position that a "clean" delivery receipt constitutes definitive proof that the carrier is not liable. However, a carrier's signed delivery receipt which states that the property was received in apparent good order is only prima facie evidence of that fact. This means that the consignee is entitled to present evidence to the contrary.

IV. Claims Settlement Practices

A. Notice Requirements

Claims against carriers subject to the I.C.C. Termination Act of 1995 must be filed in writing with the receiving or delivering carrier or the carrier upon whose line the damage occurred: within 9 months after delivery of the goods or, in case of non-delivery, within 9 months after delivery should have been made. Contrary to popular belief, no specific form of claim notice is required, as long as it is in writing. A minimum requirement would only include three items:

1. Enough information to identify the shipment;
2. A statement that the carrier is alleged to be liable for the damage; and
3. A claim for payment of either a specific or determinable amount of money.

B. What documents do you want to process a claim?

1. The original bill of lading--this is necessary to establish that the goods were delivered to the carrier as a common carrier, the nature and description of the goods and,

often most significantly, whether the cargo was subject to any released valuation which would limit the amount of carrier liability.

2. The original paid freight bill.

3. The delivery receipt of the carrier--this will indicate whether notation was made of the loss or damage at the time the goods were delivered.

4. Any acknowledgement from the carrier of the loss or damage, if it exists.

5. The original invoice or a certified copy of the invoice to support the amount of the claim. This will often contain a discount which the carrier may be able to take advantage of.

C. Measure of Damages.

Generally, after a loss has occurred, the law is concerned strictly with the restoration of the claimant to the same position he would have occupied had there been no loss or damage. This means that the claimant is entitled only to his actual loss, not special damages occasioned by factors which may be unknown to the carrier at the time of shipment.

While shippers are often entitled to the market value at destination when that figure represents the claimant's full actual loss, each case must be determined on its own merits. In some instances, after considering all of the circumstances surrounding the purchase, sale and transportation of the goods, a claimant may be entitled to less than the destination value. In many cases, as for example a shipment from a manufacturer to his own warehouse for storage pending distribution and sale, no sale has actually been made to establish a loss of earned profit. If the profit is not actually earned by the claimant, no recovery for it is allowed.

On the other hand, the law contemplates restoring the claimant to the same position he would have been in had there been no loss or damage. If this involves allowing the

claimant to recover profit which he has earned, the claimant is entitled to this recovery since the Carmack Amendment provides he is entitled to his actual loss.

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An Overview on Handling Worker's Compensation Subrogation Claims

presented by
Daniel Hessel, Esq.

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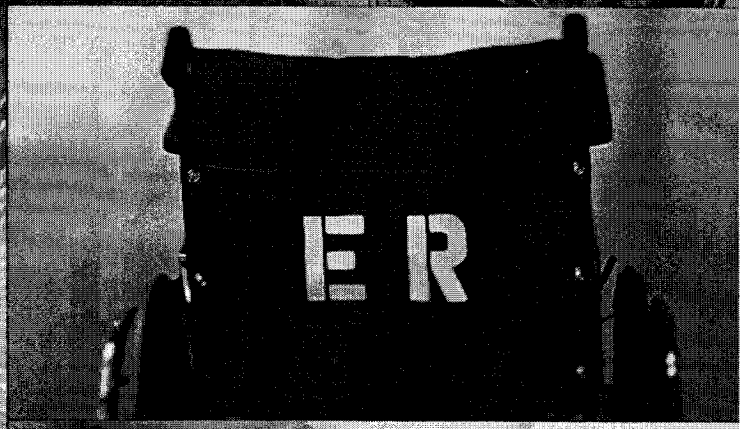
WORKERS' COMPENSATION SUBROGATION RECOVERY PRACTICE



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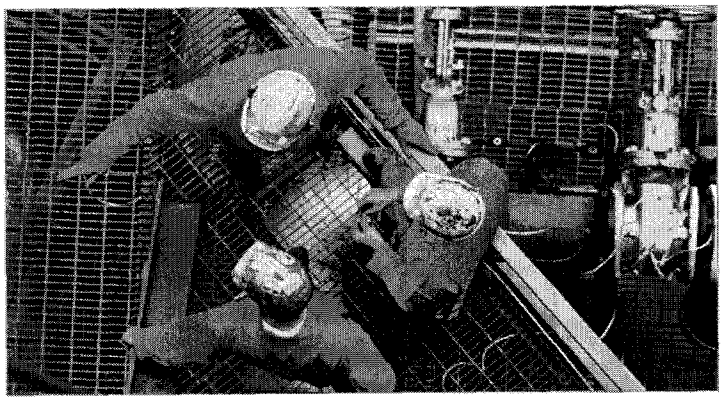


WORKERS' COMPENSATION SUBROGATION RECOVERY PRACTICE

WHO WE ARE AND WHAT WE DO

Cozen O'Connor has established itself as the preeminent subrogation law firm in the nation. Over the past 35 years, our attorneys have dedicated themselves to maximizing subrogation recoveries on behalf of the insurance industry from legally responsible third parties. Revenues achieved through an effective and well-managed subrogation and recovery program can significantly enhance the profitability of claims and underwriting operations, especially in view of ever-increasing competitive pressures. To accomplish this goal, we focus on providing timely and accurate investigation, analyzing and evaluating claims for subrogation potential, as well as determining your recovery rights with respect to the law of the appropriate jurisdiction. Our focus is to not only collect medical and indemnity dollars paid on workers' compensation claims, but to minimize your future exposure by seeking future credits.

With a truly national and international subrogation and recovery practice, Cozen O'Connor is able to handle on an economic, cost-effective and productive basis, all "serious" workers' compensation claims. "Serious" claims fall into three categories:

1. Claims with a medical exposure in excess of $50,000.
2. Claims with a total exposure in excess of $100,000.
3. Claims involving burns, amputations, crush injuries, multiple fractures, death or brain injury.

GETTING STARTED: INITIAL HANDLING OF A WORKERS' COMPENSATION SUBROGATION FILE

We have developed and refined a program to handle all workers' compensation claims from the moment you receive notice of the injury. Early notice and attorney involvement is critical to a maximum recovery. Our program involves the following steps:

1. Immediate Notice of New Serious Workers' Compensation Claims: As soon as your company receives notice of any serious workers' compensation claim, a workers' compensation recovery referral form should be sent to the workers' compensation subrogation contact attorney at the appropriate Cozen O'Connor office so that we can immediately begin investigating and analyzing the claim.
2. Preliminary Investigation and Legal Analysis: As soon as our subrogation attorney receives this information, a preliminary investigation will be conducted, on a no fee basis, to determine the circumstances of the claim, to identify and make arrangements to preserve pertinent physical evidence, and to interview relevant witnesses.
3. Selection of Experts: For the loss, Cozen O'Connor will select well-qualified experts from our complete nationwide database of experts, based on their area of expertise, background and performance record.
4. Assignment to Closest Regional Office: Cozen O'Connor is able to respond to the needs of our clients to handle subrogation and recovery matters on a cost-effective basis by deploying attorneys from our more than 20 offices strategically located across the United States, in addition to our international offices in London, and Toronto.
5. Case Reporting: Cozen O'Connor provides a preliminary status report shortly after receiving the assignment, and quarterly reports thereafter.

The hallmarks of Cozen O'Connor's time-tested success in maximizing subrogation recoveries for clients – consisting of most of the major property and casualty underwriters in the U.S. and internationally – are early intervention and no pre-screening of assignments. By giving us the opportunity to conduct an immediate investigation into potential third-party responsibility for all "serious" claims reported to your company, Cozen O'Connor will ensure that no workers' compensation subrogation opportunities are overlooked, and that all viable subrogation claims are handled with expertise from the outset, thus enhancing the prospects for a substantial recovery on behalf of your company.

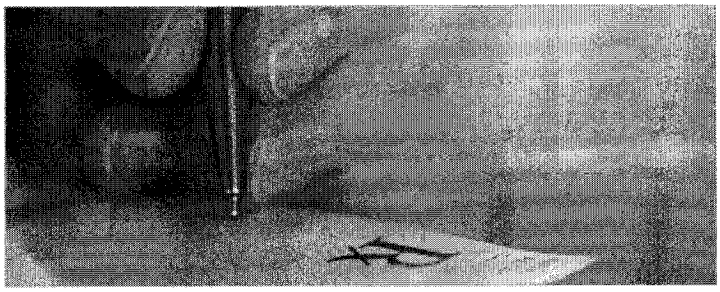
OUR RESOURCES ARE YOUR RESOURCES

Our Subrogation and Recovery Group has prepared a comprehensive desktop manual setting forth the important laws with respect to workers' compensation recovery in each of the 50 States. This reference manual addresses the issues most frequently confronted by workers' compensation and recovery professionals, including, for example, whether you have a right to pursue an independent action, whether your subrogation rights apply to uninsured motorists' proceeds, whether your

claim is barred by employer negligence and what types of notice you must provide. In addition, we have authored numerous articles and papers on workers' compensation recovery. All of these materials are available upon request or by accessing our website at www.cozen.com.

Additionally, Cozen O'Connor's Workers' Compensation Recovery Group provides a monthly *Subrogation & Recovery Alert!*, devoted to educating our clients about cutting edge, topical workers' compensation recovery issues. The *Alert!* gives you access to the latest court decisions nationwide, which may affect your company's subrogation rights, as well as your rights to future credits. We also provide you with notice of many statutory enactments, as well as amendments to existing statutes, which may affect your company's recovery rights. All of our clients qualify to be placed on our mailing list to receive the Cozen O'Connor *Subrogation & Recovery Alert!* and *Observer* at no charge.

FREQUENTLY ASKED QUESTIONS



Does a workers' compensation lien have priority over the employee's claim for pain and suffering?

In many states, yes. However, the priority of a workers' compensation lien is governed by statute. Many statutes provide that the lien must be paid in full before the employee can recover anything. In other states, the injured employee must be "made whole" before the lien can be recovered. And there are other states which provide for "equitable distribution" of the recovery proceeds. Cozen O'Connor has expertise in recognizing and making legal arguments that will protect the lien rights of the carrier. We have also developed a *50 State Compendium Manual* of the statutes in each state which describe the carriers' rights. Please contact us if you would like a complimentary copy of this manual.

How does subrogation work when the amount of the workers' compensation lien is not fixed because the claim is still open?

In most jurisdictions, when a third-party recovery is obtained, the insurer is entitled to recover its existing lien and also a "future credit" based on the amount the injured worker recovers in the suit. In such cases, the insurer's obligation to continue to pay benefits is suspended, in whole or in part, until the credit is extinguished. Thus, even in those cases where the lien is minimal but the future exposure is significant, such as wrongful death cases, it is important for the carrier to ensure that the third-party recovery is commensurate with that exposure. In such cases, it is critical to retain counsel immediately to investigate the potential for subrogation.

Are there cases in which Cozen O'Connor represents both the carrier and the injured worker?

Yes, this allows Cozen O'Connor to actively control litigation on behalf of both interested parties, and secure the best recovery possible. It also ensures that the injured employee cooperates with the prosecution of the case, which is vital to a successful recovery.

Will the insurer have to pay additional attorneys' fees if it retains Cozen O'Connor in a case where the injured worker already has an attorney who is obligated by statute to protect the lien?

No. We customarily reach an agreement with the injured worker's attorney to prosecute the case jointly, which includes an agreement to split attorneys' fees equitably, or the court makes an appropriate division of attorney fees. In those cases where Cozen O'Connor is hired to represent the insurer's subrogation interests, in no event will the insurer be responsible for paying counsel fees above the amount of fees agreed to with the claimant's attorney or as provided by statute. Our initial review of the file and investigation, however, is always done at no cost to you (except for those expert fees which you pre-approve). Therefore, there is absolutely no downside to getting Cozen O'Connor involved immediately upon notice of the claim.

Is Cozen O'Connor available to make a presentation on a specific issue?

Absolutely. The Workers' Compensation Recovery Group will make available to you and your staff training seminars on many important subjects. We can provide presentations and programs on the identification and investigation of workers' compensation claims for subrogation potential, which include compelling demonstrative evidence from actual cases. We also can provide more advanced seminars on complex legal issues confronted by subrogation professionals, including the "made whole" doctrine, employer negligence, calculation of future credits and numerous other subjects. You let us know the topic, and we will cover it.

Can I contact a Cozen O'Connor subrogation attorney off-hours?

Yes. Our clients can reach one of our senior subrogation attorneys 24 hours a day, 7 days a week, by calling our "hotline": 1-800-523-2900. We know from experience that it is to our clients' benefit to reach us immediately upon receipt of a new claim so that we can act at once to protect your subrogation interests.

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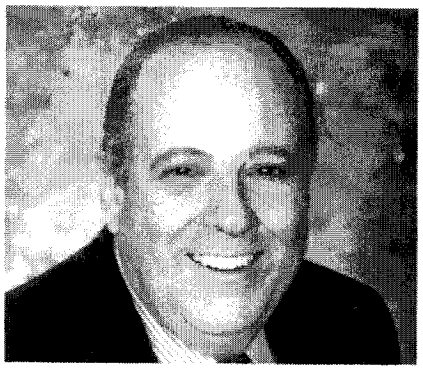

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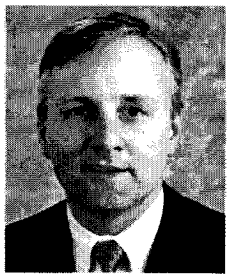

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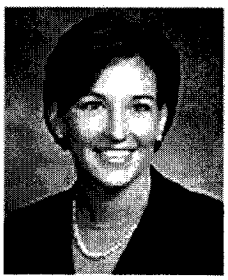

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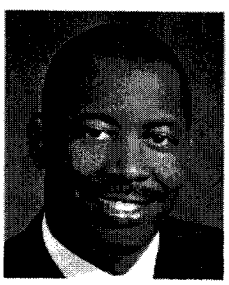

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CONSTRUCTION CLAIMS AND WORKER'S COMPENSATION SUBROGATION

I. INTRODUCTION

Construction is the most dangerous profession in the United States. According to various estimates, construction accidents lead to over 3,000 deaths annually and a substantially higher number of injuries. More times than not, a worker's compensation claim arises as a result of the construction accident. In many instances, the potential for subrogation exists. Typically, worker's compensation statutory schemes do not prevent an injured worker from pursuing a personal injury action. All states have a worker's compensation scheme. These laws may protect a contractor from being sued by its own employee in case of an occupational accident. These laws have not, however, curtailed personal injury litigation in the construction industry. An employee entitled to worker's compensation benefits may still bring suit for additional damages against a negligent third party (not his or her employer).

Notwithstanding the contract between the parties, contractors have a duty to use reasonable care to prevent injury to persons reasonably expected to be affected by their work. Many states provide that a contractor has the same liability as a possessor of land for injuries resulting from the dangerous character of the building or condition of the site while it is in his control. As set forth in the Restatement (Second) of Torts Section 343, "a contractor or subcontractor is subject to liability for injuries caused by a condition on the land if he or she (1) knows or by the exercise of reasonable care would discovery the condition, and should realize that it involves an unreasonable risk of harm; (2) should expect that they will not discover or realize the danger or will fail to protect themselves against it; and (3) fails to exercise reasonable care to protect them against the danger.

II. DUTIES AND OBLIGATIONS FOR JOBSITE SAFETY

A. Owner's Responsibilities

The owner of a construction site is not generally liable for the injuries sustained by the employees of a contractor or subcontractor working on site. However, there are two primary exceptions to this general rule. One exception is where an owner is liable for the injuries sustained by the employees of a contractor or subcontractor working on site if the owner does not delegate control of the project to the contractor and instead retains control of the work. The second exception is where an owner is liable for injuries sustained in the performance of an "inherently dangerous" activity. In both of these instances, the owner retains substantial responsibilities for jobsite safety.

B. General Contractor's Responsibilities

A general contractor in control of a structure or premises also owes to the employees of any other contractor a duty to exercise ordinary care to keep the structure or premises in a safe condition for their use.

C. Construction Manager's Responsibilities

A construction manager's responsibilities for jobsite safety depend on the role that the owner assigns to the manager. Generally, the owner contracts directly with the manager to act as its agent to plan, coordinate and improve the entire construction project. This delegation of responsibility may give rise to a third-party claim against such manager.

D. Subcontractor's Responsibilities

Subcontractors also have substantial responsibility for jobsite safety. Typically, their contracts with general contractors, construction managers or other higher tiered contractors impose upon them the primary responsibility for safety of the construction workers.

E. Design Professional's Responsibilities

Architects and engineers increasingly have been charged with negligent conduct in connection with their services prior to or during the construction phase leading to injury of construction workers.

F. Defective Equipment

In the event a piece of machinery or construction equipment causes an injury, a prompt investigation should be conducted to determine if such piece of equipment was defectively designed, manufactured, or lacked appropriate warnings.

III. MEANS AVAILABLE TO SHIFT THE RISK – USE OF THE INDEMNIFICATION AND HOLD HARMLESS PROVISIONS

Most construction parties protect themselves from liability claims related to injured construction workers through the use of indemnification and hold harmless provisions. Nearly every construction contract contains a hold harmless and indemnification clause. In contracts between an owner, a general contractor and a subcontractor, the indemnity agreements almost always favor the participant higher in the contractual chain. A prompt analysis of the contract documents needs to be performed to determine the potential for shifting the risk from one contractor to another. In a subrogation context, this becomes important where the injured worker's own employer may have assumed the risk of the negligence of another.

The majority of states can be classified as "pro indemnity." In these states, indemnity agreements are enforceable as long as the intent to indemnify is clear from the language of the indemnity agreement. Other states impose significant restrictions upon the enforceability of the indemnity and hold harmless agreements. For example, in New York, an indemnity agreement is only enforceable if (1) the intent to indemnify is clear from the language of the agreement; and (2) the indemnitee (owner or general contractor) is not actively negligent. If, however, the owner/general contractor is even 1% actively negligent, then the indemnity agreement is void. Therefore, a state by state analysis is required to determine the enforceability or lack thereof of the indemnity agreement at issue.

IV. STATUTORY EMPLOYER DOCTRINE

In a construction site accident where a general contractor is named as a defendant in a lawsuit seeking damages for an injury sustained by an employee of a subcontractor, the general contractor in many instances has the option of asserting the statutory employer defense. If the general contractor can establish that it is a "statutory employer," then it can avoid liability by asserting the benefit of the exclusivity clause of the Worker's Compensation Act.

The statutory Employer Doctrine arises in situations where the employee sustains an injury on the job and his immediate employer, usually a subcontractor, has not provided insurance coverage or is not a qualified self-insured. Under such circumstances, the injured worker can look to the general contractor for the payment of worker's compensation benefits if certain factual circumstances exist. The intent behind the doctrine is to hold the general contractor secondarily liable for injuries to the employee of a subcontractor where the subcontractor primarily liable has failed to secure benefits within insurance or self-insurance.

The general elements of the Statutory Employer Defense are as follows:

1. An employer who is under contract with an owner or one in a position of an owner.
2. Premises occupied by or under the control of such employer.
3. A subcontract made by such employer.
4. Part of the employer's regular business entrusted to such subcontractor.
5. An employee of such subcontractor.

If these five prongs are met, the general contractor may have immunity from suit.

Injured construction workers are entitled to worker's compensation benefits from employers. Legislatures throughout the country have recognized that subcontractors are less likely to maintain compensation insurance then are better financed general contractors. As a result, almost all states designate the hiring party (usually limited to the general contractor) as the "statutory employer" liable for compensation benefits in the event the immediate employer is uninsured. In return, the statutory employer can often claim immunity from tort liability if it paid compensation benefits and, in some states, even if the immediate employer (subcontractor) was insured.

V. BORROWED EMPLOYEE

The Borrowed Employee Doctrine grew out of the common law rule that a servant who is loaned by his master to a third party is regarded as the servant of the third party while under the third party's direction and control. In construction injuries, the Borrowed Employee Doctrine arises where a contractor or subcontractor provides an employee to another company to provide a service. If an injury arises when a loaned employee is performing work for the other company, the issue arises as to who was the employer for purposes of determining whether the other

company is immune from liability under the Worker's Compensation Act. Therefore, one who is in the general employ of one employer may be transferred to the services of another in such a manner that he becomes an employee of the second employer.

VI. OSHA VIOLATIONS

While OSHA does not create a private right of action, under certain circumstances, and in certain jurisdictions, an OSHA violation may be conclusive evidence of negligence or negligence per se. It therefore becomes critical to determine if an OSHA investigation has been performed and what violations, if any, were meted out. OSHA's findings and issuance of violations may have a profound impact in a third party lawsuit.

VII. CONCLUSION

The investigation of a construction injury is crucial in determining whether the case will be meritorious. Each case is different, requiring a different focus. Construction injuries run the gamut, e.g., ditch cave ins, falling objects, contact with electrical lines, collapsing scaffolds, moving equipment, faulty machinery, etc. All present a myriad of theories and potential defendants. Time is of the essence in investigating an industrial or construction site injury because the sites change daily. Contractors and subcontractors move on and off sites frequently.

The relationship among the various parties at a construction site is complicated. The liability of each respective party may be determined by the language of the various contracts as well as the statutes and case law of the jurisdiction in which the accident occurs. Therefore, every construction site accident investigation must include a detailed analysis of the issues outlined above.

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WORKERS' COMPENSATION

SUBROGATION CHECKLIST

INSURANCE COMPANY: _____

CLAIM NUMBER: _____ ADJUSTER: _____

TELEPHONE: _____

E-MAIL: _____

YES	NO	
_____	_____	Catastrophic injury: death, loss of limb, blindness, paralysis, severe burns, closed head injury, spinal injury, multiple fractures, etc.
_____	_____	Motor Vehicle Accident: including loading/unloading and exiting or entering a vehicle.
_____	_____	Premises: slip and fall, doors, elevators, escalators, etc.
_____	_____	Construction Site Accidents: falls, safety issues, subcontractor involvement, heavy equipment, electrocution, etc.
_____	_____	Machinery: accident involving machinery, heavy equipment or mechanical apparatus.
_____	_____	Products: Industrial equipment, chemicals, electrical, etc.
_____	_____	Blasting, Explosion or Fire

If "Yes" is marked on any of these categories, the case should be reviewed for subrogation potential.

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LETTER TO POLICYHOLDER EXPLAINING WORKERS' COMPENSATION SUBROGATION

Dear Risk Manager/Plant Manager,

All losses are unfortunate occurrences. They are particularly unfortunate when they occur because of the actions or omissions of some outsider. It is extremely difficult to protect against or prevent loss or injury to your employees caused by defective products, or the careless conduct of another company. All too often this leads to injuries to your employees, which in turn leads to medical bills and lost wages. You and your workers' compensation insurance carrier then become obligated to meet the financial needs of your injured employee.

Fortunately the law provides a means whereby you and/or your insurance company can seek to recover these payments made on behalf of your injured worker from the responsible party. It is called "subrogation." Subrogation is a legal right to recover the payments from the responsible party.

We believe that a better understanding of the subrogation program will ease any concerns you may have about its purpose, and at the same time enhance your appreciation of its advantages to you.

Your insurance company through retained counsel will conduct a subrogation investigation. The function of these lawyers is, with your cooperation and assistance, establishing cause and responsibility for an occurrence.

A critical element of an effective subrogation investigation is the earliest possible direct involvement of our subrogation attorneys in the causation investigation. To that end, after prior notice to you, our subrogation attorneys, along with the adjuster and other consultants, will participate in fact-gathering meetings with your representatives. If possible, critical evidence will be identified and preserved, photographs will be taken and interviews will be conducted of eyewitnesses or other knowledgeable persons. Our attorneys will treat all information in a confidential manner. They will work closely with any investigation you may be conducting.

We believe it is also important to understand what our subrogation attorneys are not doing. They are not attempting to develop grounds for denial of a claim, nor is the information or documentation they request intended to affect or influence the adjustment of the claim. They are also not looking to develop any type of liability claim against you as the injured worker's employer. They are looking for other entities to pursue.

The services of these skilled attorneys may well be of invaluable assistance to you as well as to us. Their experience in investigation and evaluation of accidents may enable you to reduce loss ratios and worker's compensation ratings when applicable, and provide other significant benefits. Some extra effort may be necessary, but there are also potential dividends, including supplementation of loss prevention activities by providing an independent evaluation of how the accident occurred and why.

We know that you have a business to run, so in those cases where we will ask for your cooperation to pursue subrogation, our intrusion will be minimal. Our attorneys and consultants will make every effort to develop the necessary information from the claims documentation and other sources. However, there may be times when we will have to speak to your knowledgeable employees and to review essential documents. We will only do so with your knowledge and consent.

We hope that the foregoing has enhanced your understanding of the purpose of subrogation and its benefits to you. Your representative will be happy to put you, or your staff, in touch with the individuals responsible for administering our subrogation program if you have any questions or comments.

WORKERS' COMPENSATION RECOVERY GROUP
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PREMISES LIABILITY
BASIC INVESTIGATION GUIDE

TO BE ASKED FOR ALL PREMISES CLAIMS

1. Did the accident occur inside or outside the premise?
2. Obtain date, time, physical address and weather conditions.
3. Why was the claimant on the premise? Ask claimant to detail their movements from the time they entered the premise to the accident location.
4. What was the claimant wearing (type of shoes, coat, eyeglasses)? What were they carrying?
5. What type of surface was the claimant walking on (cement, macadam, tile)?
6. Was the surface level or sloped?
7. What type of lighting was in the area?
8. Obtain name, address and phone numbers of witnesses and their informal statements.
9. What caused the accident? Request detailed description from the claimant.
10. Was anyone notified of the defective condition prior to the accident?
11. Were there any warnings of the dangerous condition?
12. Was an accident report filled out? Obtain a copy.
13. Who owns the premise: Name, address and telephone number?
14. Who maintains the premise? Obtain contract or agreement.
15. If the accident occurred on the insured premise, do they own or lease the premise? Obtain a copy of the lease agreement.

16. Were any repairs or alterations made to the area? If so, what was repaired and by whom? Obtain contracts and/or agreements.

17. Obtain scene photographs as soon as possible.

SLIP AND FALL ON FLOOR

1. Identify the exact location where claimant fell.

2. What caused the fall? Was the defect hidden or visible.

3. If the floor was wet, describe liquid (clear, colored, sticky, slimy).

4. If the claimant fell as a result of waxed floors, who was responsible for waxing and what product was used to wax the floor?

SLIP AND FALL DUE TO SNOW AND ICE

1. Obtain weather report.

2. Who is responsible for snow and ice removal? Obtain contract.

3. Where did the ice come from, defective rainspouts, defective plumbing, thawing snow and refreeze?

4. Were any steps taken to salt, remove or warn of the condition? If so, describe.

5. Describe ice (smooth, bumpy).

6. When did the snow start and stop?

7. Was the snow fluffy or hard packed?

8. Were there any defects under the snow (ice, pothole, crack)?

FALL ON STAIRWAY

1. Complete description of steps including: composition, number of steps, straight or curved, height and width of risers and treads, landings, handrails, covering on steps.

2. Was the claimant going up or down the steps?

3. What caused the claimant to fall?

4. Was the handrail used? Was the handrail secure?

5. Did the claimant fall backward or forwards?

6. What step was the claimant on when she/he fell?

7. Had there been any work done to the steps recently? If so, by whom?

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CONSTRUCTION ACCIDENT BASIC INSTRUCTION GUIDE

I. Preliminary Investigation Issues

A. Preserve evidence: photograph and/or video accident location before it changes.

B. Obtain copies of all photos taken by others. Note that many accident sites are photographed regularly by architects, engineers and contractors in the ordinary course of business.

C. Obtain the names of the property owner, general contractor and each subcontractor.

1. Obtain copies of all contracts between these parties for indemnity, hold harmless and statutory employer issues.

D. Names of People Involved

1. Identify every individual who was on site at the time of the accident, including the following information:

a. name and address

b. employer

c. occupation

d. the person's activity and location at the time that the accident occurred

e. how did the person first become aware of the accident (what did they see or hear)

f. is the person aware of any discussions about the accident immediately after it occurred and

g. has the person given a statement or been questioned by anyone else.

2. Who was responsible for safety at the construction site?

a. Obtain all documentation relating to any on-site safety inspections

E. Investigations by Other Parties

1. Who investigated the accident?

2. Did OSHA investigate? Was any party cited by OSHA? Were there other similar accidents previously investigated?

a. At this job site?

b. At other similar job sites?

II. Specific Types of Accidents

A. Fall from Height (including falls from structures and falls into holes)

1. What type of fall protection was provided?

a. All accessible areas more than 10 feet above the ground are required to have fall protection.

b. Types of fall protection include: guardrails, land yards, safety netting, warning tape.

2. Who was responsible for providing and maintaining fall protection?

a. Who erected the scaffold or platform or created the opening?

b. Who removed the fall protection? Why was it removed?

c. Any instructions given to employer or injured worker relating to unguarded areas or fall protection?

3. How long was the area left unguarded?

4. Why was the injured worker in the unguarded area?

a. Was the injured worker authorized to be in the unguarded area?

b. Were other individuals working in that area or authorized to work in that area?

5. What triggered the fall?

a. Accidental step

b. Slip or trip

c. Contact with other worker or moving object

d. Other unexpected event

e. Electrocution: high voltage electrical lines are required to be at least 12 feet away from a structure or work area.

f. Breakage of foot support or other object: Be sure to preserve as evidence anything that broke at the time of the fall.

6. After accident repairs

a. What, if anything, was done after the accident to make the area safe?

b. Who took action to make the area safe?

B. Trip and Fall at the Worksite

1. How long did the condition exist which caused the accident?

2. Did the accident occur in a place where people are expected to be working or walking?

3. Focus on exact cause.

a. Uneven surface

- How was the uneven surface created?

b. Debris

- Who caused it to be there?
- Who is responsible for cleanup?
- Preserve evidence: keep the debris if possible.

c. Slippery Surface

- Identify what is on the surface, water, ice, oil, other chemical.
- Where did it come from?
- Who was responsible for cleanup?

C. Struck by Falling Object

1. Preserve the falling object if possible.

2. Identify all parties working above the accident location.

3. Find out how the object was secured before the fall.

   a. Some materials are shipped from suppliers without adequate packaging or bundling or in overloaded bundles. If possible, retain the load ticket that was shipped with the bundle of material.

   b. Who was responsible for lifting the load to the area? What measures were taken to secure the load?

   c. If a hook or strap or pallet broke, retain the broken pieces.

   d. Hooks are often misused. Hooks are available which will prevent a load from accidentally slipping off.

D. Building or Trench Collapse

1. Some jobs, such as excavations involving trenches or demolitions, include an inherent risk of collapse which requires specific methods of shoring up walls and columns to prevent collapse.

2. For structural collapse, find out the name of every architect and engineer who participated in the design of the structure and copies of all architectural and engineering drawings pertaining to the structure.

3. Find out the names of the suppliers and manufacturers of any structural parts that may have failed and caused the collapse.

E. Injured by Machine

1. Identify the operator, owner and supplier of the machine.

2. Obtain the names of any other workers who operated the same machine before or after the accident.

3. See outline on products liability investigation.

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PRODUCTS LIABILITY
BASIC INVESTIGATION GUIDE

1) Identify the machine: manufacturer's name, address and phone number, name of machine, model number, serial number, size, purpose/use.

2) Identify the owner of the machine at the date of loss: name, address and phone number; date they purchased the machine and from whom; new or used; address and phone number of original supplier; address and phone number of recent supplier of parts, etc.

3) Identify all safety devices (such as guards, palm buttons, wrist straps, electric eyes, two hand trip devices, etc.); manufacturer's name, address and phone number (if different than the manufacturer of the machine itself); name of safety device, model number and serial number; who installed the safety device and when. Obtain copies of installation instructions. Was injured party using the safety device when injured?

4) Obtain copies of any literature that accompanied machine and/or safety device, such as purchase invoice, owner's manual, maintenance instructions, brochures, etc.

5) Note any warnings, signs or instructions on the machine and/or safety device. Need exact wording and placement.

6) Who maintains machine and/or safety device? Obtain copies of all service and repair records.

7) Obtain photographs: (MACHINE SHOULD BE SET UP AS IT WAS AT THE TIME OF THE ACCIDENT) – Photos of entire machine, from different angles; close up photos of the area where the injury occurred; close up photos of any safety device; close up photos of instructions/warnings.

8) Has the employer made any modifications to the machine? Note details on what, when and why.

9) Determine if there have been any other injuries on this machine, either prior or subsequent to this loss.

10) Ensure that all physical evidence is preserved.

This list comprises the standard beginning investigation needed on a products case. The information gathered will lead to additional investigation.

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