

THEORIES OF LIABILITY IN SUBROGATION CASES

COZEN AND O'CONNOR
1900 Market Street
Philadelphia, PA 19103
(215) 665-2000

Atlanta, GA
Charlotte, NC
Cherry Hill, NJ
Chicago, IL
Columbia, SC
Dallas, TX
Los Angeles, CA
New York, NY
Newark, NJ
Philadelphia, PA
San Diego, CA
Seattle, WA
W. Conshohocken, PA
Westmont, NJ

The views expressed herein are those of the author and do not necessarily represent the views or opinions of any current or former client of Cozen and O'Connor. These materials are not intended to provide legal advice. Readers should not act or rely on this material without seeking specific legal advice on matters which concern them.

Copyright (c) 2000 Cozen and O'Connor

ALL RIGHTS RESERVED

I. BACKGROUND

- A. THE NEED TO FULLY DEVELOP OPERATIVE FACTS RELEVANT TO CAUSE AND ORIGIN
- B. INTRODUCTION TO THE FIVE BASIC THEORIES OF LIABILITY IN SUBROGATION
 - 1. NEGLIGENCE OR TORT
 - 2. CONTRACT OR WARRANTY
 - 3. PRODUCTS LIABILITY OR STRICT LIABILITY (§402a RESTATEMENT OF TORTS 2d)
 - 4. LIABILITY FOR FIRE SPREAD OR ENHANCEMENT
 - 5. LIABILITY IN ACT OF GOD CASES

II. NEGLIGENCE OR TORT THEORIES

- A. ELEMENTS OF THE NEGLIGENCE CLAIM
 - 1. DUTY OF REASONABLE CARE
 - 2. BREACH OF DUTY
 - 3. PROXIMATE CAUSE
 - 4. DAMAGES
- B. NEGLIGENT ACTS VERSUS NEGLIGENT OMISSIONS
- C. STANDARDS OF CARE
 - 1. REASONABLE PERSON STANDARD
 - 2. STATUTES, CODES AND REGULATIONS
- D. THE NEGLIGENCE TIME FRAME
 - 1. PRIOR TO LOSS
 - a) IMMEDIATELY PRIOR TO LOSS
 - b) LONG BEFORE LOSS

2. CREATION OF CONDITIONS VERSUS ACTUALLY CAUSING LOSS
 3. NEGLIGENT CONDUCT THAT ENHANCES INTENSITY OR SCOPE OF DAMAGE AFTER LOSS OCCURS
- E. EXAMPLES AND CASE STUDIES
- III. CONTRACT OR WARRANTY THEORIES
- A. THE BASIS OF LIABILITY
1. THE CONCEPT OF AN UNDERTAKING
 2. THE ELEMENTS OF A CONTRACT CLAIM
 - a) CONTRACT
 - b) BREACH
 - c) DAMAGES
- B. TYPES OF CONTRACTS
1. WRITTEN
 2. ORAL
 3. IMPLIED
- C. TYPES OF WARRANTIES
1. EXPRESS
 2. IMPLIED
- D. EXAMPLES OF CONTRACT CASES
- IV. PRODUCTS LIABILITY
- A. WHAT IS §402A?
- B. THE NOTION OF LIABILITY WITHOUT FAULT
- C. TYPES OF DEFECTS
1. MANUFACTURING
 2. FAILURE TO WARN

- D. EXAMPLES OF PRODUCT CLAIMS
- V. LIABILITY FOR SPREAD OR ENHANCEMENT
 - A. BASIS OF THEORY
 - B. TYPICAL SCENARIOS
 - 1. CREATION OF HAZARDOUS CONDITIONS
 - 2. FAILURE TO MAINTAIN SPRINKLERS, ALARMS, FIRE WALLS, ETC.
 - 3. DANGEROUS OR HIGHLY COMBUSTIBLE BUILDING MATERIALS.
- VI. LIABILITY IN ACT OF GOD CASES
 - A. BACKGROUND TO THE THEORY
 - B. APPLICATIONS
 - 1. LIGHTNING CLAIMS
 - 2. HURRICANE/WINDSTORM LOSSES
 - 3. FLOOD LOSSES
 - 4. FREEZING CLAIMS
- VII. EVIDENTIARY CONSIDERATIONS AND BURDENS OF PROOF
 - A. EVIDENTIARY STANDARDS
 - B. LAY WITNESSES
 - C. EXPERT WITNESSES
 - D. STRATEGIES AND TACTICS
- VIII. DAMAGE ISSUES
 - A. PRORATION AGREEMENTS
 - B. COMPENSATORY DAMAGES
 - C. CONSEQUENTIAL DAMAGES
- IX. THE COZEN AND O'CONNOR METHODOLOGY

- A. EARLY INVESTIGATION
- B. DETAILED PLEADING OF MULTIPLE THEORIES OF LIABILITY
- C. TEAM APPROACH TO PRETRIAL AND TRIAL PREPARATION

PHILA1\285474\1 099995.000