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2007 SOUTHEAST SUBROGATION SEMINAR

THURSDAY, MAY 10, 2007
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COZEN
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2007 Southeast Subrogation Seminar

Table of Contents

I

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SPEAKER PROFILES

Atlanta
Charlotte
Cherry Hill
Chicago
Dallas
Denver
Houston
London
Los Angeles
New York Downtown
New York Midtown
Newark
Miami
Philadelphia
San Diego
San Francisco
Santa Fe
Seattle
Trenton
Toronto
Washington, DC
West Conshohocken
Wilmington

COZEN
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Peter F. Asmer, Jr.

Member
Charlotte Office
(704) 376-3400
pasmer@cozen.com

AREAS OF EXPERIENCE

- Construction Defect
- Property Subrogation
- Subrogation & Recovery

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 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 and construction 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 and Recovery Department.

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 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.

COZEN
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Karen Denise Fultz

Member
Atlanta Office
(404) 572-2057
kfultz@cozen.com

AREAS OF EXPERIENCE

- Family Law
- Subrogation & Recovery

EDUCATION

- J.D., Thomas M. Cooley Law School, 1998
- B.A., Michigan State University, 1993

MEMBERSHIPS

- President, Gate City Bar Association (2005-2006)
- Board member, Atlanta Legal Diversity Consortium
- Board member, Atlanta Bar Association
- Board member, Atlanta Volunteer Lawyers Foundation
- Member, National Bar Association
- Member, Georgia Association of Black Women Attorneys
- Member, Georgia Association of Women Lawyers
- Member, Local Bar Activities Committee, State Bar of Georgia
- Member, American Bar Association
- Member, National Bar Association

Karen D. Fultz joined the firm's Atlanta office in July 2002 and practices with the Insurance Department. She focuses her practice on subrogation and recovery. Prior to joining the firm, Karen was an associate with Lackland and Associates in Atlanta. She also served as a judicial intern for the Hon. Denise Page Hood of the U.S. District Court for the Eastern District of Michigan.

Karen is admitted to practice in Georgia. However, her cases span over the Southeast region of the country. She has been admitted Pro Hac Vice in Federal and State Courts located in Alabama, Florida, Mississippi, and Tennessee. As a member of the subrogation and recovery department she handles product liability cases ranging from $100,000 to over $1,000,000.00 involving product failures which result in fire and/or water losses. Her practice also includes family law matters such as divorce, child custody, family adoptions, and child support. She is the coordinator for the Atlanta office's pro bono program and provides legal assistance for the underprivileged and unrepresented community in the state of Georgia in partnership with Georgia Legal Services and the Atlanta Volunteer Lawyer Foundation. The pro bono cases extend her practice into defending victims of family violence, landlord/tenant and debt collection matters. She also serves as a member of the firm's diversity committee.

She is a member of the State Bar of Georgia's Insurance Law Section, and its Young Lawyers Division. She served as the President of the Gate City Bar Association (2005), and continues to serve as a member. She is also a member of the Atlanta Volunteer Lawyers Foundation, Georgia Association of Black Women Attorneys, the Atlanta Bar Association and a member of the American and National bar associations. Karen was selected for inclusion in the eighth edition of *Who's Who In Black Atlanta.*

She is the author of the article "Workers' Compensation Recovery Issues - Conflicts of Law in Georgia: Can You Intervene to Protect a Foreign State's Lien?" which was published in the *Subrogator* (1/11/2006). She has made presentations on topics such as Motor Carrier/Cargo Claims, Taking Your First Deposition, and Workers' Compensation Subrogation claims.

Karen received her bachelor of arts degree from Michigan State University in 1993 and her law degree in 1998 from Thomas M. Cooley Law School, *cum laude*, where she served on Moot Court.

COZEN
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Megan A. Lammon

Member
Charlotte Office
(704) 348-3406
mlammon@cozen.com

AREAS OF EXPERIENCE

- Complex Torts & Products Liability
- Construction Defect
- Construction Law & Litigation
- Products Liability
- Property Subrogation
- Subrogation & Recovery

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 and is a Member in the Subrogation & Recovery Department of the Charlotte office. Prior to joining Cozen O'Connor, Megan was an associate at Poyner & Spruill, LLP in Charlotte where she practiced subrogation and premises liability defense.

Megan graduated from Boston College in 1996 with a bachelor of arts degree. While at Boston College, she was a scholarship athlete and member of its Division I Womens Swim Team. She received her law degree from Wake Forest University School of Law in 2000.

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

COZEN
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Mark C. Schultz

Member
Director, National Workers' Compensation Recovery Programs
Philadelphia Office
(215) 665-2079
mschultz@cozen.com

AREAS OF EXPERIENCE

- ADR
- Construction Law & Litigation
- Products Liability
- Worker's Compensation Subrogation & Recovery

EDUCATION

- J.D., Villanova University School of Law, 1975
- B.A., Clark University, 1971

MEMBERSHIPS

- Member, Pennsylvania Judicial Conduct Board (2003-present)
- Co-Chair, Pa. Bar Association Multi-Jurisdictional Practice Commission (2001-present)
- Montgomery Bar Association
  Pennsylvania Bar Association
- American Bar Association
- Montgomery County Trial Lawyers Association
- Pennsylvania Trial Lawyers Association
- Past President, Montgomery Bar Foundation (2001)
- Member, Pennsylvania Supreme Court Disciplinary Board (1997-2003)
- Vice Chair, Pennsylvania Judicial Conduct Board (2004-2005)
- Chair, Pennsylvania Judicial Conduct Board (2005-2006)

PUBLICATIONS

- "Can an Employer Bring its Own Subrogation Action?"
- "Defenses in a Product Liability Claim"
- "Overcoming Barriers to Workers Compensation Recovery"
- "Special Issues in Managing Large Workers Compensation Loss"
- "The Challenge of Workers Compensation Recovery"
- "Workers' Compensation Recovery State Law Reference Manual"

Mark C. Schultz joined the firm in February 1998 and is resident in the Philadelphia office, where he serves as national director of firm's Workers' Compensation Recovery Programs. In this capacity, he manages national recovery programs for Cozen O'Connor clients, in addition to handling complex product liability, construction and general liability cases.

With more than 10 years of experience in ADR, Mark has mediated all types of civil cases, and he received his training and certification from Pepperdine University and the International Institute for Conflict Prevention and Resolution. During his tenure as president of the Montgomery Bar Association, he also founded the Horace Davenport Dispute Resolution Center, which is dedicated to assisting available individuals, corporations and other parties seeking resolution for disputes without litigation.

Mark is a member of the Montgomery County, Pennsylvania, and American bar associations, as well as the Montgomery County Trial Lawyers Association. He served as the president of the Montgomery County Trial Lawyers Association in 1994. He is a member of the Pennsylvania Trial Lawyers Association and the Association of Trial Lawyers of America. Mark served on the Pennsylvania Supreme Court Disciplinary Board (1997-2003) and currently serves as chairman of the Pennsylvania Judicial Conduct Board. Mark served as past president of the Montgomery Bar Association (2000) and past president of the Montgomery Bar Foundation (2001). He was named a Pennsylvania "Super Lawyer" by *Law & Politics*.

From 1975-1977, Mark was the assistant district attorney, Montgomery County, PA. He earned his bachelor of arts degree at Clark University in 1971 and his law degree at Villanova University in 1975. He was admitted to practice in Pennsylvania in 1975.

Dr. Michael E. Stevenson, PE
Principal Metallurgical Engineer
Vice-President, Engineering Sciences Division

Biographical Sketch

Dr. Michael E. Stevenson is MME's Principal Metallurgical Engineer and Vice-President of the Engineering Sciences Division. His areas of expertise include materials science, metallurgy, failure analysis, fracture mechanics, and non-destructive testing. He specializes in the performance and analysis of engineering materials in a variety of industrial applications and complex failure investigations. Dr. Stevenson is experienced with failure analysis of marine, automotive, biomedical, crane, rail, and power generation components. He also has experience with consumer products evaluation, development and implementation of non-destructive testing programs, and general metallurgical and materials consulting. Prior to his association with MME, Dr. Stevenson performed research and failure analysis at the University of Alabama Mechanical Metallurgy Laboratory of the Department of Metallurgical and Materials Engineering and the Terminal Ballistics Laboratory of the Department of Aerospace Engineering and Mechanics. Dr. Stevenson has five years of experience with Ultrasonics and Magnetics Corporation as a Metallurgical/NDT consultant. His technical interests include dynamic mechanical properties of materials, indentation hardness testing, fatigue and fracture mechanics, applied techniques for failure analysis, high strain rate material mechanics, and the performance of copper and copper alloys in extreme mechanical/chemical environments.

Education

University of Alabama, Tuscaloosa, Al, USA

Ph.D., Metallurgical Engineering (2001)

Dissertation: *"Grain Size Effects on the High Strain Rate Deformation of OFHC Copper"*

M.S., Metallurgical and Materials Engineering (1999)

Thesis: *"Microhardness Anisotropy and the Indentation Size Effect in Single Crystal Hematite, Fe_2O_3"*

B.S., Metallurgical and Materials Engineering (1998)

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Classroom Teaching Experience

Engineering Materials I: Structure and Properties of Materials
Served as graduate teaching assistant and lecturer for topics of: basic structure property relationships in engineered materials; mechanical, magnetic, chemical, optical and electronic properties of materials; corrosion of materials; polymers and composites; metals and their alloys; ceramics and glasses.

Mechanical Behavior of Materials
Served as lecturer for topics of: plasticity; fracture mechanics; metal fatigue; failure analysis; fractography; non-destructive testing.

Experience And Expertise

Dr. Stevenson has more than eight years of experience in the following technical disciplines:

- Ballistic Testing of Materials
- Contact and Impact Mechanics
- Corrosion Engineering
- Failure Analysis
- Fatigue and Fracture Mechanics
- Forensic Materials Engineering
- Mechanical and Physical Metallurgy
- Mechanics of Materials
- Non-Destructive Testing and Evaluation
- Welding Metallurgy and Weld Failure Analysis

Representative Projects

Flint Construction Services (2003): Responsible for the investigation of a mobile truck crane failure, including structural mechanics simulation using finite element analysis.

Thibault v. Universal Scaffold Systems (2002): Provided welding consulting pertaining to litigation on behalf of Universal Scaffold Systems.

Independence Maritime Agency (2001): Provided complete failure analysis for two specialty marine engine cylinder liners.

Mercedes Benz (1998): Provided complete failure analysis of a pressure connector, utilizing both optical and electron microscopy.

Mobil Oil Co. (1996): Provided metallurgical failure analysis and design support for down hole components in petroleum production operations.

Professional Registration

Registered Professional Engineer (By Examination), Alabama License #26082
Registered Professional Engineer (By Reciprocity), Georgia License # 29920

Professional Associations

American Society for Materials (**ASM-I**), member since 1996
The Minerals, Materials and Metals Society (**TMS**), member since 1996
American Welding Society (**AWS**), member since 1996
National Association of Corrosion Engineers (**NACE**), member since 2000
American Society for Testing and Materials (**ASTM**), member since 2000
American Society of Mechanical Engineers (**ASME**), member since 2001
American Society for Non-destructive Testing (**ASNT**), member since 1996
The International Metallographic Society (**IMS**), member since 2001

Professional Activities

Associate Editor, *Practical Failure Analysis/Journal of Failure Analysis and Prevention*, **ASM-I**

Editorial Review Board, *Journal of Materials Engineering and Performance*, **ASM-I**

Failure Analysis Committee, **ASM-I**

Fatigue and Fracture Committee (E28), **ASTM**

Forensic Sciences Committee (E30), **ASTM**

Forensic Engineering Subcommittee (E30.05), **ASTM**
Secretary, 2002 - Present

Industrial Advisory Board, University of Alabama Department of Aerospace Engineering and Mechanics

ASM-I Liaison/Vice-Chairman – Panel SD7 – Marine Forensics, Society of Naval Architects and Marine Engineers, **SNAME**

Structural Materials Committee, **TMS**

Symposium Co-Chair, Failure of Structural Materials, TMS Annual Meeting, Charlotte, NC, February 2004

Symposium Chair, Metallurgical Failure Analysis: Present and Future, IMS Annual Meeting, Savannah, GA, August 2004

Technical Reports

Dr. Stevenson has authored over 200 technical reports addressing various topics, including:

- Component Failures Relating to Fires and Explosions
- Corrosion Failure Analysis and Life Prediction
- Dynamic Behavior of Materials
- Environmentally Assisted Cracking of Materials
- Fatigue and Fracture Mechanics
- Failure of Aircraft, Automotive, and Crane Systems and Components
- Marine Structural Evaluation
- Metallurgical Failure Analysis
- Mechanical Integrity of Pressure and Piping Components
- Performance of Bolts and Bolted Connections

Archival Publications

26. "Failure Analysis of Gray Iron Pump Housings", E.E. Vernon, **M.E. Stevenson**, J.L. McDougall, L. McCall, *Journal of Failure Analysis and Prevention*, December 2004 (2004).

25. "Failure of a Vehicle Braking System Air Reservoir", J.L. McDougall and **M.E. Stevenson**, *Proceedings of Microscopy and Microanalysis 2004* (2004).

24. "Metallurgical Failure Analysis: Present and Future", **M.E. Stevenson,** *Proceedings of Microscopy and Microanalysis 2004* (2004).

23. "Effects of Improper Heat Treatment on Steel Crane Wheels", E.E. Vernon, **M.E. Stevenson**, J.L McDougall, *Proceedings of Microscopy and Microanalysis 2004* (2004).

22. "Failure Analysis in a Vehicle Accident Reconstruction", **M.E. Stevenson**, J.L. McDougall, E.E. Vernon, L. McCall, R.D. Bowman, *Journal of Failure Analysis and Prevention*, 4(2), pp. 49-55 (2004).

21. "Projectile Failure of Impact Resistant Glass Panels", R.C. Bradt, S.E.Jones, M.E. Barkey, **M.E. Stevenson**, *Ceramic Armor and Armor Systems*, E. Medvedovskii, Ed., Ceramic Transactions, Vol. 151, pp. 131-144 (2003).

20. "Water Chemistry And Processing Effects On the Corrosion Degradation of Copper Tubing In Cooling Water Systems", J.L. McDougall, L. McCall, **M.E. Stevenson**, *Practical Failure Analysis*, 3(5), pp. 81-89 (2003).

19. "The High Strain Rate Dynamic Stress-Strain Curve for OFHC Copper", **M.E. Stevenson**, S.E. Jones, R.C. Bradt, *Materials Science Research International,* 9(3), pp. 187-195 (2003).

18. "Metallurgical Failure Analysis of Titanium Wing Attachment Bolts", **M.E. Stevenson**, J.L. McDougall, K. Cline, *Practical Failure Analysis*, 3(4), pp. 53-58 (2003).

17. "Non-Destructive Testing and Failure Analysis", **M.E. Stevenson**, Guest Editorial, *Practical Failure Analysis*, 3(3), pp.5-6 (2003).

16. "Radiographic Inspection in Failure Investigations", R.D. Bowman, B.A. Bennett, **M.E. Stevenson**, *Practical Failure Analysis*, 3(3), pp. 73-77 (2003).

15. "Apparent Indentation Size Effect in a CVD Aluminide Coated Ni-Base Superalloy", B. Ning, M.L. Weaver, **M.E. Stevenson**, R.C. Bradt, *Surface and Coatings Technology*, Vol. 163-164, pp.112-117 (2003).

14. "The Frictional Component of the Indentation Size Effect in Single Crystal NiAl", **M.E. Stevenson**, M.L. Weaver, R.C. Bradt, *Materials Science and Engineering A345*, pp.113-117 (2003).

13. "Metallurgical Failure Analysis of Cold Cracking in A Structural Steel Weldment", **M.E. Stevenson**, S.L. Lowrie, R.D. Bowman, B.A. Bennett, *Practical Failure Analysis*, 2(4), pp. 55-60 (2002).

12. "Fatigue Failure of Stainless Steel Orthopedic Fixation Devices", **M.E. Stevenson** and R.C. Bradt, *Practical Failure Analysis*, 2(3), pp. 57-64 (2002).

11. "Knoop Microhardness Anisotropy and the Indentation Size Effect on the Basal Plane of Single Crystal Alumina (Sapphire)", M. Kaji, **M.E. Stevenson**, R.C. Bradt, *Journal of the American Ceramic Society*, 85(2), pp. 415-422 (2002).

10. "Failure Analysis Lessons Learned From September 11", **M.E. Stevenson** and D.S. Mackenzie, Guest Editorial, *Practical Failure Analysis*, 2(1), pp. 37-42 (2002).

9. "Microhardness Anisotropy and the Indentation Size Effect in Single Crystal Hematite, Fe_2O_3", **M.E. Stevenson** and R.C. Bradt. *Journal of the European Ceramic Society*, Vol. 22, pp. 1137-1148 (2002).

8. "Projectile Impact – A Major Cause of Fracture for Flat Glass", R.C. Bradt, M.E. Barkey, S.E. Jones, **M.E. Stevenson**, *The Glass Researcher*, 11(2), pp. 20-24 (2002).

7. "Micron and Sub-Micron Level Hardness Testing: A Tool for Failure Analysis", **M.E. Stevenson** and R.C. Bradt, *Practical Failure Analysis*, 1(5), pp. 6-8 (2001).

6. "Evolving Fracture Patterns of A Composite Safety Glass Panel During High Velocity Impacts", **M.E. Stevenson**, S.E. Jones, R.C Bradt, *Fractography of Glasses and Ceramics IV*, J.R. Varner and G.D. Quinn, Eds., Ceramic Transactions, Vol. 122, pp. 473-488 (2001).

5. "Effects of Heat Treating 2024 Aluminum on the High Strain-Rate Deformation in the Taylor Impact Test", **M.E. Stevenson**, W.K. Rule, S.E. Jones, R.C. Bradt, *Structures Under Extreme Loading Conditions*, Vol. 421, pp. 163-169 (2001).

4. "Microhardness Anisotropy and the Indentation Size Effect (ISE) on the (100) of Single Crystal NiAl", **M.E. Stevenson**, M.L. Weaver, R.C. Bradt, *High Temperature Ordered Intermetallic Alloys IX*, MRS Proceedings, Vol. 646, N6.4.1-N6.4.6 (2001).

3. "Analysis of Microhardness Measurements", **M.E. Stevenson** and R.C. Bradt, *Advanced Materials and Processes*, August 2000, H41-42 (2000).

2. "Mechanical Properties of Non – Metallic Materials", M.L. Weaver and **M.E Stevenson**, *ASM Handbook: Mechanical Testing and Evaluation*, H. Kuhn and D. Medlin, Eds., Vol. 8, pp. 13-25 (2000).

1. "Elastic and Plastic Properties of Gamma + Laves Phase In – Situ Composite Alloys Using Nanoindentation Techniques", M.L. Weaver, **M.E. Stevenson**, M. Shamsuzzoha, R.D. Ott, M.P Brady, *High Temperature Ordered Intermetallic Alloys VIII*, Materials Research Society Symposium Proceedings, Vol. 552, KK2.6.1-KK2.6.6 (1999).

Presentations, Seminars And Invited Lectures

"Failure Analysis in Vehicle Accident Reconstruction", ASM International Fall Meeting, Columbus, OH, October 2004.

"Metallurgical Failure Analysis: Present and Future", 37th Annual Meeting of the International Metallographic Society, Savannah, GA, August 2004. **(Invited)**

"The Future of Modeling and Simulation in Failure Analysis", NNSA Future Technologies Conference, Washington, DC, May 2004. **(Invited)**

"Advanced Engineering Failure Analysis", ASM International Atlanta Chapter, Atlanta, GA, January 2004. **(Invited)**

"Defect and Damage Assessment Using Ground Penetrating RADAR", ASM International Materials Solutions Conference, Pittsburgh, PA, October 2003.

"Radiographic Inspection in Failure Investigations", ASM International Materials Solutions Conference, Pittsburgh, PA, October 2003.

"Engineering Forensics and Failure Analysis", ASM International Birmingham Chapter, Birmingham, AL, October 2002. **(Invited)**

"Macro Scale Imaging For Failure Analysis", ASM International Annual Meeting, Columbus, OH, October 2002.

"Forensic Materials Engineering", Georgia Bar Association, Continuing Legal Education Seminar, December 2001. **(Invited)**

"Effects of Heat Treating 2024 Aluminum on the High Strain-Rate Deformation in the Taylor Impact Test", ASME PVP Conference, June 2001.

"Size Effects in the Hardness of Titanium Interlayers Roll-Bonded With Aluminum", TMS Annual Meeting, February 2001.

"Ballistic Impact Testing and High Strain Rate Material Mechanics", IBM Storage Systems, San Jose, CA, October 2000. **(Invited)**

"Frictional Effects on the Indentation Size Effect in Single Crystal NiAl", Materials Research Society Fall Meeting, November 2000.

"Evolving Fracture Patterns of A Composite Safety Glass Panel During High Velocity Impacts", Fractography of Glasses And Ceramics IV, Alfred University, Alfred, NY, June 2000.

"Fracture Resistance of Brittle Materials", Mechanical Metallurgy Seminar, University of Alabama, Tuscaloosa, AL, March 2000.

"Fracture Mechanics and Non-Destructive Testing", Training Seminar, USM Corp., New Orleans, LA, December 1999.

"Microhardness Anisotropy and the Indentation Size Effect on the Basal and Prism Planes of Single Crystal Hematite", American Ceramic Society Annual Meeting, April 1999.

"Metallurgical Failure Analysis", University of Alabama Metallurgical Engineering Seminar Series, Tuscaloosa, AL, October 1997.

"Corrosion Failure Analysis Trends in Oil Country Tubular Goods", NACE, Birmingham Section, Birmingham, AL, June 1997. **(Invited)**

II

COZEN
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JURISDICTIONS COMPARATIVE CHART:
ECONOMIC LOSS DOCTRINE

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Revised June 2006.

Jurisdictions Comparative Chart: Economic Loss Doctrine

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Revised June 2006

STATE	STATEMENT OF THE DOCTRINE	EXCEPTIONS TO THE DOCTRINE
Alabama	Bars tort claim for purely economic losses from product defect that does not damage other property, but exceptions include fraudulent inducement resulting in "purely economic loss to a product itself based upon value that is indicated by a seller's representations but not actually received, even where the product was in fact working properly." Ford Motor Co. v. Rice, 726 So. 2d 626 (Ala. 1998) (denying recovery to plaintiffs claim for unknown future risk that their vehicle might one day roll over). *See also* Vesta Fire Insurance Corp. v. Milam & Co. Construction, Inc., 2004 WL 1909458 (Ala. 2004); Lloyd Wood Coal Co. v. Clark Equipment Co., 543 So. 2d 671 (Ala. 1989) (stating that the rule applies to products liability cases involving manufacturers).	- Other property. Ford Motor Co. v. Rice, 726 So. 2d 626 (Ala. 1998) - Fraudulent inducement. Ford Motor Co. v. Rice, 726 So. 2d 626 (Ala. 1998).
Alaska	Implicitly recognizes the doctrine with the statement in Northern Power and Engineering Corp. v. Caterpillar Tractor Co., 623 P.2d 324, 329 (Alaska 1981), that Alaska allows recovery of economic loss under a strict products liability theory if "the defective product creates a situation potentially dangerous to persons or other property, and loss occurs as a result of that danger."	-- Other Property *See* Northern Power -- Dangerous Situation *See* Northern Power

Arizona	Where economic loss, in the form of repair costs, diminished value, or lost profits, is the plaintiff's only loss, the policy of the law generally would be best served by leaving the parties to their commercial remedies. Salt River Project Agr. v. Westinghouse Elec., 694 P.2d 198 at 210, 211 (Ariz. 1984). Trial courts examine three factors to determine whether damage caused by a defective product may be recoverable in tort: (1) the nature of the product defect, (2) the manner in which the loss occurred, and (3) the type(s) of the loss or damage that resulted. Id. If the court determines that tort principles are appropriate under the circumstances, the plaintiff may rely on strict liability under section 402A of the Restatement, negligence or other applicable tort theories. If the court determines that tort principles are not appropriate, the plaintiff is limited to contractual remedies. Id.	-- Other Property Nuances Where economic loss is accompanied by physical damage to personal or other property, the parties' interests generally will be realized best by the imposition of strict tort liability. Salt River Project Agr. v. Westinghouse Elec., 694 P.2d 198 at 210, 211 (Ariz. 1984). -- Accidental Loss If the only loss is non-accidental and to the product itself, or is of a consequential nature, the remedies available under the UCC will govern and strict liability and other tort theories will be unavailable. Salt River Project Agr. v. Westinghouse Elec., 694 P.2d 198 at 210, 211 (Ariz. 1984).
Arkansas	Arkansas follows the minority doctrine allowing tort recovery even when the damages are purely economic or are to the product itself. *Farm Bureau Ins. Co. v. Case Corp.*, 317 Ark. 467, 878 S.W.2d 741 (1994); *Alaskan Oil, Inc. v. Central Flying Serv., Inc.*, 975 F.2d 553 (8th Cir. 1992).	
California	California is considered the birthplace of the economic loss rule. In Seeley v. White Motor Co., 403 P.2d 145 (Cal. 1965), the California Supreme Court distinguished between tort recovery for physical injury and warranty recovery for economic loss. The court held that a buyer should not bear the risk that a product will cause physical injury, but the buyer should bear the risk that the "product will not match his economic expectations." Id. at 151. The case involved a consumer transaction, the	-- Other Property -- Special Relationship Allows limited exception where there is a "special relationship" between the plaintiff and the defendant. Biakanja v. Irvine, 49 Cal. 2d 647, 650 (1958); J'Aire v. Gregory, 24 Cal. 3d 799, 804 (1979). A "special relationship" exists between the plaintiff and the defendant where: (1) the plaintiff was an intended beneficiary of the defendant's obligations under a contract; (2) the plaintiff's loss was foreseeable; (3)

	purchase of a defective truck. The court rejected the notion that the law of warranty should be "limited to parties in a somewhat equal bargaining position." Id. at 151.	there is a high degree of certainty that the plaintiff would suffer the loss from the defendant's conduct; (4) there is a close connection between the defendant's conduct and the plaintiff's loss; (5) the defendant's conduct is morally blameworthy; and (6) the public policy favors holding the defendant responsible for plaintiff's economic loss. Biakanja at 650; J'Aire at 804.
Colorado	In Town of Alma v. AZCO Constr., Inc., 10 P.3d 1256 (Colo. 2002), the Colorado Supreme Court expressly adopted the economic loss rule. A party suffering only economic loss from a breach of express or implied contractual duties may not assert a tort claim for such breach absent an independent duty under tort law. Colorado looks to the source of the duty not the nature of the damages, because different legal theories are designed to enforce and protect different risks.	-- Professional Negligence Economic loss rule bars a construction subcontractor's claims of negligent breach of professional duty and negligent misrepresentation against a design engineer and its agent. *BRW, Inc. v. Duffy & Sons, Inc.*, 99 P.3d 66 (Colo. 2004).
Connecticut	Term "harm" does not include the product itself and that claims for damages to the product itself are governed by the Uniform Commercial Code. Connecticut Products Liability Act, CPLA §52-572. *See also* Connecticut General Life Insurance Co. v. Grodsky Service, Inc., 781 F.Supp. 897 (D. Conn. 1991) (phrase "commercial loss" in the CPLA includes all economic loss either direct or consequential such that commercial tenant could not recover for economic losses arising out of a water pipe rupture and subsequent flooding of the premises, including employee salaries and fringe benefits, taxes, rent, and the cost of expedited computer work). *See also* McKernan v. United Technologies	-- Fraud In Scap Motors, Inc. v. Pevco Systems International, Inc., 25 Conn. L. Rptr. 283 (Conn. Super. 1999), an action for breach of a settlement agreement, the defendant sought to dismiss claims alleging breach of the implied covenant of good faith and fair dealing, fraud and trade practices act violations based on the economic loss doctrine. No property damage or personal injury was alleged. The court declined "to recognize the economic loss doctrine as a bar to the plaintiff's tort causes of action . . . where the relationship between the plaintiff and the defendant is contractual and the only losses alleged by the plaintiff are economic." Id. See also, Darien Asphalt Paving,

	Corp., 717 F. Supp. 60 (D. Conn. 1989) (The district court held that the buyer of a helicopter could not recover in tort against the seller for economic damages arising out of the recall of the helicopter when no injury to persons or property other than to the helicopter itself were alleged); Bosek v. Valley Transit District, No. CV92039674 (Conn. Super. Dec. 10, 1993), (The Superior Court of Connecticut held that the plaintiff's claims for damages under the Connecticut Products Liability Act were barred. The action involved commercial parties, and alleged loss of profits, interruption of business and damage to business arising out of damage to machinery and a building); Flagg Engergy Dev't Corp. v. General Motors Corp., 244 Conn. 126, 709 A.2d 1075 (1988) (The Connecticut Supreme Court upheld the trial court's order granting the defendant's motion to strike misrepresentation and unfair trade practices claims. The plaintiff alleged that gas turbine engines manufactured by the defendant were defective, and defendant failed to cure the defects. The court held that these claims between commercial parties were inconsistent with and precluded by breach of warranty claims).	Inc. v. Town of Newtown, 1998 WL 886507 (Conn. Super, Dec. 7, 1999).
Delaware	The economic loss doctrine "prohibits recovery in tort where a product has damaged only itself (*i.e.*, has not caused personal injury or damage to *other* property) and, the only losses suffered are economic in nature." Danforth v. Acorn Structures, Inc., 608 A.2d 1194, 1195 (Del. 1990) (emphasis in original). In Danforth, the Delaware Supreme Court identified "economic loss" as "damages for inadequate value, cost of repair and replacement of the defective product, or consequent loss of	-- Other Property -- Misrepresentation A claim for negligent misrepresentation may allow for allow for a recovery in tort for economic loss. Guardian Const. Co. v. Tetra Tech. Richardson, Inc., 583 A.2d 1378 (Del. Super. 1990).

	profits -- without any claim of personal injury or damage to *other* property." Id. at 1201 n.3 (emphasis in original). The Danforth case applied the economic loss doctrine to preclude an action by a homeowner against the seller of building kits. In response to the decision in Danforth, the Delaware General Assembly passed the Home Owners Protection Act. See Del. Code Ann. tit. 6, § 3651-52 (1999). This act states: "No action based in tort to recover damages resulting from negligence in the construction or manner of construction of an improvement to residential real property and/or in the designing, planning, supervision and/or observation of any such construction or manner of construction shall be barred solely on the ground that the only losses suffered are economic in nature." Del. Code Ann. tit. 6, § 3652. Both parties argue that public policy supports their positions. This court has stated some of the general policies that support the application of the economic loss doctrine as follows: "(a) It encourages the party best situated to assess the risk of economic loss to insure against it; (b) it maintains a distinction between tort and contract law; and (c) it protects a party's freedom to allocate economic risks by contract."	
Florida	Plaintiff cannot sue in tort for purely economic damages in the absence of personal injury or damage to "other property," regardless whether the injury was from a sudden or calamitous event. Casa Clara Condominium Assn. V. Charley Toppino & Sons, Inc., 620 So. 2d 1244 (Fla. 1993). The doctrine applies to service contracts but not to professional services or to situations where the plaintiff is not in privity of	-- Other Property, i.e., non-integral property -- Lack of privity if it is a service transaction as opposed to a product liability claim. Indemnity Insurance Co. of North America v. American Aviation, Inc., 891 So. 2d 532 (Fla. 2004). -- Torts Independent of Contractual Duties. HTP v. Lineas Aereas Cosarricanses, S.A., 685 So. 2d 1238

	contract with the service provider, i.e., the doctrine applies to non-professional services so long as the plaintiff is in privity of contract with the defendant but does not require privity if the claim is for a product defect. Indemnity Insurance Co. of North America v. American Aviation, Inc., 891 So. 2d 532 (Fla. 2004) ("We conclude that the 'economic loss doctrine' or 'economic loss rule' bars a negligence action to recover solely economic damage only in circumstances where the parties are either in contractual privity or the defendant is a manufacturer or distributor of a product, and no established exception to the application of the rule applies.")	(Fla. 1996) (allowing claim of fraud in the inducement to a contract, but barring claim of fraud in the performance of contract: "Where a contract exists, a tort action will lie for either intentional or negligent acts considered to be independent from acts that breached the contract."). *See also* Alex Hofrichter, P.A. v. Zuckerman & Vendetti, P.A., 710 So. 2d 127 (Fla. 3d DCA 1998) (barring conversion, civil theft, and constructive fraud claims, but allowing claims of lawyer's alleged wrongful retention of certain fees as tantamount to "intentional misconduct"); Bankers Risk Management Services, Inc. v. Av-Med Managed Care, 697 So. 2d 158 (Fla. 2d DCA 1997) (allowing claim of tortious interference with contract as being independent of a contractual breach, but barring claim for fraudulent misrepresentation as not independent from a breach of contract claim). -- Statutory Violations. Comptech International, Inc. v. Milam Commerce Park, Ltd., 753 So. 2d 1219 (Fla. 1999) (commercial tenant can sue building owner in negligence for violation of Fla.Stat. § 553.84, which provides for a statutory civil remedy for violation of the State Minimum Building Codes). Note, however, that after Comptech, the legislature amended section 553.84 to create an "escape clause," stating: "[H]owever, if the person or party obtains the required building permits and any local government or public agency with authority to enforce the Florida Building Code approves the plans, if the construction project passes all required inspections under the code, and if there is no personal injury or damage to property other than the property that is the subject of the

		permits, plans, and inspections, this section does not apply unless the person or party knew or should have known that the violation existed." -- Professional Negligence. Moransais v. Heathman, 744 So. 2d 973 (Fla. 1999) (The economic loss rule does not bar a tort action for professional negligence against architects, engineers and lawyers, even where there is already a contract.).
Georgia	Absent personal injury or damage to property other than to the allegedly defect product itself, an action in negligence does not lie and any such cause of action may be brought only as contract warranty action. Long v. Jim Letts Oldsmobile, 135 Ga.App. 293, 217 S.E.2d 602 (Ga. Ct. App. 1975); Advanced Drainage Systems, Inc. v. Lowman, 210 Ga.App. 731, 437 S.E.2d 604 (Ga. Ct. App. 1993); Vulcan Matearials Co. v. Driltech, Inc., 306 S.E.2d 253, 257 (Ga. 1983) (stating that the rule applies "when a defective product has resulted in the loss of the value or use of the thing sold").	-- Other Property -- Sudden and Calamitous Event Plaintiff can recover in tort when there is a sudden and calamitous event that not only causes damage to the product but poses an unreasonable risk of injury to persons and other property. Vulcan Materials Co. v. Driltech, 251 Ga. 383, 306 S.E.2d 253 (1983). See also Squish La Fish, Inc. v. Thomco Specialty Products, Inc., 149 F.3d 1288 (11th Cir. 1998). -- Misrepresentation Exception "[O]ne who supplies information during the course of his business, profession, employment, or in any transaction in which he has a pecuniary interest has a duty of reasonable care and competence to parties who rely upon the information in circumstances in which the maker was manifestly aware of the use to which the information was to be put and intended that it be so used. This liability is limited to a foreseeable person or limited to a class of person for whom the information was intended, either directly or indirectly." Robert & Co. Assoc. v. Rhodes-Haverty Partnership, 250 Ga. 680, 681-82, 300 So.E.2d 503 (1983); See also Squish La Fish, Inc. v. Thomco Specialty Products, Inc., 149 F.3d 1288 (11th Cir. 1998). Under this exception, "*false* information must be

		provide to a foreseeable person that the supplier of the information was manifestly aware would use the information and that foreseeable person must rely upon the information to their detriment." Advanced Drainage Systems, Inc. v. Lowman, 210 Ga.App. 731, 437 S.E.2d 604 (Ga. Ct. App. 1993) (emphasis in original).
Hawaii	The economic loss rule bars claims based in negligence or strict liability for economic losses when the product damages only itself. State ex rel. Bronster v. U.S. Steel Corp., 919 P.2d 294, 302 (Hawaii 1996) (adopting the rule "insofar as it applies to claims for relief based on a product liability or negligent design and/or manufacture theory")	-- Other Property
Idaho	Economic loss not recoverable in tort, only in warranty, for damage to product. Ramerth v. Hart, 133 Idaho 194, 983 P.2d 848 (1999); Clark v. International Harvester Co., 99 Idaho 326, 581 P.2d 784 (1978).	-- "Parasitic Injury to Person or Property" Duffin v. Idaho Crop Improvement Ass'n, 126 Idaho 1002, 895 P.2d 1195 (1995). -- "Unique circumstances requiring different allocation of risk" Duffin -- "Special Relationship" between the parties Duffin
Illinois	"Economic loss is damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits-without any claim of personal injury or damage to other property." In re Chicago Flood Litig., 680 N.E.2d 265, 274 (Ill. 1997), *citing* Moormon Mfg. Co. v. National Tank Co., 435 N.E.2d 443, 449 (1982). Purely economic losses are generally not recoverable under the tort theories of strict liability, negligence, and innocent misrepresentation. Mormon Mfg. Co.v. National Tank Co., 435	-- Other Property Either personal injury or damage to "other property" damage [in addition to a "sudden and calamitous occurrence"] are required. Trans States Airlines v. Pratt & Whitney Can., 682 N.E.2d 45, 55 (Ill. 1997) Under Illinois law, a product and one of its component constitute two separate products only if the purchaser bargained for each separately. If the components were purchased as a fully integrated product they cannot constitute "other property" for the

	N.E.2d 443, 452-53 (1982); In re Illinois Bell Switching Station Litigation, 641 N.E.2d 440 (1994). Illinois expressly does not recognize the "professional negligence" exception as to architects and engineers. Fireman's Fund Ins. Co. v. SEC Donohue, 679 N.E.2d 1197, 1200-01 (Ill. 1997).	purpose of the economic loss doctrine. Trans States Airlines v. Pratt & Whitney Can., 682 N.E.2d 45, 55-59 (Ill. 1997). Damage to the product itself is exempted from the broad category of "property damage." Id. at 53. Therefore, even if damaged through a sudden and calamitous occurrence, damage to the product itself exempted from the category of injury that is recoverable in tort. Id. at 48, *overruling* Vaughn v. General Motors Corp., 454 N.E.2d 740 (Ill. 1983). -- Sudden or Dangerous Event Illinois law requires a showing of either personal injury or damage to other property coupled with a "sudden or dangerous occurrence" to avoid the economic loss doctrine and recover in tort. Trans States Airlines v. Pratt & Whitney Can., 682 N.E.2d 45, 55 (Ill. 1997), *citing* Mormon Mfg. Co.v. National Tank Co., 435 N.E.2d 443 (1982). There must be a showing of harm above and beyond disappointed expectations. Mars, Inc. v. Heritage Builders of Effingham, 763 N.E.2d 428, 434 (Ill.App. 2002). "Damages which are the proximate result of a sudden and calamitous occurrence that causes harm to other property are compensable in tort. Muirfield Village-Vernon Hills, LLC v. K. Reinke, Jr. and Co., 810 N.E.2d 235, 249 (Ill.App. 2 Dist. 2004). -- Lack of Privity of Contract The Economic Loss Doctrine barred recovery of economic loss damages by one party involved in a construction project from another party involved in that project where the claimant had no privity of contract with the alleged wrongdoer. Fence Rail Dev. Corp. v. Nelson & Assoc., Ltd., 528 N.E.2d 344, 348 (Ill. App. 1988).

		-- Applicability to Service Contracts "Just as a seller's duties are defined by his contract with a buyer, the duties of a provider of services may be defined by the contract he enters into with his client. When this is the case, the economic loss doctrine applies to prevent the recovery of purely economic loss in tort." Fireman's Fund Ins. Co. v. SEC Donohue, 679 N.E.2d 1197, 1200 (Ill. 1997), *citing* Congregation of the Passion, Holy Cross Province v. Touche Ross & Co., 636 N.E.2d 503 (Ill. 1994). However, an important distinction must be made: the economic loss doctrine bars recovery in tort only when the duty breached was created by the service contract; violation of duties arising independently of the service contract remain recoverable in tort. Id. ; *see also* Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc., 770 N.E.2d 177, 194 (Ill. 2002). -- Applicability to Consumers "We recognize that some jurisdictions make a distinction between commercial transactions and consumer transactions, allowing tort recovery for consumer transactions. Although we are not now persuaded that the consumer/commercial transaction distinction makes any difference when the product damages only itself, we express no opinion in that regard." Trans States Airlines v. Pratt & Whitney Can., 682 N.E.2d 45, 53-54 (Ill. 1997). -- Fraud and Misrepresentation Exceptions Under Illinois law, recovery of economic losses in tort is permitted: (1) where plaintiff's damages are proximately caused by defendant's intentional, false representation, i.e., fraud; or (2) where the plaintiff's

		damages are proximately caused by a negligent misrepresentation by a defendant in the business of supplying information for the guidance of others in their business transactions. Mormon Mfg. Co. v. National Tank Co., 435 N.E.2d 443, 452-53 (1982); In re Illinois Bell Switching Station Litigation, 641 N.E.2d 440 (1994). Note, however, that the negligent misrepresentation exception does not apply when the information supplied is merely ancillary to the sale of a product or service in connection with the sale, as the information provider is not deemed to be in the business of providing information. Fox Assocs. v. Robert Half Int'l, Inc., 777 N.E.2d 603, 606-7 (Ill.App. 2002). -- The Public Safety Exception Although Illinois has not adopted an explicit "public safety exception" to the economic loss doctrine, in Board of Education v. A, C & S, Inc., 546 N.E.2d 580, 590-91 (Ill. 1989) the Illinois Supreme Court made an exception to the typical rule that damage to other property be caused by a "sudden or calamitous" event, requiring only a showing that asbestos contamination spread throughout different parts of the building, thus constituting damage to other property.
Indiana	"Economic loss is defined as the loss of profits because the product is inferior in quality and does not work for the general purposes for which it was manufactured and sold, and includes such incidental and consequential losses as lost profits, rental expense and lost time." Bamberger & Feibleman v. Indianapolis Power & Light Co., 665 N.E.2d 933, 938 (Ind. App. 1996), *citing* Martin Rispens & Son v. Hall Farms, Inc., 621 N.E.2d 1078, 1091 (Ind. 1993); Neibarger v. Universal	-- Other Property Under Indiana law, when a manufacturer places an item into the stream of commerce, that item, together with its component parts, constitutes "the product" for purposes of the economic loss doctrine. Hitachi Constr. Mach. Co. v. Amax Coal Co., 737 N.E.2d 460, 464 (Ind.App. 2000). If one component damages the whole, or another component thereof, no damage to "other property" has occurred Id. Items added to "the

	Coops., Inc., 486 N.W.2d 612, 615 (Mich. 1992) (applying the rule to "transactions involving the sale of goods for commercial purpose where economic expectations are protected by commercial and contract law"). A manufacturer does not owe a tort duty to avoid causing purely economic damage to the product itself. Prairie Production, Inc. v. Agchem Division-Pennwalt Corp., 514 N.E.2d 1299, 1305 (Ind.App. 1987). Lost profits flowing from the failure of a product to perform as expected, i.e., economic loss, do not form the basis for a tort action; instead, the buyer's remedy lies in contract. Martin Rispens & Son v. Hall Farms, 621 N.E.2d 1078, 1089-90 (Ind. 1993).	product" after it is placed into the stream of commerce, however, do constitute other property. Id. Damage to those items caused by "the product" or any of its components does constitute damage to other property recoverable in tort. Id. "Economic losses are not recoverable in a negligence action premised on the failure of a product to perform as expected unless such failure causes personal injury or physical harm to property other than the product itself." Interstate Cold Storage, Inc. v. G.M.C., 720 N.E.2d 727, 731 (Ind. App. 1999). "Other property" is that which is "wholly outside and apart from the product itself." I/N Tek v. Hitachi, Ltd., 734 N.E.2d 584, 588 (Ind.App. 2000). Accordingly, a person may not recover in tort when only the product itself has been destroyed. Hitachi Constr. Mach. Co. v. Amax Coal Co., 737 N.E.2d 460, 463-4 (Ind.App. 2000). "Personal injury and damage to other property from a defective product are actionable... but their presence does not create a claim under the Act for damage to the product itself." Fleetwood Enters. v. Progressive Northern Ins. Co., 749 N.E.2d 492, 493 (Ind. 2001). In Gunkel v. Renovations Inc., Ind., No. 76S01-0403-CV-133, 2/01/05, the Indiana Supreme Court held that property acquired separately from the defective product or service is "other property" whose damage is recoverable in tort. The case involved the negligent installation of a stone façade to a new home. The plaintiffs hired a separate company to install the façade. The court stated, "If a component is sold to the first user as a part of the finished product, the consequences of its failure are fully within the rationale

		of the economic loss doctrine. It therefore is not 'other property.' But property acquired separately from the defective good or service is 'other property' whether or not it is, or is intended to be, incorporated into the same physical object." In short, the product is that which is purchased by the plaintiff, not the product furnished by the defendant. -- Sudden or Dangerous Event Where recovery for property damage is sought under the Act, such damage "must have happened quickly, unexpectedly and be of a calamitous nature." Martin Rispens & Son v. Hall Farms, 621 N.E.2d 1078, 1088-89 (Ind. 1993), *citing* Reed v. Central Soya Co., 621 N.E.2d 1069, 1074-75 (Ind. 1993). -- Lack of Privity of Contract Lack of privity is no defense in an action that is brought under the Product Liability Act. Yasuda Fire & Marine Ins. Co. v. Lakeshore Elec. Corp., 744 F.Supp.864 (S.D. Ind. 1990). "A plaintiff may recover against a manufacturer for economic loss for breach of express warranties, even though the plaintiff is not in privity with the manufacturer" Prairie Production, Inc. v. Agchem Division-Pennwalt Corp., 514 N.E.2d 1299, 1303 (Ind. App. 1987).
Iowa	Where damages alleged are limited to the object of the contract, as opposed to personal injury or damage to other property, the harm alleged is pure economic loss. Flom v. Stahly, 569 N.W.2d 135, 141 (Iowa Sup. 1997). A plaintiff cannot maintain a claim for purely economic damages arising out of a defendant's alleged negligence. Determan v. Johnson, 613 N.W.2d 259, 261-62 (Iowa 2000), *citing* Nebraska Innkeepers, Inc. v. Pittsburgh-Des	-- Other Property The economic loss doctrine bars tort claims for damage to the defective product itself. Richards v. Midland Brick Sales Co., 551 N.W.2d 649, 652-3 (Iowa App. 1996). "We have required at a minimum that the damage for which recovery is sought must extend beyond the product itself." Determan v. Johnson, 613 N.W.2d 259, 262 (Iowa 2000). Where the damaged product was "an integral part

	Moines Corp., 345 N.W.2d 124 (Iowa 1984). Claims based on strict liability in tort are barred where a product sold by the defendant to the plaintiff failed to perform as it was expected, but caused no physical injury to person or property. Nelson v. Todd's Ltd., 426 N.W.2d 120, 123 (Iowa 1988).	of the finished product" bargained for by the plaintiff – concrete or bricks used to build a house the buyers had purchased, for example – the other property exception does not apply. Richards v. Midland Brick Sales Co., 551 N.W.2d 649, 651 (Iowa App. 1996), *citing* Pulte Home Corp. v. Osmose Wood Preserving, 60 F.3d 734, 741 (11th Cir. 1995), *citing* Casa Clara Condominium Ass'n, v. Charley Toppino & Sons, Inc., 620 So. 2d 1244, 1247 (Fla. 1993). -- Sudden or Dangerous Event The common thread running through our cases rejecting recovery is the lack of danger created by the defective product. American Fire & Cas. Co. v. Ford Motor Co., 588 N.W.2d 437, 439-440 (Iowa 1999). These cases "emphasized that hazard and danger distinguished tort liability from contract law. They distinguished the disappointed consumers from the endangered ones." Id. When "the loss relates to a consumer or user's disappointed expectations due to deterioration, internal breakdown or non-accidental cause, the remedy lies in contract. Tort theory, on the other hand, is generally appropriate when the harm 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." Determan v. Johnson , 613 N.W.2d 259, 261-62 (Iowa 2000). -- Lack of Privity of Contract Purchasers who lack privity of contract with the manufacturer of a defective product cannot recover solely consequential economic loss for breach of express warranty or the implied warranties of merchantability and fitness for a particular purpose. Tomka

		v. Hoechst Celanese Corp., 528 N.W.2d 103, 107-8 (Iowa Sup. 1995). However, non-privity buyers may recover for direct economic loss damages if the remote seller has breached an express warranty. Beyond the Garden Gate v. Northstar Freeze-Dry Mfg., 526 N.W.2d 305, 310 (Iowa Sup. 1995). -- Applicability to Consumers Iowa courts have recognized, but not yet adopted or rejected the consumer transaction exception to the economic loss doctrine. "Some courts have pointed out the economic loss rule applies only in a commercial context, not to a consumer who purchases goods for personal, residential use. The plaintiff in this case does not argue the doctrine is inapplicable because the sale of the bricks was not a commercial transaction." Richards v. Midland Brick Sales Co., 551 N.W.2d 649, 651-62 (Iowa App. 1996).
Kansas	The economic loss doctrine prohibits a buyer of defective goods from recovering in tort where the only damage is to the defective good themselves. Prendiville v. Contemporary Homes, Inc., 83 P.3d 1257, 1259-1260 (Kan. App. 2004).	-- Other Property Prendiville v. Contemporary Homes, Inc., 83 P.3d 1257, 1259-1260 (Kan. App. 2004). Kansas adopts the "integrated systems" approach. Northwest Arkansas Masonry, Inc. v. Summit Specialty Products, Inc., 31 P.3d 982, 988 (Kan. App. 2001).
Kentucky	Kentucky state courts have not discussed the applicability of the economic loss rule, but three federal decisions, predicting how the Kentucky Supreme Court would rule, have adopted the economic loss rule to commercial transactions. Mt. Lebanon Personal Care Home, Inc. v. Hoover Universal, Inc., 2002 Fed App 0015P (6th Cir. 2002); Gooch v. E.I. Du Pont De Nemours & Company, 40 F.Supp.2d 863 (W.E.Ky Feb. 8, 1999) and Bowling Green Municipal Utilities	

	v. Thomasson Lumber Co., 902 F.Supp. 134 (W.D.Ky Oct. 11, 1995). All three decisions distinguished the case of Real Estate Marketing, Inc. v. Franz, 885 S.W.2d 921 (Ky.1994) on the basis that Franz did not involve a commercial transaction. In Franz, the Kentucky Supreme Court stated that "[w]e do not go so far as ... [to limit] recovery under products liability theory to damage or destruction of property 'other' than the product itself," by holding that the case "does not involve a transaction between a commercial buyer and seller." *see* Thomasson, 902 F.Supp. at 138 n. 2. The federal courts predict that although the Kentucky Supreme Court would not apply the ELR to non-commercial home purchases, it would apply it to commercial transactions.	
Louisiana	No Louisiana court appears to have addressed the economic loss doctrine. However, under Louisiana's Product Liability Act ("LPLA"), the term "damage" that is recoverable in a products liability claim "includes damages to the product itself and economic loss arising from a deficiency in or loss of use of the product only to the extent that [the Civil Code articles on redhibition] do [] not allow recovery of such damage or economic loss." La. Rev. Stat. Ann. §§ 9:2800.53(5). The court in R-Square Investments, Inc. v. Teledyne Industries, Inc., 1997 WL 436425 (E.D. La) held that the most plausible reading of that language would allow tort recovery where redhibition remedies (implied warranty remedies) are foreclosed.	
Maine	The economic loss doctrine bars tort recovery for a defective product's damage to itself. Oceanside at Pine Point Condo. Owners Ass'n v.	-- Other Property Maine applies the "integrated product rule" to distinguish the product from other property such that "the product"

	Peachtree Doors, Inc., 659 A.2d 267, 270-71 (Me. 1995). The doctrine "marks the fundamental boundary between the law of contracts, which is designed to enforce expectations created by agreement, and the law of torts, which is designed to protect citizens and their property by imposing a duty of reasonable care." Fireman's Fund Ins. Co. v. Childs, 52 F. Supp. 2d 139, 141 (D. Me. 1999).	is the finished product into which the component is integrated. Firemans Fund Ins. Co. v. Childs, 52 F. Supp. 2d 139, 142-43 (D. Me. 1999) -- Professional Service Contracts A federal district court has inferred from Oceanside that Maine's economic loss doctrine extends to disputes over professional service contracts. Me. Rubber Int'l v. Envtl. Mgmt. Group, Inc., 298 F. Supp. 2d 133, 137–138 (D. Me. 2004).
Maryland	Maryland does not allow tort recovery for damages to a product causing purely economic losses, unless the defect causes a dangerous condition creating a risk of death or personal injury. Morris v. Osmose Wood Preserving, 340 Md. 519, 535-36, 667 A.2d 624, 632-33 (1995) (barring homeowners' tort claims for failure to show defects in plywood created serious and unreasonable risk of death or personal injury); A.J. Decoster Co. v. Westinghouse Elec. Corp., 333 Md. 245, 250, 634 A.2d 1330, 1332 (1994); Council of Co-Owners v. Whiting-Turner, 308 Md. 18, 33-42, 517 A.2d 336, 344-48 (1986); National Coach Works v. Detroit Diesel Corp.,128 F.Supp. 821 (D. Md. 2001).	-- Other Property -- Dangerous Condition and Risk of Death or Personal Injury Morris.
Massachusetts	The Supreme Judicial Court follows the majority rule, holding that "purely economic losses are unrecoverable in tort and strict liability actions in the absence of personal injury or property damage." FMR Corp. v. Boston Edison Co., 613 N.E.2d 902, 903 (Mass. 1993) (rejecting claim that negligent repair of electric lines caused power outages which caused loss of profits); accord Garweth Corp. v. Boston Edison Co., 613 N.E.2d 92, 93-94 (Mass. 1993) (rejecting claim that negligent oil spill caused damages for delay in ability to	-- Other Property

	complete contract work).	
Michigan	"Where a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only economic losses." Niebarger v. Universal Cooperatives, Inc., 486 N.W.2d 612, 615 (Mich. 1992), quoting Kennedy v. Columbia Lumber & Mfg Co., 384 S.E.2d 730, 736 (1989). See also Huron Tool & Eng'g Co. v. Precision Consulting Servs., 532 N.W.2d 541, 543-44 (Mich.App. 1995).	-- Other Property Michigan law prohibits recovery of damages to "other property" where that damage was foreseeable to the parties at the time when the contract for sale was entered into. Affiliated F.M. Ins. Co. v. Abolite Lighting, Inc., 1998 Mich.App. LEXIS 2558 (Mich.App. 1988), *citing* Neibarger v. Universal Coops., 486 N.W.2d 612, 620 (Mich. 1992). As such, the distinction between the defendant's product and "other property" is significantly less important in Michigan than in most other jurisdictions. If the potential for damage to other property was within the contemplation of the parties when the ultimately defective product was purchased, and the parties had an opportunity to negotiate an allocation of risk to address damage to that other property in the event that the product proved to be defective, then the economic loss doctrine would bar tort claims for "other property" damage. Neibarger v. Universal Cooperatives, Inc., 486 N.W.2d 612, 620 (Mich. 1992). -- Lack of Privity of Contract Michigan courts have "expressly rejected the argument that the economic loss doctrine does not apply in the absence of privity of contract." Citizens Ins. Co. v. Osmose Wood Preserving, Inc., 585 N.W.2d 314, 316 (Mich.App. 1998), *citing* Freeman v DEC Int'l, Inc., 536 N.W.2d 815 (Mich.App. 1995). -- Applicability to Service Contracts Michigan does not apply the economic loss doctrine to preclude tort recovery of economic loss where the claim emanates from a contract for services. Quest Diagnostics, Inc. v. MCI WorldCom, Inc., 656 N.W.2d 858, 863

		(Mich.App. 2002), *quoting* Higgins v Lauritzen, 530 N.W.2d 171 (1995). -- Applicability to Consumers Michigan has not adopted an exception to economic loss doctrine for consumer transactions. Like sophisticated commercial purchasers, consumers will not be permitted to recover economic loss in tort. Sherman v. Sea Ray Boats, Inc., 649 N.W.2d 783, 786-88 (Mich.App. 2002). Consumers are limited to whatever contractual remedies they negotiate at the time of purchase without regard to whether the seller was an entity of greater knowledge or bargaining power. Id. -- Fraud and Misrepresentation Michigan recognizes an exception to the economic loss doctrine for fraud in the inducement. Huron Tool & Eng'g Co. v. Precision Consulting Servs., 532 N.W.2d 541, 544-45 (Mich.App. 1995). When one party was tricked into contracting, it will not be limited to its contractual remedies when seeking recovery of economic losses. Id..
Minnesota	A buyer may not bring a product defect tort claim against a seller for compensatory damages unless a defect in the goods sold or leased caused harm to the buyer's tangible personal property other than the goods or to the buyer's real property. In any claim brought under this subdivision, the buyer may recover only for: (1) loss of, damage to, or diminution in value of the other tangible personal property or real property, including, where appropriate, reasonable costs of repair, replacement, rebuilding, and restoration; (2) business interruption losses, excluding loss of good will and harm to business reputation, that actually occur during the period of restoration; and	-- Other Property. *See* 2002 Minnesota Statutes §§ 604.101. Minnesota Statute Section 604.101 does not define the concept of "other property." The legislative working group concluded that in Minnesota, as elsewhere around the nation, the concept is best developed through case law. S.J. Groves & Sons v. Aerospatiale Helicopter, Corp., 374 N.W.2d 431, 434 (Minn. 1985). -- Lack of Privity of Contract *See* Minn. Stat. §§ 604.101 (consumers may recover against other persons or entities in the chain of distribution even if they do not have a direct contractual relationship. TCF Bank & Sav. v. Marshall Truss Sys., Inc., 266 N.W.2d 49, 54 (Minn.App. 1991)

	(3) additional family, personal, or household expenses that are actually incurred during the period of restoration. Section 604.101.	("Minnesota has adopted the most liberal privity position available in the U.C.C."); Nelson v. International Harvester, Corp., 394 N.W.2d 578, 581 (Minn. App. 1986). "A sellers warranty, whether expressed or implied, extends to any person who may be reasonably expected to use, consume or be affected by the goods and who is injured by breach of the warranty." Minn. Stat. § 336.2-318 (1998). -- Fraud and Misrepresentation See Minn. Stat. § 604.101(4) (permitting recovery and tort for intentional or reckless misrepresentation claims relating to goods sold or leased.) -- Public Safety Exception. Asbestos contamination of the building itself, other parts of the building, and the building contents, is damage to "other property" that is recoverable in tort in spite of the Economic Loss Doctrine. 80 S. 8th St., Ltd. Partnership v. Kerry-Canada, 486 N.W.2d 393 (Minn. 1992); Independence School District No. 197 v. WR Grace & Co., 752 F.Supp. 286 (D. Minn. 1990).
Mississippi	Adopts the general rule set forth in East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986), barring claims of strict liability and negligence claims against product manufacturers for economic damages to the product itself. State Farm Mutual Automobile Ins. Co. v. Ford Motor Co., 736 So.2d 384 (Miss. Ct. App. 1999). See also Miss. Code Ann. §11-1-63	-- Other Property
Missouri	"Economic loss is distinguished from harm to person or damage to property: Economic loss includes cost of repair and replacement of defective property which is the subject of the transaction,	-- Other Property "Recovery in tort for purely economic damages limited to those cases whether it is personal injury, damage to property other than that sold, *or*

	as well as commercial loss for inadequate value and consequent loss of profits or use." Groppel Co. v. United States Gypsum Co., 616 S.W.2d 49, 55 (Mo.App. 1981). There can be no recovery in strict liability in tort where the only damage is to the product sold. Clayton Ctr. Assocs. v. W.R. Grace & Co., 861 S.W.2d 686, 692 (Mo.App. 1993), *citing* Sharp Bros. Contracting Co. v. American Hoist & Derrick Co., 703 S.W.2d 901, 903 (Mo.banc 1986).	*destruction to the property sold* due to some violent occurrence." Wilbur Waggoner Equip. & Excavating Co. v. Clark Equip. Co., 668 S.W.2d 601, 603 (Mo. App. 1984), *citing* Crowder v. Vandendeale, 564 S.W.2d 879, 881 (Mo. Banc 1978). Economic losses cannot be recovered under the tort theories of strict liability or negligence in the absence of personal injury or damage to other property. Landmark Am. Ins. Co. v. Paccar, Inc., 103 S.W.3d 894, 895 (Mo.App. 2003). -- Sudden and Calamitous Event "The line between economic loss and direct property damage is not always easy to discern, particularly when the plaintiff is seeking compensation for loss of the product itself. We cannot lay down an all inclusive rule to distinguish between the two categories; however, we note that sudden and calamitous damage will almost always result in direct property damage and that deterioration, internal breakage and depreciation will be considered economic loss." Gibson v. Reliable Chevrolet, Inc., 608 S.W.2d 471, 474 (Mo.App. 1980). -- Lack of Privity of Contract "Where the only damage complained of is an economic loss resulting from defects in an item sold (or built) pursuant to contract, a contract action affords the plaintiff complete relief, in a coterminous negligence action does not lie." Korte Constr. Co. v. Deconess Manor Ass'n., 927 S.W.2d 395 (Mo. App. 1996); but see Groppel Co. v. United States Gypsum Co., 616 S.W.2d 49, 59 (Mo.App. 1981) ("economic loss is potentially devastating to the buyer of an unmerchantable product. It is unjust to preclude recovery for a consumer economic loss from the manufacturer

		for such loss because of a lack of privity"). -- Fraud and Misrepresentation Exceptions Under Missouri law, a cause of action exists "for the recovery of pecuniary loss caused to persons who justifiably rely on information supplied for their guidance in a business transaction by one who provides the information in the course of his business, profession or other transaction in which he is interested, if the information is false and the supplier of the information failed to exercise reasonable care or competence in obtaining or communicating the information." Huttegger v. Davis, 599 S.W.2d 506, 515 (Mo. 1980)
Montana	In Jim's Excavating Service, Inc. v. HKM Associates, 265 Mont. 494, 878 P.2d 248 (Mont. 1994), the Court addressed whether the economic loss doctrine should apply to a claim against a design professional despite lack of privity with the professional. The court began by noting the following: "Although this Court has not addressed this specific question, the majority of jurisdictions have done so and have rejected the economic loss doctrine." (citing Annotation, *Tort Liability of Project Architect for Economic Damages Suffered by Contractor,* 65 A.L.R.3d 249 (1975)). The court concluded that the doctrine does not bar such a professional negligence claim: "Thus, we hold that a third party contractor may successfully recover for purely economic loss against a project engineer or architect when the design professional knew or should have foreseen that the particular plaintiff or an identifiable class of plaintiffs were at risk in relying on the information	-- Other Property -- Professional Negligence A third party contractor may successfully recover for purely economic loss against a project engineer or architect when the design professional knew or should have foreseen that the particular plaintiff or an identifiable class of plaintiffs were at risk in relying on the information supplied. Jim's Excavating Service v HKM Associates, 265 Mont. 494, 878 P.2d 248 (1994).

	supplied." Although no cases have been uncovered explicitly refining the economic loss doctrine in the product liability context subsequent to this decision, Montana has held that a strict liability action can lie when the only damage suffered is to the defective product itself. Thompson v Nebraska Mobile Homes Corp., 198 Mont. 461, 647 P.2d 334 (1982).	
Nebraska	The purchaser of a product pursuant to contract cannot recover economic losses from the seller manufacturer on claims in tort based on negligent manufacture or strict liability in the absence of physical harm to persons or property caused by the defective product. Hilt Truck Line, Inc. v. Pullman, Inc., 382 N.W.2d 310, 222 Neb. 65 (Neb. 1986).	
Nevada	No recovery for negligence or strict liability for purely economic damages. Central Bit Supply, Inc v. Waldrop Drilling and Pump, Inc., 102 Nev. 139, 717 P.2d 35 (1986)	
New Hampshire	Economic Loss is generally defined as "that loss resulting from the failure of the product to perform to the level expected by the buyer and is commonly measured by the cost of repairing or replacing the product." Nichols v. General Motors Corp., 1999 WL 33292839 (N.H. Super. Ct. 1999) (quoting Lempke v. Dagenais, 130 N.H. 782, 792). A plaintiff may not recover in a negligence claim or a tort claim in general for purely economic loss. Nichols; Border Brook Terrace Condo. Assoc. v. Gladstone, 137 N.H. 11, 18; Lempke v. Dangenais, 130 N.H. 782; Ellis v. Robert C. Morris, Inc., 128 N.H. 358, 364; . The Nichols court rejected the holding in Town of Hooksett School Dist. v. W.R. Grace &	-- Other Property -- Fraud and Misrepresentation The Nichols court noted that economic loss *is* the measure of damages in fraud and negligent misrepresentation and concealment cases, citing Eno Brick Corp. v. Barber-Greene Co., 109 N.H. 156; *Crowley v. Global Realty, Inc.*, 124 N.H. 814.

	Co., 617 Supp. 1276 (D.N.H.1984), which allowed recovery in tort for purely economic loss, noting, "A Federal Court's interpretation of New Hampshire law has no value as precedent in New Hampshire State Courts. Furthermore, Town of Hooksett predates the above cited New Hampshire cases which have held that economic loss is not recoverable in tort in New Hampshire."	
New Jersey	The New Jersey Supreme court first adopted the economic loss rule in Spring Motors Distributors, Inc. v. Ford Motor Co., 98 N.J. 555, 489 A.2d 660 (1985), where a commercial restorer of vehicles sought to recover repair cost, lost profits and decreased market value of trucks due to difficulties with the vehicles' transmissions. The court decided that neither negligence nor strict products remedies were available between commercial parties for these economic losses. The New Jersey Legislature also approved the economic loss rule by adopting the Product Liability Act in 1987. The statute provides, in pertinent part, that, with respect to products liability actions in New Jersey, "harm" means physical damage to property, other than to the product itself," N.J.S.A. § 2A:58C-1. In Easling v. Glen-Gery Corp., 804 F. Supp. 585 (D.N.J. 1992), the purchasers of a large apartment complex sued the manufacturer of allegedly defective bricks used in the apartment construction for strict products liability. The federal district court dismissed the claim, holding that the plaintiffs, as commercial purchasers, could not recover in tort without more than economic loss. The plaintiffs had	-- Other Property In Naporano Iron & Metal Co. v. American Crane Corp., 1999 WL 1276733 (D.N.J. Dec. 30, 1999), the federal district court, while recognizing the "other property" exception, limited its application where the other property is not owned by the plaintiff but was owned by third parties. The case involved a claim for product liability damages stemming from three collapses of a crane that the defendants had manufactured. In each instance, the crane itself and property belonging to the plaintiff's customers sustained damage, but no person or other property of the plaintiff had been injured. The district court held that the plaintiff failed to state a claim with respect to the property of third parties, which the court found did not fall within the "other property" exception to the economic loss doctrine. The court reasoned that a third party injured by a defective product is able to recover under tort law from the manufacturers of defective products, but the fact that the plaintiff, a party to a commercial agreement, had reimbursed its customers for the harm did not preclude application of the economic loss doctrine. -- Fraud and Misrepresentation

	alleged that the bricks were deteriorating, caused substantial damage to the apartment and also presented a hazard to apartment residents. The court reasoned that it should look to the product purchased by the plaintiff, and accepted the argument that the "product" purchased was the apartment complex rather than the bricks. In Alloway v. General Marine Industries, L.P., 149 N.J. 620, 695 A.2d 264 (1997), the New Jersey Supreme Court held that the subrogated insurer of the purchaser of a luxury boat that sank while docked, but caused no personal injury or damage to other property was limited in a suit against the manufacturer to breach of warranty remedies under the UCC. The plaintiff-buyer was not a commercial party, but, according to the court, the parties' relative bargaining power was not greatly disproportionate. Therefore, the court held that the parties' contractual allocation of risk would decide recovery of economic losses, including cost of repair and lost trade-in value of the boat.	In Coastal Group, Inc. v. Dryvit Systems, Inc., 274 N.J. 171, 643 A.2d 649 (1994), the court held that the economic loss rule did not preclude a commercial buyer's claim for fraud and misrepresentation. A condominium project owner and developer filed a breach of contract action against the contractor who installed a well system and the materials supplier alleging negligence, breach of contract and fraud. The Appellate Division held that the negligence claim had been properly dismissed, but that the plaintiff could pursue claims for fraud and misrepresentation under the New Jersey Consumer Fraud Act. -- Sudden and Calamitous Events In Naporano Iron & Metal Co. v. American Crane Corp., 1999 WL 1276733 (D.N.J. Dec. 30, 1999), discussed above, the plaintiff alleged that a crane failed in a "sudden and calamitous manner." The district court determined that the New Jersey Superior Court had rejected the sudden and calamitous exception. Id. at *6.
New Mexico	In commercial transactions without great disparity in bargaining power, economic loss may only be recovered in contract, not in tort actions for negligence or strict liability. Utah International, Inc. v. Caterpillar Tractor Co., 108 N.M 539, 775 P.2d 741 (N.M.App. 1989), cert denied,, 108 N.M. 354, 772 P.2d 884 (N.M. 1989).	-- Other Property If economic loss doctrine applies, neither damage to the product nor damage to property other than the product can be recovered in tort. Spectron Dev. Lab. v. American Hollow Boring Co., 123 N.M. 170, 936 P.2d 853 (N.M.App. 1997).
New York	In Bocre Leasing Corp. v. General Motors Corp., 84 N.Y.2d 685, 645 N.E.2d 1195, 621 N.Y.S.2d 497, (1995), the Court of Appeals of New York adopted the economic loss rule set forth in East River v. Transamerica	-- "Other Property" New York courts have held that the economic loss rule does not apply where the defective product causes damage to "persons or property other than the product itself." Arkwright

	Delaval, Inc., supra. In Bocre Leasing, the court held that a purchaser in a commercial transaction may not recover in tort under a strict products liability or negligence theory from the manufacturer, where only the product itself is damaged and there is no allegation of physical injury or other property damage. Bocre Leasing dealt with a remote purchaser of a product. Recent New Jersey decisions have extended the economic loss rule in cases involving more immediate purchasers as well. See, e.g., 7 World Trade Co. v. Westinghouse Electric Corp., 256 A.D.2d 263, 682 N.Y.S.2d 385, 387 (1st Dept. 1998) (two workers for an electrical subcontractor could not bring negligence or products liability actions against the manufacturer of the building's bus ducts which exploded during building renovations, where plaintiffs alleged losses only of an economic nature). Generally, where courts have deemed the underlying transaction to be a sale of goods, and no damage to other property or physical injury are alleged, New York courts have ruled that the plaintiff is limited to contractual remedies and typically may not maintain tort causes of action. In numerous recent decisions, courts applying New York law have precluded tort recovery for economic losses. Travelers Insurance Cos. V. Howard E. Conrad, Inc., 233 A.D.2d 890, 649 N.Y.S.2d 586 (4th Dept. 1996), (A subrogation action alleging negligence and strict products liability to recover for economic loss arising out of sinking of a yacht was precluded). See also 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 750 N.E.2d 1097, 1101 n.1 (N.Y. 2001) (stating	Mut. Ins. Co. v. Bojoirve, Inc., 1996 WL 361535 at *3 (S.D.N.Y. June 27, 1996) (citations omitted). In that case, the plaintiff alleged that a defective component part damaged not only the generator in which it was housed, but also adjacent generators, floors, ceilings, furniture and other real and personal property. Thus, because "other property" beyond the product itself was damaged, the plaintiff could recover in tort. -- Abrupt, Cataclysmic Occurrences In State Farm Fire & Casualty Co. v. Southtowns Tele-Communications, Inc., 245 A.D.2d 1028, 667 N.Y.S.2d 157 (4th Dept. 1997), the court permitted a subrogation action against a contractor that had installed a music-on-hold system. The owners alleged that the system resulted in a fire causing extensive damage to the building and its contents. The court rejected the defendant's argument that plaintiffs were limited to breach of contract remedies, holding that the plaintiffs had asserted a valid tort claim for negligent installation, "because the damages alleged sustained by the plaintiff do not arise from the failure of a music-on-hold system to perform as intended, buy arise instead from an 'abrupt, cataclysmic occurrence' allegedly caused by defendant's negligence." Id. at 158 (citations omitted). See also, LaBarre v. Mitchell, 256 A.D.2d 850, 681 N.Y.S.2d 653 (3d Dept. 1998) (holding that a defectively designed fire alert system may be considered an inherently dangerous product and its failure to perform can have catastrophic consequences, therefore permitting plaintiffs' cause of action for damage to real and personal property and lost income); Village of

	that the rule applies to suits by "an end-purchaser of a product" against a manufacturer).	Groton v. Tokheim Corp., 202 A.D.2d 728, 608 N.Y.S.2d 565 (3d Dept. 1994) (regulator in underground fuel dispensing system failed to operate, leading to fuel leak; the court noted the potential for fire or explosion, notwithstanding that no actual cataclysmic event occurred, and permitted tort recovery).
North Carolina	"[W]hen a plaintiff seeks recovery for damage to a product that is the subject of the contract between the parties, a plaintiff is limited to a contract or warranty action." Terry's Floor Fashions, Inc. v. Georgia-Pacific Corp., 1998 WL 1107771 (E.D. N.C. 1998) (citing Chicopee, Inc. v. Sims Metal Works, Inc., 98 N.C.App, 423, 432, 391 S.E.2d 211, 217 (1990) (adopting rule that "purely economic losses are not ordinarily recoverable under tort law" in context of products liability suit); AT&T Corp., 876 F.Supp. at 91 (noting that, with respect to losses recoverable in product liability suits, North Carolina follows the majority rule and does not allow recovery of purely economic losses in negligence actions); North Carolina State Ports Authority v. Lloyd A. Fry Roofing Company, 294 N.C. 73, 81, 240 S.E.2d 345, 350 (1978) ("Ordinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor."), *rejected in part on other grounds,* Trustees of Rowan Tech. College. v. J. Hyatt Hammond Assoc., Inc., 313 N.C. 230, 328 S.E.2d 274 (1985)); and Spillman v. American Homes, 108 N.C.App. 63, 65, 422 S.E.2d 740, 741-42 (1992) ("a tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to properly perform was due to the	-- Other Property The economic loss rule only applies to "the product itself"" and not to "other property." under Moore v. Coachmen Industries, Inc., 499 S.E.2d 772 (NC Ct. App. 1998) and Reece v. Homette Corporation, 429 S.E.2d 768 (NC Ct. App. 1993). Certain language in Moore, however, can be used to argue that the "other property" exception does not apply if there is an express warranty expressly disclaiming against liability for damage other property. The "other property" exception was recognized in Terry's Floor Fashions, Inc. v. Georgia-Pacific Corp., 1998 WL 1107771 (E.D. N.C. 1998), where the plaintiff, a flooring installer, sued defendant, a plywood manufacturer, on the ground that the plywood underlayment sold by defendant to plaintiff had caused discoloration of the vinyl flooring plaintiff had sold and installed for various customers. The court held that plaintiff's claim for recovery of damages to the underlayment itself was barred by the economic loss rule. As to the vinyl flooring above that underlayment, the court noted that such property was "other property" within the meaning of the economic loss rule, but held that plaintiff lacked standing to recover those damages inasmuch as that property was owned by the customers and not by the plaintiff. In the unpublished decision of Land v. Tall

	negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract. It is the law of contract and not the law of negligence which defines the obligations and remedies of the parties in such a situation.")	House Building Co., COA03 (NC Ct. App. Aug. 17, 2004), the court deemed an entire house not to be "other property" in relation to the defective synthetic stucco that coated it, citing Wilson v. Dryvit Systems, Inc., 206 F. Supp. 2d 749, 753 (E.D.N.C. 2002), *aff'd,* 71 Fed. Appx. 960 (2003). -- Torts Independent from Contract In a prior unpublished decision involving a contract to repair certain equipment, the North Carolina Court of Appeals held that the existence of a service contract precluded an action in tort for breach of the duties that arose from the contract. Kaplan Companies, Inc. and Guidecraft USA, Inc. v. Stiles Machinery, Inc. and Robert J. Kostelnik, unpublished opinion, Docket No. 01 CVS 3447 (N.C. App. May 6, 2003). However, unlike in Ellis-Don Construction, there was a governing contract in place between the parties. Moreover, the case involved service to equipment. Accordingly, even the unpublished cases applying North Carolina law stand for the proposition that the ELR only applies where there is a contract in place between the parties, the subject matter of which is physical property. Damages to property other than that designated in the contract would, arguably, be recoverable under tort theories.
North Dakota	Manufacturer not liable in tort for damage to the product itself, even though the event may have created a risk of harm. Cooperative Power Assoc. v. Westinghouse Elec. Corp., 493 N.W.2d 661, 665 (N.D. 1992). The doctrine applies to consumer transactions as well as commercial transactions. Clarys v. Ford Motor Co., 592 N.W.2d 573, 578 (N.D. 1999).	-- Other Property

Ohio	Ohio initially rejected the rule and allowed tort recovery for economic losses. *See* Inglis v. Am. Motors Corp., 209 N.E.2d 583 (Ohio 1965); Iacono v. Anderson Concrete Corp.., 326 N.E.2d 267 (Ohio 1975). However, in Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co., 537 N.E.2d 624, 629 (Ohio 1989), the Ohio Supreme Court limited its previous holdings by applying the economic loss rule to parties in privity of contract, stating: "a commercial buyer seeking recovery from the seller for economic losses resulting from damage to the defective product itself may maintain a contract action for breach of warranty under the Uniform Commercial Code; however, in the absence of injury to persons or damages to other property the commercial buyer may not recover for economic losses premised on tort theories of strict liability or negligence. " 537 N.E.2d at 635. Thus, if the parties have a contractual relationship, they may not sue in strict liability or implied warranty for their economic damages, but instead must rely on the Uniform Commercial Code's ("U.C.C.") contractual remedies. *See also* Floor Craft Floor Covering, Inc., v. Parma Community Gen. Hosp. Assn., 560 N.E.2d 206, 208 (1990). The Chemtrol court noted that where there is privity of contract and the parties have negotiated that contract from relatively equal bargaining positions, the parties are able to allocate the risk of all loss, including loss of the subject product itself, between themselves. Chemtrol Adhesives, 42 Ohio St. 3d at 45, 537 N.E.2d at 631. However, the Court expressly declined to consider whether the economic loss rule should also apply to parties lacking privity, but cast doubt on previous Ohio Supreme Court	-- Other Property In determining whether damage to the product constitutes economic loss, Ohio focuses not on the nature of the product and its components, but rather on the relationship between the parties. See Chemtrol Adhesives, Inc. v. American Manufacturers Mutual Insurance Co., 42 Ohio St. 3d 40, 44, 537 N.E.2d 624, 630 (1989).

	holdings allowing such recovery.	
Oklahoma	Plaintiff cannot bring product liability tort action when injury occurs solely to the product itself. Oklahoma Gas & Elec. v. McGraw-Edison, 1992 OK 108, 834 P.2d 980; Waggoner v. Town & Country Mobile Homes, 1990 OK 139, , 808 P.2d 649, 653	-- Other Propert Oklahoma Gas; Waggoner
Oregon	In Jones v. Emerald Pacific Homes, Inc., 188 Or App 471 (July 2, 2003), the Court appears to have implicitly recognized the economic loss doctrine, barring homeowners from suing their contractor in negligence, noting that even where there is a contract between the parties, a negligence claim does not arise unless the claimed damages "result from breach of an obligation that is independent of the terms of the contract, that is, an obligation that the law imposes on the defendant because of his or her relationship to the plaintiff, regardless of the terms of the contract between them." Jones, 188 Or App at 476.	
Pennsylvania	Pennsylvania recognizes the doctrine. Bilt-Rite Contractors, Inc., v. The Architectural Studio, 581 Pa. 454, 866 A.2d 270 (Pa. 2005).	-- Other Property Doctrine does not preclude recovery of contents of collapsed warehouse. 2J Corp. v. Tice, 126 F.3d 539 (3d Cir. 1997). -- Misrepresentation or Fraud Economic loss doctrine does not bar a claim for negligent misrepresentation. Bilt-Rite Contractors, Inc., v. The Architectural Studio, 581 Pa. 454, 866 A.2d 270 (Pa. 2005); O'Keefe v. Mercedes-Benz USA, LLC, 214 F.R.D 266 (E.D. Pa. 2003); Oppenheimer v. York Int'l, 2002 WL 31409949 (Pa. Com. Pl. Oct. 25, 2002); *but see* Wersinski v. Ford Motor Co., 286 F.3d 661 (3d Cir. 2002) (fraud claim barred). -- Architectural Services Professional negligence claim against

		architects not barred by economic loss doctrine. Bilt-Rite Contractors, Inc., v. The Architectural Studio, 581 Pa. 454, 866 A.2d 270 (Pa. 2005).
Rhode Island	Applies the doctrine in tort actions between sophisticated commercial parties with comparable bargaining power but not to consumer transactions. Rosseau v. K.N. Constr., Inc., 727 A.2d 190 (R.I. 1999)	-- Other Property -- Consumer Transactions Not applicable to consumer transactions. Rosseau.
South Carolina	A party who has a commercial relationship or contract with another party cannot sue the other party in tort for purely economic damages to personal or commercial property. Brendle's Store, Inc. v. OTR, 978 F.2d 150 (4th Cir. 1992) (commercial tenant cannot sue builder in tort for economic losses resulting from defective construction, even where there is no contract between the two commercial entities); Myrtle Beach Pipeline Corp. v. Emerson Electric Co., 843 F.Supp. 1027 (D.S.C. 1995) (purchaser of fuel metering system barred by economic loss rule from negligence claim against seller of the device which had ruptured resulting in large fuel spill); Tommy L. Griffin Plumbing and Heating C. v. Jordan, Jones and Goulding, Inc., 463 S.E.2d 85 (S.C. 1995) (if contract exists, then cannot sue in tort for purely economic damages, but can do so for breach of duty arising independently of any contract duties such as violation of statute). *See also* Koontz v. Thomas, 511 S.E.2d 407 (S.C. Ct. App. 1999) (the question of whether the plaintiff may maintain an action in tort for purely economic loss turns on the determination of the source of the duty plaintiff claims the defendant owed; a breach of a duty which arises under the provisions of a contract between the parties must be redressed under	-- Other Property The "other property" exception was severely limited in the case of Palmetto Linen Service, Inc. v. U.N.X., Inc., 205 F.3d 126 (4th Cir. 2000), though it remains to be seen whether a South Carolina state court would apply similar reasoning. In Palmetto Linen, a linen cleaning service sued a company which installed a chemical dispensing system in service's washers, and manufacturer of certain components of the system, for damages resulting from the alleged malfunction of the system, resulting in destruction of linens. The Fourth Circuit court of appeals affirmed dismissal of negligence claims based on the South Carolina economic loss rule. Significantly, the court found the "other property" exception inapplicable to damage outside the product itself, as follows: "Palmetto finally argues that the "other property" exception to the economic loss rule permits it to proceed in tort. We reject this argument as well. Although the economic loss rule generally "does not apply where other property damage is proven," *Kershaw County Bd. of Educ. v. United States Gypsum Co.,* 302 S.C. 390, 396 S.E.2d 369, 371 (S.C.1990), "courts have tended to focus on the circumstances and context giving rise to the injury" in determining whether

	contract, and a tort action will not lie; however, a breach of a duty arising independently of any contract duties between the parties may support a tort action, such that when there is a special relationship between the alleged tortfeasor and the injured party not arising in contract, the breach of that duty of care will support a tort claim); Beachwalk Villas Condo Ass'n v. Martin, 406 S.E.2d 372, 374 n.1 (S.C. 1991) (stating that the rule applies only to product defect cases in which the "duties are created solely by contract")	alleged losses qualify as "other property" damage, *Myrtle Beach Pipeline Corp.*, 843 F.Supp. at 1057. Specifically, in the context of a commercial transaction between sophisticated parties, injury to other property is not actionable in tort if the injury was or should have been reasonably contemplated by the parties to the contract." 205 F.3d at 129-130.
South Dakota	Economic losses arising out of commercial transactions are not recoverable under the tort theory of negligence in the absence of personal injury or damage to other property. City of Lennox v. Mitek Industries, Inc. 519 N.W.2d 330, 333 (S.D. 1994); Diamond Surface, Inc. v. State Cement Plant Comm'n, 583 N.W.2d 155, 160 (S.D. 1998); Northwestern Pub. Serv. v. Union Carbide Corp., 115 F. Supp. 1164, 1167 (D.S.D. 2000); Corsica Coop. Ass'n v. Behlen Mfg. Co., Inc., 967 F. Supp. 382, 395 (D.S.D. 1997).	-- Other Property Defined as collateral to the property itself. City of Lennox v. Mitek Industries, Inc. 519 N.W.2d 330, 333 (S.D. 1994). *See also* Diamond Surface, Inc. v. State Cement Plant Comm'n, 583 N.W.2d 155, 160 (S.D. 1998).
Tennessee	The Tennessee Court of Appeals once observed that "Tennessee does not have a definitive body of law on the economic loss doctrine." Trinity Industries, Inc. v. McKinnon Bridge Co., 77 S.W.3d 159, 172 (Tenn.Ct.App. 2001) Since then, however, the court has taken pains to clarify that it does apply the rule, not only to products claims but also to construction claims. Amsouth Directors, LLC v. Scaggs Ironworks, Inc., 2003 WL 21878540 (Tenn. Ct. App. August 5, 2003). One older case holds that the doctrine applies in consumer transactions. Ritter v. Custom Chemicides, Inc., 912	-- Other Property -- Fraud and Misrepresentation Tennessee courts will allow claim of misrepresentation against a third party with whom there is no privity. John Martin Company, Inc. v. Morse/Diesel, Inc., 819 S.W.2d 428 (Tenn. 1991). John Martin was an action for negligent misrepresentation by subcontractor against construction manager and on-site superintendent. The Tennessee Supreme Court held that the subcontractor, despite lack of privity, could make claim against the construction manager based upon negligent misrepresentations, whether

	S.W.2d 128 (Tenn. Ct. App. 1961).	negligence was in the form of direction or supervision. In so ruling, the court recognized that there is a split of authority on the issue of whether the "economic loss doctrine" bars recovery in tort for economic damages absent privity.
Texas	Texas law expressly precludes the recovery of purely economic losses via tort claims in three instances. First, the Economic Loss Doctrine precludes a negligence cause of action for economic damages when the loss is the subject matter of a contract between the parties. Coastal Conduit & Ditching, Inc. v. Noram Energy Corp., 29 S.W.3d 282, 285 (Tex.App.—Houston [14th Dist.] 2000, no pet.); *see also* Southwestern Bell Tel. Co. v. DeLanney, 809 S.W.2d 493, 494 (Tex. 1991) (Economic Loss Doctrine barred recovery where injury was lost profits resulting from telephone company's failure to properly publish ad as contracted for); Jim Walter Homes, Inc. v. Reed, 711 S.W.2d 617, 618 (Tex. 1986) (Economic Loss Doctrine barred recovery in tort where injury was that the house they were promised and paid for was not the house they received); Essex Ins. Co. v. Blount, Inc., 72 F. Supp.2d 722, 724 (E.D. Tex. 1999) (Economic Loss Doctrine barred recovery where injury was only to the heavy timber equipment that was the subject of the purchase contract). Second, the Economic Loss Doctrine bars recovery of economic damages in a negligence claim brought against the manufacturer or seller of a defective product where the defect results in damage only to the product itself and not to a person or to other property. Coastal Conduit & Ditching, Inc., 29 S.W.3d, 124, 126-27 (5th Cir. 1994);	-- Other Property Recognizes this exception. *See* Signal Oil & Gas Co. v. Universal Oil Products, 572 S.W.2d 320 (Tex. 1978). The Dallas Court of Appeals in Murray v. Ford Motor Company, 97 S.W.3d 888 (Tex.App.—Dallas 2003) limits any tort recovery to the damage caused **only** to the "other property." The Fifth Circuit Court of Appeals has held that Texas does not recognize a negligence cause of action when a component part is involved. *See* Hininger v. Case Corp., 23 F3d 124, 126-27 (5th Cir. 1994). Texas considers the property to be the overall finished product bargained for by the buyer rather than its individual components. *See* Alcan Aluminum Corp. v. BASF Corp., 133 F.Supp.2d 482 (N.D.Tex.2001); Mid-Continent Aircraft Corp., 572 S.W.2d 308; Equistar Chemicals, L.P. v. Dresser-Rand Company, 2003 WL 22672205 (Tex.App.—Houston [14th Dist.] 2003). -- Professional Malpractice The Texas Supreme Court and the Dallas Court of Appeals have both specifically noted that the Economic Loss Doctrine does not apply in cases of professional malpractice. *See* DeLanney, 890 S.W.2d at 494 n.1; Express One Int'l, Inc., 53 S.W.3d at 898 n.1. In Texas, "it is a well settled rule that an architect must use skill and care in the performance of his duties commensurate with the requirements

	Indelco, Inc. v. Hanson Indus. N. Am.—Grove Worldwide, 967 S.W.2d 931, 932-33 (Tex.App.—Houston [14th Dist.] 1998, pet. denied) (damages caused by a defective crane were not recoverable where damages were only to crane itself). Third, Texas law precludes the recovery of economic damages in a negligence cause of action where the parties are contractual strangers and the damages are purely economic and there is no accompanying claim for damages to a person or property. Coastal Conduit & Ditching, Inc., 29 S.W.3d at 288-90; *See* also Trans-Gulf Corp. v. Performance Aircraft Services, Inc., 82 S.W.3d 691 (Tex.App.—Eastland 2002, n.p.h.) (Economic Loss Doctrine barred negligence and negligence per se claims brought by purchaser of airplane against contractors hired to repair airplane months before it was sold, where contractors were contractual strangers with purchaser, and purchaser sought only to recover damages to the subject of the contract).	of his profession, and he is liable in damages if he is negligent in the performance of those duties." Ryan v. Morgan Spear Assoc., Inc., 546 S.W.2d 678, 681 (Tex.Civ.App.—Corpus Christi 1977, writ ref'd n.r.e.); Romero v. Parkhill, Smith & Cooper, Inc., 881 S.W.2d 522, 525 (Tex.App.—El Paso 1994, writ denied: I.O.I. Systems, Inc. v. City of Cleveland, 615 S.W.2d 786, 790 (Tex.Civ.App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.). Consequently, the Economic Loss Doctrine does not prohibit a professional negligence lawsuit.
Utah	Utah courts have recognized the economic loss doctrine, prohibiting recovery of purely economic losses in actions based on non-intentional torts. American Towers Owners Ass'n, Inc. v. CCI Mechanical, Inc., 930 P.2d 1182, 1189-92 (Utah 1996).	-- Lack of Privity Not an exception. American Towers.
Vermont	Adopted the doctrine in Pacquette v. Deere & Co., 168 Vt. 258, 719 A.2d 410 (1998), holding that where a plaintiff incurs a purely economic loss from a product defect, plaintiff's claim is limited to breach of warranty theory, not tort theory.	Other Property
Virginia	In contrast to most jurisdictions, one line of Virginia cases holds that the economic loss rule does not bar a	-- Other Property -- Actual Fraud Plaintiff must show actual fraud, not

	negligence claim so long as there is privity of contract between the parties, in which case a party may be able to sue in negligence even if the losses are purely economic. Under this line of cases, if there is no privity, there is no recovery for "purely economic" damages, but recovery for damage to "other property" is allowed. Sensenbrenner v. Rust, Orling & Neale, 236 Va. 419, 425 S.E.2d 55, 58 (1988). See also Gerald M. Moore and Son, Inc. v. Drewry, 467 S.E.2d 811 (Va. 1996) (absent of privity of contract, a person cannot be held liable for economic loss damages caused by his negligent performance of a contract, even if that person is an agent of an entity with whom the plaintiff does have privity of contract.); Miller v. Quarles, 242 Va. 343, 410 S.E.2d 639 (1991) (permitting recovery in tort where defendant's negligence arose from the performance of a contract); Copenhaver v. Rogers, 384 S.E.2d 593 (Va. 1989) (no cause of action for legal malpractice where plaintiff was not in privity with lawyer); Redman v. Brush & Co., 111 F.3d 1174, 1182 (4th Cir. 1997) (Under Virginia law, plaintiff who lost coin collection could not bring a product liability action for purely economic damages against a safe manufacturer with whom plaintiff was not in privity.); Filbert v. Joel Stowe Assoc., Inc., 40 Va. Cir. 197 (1996) (claim by home purchaser against company hired by seller that allegedly negligently performed repair dismissed under economic loss rule for lack of privity); 243 Industrial Assoc., L.P. v. Consumer Fuelco, 35 Va. Cir. 322 (1994) ("[A]n action seeking damages for a purely economic loss does not lie where the loss results from negligent performance of a contractual	constructive fraud, to get around the ELR. Virginia Transformer Corp. v. P.D. George Co., 932 F.Supp. 156, 163 (W.D. Va. 1996). "The essence of constructive fraud is negligent misrepresentation." Richmond Metro. Auth. V. McDevitt Street Bovis, Inc., 256 Va. 553, 559, 507 S.E.2d 344, 347 (1998). Therefore, where the basis of constructive fraud is negligence, the economic loss rule applies. Virginia Beach Rehab Specialists, Inc. v. Augustine Medical, Inc., 58 Va. Cir. 379 (Va. Cir. Ct. 2002) (slip copy). "[T]the economic loss rule traditionally bar claims based on tort theory and is intended to restrain efforts to prevent parties from bringing claims in tort that should be claims only for breach of contract." Richmond v. Madison Management Group, 918 F.2d 438, 446 (4th Cir. 1990), *see* William L. Prosser, *Handbook of the Law of Torts* 92, at 614 (4th ed.1971). If a defendant breaches a duty imposed by law, however, rather than by contract, the economic loss rule should not apply. Richmond, 918 F.2d at 446.

	commitment brought by a non-party to the contract."). However, another line of cases has questioned this approach to the ELR. Rotonda Condominium Unit Owners Ass'n v. Rotonda Assoc., 380 S.E.2d 876 (Va. 1989) (condominium association, despite privity with condominium developer, cannot recover in negligence for purely economic damages); P&T Associates v. Paciulli, Simmons & Assoc., Ltd, 27 Va. Cir. 405 (1992) (economic loss rule warranted dismissal of a negligence claim even where privity was present; but tort remedy is available when the "safety" of a person or property is at issue); Fournier Furniture, Inc. v. Waltz-Holst Blow Pipe Co., 1997 U.S. Dist. LEXIS 2797 (W.D. Va., March 13, 1997) (same result as P&T Assoc.); C. Kailani Memmer, Evolution of Economic Loss Rule 15, at 21-22 JOURNAL OF CIVIL LITIGATION, VOL X, No. 1 (1997). In any event, privity is critical in a case involving the sale of goods, as demonstrated by Beard Plumbing and Heating, Inc. v. Thompson Plastics, Inc., 254 Va. 240, 491 S.E.2d 731 (Va. 1997). There, the Virginia Supreme Court noted that the plaintiffs had attempted to circumvent the privity requirement for recovery of consequential damages by arguing that consequential damages are impliedly allowed under §§Va.Code 8.2-318, which provides in pertinent part: "Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was	

	a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods[.]" In rejecting plaintiff's agument, the Virginia Supreme Court held that §§ Va.Code 8.2-318 is superseded by the more specific UCC provision of §§Va.Code 8.2-715(2)(a) which requires the presence of a contract to recover consequential damages. The court began its analysis by citing, at 244, to § 8.2- 715(2), which states: "Consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty." The court noted, at 255, that "the language of the section itself contains a presumption that there is a contract between the parties" in that "[t]he phrase 'at the time of contracting' in subparagraph (a) conveys the understanding of a contract between two parties." The court thus concluded "that § 8.2- 715(2)(a) requires a contract between the parties for the recovery of consequential economic loss damages incurred as a result of a breach of warranty by the seller." The court then noted that this contract requirement appears to conflict with 8.2-318, but resolved the conflict by holding that the more specific provision, 8.2-715(2)(a) prevails. The case of Printpack, Inc. v. Pak-Tec, Inc., 2000 WL 890729 (Va. Cir. Ct. June 29, 2000), suggests that privity can be established by virtue of the	

	warranty being conferred directly to the purchaser: "[A]ccording to Printpack's allegations, there was privity. In its warranty counts (III and IV), Printpack alleges that Imaje (and Pak-Tec) warranted the printing system, breached the warranties, and those breaches caused the loss suffered by Printpack. If these allegations are proven, there was a contractual relationship between Printpack and Imaje. Such a relationship establishes privity. With privity, Printpack's loss would be consequential damages resulting from breach of warranty instead of a non-recoverable economic loss."	
Washington	Recognizes the doctrine in both the product liability and construction context. WWP v. Graybar Electric Co., 112 Wn.2d 847, 774 P.2d 1199 (Wa. 1989); Berschauer/Phillips Constr. Co. v. Seattle School District, 124 Wn.2d 816 (1994). *See also* Stanton v. Bayliner Marine Corp., 123 Wn.2d 64, 866 P.2d 15 (Wa. 1993). "Harm," for the purposes of a product liability claim includes any damages recognized by courts, but does not include direct or consequential economic losses. RCW 7.72.010(6); Berschauer/Phillips Constr. Co. v Seattle School Dist. No. 1, 124 Wn.2d 816 (1994). Purely economic damages under the WPLA are limited to contract claims under the Uniform Commercial Code. *Id.* at 827. "Economic loss" is defined as the "diminution of product value that results from a product defect" and sounds in contract, specifically warranty. Id. at 856, 860. Washington Water Power Co. v. Graybar Elec. Co., 112 Wn.2d 847, 856, 774 P.2d 1199 (1989).	-- Other Property -- Sudden and Dangerous Event Recognizes this exception. WWP. In Washington Water Power Co. v. Graybar Elec. Co., 112 Wn.2d 847, 774 P.2d 1199 (1989), the Court noted the two tests used to evaluate the "risk of harm" exception, but did not expressly adopt either one. Id. at 866-67. The Court noted the two tests used to analyze the exception, namely the "sudden and dangerous" test and the "evaluative" approach. Id. at 866-67, see also, Touchet Valley v. Opp & Seibold Const., 119 Wn.2d 334, 351 831 P.2d 724 (1992). The "evaluative" approach is based on the idea that a "product user should not have to suffer a calamitous event before earning his remedy." Stanton v. Bayliner Marine Corp., 123 Wn.2d 64, 72, 866 P.2d 15 (1994). This approach takes a number of factors into consideration including the nature of the defect, the type of risk, and "the manner in which the injury arose." Touchet, 119 Wn.2d at 351. Accordingly, Washington courts appear to use two tests, "the sudden and dangerous test" and "the risk of

		harm evaluation" to determine whether damages are purely economic losses not recoverable under the WPLA. *See,* Touchet Valley, 119 Wn.2d 334, and Staton Hills Winery Co., Ltd. v Collons, 96 Wn. App. 590, 980 P.2d 784 (1999).
West Virginia	"[S]trict liability in tort is available in cases involving physical injury as well as when there is damage to the defective product itself or to other property if such damage is the result of a 'sudden calamitous event.' However, where the only loss suffered is an economic loss, as in the case of losses which are associated with a 'bad bargain,' the injured party must pursue the remedies provided in the Uniform Commercial Code, subject to the statute of limitations contained therein. We will not circumvent the Uniform Commercial Code's remedial scheme by applying the discovery rule to a contract action in a manner not prescribed by the Code." Basham v. General Shale, 180 W. Va. 526, 377 S.E.2d 830 (WV 1988) (barring homeowners' strict liability claim against brick manufacturer for defective brick that allegedly caused damages to home).	-- Other Property
Wisconsin	The economic loss doctrine prevents a commercial purchaser of a product from recovering solely economic losses from the manufacturer under negligence or strict liability theories. Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc., 437 N.W.2d 213 (1998). Economic loss is that loss "in a product's value which occurs because the product is inferior in quality and does not work for the general purposes for which it was manufactured or sold." Wausau Tile,	-- Other Property "Economic losses do not include property damage to property other than the defective product or a system in which it is incorporated, nor do economic losses include damage arising from personal injury caused by the product." Prent Corp. v. Martek Holdings, Inc., 618 N.W.2d 201, 206 (Wis. App. 2000), *citing* Daanen & Janssen, Inc. v. Cedarrapids, Inc., 573 N.W.2d 842, 845 (Wis. 1998). "Once a part becomes integrated into a

	Inc. v. County Concrete Corp., 593 N.W.2d 445, 451 (Wis. 1999).	completed product or system, the entire product or system ceases to be 'other property' for the purposes of the economic loss doctrine." Seltzer v. Brunsell Bros., Ltd., 652 N.W.2d 806, 817 (Wis.App. 2002), *citing* Wasusau Tile, Inc. v. County Concrete Corp., 593 N.W.2d 445 (Wis. 1999). The economic loss doctrine does not bar recovery of economic losses in tort when economic loss is alleged in combination with damage to other property. Bay Breeze Condominium Ass'n, Inc. v. Norco Windows, Inc., 651 N.W.2d 738, 742 (Wis.App. 2002), *citing* Wasusau Tile, Inc. v. County Concrete Corp., 593 N.W.2d 445, 451 (Wis. 1999). -- Sudden or Dangerous Event Wisconsin courts will not apply the "other property" exception to the economic loss doctrine if the plaintiff's claim, fairly stated, involves disappointed performance expectations. Seltzer v. Brunsell Bros., Ltd., 652 N.W.2d 806, 817 (Wis.App. 2002). -- Lack of Privity of Contract The economic loss doctrine precludes recovery in tort for solely economic losses, regardless of whether privity of contract exists between the parties. Digicorp, Inc. v. Ameritech Corp., 2003 WL 21267123 *1 (Wis. 2003); Daanen & Janssen, Inc. v. Cedarrapids, Inc., 573 N.W.2d 842 (Wis. 1998). -- Applicability to Service Contracts Wisconsin has not yet extended the economic loss doctrine to the service contract context. Notwithstanding a dispute between the Wisconsin Court of Appeals and the Wisconsin federal courts regarding the economic loss doctrine applicability to service contracts, the Wisconsin Supreme Court expressly reserved the issue for

		future resolution. Daanen & Janssen, Inc. v. Cedarrapids, Inc., 574 N.W.2d 842, 851 (1998); Barr v. Premium Production Co., Inc., 2002 WL 31749954 (Wis.App). -- Applicability to Consumers The economic loss doctrine has been held to bar recovery of economic losses in tort in consumer transactions as well as commercial transactions. State Farm Mut. Auto Ins. Co. v. Ford Motor Co., 314 N.W.2d 201, 205 (Wis. 1999); Seltzer v. Brunsell Bros., Ltd., 652 N.W.2d 806, 817 (Wis.App. 2002). -- Fraud and Misrepresentation Recognizes a narrow fraud in the inducement exception to economic loss doctrine. A party to a business transaction is under a duty to disclose facts basic to the transaction if it knows the other party is about to enter into the contract with mistaken information regarding those facts, provided that the other party could reasonably expect a disclosure of the same. Wisconsin law does not allow parties perpetrating fraud in the negotiation of contracts to hide behind their contractual remedies, provided that the fraudulent conduct induced the other party to enter into the contract. Digicorp, Inc. v. Ameritech Corp., 2003 WL 21267123 *1, *5 (Wis. 2003); Huron Tool and Engineering Co. v. Precision Consulting Serv., Inc., 532 N.W.2d 541 (1995). -- The Public Safety Exception The public safety exception to the economic loss doctrine was designed "to address special public safety concerns present in claims involving contamination by inherently dangerous substances like asbestos." Bay Breeze Condominium Ass'n, Inc. v. Norco Windows, Inc., 651 N.W.2d 738, 742

		(Wis.App. 2002), *citing* Northridge Co. v. W.R. Grace & Co., 471 N.W.2d 179 (1991).
Wyoming	Bars recovery under tort theory where plaintiff claims purely economic damages unaccompanied by physical injury to persons or other property. Continental Ins. v. Page Engineering Co., 783 P.2d 641, 649 (Wyo. 1989)	-- Other Property Continental Ins.

A

The Economic Loss Rule in Subrogation Cases

COZEN O'CONNOR

Atlanta, GA

May 10, 2007

The Economic Loss Rule
What Is It?

- A court created rule
- Involves a "product"
- Involves a contract
- Separate "tort" from contract
  - You're stuck with your contract
  - Can't sue in "tort"
- Product damages "only itself"
  - No "other property" damage
  - No personal injury

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The Restatement 3d of Torts

Damages may include economic loss, but only when one of the following is present:

- Harm to the plaintiff's person
- Harm to the person of another when harm to the other interferes with an interest of the plaintiff protected by tort law
- Harm to the plaintiff's property other than the defective product itself

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Key Considerations with Contract and Warranty Claims

- Express v. Implied Terms
- Written v. Oral Terms
- Amendments/Modifications/Limitations/ Voided Terms/Waivers
- Privity of Contract
- Disclaimers
- Do you need to prove negligence?
- If no warranty remedy, can you sue under tort theories?

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"Product" v. "Other Property"

- A structure can be a "product"
- "Other property"
  - Contents
  - Non-integral parts
  - After-market additions
  - Outside scope of contract

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Exceptions

- Building Code violation
- Public safety exception
- Sudden calamitous event
- Service transaction (*e.g.*, repair or addition)
- Lack of privity
- Professional negligence
- Tort "independent" of contract
- Fraud (actual)
- Intentional misrepresentation
- Consumer/commercial product distinction

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III

Special Issues In Managing The Large Workers' Compensation Loss

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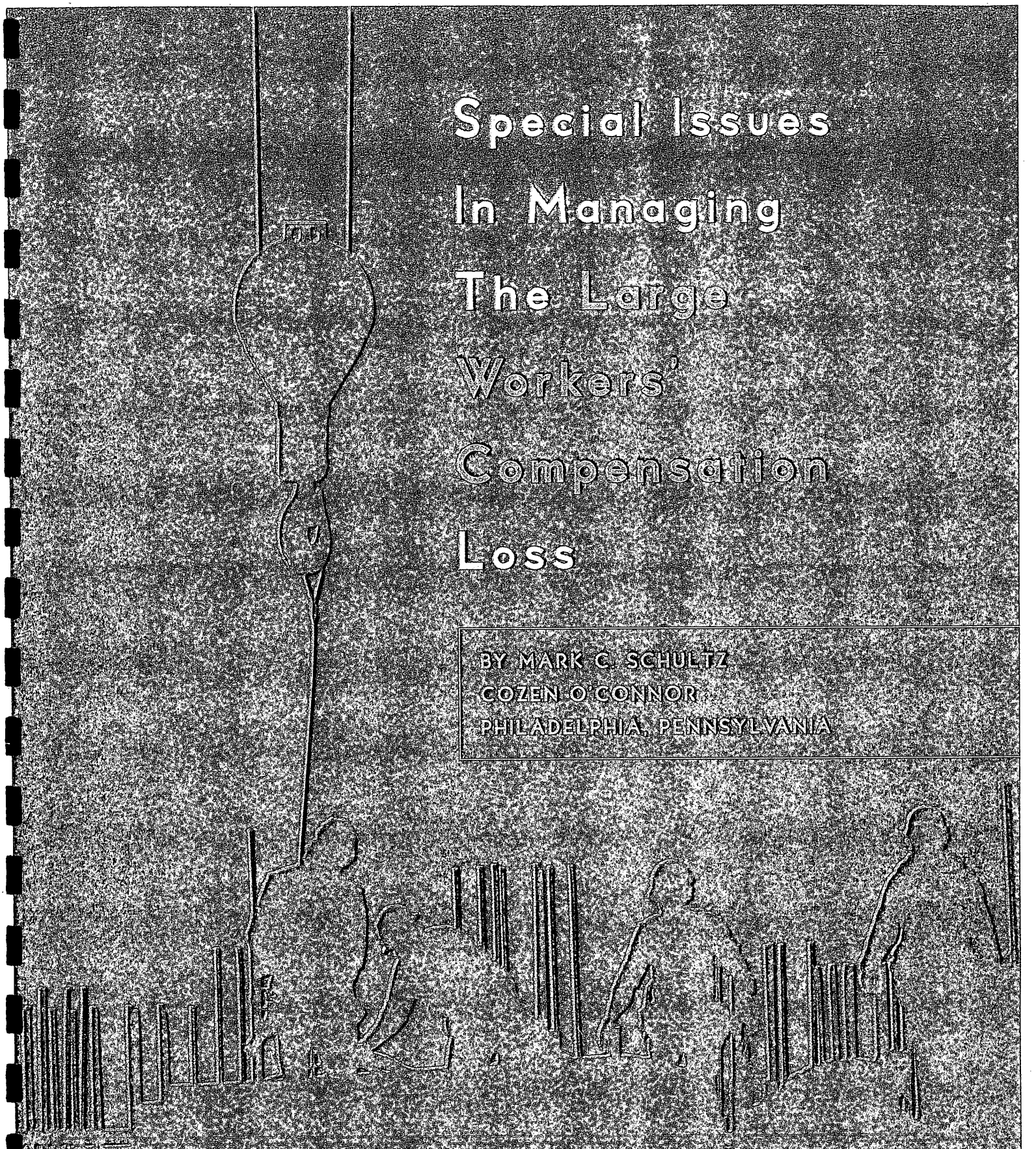


The serious work-related accident often presents challenges to a successful recovery which are infrequently encountered in other types of claims. These problems include a "bad attitude" on the part of the insured, dealing with regulatory authorities and loss prevention personnel, and the changing nature of construction sites. This article is an attempt to identify these challenges and suggest approaches for addressing them.

EDUCATING THE INSURED

The insured knows that a catastrophic workers' compensation loss can have an equally catastrophic effect on their workers' compensation insurance premiums. Where the premium is retrospectively rated, the impact is direct and the insured immediately begins paying for the loss out of its own pocket. Unfortunately, the insured often does not understand the benefit of a successful workers' compensation subrogation recovery on their premiums.

Quite to the contrary, the insured often views the subrogation investigation as an interference with their normal business operations since the investigation may tie up their resources. The recovery effort necessarily involves the cooperation of the injured worker, who may be bringing his own third party claim, and the insured therefore becomes concerned that the subrogation investigation may result in a lawsuit against the employer. The trauma of a serious injury or death at work can lead employees to blame the injured worker or themselves for the accident. This lack of sophistication can result in counterproductive behavior, or even a lack of cooperation. This can sabotage the recovery effort in its infancy.

Key employees at the insured company need to know that a successful recovery is in everyone's best interests. Depending on their premium structure, the employer may receive a direct monetary benefit when the case is resolved. Any recovery will reflect favorably on their claims experience. The insured also needs to know that they cannot be sued by their employees. In fact, in the absence of a proper indemnity agreement, with some rare exceptions, they cannot even be joined as a third party defendant. At the end of this article is a letter which can be sent to the insured to help explain the subrogation process in the workers' compensation claim.

The employer needs to understand that there is absolutely no benefit to cultivating an attitude that the employee brought the accident on himself by being careless. This attitude may be a genuine belief or a "defense mechanism" to deflect blame or relieve a guilty conscience. This is the most frequently seen obstacle to a successful recovery. The insured must understand that as far as subrogation and recovery are concerned, the injured worker and the employer are in the same boat. Since the employer and the insurance carrier are subrogated to the third party rights of the injured worker, the success of the recovery action rises and falls with the injured worker's rights. If the injured worker loses, the employer loses. Furthermore, even if the injured worker was negligent, the employer must understand that other parties may still be legally responsible and that machines have to be designed to allow for human error.

OSHA AND STATE REGULATORY AUTHORITIES

A serious on-the-job injury will often result in an investigation by OSHA, the Federal agency charged with enforcing workplace safety regulations. Many states, such as Virginia and Maryland, have their own agencies which enforce state work safety rules and investigate industrial accidents. An agency inquiry will usually involve government investigators talking to employees, reviewing records and taking photographs. The investigation can lead to a finding of OSHA violations against the insured which usually results in a fine and an order to correct a dangerous condition. OSHA has the authority to issue citations not only to the employer of the injured worker, but to the general contractor, the premises owner and to other subcontractors on the work site.

The results of an OSHA inspection can potentially damage subrogation potential. While not dispositive, the citations against the insured can influence the judge or jury in the circumstances where the findings are admissible and will usually impact settlement discussions. In states where employer negligence can defeat subrogation such as North Carolina and California, such findings can be particularly harmful. On the other hand, a finding against a party other than the insured will enhance the possibility of a successful recovery against that party. The investigative material developed by the agency is largely discoverable and can be used by the litigants in the party action to develop their case.

The insured obviously cannot control the results of the investigation, but careless statements made to agency investigators can lead to adverse findings. For example, conclusions such as "he was stupid and this whole thing was his fault," or "he should have known better; he had no reason to put his hand in there" should be avoided at all costs. The investigators should be provided facts - not opinions, guesses or conclusions. Facts concerning the conduct of third parties, such as subcontractors should be brought to the investigators' attention, as well as issues concerning machine design. This will insure that OSHA personnel have all the important facts at their disposal when they draw their final conclusions.

CONSTRUCTION SITE ACCIDENTS

Work on a construction site does not stop after a worker has been seriously injured or killed and you cannot take control of the scene as you can where there has been a large property loss. You probably will not even be able to take possession of critical evidence. There are schedules and deadlines that still must be met and many parties are

"Key employees at the insured company need to know that a successful recovery is in everyone's best interests."

involved in the construction process other than your insured. Unfortunately, the show must go on. Within a few days it may be impossible to take critical photographs of the construction site that have any relevance to the case. Walls are completed; beams, pipes and electrical conduits get covered. Subcontractors may be off the job and their employees who were important witnesses may be difficult to locate.

After a construction site accident has occurred, the appropriate expert should be engaged immediately in conjunction with a professional photographer or videographer. You cannot wait to see if the injured worker or his family employ counsel. Photographs and video taken within 48 hours of the accident can preserve your chances of a successful recovery action. Once the beams and columns have been covered, your subrogation potential may have been lost forever. The site should be canvassed to identify workers who not only may have witnessed the accident, but who may have important information about events which occurred before or after the accident. The investigator should obtain their names, addresses and telephone numbers.

DEALING WITH LOSS CONTROL/LOSS PREVENTION STAFF

Insurance companies with loss control departments will often have those departments involved in the investigation of the large workers' compensation loss. The goal in that situation is to insure that a similar incident does not occur resulting in an injury to another employee. While the goals of loss prevention are worthy, the loss prevention staff can inadvertently damage the chances of a successful recovery if they are not conscious of the implications of their actions. For example, loss prevention reports will often characterize conditions on the insured's premises as dangerous or point to the insured's practices as the "root cause" of the accident. Loss prevention may criticize the employee (often this is fueled by the insured's attitude) and blame the entire incident on the conduct of the injured worker. Loss control staff have been known to make gratuitous statements exonerating third parties such as: "there is no way this machine could have been designed to prevent this accident" or "the general contractor complied with all OSHA regulations."

Loss prevention personnel need to be mindful of the potential for recovery against a third party. The reports they generate are discoverable and the reports may lead to their depositions being taken. If they can do their job without jeopardizing the subrogation action, it is critical that they do so. Their job should not include offering unnecessary speculation or opinions concerning the cause of the accident or the liability of third parties.

WORKER'S COMPENSATION SUBROGATION: LOSS RECOVERY

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 recklessness, carelessness or indifference 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 respond to meet the financial needs of your injured employee.

Fortunately the law provides a means whereby your insurance company can seek to recover these payments made on behalf of your injured worker from the legally responsible party. It is called "subrogation." In its simplest sense, subrogation is a legal right to recover the payments from the other company who is actually legally responsible for the loss. It really just boils down to basic fairness: shouldn't the person or company responsible for the loss be the one who ultimately foots the bill?

Beyond fairness, there are important social and economic policies behind subrogation. If a wrongdoer is not made to pay for his mistakes, he has no incentive to act carefully and reasonably in the future. Society suffers because the risk of someone else being victimized by the wrongdoer is greater when he believes that there will be no cost to him. As an economic matter, the more successful we are in putting the loss where it rightfully belongs, in the hands of the wrongdoer, the greater the potential to hold down your insurance costs.

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 conducts its subrogation investigation under the guidance of subrogation attorneys. The exclusive function of these lawyers is, with your cooperation and assistance, to direct the activities of forensic consultants and investigators for the purpose of establishing cause and responsibility for an occurrence. Subrogation counsel do not become involved in adjustment of the worker's compensation claim itself, which is the exclusive province of the Claims Department acting through the assigned adjuster.

Over the years, we have learned that 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, may 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 internal investigation you may be conducting.

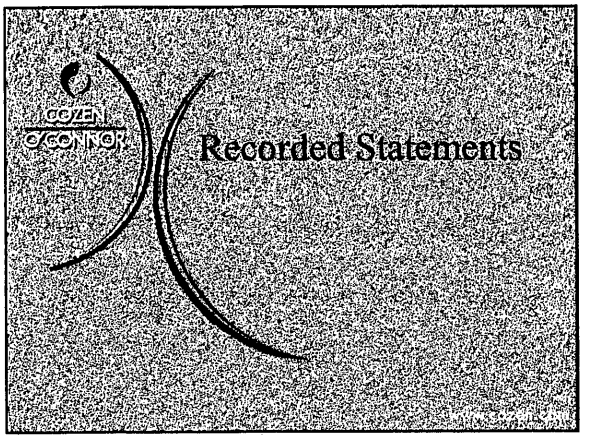
We believe it is also important to understand what our subrogation attorneys are not doing. They are not attempting to develop grounds for denial of a claim, nor is the information or documentation they request intended to affect or influence the adjustment of the claim. They are also not looking to 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 workers' 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 the reduction of premiums for retrospectively rated policies.

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.

A



Q: What gear were you in at the time of the crash?

A: Gucci sweats and Reeboks.

COZEN
O'CONNOR.

Q: Have you lived in this town all your life?

A: Not yet

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O'CONNOR.

Q: Did you blow your horn or anything?

A: After the accident?

Q: Before the accident.

A: Sure, I played for ten years. I even went to school for it.

COZEN O'CONNOR.

Recorded Statements

- The Impact of the Statement on the Third-Party Case
- Should a Recorded Statement Be Taken?
- Advice for Taking a Statement

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Impact of the Statement

- Not privileged
- Discoverable in the third-party case
- Admissible against the worker
- Will carry great weight with the jury

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Should a Statement Be Taken – Two Schools of Thought

- Yes – Preserve evidence and let chips fall where they may
- No – Too prejudicial to third-party case

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Pitfalls with Statements

- Importance of details unclear at the time
- Worker guesses at answers, tries to be helpful
- Worker hesitant about being truthful
- Worker humbly accepts blame
- Downplays seriousness of injuries

COZEN O'CONNOR.

Michael Townsend
August 4, 2005

you get off?

A. 7:00 to 3:10.

Q. How much per hour did you make?

A. $12.00, unfortunately.

Q. Did you work, well, you were scheduled to work 40 hours a week?

A. Yes, ma'am.

Q. Now, what was the date of your injury and what time of day did this occur?

A. It was June 29, I would say between -- right around 3:00 in the afternoon.

Q. This is June 29, 2005?

A. Yes, ma'am. It was the end of the day.

Q. Can you tell me in detail what happened?

A. Basically, we were running eight-inch drain lines down the hallway, an extended hallway, and we put hangers -- I guess a couple months before, some of the guys had gone ahead and run up in the ceiling, and put some hangers up from the bar joists up high, because once the dust guys ran the duct, we wouldn't be able to get back up in there. But anyway, they had gone through and had dropped rods down below the bar joists and down below where we would get to them. So when we went through, all we did was put a rod cuffing on, add a piece of rod to what they already had up, the existing rods --

Q. Can I just ask, what is a rod?

A. It's a half-inch threaded piece of rod. You can nuts up on it. It's like a bolt, but it's ten feet long.

Q. That's not the piping?

A. No, ma'am. That's what the piping hangs from. This is what caused it all, basically. Okay. The rod hangs down from the bar joists. Then you've got a

piece of 4 x 4 angle that runs from one side of the hall to the other that the piping lays on top of. That's what's holds it up in the air. The rod unwound down from the bar joists, then you've got one on one side and one on the other, and you put a piece of angle with holes in it from rod to rod, and basically, your pipe sits on top of that angle. That's basically a hanger. That's what holds the pipe in the ceiling.

Q. Okay.

A. Well, we were putting up -- we were on, I believe, maybe our tenth piece. It was the last piece we had to put up that day. And we pushed it out with two guys on a lift, one guy on a lift, one guy on the ground, and I was on a ladder. And the guy was basically doing the pipe to get it up onto the hangers, and I was on a ladder, and I was trying to -- the hangers, kind of picking up the end of it, and setting it on the angle so it wouldn't fall. I had a eight-foot ladder. The bottom of the angle was ten-foot from the floor. I had an eight-foot ladder, I could reach -- I could palm an eight-foot ceiling. So, actually, I was probably two rungs maybe, I think two rungs, or the rung that's right off the floor. I was on maybe three feet out of the lift. I was trying to pick up the end of the pipe -- I was kind of bent down, I'd pick up the end and slide it down.

Well, the last pipe when we got it up, what happened was, it rolled and basically, with the hanger set, there was no where for it to go. It couldn't fall, so that we all thought, anyway. But, it rolled to one side, and when it did, what I learned later, apparently, the rod -- the hanger rod on that one, it fell. It came down. All the pipe now down, it came down on me, and there was another guy involved. He was on down farther away from me. He ended for the sheet metal guys. I think he kind of scratched his elbow a little bit. But, basically when it came down, it was coming down on me. And the stuff's heavy. It's a couple hundred pounds a piece. I was trying to push it out of the way to keep it falling on me, and I came off the ladder. And then, I had a hold of a couple of pieces of pipe, trying to -- as it was going down with me. And I was trying to -- I was just trying to get it off of me. When I hit

the ground, I think that, personally, my weight and the weight of the pipe also, when I hit the ground -- it all happened so fast, I can't remember. I think I landed on my feet first, and then I fell to my knee and my hip. As I was laying on the ground, the pipe was still falling. I mean, it was falling everywhere. So, I was kind of just fighting it away and knocking it out of the way as it was coming down. Like I say, it happened so fast. It seemed like slow motion, but it happened so fast, to me, it was just, to me, it just seemed like a freak thing to happen.

But later on, they explained to me why. I guess that it happened. The sheet metal guy had gone through and pushed the rods up through the bar joists, which caused dealers to get hung in the bar joists. Nobody was notified about it, nobody knew about it, and I'd never been there before. It's the first time I ever worked for these -- I didn't know anything about the rods that had been put up before, so when we went down through there adding rods to it, everything was fine. But then it had been pushed up through the bar joists, and then it had been pushed up through the bar joists, I guess it finally broke those washers loose and the rods just dropped, and everything dropped. It all came down. The hangers didn't come down, but all the pipe came down.

But, personally, I don't know. I don't believe the right hangers were used to hang the rods in the first place. Because I've always been taught when you hang them, you put -- you've got clamps, you run the rod up, and then you put a nut on both sides. Had there been a nut on bottom of those rods, there would have been no way they could've been shoved up through the bar joists. That's just the way I've been taught. I've always known that, you always put a nut on the bottom, and that's the way you do it. That way, they can't be shoved up into the bar joists. Obviously, there not no nuts on the bottom of them. And they had been pushed up in the bar joists. Nobody at all could've possibly known this. Because it was to feet up in the ceiling in the dark over top of a whole bunch of dust and everything else. So it's really -- nobody could have known it. But I believe, had they been installed right, that it wouldn't have happened.

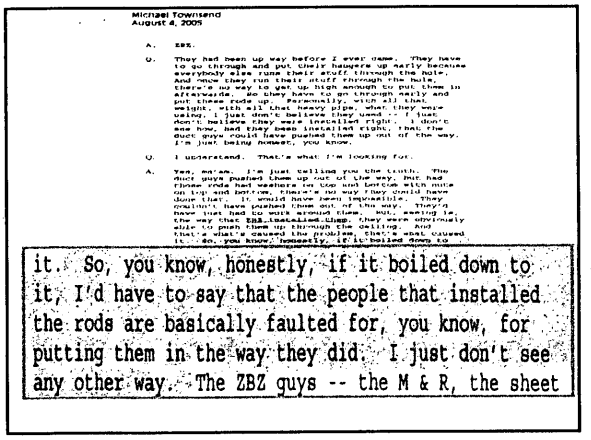
That's my personal opinion as of now. But basically, that's how it happened. Everything came down. When the weight shifted, the rods broke loose from where they had been shoved up in the ceiling and everything dropped. There was no way -- there was no time to get out of the way. I don't think no one else had it landed on my chest or my head, it would have killed me. I mean, it could've -- when it happened, happened. It could have been a lot worse. It could have hurt a lot more people, too. Cause, that was a lot of pipe that came out of the ceiling.

Q. So you think, then, that this all started because of what the sheet metal people did?

A. Well, see, the sheet metal guys pushed them up in the ceiling, and they didn't be -- pushed up into the -- they had been shoved up to the ceiling. So, personally, I believe that the hangers were actually -- believe had the hangers been put up right in the first place, there's no way the sheet metal guys could have shoved the rods up in the ceiling. And the right clamps been used and the nuts been put on bottom to tighten them up against, those bar joists, there would have been no way possible they could have shoved those rods up through there, you know. As far as whose fault it is, we're not at that point yet. We're not -- I'm not -- I'm not -- I'm not really -- it really, because personally, I don't think it could have -- it shouldn't have happened. And had those rods been put up right in the first place, which I know **can** not been rods up, had they been put up right in the first place, I don't personally believe that -- the nuts may wouldn't been able to push them up either way. But when they pushed them up out of the way, that's what caused -- it would've been impossible for them to fall completely. I -- nobody else that has ever been up between the bar joists. But had the rods been put in right and the right clamps been used, I really don't believe that -- I know they wouldn't have shoved them up in the bar joists. 'Cause they would have had nuts on the bottom, and there's no way you could have pushed them up. There's just no way. As far as, as fault goes, that's up to, I guess, between OSA and M & R. But my personal opinion is that the right hangers weren't used to begin with.

Q. Who did the hangers?

A.



Michael Townsend
August 4, 2005

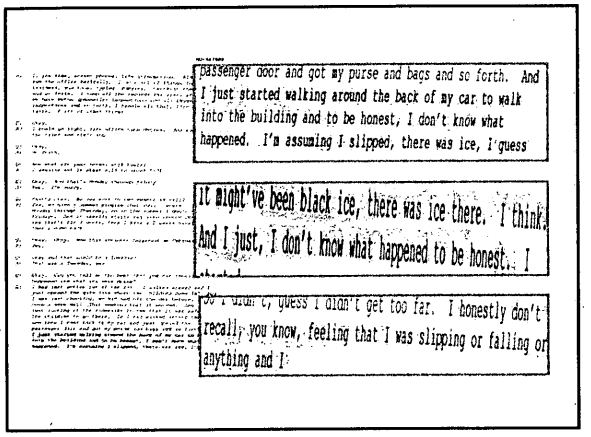
A. ZBZ.

Q. They had been up way before I ever came. They have to go through and put their hangers up early because everybody else runs their stuff through the hole. And now they run their stuff through the hole, there's no way to get up high enough to put them in afterwards. So they have to go through early and put these rods up. Personally, with all that weight, with all that heavy pipe, what they were using, I just don't believe they used -- I just don't believe they were installed right. I don't see how, had they been installed right, that the duct guys could have pushed them up out of the way. I'm just being honest, you know.

Q. I understand. That's what I'm looking for.

A. Yes, ma'am. I'm just telling you the truth. The duct guys pushed them up out of the way, but had those rods had washers on top and bottom with nuts on top and bottom, there's no way they could have done that. It would have been impossible. They couldn't have pushed them out of the way. They'd have just had to work around them, but, seeing by the way that ZBZ installed them, they were obviously able to push them up through the ceiling. And that's what's caused the problem, that's what caused it. So, you know, honestly, if it boiled down to

it. So, you know, honestly, if it boiled down to it, I'd have to say that the people that installed the rods are basically faulted for, you know, for putting them in the way they did. I just don't see any other way. The ZBZ guys -- the M & R, the sheet



passenger door and got my purse and bags and so forth. And I just started walking around the back of my car to walk into the building and to be honest, I don't know what happened. I'm assuming I slipped, there was ice, I guess

it might've been black ice, there was ice there, I think. And I just, I don't know what happened to be honest. I

do I don't, guess I didn't get too far. I honestly don't recall, you know, feeling that I was slipping or falling or anything and I

Advice for Taking Statements

- Retain Counsel in Serious Cases
- Take Notes Instead
- Give Instructions to the Witness First
- Do a Dry Run
- Stick to the Relevant Facts
- Remain Serious At All Times

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Remember what Mark Twain said:

It ain't what you don't know that gets you into trouble. It's what you know for sure that just ain't so.

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ATTORNEYS

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B

Top Ten Reasons for Mediocre Workers' Compensation Recoveries

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10

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Relying on the Plaintiff's Bar to Collect your Money

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9

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Assuming the Insured will Cooperate

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8

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Hiring the Wrong Expert

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7

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Accepting the First Loss Report at Face Value

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6

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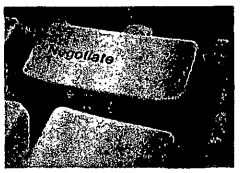
Waiting Until the End of the Case to Negotiate



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Failing to Preserve the Evidence

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Taking Recorded Statements without Counsel

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3

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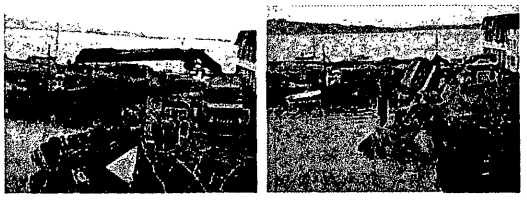
"It was a Freak Accident"



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2

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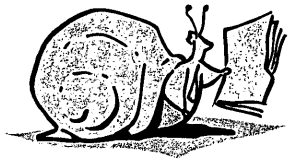
Delaying in Referral of the Claim to Counsel



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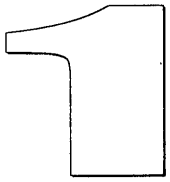

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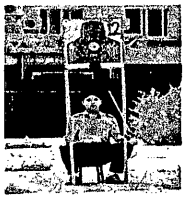
The Employee Was Negligent



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IV

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SUBROGATION LITIGATION AGREEMENTS
written and presented by:
Megan Lammon, Esquire

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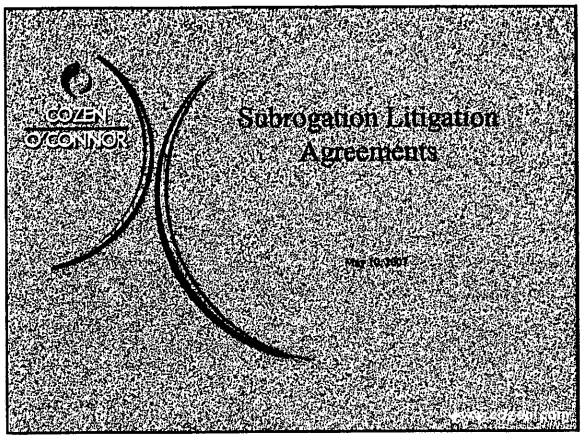

Subrogation Rights of Insurer and Insured

- When a loss occurs:
  - The insurer has a right to subrogate against a third party deemed responsible for the loss.
  - The insured also has a right to seek full compensation for its losses from the third party deemed responsible for the loss.
- And in Alabama, Georgia, Florida, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee (as well as in other states outside the southeastern US):
  - The insured is entitled to be reimbursed **first** for any recovery from a third party.
  - While the insurer is only entitled to receive any remaining balance to reimburse it for its payment to the insured.
- Which begs the question....
  - What options are available for to an insurance company pursuing a subrogation claim in view of insured's rights to recover their uninsured losses.
  - Or in other words – How do we all get along?

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So, how do we all get along?

- By Using a Subrogation Litigation Agreement – otherwise know as:
  - Loan Receipts
  - Subrogation Agreements/Subrogation Assignments
  - Pro-Rata/Joint Prosecution Agreements

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Loan Receipts

- What is It?
  - An agreement whereby the insurer extends a "loan" without interest to its insured repayable only in the event and to the extent of any net recovery that the insured may obtain from any person or entity responsible for causing a loss.
  - In other words, it is a legal fiction where, for the convenience of the insured, the insurer advances money which, even if the insured is not successful in recovering against the tortfeasor, the insurer was required to pay the insured under its insurance policy.

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Loan Receipts

- How do Loan Receipts Arise?
  - It generally involves:
    1. A loss;
    2. A claim (whether in the form of a proof of loss, or otherwise); and
    3. A payment in the form of a "loan" to an insured by his insurer which was the result of a tortuous act of a third party.
  - The result is that the insured, who is the owner of the cause of action, accepts payment for its insurer as a "loan". In exchange, the insured agrees to repay the "loan" from any recovery obtained against the responsible third party.
  - If the insured were to prosecute the cause of action following execution of the loan receipt to the exclusion of the insurer, the insurer would still retain the right to collect from the insured the amount which had been advanced under the loan receipt.

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Loan Receipts

- Does it assign the Insured's Cause of Action to the Insurer?
  - It typically does not assign the claim to the insurer - rather, it is an agreement memorializing the loan of money.
  - This is preferred because in a typical subrogation action the insurer does not want an assignment. An "assignment" is a formal transfer of rights whereby the assignee (the issuer) receives from the assignor (the insured) all that the assignor holds (the cause of action).
  - If the loan receipt only memorializes a loan, it does not assign the insured's cause of action to the insurer. This means the insured remains the real party in interest and accordingly, suit can be brought in the name of the insured. If there is an assignment, the insurance company becomes the real party in interest and suit must be brought in the name of the insurance company.

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Sample Loan Receipt

Received from XYZ Insurance Company (hereinafter referred to as "Company") the sum of $_____(Dollars), as a loan, without interest, repayable only in the event and to the extent of any net recovery the undersigned may make from any person, persons, corporation or corporations, or other parties, causing or liable for the loss or damage to the property described below, or from any insurance effected on such property, and as a security for such repayment the undersigned hereby pledges to the said Company all his, its or their claim or claims against said person, persons, corporation or corporations, or other parties, or from any insurance carrier or carriers, and any recovery thereon, and hereby delivers to said Company all documents necessary to show his, its or their interest in said property.

The undersigned covenants that no settlement has been made by the undersigned with any person, persons, corporation or corporations, or other parties against whom a claim may lie, and no release has been given to anyone responsible for such loss, and that no such settlement will be made, nor release given without the written consent of the said Company; and the undersigned covenants and agrees to cooperate fully with the said Company, to promptly present claim and, if necessary, to commence, enter into and prosecute suit against such person or persons, corporation or corporations, or other parties, through whose negligence or other fault the aforesaid loss was caused, or who may otherwise be responsible therefore, with all due diligence in his, its or their name.

In further consideration of said loan, the undersigned hereby guarantees that he, it or they are the owner(s) of said property and entitled to recover upon said claim for loss or damage thereto, and hereby appoint(s) the managers and/or agents of the said Company and their successors with irrevocable power to collect any such claim or claims, and to begin, prosecute, compromise or withdraw in his, its or their name, but at the expense of the said Company, any and all legal proceedings that the said Company may deem necessary to enforce such claim or claims, and to execute in the name of the undersigned any documents that may be necessary to carry the same into effect for the purposes of this agreement. Any legal proceedings are to be under the exclusive direction and control of said Company. The property hereinabove set forth is as follows: 123 Main Street, Somewhere, Georgia.

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Subrogation Agreements

- What are they?
  - Take on no particular form
  - Are referred to as "subrogation agreements" or "subrogation assignments"

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Subrogation Agreements

- What do they convey?
  - A complete assignment of the insured's cause of action.
  - The insured relinquishes all of his or her rights to the cause of action and the insurer is the entity which assumes the right to prosecute the cause of action in the event it desires to do so.

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Sample Subrogation Agreement

Received of XYZ Insurance Company, the sum $_____ in full settlement of all claims and demands of the undersigned for loss and damage by fire occurring on the 24th day of January, 1963, to the property described in policy no. H-277770 issued through the Decatur, Georgia agency of said company.

In consideration of and to the extent of said payment, the undersigned hereby subrogates said insurance company, to all of the rights, claims and interest which the undersigned may have against any person or corporation liable for the loss mentioned above, and authorizes the said insurance company to sue, compromise or settle in the undersigned's name or otherwise and all such claims and to execute and sign releases and acquittances and endorse checks or drafts given in settlement of such claims in the name of the undersigned, with the same force and effect as if the undersigned executed or endorsed them.

Warranted no settlement has been made by the undersigned with any person or corporation against whom claim may lie, and no release has been given to anyone responsible for the loss, and that no such settlement will be made nor release given by the undersigned without the written consent of said insurance company and the undersigned covenants and agrees to cooperate fully with said insurance company in the prosecution of such claims, and to procure and furnish all papers and documents necessary in such proceedings and to attend court and testify if the insurance company deems such to be necessary, but it is understood that the undersigned is to be saved harmless from costs in such proceedings.

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Subrogation Agreements vs. Loan Receipts

- Loan Receipts are Preferred because:
  - You can file suit in the name of the insured with a loan receipt because the insured is the real party in interest.
  - If there is a subrogation agreement, the insured assigns its rights, meaning the insurer is the real party in interest. Problems can arise:
    - As discussed, suit should be brought in the name of insurance company.
    - When pursuing causes of actions such as strict liability, other issues can arise. For example, in Georgia, only a natural person can bring a claim for strict liability. Thus, the insurer cannot bring a cause of action for strict liability. This means the subrogation agreement effectively blocked the insurer's ability to prosecute the action. *U.S. Fidelity & Guar. Co. v. J.I. Case Co.*, 432 S.E.2d 654 (Ga. App. Ct. 1993).
- Either way though, in Florida, they are necessary:
  - If the insured has not been made whole and has not executed a loan receipt or subrogation agreement, the insurer *cannot* recover any portion of the claim before the insured absent an agreement to the contrary. *Florida Farm Bureau v. Martin*, 377 So.2d 827 (Fl. 1st DCA 1979).

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Is a Loan Receipt or Subrogation Agreement Enough to Pursue the Claim?

- Not Always. Although a Loan Receipt or Subrogation Agreement provide for a right of subrogation, these documents do not address:
  - How is a recovery divided?
  - What if the assets or insurance of the third party is substantially less than the total loss?
  - Who pays the costs?
  - What if the insurer wants to settle and the insured does not? Or vice versa?
  - How are damages measured – RCV or FMV?
  - What if there is no recovery at all?
  - What if the insured and insurer disagree on litigation strategy?

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Examples When a Loan Receipt or Subrogation Agreement is Not Enough:

- A fire loss results in a $400,000.00 insurance payment and $300,000.00 in uninsured losses. The responsible third party offers you the limits of its $500,000.00 liability policy and has no other assets from which recovery may be obtained.
- Same scenario as above, except this time, the responsible third party has $1,000,000.00 in coverage. However, the third party disputes the uninsured losses and offers $400,000.00 to you and only $50,000.00 to the insured. And the third party also insists that any settlement involve all parties and completely resolve all claims.

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Solution - Joint Prosecution/Pro Rata Agreements

- What is it?
  - They are broader in scope than standard subrogation agreements or loan receipts and specifically control the relationship between counsel, the subrogating carrier and the insured.
  - Basically two parts:
    1. Agreement between the insured and insurer regarding division of recovery, costs and settlement/litigation authority.
    2. Agreement between counsel and the insured to address the formation of the attorney-client relationship.
  - Goal is to reduce or eliminate the potential for the interests of the carrier and the insured to become adverse during the recovery effort and avoid potential conflicts of interest developing for counsel.

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Joint Prosecution/Pro Rata Agreements
Elements

- Addresses all potential conflicts that could arise between the insurer and the insured, including:
  - responsibility for attorney's fees
  - non-recoverability of claimed damages
  - settlement authority
- Provides that the insured will cooperate fully with the insurer in the pursuit of a recovery
- Confirms responsibility for reimbursement of recovery expenses
  - Typically, carrier advances expenses during case, and is reimbursed out of the insured's share of recovery
  - If there is no recovery, the insured typically has no responsibility for expense reimbursement
  - "Typical" arrangement is subject to modification, depending upon insured's stake and sophistication
- Authorizes the attorney to represent the insured.

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Joint Prosecution/Pro Rata Agreements
Benefits to Each

- **Insurer**
  - Eliminates conflicts between insurer and insured.
  - Gives the insured economic incentive to cooperate wholeheartedly in recovery effort.
  - May be able to pursue recovery in the name of the insured.
  - Allows recovery of "first monies".
  - Insured will reimburse pro-rata portion of costs out of recovery.
- **Insured**
  - Expert and other out of pocket litigation costs fronted by insurer results in fairly risk free litigation.
  - Only pay pro-rata of costs after recovery.
  - Only pays attorneys' fees if there is a recovery.

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Joint Prosecution/Pro Rata Agreements
Benefits to All

- Helps to avoid disagreements during litigation that could jeopardize or delay settlement of the claim and recovery.
- Assures unified and coordinated pursuit of recovery.

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Joint Prosecution/Pro Rata Agreements
Risks to Insurer

- Getting locked into a pro-ration agreement based upon inflated or non-recoverable uninsured claims can unfairly "dilute" the carrier's fair share of the recovery, and reduce the prospects for a successful settlement

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Joint Prosecution/Pro Rata Agreements
Calculating Damages

- Agree on *recoverable* damages in the agreement.
  - The insured's right to recover damages in excess of those paid by the insurer is governed by the law of the local jurisdiction on recoverable damages, not by the total amount for which an insured could have been insured.
    - Generally, the right to recover is limited to the diminution in the fair market value of the property or the cost of replacement, whichever is less.
    - Therefore, if the insured has received payment for property losses under a replacement cost policy, but the diminution in value of the damaged property is a smaller amount, the insured may be considered to have been "made whole" under general principles of damage law even though a substantial deductible remains on the replacement cost policy.

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Joint Prosecution/Pro Rata Agreements
Calculating the "Pro Rata"

- A mathematical formula which apportions recovery from third parties between the policyholder and the insurer.
  - For example, when the insured has sustained a total loss of $100,000 and the insurer has paid the insured the limit of a $60,000 policy, a litigation agreement would provide for a sharing of any recovery, as well as expenses, on the basis of a 40 percent share for the insured and a 60 percent share for the insurer.
  - A multi-tiered approach may also be used. For instance, the agreement may provide that the insurer and policyholder apportion recovery on an 80/20 basis up to the first $250,000.00 recovered, with any amounts recovered in excess of $250,000.00 payable to the policyholder. Such an approach be used in a case where the insured had a $200,000.00 policy limit, where the insurer agreed on an adjusted loss figure of $250,000.00, yet the insured claimed items of damage in excess of $250,000.00 which the insurer did not recognize.
- Also applies to costs and in most instances will follow the same formula used to apportion recovery.

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Subrogation Agreements vs. Loan Receipts vs. Pro Rata/Joint Prosecution Agreements

- As various ramifications flow from the language employed in subrogation agreements and loan receipts, you should develop a clear understanding of the differences between the two and the language required for a loan receipt.
  - The sample loan receipt on the previous slide was tested at trial and approved by the Georgia Court of Appeals.
- You may think that a particular agreement will preserve the insurer's right to maintain a subrogation lawsuit in your insured's name, but a few misplaced words will turn a so-called loan receipt into a subrogation agreement and preclude you from being able to do so.
- As always, you should focus on potential subrogation prospects and make certain that the settlement agreement with the insured is structured to maximize the benefits which will flow to the insurer.

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