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# 2006 Midwest Subrogation Seminar

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# 2006 Midwest Subrogation Seminar

## Table of Contents

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## AREAS OF EXPERIENCE

- Subrogation & Recovery
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## EDUCATION

- J.D., Northwestern University School of Law, 1981
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## BAR ADMISSIONS

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## COURT ADMISSIONS

- United States District Court: Northern District of Illinois, including Federal Trial Bar
- United States District Court: Central District of Illinois
- United States District Court: Southern District of Illinois
- United States District Court: District of Colorado
- United States District Court: Eastern District of Wisconsin
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## MEMBERSHIPS

- Illinois State Bar Association
- American Trial Lawyers Association
- The Lake County (IL) Bar Association
- Western Loss Association
- Blue Goose International

Kevin P. Caraher is a Member of the firm and resident in Cozen O'Connor's Chicago office. He joined Cozen O'Connor in November 2004 and practices primarily in the Subrogation & Recovery department. Kevin was previously a partner at Asperger Caraher, LLC, a firm he co-founded in May 2001, after having spent 17 years at Clausen Miller P.C., a large national law firm in Chicago.

Kevin brings more than 20 years of experience in handling major subrogation claims to Cozen O'Connor, including matters involving complex multi-party property damage and business interruption litigation arising from design and construction errors, fires, explosions, structural collapses, defective products and transportation and cargo losses. A significant amount of Kevin's practice has also been concentrated in matters involving complex commercial litigation, appellate work and all forms of alternative dispute resolution.

A member of the Federal Trial Bar, Kevin has litigated a multitude of cases to judgment throughout the country in more than twenty-five states and in numerous federal district courts. He has obtained multi-million dollar judgments and settlements on losses involving petrochemical plants, warehouses, manufacturing plants, residences, restaurants, distribution centers, industrial spray dryers, and food production facilities. He has developed innovative methods for multi-party site investigation, avoidance of spoliation issues, and resolution of complex claims. He has particular expertise in matters involving complex science, engineering and technology issues.

Kevin earned his Bachelor of Arts degree in 1978 from Lawrence University and his law degree from Northwestern University School of Law in 1981 where he served as a research assistant to the Dean of the law school. Upon graduating law school, Kevin served for three years as law clerk to Justice Daniel P. Ward of the Illinois Supreme Court, where he wrote hundreds of appellate opinions. Kevin is a member of the Illinois State Bar Association, the American Trial Lawyers Association, the Lake County (IL) Bar Association, Western Loss Association and Blue Goose International. He is a former member of the Institutional Review Board of Northwestern Memorial Hospitals, the Chicago Institute of Rehabilitation and the Veterans Administration Hospital in Chicago.

Kevin is admitted to practice in Illinois and by the United States District Courts for the Northern, Central and Southern Districts of Illinois and the District of Colorado. He is also admitted to practice before the United States Court of Appeals for the Seventh and Tenth Circuits.

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## EDUCATION

- J.D., Temple University, Beasley School of Law, 2003
- B.A., *cum laude*, University of Detroit Mercy, 1998

## MEMBERSHIPS

- Association of Trial Lawyers of America

D. Christine Ducat joined Cozen O'Connor's Chicago office in August 2003 and practices with the Subrogation and Recovery Department. Prior to joining the firm, Christine served as a summer associate in Cozen O'Connor's Philadelphia office.

In 1998, Christine received her bachelor of arts degree, *cum laude,* from the University of Detroit Mercy. In 2003, she earned her law degree from Temple University Beasley School of Law, where she served on the staff of the *Temple Law Review*. While at Temple, Christine focused her studies on the art of trial advocacy. She was a member of Temple's National Trial Team and was named "Best Advocate in the Preliminary Rounds" at the 2002 National Civil Trial Competition. Christine received numerous awards for her work in trial advocacy, including two "Barrister Awards" for outstanding trial advocacy, a "Distinguished Class Performance" and "Outstanding Oral Advocacy" for her advanced trial advocacy course, and another "Outstanding Oral Advocacy" for her clinical work at the U.S. Attorney's Office. Upon graduation, Christine received the Victor A. Jaczun Award for excellence in trial advocacy, and the Leonard Segal Memorial Award for excellence in criminal law studies. Christine was also included in the 2001 edition of *Who's Who of American Law Students.*

Christine is a member of the Association of Trial Lawyers of America. She is admitted to practice in Illinois and before the U.S. District Court for the Northern District of Illinois, Northern District of Indiana and Eastern District of Michigan.

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## AREAS OF EXPERIENCE

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## EDUCATION

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- B.A., State University of New York at Oswego, 1995

## BAR ADMISSIONS

- Illinois

Jim Fabbrini joined Cozen O'Connor's Chicago office in October 2005 as an Associate in the Subrogation and Recovery Department. Prior to joining the firm, Jim was a civil plaintiff trial attorney with the Vrdolyak Law Group in Chicago.

Jim concentrates his practice in worker's compensation matters. He has experience litigating and settling personal injury, worker's compensation and third party claims. He has tried more than 65 personal injury lawsuits and conducted numerous arbitrations and mediations on behalf of both plaintiffs and defendants.

Jim earned his law degree from DePaul University College of Law in 2000 and his bachelor of arts degree from the State University of New York at Oswego in 1995, where he played varsity hockey as a goaltender. Prior to entering law school, Jim had a brief stint in the Tampa Bay Lighting's minor league organization, with the Atlanta Knights and Nashville Knights. He is admitted to practice in Illinois.

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James D. Golkow is an experienced trial lawyer who has tried numerous cases in both state and federal courts, including Pennsylvania, New York, New Jersey, Virginia, Vermont and Puerto Rico. He is Chair of the Workers' Compensation Subrogation and Recovery Group.

Mr. Golkow represents clients in complex product liability, construction accidents, premises liability, and civil litigation matters. He also specializes in matters involving medical devices and medical equipment. Mr. Golkow is National Products Liability Counsel for Pride Mobility Corporation, one of the nation's leading manufacturers of power chairs, scooters and lift chairs.

Mr. Golkow is certified to serve as an arbitrator in the Philadelphia Court of Common Pleas. He has been a speaker at a series of Continuing Legal Education seminars. Mr. Golkow has served as senior chair of a Hearing Committee for the Pennsylvania Disciplinary Board. He has also authored numerous articles on tort-related topics. He was selected a "Pennsylvania Super Lawyer" by his peers, appearing in *Philadelphia* magazine and *Pennsylvania Super Lawyers.* He is also AV peer review rated by Martindale Hubbell for his high ethical standards and legal ability.

Mr. Golkow is a 1983 *cum laude* graduate from Temple University. He earned his law degree, *cum laude,* at Delaware Law School of Widener University in 1986, where he was an editor of the *Delaware Journal of Corporate Law,* a member of the Moot Court Honor Society and Phi Kappa Phi.

Mr. Golkow is admitted to practice in Pennsylvania, New Jersey and New York, and before the U.S. District Courts for the Eastern and Middle Districts of Pennsylvania, the District of New Jersey, and the U.S. Court of Appeals for the Third Circuit. He has also achieved *pro hac vice* status in jurisdictions throughout the country.

## EDUCATION

- J.D., Delaware Law School of Widener University, *cum laude,* 1986
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## BAR ADMISSIONS

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- New Jersey
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- U.S. Court of Appeals: Third Circuit
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- Cozen O'Connor Hosts Workers' Compensation Seminar

## PUBLICATIONS

- Recouping Workers' Comp Claims

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## AREAS OF EXPERIENCE

- Aviation Litigation
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## EDUCATION

- Certificate in Advanced Business German, 1995
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## MEMBERSHIPS

- Law Society of England and Wales

Simon Jones qualified as an English solicitor in September 1995. He worked with a leading London insurance firm before joining Cozen O'Connor LLP's London office in 2001 where he is a Partner and Chair of the firm's UK Subrogation and Recovery Group.

Simon has handled a wide variety of subrogation disputes on behalf of both US and UK insurers. Simon specialises in all aspects of commercial insurance with particular emphasis on property damage subrogation claims in the High Court and associated mediation.

In conjunction with his colleagues in London and the US, Simon is able to provide advice and dispute resolution services on a full range of domestic and international subrogation matters. He is fluent in French.

Simon is an Honorary Legal Advisor at the Citizens' Advice Bureau in London.

**Michelle E. McBride, Esq.**

Michelle McBride is an attorney with the Chicago office of LexisNexis Applied Discovery. Ms. McBride's work includes initiatives designed to educate legal professionals about the evolving law and practice of electronic discovery. Prior to joining Applied Discovery, Ms. McBride practiced in Chicago where her work included commercial litigation, transportation litigation, medical malpractice and aviation litigation.

Ms. McBride is a frequent author and presenter on the topic of electronic discovery. She recently published, "Avoiding Technical Difficulties: How to Safely Copy Data for Use in E-Discovery," in the CBA Record and presented, "Managing Electronic Discovery Effectively" for the Chicago Bar Association.

Ms. McBride is a member of the American Bar Association, Association of Trial Lawyers of America, the Illinois Trial Lawyers Association and the Chicago Bar Association. She received a J.D. from Loyola University School of Law in Chicago and a Bachelor of Arts from the University of Michigan.

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- Chicago Bar Association
- Illinois Trial Lawyers Association

Anthony J. Morrone joined the Firm's Chicago office in September 2002 and focuses his practice on subrogation and recovery matters. Prior to joining Cozen O'Connor, Anthony was an associate with William J. Sneckenberg & Associates, Ltd. in Chicago.

In 1996, Anthony received his Bachelor of Science degree in economics from the University of Illinois, Urbana. He received his law degree in 1999 from The John Marshall Law School.

Anthony is a member of the Chicago and Illinois Bar Associations and the Illinois Trial Lawyers Association. He is admitted to practice in Illinois and before the United States District Court for the Northern District of Illinois.

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## BAR ADMISSIONS

- Ontario Bar

## MEMBERSHIPS

- Advocates' Society
- Canadian Defence Lawyers
- Defence Research Institute
- Toronto Lawyers Association

## COURT ADMISSIONS

- Ontario Court of Appeal
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- Supreme Court of Canada

Brett Rideout joined the firm as an Associate in May 2005.

Brett has experience in litigating matters at the Superior and Divisional Courts of Ontario, representing clients on a broad range of insurance matters, including fraud and arson defenses, products liability and property insurance claims.

Brett now focuses his practice on subrogation and recovery actions. He has successfully obtained both Anton Piller orders and Mareva Injunctions on behalf of the firm's recovery clients.

A graduate of the University of Western Ontario, Brett was called to the Ontario Bar in February 2001. He is a member of the Advocate's Society, Toronto Lawyers Association, Canadian Defence Lawyers and Defence Research Institute.

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## AREAS OF EXPERIENCE

- Bad Faith Litigation
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## EDUCATION

- J.D. Temple University, *cum laude,* 1984
- B.A. LaSalle University, *magna cum laude,* 1980

## MEMBERSHIPS

- American Bar Association
- Defense Research Institute
- ABA Tort & Insurance Practice Section

Daniel Theveny is a Member of the firm who began his practice with Cozen O'Connor's Philadelphia office in 1984, where he concentrated in insurance defense and insurance coverage matters, particularly first-party property issues. However, Dan has spent most of his career in Cozen O'Connor's Northwest Regional Office in Seattle, where he is the Office Managing Partner. His experience includes all aspects of insurance-related issues, including first party insurance coverage disputes and, particularly, property subrogation matters. He is also the head of the subrogation practice unit in the Seattle office.

Dan has litigated numerous first party coverage claims and subrogation claims, including subrogation claims involving complex product liability and advanced theories of recovery. His extensive litigation experience includes numerous mediations, arbitrations and jury trials. Dan has also been a frequent lecturer on insurance-related coverage, liability and recovery issues.

Dan graduated *magna cum laude* from LaSalle University in 1980, and earned his law degree, *cum laude*, at Temple University School of Law in 1984.

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*written and presented by*

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## Sovereign Immunity in the Midwest

### I. Introduction

When evaluating subrogation claims, you may sometimes come to the conclusion that a public entity or governmental agency bears responsibility for the loss. However, suing the government is not always a readily available remedy. Specifically, the doctrine of sovereign immunity, or a progeny thereof, will likely play a significant role. The rationale for sovereign immunity stems from early English law, which provided that "the King can do no wrong." Although this doctrine has been largely limited and qualified in most jurisdictions, all states still retain at least some form of governmental immunity. In fact, the law in most jurisdictions provides that government officials still enjoy immunity from liability in connection with performance of their discretionary or governmental acts. This distinction is usually in contrast to liability that stems from the performance of a proprietary or ministerial act by a government official. Historically, the distinction and contrast between these acts has been very complicated, and subject to varying case law interpretation. In summary, the extent and degree to which different states codify their version of governmental immunity varies significantly; however, most states adopt guidelines analogous to one or more "schools of thought" on the issue.

Typically, most jurisdictions will provide government employees with immunity for negligent acts performed while carrying out governmental functions. However, gross negligence or willful and wanton activity is usually removed from the purview of immunity and is typically actionable. Remember that proving willful and wanton conduct is extremely difficult and the conduct must be egregious, if not intentional. The other widely accepted rationale implemented to protect government agencies and employees from liability is the public duty doctrine.

Generally, to prove negligence one must establish four key elements: 1) a duty; 2) a breach of that duty; 3) proximate cause between that duty and the injury; and 4) injury or damages. The public duty doctrine acts to negate the essential "duty" element, which results in a failure to establish a *prima facie* case against the government employee. The rationale behind the public duty doctrine is that the government and government employees owe a duty to the public as a whole, and not to any one individual.

Additionally, most jurisdictions have adopted various notice requirements in the event a person intends to present a claim against a government entity or official. Many times these notice requirements are strictly construed and provide only a short time frame within which to notify the entity of the existence of a potential claim and, in some cases, may even shorten the statutes of limitations periods for filing a lawsuit. The policy for the shortened time period is to provide an adequate opportunity for an investigation and for prompt settlement of meritorious claims.[1] Many jurisdictions also have a "cap" or "ceiling" on the award of damages, thereby statutorily limiting the potential exposure of a particular government entity or official. Most jurisdictions also have statutes preventing punitive damages from being awarded against the government.

This presentation is intended to assist you in exploring the rationale of government immunity by reference to the latest Illinois case law on the subject. Additionally, it will provide you with a brief summary of the status of government immunity in the surrounding jurisdictions. This presentation will also include a summary of the various statutory caps on damages and notice requirements within these jurisdictions. Because large loss subrogation often involves fires, this paper focuses on the liability of state officials and agencies in the context of fire

[1] *Panko v. Cook County,* 42 Ill.App.3d 912, 356 N.E.2d 859 (1st Dist. 1976).

protection. It is important to note that many states, cities, counties, and municipalities have enacted legislation that impact the topics discussed in this paper and may apply differently depending on the type of government entity being pursued. Therefore, it is imperative to check both local and state law specific to the target agency in order to properly protect your subrogation claims.

### A. Governmental Immunity in Illinois

Illinois courts formally abolished the establishment of sovereign immunity in 1959.[2] However, in 1965 the Illinois General Assembly enacted the Local Governmental and Governmental Employees Tort Immunity Act (the "Act"), which protects specific local public entities and employees from liability arising from the operation of government.[3] Essentially, the Act provides a list of government units and functions that enjoy immunity from liability by absolving them of a "duty", thereby removing an element essential to proving negligence.[4] In that sense, the Act is almost an interweaving of the public duty doctrine and traditional government immunity. Unless an immunity provision is specifically applied to a government entity, municipalities are liable in tort to the same extent as private parties.[5] Fire departments and their employees are included in this category as an immune public entity, which likely has the most application to the practice of large loss property subrogation. [6]

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[2] *Molitor v. Kaneland Community Unit District,* 18 Ill.2d 11, 163 N.E.2d 89 (1959).
[3] 745 ILCS 10/5-201.
[4] *Barnett v. Zion Park District,* 171 Ill.2d 378, 665 N.E.2d 808 (1996).
[5] *Id.*
[6] 745 ILCS 10/5-102. Failure to Supress or contain fire; 745 ILCS 10/5-103. Condition of fire protection or fire fighting equipment or facilities; acts or omissions

### 1. A Case Study of Government Immunity Applied to Fire Departments and Personnel

Illinois specifically grants government immunity to a "public entity" that fails to establish a fire department or provide any fire protection whatsoever.[7] Therefore, if a government entity chooses not to establish a fire department, for whatever reason, it cannot be held liable for any harm that results from that decision.[8] However, if a public entity chooses to undertake the obligation and establish a fire department, two (2) immunity provisions apply.[9] These provisions dichotomize the scope of government immunity and the circumstances under which it applies.

First, 745 ILCS 10/5-102 appears to apply to provide blanket immunity to the fire department if it fails to extinguish a fire. Conversely, 745 ILCS 10/5-103(b) provides an exception to blanket immunity under certain circumstances. Specifically, this section provides that a public employee acting within the scope of their employment in fighting a fire may be liable for injuries if the conduct giving rise to the injury is willful and wanton. On its face, it appears that an injured party can recover for the willful and wanton conduct of fire departments and their personnel. However, Illinois courts have been reluctant to deem such actions as willful and wanton, no matter how egregious, and have consistently failed to apply 5-103(b) to fire departments in general.

In one case, a union of firefighters were on a labor strike but were ordered by a court to tend to fires in their area.[10] Despite the court injunction, the firefighters refused to attend to a

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[7] 745 ILCS 10/5-101.
[8] *Pierce v. Village of Divernon,* 17 F.3d 1074, 1077 (7th Cir. 1994).
[9] 745 ILCS 10/5-102; 745 ILCS 10/5-103.
[10] *Jackson v. Chicago Firefighters Union, Local No. 2,* 160 Ill.App.3d 975, 513 N.W.2d 1002 (1st Dist. 1987).

fire and, as a result, the plaintiffs suffered damages and sued.[11] The Illinois Appellate Court refused to apply a general willful and wanton exception to the immunity provision and held that fire departments enjoy blanket immunity under 5-102.[12] This case provides fire departments with a strong argument for not applying the willful and wanton exception to their statutory immunity. Interestingly, however, is the fact that this case did not directly address the willful and wanton exception articulated in 745 ILCS 10/5-103(b).

The willful and wanton exception of 745 ILCS 10/5-103(b) was recently considered by a federal court applying Illinois law in a property subrogation claim.[13] In *Atlantic Mutual,* a fire occurred in relation to work performed at the insured's home by Chicago Diversified Products ("Diversified"). The City of Winnetka Fire Department responded and extinguished the fire. Approximately two (2) days later, the fire rekindled and caused considerably more damage. The second fire was caused by smoldering insulation that the firefighters failed to extinguish and/or remove. The insurer, Atlantic Mutual, pursued a subrogation lawsuit against Diversified for recovery of monies paid in connection with the fire and resulting damages. Diversified, in turn, brought a third-party action for contribution against the Winnetka Fire Department, claiming negligence and willful and wanton conduct in connection with its failure to adequately extinguish the fire.

The Federal Court for the Northern District of Illinois, interpreting and applying Illinois law, dismissed the Winnetka Fire Department as a party defendant.[14] The Court concluded that the Winnetka Fire Department was immune from liability for its failure to adequately extinguish

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[11] *Id.*
[12] *Id.*
[13] *Atlantic Mutual Insurance Co. v. Chicago Diversified Products, Inc.*, 2002 U.S. Dist LEXIS 5391.
[14] *Atlantic Mutual,* 2002 U.S. Dist. LEXIS 5391.

the fire pursuant to 745 ILCS 10/5-102, even if it could be established that the fire department's actions were willful and wanton.[15] Furthermore, the Court discussed the willful and wanton exception of 5-103(b), and held that it does not apply as a blanket exception to the fire department as a whole.[16] Rather, the Court stated that 5-103(b) "permits a suit when the firefighter, while attempting to put out a fire, willfully and wantonly causes an injury," whereas 5-102 "precludes a suit no matter what the level of the firefighter's or fire department's intent."[17] The Court shed light on the distinction by citing to a case where a firefighter lost control of the hose, which struck a bystander, and placing that situation within the context and scope of 5-103(b).[18] Although this decision is not binding on Illinois State Courts, it presents an extremely persuasive precedent.

In Illinois, fire departments are granted wide latitude and general immunity in the performance of their firefighting duties. For subrogation purposes, pursuing the fire department for failing to respond to a fire, failing to extinguish a fire, causing excessive damage, among others, is generally not a feasible avenue to recovery. Even if the facts suggest that the injury was caused by a single employee while engaged in firefighting duties, proving that he or she acted in a willful and wanton manner presents an extremely high standard as a prelude to recovery. Please remember that certain Illinois governments and their employees are protected by this governmental immunity doctrine, unless they specifically consent to be sued. Also

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[15] *Id.* 2002 U.S. Dist LEXIS at 8.
[16] *Id.*
[17] *Id.*
[18] *Stubblefield v. City of Chicago,* 48 Ill.2d 267, 269 N.E.2d 504 (1971).

included among the protected class are the State of Illinois and its employees,[19] police departments,[20] and any official acting with discretion or in making policy determinations.[21]

### 2. Notice Requirements and Liability Caps

In Illinois, proper and timely notice of a potential lawsuit must be given to a government entity before filing a lawsuit. The notice requirement is strictly adhered to and is intended to ensure that the governmental entity is given an adequate opportunity to investigate and review potential lawsuits within a reasonable time of their occurrence.[22] In Illinois, the statute of limitations for filing a civil lawsuit for property damage based in tort is five (5) years.[23] However, when filing a property damage lawsuit against a government agency, the action must be brought within one (1) year of the date the injury or damage occurred or the cause of action accrued.[24] Illinois does not have a statutory liability cap limiting the amount that can be recovered against a government entity.

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[19] 745 ILCS 5/1
[20] 745 ILCS 10/2-202
[21] 745 ILCS 10/2-201.
[22] *Panko v. Cook County,* 42 Ill.App.3d 912, 356 N.E.2d 859 (1st Dist. 1976).
[23] 735 ILCS 5/13-205.
[24] 745 ILCS 10/8-101.

## II. Sovereign Immunity throughout the Midwest

### A. Indiana

#### 1. Governmental Immunity

The Indiana Tort Claims Act ("ITCA") applies to all "political subdivisions," which include virtually every local government entity, i.e., towns, cities, counties, townships, municipal corporations, etc.[25] The ITCA acts to shield government entities and government employees from liability if a loss occurs while acting within the scope of their employment.[26] Among the particular functions listed by the ITCA as immune from liability, the most notable functions involve the performance of any administrative proceeding, discretionary functions, and negligent building inspections.[27] How a fire department fights a fire is a discretionary function that entitles the department to immunity for losses related to the particular strategies it used.[28] An example of a strategy under the discretionary function includes the decision of when to leave the scene of the fire. The question of whether the fire department may be held liable for losses not related to the strategies it employed while fighting the fire is decided on a case by case basis.[29]

Indiana also recognizes the public duty doctrine and will not impose liability upon a fire department if the duty to the injured party is "in no way different from its duty to any other citizen."[30] A fire department's attempt to extinguish a fire is "made in response to its general

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[25] Ind. Code § 34-13-3-22; Ind. Code § 34-6-2-110.
[26] Ind. Code § 34-13-3-3.
[27] Ind. Code § 34-13-3-3(6), (7), and (12), respectively.
[28] *City of Hammond v. Cataldi,* 449 N.E.2d 1184 (Ind.Ct.App. 1983).
[29] *Willis v. Warren Township Fire Department,* 650 N.E.2d 321 (Ind.Ct.App. 1995).
[30] *Willis v. Warren Township Fire Department,* 672 N.E.2d 484, 486 (Ind.Ct.App. 1997).

duty to protect the safety and welfare of the public," and therefore falls under the protection of the public duty doctrine.[31]

### 2. Notice Requirements and Liability Caps

The ITCA requires that notice of a claim be filed with the governing body of the particular political subdivision, as well as the Indiana political subdivision risk management commission within 180 days after the loss occurs.[32] The time period for filing notice is extended to 270 days from the date of loss when pursuing the state or a state agency.[33] The notice must include a brief statement of facts and circumstances giving rise to the claim, the extent of the loss, the time and place, name of parties involved, amount of the claim, and residence of the claimant both at the time of the loss and at the time of filing the notice.[34] Within 90 days of receiving notice, the proper authorities must either accept or deny the claim.[35] A claim must be officially denied before a lawsuit can commence against a government agency.[36]

Indiana has a liability cap of $300,000 if the claim accrued before January 1, 2006; $500,000 if accrued after January 1, 2006; and $700,000 if accrued after January 1, 2008.[37] Additionally, there is a $5 million cap for all causes of action arising from a single occurrence.[38] Punitive damages are not recoverable against the State of Indiana or any local government agency.[39]

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[31] *City of Hammond v. Cataldi,* 449 N.E.2d 1184, 1188 (Ind.Ct.App. 1983).
[32] Ind. Code § 34-13-3-8.
[33] Ind. Code § 34-13-3-6(a).
[34] Ind. Code § 34-13-3-10.
[35] Ind. Code § 34-13-3-11.
[36] Ind. Code § 34-13-3-13.
[37] Ind. Code § 34-13-3-4(a)(1).
[38] Ind. Code § 34-13-3-4(a)(2).
[39] Ind. Code § 34-13-3-4(b).

## B. Iowa

### 1. Governmental Immunity

In 1964 Iowa eliminated the blanket defense of sovereign immunity by adopting the Iowa Tort Claims Act ("ITCA").[40] The ITCA retains government immunity for particularly designated government bodies only. Therefore, the presumption in Iowa is of liability; immunity is the exception.[41] Notable exceptions are emergency response services, failure to discover a latent defect during a building inspection, and performance of discretionary functions.[42] Iowa courts have held that city fire departments are immune under the "emergency response" exception for injuries that occurred while responding to fires.[43] It should be noted that in one case decided by the Iowa Supreme Court, the negligence of firefighters in allowing a fire to rekindle was specifically excluded from this immunity and deemed actionable under a traditional negligence theory.[44]

### 2. Notice Requirements and Liability Caps

The typical statute of limitations in Iowa for property damage tort claims is five (5) years.[45] However, when pursuing a lawsuit against a government agency, the action must be filed within six (6) months.[46] However, if written notice, identifying the time, place, circumstances and amount sought, is given within 60 days of the incident, the statute of

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[40] Iowa Code § 669.4.
[41] *Graber v. City of Ankney,* 656 N.W.2d 157 (2003).
[42] Iowa Code § 670.4(3), (6), (11).
[43] *Adams v. City of Des Moines,* 629 N.W.2d 367 (2001); *Kershner v. City of Burlington,* 618 N.W.2d 340 (2000).
[44] *Menke Hardware, Inc. v. City of Carroll,* 474 N.W.2d 579 (1991).
[45] Iowa Code § 614.1(4).
[46] Iowa Code § 670.5.

limitations is extended to two (2) years.[47] The only damages cap relates to punitive damages, which are not allowed under the ITCA.[48]

### C. Michigan

#### 1. Governmental Immunity

Michigan government agencies and employees enjoy blanket tort immunity for losses incurred while engaged in the discharge of a government function.[49] Although not specifically delineated by statute, immunity has been applied to fire departments carrying out their necessary functions.[50] There is, however, a gross negligence exception to the general rule giving immunity to government employees.[51] Specifically, the Michigan Supreme Court abolished application of the public duty doctrine to all government agencies *except* for police officers carrying out police functions.[52] The Court noted that the traditional government immunity statute already provides "government employees with significant protections from liability" and to apply the additional protection of the public duty doctrine would be unwarranted.[53]

#### 2. Notice Requirements and Liability Caps

Michigan's statute of limitations for a typical property damage claim is three (3) years.[54] However, the notice of claim or the filing of an action against a government agency or employee for personal injury or property damage must take place within six (6) months of the date of the

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[47] *Id.*
[48] Iowa Code § 670.4(5).
[49] Mich. Comp. Laws § 691.1407.
[50] *Omelenchuk v. City of Warren,* 466 Mich. 524, 647 N.W.2d 493 (2002).
[51] Mich. Comp. Laws § 691.1407(2)(c).
[52] *Beaudrie v. Henderson,* 465 Mich. 124, 631 N.W.2d 308 (2001).
[53] *Id.* at 134, 631 N.W.2d at 312.
[54] Mich. Comp. Laws § 600.5805(10).

occurrence.[55] For all other claims the claimant is required to give notice within one (1) year of accrual.[56] The notice must set forth the time, place and detailed account of the occurrence, and must be signed by the claimant.[57] Michigan does not have any statutory liability caps when suing a government agency.

### D. Missouri

#### 1. Governmental Immunity

Missouri recognizes both a statutory government immunity privilege and the public duty doctrine.[58] Generally, municipalities are not liable in tort for damages arising from the performance of government functions.[59] Specifically, municipalities bear no responsibility for injuries that occur as a result of acts or omissions during the performance of firefighting services.[60] The public duty doctrine applies to fire departments in Missouri, and the fire department and its firefighters owe no particular duty to private parties.[61] The policy driving the broad protection of government entities and employees via the application of sovereign immunity and the public duty doctrine is to promote "effective administration of public affairs by removing the threat of personal liability from those officials who must exercise their best judgment in conducting the public's business" and to "protect officials from second guessing."[62]

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[55] Mich. Comp. Laws § 600.6431(3).
[56] Mich. Comp. Laws § 600.6431(1).
[57] Mich. Comp. Laws § 600.6431.
[58] *Pace v. Pacific Fire Protection District,* 345 S.W.2d 7 (Mo.App. 1997).
[59] Mo. Rev. Stat. § 537.600; *Theodoro v. City of Herculaneum,* 879 S.W.2d 755 (Mo.App. 1994).
[60] *Claxton v. City of Rolla,* 900 S.W.2d 635 (Mo.App. 1995).
[61] *Id.* at 636.
[62] *Pace v. Pacific Fire Protection District,* 945 S.W.2d 7, 10 (Mo.App. 1997).

### 2. Notice Requirements and Liability Caps

Missouri does not have any specific notice requirements that govern suing a government agency. The statute of limitations for filing any claim based in tort for property damage is five (5) years.[63] Missouri does have a damages cap of $2 million for all claims arising out of the same occurrence and a $300,000 limit for any single individual from a single occurrence.[64] Additionally, Missouri does not allow punitive or exemplary damages to be awarded against a government entity.[65]

## E. Wisconsin

### 1. Governmental Immunity

Wisconsin acknowledges government immunity for both state and local agencies and its employees.[66] The general rule is that a public employee is immune from liability for acts performed within the scope of their employment or official duties.[67] Furthermore, a public officer or employee is immune for discretionary acts.[68] Three exceptions exist to the general rule of immunity: 1) willful and wanton activity; 2) negligent performance of a ministerial task; and 3) if the employee or official is aware of a known and compelling danger that creates a duty to act.[69] Although these exceptions appear to allow a relatively broad based application for liability, the courts remain reluctant to qualify a public officer's actions under any of the

---

[63] Mo. Rev. Stat. § 516.120.
[64] Mo. Rev. Stat. § 537.610(2).
[65] Mo. Rev. Stat. § 537.610(3).
[66] Wis. Stat. § 893.80; Wis. Stat. § 893.82.
[67] *Mellenthin v. Berger,* 265 Wis.2d 575, 666 N.W.2d 120 (2003).
[68] *Barillari v. City of Wilwaukee,* 194 Wis.2d 247, 533 N.W.2d 759 (1995).
[69] *Id.*

available exceptions to immunity. This trend is explained by the underlying public policy to protect officials on the premise that they should be "free to perform their responsibilities, using their experience, training, and good judgment, without also fearing that they or their employer could be held liable for damages from their [conduct]."[70] Therefore, Wisconsin Courts will use virtually any excuse to find that these exceptions do not apply.

### 2. Notice Requirements and Liability Caps

Wisconsin requires that notice of a claim be made within 120 days of the date of the occurrence or event giving rise to the potential claim.[71] The statute requires written notice of the circumstances to be served on the proper agency within the prescribed time frame. Strict adherence is required, otherwise the claim is barred.[72] However, an exception does exist if the agency had actual notice of the claim and the claimant can prove to a court that the government agency was not prejudiced by the lack of formal notice.[73] Typically, the statute of limitations for civil property damage claims in Wisconsin is six (6) years.[74] However, when suing a government agency, suit must be filed within three (3) years, calculated from the date notice is given to the particular agency.[75] In theory, if proper notice was given on the last possible day, suit can be filed within three (3) years and 120 days from the date the cause of action accrues.[76]

---

[70] *Id.* at 262, 533 N.W.2d at 765.
[71] Wis. Stat. § 893.80(1)(a).
[72] *Inx International Ink Co. v. Delphi Energy & Engine Management Systems,* 943 F.Supp. 993 (E.D. Wis. 1996).
[73] Wis. Stat. § 893.80(1)(a).
[74] Wis. Stat. § 893.52.
[75] Wis. Stat. § 893.70.
[76] *Colby v. Columbia County,* 202 Wis.2d 342, 550 N.W.2d 124 (1996).

Wisconsin observes two (2) different liability caps when suing a fire department or other public entity. Generally, the cap is $50,000; however, if the fire department is organized under a different statutory scheme (specifically Wis. Stat. ch. 213), the cap is $25,000.[77]

## F. Federal Government

### 1. Government Immunity

Tort claims against the federal government are governed by the Federal Tort Claims Act ("FTCA"), 28 USC §§ 1346, 2671-2680. The FTCA broadly states that the United States shall be liable for torts to the same extent as a private individual under similar circumstances. However, 28 USC § 2680 grants the federal government immunity for discretionary acts, and for acts based on the execution of statutes or regulations. The statute also grants immunity in a number other situations.

### 2. Notice Requirements and Liability Caps

28 USC § 2401 governs both notice requirements and the statute of limitations for tort actions against the federal government. Specifically, this statute requires that written notice of a claim be presented to the appropriate federal agency within two (2) years after the claim originates. The claimant must thereafter file suit within six (6) months from the date of mailing of the notice of final denial of the claim by the agency to which it was presented. If no formal denial is issued by the federal agency within six (6) months following service of the notice of claim, the claimant may deem the lack of a response as a denial for purposes of this section and commence with suit. The federal government has no statutory liability caps for tort actions.

---

[77] Wis. Stat. § 893.80(3).

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# What Recovery Personnel Need to Know About Electronic Discovery

*written and presented by*
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# What Recovery Personnel Need to Know About Electronic Discovery

## The Fourth Annual Cozen O'Connor Midwest Subrogation Seminar

## May 4, 2006



LexisNexis Applied Discovery

# Presenters

Kevin Caraher
Cozen O'Connor – Chicago

Michelle McBride
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## Why Does It Matter?

- About 31 billion emails are sent daily, on the Internet and elsewhere, a figure which is expected to double by 2006. The average Email is about 59 kilobytes in size, thus the annual flow of emails worldwide is 667,585 terabytes.
- -- IDC Email Usage Forecast and Analysis (2003)
- (http:/www.sims.berkeley.edu/research/products/how-much-info.com



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## Why Does It Matter?

- 93% of all corporate documents are created electronically.
- *The World Wide Web* contains about 170 terabytes of information on its surface; in volume this is seventeen times the size of the Library of Congress print collections.
- -- Source: Lyman, P. and Varian, H. "How Much Information?" (http:/www.sims.berkeley.edu/research/products/how-much-info.com (2003)



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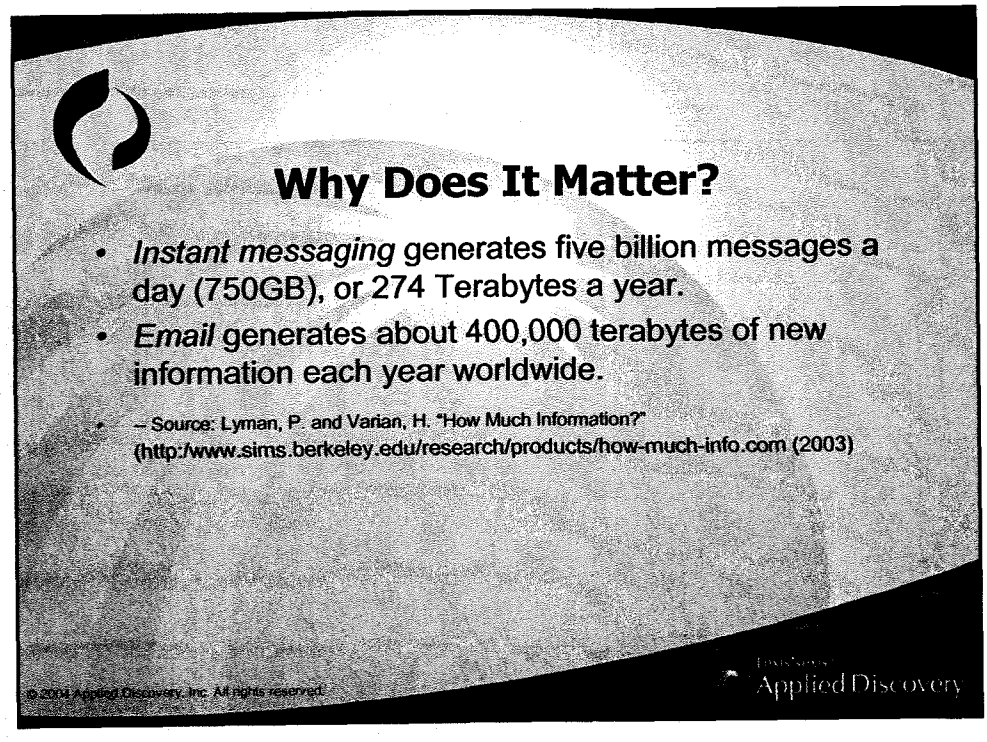
Why Does It Matter?
• *Instant messaging* generates five billion messages a day (750GB), or 274 Terabytes a year.
• *Email* generates about 400,000 terabytes of new information each year worldwide.
– Source: Lyman, P. and Varian, H. "How Much Information?" (http:/www.sims.berkeley.edu/research/products/how-much-info.com (2003)
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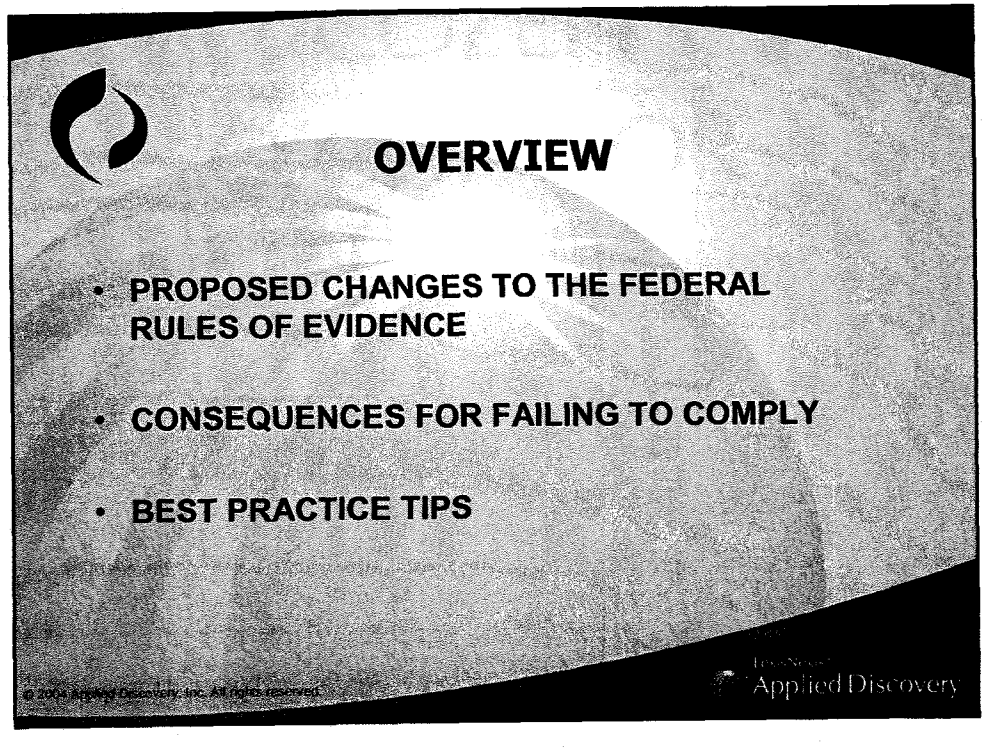
OVERVIEW
• PROPOSED CHANGES TO THE FEDERAL RULES OF EVIDENCE
• CONSEQUENCES FOR FAILING TO COMPLY
• BEST PRACTICE TIPS
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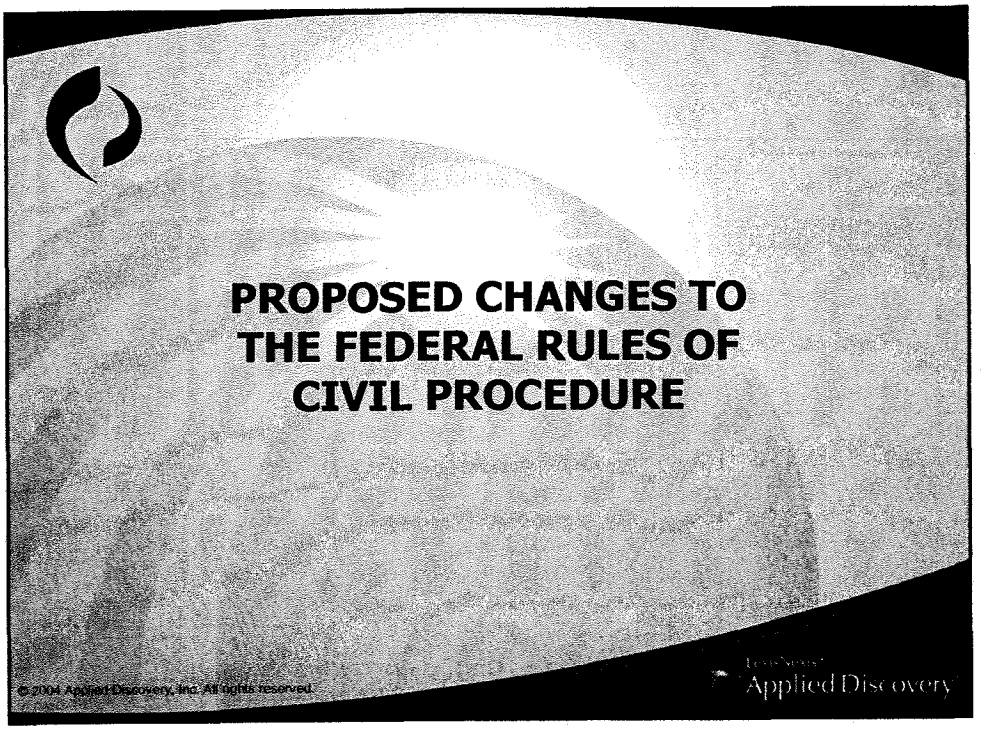
PROPOSED CHANGES TO
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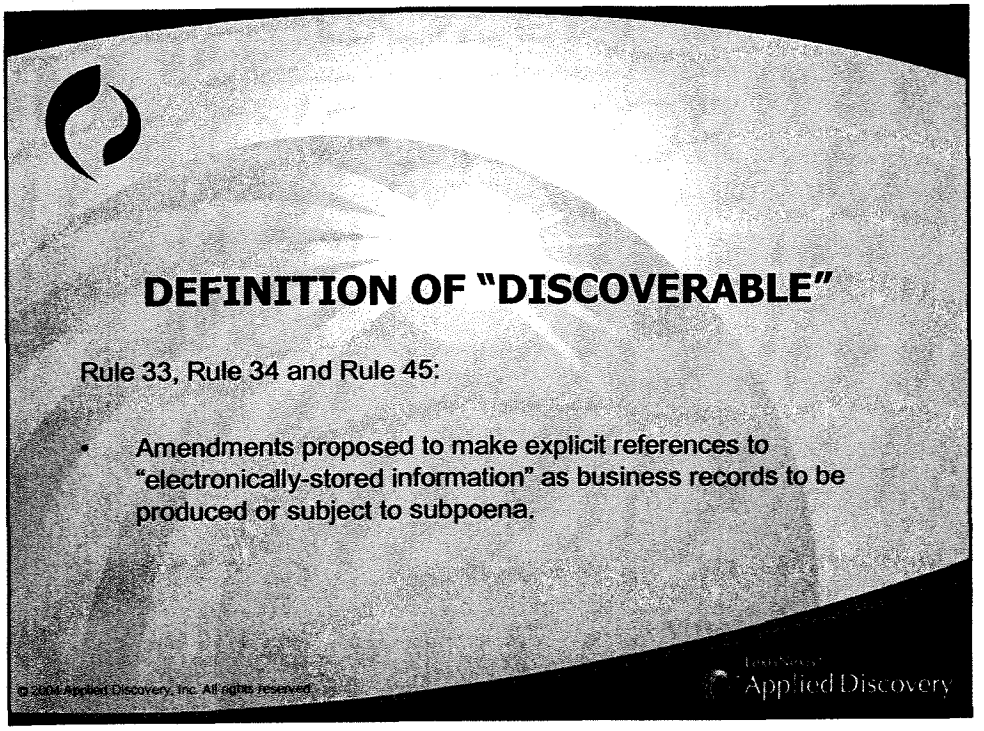
DEFINITION OF "DISCOVERABLE"
Rule 33, Rule 34 and Rule 45:
• Amendments proposed to make explicit references to "electronically-stored information" as business records to be produced or subject to subpoena.
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## "MEET & CONFER" AMENDMENTS

Rule 16(b), Rule 26(f) and Form 35:

- Parties directed to discuss e-discovery issues during their discovery planning conference. Must discuss:
  1. Preservation of evidence
  2. Issues related to the disclosure or discovery of electronically-stored information
  3. Consideration of inadvertent production and potential waiver of privilege
  4. Form of production
- Scheduling order may include provisions governing the discovery of electronically-stored information.
- Report of parties' planning meeting required by Form 35 must include proposals regarding electronic information.



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## FORM OF PRODUCTION

Rule 34 and Rule 45

- If document request or subpoena does specify the form for producing "electronically-stored information"...
- Responding party may object or agree with request.
- If responding party objects, parties required to confer before motion to compel is filed.
- Upon motion showing good cause for the specific form, Court may order form of production.
  - Court not limited to form originally requested



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## SCOPE OF PRODUCTION

- Electronic discovery may be required, *i.e.*, traditional paper printouts alone may be insufficient.
  -- Anti-Monopoly, Inc. v. Hasbro, Inc., 1995 WL 649934 (S.D.N.Y. Nov. 3, 1995)
  -- Storch v. IPCO Safety Products Co., 1997 U.S.Dist. LEXIS 10118, 1997 WL 401589 (E.D.Pa. July 16, 1997)





## SCOPE OF PRODUCTION

- Backup tapes must be produced if relevant.
  -- In re: CI Host, Inc., 92 S.W.3d 514 (Tex. 2002)
- Mere copies of files are not enough; a bit-by-bit forensic image is the standard.
  -- Taylor v. State, 93 S.W.3d 487 (Tex. App. 2002)
- Requesting party should have access to active and deleted data alike.
  -- Simon Property Group v. mySimon, Inc., 194 F.R.D. 639 (S.D.Ind. 2000)

## DISCOVERY OF INFORMATION "NOT REASONABLY ACCESSIBLE"

Rule 26(b)(2) and Rule 45(d)(1)(C):

- Responding party need not provide discovery of electronic information that is not reasonably accessible.
- However, upon the requesting party's motion, the responding party must show that the information is not reasonably accessible.
- Even if that showing is made, the court may still order its production if the requesting party demonstrates good cause.



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## PROPOSED FRCP CHANGES

Rule 26(b)(2):
*Committee Notes*

- The distinctive features of electronically stored information should be addressed, including volume, variety of electronic documents and the difficulty of locating, retrieving and producing certain electronically stored information.
- Backup data is a key issue: notes discuss the use of data storage for disaster recovery vs. discovery purposes.
- Good cause may be shown for producing "inaccessible" data, and the familiar balancing test of Rule 26 will apply.
- Court still has discretion, and circumstances of the case will prevail.



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## PRIVILEGE WAIVER (INADVERTENT PRODUCTION)

Rule 26(b)(5) and Rule 45(d)(2)(B):

- When a party produces information without intending to waive a claim of privilege, it may, within a reasonable time, notify the receiving party of the claim of privilege.
- After being notified, the receiving party must return, sequester, or destroy all copies of the specified information.
- Producing party must preserve the information pending the court's ruling on whether privilege was properly asserted and whether it was waived.



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## "SAFE HARBOR" FOR DELETED OR LOST DATA

Rule 37(f): *Following April Committee Meeting*

- Scaled down version adopted
  - "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine, good faith operation of the party's electronic information systems."
- Anticipated to be submitted to Standing Committee with other proposed amendments
- Additional wording to be added to Committee Notes
- Expected to receive the most attention



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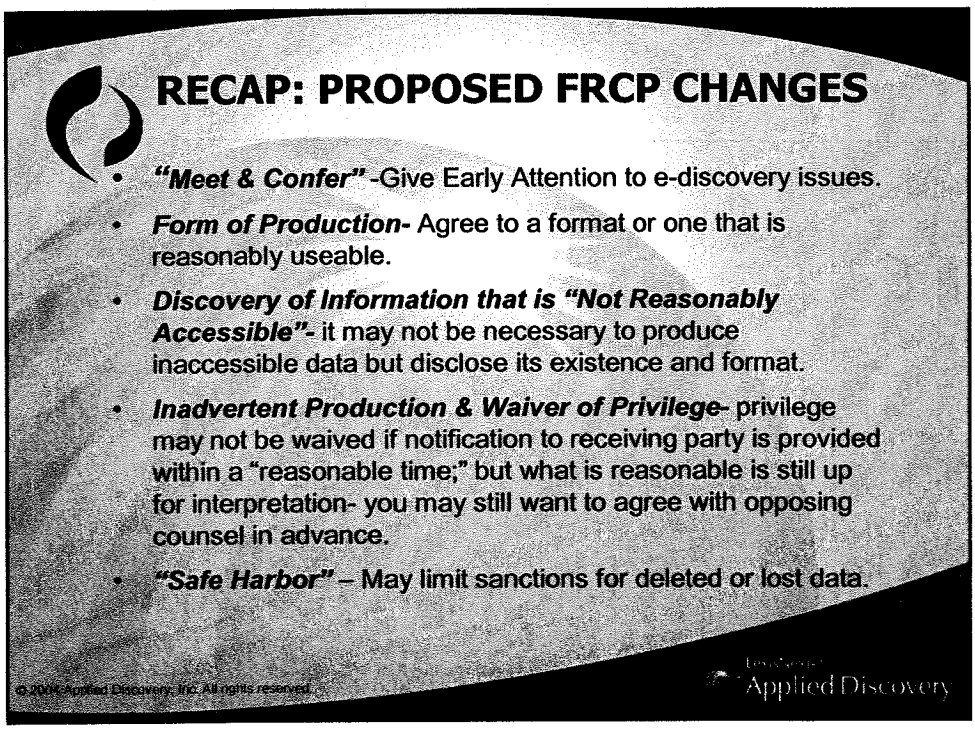
RECAP: PROPOSED FRCP CHANGES
"Meet & Confer" -Give Early Attention to e-discovery issues.
Form of Production- Agree to a format or one that is reasonably useable.
Discovery of Information that is "Not Reasonably Accessible"- it may not be necessary to produce inaccessible data but disclose its existence and format.
Inadvertent Production & Waiver of Privilege- privilege may not be waived if notification to receiving party is provided within a "reasonable time;" but what is reasonable is still up for interpretation- you may still want to agree with opposing counsel in advance.
"Safe Harbor" – May limit sanctions for deleted or lost data.
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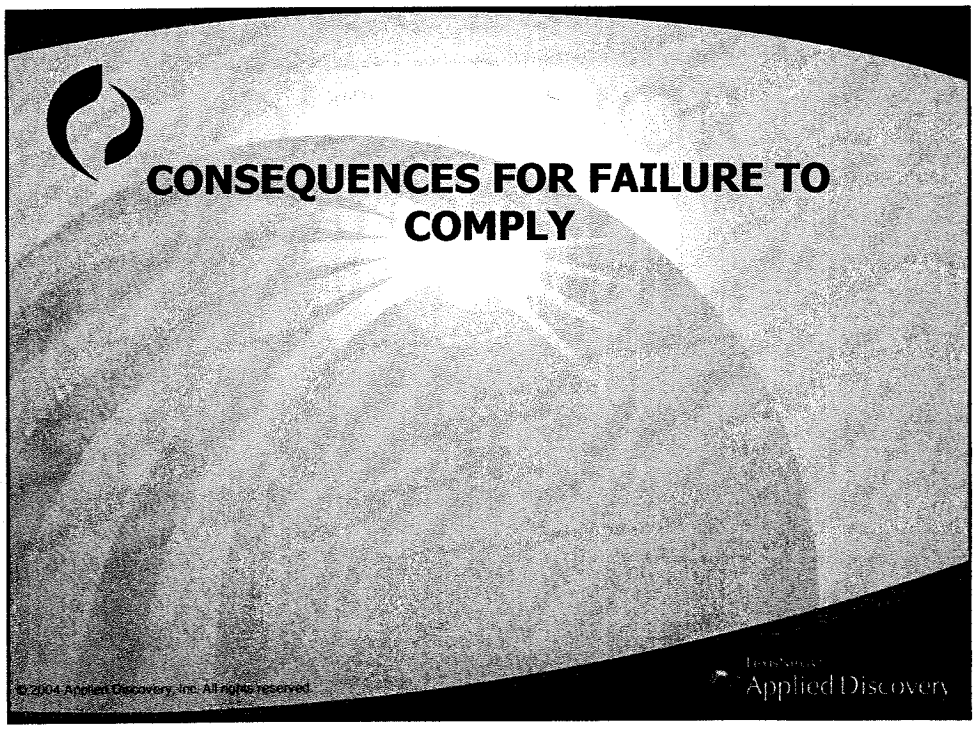
CONSEQUENCES FOR FAILURE TO COMPLY
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# SANCTIONS

- **Discovery Sanctions**
  - **Standard**: Party can be sanctioned, for negligence in failing to identify and produce electronic evidence.
  - "Purposeful sluggishness" in production
  - Incomplete/inaccurate Rule 26 disclosures
- **Spoliation Sanctions**
  - Destruction of evidence
  - Unreasonable or inconsistently enforced document retention policy
  - Failure to preserve information on backup tapes
- **Nature of Sanctions**
  - Monetary penalties
  - Adverse inference instruction
  - Entry of judgment

*Zubulake v. UBS Warburg "Zubulake V", 2004 U.S. Dist. Lexis 13574 (S.D.N.Y. July 20, 2004); Wiginton v. CB Richard Ellis, 2004 U.S. Dist. LEXIS 15722 (N.D. Ill. Aug. 9, 2004); RFC v. DeGeorge Corp, 306 F.3d 99, 2002 U.S. App. LEXIS 20422 (2d Cir. Sept. 26, 2002); GTFM v. Wal-Mart Stores, 2000 U.S. Dist. Lexis 1626 (S.D.N.Y. Nov. 8, 2000); In re Prudential Sales Practices Litig, 169 F.R.D. 598, (D. N.J. Jan. 6, 1997); Metropolitan Opera v. Local 100, 212 F.R.D. 178, (S.D.N.Y. Jan. 28, 2003).*



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# SANCTIONS

- **Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. Inc.**, No. CA 03-5045, 15th Jud. Cir., Palm Beach Cty., Fla., Mar. 23, 2005: ***Adverse inference instruction*** and ***partial default judgment*** lead to ***$1.5 billion judgment*** against defendant.
- **US v. Philip Morris USA**, 2004 U.S. Dist. LEXIS 13580 (D.D.C., July 21, 2004): Court orders ***$2.75 million*** in discovery sanctions for failure of 11 high ranking corporate officials to adhere to the company's document retention policies and court's preservation order. The corporate officials are also barred from testifying at trial.
- **Zubulake V**, 2003 U.S. Dist. LEXIS 13574 (S.D.N.Y. July 20, 2004): Court orders defendant to ***pay costs*** associated with discovery dispute and provides plaintiff with ***adverse inference instruction***.
- ***RFC v. DeGeorge Corp.***, *2002 U.S. App. LEXIS 20422 (2d Cir. 2002)*: Second Circuit ***remands*** for consideration of sanctions against party who failed to produce emails in time for trial.



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## SANCTIONS

- Statistics:
- According to a survey of recent published decisions, negligent e-discovery conduct has been sanctioned in all 12 federal circuits.
  - The E-discovery Missteps that Judges Love to Hate, Neale, P., February 2005
- Courts granted sanctions 65% of the time, with defendants being sanctioned about four times (81%) as often as plaintiffs(19%).
  - Scheindlein, S. and Wangkeo, K., Electronic Discovery Sanctions in the Twenty-First Century, 11 Mich. Telecomm. Tech. L. Rev. 71 (2004)



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## BEST PRACTICE TIPS



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# BEST PRACTICE TIPS

**There are a number of steps counsel should take to ensure electronic data is preserved:**

- Issue a "litigation hold" at the outset of litigation or when litigation is "reasonably anticipated" (whichever is first)
- Periodically reissue the "litigation hold" so that new employees are aware of it and so that all employees are reminded of it.
- Counsel should communicate directly with the "key players" in the litigation.
- Instruct all employees to produce "electronic copies" of their relevant active files.
  - *Best Practice:* employee should not provide the actual relevant files, but should point them out to counsel, so that they can be collected by the IT department or an outside expert to avoid spoliation of evidence.
- Ensure relevant back up tapes are identified and stored in a safe place.



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# BEST PRACTICE TIPS

***Mandatory Disclosure***

- Let opposing counsel know what types of electronic data you have and where and how it is stored.
  - Either through "meet and confer" or letters
  - Separate meetings to discuss e-discovery are most effective
- Even if you don't turn over the documents themselves, disclose their existence
  - Investigate your client's internal IT systems and capabilities/limitations



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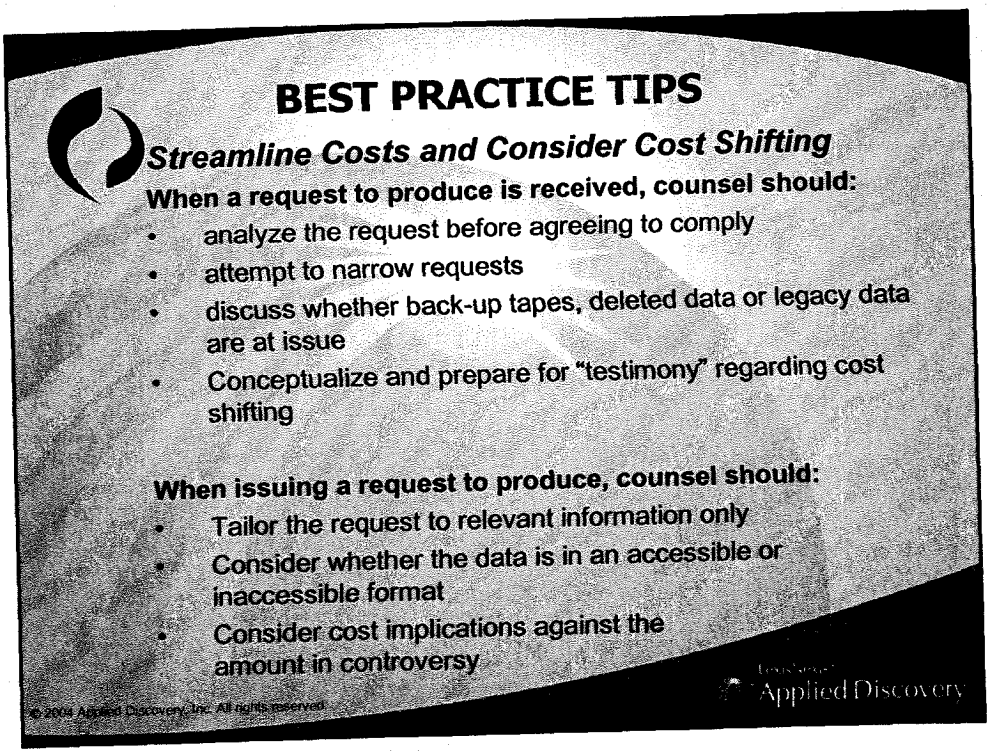
BEST PRACTICE TIPS
Streamline Costs and Consider Cost Shifting
When a request to produce is received, counsel should:
• analyze the request before agreeing to comply
• attempt to narrow requests
• discuss whether back-up tapes, deleted data or legacy data are at issue
• Conceptualize and prepare for "testimony" regarding cost shifting
When issuing a request to produce, counsel should:
• Tailor the request to relevant information only
• Consider whether the data is in an accessible or inaccessible format
• Consider cost implications against the amount in controversy
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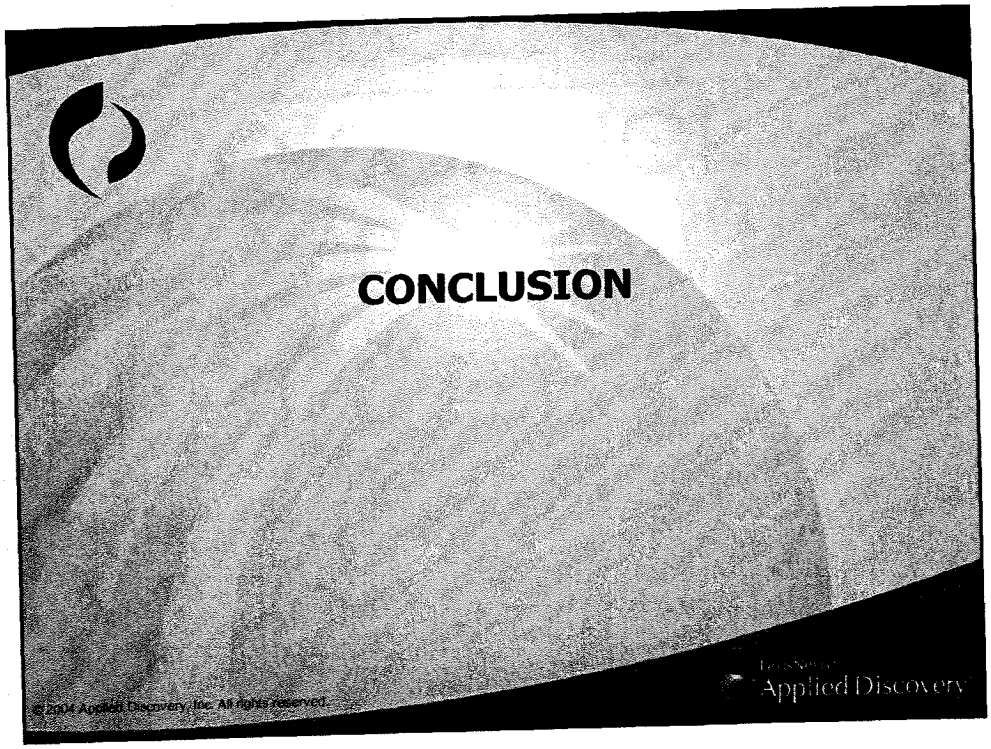
CONCLUSION
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STATES V. CANADA: A COMPARISON OF SUBROGATION CLAIMS

*written and presented by*

Brett Rideout

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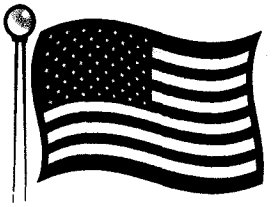
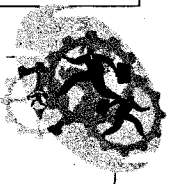
# STATES vs. CANADA:

## A comparison of subrogation claims

Brett E. Rideout
(Toronto Office)



## Subrogation Principles



States:

- Contractual; Equitable
- Necessity of Payment [Allendale v. Kaiser – use of declaratory action to avoid SOL running prior to payments
- Auto Subro – allowed in most states [Mich.]
- Worker's Comp. Subro – allowed in some states [See jurisdictional charts]

# Subrogation Principles

Canada:

- Contractual; Equitable
- Necessity of Payment – required – Ivamy, General Principles of Business Law, 5th ed., 1986 at 471
- Auto Subro – [not allowed]
- Worker's Comp. Subro –[Generally, prohibited by statute]

# Prosecuting Cases

States:

- State Courts v. Federal Courts
- Pleadings: Complaint [action can be filed either in name of insured or insurer] and Answer;
- Discovery & Disclosure
- Experts [strict disclosure requirements in fed and some state court; expert depositions now common]
- Mediation, arbitration and trials
- Causes of Action [negligence; contracts; warranties; products liability]
- Control of litigation [insurer]

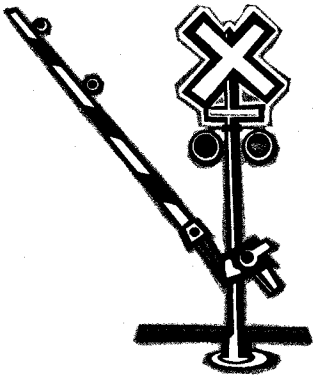
# Prosecuting Cases

Canada:

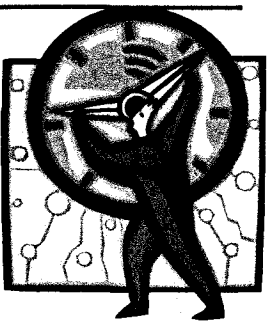
- Overview of Court System [Common law v. Civil law]
- Pleadings: Statement of Claims [action must be filed in name of insured] and Defences
- Mandatory Mediation; Discoveries
- Experts [Reports must be served 90 days before trial; not examined before trial]
- Jury and Non-Jury trials
- Loser pays

# Roadblocks to Recovery

- Statutes of Limitations/ Repose
- Spoliation
- Waivers of Subrogation
- Daubert/Experts
- Costs



# Statutes of Limitations/ Repose



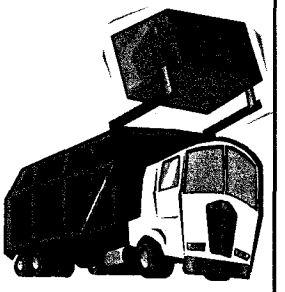
States:

- Vary greatly

Canada:

- new Ontario SOL – 2 yrs. v. 6 yrs.
- see jurisdictional chart

# Spoliation



States:

- Adverse Inference/ Cause of Action/ Dismissal

Canada:

- Evidentiary Presumption [Endean v. Canadian Red Cross]
- No cause of action [Spasic Estate v. Imperial Tobacco]

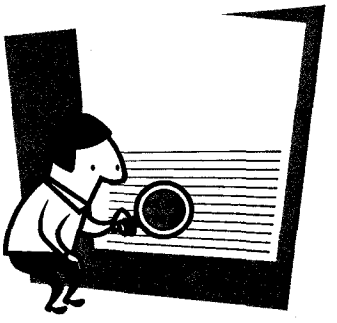
## Waivers of Subrogation

States:

- Enforceable, but can be circumvented

Canada:

- Enforceable



## Daubert/Experts

States:

- Qualifications, Reliability and Usefulness of Experts assessed by courts [Daubert / Frye]

Canada:

- Follows Daubert principles – R.v J.-L.J. (2000) 2 S.C.R.

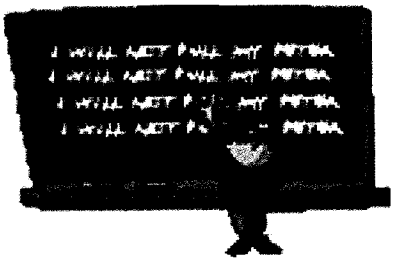
## Sanctions/Loser Pays Rule

States:

- Rule 11 in Fed. Court; similar sanctions in state courts
- By contract

Canada:

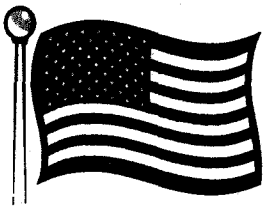
- Costs assessments



# STATES vs. CANADA:

## A comparison of subrogation claims

Brett E. Rideout
(Toronto office)



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| PROVINCE | ACTIONS RE PROPERTY DAMAGE | | INSURANCE CONTRACTS | |
|---|---|---|---|---|
| | **General** | **Ultimate** | **Actions against Insured to Recover Monies Payable under Contract** | **Fire Insurance** |
| **New Brunswick** | **6 years** commencing when **cause of action arises,** *Limitation of Actions Act,* R.S. N.B. 1973, c. L-8, s. 9 | **None** | No action may be commenced until **60 days** after **proof of happening of event in which money becomes payable,** *Insurance Act,* R.S.N.B. 1973, c. I-12, s. 111. | **1 year** commencing at time **loss or damage occurs,** *Insurance Act,* R.S.N.B. 1973, c. I-12, s. 127(2), statutory condition 14. |
| **Nfind. & Labrador** | **2 years** commencing when cause of action is **discovered,** *Limitations Act,* S.N.L. 1995, c. L-16.1, ss. 5(b); 13; 14. | **10 years** commencing when **cause of action arises,** *Limitations Act,* S.N.L. 1995, c. L-16.1, s. 14 (3). | No action may be commenced until **60 days** after **proof of happening of event in which money becomes payable,** *Insurance Contracts Act,* R.S.N.L.1990, c.I-12, s. 17 | **1 year** commencing at time **loss or damage occurs,** *Fire Insurance Act,* S.N.L. 1990, c. F-10, s. 8, statutory condition 14. |
| **N.W.T.** | **6 years** commencing when **cause of action arises,** *Limitation of Actions Act,* R.S.N.W.T. 1988, c. L-8, s. 2(e). | **None** | No action may be commenced until **60 days** after **proof of happening of event in which money becomes payable,** *Insurance Act,* R.S.N.W.T. 1988, c. I-4, s. 53. | **2 years** commencing at time **loss or damage occurs,** *Insurance Act,* R.S.N.W.T. 1988, c. I-4, s. 64, statutory condition 14. |
| **Nova Scotia** | **6 years** ' commencing when **cause of action arises,** *Limitation of Actions Act,* R.S.N.S. 1989, c. 258, s. 2(1)(e) | **None** | No action may be commenced until **60 days** after **proof of happening of event in which money becomes payable,** *Insurance Act* R.S.N.S.1989, c. 231, s. 24. | **1 year** commencing at time **loss or damage occurs,** *Insurance Act,* R.S.N.S. 1989, c. 231, s. 167(2), statutory condition 14 |
| | **EXCEPTION:** Within **4 years** of expiry of general limitation period, court may **disallow the limitation** having regard to circumstances of the case- Listed are enumerated factors to consider including date of "discovery" of claim, *Limitation of Actions Act,* R.S.N.S. 1989, c. 258, s. 3. | | | |
| **Nunavut** | **6 years** commencing when **cause of action arises,** *Limitation of Actions Act,* R.S.N.W.T. 1988, c. L-8, s. 2(e). | **None** | No action may be commenced until **60 days** after **proof of happening of event in which money becomes payable,** *Insurance Act (Nunavut),* R.S.N.W.T. 1988, c. I-4, s. 53. | **2 years** commencing at time **loss or damage occurs,** *Insurance Act (Nunavut),* R.S.N.W.T. 1988, c. I-4, s. 64, statutory condition 14. |

| PROVINCE | ACTIONS RE PROPERTY DAMAGE | | INSURANCE CONTRACTS | |
|---|---|---|---|---|
| | **General** | **Ultimate** | **Actions against Insured to Recover Monies Payable under Contract** | **Fire Insurance** |
| **Alberta** | **2 years** commencing when cause of action is **discovered,** *Limitations Act,* R.S.A. 2000, c. L-12, s. 3(1)(a) | **10 years** commencing when **cause of action arises,** *Limitations Act,* R.S.A. 2000, c. L-12, ss. 3(1)(b); 11 | No action may be commenced until **60 days** after **proof of happening of event in which money becomes payable,** *Insurance Act,* R.S.A. 2000, c. I-3, s. 520 | **1 year** commencing at time **loss or damage occurs,** *Insurance Act,* R.S.A. 2000, c. I-3, s. 520, statutory condition 14. |
| **British Columbia** | **2 years** commencing when cause of action is **discovered,** *Limitation Act,* R.S.B.C. 1996, c. 266, ss. 3(2); 6. | **30 years** commencing when **cause of action arises,** *Limitation Act,* R.S.B.C. 1996, c.266, s. 8(1). | **1 year** commencing on **furnishing of proof of loss of claim,** *Insurance Act,* R.S.B.C. 1996, c. 226, s. 22(1).<br><br>No action may be commenced until **60 days** after **proof of happening of event in which money becomes payable,** *Insurance Act,* R.S.B.C. 1996, c. 226, s, 22(2) | **1 year** commencing at time **loss or damage occurs,** *Insurance Act,* R.S.B.C. 1996, c. 226, s. 126 |
| **Manitoba** | Damage to Real Property (direct or indirect) **6 years** commencing when **cause of action arises,** *Limitation of Actions Act,* C.C.S.M. c. L150, s. 2(1)(f)<br><br>Damage to Chattels (direct or indirect) **2 years** commencing when **cause of action arises,** *Limitation of Actions Act,* C.C.S.M. c. L150, s. 2(1)(g).<br><br>Actions on Recovery of Money on a Simple Contract **6 years** commencing when cause of action arises *Limitation of Actions Act,* C.C.S.M. c. L150, s. 2(1)(i) | **30 years** commencing when **cause of action arises.** *Limitation of Actions Act,* C.C.S.M. c. L150, s. 14(4). | No action may be commenced until **60 days** after **proof of happening of event in which money becomes payable,** *Insurance Act,* C.C.S.M. c. 140, s. 131 | **2 years** commencing at time **loss or damage occurs,** *Insurance Act,* C.C.S.M. c. 140, s. 142(1), statutory condition 14 |
| | **EXCEPTION:** Court can grant leave to continue or begin an action if not more than **12 months** have elapsed between date the action was **"discovered"** and date of application for leave, subject to ultimate limitation period. *Limitation of Actions Act,* C.C.S.M. c. L150, s. 14(1). | | | |

| PROVINCE | ACTIONS RE PROPERTY DAMAGE | | INSURANCE CONTRACTS | |
|---|---|---|---|---|
| | **General** | **Ultimate** | **Actions against Insured to Recover Monies Payable under Contract** | **Fire Insurance** |
| **Ontario** | **2 years** commencing when cause of action is **discovered,** *Limitations Act, 2002,* S.O. 2004, c. 31, ss. 4, 5 | **15 years** commencing when **cause of action arises,** *Limitations Act, 2002,* S.O. 2004, c. 31, s. 15 | No action may be commenced until **60 days** after **proof of happening of event in which money becomes payable,** *Insurance Act,* R.S.O. 1990, c. I.8, s. 136 | **1 year** commencing at time **loss or damage occurs,** *Insurance Act,* R.S.O. 1990, c. I.8, s. 148, statutory condition 14 |
| | **Transitional Rules:** Apply if a cause of action arose before January 1, 2004 and no proceeding commenced:<br>• Claim not "discovered" until after Jan 1, 2004, then **2 years from discovery**, s. 24(5)(1)<br>• Claim "discovered" before Jan 1, 2004, then **6 years from discovery**, s. 24(5)(4)<br>• If former limitation period expired before Jan 1, 2004, then no proceeding shall be commenced, s. 24(3). | | | |
| **P.E.I.** | **6 years** commencing when **cause of action arises,** *Statute of Limitations,* R.S.P.E.I. 1988, c. S-7, s. 2(1)(g) | **None** | No action may be commenced until **60 days** after **proof of happening of event in which money becomes payable,** *Insurance Act,* R.S.P.E.I. 1988, c. I-4, s. 100 | **1 year** commencing at time **loss or damage occurs,** *Insurance Act,* R.S.P.E.I. 1988, c. I-4, s. 114, statutory condition 14 |
| **Quebec** | **3 years** from time **right of action arises** ("extinctive prescription"), *Civil Code of Quebec,* S.Q. 1991, c. 64, art. 2923. | | | |
| **Sask.** | **6 years** commencing when **cause of action arises,** *Limitation of Actions Act,* R.S.S. 1978, c. L-15, s. 3(1)(e), (f) | **None** | No action may be commenced until **60 days** after **proof of happening of event in which money becomes payable,** *Saskatchewan Insurance Act,* R.S.S. 1978, c. S-26, s. 114 | **1 year** commencing at time **loss or damage occurs,** *Saskatchewan Insurance Act,* R.S.S.. 1978, c. S-26, s. 128, statutory condition 14 |
| **Yukon** | **6 years** commencing when **cause of action arises,** *Limitation of Actions Act,* R.S.Y. 2002, c. 139, s. 2(1)(e), (f) | **None** | No action may be commenced until **60 days** after **proof of happening of event in which money becomes payable,** *Insurance Act,* R.S.Y. 2002, c. 119, s. 62 | **2 years** commencing at time **loss or damage occurs,** *Insurance Act,* R.S.Y. 2002, c. 119, s. 71, statutory condition 14 |

| EQUITABLE LIMITATIONS<br>(Apply in conjunction with statutory limitation periods) | |
|---|---|
| **LACHES** | **ACQUIESCENCE** |
| Occurs where:<br>**a) unreasonable delay** in commencement of proceedings, **and**<br>**b) consequences of delay are unreasonable or unjust** having regard to all circumstances. | **1.** Plaintiff stands by and watches deprivation of his rights and does nothing OR<br>**2.** After deprivation of his rights and in full knowledge of their existence, plaintiff delays OR<br>**3.** Defendant's position is altered by reliance on plaintiff's inaction where plaintiff has knowledge of his rights and does nothing. |

## PURPOSES OF LIMITATION STATUTES

- Define a time in which a defendant will be free of ancient obligations
- Prevent plaintiffs from bringing claims where evidence is lost via passage of time
- Create incentive for plaintiffs to bring suits in a timely fashion
- Take into account the plaintiffs' circumstances when assessing whether a claim should be barred by the passage of time.

## COMMON FEATURES OF CANADIAN LIMITATION STATUTES

- Limitation periods are a defense and must be specifically pleaded.
- Special provisions apply where calculating limitation periods where plaintiff is a minor or under a disability.
- Limitation periods may not be shortened by agreement, however many provincial statutes permit parties to extend limitation periods by agreement.
- In Ontario, parties cannot vary limitation periods by agreement however time stops running where dispute resolution is attempted via an independent 3rd party, *Limitations Act, 2002*, S.O. 2004, c. 31, ss. 11, 22
- Where a defendant acknowledges or makes partial payment on a claim, limitation statutes generally permit the limitation period to run anew from the time of the acknowledgement or partial payment.
- In some provinces, limitation statutes apply beyond civil proceedings to include self-help remedies such as arbitration, *ie Limitation Act*, R.S.B.C. 1996, c. 266, s.1
- Equitable limitations operate in conjunction with statutory limitation periods and may serve to bar a claim within the statutory limitation period provided.

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SUBROGATION ACROSS THE POND
*written and presented by*
Simon Jones

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# Subrogation Across The Pond

Simon Jones

Cozen O'Connor, London Office

4th May 2006

1

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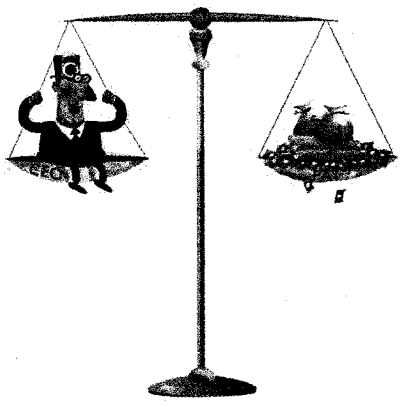
- Good News
- Fundamental Principle of English law
  - A party that has suffered a civil wrong must be fully compensated



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- Loser pays:
  - Damages
  - Interest
  - Costs (legal fees and expenses)

**LOSER**

3

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- Hourly charges not the only option
- Access to Justice Act 1999
- No win : no fee – permitted but RESTRICTED
- Success fees


4

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- All good news for subrogating insurers?
- No – loser pays works both ways
- Significant litigation risk
- New insurance product : After the Event Insurance (AEI)

5

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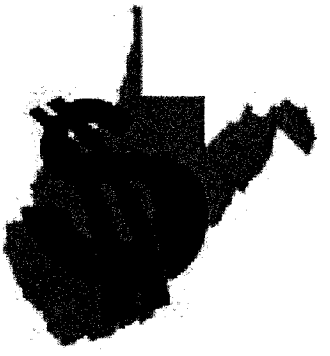
- Born in England: History of subrogation
- Gordon Riots – the story in a nutshell
- We started it (and then forgot about it)
- Subrogation – increasingly relevant due to US Capital in London insurance markets



6

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- Four key differences between subrogation in US and England:
  - Always in insured's name
  - Never any direct action by insurers unless rights assigned
  - Judge, not jury
  - Indemnity means indemnity

7

## ***The Birth of Subrogation and the War of Independence***

Question : How did a war between the British and the Americans - and a related riot in London - lead to one of the earliest ever reported subrogation cases?

First, some history. Let's go back to the late 1700s when the British were fighting the Americans. The British army, which expected to be victorious in what became the American War of Independence, was very different to the disciplined American army of George Washington. Because they were being outfought, the British soldiers were an unhappy lot, as the following extract from a soldier's letter home from Charleston, South Carolina, in the spring of 1781 shows.

> *"I wish our ministry could send us a Hercules to conquer these obstinate Americans, whose aversion to the cause of Britain grows stronger every day.*
>
> *If you go into company with any of them occasionally, they are barely civil ... They are in general sullen, silent and thoughtful. The King's health they dare not refuse, but they drink it in such a manner as if they expected it would choke them ... ; I am heartily tired of this country, and wish myself at home."*

The uniform they wore was suitable for European warfare but in America it made the troops extremely conspicuous. Their weapons were becoming outdated; they were inaccurate and had only a 50 yard range. The British army lacked knowledge of the terrain, their maps were inadequate and the officers had little concept of the distances involved in such a vast continent.

Inevitably, word got back to Britain. The British government had encountered significant difficulty in recruiting men into the army despite the 1778 Catholic Relief Act, which allowed Roman Catholics in Great Britain to own property, inherit land, and, all importantly, join the army. However, the Act was hugely unpopular amonst non-Catholics and this is where we are led to early subrogation case law.

Reaction against the Catholic Relief Act led to violent anti-Catholic riots in London in June and July 1780. Lord George Gordon marched on parliament with a crowd of 50,000 supporters to present a petition requesting the repeal of the Act and a return to Catholic repression. Edinburgh and Glasgow had already seen similar riots. Chapels, Catholic houses, prisons, public buildings and even Catholics in the

street were attacked. There were running battles between the demonstrators and the authorities.

It took the government and the London authorities ten days to restore order in the capital. By that time, 12,000 troops had been deployed, over 700 killed and 25 of the rioters were subsequently hanged. Gordon was tried for high treason but acquitted. The Lord Mayor of London was fined £1,000 for negligence of his duties. And all this because of an Act that was partly introduced to swell the number of British troops in America.

It was estimated that over £180,000 worth of property was destroyed during the "Gordon Riots", a huge amount of money in 1780. One of those who suffered damage to his property was a householder by the name of Mason. Mason's house had been insured against damage and his insurance company had indemnified him for damage caused by the rioters. The insurance company brought an action against the London authority ("the Hundred") as the Riot Act of 1714 made the Hundred liable to the same extent as trespassers who actually caused damage by riot. The insurance company sued in Mason's name and with his consent. A defence was raised by the Hundred to the effect that Mason had already received his compensation (from insurers), so there was no reason for them to pay him anything.

Lord Mansfield, in one of the earliest recorded judgments on subrogation[1], stated that payment of the loss by the insurer to the assured did not affect the liability of the wrongdoer :

*"Every day the insurer is put in the place of the insured ... The insurer uses the name of the insured. The case is clear; the [Riot] Act puts the hundred, for civil purposes, in the place of the trespassers; and, upon principles of policy ... I am satisfied that it is to be considered as if the insurers had not paid a farthing".*

So, while our poor soldiers were being soundly defeated in America, their fellow citizens back home were finding time not only to riot but also to win the race to define principles of subrogation for the English-speaking world.

---

[1] *Mason v. Sainsbury and Another* (1782) 3 Doug. 61.

Of course, the concept of subrogation is even older. It dates back to Roman law under which the principle developed that a third party, who met a debt for which someone else was liable, was able to be subrogated to the rights of the creditor against the debtor.

One can go back even further than 1782 to the very first reported English subrogation case of *Randal v. Cockran* (1748) 1 Ves.Sen. 98. A vessel was insured against loss and the insurance company paid the amount of the insurance when the vessel was captured by the Spaniards. The owner of the vessel became entitled to share in prize money from sales of captured Spanish vessels in accordance with a Royal Proclamation. The dispute involved the insurance company's claims to part of the prize monies.

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LIABILITY INSURANCE & SUBROGATION: GETTING TO THE END GAME
*written and presented by*
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# LIABILITY INSURANCE & SUBROGATION : GETTING TO THE END GAME

Anthony Morrone
Cozen O'Connor-Chicago Office

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# THE BASICS OF LIABILITY INSURANCE

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# Types of Liability Policies

- Occurrence
  - Insures against claims when there is an occurrence as defined in the policy
- Claims Made
  - Insures against claims during the present policy period

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# How is Liability Coverage Triggered

- Occurrence
  - "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
  - Accident Not Usually Defined in policy
    - "an unforeseen occurrence, usually of untoward or disastrous character or an undesigned sudden or unexpected event of an inflictive or unfortunate nature."
- Covered Event
  - Property Damage or Personal Injury
    - Tangible Damage
    - Loss of Use
- No Exclusions

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## Typical Exclusions and Limitations

- Your Work
- Your Product
- Fire Legal Limits
- Intentional Acts
- Insured Contract
- Pollution Exclusion
- Liquor Liability
- Care Custody & Control

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## Liability Carrier's Obligations

- Defend against Claims
  - Investigate
  - Hire Consultants
  - Hire Defense Attorneys
- Indemnify
  - Duty to Defend much broader than Duty To Indemnify

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## Liability Insured's Obligations

- Notice of Claim or Potential Claim as soon as Practicable
- Notice of Suit Immediately
- Cooperate in Investigation & Defense

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## Liability Carrier's Options When Coverage is an Issue

- Defend under a Reservation of Rights
  - Reservation of Rights Must be Issued as soon as Coverage is Reasonably an Issue
  - No Reservation of Rights = Waiver
  - Must be Specific
  - "Mend the Hold Doctrine"
- Deny Coverage & Not Provide Defense
  - Look for creative settlements
- File Declaratory Action

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## Bases for Declaratory Actions

- Coverage Issues
- Notice Issues
- Liability Insured's conduct

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## Interpretation Issues

- Exclusions are typically read severally
  - One Exclusion is enough to nullify coverage
- Read in Favor of Coverage Wherever Possible

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## Proper Parties to Declaratory Action

- All Interested Parties
  - Liability Insured (our subro target)
  - Liability Insured's other Carriers
  - Other Subro Targets
  - Subrogated Carriers
  - Subrogor
  - Other Potential Claimants
- Coverage Decisions May not be Binding if All Interested Parties Not Named

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## Defending Declaratory Actions

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# Venue

- Analyze Venue closely
  - Is it the same as the loss location
  - Liability Insured's home venue
  - Liability Carrier's home venue
- Venue Appropriate
  - Loss Location
  - Where Contract Formed/Breached
  - Where Liability Insured resides
- Consider Challenging Venue
  - Take away home town advantage
  - Take opposing counsel out of comfort zone

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# Initial Responsive Pleading

- Motion to Dismiss/Judgment on the Pleadings
- Answer
- Affirmative Defenses
  - Waiver & Estoppel
    - Must be considered early
    - Look at timing of Reservation of Rights
    - Compare Complaint to Reservation of Rights
    - If Target Defendant is BK, speak with Trustee
  - Unclean Hands
  - Ambiguity in policy

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# Discovery to Liability Carrier

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## Interrogatories

- Narrowly tailored
  - Not going to win subro case here
  - Who at company is responsible for making coverage determinations
    - Depose individual(s)
  - Seek information relied on for coverage determination
    - Statements of witnesses
    - Tangible evidence to support claims

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## Production Requests

- All statements relied on in making coverage determination
- All documents produced by Liability Insured
- All documents produced by Subrogee
  - Good to know if your insured is talking to other side
- Other tangible evidence


## Discovery to Liability Insured

- Look for ways to help prove underlying case
  - Will get objections so be prepared to fight
- Otherwise don't waste time

# Protect Coverage in Subro Action

- Do Not Make "Notice" Accusations in Notice Letters
- Preserve scene if possible to allow carrier opportunity to investigate
- Plead Covered Losses
- Discovery
  - Ask for copies of All Insurance Policies
  - Ask for Copies of Reservation of Rights letters
- Advise Client of Coverage Issues Promptly

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# Resolution

- Motion for Summary Judgment
- Evidentiary Hearing
- No Jury

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# LIABILITY INSURANCE & SUBROGATION : GETTING TO THE END GAME

PART DEUX

*written and presented by*

Christine Ducat, Esq.

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# LIABILITY INSURANCE & SUBROGATION : GETTING TO THE END GAME

## Part Deux

### Exclusions Explained

Christine Ducat
COZEN O'CONNOR – Chicago Office

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## Your Product

- Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by You . . .
  - Includes warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product;"

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## Your Work

- Work or operations performed by you or on your behalf; and
- Materials, parts or equipment furnished in connection with such work or operations.
  - Includes warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work;"
  - Includes the providing of or failure to provide warnings or instructions


## Your Product & Your Work

- Liability carrier's way of stating they do not insure for economic loss
- If you have economic loss issues, must consider these Exclusions
- Ensuing loss still covered
  - Damage that faulty work/product causes to other property
- Performance bonds

## Care Custody & Control Exclusions

- Bailment cases
- Shipping cases
- Warehouse cases

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## Fire Legal Limit

- Usually in place for rental property
  - Limits liability carrier's indemnification obligations for fire in buildings owned, occupied or controlled by liability insured
  - Does not apply to areas not owned, occupied or controlled
    - Mall fires
    - Industrial complexes
    - Warehouse

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## Intentional Acts Exclusion

- Hand-in-hand with "Occurrence"
- Courts usually use two part test
  - (1) intended to act, and
  - (2) specifically intended to harm a third party.
    - Does not matter what harm was intended

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## Liquor Liability Exclusions

- Restaurants & Bars
  - Look for insurance through Dramshop Policies

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# Insured Contracts

- This exclusion says that the Policy does not apply to property damage for which the insured is obligated to pay by reason of the assumption of liability in a contract or agreement. The exclusion does not apply to liability that the insured would have in the absence of the contract or agreement.

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# Pollution Exclusion

- Pollution Defined
  - Injury or damage arising from "discharge, dispersal, seepage, migration, release or escape" of pollutants
  - Courts have construed this language to apply to pollutants which travel "from a contained place to the insured person's surroundings and then cause injury."
  - Not a pollutant if injuries caused by irritants that are stationary (gas explosion as opposed to gas seepage)
- Be Wary When Dealing with
  - Environment claims
  - Chemical spills/leaks
  - Smoke damage
  - Mold

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# Pollution Exclusion

- Three Basic Types
  - "Standard pollution exclusion"
    - No coverage unless occurrence is sudden and accidental
  - "Absolute pollution exclusion"
    - No coverage for any pollution claims
    - Most Courts consider it ambiguous
  - "Total pollution exclusion"
    - Industry's response to Court's review of absolute pollution exclusions

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# UNIQUE HURDLES IN WORKERS' COMPENSATION SUBROGATION RECOVERY

*written and presented by*

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# An Overview on Handling Workers' Compensation Subrogation Claims

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Seminar and Training for:

**MIDWEST SUBROGATION SEMINAR**

Chicago, Illinois

May 4, 2006

## OUTLINE OF PRESENTATION

I. WORKERS' COMPENSATION RECOVERY AND THE COZEN O'CONNOR PROGRAM

II. CASE STUDIES:

A. Premises liability

B. Products liability

C. Construction liability

D. Products liability

III. NEGLIGENCE VS. STRICT LIABILITY

## CONSTRUCTION CLAIMS AND WORKER'S COMPENSATION SUBROGATION

### I. INTRODUCTION

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

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

## II. DUTIES AND OBLIGATIONS FOR JOBSITE SAFETY

### A. Owner's Responsibilities

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

### B. General Contractor's Responsibilities

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

### C. Construction Manager's Responsibilities

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

### D. Subcontractor's Responsibilities

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

### E. Design Professional's Responsibilities

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

### F. Defective Equipment

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

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

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

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

## IV. STATUTORY EMPLOYER DOCTRINE

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

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

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

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

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

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

## V. BORROWED EMPLOYEE

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

in the general employ of one employer may be transferred to the services of another in such a manner that he becomes an employee of the second employer.

## VI. OSHA VIOLATIONS

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

## VII. CONCLUSION

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

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

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# WORKERS' COMPENSATION

# SUBROGATION CHECKLIST

INSURANCE COMPANY: _____

CLAIM NUMBER: _____ ADJUSTER: _____

TELEPHONE: _____

E-MAIL: _____

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

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

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**LETTER TO POLICYHOLDER EXPLAINING WORKERS' COMPENSATION SUBROGATION**

Dear Risk Manager/Plant Manager,

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

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

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

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

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

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

are also not looking to develop any type of liability claim against you as the injured worker's employer. They are looking for other entities to pursue.

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

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

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


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# PREMISES LIABILITY
# BASIC INVESTIGATION GUIDE

## TO BE ASKED FOR ALL PREMISES CLAIMS

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

15. If the accident occurred on the insured premise, do they own or lease the premise? Obtain a copy of the lease agreement.

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

17. Obtain scene photographs as soon as possible.

**SLIP AND FALL ON FLOOR**

1. Identify the exact location where claimant fell.

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

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

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

**SLIP AND FALL DUE TO SNOW AND ICE**

1. Obtain weather report.

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

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

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

5. Describe ice (smooth, bumpy).

6. When did the snow start and stop?

7. Was the snow fluffy or hard packed?

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

**FALL ON STAIRWAY**

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

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

3. What caused the claimant to fall?

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

5. Did the claimant fall backward or forwards?

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

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

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# CONSTRUCTION ACCIDENT BASIC INSTRUCTION GUIDE

I. Preliminary Investigation Issues

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

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

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

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

D. Names of People Involved

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

a. name and address

b. employer

c. occupation

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

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

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

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

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

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

E. Investigations by Other Parties

1. Who investigated the accident?

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

a. At this job site?

b. At other similar job sites?

II. Specific Types of Accidents

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

1. What type of fall protection was provided?

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

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

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

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

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

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

3. How long was the area left unguarded?

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

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

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

5. What triggered the fall?

a. Accidental step

b. Slip or trip

c. Contact with other worker or moving object

d. Other unexpected event

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

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

6. After accident repairs

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

b. Who took action to make the area safe?

B. Trip and Fall at the Worksite

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

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

3. Focus on exact cause.

a. Uneven surface

- How was the uneven surface created?

b. Debris

- Who caused it to be there?

- Who is responsible for cleanup?

- Preserve evidence: keep the debris if possible.

c. Slippery Surface

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

C. Struck by Falling Object

1. Preserve the falling object if possible.
2. Identify all parties working above the accident location.
3. Find out how the object was secured before the fall.
   a. Some materials are shipped from suppliers without adequate packaging or bundling or in overloaded bundles. If possible, retain the load ticket that was shipped with the bundle of material.
   b. Who was responsible for lifting the load to the area? What measures were taken to secure the load?
   c. If a hook or strap or pallet broke, retain the broken pieces.
   d. Hooks are often misused. Hooks are available which will prevent a load from accidentally slipping off.

D. Building or Trench Collapse

1. Some jobs, such as excavations involving trenches or demolitions, include an inherent risk of collapse which requires specific methods of shoring up walls and columns to prevent collapse.
2. For structural collapse, find out the name of every architect and engineer who participated in the design of the structure and copies of all architectural and engineering drawings pertaining to the structure.
3. Find out the names of the suppliers and manufacturers of any structural parts that may have failed and caused the collapse.

E. Injured by Machine

1. Identify the operator, owner and supplier of the machine.
2. Obtain the names of any other workers who operated the same machine before or after the accident.
3. See outline on products liability investigation.

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**PRODUCTS LIABILITY**
**BASIC INVESTIGATION GUIDE**

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

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

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

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

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

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

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

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

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

10. Ensure that all physical evidence is preserved.

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


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