COZEN O'CONNOR®

FALL 2009

SUBROGATION AND RECOVERY OBSERVER

NEWS ON CONTEMPORARY ISSUES

MESSAGE FROM THE CHAIR

TO THE FRIENDS OF COZEN O'CONNOR:

Our Fall 2009 *Subro Observer* is chock full of important information regarding recent settlements and court decisions (both trial level and appellate), product recalls by the CPSC based upon design and manufacturing defects, and the extension of our subrogation methodology to claims in multiple foreign jurisdictions. We hope you find it of interest and are happy to expand upon these subjects and other areas of interest, as part of our private client training for you, our valued clients. We provide full CE credits and cover all expenses as part of our continuing effort to keep you abreast of all cutting edge developments in the world of subrogation and recovery.

In this connection, we also have expanded our Subrogation Task Forces which are staffed by attorneys distributed among our 24 offices who have specialized expertise in various repetitive failure claims, including corrugated stainless steel tubing ("CSST") losses, Chinese drywall claims, appliance failures, and metal halide lamp explosions. In each of these areas, as well as for numerous other product defects, we have amassed a comprehensive database comprised of tens of thousands of documents produced during discovery and obtained from public sources, which enables us to maximize and accelerate the recovery, as opposed to reinventing the wheel for each claim.

We also are pleased to annouce that we have started a Subrogation & Recovery Law Blog, for which instructions to access are contained within.

We hope each of you had an enjoyable summer, and look forward to entering the stretch drive on your behalves with the coming Fall/Winter seasons.

Very truly yours,

Elliott R. Feldman, Esquire
Chair, Subrogation and Recovery Department
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SPOTLIGHT ON….INTERNATIONAL RECOVERIES

In addition to the recoveries highlighted below, we have also recently settled cases in Brazil, Columbia, France, Taiwan, Russia and a confidential eight figure settlement in Iraq from our offices here and in conjunction with our international offices in London and Toronto.


Peter G. Rossi

TERMINAL RECOVERY… IN GERMANY

Peter Rossi of the Philadelphia Office in our Atlantic Region was able to settle a significant claim for AIG and Zurich in a loss occurring in an occupied passenger terminal at the airport in Düsseldorf, Germany. Tragically, seventeen people were killed and sixty-two were injured. The fire began at 3:31 p.m. and was declared under control approximately four hours later. The National Fire Protection Association prepared a fire investigation summary regarding the fire as it was one of the worst fire related tragedies of the year.

The fire was believed to have been caused by a welder igniting hidden construction materials and our theory of liability was based on negligent construction and code violations. AIG and Zurich had insured a company that went out of business during the lengthy time the case was pending in the German courts. The insured provided several services at the airport, including servicing airplanes and handling baggage. A significant part of the claim was the loss of a contract with the Air Force for servicing its equipment. The insured had only a few months of operational history so the business interruption claim was difficult to articulate and prove. Despite these issues and numerous competing claims, Peter was successful in settling the case for $1.25 million (Euros).


Natalie Cooksammy

ADVERTISING A SETTLEMENT … IN ENGLAND

Natalie Cooksammy of our London Office recently obtained a $660,000 settlement on behalf of Chubb U.K. Chubb insured an advertising agency that was a tenant in a commercial building. In April 2004, the landlord decided to refurbish the building, including performing mechanical and electrical work on the roof. In August, there were heavy rains that caused water damage throughout the area, including the insured's building. Natalie pursued an argument that the roof had been negligently designed and had been damaged by contractors carrying out the renovation work. The case was vigorously contested and included extensive expert evidence on both sides. The recovery is approximately two-third of the replacement cost loss paid by Chubb.


Blanca Quintero

BRACE YOURSELF…FOR A RECOVERY IN MEXICO

Blanca Quintero of the San Diego Office in our Western Region, with the assistance of local counsel in Mexico City, was able to obtain a recovery for our client Marriott International. The case involved a significant release of water at a Marriott property in Mexico City. A contractor was performing HVAC work when it improperly removed one of the support braces to a fire sprinkler pipe. The loss of support to the pipe caused it to break and discharge water which flooded the hotel ballroom.

Blanca was able to recover $180,000 of the $235,000 loss on a pre-suit basis.


Robert W. Phelan

LOSSES IN TRANSIT…ALL OVER

Rob Phelan of the New York Office in our Atlantic Region was successful in recovering on three transit losses originating in three different countries: computer chips in transit from Belgium to Germany; grapes travelling from Chile to the United States; and clothing shipped from the Dominican Republic to the U.S. Rob was able to resolve all of the claims from his office in New York City.

TRIAL VICTORIES

William N. Clark, Jr.

START SPREADING THE NEWS…

Bill Clark of the Philadelphia office in our Atlantic Region obtained a plaintiff's verdict in Pennsylvania state court in the amount of $620,000 in early 2009. With interest for delay, the judgment exceeded $800,000.

The case arose out of a fire in February 2000 at the Southampton Estates Retirement Community in Bucks County, Pennsylvania. The fire spread from the living room of an apartment into the attic and down the common area hallway. The living room in the unit was protected by a sprinkler head located approximately seven feet from the point of origin. Our cause and origin investigators and the local fire officials believed that the fire was electrical in nature. The sprinkler system failed to activate and the fire thus spread throughout the building, causing damage in excess of $720,000.

We filed suit against two fire protection inspection companies claiming that both had failed to properly warn the insured that the sprinkler system contained significant scale and rust that obstructed the flow of water and prevented the heads from discharging water as designed. The two sprinkler companies were hired to conduct annual sprinkler inspections required by NFPA 25.

The defendants argued that they notified the insured on three separate occasions that the sprinkler system required periodic internal inspections to identify and remove any obstructions. One defendant had sent a letter to Southampton Estates two years before the fire warning of "potential obstruction problems" and recommending an inspection for such obstructions. While the insured admitted receiving notifications, Bill argued that the previous notices were ineffective to inform the insured of the potential hazards and dangers of not conducting an internal inspection of the system and instead essentially were marketing pieces. The jury agreed with Bill and rejected the defendants' arguments.

After one week of trial, the jury found the defendants 85% at fault and the insured 15%. The jury awarded 100% of the claimed spread damages of $720,000 and the Court molded the verdict to reflect the reduction for comparative fault. The highest offer before trial was $150,000.

Thomas M. Regan

David D. Brisco

CANON FIRE…

Tom Regan and David Brisco of the San Diego Office in our West Region obtained a hard fought jury verdict on liability after six weeks of trial in California state court for Farmer's Insurance Group.

A fire in the insured's commercial strip mall during the early morning hours of September 12, 2006 caused approximately $860,000 in damage. Our fire investigators believed the fire had originated in a six-year old Canon copy machine which was plugged in, but not turned on at the time of the fire. Through detailed analysis and testing, we concluded that the fire started in the power supply board that remained energized even when the power switch was in the "off" position.

As is often the case when manufacturers are defending their products, the case became extremely contentious. Tom and David had to file motions to obtain the relevant documents in discovery with the manufacturer claiming that the copy machine had been made in Japan and that it had no information about the power supply board. Tom and David located an exemplar power supply board and, through extensive metallurgical testing, we were able to reconstruct the failure mode. The defendant filed numerous motions, including one on the eve of trial seeking to continue the trial to add experts and conduct additional testing.

The defendant continued to conduct testing even during the start of trial which it attempted to introduce into evidence. Tom and David had to conduct four expert depositions out of the presence of the jury during trial while the judge considered the defendant's motion. Eventually, the Court excluded evidence of this additional testing based upon information uncovered by us that Canon had failed to disclose relevant information during the discovery process.

The jury of twelve voted unanimously to establish liability on the part of Canon based upon negligence and products liability. No offer to settle the case ever had been extended by Canon. The damages phase of the trial is being scheduled.


Mark E. Utke

DEFECTIVE BY DESIGN…

Mark Utke of the Philadelphia Office in our Atlantic Region obtained a favorable jury verdict on behalf of Liberty Mutual following a 10-day trial in New York federal court. The verdict, with interest, was in excess of $845,000.

This product liability action arose from a February 2005 fire in an unoccupied vacation home in East Hampton, New York. Mark was able to convince the nine member jury that a twenty-year old electric space heater caused the fire as a result of a defective design by the manufacturer. The space heater was located in the crawlspace of the home that required supplemental heat to keep water pipes from freezing in cold weather. Despite operating without incident for over two decades, Mark established that the ignition of the fire was initiated by the failure of the heater's fan motor, which started a sequence of events within the heater that led to the cycling of the high-limit switch, a safety device only intended to operate when an over-temperature condition occurs. The high limit switch failed in a closed position, which allowed the heating element of the unit to enter into a thermal run-away condition and ignite surrounding combustibles. The jury found that the 20-year-old heater was defectively designed in that it failed to incorporate a one-time thermal fuse for the purpose of shutting down power to the unit in the event of an over-temperature situation which would have prevented the runaway condition that led to the fire.

"The jury found that the 20-year-old heater was defectively designed in that it failed to incorporate a one-time thermal fuse."

Before and throughout trial, the manufacturer maintained that its heater did not cause the fire and took a no-pay position, in part, because no other claims of fire had ever been made against the model heater with over 135,000 units placed into service since 1982. Mark convinced the jury otherwise. The jury deliberated for only two hours before finding unanimously for our client in the amount of $625,000 with an additional $220,000 in pre-judgment interest under New York law.


Paul R. Bartolacci

GREEN ACRES IS THE LIFE FOR ME…

Paul Bartolacci of the Philadelphia office in the Atlantic Region obtained a $3.5 million dollar verdict on behalf of Thunder Valley Farm in Pennsylvania state court after a two-week jury trial.

The case arose out of the activities related to the expansion of Thunder Valley Farm in Chester County, Pennsylvania, a second generation dairy farm that has been operating since 1944. In 2003, the farm expanded operations from 200 milking cows to 600 milking cows. The expansion included the construction of new facilities, including water distribution and waste removal systems. Shortly after the expansion, milk production decreased and herd health issues increased. After consulting with his veterinarians, the farmer looked at the water that was being supplied to the cows for drinking. This water was stored in a 31,000 gallon underground tank. In 2006, the farm found that there was a crack in the underground PVC pipe that carried waste water to a different part of the facility. This gray-water filled a trench adjacent to the underground drinking water tank and, because of the small welding deficiency in the tank, the gray-water was able to leak into the tank that was pumped to the cows for drinking.

Cozen O'Connor was retained by Thunder Valley Farms six months after the water problem was discovered and the plumbing and welding deficiencies corrected. Paul filed suit against the plumbing contractor who installed the PVC piping and the welding contractor who made the piping connection to the tank. We claimed that the cows' intake of drinking water containing the mixture of gray-water led to losses in milk production, increased herd health issues and decreased reproduction which caused the farm to incur additional expenses in order to continue its internal herd growth. At trial, Paul presented opinion testimony from the farm owner, veterinarians, a water quality expert, a geologist, a metallurgist, and a mechanical engineer.

The defendants argued that the losses were not the result of any gray-water making its way into the drinking water system. Rather, the defense position was that the losses, if any, were a result of normal growing pains associated with the expansion of a dairy farm from 200 to 600 cows, including bringing new cows into the milking herd; management

issues; use of new equipment; feed deficiencies; and a host of other management and operational issues. In addition, the defense argued that the amount of gray-water that infiltrated the 31,000 gallon tank was so diluted before it made its way to the drinking bowls that it was inconsequential. The defendants presented testimony from a veterinarian that cows have an ability to "detoxify" organic contaminants so that it would not affect any milk production. The witnesses on behalf of the defense included a veterinarian from the Ohio State School of Veterinarian Medicine and a Farm Management Professor from Cornell University.

After deliberating over four hours following two weeks of testimony, Thunder Valley Farm was awarded $3.75 million dollars, including pre-judgment interest. The highest offer before trial was $250,000.

SIGNIFICANT SETTLEMENTS

Mark S. Anderson

Megan L. McFarland

HIGH WATER MARK…

Mark Anderson and Megan McFarland of our Seattle office in the Northwest Region obtained a $5,000,000 settlement on behalf of RSUI for a water damage claim in Hawaii. The loss occurred on October 30, 2004 when ten inches of rain fell on the Island of Oahu. The rain collected in a stream that rapidly grew to create a 14-foot deep wall of water, moving at a rate of 5,200 cubic feet per second, which crashed into a bridge extending above the stream. The bridge diverted a 4-foot deep wall of water into an adjacent road leading to the campus of the University of Hawaii. That wall of water resulted in substantial flood damage to the university (the water was so deep on campus that the police had to prevent students from using inner tubes on the water).

Mark was able to locate a stream maintenance plan developed by the City and County of Honolulu, which recommended that the City perform regular dredging and maintenance at the bridge to maintain flow capacity. The plan was never followed by the City, resulting in a reduction of hydraulic capacity under the bridge of approximately 40% due to the build-up of silt and debris. We thus brought suit against the City and County of Honolulu as subrogee of the University of Hawaii.

The case was vigorously contested with extensive and highly technical discovery involving hydrological studies and related forensic issues. Thirty days before trial, with several Motions for Summary Judgment pending, Mark and Megan were able to obtain the $5,000,000 settlement.

James P. Cullen, Jr.

TORCH STONE…

Jim Cullen and Mark Utke of our Philadelphia office in the Atlantic Region obtained a $3,000,000 settlement for Chubb which represented the defendant's liability limits. The settlement was obtained in less than one year.

The loss occurred at the compound of an extremely wealthy individual in Westport, Connecticut. The primary residence was being renovated and the renovations included installation of a flagstone patio. The stone mason was "thermalizing" the exterior edge of the flagstone to give it a rough, natural appearance. Instead of a grinder being used to rough up the edge, the mason used a torch that we contended had caused the fire.

The defendant contractor contested liability, pointing out that the flagstone was several feet from the home, and that the contractor remained onsite for one hour after completing his work without any indication of a fire. The total loss was approximately $4.3 million dollars. The defendant also argued that there should be substantial deductions from the loss amount based upon a number of factors. The primary arguments were that the home was declared a total loss even though post-fire photos and inspections demonstrated primarily smoke damage; the loss was paid on a replacement cost basis, and the defendants argued that the measure of recoverable damages in tort claims is diminution in market

value; the general contractor had a 30% markup, allegedly well-above conventional prices; and the additional living expense payment consisted of renovations and improvements to the insured's guest home so that the insured could live there during the rebuilding of the primary residence.

Jim and Mark were able to convince defense counsel to tender the defendant's $3,000,000 policy limits in very short order by aggressively pursuing discovery while keeping settlement negotiations active.


James D. Dendinger


Stephen M. Halbeisen

SPRAY ON FIRE…

Jim Dendinger and Steve Halbeisen of our Dallas Office in the South Central Region obtained a settlement of $1 million in U.S. dollars and $2.75 million in Canadian dollars for RSUI. Part of the payment was in Canadian dollars because the claim was being paid by a Canadian liability insurer for a loss in Texas.

"The subcontractor violated the installation specifications by spraying the insulation in an extremely thick application, rather than thinner layers with adequate cure time between applications, as required."

RSUI insured a mansion owned by another extremely wealthy insured. The home included 17,500 square feet of living space and was situated on five acres. The home was undergoing a $12 million dollar renovation when the fire occurred. The insured was serving as the general contractor through a separate corporation owned by the insured. At the time of the fire, a subcontractor was applying polyurethane spray foam insulation. The subcontractor violated the installation specifications by spraying the insulation in an extremely thick application, rather than thinner layers with adequate cure time between applications, as required. We initially pursued a claim against the responsible subcontractor who misapplied the product. We settled for the subcontractor's policy limits of $1,000,000 and then filed suit on behalf of RSUI against the manufacturer of the foam insulation on the basis of inadequate warnings and instructions. The insured/GC intervened in the suit, seeking damages in excess of $30,000,000 under the Texas Deceptive Trade Practices Act. Steve and Jim were able to negotiate an additional settlement of $2,750,000 (Can) for RSUI with the approval of the insured which continued to prosecute its uninsured claims against the manufacturer.


James I. Tarman, Jr.

GRINDING OUT A SETTLEMENT…

Paul Bartolacci of our Philadelphia office in the Atlantic Region and Jim Tarman of our Chicago office in the Midwest Regional Office teamed up for a $1.3 million dollar settlement on behalf of our clients Liberty Mutual and Chubb. The case involved a fire at a manufacturing facility in Indiana. The fire arose in a machine used to grind steel bits into tools. An oil-based lubricant was used as part of the cutting operation, which we determined had been ignited when the grinding machine overheated.

Our insured performed several substantial modifications to the equipment, including rewiring, so that the mist extractor for the lubricant would continue to run even if overheating occurred and an on-board fire extinguisher discharged. Doing so essentially bypassed a safety switch to provide for a continued pneumatic pressure and the continued operation of the machine, notwithstanding activation of the safety switch.

Despite this allegation of comparative fault, Paul and Jim were able to develop a persuasive case that involved design defects and negligent maintenance by the defendant manufacturer/installer. The $1.3 million dollar recovery was almost 100% of the defense evaluation of our damages.


Robert J. Slavik

CHIMNEY SWEEP…

Jack Slavik of our Seattle office in the Northwest Region obtained a pre-suit settlement representing approximately 95% of the ACV damages on behalf of USAA.

The initial fire investigator believed that the fire was related to faulty installation of a

wood burning stove. We conducted additional investigation and determined that the installer, Cascade Chimney, had performed unauthorized modifications in connection with the installation of the stove which allowed hot gases to escape, which ultimately ignited nearby wood framing. The stove had been installed four years before the fire when the house was owned by a former owner. The insured purchased the home and moved in approximately a year before the fire.

The defendant installer argued that in the four years following installation, the chimney had been dislodged by the owners during cleaning, and when roofing work was done. We tracked down the former homeowner and obtained a statement rejecting those assertions. We also conducted a series of tests of the evidence to establish that our scenario was scientifically correct.

On the eve of the expiration of the statute of limitations, the case was resolved without suit being filed in the amount of $232,500.


Suzanne C. Radcliff

STORM SURGE…

Steve Halbeisen and Suzanne Radcliff of our Dallas office in the South Central Region obtained a highly favorable settlement on behalf of Chubb. The claims arose out of virtually identical incidents that damaged the insured's tunnel boring machine at a sewer relief project in Houston, Texas. The first loss occurred on June 19, 2006 during a storm that produced almost ten inches of rain. The insured was in the process of tunneling a 120-inch diameter storm sewer line that intersected with an existing 60- inch diameter waste water sewer line. The general contractor cut a large section of the waste water line and installed a new bypass running underneath the storm sewer line. On the date of the loss, heavy rains overwhelmed the waste water treatment facility downstream of the project, which eventually discharged out of the concrete junction box within which the bypass was being constructed. As a result, the tunnel boring machine was submerged in water. The total damages were approximately $1.5 million dollars.

Before the repairs were completed, another discharge event submerged the same machine on October 16, 2007 causing an additional $327,000 in damages.

We filed suit against the general contractor. The theory against the general contractor was its failure to have properly designed the concrete junction boxes and to have anticipated the discharge of waste water under heavy storm conditions. The general contractor blamed the City of Houston (which was immune from suit) as well as two engineering firms with whom it had worked. The GC also alleged that the insured, a contracting company, had significant comparative fault because it had removed the backfill which had been placed on top of the concrete junction box lids.

A month before trial was scheduled to start, the GC made a demand upon the insured for its defense costs per a written subcontract between the companies. We were able to negotiate a confidential settlement which included a complete release of all claims, including the indemnification claim for defense costs.

ARBITRATION VICTORIES


Howard D. Maycon


Michael J. Partos

REAR ENDER WINDS UP AS ARBITRATION TENDER…

Howard Maycon and Mike Partos from our Western Regional Office in Los Angeles obtained a $508,000 binding arbitration victory for Lexington Insurance Company and Gregg In Situ, Inc. Gregg is a nationally renowned geotechnical soil sampling company that sustained a loss when one of its mobile labs was totaled in a rear-end highway collision while being transported. Lexington provided the property insurance on the trailer and paid $150,000 following the loss. We also represented Gregg for its uninsured business interruption loss resulting from the accident and loss of use of the mobile trailer.

Howard and Mike filed suit in Gregg's name for the entire loss. The defendant contested causation and liability and both sides retained accident reconstruction experts to assist in proving their cases. We also had to present a complex business interruption claim that included issues such as seasonal earnings, growth trends of the company, and dealing with lost profits company-wide as the insured had multiple offices.

Before the binding arbitration, the defense offered $160,000 to resolve the matter, which it contended was a case where a defense verdict was likely. Two days before the binding arbitration, while our team was in route to San Jose, California for the hearing, defense counsel increased the offer to $180,000.

At the arbitration, testimony was elicited from nine witnesses, including drivers of the vehicles, an eyewitness, a California highway patrol officer, accident reconstruction experts, and economists. In his 10-page decision, the arbitrator cancelled out the dueling accident reconstruction experts and relied upon the eyewitnesses to establish liability in our clients' favor. In awarding lost profits in an amount more than double the value of the vehicle, the arbitrator cited Mark Twain's famous line about "lies, damn lies, and statistics."

ALL WET…

John Reis of the Charlotte office in our Southeast Regional Office recently obtained an intra-company arbitration award on behalf of Zurich for $500,000 on a claim of $650,000.


John W. Reis

The claim involved water damage from rain intrusion into a sporting goods store insured by Zurich. The rain leaked through a temporary roof installed by a contractor. The temporary roof had been installed above a new addition to the insured's store during construction. The insured's goods, primarily football jerseys, were stacked in shelving against a temporary wall that separated the existing structure from the new addition. The insured was the tenant of the building and its lease with the landlord had a subrogation waiver between the landlord and tenant.

The roofing contractor was the only target, but it contested liability on a number of grounds, including a contention that the roof system was known by the insured to be temporary in nature, and thus the insured assumed the risk of storing goods in the new addition, as opposed to moving its goods back into the existing structure under the permanent roof. This argument had potential in light of the 3-day long rain storm that caused the loss. John effectively countered this argument by proving that a sheet metal brace was used to support the temporary roof rather than steel, which allowed the roof structure to move during a storm with heavy winds.

APPELLATE VICTORIES

In our Summer 2008 Volume, we reported that Paul Bartolacci of our Philadelphia Office in the Atlantic Region received a plaintiff's verdict in the amount of $1.5 million in Ohio state court following a three-day jury trial for Liberty Mutual. On July 31, 2009, the liability verdict and damage award was affirmed in the Ohio Court of Appeals.

The cased involved a fire that occurred on January 20, 2006 in a building owned by Liberty's insured. A tenant in the building manufactured a line of incense sticks and a fire started near the incense stick manufacturing area and spread throughout the building, causing the building to be a total loss. Paul successfully convinced the jury that the tenant was negligent, violated fire and safety codes, acted with gross negligence and willful and wanton misconduct, and proximately caused the fire. The jury also found that D&J breached its lease with the insured.

On appeal, D&J raised several issues. In addressing them, the appellate court held that gross negligence and willful and wanton misconduct would prevent a waiver of subrogation clause from insulating the tenant from liability. In addition,

the Court noted that the defendant tenant violated the terms of the lease by failing to comply with fire codes and, therefore, could not rely on the waiver. With respect to damages, the defense had contended at trial that the county tax assessment set the ceiling for any value on the building loss. The Court of Appeals rejected that argument.

The Court affirmed the judgment of the trial court in the amount of $1,555,708.18. Paul had cross-appealed because the trial court dismissed a claim for pre-judgment interest without holding a hearing. The Court concluded that "substantial justice was not done with respect to Ohio Casualty's Motion for Pre-Judgment Interest" and remanded that issue to the trial court.


Kevin P. Caraher

We also reported in our Summer 2008 Volume that Kevin Carahar of our Chicago Office in the Midwest Region obtained a verdict in May 2008 in Illinois state court on behalf of Fireman's Fund Insurance Company for $3.3 million dollars of which FFIC's share was 43%. An unidentified arsonist had stolen a car and eventually left it in the shipping area of an industrial building in Chicago. He then set the car on fire and the fire spread to a wood loading dock in the building of origin, eventually igniting an adjacent building owned by our client's insured. We asserted negligent maintenance and operation of the sprinkler system in the building of origin had caused the uncontrollable spread of the fire. The trial court then granted the defendant's motion for a new trial on the basis of an inconsistent verdict (the jury had found the defendant tenant liable while finding the owner, who also was the principal of the tenant, not liable). In a decision dated August 21, 2009, an Illinois Appellate Court affirmed the jury verdict, and reversed the trial court's order for a new trial.

The Appellate Court found that Illinois law recognized a duty with regard to damage caused by the spread of fire from one parcel of property (or part of property) to another. The Court also recognized that while the tenant was under no duty to prevent the criminal arson which started the fire the defendant was sued for its failure to maintain and operate a proper fire suppression sprinkler system in the building. In addition, the Court was not persuaded "that this duty runs only to those whose property is 'immediately adjacent' to the defendant's property." Other allegations of error raised by the defense were rejected by the Illinois Appellate Court which remanded the case to the trial court for entry of judgment on the jury's original verdict.

RECENT RECALLS

During late 2008 and 2009, a number of manufacturers announced significant recalls of products due to fire hazards. The National Highway Traffic Safety Administration announced that the possibility of engine fires had prompted General Motors to voluntarily recall nearly 1.5 million passenger sedans manufactured between 1997 and 2003. The recall covers certain mid and full-sized passenger sedans under GM's Chevrolet, Buick, Oldsmobile, and Pontiac brands. The affected vehicles have naturally aspirated 3.8 liter V6 engines. The problem involves a potential for oil to leak on the exhaust manifold during hard breaking. When a car operates under normal conditions, the manifold can get very hot and ignite the oil.

The United States Consumer Product Safety Commission announced a voluntary recall by Sears of Kenmore and Kenmore Elite coffeemakers. The recall involved about 145,000 units because the wiring in the coffeemaker could overheat, posing a fire hazard to consumers. Sears had received 20 reports of the coffeemakers overheating, including 12 fires, causing damage to countertops, cabinet damage, and plastic melting on the floor. The recall involves 12-cup Kenmore coffeemakers sold in black, white, and red with the following Model Numbers: 100.80006 (black), 100.81006 (white), and 100.82006 (red). The recall also involves 12-cup Kenmore Elite coffeemakers with thermal carafe (Model Number 100.90007) and 14-cup Kenmore Elite

coffeemakers (Model Number 100.90006). The model number can be found on the bottom of the unit.

The United States Consumer Product Safety Commission and General Electric Company issued a voluntary recall of several models of General Electric wall ovens because of potential fire and burn risk caused by the machine's self-cleaning cycle. The recall affected GE, GE Profile, Monogram, and Kenmore wall oven brands, which could pose a fire or burn hazard to users if the wall oven door is removed and incorrectly re-attached. GE reported 28 incidents of minor property damage, mostly to kitchen cabinets adjacent to the ovens. About 244,000 ovens were involved in the recall and the company will repair affected items free of charges. The ovens were sold at home building and appliances stores from October 2002 to December 2004.

Earlier in the year, Wal-Mart issued a recall for GE toasters after consumers complained that the toaster had caused sparks or fires. Wal-Mart had received 140 reports of fires or sparks coming from toasters or reports of the toasters tripping the circuit breaker in homes. Wal-Mart warned that short circuit in the wiring could occur between the heating element and the bread cage, causing fire and electrical shock hazards for consumers.

Wal-Mart Stores, in conjunction with the CPSC, also recalled 1.5 million Chinese-made DVD players in response to several reports that the devices had overheated and started fires. The Durabrand DVD players, which retail for $29.00, were affected. Wal-Mart said it had received 12 reports of fires related to the DVDs, including five that resulted in fires serious enough to cause property damage. Wal-Mart advised consumers to stop using the Durabrand players immediately and return them to the nearest Wal-Mart for a refund. The units were sold exclusively at stores from 2006 until July of 2009. Durabrand is generic brand sold exclusively at Wal-Mart.

Maytag Corporation and the CPSC recently announced the expanding of a recall the agency issued earlier in 2009 that affected 1.6 million refrigerators. The latest recall involves an additional 46,000 units according to the CPSC. The original recall was in March of 2009 and the potential hazard is caused by relay ignition, an electrical failure in the relay, the part of the refrigerator that activates its compressor, which can cause overheating and lead to a fire. The defective refrigerators were sold between September and May 2004. The recall applies to refrigerators with freezers on the side and top, but not the bottom. The brands affected by the most recent recall include Maytag, Magic Chief, Performa by Maytag and Crosley. The earlier recall addressed refrigerators with side by side and top freezers that were sold between January 2001 and January 2006.

SUBROGATION & RECOVERY LAW BLOG

In July, we launched our Subrogation & Recovery Law Blog at www.subrogationrecoverylawblog.com. Our team of bloggers will offer commentaries and insights on current issues and developing trends in subrogation and recovery claims. The Blog will also provide an outlet for our clients to share areas of concerns and responses to our reports.

Along with our Subrogation Alerts, Subrogation White papers and our *Subrogation & Recovery Observer,* our new Subrogation & Recovery Law Blog enables our 150 plus subrogation attorneys, recovery analysts and paralegals in our 25 offices to provide you with important information and up-to-date research on subrogation issues that confront the insurance industry. Howard Maycon of our Los Angeles Office is Editor of our Blog with our Blog Task Force comprised of attorneys from each of our regional offices.

COZEN O'CONNOR

CPSC PRODUCT RECALLS FOR COMMON HOUSEHOLD APPLIANCES

Below is a listing of all of the product recalls for common household appliances issued by the Consumer Products Safety Commission since 2000. These products were recalled because they pose a significant risk of causing property damage. Anytime that you have a property loss that you believe was caused by a product, you should visit the CPSC's website at cpsc.gov to find out whether the product in question has been the subject of a recall.

If you have any questions about pursuing a products liability action against a manufacturer, please contact Matt Noone, Chairman of the Cozen O'Connor Appliance Failure Task Force. He can be reached at 800.523.2900, or at mnoone@cozen.com.

COFFEE MAKERS		
Manufacturer/ Distributor	Model Number	Date of Recall
Bunn-O-Matic Corp.	GR-10B, GR10W, B-10B, B-10W, BST-10B	July 25, 2006
Bunn-O-Matic Corp.	GR-10B, GR-10W, B-10B, B10W, BT-10B	June 10, 2005
Whirlpool Corp.	KCM120OB, KCM300OB, KCM120WH, KCM300WH	June 2, 2005, rev'd September 23, 2005
Whirlpool Corp.	KCM200OB, KCM400OB, KCM200WH, KCM400WH, KCM400ER, KCM400BU	June 2, 2005, rev'd September 23, 2005
Krups North America	398 and 405	July 11, 2001
Eugster/Frismag AG – Jura Impressa Automatic Coffee Center Espresso	E50, E55, E70 or E75	March 30, 2006
Eugster/Frismag – C1000 Capresso Automatic Coffee Center	C1000, model no. 152	March 7, 2006
Eugster/Frismag – Orchestro Espresso Makers	889-45, 890-41	February 15, 2006
Atico International USA, Inc. – Kitchen Gourmet	XQ-673K	April 6, 2009
Atico International USA, Inc. – Signature Gourmet	XQ-673BT and CM4193D	April 6, 2009
Sears, Roebuck and Co. – Kenmore and Kenmore Elite	100.80006 (black), 100.81006 (white), 100.90007, 100.90006	August 26, 2008
Atico International USA, Inc. – Signature Gourmet and Kitchen Gourmet	XQ-673B	July 18, 2007
Starbucks Coffee Company Starbucks Brista Aroma		October 17, 2006
Applica Consumer Products Inc.- Black & Decker Brand Thermal	TCM900 and TCM805	June 6, 2006
ICED TEA MAKERS		
Back to Basics Products LLC – IT 400	IT400, date code of CA1307 or CA1307-A	September 13, 2007
DISHWASHERS		
BSH Home Appliances Corp. - Bosch	SHE43C, SHE44C, SHE46C, SHE56C, SHU33, SHU42, SHU432, SHU43C, SHU53A	July 11, 2009
BSH Home Appliances Corp. – Siemens	SL34A	July 15, 2009

DISHWASHERS (continued)		
Manufacturer/ Distributor	Model Number	Date of Recall
Asko Cylinda AB/AM Appliance Group, Inc.	Model Series DW95, model nos. 1355, 1385, 1475, 1485, 1555, 1585, 1595, 1655, 1805, 1885 and 1895	June 14, 2007, rev'd January 15, 2008
GE Consumer & Industrial – Eterna	EDW20, EDW30	May 16, 2007
GE Consumer & Industrial – GE and GE Profile	GHD50, GSD40, GSD41, GSD43, GSD46, GSD4910Z, GSD4920Z. GSD4930Z, GSD4940Z0, GSD50, GSD51, GSD521, GSD522, GSD523, GSD531, GSD532, GSD532, GSD535, GSD536, GSD55, GSD56, GSD57, GSD58, GSD59, GSDL3, GSDL6	May 16, 2007
GE Consumer & Industrial – GE Monogram	ZBD3500ZO	May 16, 2007
GE Consumer & Industrial – Hotpoint	HDA3400F, HDA35	May 16, 2007
GE Consumer & Industrial – GE & GE Profile	GHD35, GSD21, GSD2200D, GSD2200F, GSD2200G, GSD2201F, GSD2220F, GSD2221F, GSD2230F, GSD2231F, GSD2250F, GSD23, GSD26, GSD27, GSD3115F, GSD3125F, GSD3135F, GSD3200G, GSD3210F, GSD3220F, GSD3230F, GSD33, GSD341, GSD342, GSD343, GSD345, GSD3610F, GSD3620F, GSD3630F, GSD3650F, GSD37, GSD381, GSD382, GSD383, GSD385, GSD391, GSD392, GSD393, GSD4525F, GSD4535F, GSD4555F, GSDL122F, GSDL132F, GSDL24, GSM2100F, GSM2100G, GSM2100Z0, GSM2110D, GSM2110F, GSM2130D, GSM2130F	May 16, 2007
GE Consumer & Industrial Sears-Kenmore	363.1438, 363.1447, 363.1445, 363.1448, 363.1457, 363.1467, 363.1475, 363.15161792, 363.1517, 363.1521, 363.1527, 363.1528, 363.1531, 363.1532, 363.1546, 363.1547, 363.1548, 363.1556, 363.1565, 363.1567, 363.1617, 363.1655	May 16, 2007
Maytag Corp.	MDB3, MDB4, MDB5, MDB6, MDB7, MDB8, MDB9, MDBD, MDC3, MDC4, MDC5, DWU9	February 1, 2007
Maytag Corp. – Jenn-Air	JDB3, JDB4, JDB5, JDB6, JDB7	February 1, 2007
Whirlpool Corporation	Model No. beginning with DU1, DUL, GU1, GU2, GU6	February 25, 2005, rev'd April 8, 2005
Whirlpool Corporation – Kenmore	Model No. beginning with 665.143, 665.160, 665, 163, 665.170, 665.173	February 25, 2005, rev'd April 8, 2005
GE Consumer and Industrial	GSD5500G, GSD5560G, GSD5800G, GSD5960G, EDW3000G; EDW3060G	February 25, 2005, rev'd April 8, 2005
General Electric Appliances GE & Hotpoint	GSD500D, GSD500G, GSD540, HDA467, HDA477, HDA487	December 14, 2000
DRYERS		
Miele, Inc.	T 9820	T 9820
Whirlpool Corp. – Compact Twin Washer/ Gas Dryer Units	LTG5243DZ2, LTG5243DT2, LTG5243DQ2, LTG5243DQ3, LTG5243DT3	July 2, 2002
Whirlpool Corp. – Kenmore Laundry Center Washer/Gas Dryer Units	110.98752792, 110.98752793	July 2, 2002
Whirlpool Corp. – GE Unitized Spacemaker Washer/Gas Dryer Units	WSM2480TBAWW, WSM2480TCAWW	July 2, 2002
Whirlpool Compact Thin Twin	Begins with MM, ML or MK: LTG5243DZ2, LTG5243DT2 LTG5243DQ2 LTG5243DQ3 LTG5243DTE	July 2, 2002

DRYERS (continued)		
Manufacturer/ Distributor	Model Number	Date of Recall
Kenmore Laundry Center	Begins with MM, ML or MK: 110.98752792, 110.98752793	July 2, 2002
General Electric Unitized Spacemaker	Has Z, A, D as second character: WSM280TBAWW WSM2480TCAWW	July 2, 2002
DEEP FRYERS		
JC Penney – Cooks	22016	March 11, 2008
OVENS		
GE Consumer & Industrial	Model no begins with J2B900 and J2B915	April 8, 2009
GE Consumer & Industrial	GE/Profile JCT915, JT912, JT915, JT952, JT955, JT965, JT980, JTP20, JTP25, JTP28, JTP48, JTP50, JTP86	November 18, 2008
GE Consumer & Industrial	Monogram ZET3058, ZET938, ZET958	November 18, 2008
GE Consumer & Industrial	Kenmore (all models numbers start with 911) 4771, 4775, 4781, 4904, 4905, 4923	November 18, 2008
Frigidaire Canada	790.30472400, 790.30473400, 790.30473401, 790.3047440, 790.30479400	May 20, 2008
Keystone Manufacturing Co. Cook's Essentials Multi-Function Convection Oven with pull-out Rotisserie	910500	September 12, 2007
Keystone Manufacturing Co.- Deni Convection Oven with Rotisserie	10500	September 12, 2007
Petters Consumer Brands LLC – Sunbeam Microwave	SNM1501RAQ	July 17, 2007
BSH Home Appliances Corp.- Thermador Built-In Ovens	(single ovens) C271B, C301B, SEC271B and SEC301B	June 29, 2007
BSH Home Appliances Corp. – Thermador Built-In Ovens	(combination models) SEM272B, SEM302B, SEMW272B and SEMW302B	June 29, 2007
BSH Home Appliances Corp. – Thermador Ceramic Cooktops	CIT302DS/01 and CIT362DS/01	June 7, 2007
GE Consumer & Industrial – GE Monogram Professional Gas Ranges	ZDP48N6DHSS, ZDP48L6DHSS, ZDP36N4DHSS and ZDP36L4DHSS	June 6, 2007
GE Consumer & Industrial – GE Monogram Professional Gas Ranges	ZDP48N6RH1SS, ZDP48L6RH1SS, ZDP48N4GH1SS, ZDP48L4GH1SS, ZDP48N6DH1SS, ZDP36N4DH11SS and ZDP36L4DH1SS	December 15, 2005
GE Consumer & Industrial	GE/GE Profile JKP85B0A3BB, JKP85B0D1BB, JPK85W0A3WW, JKP85W0D1WW, JKP86B0F1BB, JKP86C0F1CC, JKP86S0F1SS, JKP86W0F1WW, JT965B0F1BB, JT965C0F1CC, JT965S0F1SS, JT965W0F1WW, JTP85B0D1BB, JTP85W0A2WW, JTP85W0A3WW, JTP85W0A4WW, JTP85W0A5WW, JTP85W0D1WW, JTP86B0F1BB, JTP86C0F1CC, JTP86S0F1SS, JTP86W0F1WW, JTP95B0A2BB, JTP95B0A3BB, JTP95B0A4BB, JTP95B0A5BB, JTP95B0D1BB, JTP95W0A2WW, JTP95W0A3WW, JTP95W0A4WW, JTP95W0A5WW, JTP95W0D1WW	December 5, 2007

OVENS (continued)		
Manufacturer/ Distributor	Model Number	Date of Recall
GE Consumer & Industrial	Kenmore (all model numbers start with 911) 41485991, 41485993, 41485994, 41489991, 41489992, 41489993, 41489994, 41489994, 49485992, 49489992, 47692100, 47699100, 47862100, 47869100, 47812200, 47813200, 47814200, 47819200, 47792200, 47793200, 47794200, 47799200	December 5, 2007
WASHERS		
Top Load Washer - Crosley, Frigidaire, Kelvinator, White-Westinghouse	CTW100FW, GLWS1749FS, SWS833HS, FTW3011KW, KWS1349DS, SWX703HQ, FTW3014KW, MWS939AS, SWX703HS, FWS1233FS, SWS1233HQ, WWS833FS, FWS933FS, SWS1233HS, WWTW3000KW, GLWS1439FC, SWS1339HS, GLWS1439FS, SWS1649HS	July 30, 2009
Maytag and Samsung Front Loading Washers	2005: GA, GC, GE, GG, GJ, GL, GN, GP, GR, GT, GV, GX. 2006: JA, JC, JE, JG, JJ, JL, JN.	
Front Load Washer – Crosley, Frigidaire, Wascomat, White-Westinghouse	CFW2000FW, FTF530FX, WE17N, FCCW3000FS, GLTF1570FS, WTF330HS, WE17M	July 30, 2009
Laundry Center – Crosley, Frigidaire, Kenmore, White-Westinghouse	97812, CLCE900FW, GLET1142FS, 97912, FEX831FS, GLGH1642FS, 97962, FGX831FS, GLGT1031FS, C97812, FLGB82001FS, MEX731CFS, C97962, GLEH1642FS, SWSG1031HS, CLCE500FW, GLET1031FS, SWXG831HS	July 30, 2009
REFRIGERATORS		
Kenmore Elite Trio	21Cu.Ft.: 795.7519240, 795.7519340, 795.7519440, 795.7519640, 795.7519940, 25Cu.Ft.: 795.7554640, 795.7554940, 795.7555240, 795.7555340, 795.7555440, 795.7555640, 795.7555940, 795.7554240, 795.7554340, 795.7554440	June 29, 2005
LG	LRFC21755TT, LRFC2570SW LRFC21755SB LRFC25750SB LRFC21755ST LRFC25750TT	June 29, 2005
Viking Range Corp.	Viking Range Corp.	
Maytag (Jenn-Air, Amana, Admiral, Magic Chef)	Side by Side:AA, AC, AE, AG, AJ, AL, AN, AP, AR, AT, AV, AX, CA, CC, CE, CG, CJ, CL, ZB, ZD, ZF, ZH, ZK, ZM, ZQ, ZS, ZU, ZW, ZY, ZZ; and Model Numbers beginning with ARS, CS, JC, JS, MS, MZ, PS. Top Freezer: AA, AC, AE, AG, AJ, AL, AN, AP, AR, AT, AV, AX, ZK, ZM, ZQ, ZS, ZU, ZW, ZY, ZZ; and Model Numbers beginning with AT, CT, MT, PT	

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RECENT OPINIONS OF INTEREST IN THE SUBROGATION ARENA

INSURER'S SUBROGATION SUIT DOES NOT "SPLIT A CAUSE OF ACTION" IN PENNSYLVANIA

The Pennsylvania Superior Court recently clarified Pennsylvania law relating to splitting a cause of action. The case arose out of a fire in June 2005 in Allegheny County, Pennsylvania.

George Hay was following a tractor trailer down an exit ramp when, without warning, the driver of the vehicle attempted a u-turn in the middle of the exit ramp. The driver was unsuccessful and the tractor trailer jack-knifed on the ramp, blocking both lanes of travel. Mr. Hay was unable to stop his vehicle before striking the truck. State Farm promptly reimbursed Mr. Hay for the property damage to his vehicle and State Farm was subrogated in the amount of $9,020.58 for damages paid to its insured.

In October 2006, Mr. Hay and his wife filed a Complaint alleging personal injuries from the accident. Suit was filed against the driver and his employer. The Complaint sought compensation for Mr. Hay's physical injuries, his mental anxiety, and his wife's loss of consortium. The Complaint did not request compensation for the damages to the vehicle sustained in the collision.

In May 2007, State Farm filed its own Complaint against the defendant seeking satisfaction of its subrogation lien. State Farm did not assert a claim for Mr. Hay's personal injuries or attempt to recover the deductible. The defendants filed preliminary objections asserting that State Farm was not entitled to recover on its subrogated claim. The defendant contended that State Farm had waived its negligence claim pursuant to Pennsylvania Rule of Civil Procedure 1020(d), because the Hays had already filed a Complaint seeking damages arising out of the same "transaction or occurrence." The trial court accepted the argument and dismissed State Farm's Complaint. State Farm appealed.

In considering the matter, the appellate court noted that the trial court's reasoning suggested that the separate actions commenced by Mr. Hay for personal injury and State Farm for property damage split the cause of action in the underlying case, as both actions arose from the same transaction and both asserted negligence. The trial court further reasoned that such an action was improper based on case law holding that in a subrogation action the insurance company stands in the shoes of the insured.

State Farm contended on appeal that its right to recover on its subrogated property damage claim exists independent of Hay's personal injury claims and that, while limited to the extent of Hay's original property damage, State Farm's claim may not have been joined with Hay's claim under Rule 1020.

The appellate court reviewed the language of Rule 1020 and observed that the plain language of the Rule appears to presume application only to claims raised by a single plaintiff. Pa.R.C.P. 1020(a). The appellate court concluded that "Rule 1020(d) can be used to compel joinder of causes of action brought by multiple parties in separate actions (and waiver of those not so joined) only if the interest of those parties would require compulsory joinder in a single action as plaintiffs." Noting that the unity and identity of interest between an insurer and its insured is not sufficient to compel their joinder as plaintiffs if they were any other two parties, they may not be compelled to assert their related claims in a single action under Rule 1020(d). The "unity and identity of interests" of State Farm and its insured ceased to exist after State Farm paid its insured's claim for property damage. State Farm had no interest in the insured's personal injury action and, thus, no particular motivation to pursue recovery on such a claim. Similarly, State Farm's insured, once reimbursed for his property damage under the terms of the insurance policy, has no further interest in pursuing that claim. The trial court's ruling resulted in an impractical and unjust result because it did not recognize that State Farm acted only to recover its own loss and was acting in its own capacity. *State Farm Mut. Auto. Ins. Co. v. Ware's Van Storage, 953 A. 2d 568 (Pa. Super 2008).*

FLORIDA APPELLATE COURT EMBRACES "THE UNDERTAKER DOCTRINE"

In *Travelers Insurance Company v. Securitylink from Ameritech, Inc., No. 3007-3177,* a Florida appellate court overturned a trial court order dismissing a Complaint against a security company on the grounds that the security company did not owe a duty to Travelers' insured.

Travelers Insurance Company insured a warehouse owner. The warehouse owner contracted with Securitylink from Ameritech, Inc. ("the alarm company") to install and monitor an alarm at its warehouse. The alarm company, in turn, employed the security company, Vanguard Security, Inc., to respond to alarm calls at the warehouse. According to established procedure, when the alarm sounded the alarm company contacted the security company to send a guard to inspect the premises. The guard from the security company would go to the warehouse, inspect the premises for any signs of forced entry or suspicious activity, and report back to the alarm company.

One weekend, the alarm company received four alarm signals from the warehouse. Each time, the alarm company called the security company to dispatch a guard to inspect the premises. On the first three alarms, the guard inspected the premises and reported no evidence of forced entry or suspicious activity. On the fourth alarm, the alarm company called the warehouse owner, requesting it send someone to the warehouse. Upon entering the warehouse, the warehouse owner discovered a ladder descending from a broken skylight and determined that merchandise was missing.

Travelers paid the claim on the stolen merchandise and filed a subrogation action to recover the monies paid on the claim. After several amendments, the insurer's Complaint alleged negligence, gross negligence, and breach of contract against both the alarm company and the security company. Upon motion, the trial court dismissed the claims against the security company, and the insurer appealed.

The security company contended that it owed a duty only to the alarm company with whom it contracted. The Court of Appeals stated, however, that Florida law is well settled that a non-contracting party may bring an action for breach of contractual duty when the party is the intended beneficiary of the contract. Further, negligent performance of inspections may give rise to a cause of action.

The Court of Appeals cited two Florida cases adopting the standards set forth in Section 324A of the Restatement (Second) of Torts (1965) relating to the "undertaker doctrine." The security company undertook, upon request, to respond to and inspect the property of an alarm company customer for forced entry or suspicious activity. Although the security company contracted to provide this service at the request of the alarm company, the alarm company customers, including the warehouse owner, were the direct beneficiaries of the contracted services. In addition, the security company undertook to render services that were necessary to protect the property of the alarm company customers.

The Court reasoned as follows:

> Thus, the security company may be held liable to the warehouse owner: (a) if the security company failed to reasonably perform its obligation to respond and inspect the warehouse premises; (b) the warehouse owner suffered harm because it relied on the security company reasonably performing these services; and (c) the harm suffered is directly attributable to the security company's failure to reasonably perform these services. We, therefore, determine that the insurer's Complaint sufficiently pleads a cause of action against the security company under the undertaker doctrine.

KENTUCKY APPELLATE COURT ADDRESSES "ECONOMIC LOSS DOCTRINE"

A Kentucky Appeals Court recently addressed the economic loss rule in a decision on an insurance company's product liability suit over a $2.8 million dollars piece of industrial equipment that failed and destroyed itself. *Industrial Risk Insurers v. Giddings & Lewis, Inc.* The Court of Appeals for the Commonwealth of Kentucky No. 2007-CA-002163-MR bolstered an earlier decision from the same court whether the doctrine, which generally bars claims in cases where a product only damages itself, can be applied to cases in Kentucky.

The Kentucky Supreme Court has not yet addressed the economic loss doctrine but in 2004 the Kentucky Appellate Court offered a limited ruling on the applicability of the doctrine. The Court essentially adopted Colorado's version of the economic loss rule.

The facts in the most recent case arose from a 1997 fire at an Ingersoll-Rand Company facility. Several tons of metal escaped from a spinning lathe and destroyed the equipment and several nearby components. Industrial Risk Insurers paid $2.8 million for repairs and related costs associated with the

incident. IRI then sued the manufacturer of the machine asserting claims of negligence, product liability, negligent misrepresentation, and fraud. The trial court granted summary judgment to the defendant based upon the economic loss rule although the Court freely admitted that it did not understand the logic behind the exception. The appeals court affirmed the applicability of the rule and dismissed IRI's contention that the Complaint was subject to an exception for sudden and calamitous events. IRI urged Kentucky to adopt the sudden and calamitous event exception to the economic loss rule which essentially renders the rule inapplicable if the damage occurs in the course of a dangerous accident that might have caused personal injury or, in some cases, property damage.

The appeals court did not believe there was any logical reason to determine the amount of damage available based on whether a product failed by small increments or suddenly. The end result is the same, the product failed. The appeals court did determine that the claims of negligent misrepresentation and fraud arose out of common law tort theories and thus did not fall within the economic loss rule. The case was sent back to the Circuit Court to address those issues. The Court cautioned that it was not holding that the claims would ultimately withstand appropriate motions for summary judgment or a directed verdict but the parties should be permitted to make their arguments regarding the validity of those claims. The Court also left open the issue of whether IRI could prove that the lathe components constitute one product or several products, a distinction that might allow the possibility of recovery.

"The appeals court did not believe there was any logical reason to determine the amount of damage available based on whether a product failed by small increments or suddenly. The end result is the same..."

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