REGIONAL SUBROGATION PRACTICE UPDATE: LAW AND PROCEDURE IN NEW ENGLAND STATES

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Introduction

Recent changes in insurance law may dramatically affect chances for success in subrogation cases in certain states. The prominent relevant issues include: spoliation of evidence; the economic loss doctrine; exculpatory or limitation of liability provisions; waiver of subrogation clauses; and the implied-coinsured doctrine. In the following sections, we will discuss and update the law regarding these subrogation topics for insurance professionals in the New England states. For each state we have attempted to discuss the most recent decisions and emerging legal trends. Where no recent caselaw exists in certain states, we have explained and outlined the existing rule of law.

I. SPOLIATION OF EVIDENCE

Spoliation of evidence refers to "destruction or the significant and meaningful alteration" of a document, instrument or object. See Cozen, Insuring Real Property §20.04 (1999). When evidence is destroyed, altered or lost so that the non-spoliating party is unable to examine it, this doctrine may be applied to allow an evidentiary inference that whatever was destroyed would have been helpful to the non-spoliating party. In the context of subrogation claims, the spoliation doctrine arises most often in products liability cases when evidence has been lost, destroyed or altered during testing, or in fire-damage cases when evidence from a fire scene has not been preserved. Id.

Sanctions for spoliation vary, particularly across different jurisdictions. In a majority of states, the court may, under proper circumstances, advise the jury to infer that the spoliated evidence was damaging to the party that destroyed the evidence. In other cases, the judge may prevent expert testimony or even dismiss the claim. Important issues of fact affect the proper sanctions, including intent or knowledge on the part of the spoliator and whether the spoliator was a party to the action. Finally, an emerging trend in certain states is for courts to recognize spoliation, whether negligent or intentional, as a separate and independent tort, permitting recovery of damages against the spoliator. Currently, courts are split regarding recognition of spoliation as a separate tort. In the following sections, we discuss cases where courts in the New England states have confronted this emerging trend.

A. Connecticut

1. Adverse Inference Permitted

Connecticut courts historically have permitted an adverse inference to be drawn against a spoliating party. Beers v. Bayliner Marine Corp., 236 Conn. 769, 675 A.2d 829 (1996) is the leading decision. In that case, the Supreme Court of Connecticut addressed intentional spoliation of evidence in a products liability action. Plaintiffs alleged that they sustained personal injuries as a result of the defective condition of the defendant's product, an outboard motor boat, including manufacturing and design defects, failure to warn of the product's hazards, and failure to adequately test the boat. The defendant-manufacturer moved for summary judgment on grounds that one of the plaintiffs, after having had the boat inspected by an expert, had removed and disposed of the boat's motor before filing its products liability action. In fact, plaintiff Beers admitted that he had removed and subsequently gave away the motor. The defendant argued that, as a result of spoliation of evidence, it was unable to defend the action.

The trial court granted summary judgment against the plaintiffs, and plaintiffs appealed. In its first opportunity to address spoliation of evidence in a civil case, the Supreme Court of Connecticut rejected a "blanket approach" to intentional spoliation of evidence, which would require dismissal of the case in order to punish the spoliator; such an approach would be inapplicable in any event against the non-spoliating plaintiff in this case. Rather, the court adopted the majority rule, holding "that the trier of fact may draw an inference from the intentional spoliation of evidence that the destroyed evidence would have been unfavorable to the party that destroyed it." Id., 236 Conn. at 775 (citations omitted).

The court added, further, that an adverse inference is warranted against the party who has destroyed evidence only if the trier of fact is satisfied that the party seeking the adverse inference proves the following:

1. Spoliation was intentional (not necessarily that the spoliator intended to perpetrate fraud, but that the evidence was disposed of intentionally and not merely inadvertently destroyed).

2. The destroyed evidence was relevant to the issue or matter for which the party seeks the inference (e.g., spoliation of a machine may give rise to an adverse inference as to a manufacturing defect, but not with respect to a design defect when the destruction does not hinder the defense).

3. The party seeking the inference has acted with due diligence with respect to the spoliated evidence by, for example, putting the spoliator on notice that the evidence should be preserved.

4. Finally, the jury or trier of fact must be instructed that it is not required to draw the inference that the destroyed evidence would be unfavorable, but that it may do so upon being satisfied that the above conditions have been met.

Id., 236 Conn. at 777-79. The court also noted that the adverse inference does not replace evidence of material facts, nor does it shift the burden of proof, although it may tip the scale when the evidence is otherwise closely balanced.

In conclusion, the Supreme Court held that the trial court improperly granted summary judgment in this case, noting that summary judgment may be appropriate in other cases under different facts, e.g., if plaintiffs' claim had been limited to a defect in the motor that could be supported only by expert, visual inspection.

2. Independent Tort of Spoliation Not Recognized in Connecticut

The Superior Court of Connecticut has had several occasions to review a proposed cause of action for spoliation of evidence, and in all instances has refused to expressly recognize an independent tort. Most recently, in Fontanella v. Liberty Mutual Insurance Co., No. 369092, 1998 WL 568728 (Conn. Super. Aug. 26, 1998), the Superior Court of Connecticut, presented with the question whether negligent spoliation of evidence is an actionable tort, decided the issue on narrower grounds. The court noted that spoliation is appropriately addressed by an adverse inference when a party is the spoliator. In this case, the plaintiff had sold the evidence to the defendant after the accident with no restrictions on the sale, and the defendant, thus, was under no duty to preserve the evidence. Noting a split of authority in other states regarding negligent spoliation by a third party as an actionable tort, and also that the Connecticut Supreme Court had not decided this issue, the court declined to establish a new tort.

In Regency Coachworks, Inc. v. General Motors Corp., No. CV95554389, 1996 WL 409339 (Conn. Super. June 26, 1996), the court considered whether a cause of action for spoliation arose when the defendant discarded a vehicle transmission which the plaintiff alleged had caused personal injuries to the plaintiff, the lessee of the vehicle. Reviewing the law in various jurisdictions, the court decided that Connecticut authority did not support recognition of a separate tort. Furthermore, the court found none of the arguments in favor of recognition of a

separate tort persuasive. See also, Moisei v. Pilkington Barnes-Hind, Inc., No. CV960561712S, 1997 WL 539784 (Conn. Super. Aug. 21, 1997) (noting the Supreme Court of Connecticut refused to punish the spoliator in Beers v. Bayliner Marine Corp., supra, and therefore holding there is no cause of action for spoliation of evidence).

In Reilly v. D'Errico, 12 Conn. L. Rptr. 457, 1994 WL 547671 (Sept. 22, 1994), the Superior Court outlined the elements of torts of intentional and negligent spoliation of evidence, but held that Connecticut law does not recognize a cause of action for tortious interference with a civil action by spoliation of evidence. The court noted: (1) a remedy in the form of sanctions already exists; (2) such a tort would be inherently speculative in nature; and (3) certain judicial policies, such as finality of judgments, would be violated.

B. Maine

Courts applying Maine law have not recently considered the proper sanction for destruction of evidence, negligent or intentional, in a civil case. As is outlined in this section, a majority of New England states do permit an adverse inference to be drawn under proper circumstances and with the necessary showing. E.g., Beers v. Bayliner Marine Corp., supra, 236 Conn. at 777-79 (requiring that spoliation be intentional rather than a matter of routine; the evidence destroyed must have been relevant; the party seeking an adverse inference must have acted with due diligence; and the inference may, but need not necessarily, be drawn).

Although not strictly applicable to civil cases, in the criminal context, destruction or dumping of evidence in certain circumstances may warrant an adverse presumption. E.g., M.R.S.A. §2223(1) (destruction of liquor is prima facie evidence that liquor was intended for illegal sale). Maine v. Coombs, 704 A.2d 387 (Me.), cert. denied, 118 S.Ct. 1819 (1998), involved a motion to suppress the defendant's confession and appeal from a theft conviction. A

local police sergeant summoned to investigate a store theft found marijuana in the defendant's car, which he confiscated and allegedly flushed down the store toilet in exchange for the defendant's confession to the theft charge. The Supreme Judicial Court of Maine upheld the conviction and the confession as voluntary. The dissenting judge noted that the sergeant's "unauthorized and highly irregular act of destroying evidence of either a civil or criminal offense raises serious doubts" concerning the validity and propriety of the confession.

C. Massachusetts

1. Adverse Inference Permitted for Knowing Spoliation

In Kippenhan v. Chaulk Services, Inc., 420 Mass. 124, 697 N.E.2d 527 (1998), the Supreme Judicial Court of Massachusetts recently outlined parameters of the spoliation doctrine. A patient, who was allegedly injured when the stretcher on which he was being transported into an ambulance collapsed, sued the ambulance attendants, ambulance service and stretcher manufacturer. The trial court precluded evidence regarding the stretcher's preaccident condition as a sanction for the ambulance service's alleged spoliation of evidence, and subsequently granted the stretcher manufacturer's motion for summary judgment. On appeal, the Supreme Judicial Court vacated the judgment and remanded for a determination of knowledge of the ambulance service. The court held that spoliation does not include the "fault-free" destruction or loss of evidence. Rather, sanctions are appropriate only when a litigant or its expert knows or reasonably should have known that the evidence may be relevant to a potential lawsuit; where an action has not yet been filed, the threat of a lawsuit must be sufficiently apparent that a reasonable person in the spoliator's position would realize the importance of the evidence. In this case, fact issues precluded summary judgment, which was inappropriate in any event as against the plaintiff-patient who did not cause the loss or disappearance of the stretcher.

Massachusetts courts have historically permitted an adverse inference regarding destroyed or damaged evidence to be drawn against a spoliating party under proper circumstances. In Capitol Bank and Trust Co. v. Richman, 19 Mass. App. 515, 475 N.E.2d 1236, rev, denied, 395 Mass. 1101, 480 N.E.2d 24 (1985), an action by a bank against an alleged guarantor to collect a loan, the Appeals Court of Massachusetts noted that under Massachusetts law a document destroyed by its proponent is presumed to have contained matter unfavorable to that proponent. The court held in that case that secondary evidence (i.e. evidence other than the original loan document in question) would not be admissible until the unfavorable presumption is overcome. Id., 475 N.E.2d at 1240 (citing Liacos, Handbook of Massachusetts Evidence at 363 (5th ed. 1981)).

2. Preclusion Of Expert Testimony

Massachusetts courts also have held that expert testimony regarding a damaged product may be precluded at the request of a prejudiced party. Nally v. Volkswagen of America, Inc., 405 Mass. 191, 539 N.E.2d 1017 (1989) was a wrongful death action in which the plaintiff alleged defects in the rear seat and hatchback latching systems of an automobile. Defendant Volkswagen denied the allegations and requested that the trial judge preclude testimony from the plaintiff's accident reconstruction expert on grounds that the expert "'systematically spoliated…important items of physical evidence…by destroying, carrying out destructive testing on, failing to preserve and/or misplacing" the evidence, such that Volkswagen was deprived of the opportunity to examine the evidence itself and rebut the plaintiff's testimony. The trial court precluded the expert's testimony, without evidentiary hearing or fact-finding. Because the plaintiff's case rested upon the expert's testimony, the trial court granted Volkswagen's motion for summary judgment.

On appeal, the court held that summary judgment was proper only if the trial court acted within its discretion in precluding the expert's testimony. Reviewing rules of evidence in both criminal and civil cases, the court held that preclusion of expert testimony may be proper, stating:

> We conclude that, in a civil case, where an expert has removed an item of physical evidence and the item has disappeared, or the expert has caused a change in the substance or appearance of such an item in such circumstances that the expert knows or reasonably should know that an item in its original form may be material to litigation, the judge at the request of a potentially prejudiced litigant, should preclude the expert from testifying as to his or her observation of such items before he or she altered them and as to any opinion based thereon.

Id., 539 N.E.2d at 1021. Also, testimony may be precluded as a result of spoliation whether the expert's conduct occurred before or after that expert was retained by a party. The court reasoned: first, the non-spoliating party may be unfairly prejudiced absent preclusion; and second, the physical items, in their original condition immediately after an accident, may be more instructive and persuasive to a jury than oral or photographic descriptions. Significantly, though, the court decided that the trial judge in that case had erred in failing to conduct fact-finding regarding the expert's motivation and knowledge about spoliation and the effect that spoliation would have had on defendant's case. Therefore, the court decided that preclusion was improper.

D. New Hampshire

Adverse Inference Permitted

In Rodriguez v. Webb, 141 N.H. 177, 680 A.2d 604 (1996) the plaintiff, who was injured while crushing aluminum cans in a metal baling machine owned by the defendant, sued the defendant for negligence and intentional spoliation. Following the accident, but prior to institution of the action, the defendant cut up the baler and sold it as scrap metal. The jury returned a verdict in favor of the plaintiff on the negligence count, and the plaintiff dropped the intentional spoliation claim which was never considered by the jury. On appeal, the defendant argued that the trial court had erred in recognizing the tort of intentional spoliation and should not have permitted evidence regarding destruction of the baler.

The Supreme Court of New Hampshire rejected this argument, though it declined to decide whether New Hampshire recognizes an independent action for intentional spoliation of evidence. The court held that destruction of the baler was relevant to the negligence claim, and therefore evidence of its destruction was admissible. In upholding the trial court's ruling admitting evidence regarding the circumstances surrounding the baler's destruction, the court observed: the defendant destroyed a crucial piece of evidence; the defendant's destruction was intentional, rather than as a matter of routine; and although there was no evidence of fraud, "the circumstances of the destruction alone [i.e. shortly after the accident giving rise to the litigation] were sufficient to infer that the destroyed evidence would have favored the plaintiff." Id., 680 A.2d at 606-07. Moreover, the court upheld the trial court's discretion in determining that the probative value of the evidence outweighed any prejudice to the defendant. Finally, because the jury verdict rested on negligence, the court did not decide whether intentional spoliation may be recognized as an independent tort.

In Testa v. Wal-Mart Stores, Inc., 144 F.3d 173 (1st Cir. 1998), the United States Court of Appeals for the First Circuit, applying New Hampshire law, held that an adequate foundation existed to permit the jury to draw a negative inference arising from the unavailability of the defendant-store's purchase order and telephone records in a negligence action brought by a truck driver who sustained personal injuries when he slipped on an icy ramp. The store was on notice of a claim and knew of the records' relevance.

E. Rhode Island

Adverse Inference Permitted

Recently in Farrell v. Connetti Trailer Sales, Inc., 727 A.2d 183 (R.I. 1999), the Supreme Court of Rhode Island held that the trial court should not have precluded all post-repair evidence in an action alleging defective repairs, but rather should have given an instruction to the jury regarding spoliation of evidence. The owners of a motor home, who had arranged for a bank to repossess the home, sued the motor-home retailer and manufacturer for damages allegedly resulting from defective repairs. The court noted that there was no evidence of bad faith or willful destruction of the evidence, and the retailer and manufacturer had been given an opportunity to inspect or repair the vehicle on several occasions. Under these circumstances, the proper remedy was an instruction to the jury that, in light of the owners' conduct in making the motor home unavailable, the jury could draw an adverse inference against the motor-home owners as to the allegedly defective repair work.

In Rhode Island Hospital Trust National Bank v. Eastern General Contractors, Inc., 674 A.2d 1227 (R.I. 1996), the plaintiff bank brought a declaratory judgment action in connection with its refusal to pay a presentation for payment where the bank had allegedly failed

to comply with terms of a standby letter of credit. Under the doctrine "omnia praesumuntur contra spoliatiorem," or "all things are presumed against a despoiler," the court ruled that the beneficiary was entitled to present to the jury evidence that the bank may have recorded and subsequently destroyed a relevant telephone conversation.

The court noted:

> Although a showing that a party has destroyed evidence in bad faith or in anticipation of trial may strengthen the spoliation inference, such showing is not essential to permitting the inference.
>
> * * *
>
> "Destruction of potentially relevant evidence obviously occurs along a continuum of fault — ranging from innocence through the degrees of negligence to intentionality." In any case, we make no determination here as to whether Hospital Trust's alleged destruction of evidence would give rise to an adverse inference, not do we suggest the weight of any such inference. We are of the opinion, however, that the doctrine supports our conclusion that, at the very least, such evidence should not have been withheld from the jury.

Id., 647 A.2d at 1234 (citations omitted).

F. Vermont

Though not considering this issue recently, Vermont courts historically have permitted an adverse inference against a spoliating party regarding the destruction of evidence in civil cases under certain circumstances. E.g., In re Campbell's Will, 102 Vt. 294, 147 A. 687 (1929) (adverse inference drawn against surviving husband who mutilated his wife's will where husband would have benefited from mutilation); F.R. Patch Manufacturing Co. v. Protection Lodge, 77 Vt. 294, 60 A. 74 (1905) (concealment of records and spoliation of evidence may give

rise to adverse inference or presumption against spoliating party, but other party is not relieved of his burden to introduce evidence to affirmatively prove his case).

This rule permitting adverse inferences appears inapplicable under Vermont law when a non-party destroys evidence. In Lavalette v. Noyes, 124 Vt. 353, 205 A.2d 413 (1964), the court held that no presumption of falsity arose as to a landowner's testimony regarding a writing, merely as a result of the owner's destruction of the writing, where the owner was not a party to the present action, but was an outsider with no apparent reason or obligation to preserve the writing.

II. ECONOMIC LOSS DOCTRINE

Pursuant to the economic loss doctrine, a commercial buyer generally has no remedy based on negligence or products liability for damage which occurs only to the seller's product, with no other physical injury or damage to tangible property. Such damage to the seller's product is often deemed "economic loss," and is not recoverable in tort. The United States Supreme Court applied the economic loss doctrine in East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986), a proceeding under admiralty law. In that case, the court held that a commercial buyer cannot recover in tort for physical damage to a product itself, because such damage (i.e., failure of a product to function properly) is the essence of an action under warranty.

Many state courts apply the economic loss doctrine to preclude recovery in tort for damage which is confined to the seller's product. Often the issue centers around an important exception to the economic loss doctrine: that is, whether the damaged property constitutes property of the plaintiff other than the seller's product (i.e. "other property"), and is

therefore outside the scope of the economic loss doctrine. A second related and hotly-contested issue is the definition of “product” for purposes of determining whether the loss is merely economic: is the "product" in question the finished product purchased by the plaintiff (the "integrated products rule") or a defective component part? Courts in many jurisdictions, including those in the New England states, also have grappled with applicability of the economic loss doctrine in the context of negligently-provided services, as opposed to defective products. Most courts hold that the doctrine of economic loss is inapplicable to the provision of services, as discussed in the following sections. With respect to emerging trends in this area, courts currently are split regarding whether negligent misrepresentation claims should be excepted from the economic loss rule. As discussed in the following sections, these are often fact-sensitive inquiries to be determined on a case-by-case basis. General guidelines for the New England states are provided below.

A. Connecticut

The Connecticut Products Liability Act (CPLA) sets forth a version of the economic loss doctrine as follows:

> “Harm” includes damage to property, including the product itself, and personal injuries including wrongful death. As between commercial parties, “harm” does not include commercial loss.

CGLA §52-572m(d) (1998 Supp.). The economic loss doctrine is reiterated in other sections of the CPLA:

> As between commercial parties, commercial loss caused by a product is not harm and may not be recovered by a commercial claimant in a products liability claim. An action for commercial loss caused by a product may be brought only under, and

> shall be governed by, title 42a, the Uniform Commercial Code.

Id., §52-572n(c).

In Connecticut General Life Insurance Co. v. Grodsky Service, Inc., 781 F. Supp. 897 (D. Conn. 1991), the district court held that the phrase "commercial loss" in the CPLA includes all economic loss either direct or consequential. Pursuant to the statute, the court decided that a commercial tenant could not recover under Connecticut products liability law for economic losses arising out of a water pipe rupture and subsequent flooding of the premises. The court characterized as commercial losses, and therefore barred under the economic loss doctrine recovery of: employee salaries and fringe benefits; taxes; rent; and cost of expedited computer work.

In McKernan v. United Technologies Corp., 717 F. Supp. 60 (D. Conn. 1989), the district court held that the buyer of a helicopter could not recover in tort against the seller for economic damage arising out of the recall of the helicopter when no injury to persons or property other than to the helicopter itself were alleged. Similarly, in Bosek v. Valley Transit District, No. CV92039674 (Conn. Super. Dec. 10, 1993), the Superior Court of Connecticut, Judicial District, held in a memorandum decision that the plaintiff's claims for damages under the Connecticut Products Liability Act were barred. The action involved commercial parties, and alleged loss of profits, interruption of business and damage to business arising out of damage to machinery and a building.

In Flagg Energy Dev't Corp. v. General Motors Corp., No. CV92-02421985, 1993 WL 408069 (Conn. Super. Oct. 1, 1993), the court granted defendant's motion to strike the plaintiff's claims alleging misrepresentation and unfair trade practices. Essentially, the plaintiff

alleged that gas turbine engines manufactured by the defendant were defective, and defendant failed to cure the defects. Citing the Connecticut products liability statute, the court held that these claims between commercial parties gave rise to economic loss, and dismissed the tort and unfair trade practices claims.

Finally, in American Nat'l Fire Insurance Co. v. A. Secondino & Sons, No. 3:92-629 (JAC) 1995 WL 253085 (D. Conn. Apr. 28, 1995), the district court held, in a subrogation action arising out of flood damage, that the economic loss doctrine contained in the Connecticut products liability statute did not preclude claims for contribution and indemnification as between commercial parties. The court rejected the defendants' argument that actions for contribution and indemnity, as a matter of law, are actions for recovery of commercial loss for purposes of the CPLA.

B. Maine

A leading recent Maine decision regarding the economic loss doctrine is Oceanside at Pine Point Condominium Owners Assoc. v. Peachtree Doors, Inc., 659 A.2d 267 (Me. 1995). That case involved a class action suit alleging, among other things, breach of warranties, negligence and products liability in connection with defective windows sold by the defendant which were incorporated into condominiums. The Supreme Judicial Court of Maine first explained that recovery is permitted in tort for personal injuries and physical damage to property other than the defective product. In addition, once personal injuries or damage to other property has occurred, some courts do allow recovery for repairs or loss of the defective product itself. Tort recovery is generally not permitted for simple damage to the defective product alone. In considering whether a product has injured only itself, the court examined the product which

the plaintiff ultimately purchased, (usually a finished product) rather than the product sold by the defendant (typically a component part).

In that case, the court found that the "product" in question was the condominium units, rather than the windows, which were components of the units. "Because the windows were integrated into the finished product purchased by the plaintiffs, the damage caused by any defect in the windows constituted damage only to the product itself, not damage to "other property." Id., 659 A.2d at 270. Accordingly, the plaintiffs could not recover in tort. Rather, their claims for economic loss were more appropriately addressed under warranty actions, some of which were barred by the warranty statute of limitations, which, under the U.C.C., is four years from the date of sale, as opposed to running from the date of loss.

More recently, the United States District Court in Maine, considering the scope of the economic loss doctrine, certified a question to the Supreme Judicial Court of Maine. In that case, Fireman's Fund Insurance Co. v. Childs, 52 F. Supp. 2d 139, (D. Me. 1999), a subrogation action, plaintiff sought recovery of compensatory and punitive damages paid to the insured allegedly resulting from the defendant's defective design and construction of a hotel. Plaintiff alleged that the defendant's negligence caused the hotel property to incur severe water damage during a storm. Defendant argued that the economic loss doctrine barred the plaintiff's claim.

The issue was whether the allegedly negligently-designed product in that case (masonry facade) had damaged only itself, or whether the product damaged other property as well. Plaintiff alleged that the hotel suffered water damage due to faulty design of masonry facade and weep holes. The court observed that, in the context of claims based on defective product components, other courts have held that the relevant "product" for purposes of the economic loss rule is the finished product into which the component is integrated, (the

"integrated products rule"). Plaintiff also argued that the economic loss doctrine does not apply where, as in this case, the claim involved negligently-rendered services (rather than manufacture or sale of the product) and the parties were not in privity of contract. The court, unable to predict Maine law regarding application of the economic loss doctrine under these two circumstances, certified these important questions to the Supreme Judicial Court of Maine. Cozen and O'Connor attorneys are monitoring the progression of this case.

C. Massachusetts

Massachusetts "follows the traditional rule that 'purely economic losses are unrecoverable in tort and strict liability actions in the absence of personal injury and property damage.'" Priority Fishing Corp. v. LAL Construction Co., Inc., 40 Mass. App. 719, 667 N.E.2d 290 (1996) (citation omitted). The doctrine has been applied to preclude recovery for damages resulting from an underground-tank oil spill and related cleanup arising from malfunction of a level control measuring device. See Garweth Corp. V. Boston Edison Co., 415 Mass. 303, 613 N.E.2d 92 (1993). The court distinguished that factual situation involving an underground oil spill from asbestos and other contamination cases, reasoning that in the case of the oil spill there was no physical damage to property.

Massachusetts courts have also applied the integrated products rule, holding: "In the context of claims based on defective components, most courts have held that the relevant 'product' is the finished product into which the component is integrated." Sebago, Inc. v. Beazer East, Inc., 18 F. Supp. 2d 70, 90 (D. Mass. 1998). That case involved actions brought by purchasers of buildings containing phenolic foam roof insulation ("PFRI") against PFRI manufacturers, alleging damage resulting from alleged defects in the PFRI. The court held that, for purposes of the economic loss doctrine, the product at issue was the completed buildings,

rather than the PFRI, therefore the purchasers could not recover against the manufacturer on negligence or strict liability claims. Importantly, in the absence of express Massachusetts authority, the district court predicted that Massachusetts courts would hold that the economic loss doctrine barred the plaintiffs' negligent misrepresentation claims; the court distinguished cases involving, as here, defective products from those arising out of the provision of services where negligent misrepresentation claims may be excepted from the economic loss rule.

On the other hand, in Priority Finishing Corp. v. LAL Construction, supra, the Appeals Court of Massachusetts decided that the economic loss doctrine did not apply where the plaintiff was a bailee of damaged goods. The plaintiff's business was custom dyeing and finishing of raw fabrics, which were not owned by the plaintiff but were supplied by clothing manufacturers who specified the amount of yardage to be returned to them in particular colors. While in the process of dyeing fabric, electricity to the plaintiff's plant was cut off due to severing of a power line, resulting in damage to the fabric. Plaintiff alleged that a general contractor on the project had been negligent. The plaintiff reimbursed its customers, then sued the contractor, seeking recovery of the fair market value of the damaged fabric and lost profits. The court decided that this claim was not barred by the economic loss doctrine because the plaintiff's pecuniary losses were derived from physical harm to property for which the plaintiff, as a bailee, had a right to recover.

D. New Hampshire

Like other New England states, New Hampshire strict liability law "does not apply beyond the area of physical harm caused to the user or his property." Town of Hooksett School Dist. V. W.R. Grace Co., 617 F. Supp. 126, 130 (D.N.H. 1984) (citations omitted).

Economic loss is defined as the diminution in the value of the product due to its inferior quality and failure to serve the general purpose for which it was manufactured and sold. Id.

In Tourist Village Motel, Inc. v. Massachusetts Engineering Co., Inc., 801 F. Supp. 903 (D.N.H. 1992), the court held the economic loss doctrine did not preclude recovery of damages for soil contamination as a result of leaking of a 10,000 gallon fuel-oil tank manufactured by the defendant. The court characterized the plaintiff's loss as physical harm, and therefore outside the scope of the economic loss doctrine.

E. Vermont

In Paquette v. Deere and Co., 719 A.2d 410 (Vt. 1998), the Supreme Court of Vermont held that purely economic damages were not available under the theory of strict products liability. The owners of an allegedly defective motor home sued the home manufacturer to recover damages for reduced value of the home under products liability and breach of warranty theories. Although a manufacturer is strictly liable for physical harm or property damages resulting from a defective product, the owners of the motor home could not recover economic losses in a strict liability action where defective wiring and related problems resulted only in reduced value of the home.

Applying Vermont law in Mainline Tractor & Equipment Co., Inc. v. Nutrite Corp., 937 F. Supp. 1095 (D.Vt. 1996), the district court stated that there is persistent judicial unwillingness to use tort theories to protect against economic loss. As the court noted, the line between property damage and economic loss may be unclear, but in the typical products liability case the defective product damages other property, while in economic loss cases the product injures only itself and the damages sought are for inadequate product value and consequent loss of profits.

In Mainline Tractor, supra, the plaintiff contended that herbicide sold and manufactured by the defendants failed to effectively control crabgrass, resulting in a reduced corn crop yield. The court acknowledge that the corn, i.e. property other than the defective product, allegedly had been damaged. Nevertheless, according to the court, the gist of the plaintiff's complaint was failure of the defendant's product to perform as expected resulting in plaintiff's loss of profits. The court concluded that this harm was more properly characterized as economic loss rather than property damage. Id., 937 F. Supp. at 1101.

III. LIMITATION OF LIABILITY OR EXCULPATORY CLAUSES

Limitation of liability or exculpatory clauses may be present in lease agreements or other contractual arrangements, which are often raised in an effort to limit liability for a party's negligence. Whether these clauses are given effect, and their impact in a subrogation action where the subrogated insurer typically stands in the shoes of the insured, depends upon the wording used, as well as the applicable law in a particular jurisdiction. These agreements and the scope of their enforceability are discussed below.

A. Connecticut

The Connecticut Supreme Court has held that Connecticut law does not favor contractual provisions which relieve a person from his or her own negligence. Griffin v. Nationwide Moving & Storage Co., Inc., 187 Conn. 405, 446 A.2d 799 (1982) (citing Restatement (Second) Contracts §195). Such provisions may be upheld in "proper circumstances," though the Supreme Court has left it to lower and appellate courts in Connecticut to flesh out "proper circumstances." Generally, a party may not exempt itself from liability for gross negligence. Also, exculpatory clauses are strictly construed against the party attempting to relieve itself of negligence. "[A]greements exempting parties from liability for

their own negligence are not favored by the law and, if possible, are construed so as not to confer immunity from liability." Maryheart Crusaders v. Barry, No. CV96-02516475, 1998 WL 203407 (Conn. Super. Apr. 10, 1998) (mem. dec., citing Fedor v. Mauwehu Council, 21 Conn. Super. 38, 39, 143 A.2d 466 (1958)). Finally, the provision must specifically and conspicuously identify the precise acts which the parties intend to except from liability.

Recently, in Mattegat v. Klopfenstein, 50 Conn. App. 97, 717 A.2d 276, certif. denied, 247 Conn. 922, 722 A.2d 810 (1998), the Appellate Court of Connecticut considered a disclaimer of liability contained in a property inspection contract, which provided:

> COMPANY LIABILITY. The Company's liability for any Client post-inspection (Limited-Time) claims is limited to a maximum of the inspection fee paid unless an inspection warranty was purchased by the Client. This liability limit also applies to Extended Time Inspections six (6) months from the inspection date.

The parties agreed that the property inspection would include a probe for wood-destroying insect infestation. On the basis of the defendant's inspection report, plaintiff purchased the property, which was later found to be infested and had extensive, visible evidence of wood-destroying insect damage. The defendant raised the "Company Liability" provision in defense of plaintiff's $17,000 claim for repair damages, and offered to refund the inspection fee.

On appeal, the court decided that the "Company Liability" provision did not limit defendant's damages to the $225 inspection fee. The court noted, "The law does not favor contract provisions which relieve a person from his own negligence." Id., 717 A.2d at 279 (citations omitted). In addition, the contract in this case was on a preprinted form and had not been discussed by the parties. Connecticut courts hold that disclaimers of liability of this type

are "against public policy when entered into by professional service providers in the course of dealing with the general public," except under certain circumstances, such as agreement of both parties. Id. (footnote omitted). In this case, absent any discussion, much less agreement between the parties as to the provision, the provision was held unenforceable.

In Western Alliance Insurance Co. v. Wells Fargo Alarm Services, Inc., 965 F. Supp. 271 (D.Conn. 1996), the district court considered a lease provision stating that the parties "specifically understand and agree that Landlord shall not be liable to Tenant…for any damage to, or loss (by theft or otherwise) of, any property of Tenant of any kind or nature…" The court decided that this provision, so broadly written that it could be read as exonerating the landlord from grossly negligent, reckless and intentional conduct, would not be upheld to limit liability where the complaint alleged gross negligence.

Cases upholding limitation of liability provisions include Maryheart Crusaders v. Barry, supra, which involved a lease agreement providing that the landlord would not be responsible for loss or damage to property or injury to persons occurring in or about the premises, by reason of any existing or future condition or defect, or for acts, omissions or negligence of other persons or tenants. The tenant also agreed, pursuant to the lease, to indemnify the landlord. The Superior Court held that this provision was clear and unambiguous and included indemnification and exculpation of the lessor for its own negligence.

On a related issue, in two recent memorandum decisions, the Superior Court of Connecticut upheld liquidated damages clauses contained in alarm contracts. See Hartford Insurance Co. v. ADT Security Systems, Inc., No. CV980357149, 1999 WL 259688 (Conn. Super. Apr. 22, 1999); U.S. Fidelity & Guaranty Co. v. Sonitrol Services Corp., No. CV9301342675, 1996 WL 456327 (Conn. Super. July 29, 1996). The three requirements for a

valid liquidated damages provision include, briefly, the following: (1) damages at issue must be uncertain in amount or difficult to prove; (2) the parties must have intended to liquidate damages in advance; and (3) the amount stipulated must be reasonable.

B. Maine

Maine has adopted relatively strict standards for enforcement of limitation of liability provisions; clauses purporting to indemnify a party for damages due to its own negligence are looked upon with disfavor and are construed strictly against such an interpretation. See Burns & Roe, Inc. v. Central Maine Power Co., 659 F. Supp. 141, 143-44 (D. Me. 1987).

In Emery Waterhouse Co. v. Lea, 467 A.2d 986 (Me. 1983), the court considered an indemnity and hold harmless provision contained in a lease agreement. The court noted generally that such provisions holding a party harmless from damages due to negligence may lawfully be inserted in contracts and are not against public policy. But when attempting to avoid or seek indemnification for damages as a result of a party's own negligence, "such contractual provisions, with virtual unanimity, are looked upon with disfavor by the courts, and are construed strictly." Id., 467 A.2d at 993 (holding that indemnity and hold harmless provisions did not include damages from the indemnitee's own negligence).

In International Paper Co. v. A & A Brochu, 899 F. Supp. 715 (D. Me. 1995), the district court held that a contractual provision requiring a pulpwood seller to indemnify the buyer for injuries caused by, resulting from, or attributable to operations of the seller required the seller to indemnify the buyer for injuries derived from performance of the contract, including those not

caused by the seller. Thus, the court held that the seller was required to indemnify the buyer in a workers compensation suit brought by the seller's employee against the buyer.

In contrast, in McGraw v. S. D. Warren Co., 656 A.2d 1222 (Me. 1995), the Supreme Judicial Court of Maine held that a construction contract, which did not expressly provide that the contractor wold indemnify the owner against the owner's own negligence, precluded the owner's attempt to seek indemnification in an action brought by the contractor's employees against it alleging injury from noxious smoke. Noting that clauses purporting to indemnify a party against its own negligence are disfavored and strictly construed, the court held that the clear and unequivocal language necessary to effect indemnity against a party's own negligence was lacking.

In Paris Utility Dist. v. A. C. Lawrence Leather Co., Inc., 861 F.2d 1 (1st Cir. 1988), applying Maine law, the Court of Appeals for the First Circuit held that a hold harmless and indemnity agreement between a utility district and its corporate customer did not clearly and unequivocally reflect the parties' mutual intention to cover loss caused by the customer's negligence.

In Doyle v. Bowdoin College, 403 A.2d 1206 (Me. 1979), the plaintiff sued the defendant college alleging negligence in connection with eye injuries he sustained while playing floor hockey. The Supreme Judicial Court of Maine noted that contractual exclusions of liability for a party's own negligence are traditionally disfavored and subject to heightened judicial scrutiny. The terms of the agreement must be "brought home" with great particularity and show intent to release a party from liability beyond doubt by express stipulation. Id., 403 A.2d at 208 (citations omitted). The documents in question contained no express reference to the defendant's liability for its own negligence. Although the documents specifically provided that the college

would not assume or accept responsibility for injuries sustained, such language was held insufficient to limit liability for the college's own alleged negligence.

C. Massachusetts

Under Massachusetts law, a party may exempt itself from liability which it might subsequently incur as a result of its own negligence. Zavras v. Capeway Rovers Motorcycle Club, Inc., 44 Mass. App. 17, 687 N.E.2d 1263 (1997). Such an agreement is typically invalid, where it purports to shield one from responsibility for violation of a statutory duty; where a public utility attempts to limit its liability; or where there is "an obvious disadvantage in bargaining power so that the effect of the contract is to put a party at the mercy of the other's negligence." Id., 687 N.E.2d at 1265. In addition, such a limitation will not be upheld where it attempts to exempt a party from tort liability for harm caused intentionally, recklessly or by grossly negligent conduct. Id. In that case, the Massachusetts Appeals Court held that release of liability, contained in motorcycle racing agreement, could not shield the defendant track from liability for grossly negligent conduct.

D. New Hampshire

The Supreme Court of New Hampshire has stated that exculpatory contracts may be valid, but those which purport to release a party from his or her own negligence are enforceable only under certain circumstances and will be strictly construed. Barnes v. New Hampshire Karting Assoc., Inc., 128 N.H. 102, 509 A.2d 151 (1986). An exculpatory agreement will not be enforced if it contravenes public policy, either due to the existence of a special relationship or disparity in bargaining power. Id. Moreover, where the defendant is a common

carrier, innkeeper or public utility or is otherwise charged with a duty of public service, the defendant cannot avoid the consequence of its own negligence. Id.

To effectively release a party from liability for his own negligence, the contract must clearly state that the defendant is not responsible for the consequences of his own negligence, although courts have stated that neither the term "negligence" nor any other magic words need appear in the agreement. Id., 640 A.2d at 778 (citations omitted). But see Dunn v. CLD Paving Co., Inc., 140 N.H. 120, 663 A.2d 104 (1995) (noting this rule, but refusing to find an express indemnity agreement in a lease provision which did not use any form of the words "indemnity," "negligence" or other traditional words used to express indemnity, release or assumption of legal liability, therefore the lessee would be responsible only for maintaining the work areas of the leased premises). In addition, New Hampshire courts have required, in order to uphold an exculpatory contract, that the agreeing party understood the import of the agreement or that a reasonable person in his position would have known of the exculpatory provision. Generally, a party's understanding may be a question of fact "unless the exculpatory language is clear and a misunderstanding was unreasonable." Wright v. Loon Mountain Recreation Corp., 140 N.H. 166, 663 A.2d 1340, 1341 (1995).

In Wright v. Loon Mountain, supra, the Supreme Court of New Hampshire held that the contract structure and organization obscured the exculpatory clause; the court believed that the exculpatory language, though highlighted by capital letters, was overshadowed and obscured by qualifying terms and phrases. Therefore, strictly construing the contract language against the defendant, the provision could not relieve the defendant of responsibility for negligence in connection with a horseback riding tour. The plaintiff sustained personal injuries when she was kicked in the leg by the guide's horse, and she sued the defendant for negligence.

The court decided that the contract provision did not contemplate exculpation either from liability for personal injuries arising from negligence of the tour guide or that arising out of injuries involving horses not ridden by the plaintiff. Thus, the court concluded that the exculpatory contract lacked a straightforward statement of the defendant's intent to avoid liability for its failure to use reasonable care in any way.

Similarly, in Dunn v. CLD Paving, Inc., supra, the Supreme Court of New Hampshire held that a lease agreement, which merely allocated maintenance duties for the leased premises, did not require the lessee to hold the lessor harmless. The court held that use of the word "responsible," contained in the lease agreement did not evidence an intent to indemnify a party for its own negligence, and therefore did not constitute an express indemnity provision.

The court reached a similar result in Audley v. Melton, 138 N.H. 416, 640 A.2d 777 (1994) where the plaintiff, a professional model, sustained injuries when she was bitten by a lion during a photography shoot at the defendant's studio. The agreement provided that the plaintiff realized working with wild animals presented a hazardous situation, and she took "all responsibility upon [herself] for any event as described above that may take place and held the defendant free of any and all liability."

The Supreme Court of New Hampshire decided that this language also failed to satisfy the New Hampshire requirement that "a contract must clearly state that the defendant is not responsible for the consequences of his negligence." Id., 640 A.2d at 778. The court reasoned that the contract failed, not because it did not use "negligence" or other special words, but because no particular attention was called in the general language to the notion that defendant was released from liability for his own negligence. Compare, Barnes v. New Hampshire Karting Assoc., Inc., 128 N.H. 102, 509 A.2d 151 (1986) (release contained in a

racetrack contract was not against public policy, nor was there disparity in bargaining power; moreover the language was sufficient to absolve defendant from liability arising out of negligence which caused plaintiff's injuries during practice laps around the track).

E. Rhode Island

Exculpatory clauses which negate liability for an individual's own negligence may be upheld in Rhode Island if the clause is sufficiently specific and not against public policy. Ostalkiewicz v. Guardian Alarm Div. of Colbert's Sec. Services, 520 A.2d 563, 566 (R.I. 1987). "A contract will not be construed to indemnify the indemnitee against losses resulting from his or her own negligent acts unless the parties' intention to hold harmless is clearly and unequivocally expressed in the contract." Corrente v. Conforti & Eisele Co., 468 A.2d 920, 922 (R.I. 1983).

In Crowther v. Mariner Square Condominium Assoc., 667 A.2d 789 (R.I. 1995) the Supreme Court of Rhode Island upheld a contractual provision between a landscaping company and mall stating that the landscaping company was not responsible for injuries sustained by slipping on ice. Therefore, the court held that the landscaping company would not be liable for injuries sustained by a pedestrian who fell on ice, noting that, although the exculpatory language here was not as specific as in other cases, the intent to hold the landscaper harmless in this situation was clear.

In E. H. Ashley & Co., Inc. v. Wells Fargo Alarm Services, 907 F.2d 1274 (1st Cir. 1990), the Court of Appeals for the First Circuit held that an insurer in a subrogation action was bound by a limitation of liability clause contained in a burglar alarm service contract, which provided that the burglar alarm service company was not an insurer, and would not be liable for

loss or damage, irrespective of origin, whether caused directly or indirectly by the service company's negligent acts or omissions or those of its employees. The court further held that the contract was not void as an unconscionable contract of adhesion.

In Ostalkiewicz v. Guardian Alarm, supra, the court upheld an agreement that Guardian Alarm "would not be liable 'for any loss occasioned by malfeasance or misfeasance in the performance of the System or of the services under this Agreement or for any loss or damage sustained through burglary, theft, robbery, fire or other cause'." The court decided that the parties had dealt at arm's length and the terms of the contract clearly exculpated the alarm company from damage arising out of its own negligence.

Similarly, in Rhode Island Hospital Trust National Bank v. Dudley Service Corp., 605 A.2d 1325 (R.I. 1992) the Supreme Court of Rhode Island upheld a limitation of liability contained in a lease agreement. The lease provided that the lessor would not be liable for loss or damage "whether or not the loss or damage is due to dishonest acts or negligence of lessor's employees or customers." Id. The court held that this provision was clear and unambiguous, the parties were sophisticated and had dealt at arm's length. Therefore, the limitation of liability would be enforced.

F. Vermont

Under Vermont law, "[c]ontractual disclaimers of liability for negligence have traditionally been disfavored," and are "subject to more exacting judicial scrutiny than other contractual provisions." Housing Vermont v. Goldsmith & Morris, 165 Vt. 428, 685 A.2d 1086 (1996). The language must make the intention of both parties to relieve the defendant of liability unmistakable. Id.

In that case, the Supreme Court of Vermont held that a broadly worded disclaimer, contained in a contract for architectural design services, was unenforceable in the context of the plaintiffs' claims for cost-overrun damages due to architectural malpractice. The provision specified in part as follows:

> The Architect cannot and does not warrant or represent that bids or negotiated prices will not vary from the Owner's Project budget or from any estimate of construction cost or evaluation prepared or agreed to by the Architect.

Id. Most notably, the court held that this language contained no reference to negligence or wrongful conduct of any kind, and therefore was insufficient to insulate defendant from liability for malpractice.

More recently, in Investment Properties Inc. v. Lyttle, No. 98-050, 1999 WL 652080 (Vt. Aug. 27, 1999), the Supreme Court of Vermont considered a "release" contained in an agreement between a property owner and architect, releasing and discharging the architects from any and all claims, demands, damages or actions related to the design, installation or maintenance of a concrete unlayment for carpet. The court held that the scope and construction of such an agreement, though normally a question of law, could not be determined from the language alone, but must be resolved in light of surrounding facts and circumstances.

In Hamelin v. Simpson Paper (Vermont) Co., 167 Vt. 17, 702 A.2d 86 (1997), the Supreme Court of Vermont held that a contract between a contractor and landowner required the contractor to defend and indemnify the landowner in an action brought by a security guard for personal injuries. The contract provided that the contractor would indemnify and hold the landowner harmless from any and all loss.

In Dalury v. S-K-I, Ltd., 164 Vt. 329, 670 A.2d 795 (1995), the Supreme Court of Vermont considered public policy exceptions to enforceability of limitations of liability for negligence. The court decided that exculpatory agreements, which the defendant ski resort required skiers to sign, releasing the resort from all liability resulting from negligence were void as contrary to public policy. The court reasoned that ski resorts, like other businesses, are subject to public regulation and hold themselves out as open to and willing to perform a service to the public. Though each ski ticket sale is, by itself, a purely private transaction, when a substantial number of sales occur as a result of the resort's general invitation to the public, a legitimate public interest in safety arises. In such a context, even a well-worded exculpatory clause may be declared void. In addition, enforcement of broad waivers of liability for negligent acts which the skiers, as signers of the agreements, had no ability to control, would effectively remove any incentive for ski resorts to maintain safety and manage risk, a result which also was contrary to public policy. See also, Spencer v. Killington, Ltd., 167 Vt. 137, 702 A.2d 35 (1997) (exculpatory language in race entry form signed by skier purporting to release ski area of liability for injury from ski area's negligence was void as contrary to public policy).

IV. WAIVER OF SUBROGATION

Waivers of subrogation are closely related to limitation of liability provisions or exculpatory clauses which may be contained in contracts into which insureds may enter. It has been stated that an insurer stands in the shoes of the insured with respect to subrogation rights, and its rights rise no higher than those of the insured. See, e.g., Orselet v. DeMatteo, 206 Conn. 542, 546, 539 A.2d 95 (1988). Accordingly, waivers of subrogation by the insured may be raised as a defense in a subrogation action. Courts in several New England states recently have considered this issue.

A. Connecticut

In Maryland Casualty v. Trane Co., No. CV9805798895 (Conn. Super. Aug. 10, 1999), an unreported decision subject to appellate review, the Superior Court of Connecticut considered whether a provision entitled "Waiver of Subrogation," contained in a contract entered into between a contractor and subcontractor barred a subrogation action by the insurer for the general contractor. The provision stated that the parties waived all rights against each other for damages covered by, among other things, property insurance and commercial general liability insurance. The court held that this provision, as a matter of law, precluded the subrogation action alleging products liability and breach of contract in connection with repair and replacement of fan coil units installed in the property, although the insurer could possibly pursue a cause of action against its insured for breach of the insurance policy, which the insurer had alleged did not permit a waiver of subrogation.

B. Maine

In Willis Realty Assocs. v. Cimino Construction Co., 623 A.2d 1287 (Me. 1993), the court held that a contractual agreement between a contractor and property owner waived

subrogation recovery to the extent covered by insurance, therefore the property owner could not recover damages arising out of the collapse of a back wall, where the losses had been paid by the owner's insurer. The court held that the waiver did not bar an action by the tenant against the contractor for damages arising out of the collapse, because the tenant was not a party to the contract between the property owner and building contractor, even thought the contractor's insurer had paid the tenant's losses and the president of the tenant (a realty association) had signed the contract for the property owner.

C. New Hampshire

In Chadwick v. CSI, Ltd., 629 A.2d 820 (N.H. 1993), the Supreme Court of New Hampshire held that a waiver of subrogation provision contained in a construction contract applied to damages incurred beyond those sustained to "the work," defined in the contract as construction and services. Read as a whole, the contract broadened the scope of the waiver to cover a person or entity that would otherwise have a duty of indemnification, and thus precluded subrogation, by way of counterclaim, by a school against a subcontractor in connection with fire damage.

D. Vermont

In Fairchild Square Co. v. Green Mountain Bagel Bakery, 163 Vt. 433, 658 A.2d 31 (1995), the Supreme Court of Vermont found that a contractual provision contained in a lease agreement constituted a waiver by the landlord of its right to sue the tenant for fire damage. The court held that the waiver provision in the contract applied to any loss by fire without limitation to the leased premises, therefore the court rejected the landlord's argument that the waiver did not extend to damage to other property within its building not leased by the tenant.

V. IMPLIED-COINSURED DOCTRINE

A subrogation action typically may not be maintained against another insured under the same policy. See 6A Appleman, Insurance Law & Practice §4055 (1972 & 1999 Supp.). Subrogation may also be precluded if the prosecution of such an action would have the effect of the insurer recovering from the insured on the same risk the insurer undertook for payment of the premium, even though the person sued is not named in the policy. Id. (citations omitted).

In the context of lease agreements particularly, but in other areas such as building and construction agreements, the implied-coinsured doctrine may be raised in an effort to preclude a subrogation action. Pursuant to this doctrine, the lessor's insurer may be precluded from recovering against a tenant in a subrogation action, absent an express agreement or lease provision establishing the tenant's liability, because the tenant may be considered the landlord's co-insured. In the context of construction projects, a subcontractor may argue that it is a coinsured under a builder's risk policy, and contend that subrogation should be precluded. The arguable rationale for the implied coinsured doctrine is that the parties may have a reasonable expectation of privity arising out of the lease agreement or construction contract, as well as an insurable interest in the property. Additionally, landlords may pass on the cost of insurance premiums to the tenants in the form of rent payments. See 6A J. Appleman & S. Liebo, Appleman's Insurance Law & Practice §4055 (1992 & 1997 Supp.). Many of these issues are extremely fact sensitive and depend on the relationship of the parties', the language of underlying agreements and policies, and the intent of the parties. Often at issue (and strongly contested in the context of construction contracts) is the existence, if any, of the purported coinsured's insurable interest in the damaged property. This section explores the application of the implied–coinsured doctrine in the New England states.

A. Connecticut

In an unreported decision, Great American Insurance Co. v. Cahill, No. CV950372249, 1997 WL 375099 (Conn. Super. June 24, 1997), the Superior Court of Connecticut concluded that the plaintiff-insurer had no right of subrogation against a tenant in connection with a fire caused by the negligence of the tenant's fifteen-year old son. The lease contained no express provision stating that the tenant would be liable to the landlord's insurer for fire damage caused by the tenant's negligence, nor did the lease contain any provision relative to a fire insurance subrogation claim in the event of a fire. Also, the landlord stated that he did not intend that the lessee would be liable for such a claim. These facts, taken together, precluded subrogation based on the implied-coinsured doctrine. See also, Aetna Life & Casualty v. Mark, 9 Conn. L. Rep. 402, 1993 WL 280195 (Conn. Super. Ct. July 21, 1993) (absent an express lease provision holding the tenant liable for negligence, and where the lease implied that the lessor carried fire insurance, the insurance company's subrogation action was barred).

B. Maine

In General Electric Co. v. Zurich-American Insurance Co., 952 F.Supp. 18 (D.Me. 1996), the United States District Court considered, in a case of first impression, "whether a named insured under a builder's risk insurance policy has an insurable interest in its potential liability for damages, as well as in its tangible property interests." Id., 952 F. Supp. at 19. Alternative Energy, Inc. ("AEI") developed and constructed electric generation plants. GE supplied AEI with steam turbines for the plants, pursuant to contract. AEI obtained insurance through Zurich for the construction projects, which provided in pertinent part that the policy would insure against risk of loss of or damages to property in the course of construction, and included GE as a named insured. A fire occurred at one of the plants, allegedly due to GE's

negligent installation of a turbine, with losses exceeding $2 million. Zurich notified GE of its subrogation claim, based on negligence, breach of contract and warranty, and strict liability. GE argued that it was a named insured under the policy, and possessed an insurable interest in the project property.

The district court observed that insurance companies may not subrogate against their own insureds. In response, Zurich argued that even if GE was a named insured on the policy, it had no tangible property interest or risk of loss at the site, and therefore no insurable interest. Noting conflicting decisions in other jurisdictions regarding a contractor's potential insurable interest under a builder's risk policy, and citing the definition of insurable interest set forth in the Maine Insurance Code, 24-A M.R.S.A. §2406(2), the court held that GE had an insurable interest in the project. According to the court, "an insured's interest in being held free from any liability arising out of its involvement in a construction project is indeed a substantial economic interest of the kind referred to in the statute." Id., 952 F. Supp. 21. As a named insured on the policy with an insurable interest, GE was immune from a subrogation claim by Zurich.

In Willis Realty Assocs. v. Cimino Construction Co., 623 A.2d 1287 (Me. 1993), the Supreme Judicial Court of Maine held that a building contractor was not an implied coinsured under a policy carried by a building owner and tenant. Therefore, the contractor was subject to a subrogation action to recover damages paid by the owner's insurer to the tenant for damage which resulted from a wall collapse during construction of a building addition. Most notably, the policy contained an endorsement extending the building owner's property insurance coverage to additions. Nevertheless, the court concluded that this endorsement evidenced no intent to indemnify the contractor or render the contractor a coinsured, even though payments

made to the policy's named insured included the cost of replacing some of the contractor's construction materials and equipment damaged by the collapse.

C. Massachusetts

In Peterson v. Silva, 428 Mass. 751, 704 N.E. 2d 1163 (1999), the Supreme Judicial Court of Massachusetts upheld the defendant-tenant's motion for summary judgment on grounds that the lease agreement did not explicitly establish the tenant's liability for negligently-caused fire damage. The court noted that "an insurer cannot recover by means of subrogation against its own insured." Id., 704 N.E. 2d at 1164 (citations omitted). If the tenants were considered insureds along with the landlord, then subrogation would be precluded.

The agreement in question was a standard form lease, which provided in pertinent part that the landlord would provide certain insurance coverage. Also, the landlord paid fire insurance premiums out of the rental income received from tenants. The lease also provided that the tenants would indemnify the landlord from all loss resulting from the tenant's carelessness, neglect or improper conduct. The court also considered significant the lack of any express provision in the lease establishing the tenant's liability for negligently-caused fire. The general language of the lease was therefore insufficient to create liability on the part of the tenants. The court reasoned that public policy also supported this conclusion:

> The reasonable expectation of the defendants, and all tenants, is that their rent includes the landlord's cost for fire insurance, and that any damage to the property from fire is covered by that insurance. It surely is not in the public interest to require all the tenants to insure the building which they share, thus causing the building to be fully insured by each tenancy.

Id. 704 N.E. 2d at 1166.

The same court reached similar results in Lexington Insurance Co., v. All Regions Chemical Labs, Inc., 419 Mass. 712, 647 N.E. 2d 399 (1995) and Lumber Mutual Insurance Co. v. Zoltek Corp., 419 Mass. 704, 647 N.E. 2d 395 (1995). Both cases involved subrogation actions for property damage arising out of lease arrangements. In Lexington v. All Regions, supra, the lease contained a "yield-up" clause requiring the tenant to return the property in the same condition as when rented except for "damage by fire or other casualty." The Supreme Judicial Court of Massachusetts held that this clause protected the tenants from liability to the landlord and the landlord's subrogee. The court observed that the landlord could have inserted an exception for fires caused by the negligence of the tenant. Absent such a limitation, the tenant would be considered a coinsured with the lessor. In Zoltek, supra, the language of the lease required the tenant to contribute to the premium for the policy, and testimony established that, based upon the tenant's contribution to the premium, the tenant was not required to carry property insurance. Accordingly, the Supreme Judicial Court of Massachusetts held that the tenant and landlord were coinsureds, and subrogation against the tenant was precluded.

D. Rhode Island

Courts applying Rhode Island law adhere to the implied-coinsured doctrine. In New Amsterdam Casualty Co. v. Homans-Kohler, Inc., 305 F. Supp. 1017 (D.R.I. 1969), the court started: "…where an insurance company has paid a loss to one insured under its policy it cannot as subrogree recover the amount so paid from a coinsured under said policy even though the latter's negligence may have caused said loss, there being no fraud or design on his part." Id., 305 F. Supp. at 1019 (citations omitted). In that case, the court held that two subcontractors of the insured property owner working on the construction of a computer center were coinsureds under the owner's fire policy, thus precluding a subrogation action by the owner's insurer. Most

notably, the policy contained a "builder's risk" provision, which specified that the policy covered temporary structures, machinery, tools and equipment incident to the construction, and the policy covered subcontractors.

E. Vermont

In Aetna Casualty & Surety Co. v. Barasch, 158 Vt. 638, 603 A.2d 380 (1992), the insurer of a condominium brought a subrogation action against guests of the condominium owner to recover amounts paid to the owner as a result of a fire, allegedly caused by negligence of one of the guests, the adult daughter of the owner's employee. The insurer attempted to show that the guest-employee was responsible for his adult daughter's negligence in causing the fire. The trial court granted summary judgment in favor of the guest.

Citing cases from other jurisdictions regarding an insurer's right of subrogation against a tenant of its insured, the Supreme Court of Vermont held:

> Even if the insurer is correct in assuming that a landlord's insurer has a right of subrogation against a tenant for fire damage caused by the tenant's negligence, the insurer here has failed to counter the father's assertion that the parties neither expressly nor impliedly intended to create a landlord/tenant relationship.

Id., 603 A.2d at 380-81 (citing and comparing Safeco Insurance Co. v. Weisgerber., 115 Idaho 428, 767 P.2d 271 (1989), which holds that a landlord's insurer has no right of subrogation against a tenant absent express agreement to the contrary, with Fire Insurance Exchange v. Geekie, 179 Ill.App.3d 679, 534 N.E.2d 1061 (1989), which allowed a subrogation action against a negligent tenant under an oral lease, where the tenant had obtained a separate insurance policy covering fire damage). Thus, the scope of the implied-coinsured doctrine appears undecided in

Vermont. In Aetna Casualty & Surety Co. v. Barasch, supra, the court was not required to address this question, but instead decided the case on other grounds.

Conclusion

The law regarding insurance subrogation claims continues to evolve, with state and federal courts in New England recently issuing many important decisions. We believe spoliation of evidence (including the possible recognition of a separate tort for intentional or negligent spoliation), and refinements in the economic loss doctrine with respect to the integrated products rule, in particular, merit close attention and monitoring in the New England states. These issues affect both the right and amount of recovery in subrogation actions, and significantly impact the trial of subrogation claims through evidentiary presumptions and inferences. Cozen and O'Connor welcomes your comments and questions regarding these and any other insurance subrogation matters.

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