SUBROGATION AND THE EXPERT WITNESS

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SUBROGATION AND THE EXPERT WITNESS

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WHAT IS AN EXPERT, AND WHAT IS AN ENGINEER?

- **EXPERT**

  **FEDERAL RULES OF EVIDENCE, RULE 702:**

  "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

- **ENGINEER**

  An individual who, via professional education and practical experience, has acquired knowledge of mathematics, the physical sciences, and the principles by which mechanical properties of matter are made useful to man in structures and machines.

- **ENGINEER AND EXPERT ARE NOT SYNONYMOUS**

  - You don't need to be an Engineer to qualify as an Expert.
  - An Engineer is not automatically qualified as an Expert in everything.
  - A true Expert has a specific area of expertise.
  - Beware the Professional Expert - an expert in everything
EXPERT'S ROLE IN THE SUBROGATION PROCESS!

- PRELIMINARY DETERMINATION OF THE POTENTIAL FOR SUBROGATION
  - Initial review of the particulars involved
  - Detailed loss site investigation with photographic/video graphic documentation
  - Determination of the probable cause of the loss and identification of possible responsible third party or parties.
  - Collection and preservation of physical evidence
  - Identification of possible mitigating circumstances
  - Report of findings, conclusions, and recommendations.

- AFTER THE POTENTIAL FOR SUBROGATION HAS BEEN AFFIRMED
  - Collection of pertinent documents
  - Interview witnesses or others with knowledge of loss circumstances
  - Detailed review of applicable codes or standards
  - Formulate technical input to subrogation attorney
  - Provide expert witness testimony
EXPERT'S ROLE IN THE SUBROGATION PROCESS!

- **DO I NEED AN EXPERT WITNESS ON MY CLAIM?**
  - Probably no if the claim is a repetitive one, i.e., made against the same party for the same type of loss. Examples: toilet tank valve failures; water filter housing failures; polybutylene pipe failures.
  - Most likely if the claim is a unique one with a previously untested theory of liability.

- **WHEN AN EXPERT WITNESS IS ESSENTIAL TO YOUR CLAIM**
  - For a large loss / recovery with a previously untested theory of liability.
  - For claims against "Professionals" or specialists, i.e., engineers, architects, contractors, etc.
CHOOSING THE RIGHT EXPERT

(WHO GETS TO CHOOSE?)

- Choose a "specialist" not a "generalist," particularly in losses involving products or equipment.

- If engineering expertise is required, make sure that the expert is a P.E.

- Ask about the expert's chain of custody/evidence transfer documents and procedures.

- How and where does the expert store evidence and how does he/she control the disposal of evidence?

- Is the expert insured?
  - General liability
  - Forensic Engineering Errors & Omissions
CHOOSING THE RIGHT EXPERT

- POTENTIAL RESOURCES FOR OBTAINING AN EXPERT WITNESS

  - Other company people or in-house lists of "approved" experts or forensic engineering firms.
  - Attorneys
  - Local claims association lists or claims related directories containing names of forensic engineering firms.
  - Universities
  - Professional trade associations
  - Engineering societies
  - The Internet
    - 
    -
    -
  - FORCON International!
THE IMPORTANCE OF EARLY INVESTIGATION BY THE EXPERT

- PRIMARY REASONS FOR EARLY INVESTIGATION BY AN EXPERT

These reasons generally apply to all losses where an expert opinion is needed in order to pursue subrogation:

- Observe and photographically document loss site conditions before they change.

- Locate, identify, and secure physical evidence before it disappears or changes.

- Provide the expert with the opportunity to base his/her opinion, and possible future testimony, on as much personal observation and data collection as possible.

Other, loss specific reasons apply to various types of losses where subrogation is a consideration.
THE IMPORTANCE OF EARLY INVESTIGATION BY THE EXPERT

- FIRE

Specific reasons for early investigation:

- Proving arson or third party responsibility requires solid evidence and strong expert testimony.

- Evidence of accelerants deteriorates with time and under adverse weather conditions.

- Recollection of fire fighters and other witnesses may deteriorate quickly.

- Demolition and debris removal may be initiated quickly after fire is extinguished.

- Fire scene might not be securable thus allowing access by curious parties and others who can disturb or remove evidence.

- Specialized expert might also need to examine the fire scene after the C & 0 expert has made an initial determination of possible cause and origin.
THE IMPORTANCE OF EARLY INVESTIGATION BY THE EXPERT

- STRUCTURAL FAILURE OR DAMAGE

Specific reasons for early investigation:

- The loading that caused the failure might still be present if a visit is made quickly, i.e. snow, ponded water from rain or mechanical equipment, ice, etc. If the expert can arrive before these elements or items begin to disappear the weight and other affects can be more closely determined.

- First impressions are extremely important when investigating a collapse site. This one mental photograph will determine how quickly the appropriate cause will be found. Most structural experts will be able to isolate the area of the initial failure by virtue of the direction and sequence of the failed pieces. Once the site has been disturbed it becomes much more difficult to locate the initial failure or "trigger". If your expert is the third or fourth to arrive at the site he will most likely view a site that has been considerably altered since the collapse.
THE IMPORTANCE OF EARLY INVESTIGATION BY THE EXPERT

Specific reasons for early investigation:

- The first expert to arrive is usually the only one who gets to examine the undisturbed conditions. Once he steps onto the site it will become disturbed by his normal activities such as stepping on, leaning against, tripping over, or otherwise repositioning the debris.

- Most experts will move some items to obtain a better angle or view for photographs. Once photographed the item is seldom replaced in the exact position it was found in, thereby realigning the debris.
THE IMPORTANCE OF EARLY INVESTIGATION BY THE EXPERT

VEHICULAR ACCIDENT

Specific reasons for early investigation:

- Anti-Lock Brake cars leave very faint marks that have a much shorter life than regular skid marks.

- Accident vehicles may become altered through handling or dismantling at salvage yards.

- Lamps - filaments and tungsten oxide are fragile short term evidence that can be destroyed by weather and handling.

- Police officers may lose memory and notes that they have immediately after the crash.

- Vehicles need to be examined to make the opinion of the expert more useful.

- "Hot Spots" on tread or sidewall of tire shows many things about vehicle dynamics - this is short term.
THE IMPORTANCE OF EARLY INVESTIGATION BY
THE EXPERT

VEHICULAR ACCIDENT (Continued)

Specific reasons for early investigation:

- Outside sources of photos and video, such as newspaper and fire department, may lose or destroy photos after a short time.

- When opinions reached are compared to police opinions, the closer to the time of the accident that the expert has been to the scene the better.

- Trucks and driver's logs are best inspected soon after the crash before alterations can be made. Truck equipment may be a very important issue in accident causation.
THE IMPORTANCE OF EARLY INVESTIGATION BY THE EXPERT

- EQUIPMENT FAILURE/PRODUCT LIABILITY

Specific reasons for early investigation:

- Observe the damage before repairs are made so that the damaged parts don't become unverifiable or totally unavailable.

- Collect and properly preserve the evidence particularly if there are failure surfaces that should undergo metallurgical examination.
IDENTIFYING THAT THE POTENTIAL FOR SUBROGATION EXISTS

WHAT TO LOOK FOR, IN GENERAL

- Did the damage or injury result from possible failure of, or exposure to something that is man-made.

- If Mother Nature didn’t cause it, and if it wasn’t clearly accidental or intentional, there is a good chance that some third party is responsible.
CLAIMS WITH SUBROGATION POTENTIAL

STRUCTURE FIRE

- If not lightning, arson or an accident - then something failed or malfunctioned
  - Possibilities:
    - Wiring
    - Appliance
    - Gas leak
    - Fireplace
    - Electronic devices
    - Electric utility

- Make sure you know the reason for the fire before you rule out subrogation.

- Is building sprinklered and did sprinkler system function as expected?

- Is building monitored by security company and did they respond as expected?
CLAIMS WITH SUBROGATION POTENTIAL

STRUCTURE WATER DAMAGE

- If it came from water system and there hasn't been freezing temperatures, then it is probably a human error problem.
  - Possibilities:
    - Plumbing system failure or faulty installation
    - Appliance malfunction
    - Water filter leak
    - Water heater leak - no drain pan

- If it came from rain water entering building through building envelope.
  - Possibilities:
    - Faulty design or construction of roof system, roof drains, windows, curtain wall system, etc.
    - Faulty design or construction of seals around building penetrations
    - Faulty exterior finish system, i.e. E.I.F.S.
CLAIMS WITH SUBROGATION POTENTIAL

STRUCTURE WIND DAMAGE

- Is it an isolated case and were wind speeds not that significant?

  - Possibilities:
    - Faulty design
    - Faulty construction

STRUCTURE COLLAPSE

- Is it an isolated case as opposed to one of many buildings which experienced some evident external force or roof load i.e. excessive snow or ice?

  - Possibilities:
    - Faulty design
    - Faulty construction
CLAIMS WITH SUBROGATION POTENTIAL

VEHICULAR FIRE OR MECHANICAL FAILURE

- These don't just happen!
- If vehicle is fairly new, find out if there have been any recalls or investigations of problems by the National Highway Traffic Safety Administration (NHTSA) Hotline - 800-424-9393.
- Has vehicle recently had repairs or maintenance performed by some third party.
- Has vehicle had a recurring problem that dealer's service has not been able to correct satisfactorily.

VEHICULAR ACCIDENT

- Don't assume that police accident reports are always correct.
- Subrogation possibilities
  - Vehicle malfunction (see above)
  - Faulty traffic signal
  - Roadway conditions
  - Improper signage or traffic controls for construction activities
**CLAIMS WITH SUBROGATION POTENTIAL**

**WORK PLACE INJURY**

- Was there a machine or piece of equipment involved?
  Possibilities for subrogation:
  - Malfunction or failure of machine or a safety feature
  - Inadequate or missing guard, warning, or safety inter-lock
  - Improper maintenance or repair if responsibility of third party
  - Improper design
  - Failure to comply with applicable standard
  - Faulty installation

- Is accident location different from employers place of business, i.e. employee of temporary employment agency?
  Possibilities for subrogation:
  - Failure to provide proper training or instructions
  - Poor maintenance
  - Unsafe working environment
SPOILATION OF EVIDENCE

- The destruction, or the significant and meaningful alteration of a document or instrument.

**Examples**

- loss or destruction of evidence or documents
- destructive testing of allegedly defective products prior to a defendant's opportunity to so inspect
- the failure to retain evidence which supports a claim
- the failure to retain evidence which the spoilator has eliminated as the cause of the loss.

- Spoilation of evidence is commonly addressed through the doctrine of "all presumptions against the destroyer".
  - inference or presumption that the lost or destroyed evidence would have been unfavorable to the spoilator.
PRESERVING EVIDENCE

- Thoroughly photograph and/or videotape the evidence at the loss site before it is altered or removed.

- Carefully tag, remove, and protect the evidence.

- Initiate a chain of custody document and limit the number of custody transfers.

- Do not perform any destructive examination or testing of the evidence until all possibly responsible parties have been given the opportunity to participate in the joint destructive examination or testing.

- Preserve evidence which has been eliminated as the possible cause of the loss.

- Store the evidence in a secured location where it will be reasonably protected from deterioration, alteration, or inadvertent disposal.

- Do not dispose of the evidence until all parties agree to the disposal.
THE BURDEN OF PROOF IS ON YOU!

- **YOU** are now the claimant/plaintiff

- **YOU** need to take the initiative to determine if you have a valid claim and to make sure that everything is being done to prove that claim!

- **YOU** need to make sure that all the evidence is being properly preserved!

- **YOU** need to be aggressive, not just defensive!