

# SUBROGATION LAW

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# FACULTY

Presenters:

Moderator:

Fred Pfenninger,  
Pfenninger & Associates  
[fred@indianacollections.com](mailto:fred@indianacollections.com)  
(317) 848-7500

Blake Orner,  
Grant & Grant  
[tbo@grantandgrant.net](mailto:tbo@grantandgrant.net)  
(317) 251-7550

Russ Wilson  
American StructurePoint  
[Rwilson@structurepoint.com](mailto:Rwilson@structurepoint.com)  
(317) 547-5580

Mike Jacob, P.E.  
Veritas Engineering Laboratories  
[Mike.Jacob@VeritasEng.com](mailto:Mike.Jacob@VeritasEng.com)  
(888) 317-8013

Steven St. John  
Skiles DeTrude  
[rsstjohn@skilesdetrude.com](mailto:rsstjohn@skilesdetrude.com)  
(317) 321-2400

# WHAT IS SUBROGATION?

- “Subrogation is a doctrine of equity long recognized in Indiana. It applies whenever a party, not acting as a volunteer, pays the debt of another that, in good conscience, should have been paid by the one primarily liable.” *Wirth v. Am. Family Mut. Ins. Co.*, 950 N.E.2d 1214, 1216 (Ind. Ct. App. 2011).



# Automobile Subrogation

- ❖ Service of Process—Secretary of State
- ❖ Damage Valuation
- ❖ Enforcing Judgments
  - ❖ License Suspension
  - ❖ Proceedings Supplemental



# Service of Process: Secretary of State Appointed as Agent

I.C. 34-33-3-1

(1) Operation of motor vehicle on street or highway or any other place in Indiana

(2) Nonresident

"Operation is an Agreement that process against the person has the same legal force and validity as if served upon the person personally"

Ind. T.R. 4.4

(1) *Nonresident or a person whose residence is unknown*

(2) causes personal injury or property damage within the State of Indiana

(3) Service must comply with Ind. T.R. 4.10

# Service of Process: Secretary of State Appointed as Agent

*Munster vs. Groce*, 829 N.E.2d 52 (Ind. Ct. App. 2005)

- Indiana Court of Appeals recognized service via Indiana Secretary of State is effective even without actual notice to the Defendant
- No affidavit required unlike service via publication
- Due Process Issues: Only when service challenged by Defendant. Burden shifts to Plaintiff to demonstrate steps taken to perfect service

# AUTOMOBILE SUBROGATION

## Enforcing Judgments

- Suspension of Driving Privilege
  - I.C. 9-25-6-4
- Proceeding Supplemental



# Automobile Subrogation

## Recovery of Medical Payment Subrogation Lien

*Erie Insurance Co. vs. George*, 681 N.E. 2d 183 (Ind. 1997)

- Insured controls action for recovery. Subrogating carrier cannot maintain separate, independent claim.
- Insurance carrier can still settle its medical payment lien with the tortfeasor's carrier.

I.C. 34-53-1

- Insured still required to reimburse from any settlement or recovery.
- Subrogation lien holder must reimburse costs and attorney fees.



# Recovery of Medical Payment Lien After Insured Settlement

*Tate vs. Secura Ins.*, 587 N.E.2d 665,  
670 (Ind. 1992)

- If tortfeasor and/or tortfeasor's carrier is on notice of lien, then any release with the insured is not a defense against the subrogating carrier
- See also *Allstate Ins. Co. vs. Meek*, 489 N.E. 2d 530 (Ind. Ct. App. 1986); *Hockelberg vs. Farm Bureau Ins.*, 407 N.E. 2d (Ind. Ct. App. 1980).

*Holland vs. Indiana Farm Bureau Ins.,*  
110 N.E. 3d 369 (Ind. Ct. App. 2018)

- ❖ Cause of action against personal injury counsel for failure to reimburse lien
  
- ❖ Personal Injury Counsel owes fiduciary duty to subrogation carrier
  - ❖ *I.C. 34-53-1*
  - ❖ Indiana Rule of Professional Conduct 1.15

# WORKERS COMPENSATION SUBROGATION

I.C. 22-3-2-13: Intervening in Employee's Personal Injury Action

## Barriers to Lien Recovery

- "Made Whole" Doctrine
- Lien Reduction Statute

## Uninsured/Underinsured Settlement

- Are these policies "other persons" for the purpose of recovery under I.C. 22-3-2-13?
- Effect of Insured's/Employee's recovery from UM/UIM policy provisions on "Made Whole" arguments

# Barriers to Lien Recovery

## "Made Whole" Doctrine

- Equitable principal: Insured must have been reimbursed fully for his/her damages before subrogation can arise.
- *Capps vs. Klebs*, 382 N.E. 2d 947 (Ind. Ct. App. 1978)

## Lien Reduction Statute: Ind. Code 34-51-2-19

- "Made Whole" Doctrine codified
- *Dep't of Pub. Welfare, State of Ind. vs. Couch*, 605 N.E. 2d 165 (Ind. 1992): Broad application of Lien Reduction/"Made Whole" Doctrine
- *Wirth vs. Am. Family Mut. Ins. Co.*, 950 N.E.2d 1214 (Ind. Ct. App. 2011): Places some burden back on the plaintiff/employee to show lien reduction should be applied

# Workers Compensation Subrogation in Light of UIM/UM Policy Provisions

Interpretation of "other person" as provided in I.C. 22-3-2-13 impacts recoverability of workers compensation lien

*Ansert Mech. Contrs. vs. Ansert*, 690 N.E. 2d 305 (Ind. Ct. App. 1997): Workers compensation carrier was entitled to a lien pursuant to I.C. 22-3-2-13 on payment from **employer's** UIM policy

*Pinkerton's Inc. vs. Ferguson*, 824 N.E.2d 789 (Ind. Ct. App. 2005): **Employee's** UM policy was not an "other person" under the statute and workers compensation carrier was not entitled to lien for payments made under the policy



# LARGE LOSS PROPERTY SUBROGATION



# LARGE LOSS PROPERTY SUBROGATION: INVESTIGATION

## PLAINTIFF'S PERSPECTIVE

### ➤ WATCH THE CLOCK!

### ➤ Statute of Repose

➤ Products: I.C. 34-20-3-1

➤ Construction: I.C. 32-30-1-5; I.C.  
32-30-1-6

### ➤ Notice to Parties

### ➤ Expert Selection

### ➤ Preservation of Loss Scene

### ➤ Identification of all parties and evidence

### ➤ Obtain documentation

➤ Waivers of Subrogation

➤ Assists Expert investigation



# LARGE LOSS PROPERTY SUBROGATION: INVESTIGATION

## Defense Perspective

- Initial Investigation
- Obtain Facts
- Site/Scene Investigation
- Expert Witness Selection at Investigative Stage





# EXPERT PERSPECTIVE: FIRE SUBROGATION

- ❖ Scientific Method
- ❖ NFPA 921
- ❖ Negative Corpus
- ❖ Case Study: Applebee's Kitchen  
Fire Mystery



# EXPERT PERSPECTIVE: WATER LOSSES

- ❖ Investigation of Water Losses
  - ❖ What makes water different?
- ❖ Collecting Relevant Information
- ❖ Collection and Preservation Do's and Don't's



# Theories

	Meaning	Examples
Improper Installation	Mistake by Installer	Overtightening, non-compliance with instructions.
Abuse	External Damage	Crushing, impact, etc.
Abnormal Environmental Conditions	Exposure to unusual conditions	Freezing, melting, certain types of chemical attack.
Manufacturing Defect	A defect that occurs during production	Improper material composition, improper assembly by the manufacturer
Design Defect	A defect that occurs during product design	Improper material selection, sharp corners, omitted features
Improper Maintenance	The absence of reasonable maintenance caused the failure	Engine failure caused by not changing engine oil
Failure to Warn	A failure to warn the user that foreseeable use and/or misuse would create a failure.	Not warning consumers that using toilet cleaners will cause toilet fill valves to fail.

# LARGE LOSS PROPERTY SUBROGATION: LITIGATION

- ❖ Causes of Action
- ❖ Defenses
- ❖ Discovery
- ❖ Expert Witnesses
- ❖ Other Considerations
  - ❖ Deeming the Seller/Distributor as Manufacturer
  - ❖ Malfunction Theory
  - ❖ Independent Contractor vs. Agency
  - ❖ Preservation of Evidence and Spoliation

# LARGE LOSS PROPERTY SUBROGATION: LITIGATION

## ❖ CAUSES OF ACTION:

❖ Negligence

❖ Breach of Contract/Skillful and Workmanlike Manner

❖ Product Liability



# LARGE LOSS PROPERTY SUBROGATION: LITIGATION

## ❖ DEFENSES:

- ❖ Nonparty Defenses
- ❖ Spoliation of Evidence
- ❖ Contractual Defenses
- ❖ Act of God



# LARGE LOSS PROPERTY SUBROGATION: LITIGATION

## DISCOVERY

- ❖ WRITTEN DISCOVERY
- ❖ DEPOSITIONS
- ❖ PRACTICE TIPS



# LARGE LOSS PROPERTY SUBROGATION: LITIGATION

## EXPERT WITNESSES IN LITIGATION

- ❖ Choosing an Expert Witness
  - ❖ Strategy
  - ❖ Resources
- ❖ Ind. Evid. Rule 702. Testimony of Expert Witnesses
  - ❖ Indiana's standard for admission of expert witness testimony
  - ❖ "...*Daubert* is merely instructive in Indiana, and we do not apply its factors as a litmus test for admitting evidence under Indiana Evidence Rule 702(b)." *Turner v. State*, 953 N.E.2d 1039, 1051 (Ind. 2011).
- ❖ Expert Discovery





# LARGE LOSS PROPERTY SUBROGATION: LITIGATION

## Deeming Seller As Manufacturer: Ind. Code §34-20-2-4

❖ *Kennedy v. Guess, Inc.*, 806 N.E.2d 776, 782 (Ind. 2004).

## Apparent Manufacturer Theory

❖ *Dudley Sports CO. v. Schmitt*, 279 N.E.2d 266, 224 (1972).



# LARGE LOSS PROPERTY SUBROGATION: LITIGATION

## ❖ Malfunction Theory: Saving a Case with Less Than Perfect Evidence

❖ No *Res Ipsa* Product Liability Claims

❖ *Ford Motor Co. vs. Reed*, 689 N.E. 2d 751  
(Ind. Ct. App. 1997).

❖ Specific defect not identified

❖ However, expert did:

❖ Identify evidence of arcing in internal wiring

❖ Eliminate “every possibility but a defect in the console” *Id.*



# LARGE LOSS PROPERTY SUBROGATION: LITIGATION

## Independent Contractor Defense

❖ General contractor is not ALWAYS absolved from liability for damages resulting from negligent work it was hired to perform, but was performed by an agent/subcontractor

❖ *Sessengut v. Posey*, 67 Ind. 408, 411-12 (1879).

❖ *Independent Five and Ten Cent Stores of New York v. Heller*, 127 N.E. 439 (Ind. 1920).

❖ *Wass v. Sutev*, 84 N.E.2d 734 (Ind.Ct.App. 1949)( *en banc*).

❖ *Sword vs. NKC Hospitals, Inc.*, 714 N.E. 2d 142, 149 (Ind. 1999)

❖ Restatement (Second) of Torts 429



# LARGE LOSS PROPERTY SUBROGATION: LITIGATION

## SPOILIATION OF EVIDENCE

- ❖ “the intentional destruction, mutilation, alteration, or concealment of evidence.”  
*Glotzbach v. Froman*, 854 N.E.2d 337, 338 (Ind. 2006) citing *Cahoon v. Cummings*, 734 N.E.2d 535, 545 (Ind.2000).
- ❖ Avoid tunnel vision!
- ❖ Notify all potential parties of loss as soon as possible
- ❖ If Spoliation Occurs...
  - ❖ Sanctions Under Trial Rule 37
  - ❖ Cause of Action: First Party vs. Third Party Spoliation



# LARGE LOSS PROPERTY SUBROGATION: LITIGATION

## Economic Loss Rule

- ❖ Precludes recovery of purely economic damages under a theory of negligence
- ❖ Often raised in subrogation actions where personal injury is not an issue—does not apply universally to all subrogation claims!
- ❖ Product Liability
  - Recovery for failure of the product itself (i.e. repair or replacement) under negligence theory is barred
- ❖ Negligent Construction
  - Recovery for negligent design or construction is barred by economic loss rule when damages is for repair or remediation of property that was the subject of the project
    - *Indianapolis-Marion County Public Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722 (Ind. 2010)



# LARGE LOSS PROPERTY SUBROGATION: LITIGATION

## Economic Loss Rule

### ❖ “Other” Property

❖ If negligence or defect in product results in injuries or damages to property or person other than the product (or property other than that which contractor was hired to perform work on), i.e. consequential damages, Economic Loss Rule does not apply.

- *Guideone Ins. Co. v. U.S. Water Systems Inc.*, 950 N.E.2d 1236, 1244 (Ind. Ct. App. 2011).
- See also *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150, 156 (Ind. 2005).