



2023 HADA SEMINAR

EVENT PROGRAM



SEATTLE, WA / SEPTEMBER 19 AND 20, 2023

19
TUE

| | |
|---|------------------------|
| Registration Check-In <i>All presentations are located in the Pike Room</i> | 7:30 a.m. - 8:30 a.m. |
| Continental Breakfast | 8:30 a.m. - 9:00 a.m. |
| Welcome and Introductions | 9:00 a.m. - 9:05 a.m. |
| Presentations | 9:05 a.m. - 12:00 p.m. |
| Session One: Property Insurance Law and Coverage, Updates to Case Law , Alan Lyons, <i>Herrick Fienstein LLP</i> | (5-minute break) |
| Session Two: Subrogation and Recovery , Lee Wickerd and Mark Solomon, <i>Matthiesen Wickerd and Lehrer</i> | |
| Lunch <i>Located in the Pine Room</i> | 12:00 p.m. - 1:00 p.m. |
| Free Time to Explore | 1:00 p.m. - 6:00 p.m. |
| Networking Cocktail Reception and Dinner <i>Located in the Puget Sound Room</i> | 6:00 p.m. - 8:00 p.m. |

20
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| Continental Breakfast | 7:30 a.m. - 8:00 a.m. |
| Welcome and Introductions | 8:15 a.m. - 8:30 a.m. |
| Slip, Trip, and Fall Mock Trial | 8:30 a.m. - 12:00 p.m. |
| Plaintiff , Allyson Avila, <i>Gordon Rees</i> | |
| Defense , Paul Caleo, <i>Gordon Rees</i> | |
| Plaintiff Treating Expert MD , Chris Cookson, <i>HAI Group</i> | |
| Defense Expert MD , Janelle Howard, <i>HAI Group</i> | |
| Plaintiff , Jamie Calli, <i>HAI Group</i> | |
| Judge , Ed Malaspina, <i>HAI Group</i> | |
| Facilitator and Bailiff , Tony Corleto, <i>HAI Group</i> | |
| Appellate Judge , Ed Lowndes, <i>Housing Authority of Kansas City, MO</i> | |

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S P E A K E R S

ALAN LYONS, HERRICK

Alan Lyons is the chair of Herrick's Insurance & Reinsurance Group.

Alan has more than 20 years of experience advising insurers on insurance coverage and reinsurance issues, including insurance coverage litigations and arbitrations, drafting policies and reinsurance agreements, and advising on the development and structure of new insurance products.

Alan serves as national coverage counsel for insurers and risk retention groups, evaluating claims, preparing coverage opinions, and handling arbitration and litigation involving a variety of lines of insurance, including commercial general liability, commercial property, directors and officers liability, errors and omissions liability, employment practices liability, pollution, fine art, and cyber insurance policies.

**Insurance Litigation and Arbitration**

Alan is an accomplished litigator who regularly represents clients in complex coverage litigation in federal and state courts, and in arbitration venues regarding a wide range of coverage issues, including:

- Catastrophic losses arising out of natural disasters
- Pollution exclusions
- Environmental claims
- Construction-related coverage disputes
- Toxic tort litigation, including asbestos, lead paint and mold claims
- Priority of coverage among concurrent and consecutive insurers
- Allocation of risk and trigger of coverage
- Number of occurrences
- Late notice
- Coverage under additional insured endorsements
- Coverage under directors and officers liability policies for underlying shareholder class actions and derivative lawsuits
- Coverage under errors and omissions/professional liability insurance policies for underlying claims against broker-dealers and numerous other professionals
- Excess, bad faith, extra-contractual and punitive damage claims involving both first- and third-party coverage
- Employment discrimination, harassment and wrongful termination coverage
- Construction project builders' risk and liability policies
- Cyber insurance claims

Reinsurance

Alan regularly represents reinsureds and reinsurers in litigation and reinsurance arbitrations through to awards involving issues such as follow the fortunes/settlements, allocation disputes, the use and accounting of finite reinsurance, interpretation of warranty provisions, reinsurers' collateral obligations and the scope of contractual offset provisions.

Policy Drafting

Alan advises insurers and reinsurers regarding their policy and treaty language, and drafts insurance policies, endorsements and reinsurance agreements. His recent work in this area includes drafting several insurance policies for a European insurer's alternative risk transfer products covering areas such as political risks, professional liability, construction and nuclear energy. In addition, Alan develops and structures new insurance products, including preparing the necessary transactional documents, analyzing regulatory compliance matters, and forming captives and risk retention groups.

Memberships & Associations

- New York State Bar Association
- Law Society of England and Wales

S P E A K E R S

**LEE R. WICKERT, MATTHIESEN, WICKERT, & LEHRER, S.C.**

Lee R. Wickert is an insurance litigator that originally joined our Wisconsin office, but transferred to our Austin, Texas branch when it opened in May 2019. Lee is a graduate of the University of Wisconsin and obtained his law degree at Marquette Law School and his M.B.A. at Marquette University. Lee is licensed in Wisconsin and Texas.

Lee is no stranger to the firm having worked for the firm since 2009, including three years as a research law clerk, and is already a profile writer. He was a legal research assistant at Marquette University, creating class material for a Bankruptcy Law class, and contributing toward a law school text book on bankruptcy. Lee is also co-author of "Fundamentals of Insurance Coverage in All 50 States – Sixth Edition", published by Juris Publishing, Inc., New York, New York.

Lee previously worked for Governor Scott Walker, Office of Legal Counsel, where he served as legal liaison ensuring the compliance of new legislation with Wisconsin law and the Wisconsin Constitution. He has also been an analyst with AXA Advisors in Milwaukee and a credit operation specialist with Johnson Bank in Racine.

Lee is a former hockey goalie, played hockey for the University of Wisconsin-Milwaukee and, prior to relocating to Texas, was the assistant coach for the Cedarburg High School varsity hockey team. When he isn't drafting subrogation complaints, Lee enjoys weight-lifting, politics, scuba diving, downhill skiing, and playing board games with family and friends.

MARK A. SOLOMON, MATTHIESEN, WICKERT & LEHRER, S.C.

Mark A. Solomon is an insurance trial lawyer and the managing partner of Matthiesen, Wickert & Lehrer's Austin, Texas branch office. Mark is licensed to practice law in Texas, Colorado, and Georgia. Mark's practice focuses on complex property and casualty subrogation, workers' compensation subrogation, and automobile subrogation.

Mark has a wealth of litigation and insurance claims experience. After nearly ten years of litigating with two of Houston's premier litigation firms, Mark joined Farmers Insurance Group as a trial attorney, litigating a large docket of large loss commercial property claims, homeowners' claims, and automobile liability losses. In 2016, he became Supervising Attorney at Farmers, managing a team of seven attorneys, paralegals, and collection specialists throughout the country. He specialized in litigating matters for the national property subrogation group. Mark joined MWL's Austin, Texas office in 2019.



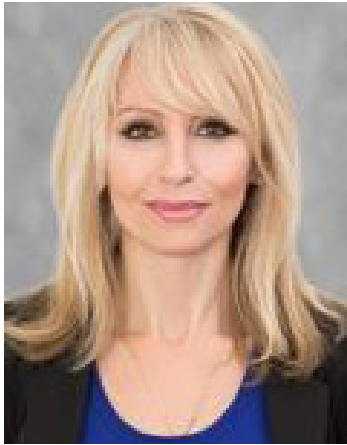
Mark handles complex property and casualty subrogation along with workers' compensation and automobile subrogation cases throughout Texas and across the country. Mark is a self-proclaimed perfectionist. His vast experience includes preparation and trial of cases in both state and federal court and his expertise in large, complex property subrogation losses provides welcome assistance to a burgeoning large loss property subrogation practice here at MWL.

Mark is a Longhorn and boasts an undergraduate degree from the University of Texas – Austin and graduated from South Texas College of Law in Houston, Texas. He is a leader on the CE and subrogation training team at MWL and has for years conducted training and CE classes for subrogation professionals for clients and insurance professionals throughout the country. He is a long-time member of the National Association of Subrogation Professionals.

Mark believes strongly that *"the person who says it cannot be done should not interrupt the person who is doing it."* With that attitude, he is a perfect fit at MWL.

Mark was born in Atlanta, Georgia and raised in Albuquerque, New Mexico. In his free time, Mark enjoys spending time with his wife, Brennan, and their daughter, Sadie. He is an avid golfer and fisherman and enjoys attending Longhorn football games in the fall. Mark and his family enjoy traveling to new places and exploring the parks and green spaces throughout Austin. He is an avid gardener and tends to his diverse collection of plumeria plants he has collected, bred, and raised for the past twelve years.

S P E A K E R S



ALLYSON A. AVILA, GORDON & REES

Allyson A. Avila is an accomplished trial attorney who enjoys an enviable track record of success. Dependable, responsive and approachable, her time and talent in the courtroom make her a “go-to” attorney when there is a risk of high exposure.

Ms. Avila maintains a diverse civil trial practice, including medical malpractice and nursing home litigation, premises liability, employment claims, contract disputes and product liability. She counsels and defends a wide spectrum of private, institutional and municipal clients, invariably garnering their loyalty and respect.

Ms. Avila is also one of only a few attorneys in the nation that has intimate knowledge of the aesthetic industry and the nuances of medical spa formation, licensing, and compliance with state and federal laws. Ms. Avila envisions, constructs and executes legal and regulatory strategies that drive business results. A strong relationship and alliance builder, she understands the importance of agreement and collaboration to help ensure that workable strategies are designed in a way that most effectively addresses the unique needs of each client to meet her client’s business objectives.

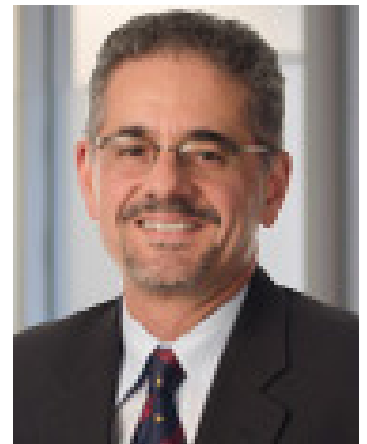
Ms. Avila and her team deliver added value to clients by regularly visiting their facilities and presenting educational and risk management programs. She is a frequent lecturer at global aesthetic conferences.

Ms. Avila’s practice area expertise and experience includes:

- Health Care and Medical Malpractice Litigation
- Tort & Product Liability
- Commercial Transactions and Litigation
- Employment Law

PAUL CALEO, GORDON & REES

Paul Caleo is a Partner in the Oakland office of Gordon & Rees and is a member of the Product & General Liability practice group. Mr. Caleo has 35 years of experience in trying cases. He is skilled in defending and protecting his clients’ interests before juries and fact finders. He is a member of the San Francisco Chapter of ABOTA and has successfully tried to verdict large loss/high risk personal injury cases in what are regarded as some of the most defendant hostile and plaintiff friendly venues in the country. His extensive experience allows him to economically and efficiently manage the risks presented to his clients by litigation throughout California both in the Claims stage and once the lawsuit is filed. Mr. Caleo’s experience and reputation for integrity allows him to create a relationship with opposing counsel that can lead to early resolution.



S P E A K E R S



CHRISTOPHER COOKSON, HAI GROUP

Christopher Cookson is a regional manager of claims with HAI Group. He has worked in the insurance industry handling liability claims for 20 years, as a field investigator, adjuster, auditor, and manager. Chris joined HAI Group in April 2015. He and his team handle general liability claims for HARRG and HEIC, and automobile liability claims for HARRG. In this capacity, he handles a large variety of claims, including employment practices liability and discrimination claims. He is a graduate of the University of Connecticut and earned his Chartered Property Casualty Underwriter (CPCU) designation in 2007.

JANELLE HOWARD, HAI GROUP

Janelle Howard is a regional manager of claims at HAI Group. She joined HAI Group in 1998 and has worked closely with member housing authorities and affordable housing providers to provide exceptional casualty claims handling. With more than 25 years of claims experience, Janelle holds a master's in social work (MSW), an Associate in Claims (AIC), and is a Certified Public Housing Manager (PHM).



JAMIE CALLI, HAI GROUP

Jamie Calli is the executive assistant to the chief executive officer at HAI Group. She also oversees employee events, and HAI Group's Community and Resident Services Team, the charitable initiative of the company. Prior to coming to HAI Group in 2022, Jamie was the executive producer at WFSB Channel 3 Eyewitness News, where she worked for 18 years. She was most recently in charge of Great Day Connecticut, the #1 rated lifestyle show in Connecticut. Jamie is a licensed insurance producer and has her certificate in public housing management (PHM). She was named to Connecticut Magazine's '40 Under 40' list in 2014 and was Alumnus of the Year for Sacred Heart High School in Waterbury, Connecticut in 2015.



S P E A K E R S

ED MALASPINA, HAI GROUP

Ed Malaspina, President and Chief Executive Officer, joined HAI Group in 1991 and has served in a variety of leadership positions. His company oversight has included business development, corporate marketing, enterprise strategy, as well as industry initiatives and market intelligence. Ed has more than 30 years of experience working in the public and affordable housing industry.

During his tenure, he has worked closely with housing authorities and commercial habitational clients on a variety of endeavors including insurance, accreditation, and financial products. He is a Certified Public Housing Manager (PHM), licensed insurance producer, certified insurance consultant (CIC), excess and surplus lines broker, a licensed claims adjuster, a reinsurance education scholar, real estate broker, and a Governance Fellow and is Directorship Certified with the National Association of Corporate Directors (NACD).

Ed holds a bachelor's degree in mechanical engineering and a master's degree in business administration.



TONY CORLETO, HAI GROUP



As HAI Group's chief legal and compliance officer, Tony Corleto is responsible for overseeing the company's legal, regulatory compliance, claims, and internal audit functions. Tony has more than 20 years of experience serving nonprofits nationwide, the insurance industry, licensed professionals in a wide range of industries, and a diverse range of additional clients. Prior to joining the company, Tony was a partner at Gordon Rees Scully Mansukhani, LLP, where his practice focused on professional liability, intellectual property, complex tort matters, and sports concussion. Tony's vast legal experience also includes successfully representing clients in complex litigation and class actions, including professional liability, intellectual property, transactions, civil rights, and employment. Tony has served as outside general counsel for a nationwide environmental consultancy, the national Pop Warner Football organization, and various other business concerns. During his tenure at the law firm Wilson Elser, Tony defended cases on behalf of HAI Group and spoke on various panels at HAI Group's annual seminar for housing authority defense attorneys. He earned his juris doctorate from Pace University School of Law and a bachelor's degree in business administration from The College of Insurance co-op program. Tony is admitted to practice law in the State of Connecticut; the State of New York; the U.S. Court of Appeals, Second Circuit; and U.S. District Courts in Connecticut and New York.

EDWIN T. LOWNDES, HOUSING AUTHORITY OF KANSAS CITY

Edwin T. Lowndes has served as the Executive Director for the Housing Authority of Kansas City, Missouri since 2001. Mr. Lowndes began his career at the Housing Authority in 1995 as General Counsel. Prior to coming to the Housing Authority, Mr. Lowndes served as a Deputy County Attorney for Douglas County, Nebraska working primarily on civil matters, concentrating on regulatory and governmental issues, counsel to the County Board of Commissioners and handling court appeals. Prior to working for the County, Mr. Lowndes worked for Mutual of Omaha and an underwriter and a budget analyst.

In addition to his duties as the Executive Director for the Housing Authority, Mr. Lowndes serves as a member of the board of directors for HAI Group; a member of the board of directors for the Council of Large Public Housing Authorities; a member of the Kansas City Workforce Investment Board; and a member of advisory committee for the Metropolitan Community Service Program of the Kansas City Metropolitan Crime Commission.

Mr. Lowndes earned both his bachelor's degree in business administration and his juris doctorate from Creighton University.





Introduction to Commercial Property Insurance Claims

Alan R. Lyons

September 19, 2023

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Commercial Property Insurance - General

- “First party” coverage – claims are paid solely to the policyholder (or loss payee/mortgagee).
- Covers physical damage to “covered property”
- Can also cover:
 - Loss of rental income
 - Extra expense



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Coverage Questions

- Does the claim fall within the insuring agreement? “We cover direct physical loss to covered property at a “covered location” caused by a covered peril.”
 - Is there direct physical loss?
 - If so, is the direct physical loss to covered property?
 - If so, is the covered property at a covered location?
 - If so, was the loss caused by a covered peril?
- Covered Peril
 - Does an exclusion apply?
 - Does an exception to an exclusion apply?
- Does a Supplemental Coverage or Coverage Extension Apply?



Is there Direct Physical Loss?



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What Property is “Covered Property?”

Building Property:

- Buildings and Structures
- Completed Additions
- Fixtures, machinery, and equipment which are a permanent part of a covered building or structure
- Outdoor fixtures
- Personal property used to maintain and service the building and premises
 - Air conditioning equipment
 - Fire extinguishing equipment
 - Outdoor furniture
 - Floor coverings
 - Appliances for refrigeration, ventilation, cooking, dishwashing or laundering



Building Property Not Covered

Except as provided under a Supplemental Coverage:

- Pilings, piers, wharves, docks or retaining walls
- Underground pipes, flues, or drains
- Bridges, walkways, roadways and other paved surfaces



What Property is “Covered Property?”

Business Personal Property:

- Your business personal property in buildings or structures at a “covered location” or within 1,000 feet of a “covered location”
- Your use interest as tenant in improvements and betterments (fixtures/alterations made a part of the leased premises which you acquired as tenant but are not permitted to remove)
- Leased personal property for which You have a contractual obligation to insure
- Furniture
- All other personal property owned by You and used in Your business
- Electronic data processing equipment/data/media (fax machines, word processors, telephone equipment, portable computers, data/media stored thereon)



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Property Not Covered

- Vehicles, watercraft, aircraft
- Land
- Water
- Money, securities
- Animals
- Outdoor trees, shrubs, plants (except as provided in Supplemental Coverage)



Is Covered Property at “Covered Location?”

- Location described on Location Schedule
- Location Schedule includes details of property and identifies:
 - Limits – per location or blanket?
 - Valuation – e.g. replacement cost
 - Any restrictions – e.g. wind/hail deductibles



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Was Loss Caused By Covered Peril?

- “Named Perils” Coverage
 - Covers only the perils that are listed in the policy.
 - “Basic Form” – covers only damage caused by fire, lightning, wind, commotion, smoke, hail, aircraft, vehicles, explosions, riots, vandalism, sprinkler leakage, sinkhole collapse and volcanic action
 - “Broad Form” – adds falling objects, weight of snow, ice and sleet, water damage from appliances and systems
- “All Risk” Coverage
 - Covers ALL perils except those that are listed as being excluded. Also referred to as “Special Form” coverage.



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Exclusions

“We cover risks of direct physical loss unless the loss is limited or caused by a peril that is excluded.”

Anti-concurrent causation language:

“We do not pay for loss or damage caused directly or indirectly by one or more of the following excluded causes or events. Such loss or damage is excluded regardless of other causes or events that contribute to or aggravate the loss, whether such causes or events act to produce the loss before, at the same time as, or after the excluded causes or events.”



Exclusions

Section 1 Exclusions – subject to anti-concurrent causation language:

- Ordinance or Law (but see Supplemental Coverage)
- Earth Movement
- Civil Authority
- Nuclear Hazard
- War/Military Action
- Flood
- Utility failure
- Sewer Backup and Water Below the Surface



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Exclusions

- Section 2 Exclusions – no anti-concurrent causation language:
 - Contamination/Deterioration
 - Defects, errors and omissions
 - Pollutants
 - Seepage for at least 14 days
 - Settling, cracking, shrinking, bulging, expanding
 - Wear and Tear
 - Weather

Some exclusions have ensuing loss exceptions: e.g. “But if a defect, error, or omission as described above results in a covered peril, ‘we’ cover the loss or damage caused by that covered peril.”



Coverage Extensions/Supplemental Coverages

- Coverage Extensions – limit is part of and not in addition to the applicable limit
 - Debris Removal
- Supplemental Coverage – limit is separate from and not part of the applicable limit.
 - Ordinance or Law - Coverage for loss caused by enforcement of ordinances or laws regulating construction and repair of damaged buildings
 - Pollutant Cleanup and Removal
 - Sewer Backup and Water Below the Surface
 - Underground Pipes, Pilings, Bridges and Roadways



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Conditions

- Notice condition
 - Prompt notice requirement
- Protect Property
 - Covers emergency repairs to mitigate loss
- Proof of Loss
 - 60 days after insurer's request
- Examination under oath



Valuation

- Replacement Cost
 - The cost of repair or replacement with similar materials on the same site and used for the same purpose
 - Replacement cost is only paid when the damaged property is actually repaired or replaced
 - No deduction for depreciation (decrease in the value of property over a period of time, usually as result of age, wear and tear from use)
 - It does not include the market value of the building or the cost of the land.
 - Insured can make a claim for actual cash value before repair or replacement takes place, and later for the replacement cost if it notifies us of that intent within 180 days after the loss
- Actual Cash Value = Replacement cost minus depreciation
- Disputes regarding ACV and RCV are resolved by an Appraisal
- Suit limitation provision



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Windstorm or Hail Deductible Endorsement

- Percentage deductible (1%, 2% or 5%)
- Only applies to loss caused directly or indirectly by windstorm or hail
- Loss caused by a weather condition other than windstorm or hail will be considered to be caused by windstorm or hail if the loss would not have occurred without the windstorm or hail
- We pay that part of the loss over the deductible
- Deductible amount determined by applying the percentage indicated on the schedule (1%, 2% or 5%) to the value of the covered property that is involved in the loss
- Deductible applies separately to each building



Flood Insurance (NFIP)

- The National Flood Insurance Plan can cover flood losses of up to \$500,000 per commercial building plus \$500,000 for the contents of each building (limits are \$250,000 for residential buildings)
- NFIP policy does not cover loss of business income or rental income caused by flood
- Losses are paid on an actual cash value basis not replacement cost
- Private insurers can and do issue additional flood insurance to fill in the gaps and provide excess coverage. Coverage may be subject to a sublimit/separate deductible



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Flood Endorsement – Blanket Flood Coverage

- Covers loss caused by “flood” “unless specifically excluded or wholly or partially located in a Special Flood Hazard Area as defined by FEMA, Zone B or Zone X (shaded) on the effective date of the policy”
- Declarations will contain a flood limit and flood deductible – greater of 10% of the flood limit, or the basic policy deductible
- Limit applies as excess over any other flood insurance, e.g. the NFIP policy
- “Flood” definition:
 - Includes: “Unusual or rapid accumulation or runoff of surface waters from any source”



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Business Income Coverage

- “We provide the coverages described below during the ‘restoration period’ when ‘your’ ‘business’ is necessarily wholly or partially interrupted by direct physical loss of or damage to property at a ‘covered location’ . . . as a result of a covered peril.”
- Earnings (e.g. loss of rent)
- Extra Expense (e.g. cost of temporary location; amounts paid to minimize the interruption)
- Waiting Period instead of a \$ deductible
- “Restoration period”
 - Starts on the date of the physical loss or damage
 - Ends on the date:
 - the property should be rebuilt, repaired or replaced; or
 - business is resumed at a new permanent location



Extended Period of Indemnity

- BI insurance can be endorsed to include an “extended period of indemnity”
 - Extends BI insurance beyond the date when payments would otherwise end, i.e. the date when the building is restored to its pre-loss condition
 - This gives the insured more time to bring income back to its pre-loss level
 - Income Coverage Extension – provides up to 90 days of extended BI coverage



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Housing Plus Endorsement

- Unscheduled Business Personal Property Insurance
- Unscheduled loss of earnings and rents



Builders Risk Insurance

- Covers property in the course of construction
- Typically written on an “all-risk” basis
- Covers not only property at construction site, but also to property at off-site storage locations and in transit
- Limit = estimated completed value of the project
- Can include soft costs coverage/delayed completion coverage
- Coverage terminates when work is completed and property is ready for use and occupancy



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Equipment Breakdown Insurance

- Covers damage to boilers, generators, engines, pumps, compressors, water heaters, HVAC systems, central heating systems, elevators, escalators, refrigeration equipment, transformers, etc.
- Damage must result from a covered cause, e.g. power surge, short circuit, mechanical breakdown



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Unconventional Subrogation: Recovering on Unrecoverable Claims



Presented by:
Matthiesen, Wickert & Lehrer, S.C.
Mark Solomon and Lee Wickert

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Nationwide Insurance Litigation Law Firm
We are where you need us!



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MWL IS NATIONWIDE SUBROGATION

- 1 Law Firm - 50 State Expertise
- Local Counsel Throughout North America
- Immediate Action - No Matter The Venue



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AREAS OF EXPERTISE

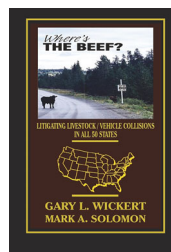
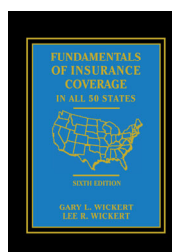
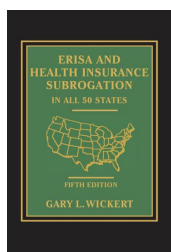
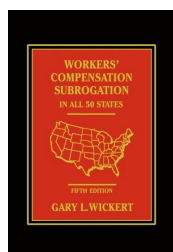
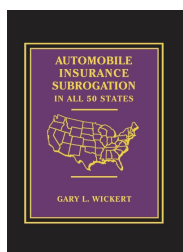
- **Nationwide Subrogation**
 - **Workers' Compensation**
 - **Property and Casualty**
 - **Automobile – Med Pay/PIP/Collision**
 - **ERISA and Health Insurance Plans**
 - **Occupational Accident Plans**
 - **Motor Carrier/Fleet/Cargo/Inland Marine**
 - **Product Liability**
 - **Construction Defect**
- **Civil Litigation Defense**
 - **Liability/Casualty/Coverage**
 - **Workers' Compensation Defense**
- **Manufacturer's Product Liability Defense**



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THE LEADER IN SUBROGATION KNOWLEDGE

- We Wrote The Book on Subrogation!
 - *Automobile Insurance Subrogation In All 50 States*
 - *Workers' Compensation Subrogation In All 50 States*
 - *ERISA and Health Insurance Subrogation In All 50 States*
 - *Fundamentals of Insurance Coverage In All 50 States*
 - *Subrogating Livestock/Vehicle Collisions in All 50 States*



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WHAT IS SUBROGATION?

- Equitable concept where, when an insurance carrier has paid a claim, it “stands in the shoes” of its insured and is able to pursue a responsible third party.
- The insurance carrier takes on the role of the plaintiff.
- If there is a property damage claim, which isn’t the fault of the insured, think subrogation.



RECOGNIZING SUBROGATION

- Prompt Recognition And Action Required
- Requires Training And Experience
- Must Put On Plaintiff's Hat
- Understanding Tort Law
- Need Evidence To Prove Your Case



SUBROGATION IS AN INVESTMENT



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PROPERTY DAMAGES: COMMON LOSSES



- Fire Damage
 - Dryers
 - Washing Machines
 - Dishwashers
 - Electrical

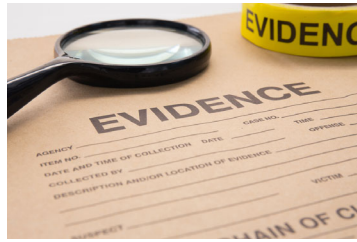
PROPERTY DAMAGES: COMMON LOSSES

- **Water Damage**
 - **Water Supply Lines (Kitchen and Bathroom)**
 - **Plumbing Parts**
 - **Nail Into Pipe**
 - **Sprinkler Systems**
 - **Washing Machines**
 - **Dishwashers**



PROPERTY CLAIM ISSUE: EVIDENCE

- **Evidence Is The Building Block Of The Case**
- You Will Still Need Evidence To Prove Your Case
 - Spoliation of Evidence
 - Preservation of Evidence



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10

SPOLIATION

- **Definition:** “The intentional destruction, mutilation, alteration, or concealment of evidence.”
Black’s Law Dictionary
- **Effect:** Undermines the “truth-seeking” function of the judicial system.



EVIDENCE PRESERVATION AND SPOLIATION

- Protect the Scene
- Notice To ALL Potentially Interested Parties
- Schedule a Joint Inspection
- Establish a Protocol/Chain of Custody
- Preserve the Key Evidence
 - Photos and Video Are a Minimum
 - Retain Key Physical Evidence and Alternate Causes When Feasible



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12

SANCTIONS FOR SPOILIATION

- Adverse Inference
 - “All things are presumed against a despoiler.”
 - Jury Instruction Is Given
- Dismissal
 - Court Strikes Introduction of Evidence
 - Case Dismissed



PROPERTY CLAIM ISSUE – ECONOMIC LOSS DOCTRINE

- Can I recover the cost of the product?
 - **Economic Loss Doctrine**
 - **Product Failure.** The ELD applies when losses from an occurrence arise from failure of a product and damage or loss is limited to the product itself.
 - The ELD was originally established to set perimeters only in such product liability cases.
 - In such cases, recovery is generally limited to remedies grounded in contract (such as warranty claims or contract-based statutory remedies), rather than tort.
 - **How Does It Apply To My Case?**
 - **You can still recover, just not in Tort.**



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LANDLORD/TENANT SUBROGATION

- Is it possible?
 1. Depends on the jurisdiction.
 - **The *Sutton* Rule**
 2. Look to the lease.
 3. Know your subrogation rights.
- The *Sutton* Rule
 - *Sutton v. Jondahl*, 532 P.2d 478 (Okla. App. 1975)
 - Tenant is considered co-insured with landlord under landlord's policy with respect to fire damages to residential property.
 - Can't subrogate against a co-insured.



LANDLORD/TENANT SUBROGATION ANALYST

- Answer the following questions for every claim:
 1. In which jurisdiction was the loss?
 2. Does the *Sutton* rule apply?
 3. Is there a written lease?
 4. How does the lease address the intention of the parties?
 5. What are your SUBROGATION RIGHTS?

**MUST KNOW ANSWERS TO MAXIMIZE RECOVERY
ANSWERS DEPEND ON WHICH STATE YOU ARE IN**



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THE SUTTON RULE

- *Sutton v. Jondahl*, 532 P.2d 478 (Okla. App. 1975)
- Applicable in many states.
- Tenant is considered co-insured with landlord under landlord's policy with respect to fire damages to residential property.
- Landlord's insurer cannot sue the tenant in subrogation because to do so would be as if suing its own insured.



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THE LOGIC BEHIND *SUTTON*

- Decided on principles of basic equity and fundamental justice.
- Not decided on the language of the lease.
- Exception: IF lease terms establish tenant's liability.
- Landlord's insurance is liable for the mutual benefit of both.



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CASE BY CASE APPROACH

- Courts avoid making assumptions and adopting fictions that are largely conjectural, if not patently illogical.
 - *American Family Mut. Ins. Co. v. Auto-Owners Ins. Co.*, 2008 WL 4816666 (S.D. 2008)
- The fiction that by paying rent, the lessee paid the insurance premium is not appropriate. Such a fiction ignores the fact the market, i.e., supply and demand, is the controlling factor in fixing and negotiating rent.
 - *Page v. Scott*, 567 S.W.2d 101 (Ark. 1978)



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CASE BY CASE APPROACH CONT....

- Some states have adopted more logical standards for determining when a tenant is exonerated from liability for negligent conduct.
- Iowa Supreme Court: Landlord and tenant have separate estates capable of being valued and insured separately.
 - *Neubauer v. Hostetter*, 485 N.W.2d 97 (Iowa 1992).
- Applies basic contract principles and the equitable underpinnings of subrogation.
 - Intent and reasonable expectations of the parties when negotiating the terms of the lease.



SUTTON LOGIC CONT....

- Both landlord and tenant have insurable interest in rented property.
 - Landlord owns the fee interest.
 - Tenant own the possessory interest.
- Paid insurance premium is an overhead expense and is considered by landlord when fixing rent.
- Tenant pays premium as part of monthly rent.
- Absent express language in lease, tenant may rely on landlord to provide insurance for realty.



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SUBROGATING AGAINST GOD: Turning Natural Disasters Into Recoveries



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“When written in Chinese, the word ‘Crises’ is composed of two characters. One represents ‘danger’ and the other represents ‘opportunity’.”

– John Fitzgerald Kennedy

12 April 1959

拼音



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NATURAL DISASTERS

- Hurricanes
- Floods
- Wildfires
- Hailstorms
- Ice Storms
- Windstorms
- Sandstorms
- Lightning
- Droughts
- Heat Waves
- Tornadoes



TEN WORST NATURAL DISASTERS IN U.S. HISTORY

Based on Combination of Human Lives Lost
and Economic Damages



NO. 10
TRI-STATE TORNADO — MARCH 18, 1925



700 People Killed - \$1.4 Billion in Damage



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NO. 9
PESHTIGO FIRE — OCTOBER 8, 1871



1,200 People Killed - \$3 Billion in Damage



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NO. 8
JOHNSTOWN FLOOD — MAY 31, 1889



2,209 People Killed - \$7 Billion in Damage



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NO. 7 HEAT WAVE OF 1988



5,000 People Killed - \$61 Billion in Damage



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NO. 6 HEAT WAVE OF 1980



1,700 People Killed - \$48 Billion in Damage



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NO. 5 - LAKE OKEECHOBEE HURRICANE SEPTEMBER 16, 1928



2,500 People Killed - \$18 Billion in Damage



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NO. 4 - GREAT SAN FRANCISCO FIRE AND EARTHQUAKE — APRIL 18, 1906



3,000 People Killed - \$30 Billion in Damage



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NO. 3 DUST BOWL — 1930'S



3,000 People Killed - \$100 Billion in Da



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NO. 2 HURRICANE KATRINA — AUGUST 29, 2005



1,836 People Killed - \$150 Billion in Damage



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HURRICANE KATRINA

A DISASTER IN OUR LIFETIME

- August 29, 2005
 - \$150 Billion in Damages
 - 1,836 People Killed
 - Levee Breaches in New Orleans Flooded 80% of the City
 - More Than One Million People Displaced
 - \$16.3 Billion Paid by NFIP
 - \$21.7 Billion Paid by FEMA
 - \$41.1 Billion Paid by Private Insurers to Settle 1.7 Million Different Property Damage Claims



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NO. 1 - GALVESTON HURRICANE — SEPTEMBER 8, 1900



8,000-10,000 People Killed - \$105 Billion in Damage



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TEXAS FREEZE CLAIMS – FEBRUARY 2021



700 People Killed - \$11.2 Billion in Damage



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WEATHER-RELATED CATASTROPHES

- Annual Certainty
- Question Not “If” But “When” They Occur
- Subrogation Potential Is Well Hidden
- Mining Subrogation Potential Not Easy
- Prompt Action, Notice, Investigation Required
- Getting The Right Expert
- Investing In Subrogation



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GREAT USA FLOOD OF 1993

- Upper Mississippi River Basin
- \$15 Billion In Damages
- 50 People Killed
- Hundreds of Levees Destroyed
- Thousands Evacuated
- Flood Occurred In Middle of It All
- 1,369 New Subaru Vehicles
\$11,285,714





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SUBROGATION INVESTIGATION

- Obtained All Contracts
- Photographed Entire Premises
- Hired Hydrologist/Surveyor
- Talked To Neighbors
- Obtained Entire Topographic/Legal History
- Interviewed Witnesses
- Filed Suit To Obtain Additional Documents/Evidence



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SUBROGATION RECOVERY

\$ 7,275,000



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ALAMEDA COUNTY FLOODING 1998

- February 1998 – 100 Year Storm
- Bay Cities Auto Auction/Cox Enterprises
- 60 Acres Surrounded By Storm Channels
- Sitting In 100 Year Flood Plain
- 15 Year Storm Drainage System
- Levees Neglected/Negligent Design
- N-Values and Sediment
- 2,210 Vehicles Damages - \$4 Million





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INVERSE CONDEMNATION (CA)

- Deprivation of Property Rights, by the Government, in Manner or Degree Specific To Individual Owner, As Opposed To Public in General
- Physical Invasion/Excessive Regulation
- Must Be Negligent PLAN of Maintenance, Not Just Negligent Maintenance
- Balance Need For Flood Control Projects Against Damages Occasioned by Their Failure or Unfair Effect On Certain Residents
- Owner Gives More Than His Share To Public Undertaking
- Damages, Interest, Attorney's Fees



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SUBROGATION RECOVERY

\$ 2,500,000



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SUBROGATION INVESTIGATION

- Statements
- Police Reports
- Experts
- Notice
- Visit Scene and Neighborhood
- Talk To Neighbors
- Photographs
- Subrogation Counsel



GENESIS OF A FLOOD



FLOOD

Too much water in too short of a period of time for a structure.





THREE FACTORS OF A FLOOD

- Storm Event
- Watershed
- Structures



FIRST FACTOR: STORM EVENTS

- Random in Intensity and Frequency
- Standard Storm Events Defined For Design
 - 1, 2, 5, 10, 25, 50, 100 Year and PMP
 - Example: Fairfield County, Connecticut
- 1 Year Storm: 2.7 Inches in 24 Hours
- 25 Year Storm: 5.7 Inches in 24 Hours
- 100 Year Storm: 7.2 Inches in 24 Hours



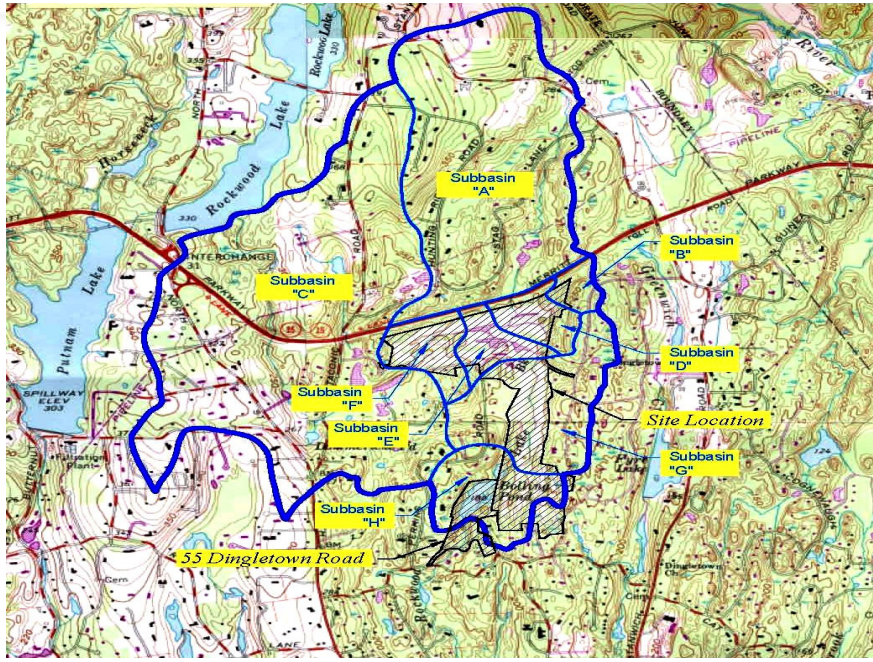
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SECOND FACTOR: WATERSHED

- Size/Area
- Land Surface Slopes
- Land Surface Cover
- Surface Conditions





THIRD FACTOR: STRUCTURES

- **Natural**

- Streambed
- Riverbed
- Pond
- Lake
- Ditch
- Swale



- **Man Made**

- Spillways
- Channels
- Culverts
- Storm Sewers
- Catch Basins
- Gutters



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CAUSES OF A FLOOD

- Factors Change
- Storm Event
 - Larger Storm Than Design Event
 - More Intense Storm Than Design Event



CAUSES OF A FLOOD

- Factors Change
- Watershed Conditions
 - Rural/Suburban to Urban (Development)
 - Snow Cover (Additional Water)
 - Frozen Ground (More Runoff)
 - Saturated Ground (More Runoff)



CAUSES OF A FLOOD



- Factors Change
- Structure Conditions
 - Settlement
 - Construction Errors
 - Damage/Deterioration
 - Blocked/Restricted
 - Design Errors







CAUSES OF A FLOOD



- Factors Change
- Structure Conditions
 - Settlement
 - Construction Errors
 - Damage/Deterioration
 - Blocked/Restricted
 - Design Errors

WILDFIRES

- \$10 Billion In Losses Over Past 25 Years
- Primarily Affect Western States:
 - California, Texas, and Colorado have the most claims.
- So far in 2015, there have been 44,080 wildfires in the U.S. burning 8,441,223 acres.
- In 2014: 63,312 Wildfires Burned 3.6 Million Acres
- Insurers Paid \$6 Billion From 1995-2014
- 90% Caused By Humans
- Subrogation Opportunities:
 - Electrical Distribution Lines
 - Controlled Burns
 - Faulty Equipment



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ICE STORMS

- Claims have averaged \$1.2 billion annually from snow, ice, and freezing rain, increasing to \$2.5 billion recently.
- Subrogation Opportunities:
 - Government Entities
 - Faulty Maintenance
 - Products Liability
 - Roof Collapse
 - Downed Power Lines



WINDSTORMS

- Affects the entire U. S. (not from hurricanes).
- Microbursts can generate winds in excess of 100 mph, blowing off roofs, collapsing walls, felling trees, and blowing out windows.
- Subrogation Opportunities:
 - Bailment
 - Improper Construction
 - Improper Repairs
 - Landowner Notice of Defective Tree/Neighboring Building
 - Gravel Roofs – Flying Stones



LIGHTNING

- **Fatalities: About 33 Each Year From 2004 to 2013**
- **Property Damage: \$739 Million in Homeowner Loss in 2014 – 99,871 Claims**
- **Subrogation Opportunities:**
 - **Failure to Utilize Lightning Protection Systems**
 - **Improper Installation of Lightning Protection Systems**
 - **Poor Maintenance of Lightning Protection Systems**



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TORNADO CLAIMS

- Hurricanes (100+ mph) / Tornadoes (260 mph)
- F5 Tornado Moore, Oklahoma (May 20, 2013)
 - \$2 Billion Damage / 30 Minutes Warning
- Building Designed to “Breathe”
- High Wind Claims
- Structural Failures
 - Brackets, Trusses, and Membranes
 - Building Code Violations
- Damage From Roof-Top Gravel



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MWL 50-STATE REFERENCE CHARTS

The screenshot displays the website for Matthiesen, Wickert & Lehrer, S.C. At the top, there is a header with the phone number (800) 637-9176, a search bar, and navigation links for Careers, Fees, 中文, and Search our Website. Below this is the MWL logo and the firm's name, MATTHIESEN, WICKERT & LEHRER, S.C., with the tagline 'America's Subrogation Law Firm' and office locations: Hartford, New Orleans, Los Angeles, Austin, Jacksonville, and Boston. A secondary navigation bar includes links for About, Attorneys, Practice Areas, Resources, Webinars, Blog, and Contact. A main navigation bar features 'Ask A Question', 'Refer A File', 'Reference Charts' (highlighted with a yellow circle), 'Laws By State', and 'Upcoming Events'. The main content area features a large graphic with the text 'AMERICA'S SUBROGATION FIRM' and a vertical list of navigation buttons: 'Ask A Question', 'Refer-a-File', 'Reference Charts' (highlighted with a yellow circle), 'Laws by State', and 'Upcoming Events'. The background of the main content area shows a city skyline at night.

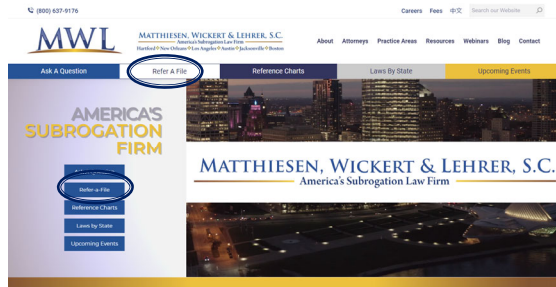
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FILE REFERRAL TO MWL

- Refer a file to MWL in two easy steps via MWL's website's "Refer A File" Feature:
 - **Step One:** Select your type of loss from the drop-down menu and provide your contact information.
 - **Step Two:** Provide as much information as possible on the file you are referring and securely attach your file, no matter the size. This allows MWL to hit the ground running once it is in our hands.
- Using this method of referral means having your file in the hands of an experienced subrogation attorney in just seconds.



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Unconventional Subrogation: Recovering on Unrecoverable Claims



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