

WHERE'S THE PAINT?

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SUBROGATING PAINT OVERSPRAY CLAIMS

More than 1,000 vehicles a day are damaged by paint overspray in the United States, resulting in more than one-half of a billion dollars in damage and insurance claims annually. Airborne paint overspray results from all sorts of industrial, commercial and even private paint jobs, such as in the cases of bridges, water towers, and other large and inconveniently located outdoor areas that simply need painting. When you add this damage to other sources of overspray, such as wet road striping, industrial fallout and petrochemicals, emissions and flares, the toll on insurance companies reaches epidemic proportions. The insurance industry is left with three options to combat this epidemic of claims: (1) excluding paint overspray as a covered loss; (2) raising premiums significantly; and (3) subrogation.¹

The first two of these three options just make the problem worse. The result of excluding paint overspray coverage and raising premiums is a glut of painting contractors who are uninsured for the thousands of claims filed daily as a result of paint overspray. Experience has shown that nine out of ten painting contractors do not carry the requisite liability insurance to cover damages from paint overspray, if they have insurance at all. Property carriers must be both "subrogation smart" and aggressive, in order to effectively subrogate in such situations.

Paint overspray is an inherent risk for any painting contractor, and even the most careful painting contractor can cause overspray damage. Even the law recognizes that paint overspray is a "relatively common occurrence."² Nonetheless, painting contractors play the odds every day, as even conscientious and prudent painting contractors will face occasional overspray situations. Contractors who have procured liability insurance frequently find themselves with overspray liability coverage which includes a large deductible on a "per claim" basis, rather than a per occurrence basis. Frequently, they are no better off than if they had no insurance at all, and the result is that many of them don't. This presents a dilemma for the subrogating carrier, who can easily subrogate the negligent painting contractor, but without insurance, rarely see a recovery. Subrogation professionals must look elsewhere for their recoveries.

SUBROGATING AGAINST THE OWNER

If the party responsible for causing the overspray is the owner of the premises himself or an employee of the owner, our job is rather simple. The owner will be responsible for the actions of his employee which were done in the course and scope of his employment. If the owner instructed the employee to paint a tower or the outside of a building, and a negligent overspray results, the owner will be found liable. But more often, painting is done by an independent contractor - a painting professional

hired by the owner to perform the work of painting an exterior structure. Unfortunately, the general rule, and the principle which has plagued subrogation professionals handling paint overspray cases for decades, is that the employer of an independent contractor is not liable for paint overspray caused by the negligent acts of the contractor or its employees.³ A painting contractor is an "independent contractor" whenever he does work of another under conditions which are not sufficient to make him a servant or employee of the other person. The non-liability of an owner for overspray caused by the negligent actions of an independent contractor was actually the rule at common law. For many years, there was no exception and the owner simply could not be held liable for the actions of an independent contractor who was not his employee.

The first departure from the old common rule was *Bower v. Peate*, 1 Queen's Bench Division 321 (1876), in which an employee was held liable when the foundation of the plaintiff's building was undermined by the contractor's excavation. Since that decision, the law has progressed by the recognition of an increasingly large number of "exceptions" to the general rule that an owner will not be responsible for the actions of an independent contractor. In fact, these exceptions are now so numerous, and have eroded the general rule so much, that the general rule is now said to be applied only where there is "no good reason from departing from it."⁴ In general, the exceptions may be said to fall under three very broad categories: (1) negligence of the employer in selecting, instructing, or supervising the contractor; (2) non-delegable duties of the employer arising out of some relation toward the public or the particular plaintiff/insured; and (3) work which is specially peculiarly, or "inherently" dangerous.

NEGLIGENCE OF THE EMPLOYER IN SELECTING, INSTRUCTING, OR SUPERVISING A CONTRACTOR

If the owner negligently gives orders or directions to the contractor, and the contractor follows them, the owner can be found liable the same as though the after omission were that of the employer himself.⁵ The difficulty of subrogating under this exception is proof that the employer of the independent contractor actually gave instructions or orders, which were followed by the contractor, and which, in turn, resulted in the overspray. Quite frequently, the subrogating carrier can candidly interview the contractor, and tactfully explain that he may be facing liability alone unless he cooperates. The premise behind this exception is that the employer was negligent in directing the contractor to do work which is dangerous in itself or in the manner in which it is done. Therefore, the employer is subject to liability under this exception for only that physical harm

which was caused by the dangerous character of the work or the dangerous manner in which it is directed to be done. A classic example would be an employer who tells the contractor to continue with spraying activity in high winds, after the contractor warns the employer that it would probably be safer to wait for a calmer day. If a contract is involved, it is often beneficial to obtain the contract and look to see how specific the instructions are to the contractor. If the contractor is not able to deviate from the details of the contract, the owner may be liable if the manner specified in the contract approximately caused the damage. An exculpatory clause in the contract may or may not relieve the owner from liability, depending on the state involved, but it certainly will play a role when determining the duty of care owed by the owner.⁶ Unfortunately, as is the case in many areas of subrogation, a carrier's recovery rights and the respective liability of third parties involved in a subrogation action are almost always determined by the individual law of the state involved.

One of the most frequently considered, but least applicable (depending on the state) exceptions to the general rule of non-liability of the owner for the actions of an independent contractor, is one involving negligent employment of an independent contractor. An employer or owner may be liable if he fails to exercise reasonable care in employing a competent and careful contractor, provided:

(1) the work will involve a risk of physical harm unless it is skillfully and carefully done; or (2) the contractor is employed to perform a duty which the employer owes the third persons.⁷

A "competent and careful contractor" is a contractor who possesses the knowledge, skill, experience and available equipment which a reasonable man would realize that a contractor must have in order to do the work which he is employed to do without creating an unreasonable risk of injury to others, and who also possesses the personal characteristics which are equally necessary.⁸ The difficulty with this exception is that the damage has to result from some quality in the contractor which made it negligent for the employer to entrust the work to him. This is often difficult to prove. Hiring a contractor without insurance

may result in the contractor being uninsured, but it does not result in the damages which result from the contractor's negligence. Therefore, we find an insufficient number of cases dealing with the question of whether or not the employer may be responsible to a third person for failure to employ a contractor who is financially responsible and covered by liability insurance. In the right circumstances, it may work, but it will certainly be an uphill battle.

NON-DELEGABLE DUTIES OF THE EMPLOYER

One possible, although less frequently used, exception to the general rule that an owner is not responsible for the negligent acts of an independent contractor, is where the owner employs an independent contractor to do work in a public place. If the work, unless done carefully, involves a risk of making the physical condition of the place dangerous for the use of members of the public, the owner may be liable for physical harm caused by the negligent act or omissions of the contractor.⁹ "Public place" means a place which a state or any of its subdivisions maintain for the use of the public and includes not only public highways, but parks, public buildings and other similar places. Presumably, it would include parking lots in such public places. Under such situations, it may be possible to pin liability on the owner for failure to warn or provide adequate signage relating to the danger of paint overspray in a public place.¹⁰

Subrogation for paint overspray claims under this exception will be limited to specific situations in which the overspray damages caused in a public place, such as in a parking lot. Results will vary from state to state, but there is an amazing absence of case law involving this area of the law as it relates to overspray damage. In part, this is due to the overwhelming notion of the general common law rule pervading our legal society, which is that the owner is not responsible for the negligent acts of an independent contractor. Our job as subrogation professionals is to carve out further exceptions to that general rule.

WORK WHICH IS PECULIARLY OR "INHERENTLY" DANGEROUS

If the work to be performed by the independent contractor is likely to create a peculiar unreasonable risk of damage to others, unless special precautions are taken, the employer or owner may be held liable if he fails to provide in the contract that the contractor takes such precautions, or, fails to exercise reasonable care to provide in some other manner for the taking of such precautions.¹¹ Clearly, the question here is whether or not commercial exterior painting operations carry with them a "peculiar unreasonable risk of physical damage." As with many other areas of the law, the answer to this question is highly dependent on the state in which you are subrogating. This area also represents the most common exception to the general rule that the owner will not be responsible for the negligent acts of an independent painting contractor.

A Wisconsin Supreme Court determined that hauling corn silage did not create an unreasonable risk of harm, and therefore, an owner hiring an independent contractor to haul the corn silage was not liable for the actions of its independent contractor.¹² New Mexico has recognized that the installation of high-voltage lighting systems does involve such a risk, and the owner will be responsible for the negligent acts of its independent contractor under such circumstances.¹³ But what about painting? Is painting so inherently dangerous that the owner should be responsible for the actions of the painting contractor where precautions are not required to be taken? Again, the answer depends on the state in which you are subrogating, and it is important for subrogation professionals to remove their myopic defense-mentality glasses in order to see the potential for liability of an owner under these circumstances.

The Tennessee Court of Appeals notes that this exception to the common law rule of non-liability is not limited to work that is "abnormally dangerous" or that carries with it a high degree of risk of harm to others.¹⁴ For example, if A employs B, an independent contractor, to paint the wall of his building above the public sidewalk, and B's employee drops his paint bucket which falls on C, the danger of dropping the paint bucket is inherent in the work and will be subject to liability to C.¹⁵ The law observes that the use of a scaffold in painting a wall of building above a sidewalk involves a recognizable risk that the scaffold, paint brush or bucket may fall and injure someone.¹⁶ Likewise, Tennessee recognizes that overspray is a well-known risk inherent in spray painting.¹⁷ The risk of damage to surrounding property caused by overspray is unreasonable because the probability in gravity of the damage far outweighs the burden on persons engaged in spray painting to take precautions to prevent the damage.¹⁸ The Tennessee Supreme Court has noted that a risk becomes unreasonable if the reasonably foreseeable probability and gravity of the harm far outweighs the burden upon the defendant to engage in alternative conduct that would have prevented the harm.¹⁹ Therefore, Tennessee holds that the owner which has hired a painting contractor is liable for damage resulting from overspray.²⁰ The same is true in Illinois, where the Illinois Court of Appeals has held hiring a painting contractor is sufficient to fall within the rule that one who employs an independent contractor to do work involving a special danger to others which

the owner knows or has reason to know to be inherent in the work, is liable for damage which results from painting overspray.²¹ Illinois rejected the argument that inherently dangerous activities are limited to such things as explosives, poisons, toxic chemicals and wild animals. Because overspray damage should be anticipated by an owner when hiring an independent contractor, and because paint overspray is a relatively common occurrence, an owner should anticipate that paint might accidentally be sprayed or splattered onto vehicles or other premises nearby.²² The court noted that “it is common knowledge that spray paint is often carried by the wind and often splatters on surfaces where it is not wanted.”²³ Other states, although not specifically addressing this area of law with respect to paint overspray, have indicated that this particular exception to the general rule of non-liability of an owner hiring an independent contractor will apply in situations involving potential for physical harm which is much less significant than what otherwise might be expected.²⁴ A New York court held that use of acid to clean the side of a building is an inherently dangerous activity which

would expose the owner to liability under this exception.²⁵ This is because this work involved a risk of harm inherent in the nature of the work itself, just as the overspray is a risk inherent in exterior painting.

Some states have held that painting is not an inherently dangerous activity. A Missouri Court of Appeals held that painting an enclosed interior stairwell was not an inherently dangerous activity sufficient to provide an exception to the general rule denying the owner’s liability for the negligence of its independent contractor.²⁶ To determine whether an activity is inherently dangerous, a court must ascertain the nature of the activity and the manner in which it is ordinarily performed.²⁷ Ohio has held that painting near high power lines is an inherently dangerous activity,²⁸ but has not applied the exception to normal spray painting operations. Kentucky has defined spray painting as a “comparatively passive activity,” and has held that an owner cannot be responsible for overspray damage caused by an independent contractor it has hired to do the painting, because it does not consider painting to be “inherently dangerous.”²⁹ The court in that case

took the extreme position that if something can be done without probable injury, it is not “inherently dangerous.” They rejected the argument that an activity such as spray painting can become inherently dangerous if preformed under certain circumstances, including the location of the work, time of day, wind conditions, etc.³⁰ The court determined that such influences do not transform “the basic nature” of the activity to one that is inherently dangerous.

SUMMARY

Whether or not an owner who hires an independent contractor to conduct painting operations will be responsible for paint overspray damage caused by the negligence of the contractor will be largely dependent on the state in which you are subrogating. As is true with most subrogation investigation, it is vitally important to obtain all of the relevant information, documents and statements necessary to ascertain the facts on which the liability of the owner will hinge. If the loss is large enough, and cooperation is not being had from the various parties involved, it is often prudent to get subrogation counsel involved, even at the

investigative stage. Any painting contractor without sufficient insurance or assets to satisfy a large judgment should be made an ally, and can be used effectively to assist in building a legal case against the owner. Painting overspray is almost unavoidable - understanding your subrogation rights and taking effective and prompt action toward enforcing those rights is not. Therefore, we have to be diligent and aggressive in both building and pursuing our subrogation rights in all claims involving paint overspray.

ENDNOTES

¹ Exterior painting contractor underwriting usually provides coverage for exterior painting less than three stories and excludes bridges and overspray losses, with a \$500 deductible on a “per claim” basis.

² *Benesh v. New Era, Inc.*, 566 N.E.2d 779, 782 (Ill. App. 1991).

³ Restatement (Second) of Torts § 409 (1965); *Peter v. Public Constructors, Inc.*, 368 F.2d 111 (3rd Cir. 1966); *Garczynski v. Darin & Armstrong*, 420 F.2d 941 (6th

Cir. 1970); *Kragel v. Wal-Mart Stores, Inc.*, 537 N.W.2d 699 (Iowa 1995); *Candelaria v. B.C. General Contractors, Inc.*, 600 N.W.2d 348 (Mich. App. 1999); *Read v. Scott Fetzer Co.*, 990 S.W.2d 732 (Tex. 1999); *Toland v. Sunland Housing Group, Inc.*, 74 Cal. Rptr.2d 878 (Cal. 1998); *Ahl v. Stone Southwest, Inc.*, 666 So.2d 922 (Fla. App. 1995).

⁴ *Pacific Fire Ins. Co. v. Kenny Boiler & Mfg. Co.*, 277 N.W. 226 (1937) (stating that “indeed it would be proper to say that the rule is now primarily important as a preamble to the catalog of its exceptions.”).

⁵ Restatement (Second) of Torts § 410 (1965); *German v. Mountain States Telephone*, 462 P.2d 108 (Ariz. App. 1969); *Widman v. Rossmoor Sanitation, Inc.*, 97 Cal. Rptr. 52 (Cal. App. 1971); *Horn v. State*, 297 N.Y.S.2d 795 (N.Y. Sup. Ct. App. 1969); *Givens v. Mullikin*, 75 S.W.3d 383 (Tenn. 2002); *Hayes v. A.J. Associates, Inc.*, 960 P.2d 556 (Alaska 1998).

⁶ *Gonzalez v. United States Steel*, 374 A.2d 1334 (Pa. Super. 1977), *aff’d* 398 A.2d 1378 (Pa. 1979).

⁷ Restatement (Second) of Torts § 411 (1965); *Garguilo v. Moore*, 242 A.2d 716 (Conn. 1968); *Gomien v. Wear-Ever Aluminum, Inc.*, 276 N.E.2d 336 (Ill. 1971); *Hercules Powder Co. v. Hicks*, 453 S.W.2d 583 (Ky. 1970); *Mills v. Angel*, 995 S.W.2d 262 (Tex. App. 1999); *Kinsman v. Unocal Corp.*, 2 Cal. Rptr.3d 87 (Cal. App. 2003).

⁸ Restatement (Second) of Torts § 411 (1965), cmt. (a).

⁹ Restatement (Second) of Torts § 417 (1965).

¹⁰ *Van Arsdale v. Hollinger*, 437 P.2d 508 (Cal. 1968); *Westby v. Itasca County*, 290 N.W.2d 437 (Minn. 1980).

¹¹ Restatement (Second) of Torts § 413 (1965); *Mueller v. Luther*, 142 N.W.2d 848 (Wis. 1966).

¹² *Id.*

¹³ *Saiz v. Belen School District*, 827 P.2d 102 (N.M. 1992).

¹⁴ *Waggoner Motors, Inc. v. Waverly Church of Christ*, 2004 WL 2083712 (Tenn. Ct. App. 2004).

¹⁵ Restatement (Second) of Torts § 427 (1965), cmt. (d), illus. 1.

¹⁶ Id.

¹⁷ Id.; Benesh, *supra*. (Noting that paint overspray is a relatively common occurrence).

¹⁸ Id.

¹⁹ *Burroughs v. Magee*, 118 S.W.3d 323 (Tenn. 2003); *McCall v. Wilder*, 913 S.W.2d 150 (Tenn. 1995).

²⁰ *Waggoner Motors, Inc.*, *supra*.

²¹ *Benesh v. New Era, Inc.*, 566 N.E.2d 779 (Ill. App. 1991); Restatement (Second) of Torts § 427 (1965).

²² Id.

²³ Id. at 782.

²⁴ *Jones v. American Service Bureau, Inc.*, 1997 WL 15281 (D. Md. 1997) (involving medical screening procedure); *Levy v. Currier*, 587 A.2d 205 (D.C. App. 1991) (use of acetylene torch to cut fire escape is inherently dangerous).

²⁵ *Beck v. Woodward Affiliates*, 640 N.Y.S.2d 205 (N.Y.A.D. 1996) (woman injured when she leaned against building that had been cleaned with acid for about five minutes while watching the Macy's Thanksgiving Day Parade).

²⁶ *Bowles v. Weld Tire & Wheel, Inc.*, 41 S.W.3d 18 (Mo. App. 2001).

²⁷ Id.

²⁸ *Gordon v. Ponderosa, Inc.*, 191 WL 70114 (Ohio App. 1991).

²⁹ *Miles Farm Supply v. Ellis*, 878 S.W.2d 803 (Ky. App. 1994).

³⁰ Id.