

INSIDE FIRE



Each year, fire departments respond to an average of 210 structure fires caused by Christmas trees. Carefully decorated Christmas trees can help make your holidays safe.

Picking the Tree—If you have an artificial tree, be sure it is labeled, certified, or identified by the manufacturer as fire retardant. If you have a real tree, be sure to choose a tree with fresh, green needles that do not fall off when touched.

Placing the Tree—Before placing the tree in the stand, cut 1" - 2" from the base of the trunk. Make sure the tree is at least 3' away from any heat source. Like fireplaces, radiators, candles, heat vents or lights. Make sure the tree is not blocking an exit. And, add water to the tree stand. Be sure to add water daily.

Make Sure Your Holiday is Safe - Follow These NFPA Tips

Lighting the Tree—Use lights that have the label of an independent testing laboratory. Some lights are only for indoor or outdoor use, but not both. Replace any string of lights with worn or broken cords or loose bulb connections. Connect no more than 3 strands of mini string sets and a maximum of 50 lights for screw-in bulbs. Read manufacturers instructions for number of LED strands to connect. Never use lit candles to decorate a tree and always turn off the Christmas lights before leaving home or going to bed.

After Christmas—Get rid of the tree when it begins dropping needles. Dried-out trees are a fire danger and should not be left in the home or garage or placed outside against the home. Check with your local community to find a recycling program, bring outdoor electrical lights inside after the holidays to prevent hazards and make them last longer.



Whitemore Fire Consultants, Inc.

952-461-7000 (Office)

952-461-7100 (FAX)

www.whitemorefire.com

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Confessions of an Insurance Subrogation Attorney, by Jeffrey M. Baill



Jeffrey M. Baill

After 33 years of practicing an esoteric area of the law, it is time to explain what my career and the subrogation industry is all about. In order to give the appropriate picture, I really need to start at the beginning.

Confession #1

I have become comfortable with the idea that very few people have any idea what subrogation means, including many lawyers and judges. This leads me to the great elevator speech that my children could give on cue by the time they were eight years old” “If the furnace in your house malfunctions, explodes, and burns your house down, your insurance company pays to rebuild your house. It assumes any rights you have. Subrogation, the substitution of one’s rights to another, enables the insurance company to make a claim against the manufacturer or installer of the furnace to recover the money the insurance company paid to re-build your house.”

This right is not new. It has existed since the 1700s, when it was created in English law by Lord Mansfield.¹ It has been recognized by common law and equity, and exists specifically in most insurance contracts in the United States. It has been recognized and analyzed by Minnesota courts in countless cases.² The genesis of the doctrine is that without it, an insured could double recover—once from the tortfeasor and once from the insured’s own insurance carrier. In order to prevent such a windfall, the courts granted the insurance carrier a right of reimbursement. The reality is that few people have ever heard of the word, aside, of course, from law students who hear it during one session of their contracts class.

Based on many experiences, that one day of contracts class was not a memorable one for many judges who get assigned to a subrogation case. Challenging as it might be, I have tactfully had to give the elevator speech to judges (and juries). Indeed, I have encountered the phrase “its just a subrogation

case” on more occasions that I can remember. Thankfully, our Minnesota Supreme Court is making great strides in recognizing and explaining the importance of subrogation. The Court, in a recent opinion, has begun to rely on the idea that subrogation achieves an important result by holding tortfeasors responsible for their actions.³

From my perspective, this is helpful analysis by the Court. The obscurity of the concept of subrogation to the general public becomes problematic when an insured first hears the word. Because many subrogation claims require involvement and cooperation of the insured’s, it is imperative that they understand how the right is derived. To the insured, it is easiest to refer to the language of the insurance policy and the clause that requires the insured to cooperate with the carrier in its subrogation efforts. Despite the clear language of the contractual insurance language, subrogating carriers are often accused of trying to take money out of their insured’s’ pockets when a settlement is reached.

Confession #2

I really believe subrogation is a good thing and I am proud of what I do. There are three entities that benefit from a subrogation recovery; the carrier, the insured, and society as a whole.

The Insurance Carrier

The benefit to the insurance carrier should be obvious. Any dollar the carrier brings into the company is positive. Whether the company is a publicly-held company or a mutual company owned by the policyholders, the benefit is the same. More revenue enhances the company’s bottom line. There are three main ways an insurance company brings in revenue: premiums, investments and subrogation recoveries. With over 3,000 insurance companies competing with each other for the premium dollar, the advertising, marketing and other promotion costs make this dollar an extremely expensive dollar to bring in. Every insurance company is a prisoner to the general investment environment.

When the market is rising, most carriers make money on their investments. When the market crashes, as happened in 2008 and 2009, carriers will probably lose money on this side

of the business. Carriers can do better than their peers at the margins, but generally limited by the general market performance. Subrogation is an area where an insurer has a right to recover dollars. The question becomes whether carriers are set up to properly identify and execute opportunities. The subrogation dollar is almost always cheaper to obtain than the premium dollar. When the stock market is down, subrogation may be the second largest source of income for a carrier.

Subrogation recoveries can easily make the difference between a company being in the red or the black in any given year. In the auto subrogation world, companies can recover between 12 and 22% of their paid losses in a given year.⁴ This is a huge opportunity for an insurance company to improve their financial performance. Over the past 30 years, as carriers have come to recognize the financial impact of a successful subrogation program, they have begun to dedicate increases attention and resources to their subrogation departments. They are now actively managed, benchmarked, and analyzed to maximize revenues.

The Insured

Subrogation exists in many lines of insurance, including auto, health, property and workers’ compensation. In each arena, the insured benefits from a recovery in different ways” In an auto subrogation claim, the insured usually suffers a loss of his or her deductible when a motor vehicle accident occurs. The carrier’s subrogation efforts are the most effective method of recovering that loss. When both parties to an automobile accident have insurance (which is required under Minnesota law), the carriers each pay for their own insured’s damages, less the deductible. They then negotiate the claim. If they cannot agree to a resolution, most carriers belong to an arbitration agreement. The claim is submitted and a decision on liability and damages is rendered.

The insured deductible is recovered from the liability carrier through this process. Unfortunately, many individuals in Minnesota drive without insurance. In the

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circumstance where the uninsured person is at fault, the carrier's subrogation efforts are the best chance the insured has of ever getting back any part of his or her deductible. As deductibles continue to increase in size, insured's become more interested in this process. I rarely meet an insured who understands why he or she has incurred a deductible when the other party is at fault. Recovery of the deductible becomes an important customer service issue where insured's do not expect to have any financial loss because the accident was not their fault.

In property loss cases, deductibles are also increasing rapidly. Some insured's have deductibles that are a percentage of their coverage. It is not unusual to see a deductible on a homeowner's claim in excess of \$10,000.00. On a commercial loss, there may be a very large deductible or self-insured retentions. In all of these cases, the insured are usually very concerned about the carriers attempts to recover these losses. In the workers' compensation area, a business's premiums are based on an experience rating.

This means any loss can cause premiums to rise. A recovery will have the effect of lowering rates. Companies have a vested interest in the recovery efforts. In addition to deductible recoveries, insured's benefit when an insurance carrier's investigation into the cause of a loss creates the evidence necessary for the insured to make his or her own claims for uninsured losses. A homeowner who loses her or his house to fire may be paid for his insured loss, but what about the portion of the loss that exceeded available coverage? Without the subrogation investigation, such an insured might reluctantly accept the policy limits and absorb the uninsured loss that should be paid by the party that caused the fire. Subrogation investigations yield evidence, theories of liability and viable third parties to pursue.

Society

Whenever there is an airplane crash in this country, the Federal Aviation Administration conducts an investigation. One purpose is to find out the cause of the accident so that other accidents can be avoided. When a fire occurs in a home in Minnesota, fire officials

make one determination: Was the cause of the fire intentional or accidental? If intentional fire is ruled out, most officials leave the actual determination of cause to the insurance investigators. If there was no right of subrogation, there would be no need for any further investigation. Let us assume there is a defective brand of furnace that is causing fires around the country.

It is often the subrogation investigations conducted by insurance companies that identify this defect and make it public. If these investigations never occurred, how much longer would it take to get these products off the market? How much additional property damage or personal injury would occur? One example of an insurance investigation resulting in a safer society was written about in the *Wall Street Journal* (Sept. 6, 2000). A researcher at State Farm received multiple reports of Firestone tires on Ford vehicles that were failing and causing property damage, injuries and deaths. He ultimately reported his findings to the National Highway Transportation Safety Administration, which helped lead to the recall of over 14 million tires, and undoubtedly, safer vehicles. In many insurance claims, the subrogation investigation is the only inquiry into the cause of a loss. The community as a whole benefits each time a defective product or procedure is identified. While the benefits of subrogation seem quite obvious, it may surprise you that there is often great opposition to the practice by the plaintiff's personal injury bar.

Confession #3

Subrogation counsel can assist plaintiffs' personal injury counsel, and have a positive effect on a case. I often work with lawyers for injured parties who are making auto accident, workers' compensation, or health insurance claims. Some are adversarial from the outset, worried about one thing: Is my client going to take money out of their clients' pockets when settlements are reached with the tortfeasor? Plaintiff's counsel have the ethical duty to represent their clients' interest. I have the ethical duty to represent mine. I firmly believe that these two goals can co-exist, and that by working together, plaintiff's and subrogated carriers can maximize results.

Below is a list of benefits that a subrogation attorney can provide: Subrogation counsel may have access to more information about what happened initially than any other participant in the case. Because of the volume of claims that subrogation attorneys handle, they work with a cadre of experts around the country on a regular basis who are often leaders in their field of forensics. Subrogation attorneys may have more experience with product liability cases than most plaintiffs' firms. Subrogation attorneys develop specialized expertise in handling of the product cases due to the volume of cases they receive from insurance carriers. In injury cases involving a work-related injury workers' compensation subrogation counsel can often obtain the cooperation of the employer, and therefore gain easier access to relevant evidence which can be important to a case. Subrogation counsel has a high volume of cases and can develop relationships over time that assist in moving cases towards resolution. Subrogation counsel is sometimes viewed as a neutral observer by a mediator and may help the mediator find an avenue to reach consensus.

Confession #4

I am a plaintiff's attorney. In my early days of practice, I used to belong to the plaintiff's trade associations. I firmly believe in the power of organizations to make professionals better at their jobs. I have always viewed my practice as a plaintiff's practice. I do plaintiff's work for the insurance industry. However, when I attended the plaintiff's bar meetings, I was always asked why I was there. I would reply that I handled plaintiff's cases. The response from the other plaintiff's attorneys was always that I worked for insurance companies, as if that disqualified my participation. I never had any interest in belonging to the defense bar associations. I was not a defense attorney. It became clear to me that subrogation was perceived by others as a world unto itself. The only solution was the create an association for the subrogation community. In 1998, the National Association of Subrogation Professionals (NASP) was

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born. Approximately 2,500 professionals belong to the association, including lawyers, insurance professionals, and others who support the industry,

Interestingly, people in the insurance companies who worked in subrogation had the same isolated feeling. There were that one percent of people in the insurance business who made claims instead of defending them. There was very little understanding of the world of subrogation by the rest of the claims world. NASP has helped our industry by creating a sense of unity and understanding. One constant about subrogation nationally, leads me to my last confession.

Confession #5

Truth is stranger than fiction. Many people may view the work of an attorney

representing an insurance company as boring and mundane. I can tell you without a doubt that representing an insurance carrier in a subrogation case can be anything but boring. The factual scenarios giving rise to a subrogation claim can range from the case of a turkey bowling in a super market aisle, to fire caused by spontaneous combustion of rags, to something as tragic as the 35W bridge collapse. The work of a subrogation lawyer requires ingenuity, creativity, and open-mindedness as the subrogation team develops and follows through on a theory of liability aimed at recovery. It is the experience of working through the challenging and unique cases, often with other lawyers representing injured parties and defendants, that gives me satisfaction in my field. Most Minnesota lawyers really do good work for their clients, even subrogation lawyers.

¹Mason v. Sainsbury and Another (1782) 3 Doug 61.

²Westendorf by Westendorf v. Stasson, 330 N.W.2d 699 (Minn 1983) Travelers Indemnity Co. v. Vaccari, 310 Minn. 972 45 N.W.2d (1976); Time Ins. Co. v. Opus Corp., 519 N.W.2d 470 (Minn. Ct. App. 1994)

³RAM Mut. Ins. Co. v. Rohde, 820 N.W.2d 1 (Minn. 2012).

⁴(National Association of Subrogation Professionals Automobile Subrogation Benchmarking St.

Jeffrey M. Baill, is a Partner at the law firm of Yost & Baill in Minneapolis, Minnesota. The above article is a reprint from the November 2013 Minnesota Bar Association newsletter.

A Note From Robert B. Whitmore



It is so hard to believe that we have come to the end of 2013. The Holidays always provides each of us the opportunity to reflect on the past 12 months. Whitmore Fire Consultants, Inc. and our staff is no different. I personally am grateful for the contributions of my staff, who continue to work hard everyday to provide our clients and me, with the best they have to offer. I am also blessed and grateful to our clients . . . who entrust us each and everyday to represent their company at fire scenes, in court, at depositions, and inspections. We certainly do not take the confidence you have in us lightly. Congratulations to Doug Noah, CFI who will be celebrating his 5th year anniversary, Brian P. Haag, CFI who will be celebrating his 13 year anniversary, Brian R. Whitmore, CFI who will be celebrating his 4th year anniversary and Mark T. McCue, CFI who will be celebrating his 16th year in 2014. I also want to recognize Amy Powell and Jodi Davis for their 5 years of working for Whitmore Fire Consultants, Inc. The dedication of our investigators and administrative staff and their longevity with my firm provide unparalleled experience to our clients and the industry. Thank you for your ongoing efforts and dedication! For with each of you, Whitmore Fire Consultants provides what I believe to be the most ethical, professional investigations and support services in the industry.

2014 marks the 20th year of Whitmore Fire Consultants. That in itself is a huge accomplishment, but to think that I have been around 40+ years in this industry is mind boggling. I have seen so many advances and changes in how we investigate fires and represent the interests of our clients in courts. We've also seen how NFPA 921 and the Daubert challenges has affected our industry. In many respects, all of those changes have made us a better fire investigation community. I look forward to 2014 and all that it has to offer.

Thank you to all and from our family to yours, Happy Holidays and Happy New Year!

Robert B. Whitmore, CFI
President, Whitmore Fire Consultants

RECALLS

PackTite Recalls Bed Bug Heating Units Due Fire Hazard



The Consumer Product Safety Commission in cooperation with Nuvenco, Inc. dba PackTite™ of Ft. Collins, Colorado has voluntarily issued a recall of the PackTite™ Heating Units for Bed Bug Control. The bed bug heaters can overheat, melt and cause a fire, posing a fire hazard.



RECALLED MODELS
NO text visible on top of heater casing

This recall involves PackTite bed bug heating units sold with PackTite™ original bed bug treatment systems. Consumers place items for bed bug treatment inside PackTite's black canvas bag and turn the heater on inside the bag. The white heaters are attached to a black wire frame that fits in the bag. PackTite™ is printed in white on the bag. The bags measure 36 inches long by 19 inches wide by 24 inches tall. The recalled heaters do not have any visible text on the up-facing side of the heater casing, but they do have reset instructions on the underside of the heater.

Approximately 9000 units were sold by Pest control companies and pest control product distributors nationwide, including Atlantic Pest Solutions, Bedbug Central, Bedbug Supply, Broadway Exterminating, Dana Pest Control, Do My Own Pest Control, Grainger, M&M Environmental Isotech, K-9 Sweeps, Orkin, Pestaway, Round-the-Clock Pest Control, Steritech, Stern Environmental, Tallman Scientific, Univar and US Bedbugs from October 2009 through January 2013 for between \$300 and \$330 for the system and \$53 for the heater when sold separately.

Consumers should immediately stop using the recalled heating units and contact PackTite for a free replacement heater. For more information, please visit the firm's website at: www.packtite.com and click on "Product Recall".

Gas Trimmers Recalled by efco Due to Fire Hazard



The Consumer Product Safety Commission in cooperation with Emak USA, Inc. of Wooster, Ohio has voluntarily issued a recall of the efco gas trimmers. The muffler on the trimmer's engine can break during use and pose a fire hazard.

The trimmers are used in both residential and professional applications for cutting grass and light brush. The cutting attachments include a trimmer head and metal blade. The trimmers are about 72 inches long. They are colored red and gray with either a bike or loop handle configuration. Three models are recalled in two engine sizes measured in cubic centimeters. They are: 36cc models 8371 S and 8371 T, and a 40.2cc model 8421 T engine displacement. The brand name "efco" and model number are printed on the front of the engine and the brand name also appears on the wand. The firm has received eight reports of incidents, including one resulting in singed hair. No serious injury or property damage has been reported.



Approximately 1,400 units were sold at authorized efco dealers at both retail stores and online, and Menards stores between June 2009 and July 2013 for about \$400.

Consumers should stop using the recalled trimmers immediately and return them to an authorized efco dealer for a free muffler replacement. For more information visit www.efcower.com and click on Recall Information,

WHITEMORE

FIRE CONSULTANTS, INC.

PO Box 1261
Prior Lake, MN 55372
Telephone: 952-461-7000

www.whitemorefire.com



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Easy go to the **Whitemore Fire Consultant's** Website:

www.whitemorefire.com

Click on "Submit a Loss" tab

Complete the online form and press "submit" and you will receive an electronic confirmation of our receipt of your loss request. You will also receive a response from our on-call representative as well as a follow-up all during the next business day.



Submit Your Loss Online