



A Quarterly Publication Focusing on Fire-Related Issues

Inside fire



Sharon Horozaniecki

Failure to Cooperate Can be Costly *Wisconsin Summary Judgment*, by Sharon Horozaniecki, Esq.

In Wisconsin, an insured's failure to cooperate with the terms of an insurance policy can be a costly mistake. On January 7, 2011, Ashland County, Wisconsin Circuit Court Judge Robert E. Eaton ruled just that when granting an insurer's Motion of Summary Judgment, precluding the insured from recovering under a fire policy insured by the insurer.

On April 18, 2007, a fire broke out at the insured's vacant home in Mellen, Wisconsin. The insured, a full-time Florida resident, was in nearby Ashland that week, visiting relatives and fixing up an old farmhouse owned by his son. He was seen in Mellen moving items from his vacant home to a nearby pole barn just days before the fire. Immediately after the Mellen Fire Department arrived on the scene around 10 p.m., the insured's sister called to alert him to the fire. His response was to simply fall back asleep.

The insurer immediately began a thorough origin and cause investigation into the fire, which would ultimately reveal that the fire originated in the basement of the home. Chemical analysis of the carpet debris in the area of origin determined the existence of petroleum distillate, a widely available class of accelerants. The insurer's investigators were able to rule out any accidental sources of ignition.

After returning to Florida weeks after the fire, the insured filed a proof of loss with the insurer seeking over \$300,000 in fire damages. Interestingly, in 2006, the insured had tried to sell the home for a list price of \$117,000. But he pulled the home off the market in December, and increased his coverage from \$167,200 to \$255,447—a 65% increase, just four months before the fire. In June 2007, the insurer requested a recorded statement of the insured. He refused, but then changed his mind, and gave a statement near his home in Florida. The insurer then requested his examination under oath in Ashland, Wisconsin, on September 5, 2007. The insured refused, claiming his health was too poor to travel. The insurer then agreed to travel to Florida to take his examination under oath on October 11, 2007. Before the examination, the insurer requested in writing that the insured bring relevant

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financial documentation with him to the examination, such as his state and federal tax returns for the preceding 3 years, credit card statements, loan balances, personal income and banking information at the time of the fire, and the financial information of his manufacturing company that he owned in Florida. Not only did the insured refuse to bring such documentation with him to the examination under oath, he also refused to answer any questions about his financial condition when questioned by the insurer's attorney, and he ultimately walked out of the examination.

After numerous requests, the insured agreed to reconvene the examination under oath on January 22, 2008. But the second examination proved to be no different from the first. The insured simply refused to provide his financial information. After much coaxing, he eventually agreed to sign an authorization for the release of his tax returns and banking records. But shortly after the insurer submitted the releases to local banks in Florida, the insured contacted his banker and told him to "hold off on furnishing statements..." The insurer's attorney tried one more time to get the insured's banking records, writing him a letter warning that his claim could be denied for his failure to cooperate if he didn't produce them. In response, the insured sent only partial records to the insurer, and no tax returns. Based on the results of the fire investigation and the insured's failure to cooperate, the insurer denied his claim.

On March 31, 2008, the insurer filed its Complaint in Ashland County, Wisconsin seeking a declaration from the Court that the insured's failure to cooperate, misrepresentation and concealment, and the incendiary nature of the fire by the insured or at his directive voided coverage under the policy. The insured subsequently dodged personal service of the Complaint in Florida, forcing the insurer to complete service by publication under Section 801.11(2) (c) of the Wisconsin Statutes. In response, the insured retained counsel, answered the Complaint and filed a counterclaim asserting that the insurer denied his claim in bad faith.

Amazingly, the insured continued to conceal his financial information throughout the discovery process. The insurer had to bring a Motion to Compel Discovery to try to obtain the insured's full tax returns, checking account statements and financial books of the insured's manufacturing

company. Even after the Court issued an Order compelling the insured to produce his complete financial information, he still refused to produce all of the requested documents. As the trial date loomed, the insured's failure to cooperate continued, as he refused to produce his expert witnesses for deposition. Again, the insurer obtained a Court Order compelling him to produce his witnesses. The insured decided that he would rather be sanctioned by the Court than comply with the Order.

"Since 1861, the Supreme Court of Wisconsin has consistently enforced insurance policy provisions . . ."

In September 2010, the insurer brought a Motion for Summary Judgment based on three arguments: the insured's failure to comply with the Court Order compelling him to produce his witnesses required dismissal of his bad faith claim; the insured's failure to make out a prima facie case that the fire was accidental without expert witnesses required a ruling in the insurer's favor; and that the insured's failure to cooperate with the policy terms voided coverage. The Court denied the insurer's Motion on the first two grounds, choosing to sanction the insured by precluding his expert witnesses from testifying at trial, rather than outright dismissing his bad faith claim and declaring there to be no coverage. But the Court took the failure to cooperate argument under advisement, stating it had to look further into Wisconsin case law on the issue.

Since 1861, the Supreme Court of Wisconsin has consistently enforced insurance policy provisions that require an insured to submit to an examination under oath and to *truthfully answer all questions before him*. See *Bonner v. The Home Ins. Co.*, 13 Wis. 677, 1861 WL 1515 at *1 (Wis. 1861) overruled on other grounds by, *Hiles v. Hanover Fire Ins. Co.*, 65 Wis. 585, 27 N.W. 348 (Wis. 1886). The rule of law set forth in *Bonner*, requiring strict compliance with reasonable policy terms, was reaffirmed in *Hart v. Fraternal Alliance*, 108 Wis. 490, 495, 84 N.W. 851 (Wis. 1901) (holding beneficiary's failure to comply with relevant stipulation in insurance policy requiring production of proof of death freed insurer from liability). Two more recent Wisconsin cases, *Kisting v. Westchester Fire Ins. Co.*, 290 F.Supp. 141 (W.D. Wis. 1968) *aff'd*, 416 F.2d 967

(7th Cir. 1969) and *State Farm Fire & Cas. Ins. Co. v. Walker*, 157 Wis.2d 459, 459 N.W.2d 605 (Wis. Ct. App. 1990) *cert. denied*, 465 N.W.2d 655 (Wis. 1990) further reinforce this "strict compliance" precedent. In *Kisting*, the Seventh Circuit affirmed the District Court's "thoroughly discussed and correctly resolved" decision awarding summary judgment to an insurer where the insured's refusal to answer questions asked of him at an examination under oath was a breach of the fire policy's provisions, and thus, barred the insured's recovery of the policy proceeds. 416 F.2d at 967. After lightning struck his farmhouse and buildings, Plaintiff *Kisting* filed a claim with Defendant *Westchester Fire Insurance Company* ("Westchester") to recover over \$16,000.00 in fire damage to his property. *Kisting*, 290 F.Supp. 141, 143 (W.D. Wis. 1968). During an examination under oath, *Kisting* refused to answer several questions about his past income tax returns and bank deposits, his corporation's financial status and his payments to the government compromising a tax dispute. *Id.* at 145-147. Defendant *Westchester* subsequently asserted arson as an affirmative defense to *Kisting's* suit for recovery under the policy terms. *Id.* at 143. Although *Kisting* claimed that the information sought in the examination under oath was immaterial, the District Court disagreed and entered summary judgment in favor of *Westchester*, finding "[t]he financial status and financial gain to the insured are circumstances relevant to the arson defense" and thus, *Kisting's* refusal to answer precluded his recovery under the policy. *Kisting*, 290 F.Supp. at 149 (citations omitted) ("[n]oncompliance sufficient to preclude recovery has been found where the insured did submit to the examination, but refused to answer certain material questions").

Similarly, in *State Farm Ins. Co. v. Walker*, 157 Wis.2d 459, 459 N.W.2d 605 (Wis. Ct. App. 1990), the Wisconsin Court of Appeals determined that Plaintiff's refusal to answer several questions asked of him during an examination under oath precluded his recovery under the fire policy. *Walker*, 157 Wis.2d at 469, 459 N.W.2d at 609. Specifically, the insurer had asked *Walker* about his name change and his financial situation. *Id.* The appellate court found those background and financial questions to be material, since the information sought could have aided the fire investigation and revealed the possible motives for arson. *Id.* By refusing to answer, *Walker* breached the policy terms. *Id.* Thus, as of 1990, the "strict compliance" standard originally set forth in *Bonner*, *supra*, was alive and well.

After reviewing this extensive body of case law, Judge Robert E. Eaton of the Ashland County Circuit Court granted the insurer's Motion for Summary Judgment on January 7, 2011, only three weeks before trial. Significantly, the Court found that

The contract obligated [the insured] to provide records and documents required by the plaintiff. [The insured] wrongfully interpreted this contract provision to mean that he, rather than the plaintiff, would decide what was required. As a result, [the insured] wrongfully failed to provide material information requested by plaintiff. The Court of Appeals has stated: "An offer to answer questions about a fire after the insurance carrier has instituted a court action is too late to be meaningful to the insurance company." (Ct. Order and Mem., p.3). (emphasis added).

Hence, the cliché "timing is everything" is especially true in the context of an insured's compliance with an insurer's fire investigation. In the instant case, the insured offered too little information, too late, as the insurer could not make meaningful use of the piecemeal financial information the insured offered at his fancy.

In addition, the insurance contract itself has more "teeth" when practically applied by an insurer in light of Ashland County Circuit Court's ruling, since the insured must "strictly comply" with reasonable policy terms, or face losing coverage in its entirety. In sum, an insured's cooperation in a fire investigation is not optional: Any material failure by the insured to cooperate should be vigorously pursued by an insurer in its defense of a claim in Wisconsin, and elsewhere.

Sharon M. Horozaniecki, Esq. is an attorney with the law firm of Morrison, Fenske & Sund. Established in 1991 with an emphasis on commercial real estate development and general representation of small to medium sized business ventures. The firm's areas of expertise have grown to include all aspects of real estate, commercial litigation, product liability litigation (including fire and explosion) insurance litigation. Morrison, Fenske & Sund's Twin Cities offices are located in Minnetonka, Minnesota.



Put a Freeze on Winter Fires

By the Numbers: Winter Residential & Building Fires

Winter residential building fires result in an estimated average of **945 deaths, 3,825 injuries and \$1,708,000,000** in property loss each year.

Fires in one and two family dwellings account for **67%** of all winter residential building fires.

Cooking is the leading cause of all winter residential building fires.

Winter residential building fires occur mainly in the **early evening hours, peaking from 5:00 to 8:00 PM.**

Although at its highest in December, residential building fire incidence is collectively highest in the three winter months of **January, February and March.**



National Fire Protection Association

The authority on fire, electrical, and building safety

*Based upon information provided by NFPA Safety Information at their website:

nfpa.org

Welcome to Winter!!!

It seems as all of us get older, the winter months seem to drag on and on . . . But winter is also a time of families staying home and hunkering down while the wind and snow piles up outside. As of today, we are all seeing images of Chicago, Dallas and Kansas City as they are digging out from one of the country's largest blizzards. Although *this* storm missed us, we all need to be cognizant of the safety measures we must take to keep our families and homes and business safe during this heavy fire season. A few suggestions:



- Test your smoke alarms and tell guests about your home fire escape plan.
- Keep children and pets away from all lit candles.
- Keep matches and lighters up high in a locked cabinet.
- Stay in the kitchen when cooking on a stovetop.
- Ask smokers to smoke outside. Remind smokers to keep their smoking materials with them so young children do not touch them. Provide large, deep ashtrays for smokers. Wet cigarette butts with water before discarding.
- Be sure to ensure your wood burning fireplace doors are closed tight before retiring and never, leave a fire burning in your fireplace if you leave your home or retire for the evening.

Until our next storm . . . Stay safe & warm.

Bob Whitmore

Pennsylvania Jury Finds CSST Defective, by David R. Schlee, Esq.

A jury in Chester County, PA recently found OmegaFlex, a manufacturer of corrugated stainless steel tubing (CSST), liable for 100% of the damages caused by a house fire. CSST is flexible pipe with an exterior polyethylene coating. For the past several decades it has been widely used in propane and natural gas piping systems inside houses and other structures.

OmegaFlex sold a brand of CSST used in the plaintiff's house called TracPipe. The plaintiffs alleged that lightning struck near their house, and that the energy from the lightning strike caused an arc between the CSST and another piece of metal. They alleged that the arc perforated the CSST, allowing gas to escape and ignite.

Plaintiffs contended that CSST is defective because, unlike black iron pipe, its walls are

too thin to withstand an arc caused by indirect lightning without perforating. OmegaFlex countered that a properly bonded CSST system is resistant to arcing caused by indirect lightning strikes. The CSST system in the plaintiffs' house was installed with a bonding clamp and wire, but the clamp was either broken or it melted off during the fire. The case is *Tincher v. OmegaFlex*, Common Pleas Court of Chester County, PA.

When lightning strikes near a house, it may cause different electric potentials to form between the house's pipes, wiring, and other metallic systems. If two metallic systems such as piping, wiring, coax cable, or metal ducts have greatly different electric potentials, an arc can form between them if an arc forms between CSST and another metallic system, the arc may create a hole in the CSST, allowing gas to escape from it.

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Congratulations to Bob Whitmore, Brian Haag, Doug Noah and Mark McCue for recently completing their HAZWOPR 8-Hour recertification class. Annually, Whitmore Fire Consultants, Inc. participates in a daylong educational program providing necessary instruction providing our investigators with the expertise and safety measures necessary for complex, hazardous materials fire investigation.

A special thank you to Nancy Jacobsen of Western National Insurance for sponsoring this program. Several lawyers and other experts attending the program held at the Western National Insurance offices in Bloomington, Minnesota.



Bob Whitmore recently presented a one-day seminar to the Nebraska Chapter of the International Association of Arson Investigators in Hastings, Nebraska. Several members of the fire service as well as other private sector investigators attended the program on Fire Investigation and NFPA 921.

Bob also provided a one day program to State Farm Insurance Companies in Lincoln, Nebraska on "SIU Awareness Day" assisting their adjusters in complex investigations and fire claims.



Congratulations to Brian Whitmore for completing the 40-Hour HAZWOPR class provided by the Wisconsin Chapter of the International Association of Arson Investigators in Hudson, Wisconsin. Brian also successfully completed his Fire Investigation Technician certification through the International Association of Arson Investigators.

Congratulations to Doug Noah for achieving his Certified Fire Investigator (CFI) certification through the International Association of Arson Investigators. His achievement brings all investigators with Whitmore Fire Consultants, Inc. being CFI's.

Pennsylvania Jury Finds CSST Defective, Continued

OmegaFlex argued that a properly bonded CSST system complies with the bonding requirements in electric and gas codes, and is resistant to the risk posed by indirect lightning. Bonding reduces the difference in the electric potentials of two circuits, reducing the risk of arcing between them. The plaintiffs' attorneys, however, argues that the codes only addressed "stray electrical current," not the energy created by indirect lightning, and that OmegaFlex.

Countered that a properly bonded system is resistant to indirect lightning strikes, but the bonding was disconnected at the time of the incident.

Other Litigation

While a number of cases have been filed alleging lightning-induced CSST failure, *Tincher v. OmegaFlex* is the first case to reach a jury on the broader issue of whether CSST's susceptibility to indirect lightning makes it unreasonably hazardous.

In 2006, four of the six manufacturers of CSST agreed to settle a class-action lawsuit involving CSST: Titeflex Cor., Ward Manufacturing, Inc., OmegaFlex, Inc., and Parker Hannifin Corp. Earlier articles discussed that case, known as *Lovelis v. Titeflex*. Representing property owners with CSST installed, the plaintiffs claimed that CSST does not have sufficient wall thickness to protect against failure in the event of a lightning strike, and that the manufacturer did not sufficiently warn of the need to install lightning protection systems or bonding and grounding systems when CSST is used. The manufacturers denied those claims and asserted that CSST was safe as long as it was properly installed.

"The status of CSST in the next version of NFPA 52 is uncertain . . ."

The initial terms of the settlement required the parties to notify the estimated two million class members who owned CSST of an opportunity to object to the settlement or opt out of it. Upon final approval of the settlement on Feb. 1, 2007, an estimated \$1.6 million class members were notified of it. Thirty two class members opted out of it, and six members objected to the terms, which included the plaintiffs attorneys' fees of \$29.2 million.

The terms of the final settlement, class members had a right to submit a claim. Upon proof that CSST was installed in their home or other building, class members would be issued a voucher that could be used toward a lightning protection system or bonding and

grounding system. The vouchers could not be used for piping replacement and ranged from \$75 to \$2000, depending on the size of the piping system and frequency of lightning strikes in the area of the sys-

tem. The settlement did not include a product recall or require any modifications to systems using CSST.

Code Requirements

The 1988 edition of the National Fuel Gas Code, NFPA 54, first recognized CSST. That edition also first required bonding of gas piping systems, stating "(a) Each above-ground portion of a gas piping system upstream from the equipment shutoff valve shall be electrically continuous and bonded to any grounding electrode as defined in the National Electric Code, ANSI/FFPA 70. (b) Gas Piping shall not be used as a grounding electrode."

Since then, both the bonding requirements for gas piping systems and the requirements for systems using CSST



under NFPA 54 have changed. Previous versions of NFPA 54 allowed for gas piping to be bonded through the appliances to which it was connected. The 2009 edition of NFPA 54 now states that "CSST gas piping shall be bonded to the electrical service grounding electrode system at the point where the gas service enters the building. The bonding jumper shall not be smaller than 6 AWG copper wire or equivalent."

The comment to that section in the NFPA 54 handbook specifically mentions that the new awareness of lightning damage related to CSST prompted two changes in the code. In addition to requiring a minimum sized bonding jumper where gas service enters a building with a CSST system, the 2009 edition of NFPA 54 also clarified that, while "(g)as piping shall not be used as a grounding conductor or electrode," it may be bonded to a grounding system, including a lightning protection system.

The status of CSST in the next version of NFPA 54 is uncertain. A report of the March 2, 2010 NFPA Standards Council noted concerns over incidents of lightning-induced failure of CSST, and stated that over the revision cycle for the next edition of NFPA 54, schedule for 2014, "the industry or others advocating the continued use of CSST in gas piping systems shall validate the safe use of the product through independent third-party validated research and testing that can be reviewed and evaluated by standards developers in a timely way." The Standards Council warned manufacturers of CSST that, if they did not provide evidence of a solution to protect against lightning-induced failures, it may take actions "up to and including the prohibition of the use of CSST in NFPA 54."

Camping Stoves and Equipment Recalled by Katadyn North America Due to Fire Hazard

The U.S. Consumer Product Safety Commission and Health Canada, in cooperation with Katadyn North America Inc. of Minneapolis, Minn., announced a voluntary recall of the Camping Stoves and Equipment. The camping stoves were manufactured in China.

Consumers should stop using recalled products immediately unless otherwise instructed. It is illegal to resell or attempt to resell a recalled consumer product. About 5,300 were sold in the United States and 2,400 in Canada Specialty outdoor and sporting goods retailers in the United States and Canada and on the Internet from January 2009 through September 2010 for between \$150 and \$180. The pumps and spare parts kits were also sold separately for between \$15 and \$50.

Damaged fuel lines and/or O-rings may cause fuel leakage, posing a fire hazard to consumers. There are 70 reports of incidents involving the stove's fuel line leaking or damage to O-rings. No injuries or fires have been reported.

This recall involves Optimus Nova and Nova+ camping stoves and equipment, including the stove's fuel pump and spare parts/repair kits. The stoves are black metal, measure about 6 inches in diameter and 3 1/2 inches high and can be used with multiple types of fuel. Stove serial numbers QA000011 through QA007313 are included in this recall. The serial number and "Optimus" are printed on the side of the camping stove. Pumps and spare parts kits also were sold separately. Pumps have a green open/close valve. Spare parts kits model numbers include 80163051, 8520, 80176321 and 8511 and are printed on the packaging.



Pennsylvania Jury Finds CSST Defective, Continued

As manufacturer recommendations, local codes and the National Fuel Code continue to evolve to account for concerns about the damage indirect lightning creates for piping systems using CSST, the installation and bonding requirements for CSST under different standards and codes may differ and conflict. While a bonding jumper would seem to be part of a piping system installation, bonding and grounding work performed by licensed electricians. Therefore, as they consider adopting the bonding requirements in NFPA 54, different state and location jurisdictions may consider those requirements to be either electrical work or plumbing and gas fitting procedures, and may require either an electrical or plumbing contractor to perform the work, and thus take on the responsibility to perform it correctly. It is unknown whether OmegaFlex will appeal the verdict against it.

David R. Schlee is a partner in the law firm of Schlee, Huber, McMullen & Krause, P.C. with offices in Kansas City, KS. Readers who have questions or comments may contact Mr. Schlee at drschlee@schleehuber.com

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Metallic Taper Candles Sold Exclusively at Yankee Candle Stores Recalled by General Wax & Candle Company Due to Fire Hazard



The U.S. Consumer Product Safety Commission, in cooperation with General Wax & Candle Company, of North Hollywood, Calif. announced a voluntary recall of Silver and Gold Metallic Taper Candles

Consumers should stop using recalled products immediately unless otherwise instructed. It is illegal to resell or attempt to resell a recalled consumer product. About 33,000 units were sold at Yankee Candle stores nationwide from October 2010 through November 2010 for about \$2

The metallic paint can ignite on the candles, posing a risk of fire. No injuries have been reported.

This recall involves 10 inch metallic silver and gold taper candles. The price "\$1.99" and the UPC code 609032492687 or 609032492694 are printed on the candles' plastic wrapping and were manufactured in the United States.

Consumers should immediately stop using the recalled candles and return them to any Yankee Candle store or contact General Wax and Candle for a full refund. For additional information, contact General Wax and Candle at (800) 543-0642 between 9 a.m. and 5 p.m. PT, Monday through Friday, or visit the firm's website at www.generalwaxrefund.com



Recalls



Meijer Recalls Oscillating Ceramic Heaters Due to Fire Hazard

The U.S. Consumer Product Safety Commission, in cooperation with Meijer, of Grand Rapids, Mich. announced a voluntary recall of the Touch Point Oscillating Ceramic Heaters. Consumers should stop using the recalled product immediately unless otherwise instructed. It is illegal to resell or attempt to resell a recalled consumer product. About 6,700 units were sold at Meijer stores in Indiana, Illinois, Kentucky, Michigan, and Ohio from October 2009 through October 2010 for about \$25. The heater was manufactured by Ningbo Dongji Electronic Tech Co. LTC, of Ningbo, Dongki, China

The oscillating mechanism in the heaters can short out, posing a fire hazard to consumers. Meijer has received two reports of incidents involving fires that resulted in property damage. No injuries have been reported.

This recall involves Touch Point PTC oscillating ceramic heater with model number PTC-902 and serial numbers between 35005-43008. Model and serial numbers are located on a sticker on the bottom of the heater. The grey/silver colored heaters are about 10 inches tall and have a screen across the front.

Consumers should immediately stop using the recalled heaters and return them to the nearest Meijer retail store for a full refund of the purchase price. For additional information, contact Meijer toll-free at (866) 927-8699 between 9 a.m. and 5 p.m. ET Monday through Friday or visit the firm's website at www.meijer.com



Haier America Recalls Chest Freezers Due to Fire Hazard

The U.S. Consumer Product Safety Commission, in cooperation Haier America Trading, LLC, New York, NY announced a voluntary recall of the Black & Decker chest freezer. Consumers should stop using recalled products immediately unless otherwise instructed. It is illegal to resell or attempt to resell a recalled consumer product.

About 67,500 Black & Decker Model BFE53 was sold exclusively at Wal-Mart nationwide from January 2010 through September 2010, for about \$150. Haier Model ESNM053E was sold through Amazon.com and other retailers from May 2010 through October 2010 for between \$220 to \$290 and were manufactured in China.

A capacitor in the freezer's circuitry can overheat, posing a fire hazard. Haier America and CPSC have received reports of 18 incidents, including four reports of fires with minor property damage, consisting of smoke damage, damage to a wall, and food spoilage. There have been no reports of injuries.

This recall involves the Black & Decker® Model BFE53 and Haier® Model ESNM053E 5.3 cubic foot capacity white chest freezers. "Black & Decker" is printed at the front upper-right corner or "Haier" is printed on the front upper-left corner of the freezer. "Black & Decker" or "Haier," the model number, the unit's serial number and other information are printed on a rating label at the top center of the back of the freezer. Only Model BFE53 and Model ESNM053E freezers. Consumers should immediately unplug their freezer and contact the company to schedule an appointment for a free repair. For additional information call the company hotline at 877-878-7579, or visit the firm's website at: www.chestfreezerrecall.com.

final thoughts...

Be sure and check your furnaces, space heaters and fire places during this cold time of the year. Oftentimes, fires and carbon monoxide are the result of defective furnaces and heaters. Keep your family safe.



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Contact us at **952-461-7000**— www.whitemorefire.com

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WHITEMORE FIRE CONSULTANTS, INC.



Upcoming Events>>>

2011 MNIAAI Fire Investigation Conference

*March 23-25, 2011
St. Cloud, Minnesota*

Visit:

www.mniaai.org to register