Inside Fire

October 2012

A Quarterly Newsletter Distributed by Whitemore Fire Consultants, Inc.

The Substantial Change to Landlord/Tenant Subrogation

By Alexander M. Jadin, Esq.

For a complete copy of the Minnesota Supreme Court opinion, please visit our website at www.whitemorefire.com under the "Publications" tab.

———

On September 5, 2012 the Minnesota Supreme Court issued their ruling on the case, *RAM Mutual Insurance Company v. Rusty Rohde d/b/a Studio 71 Salon, A10-2146.*

The Court determined that whether an insurer may maintain a subrogation action against the negligent tenant of its insured is a question answered by examining the facts and circumstances of each case. Specifically, the Court rejected the rule from *United Fire & Casualty v. Bruggeman,* 505 N.W.2d 87 (Minn. App. 1993), *rev. denied* (Minn. Oct. 10. 1993) and concluded that the question of whether an insurer may pursue a subrogation action against the tenant of an insured, when the tenant's negligence caused damage to the insured's property, must be answered by examining the unique facts and circumstances of each case.

For nearly twenty years the rule in Minnesota was that the landlord's insurer was prevented from subrogating against a tenant. The Minnesota Supreme Court's ruling opens a new and potentially expansive avenue for subrogation investigation and recovery.

WHITEMORE
FIRE CONSULTANTS, INC.

Inside This Newsletter

The Substantial Change to Landlord/Tenant Subrogation (Continued)

The *RAM* case involves the landlord and tenant relationship between JD Property Management, LLC and Rudy Rohde. JD Property owned a rental property in Sauk Centre, Minnesota, containing three business suites. Rohde rents one of the suites and operates a salon business, the Studio 71 Salon, in the leased premises.

The property suffered a water damage claim as a result of a broken water line. RAM (JD Property's insured) paid JD Property $17,509, the full amount of JD Property's claim to repair the damage. Because Rohde had installed the water line, allegedly without JD Property's knowledge in violation of the lease, RAM filed a subrogation action against Rohde. While the *RAM* case resulted from a water loss, the court's ruling clearly has widespread application to the fire investigation and fire subrogation industry in Minnesota.

The Minnesota Supreme Court revisited the position prevented subrogation against a negligent tenant. The *Bruggeman* court, following what it described as "the majority position," determined that "the landlord and the tenant were co-insured's because each had an insurable interest in the property—the landlord a fee interest and the tenant a possessory interest." *Bruggeman*, 505 N.W.2d 87 at 88-89. The court grounded this result in its determination that by paying rent, tenants indirectly pay a landlord's insurance premiums. *Id*. At 89. Because an insurer cannot bring a subrogation action against its own insured, the court concluded that the tenants, as co-insured's of the landlord, were "not subject to subrogation" by the insurer. *Id*. at 90.

In reversing Bruggeman the court can concluded for several reasons that rather than blanket prevention of subrogation a case-by-case approach provides an adequate and supportable analytical framework, and is the soundest method to evaluate when an insurer has a subrogation right against an insured's tenant.

1. The case-by-case approach is best suited to the areas of law implicated by the subrogation question posed by this case. While the case-by-case approach does not provide the same kind of predictability that accompanies either the pro– or no-subrogation approaches, the case-by-case method provides more predictability to parties by simply enforcing the terms of their contracts.

2. The case-by-case approach best effectuates the intents of the contracting parties while still taking into account the equitable principles underlying subrogation actions. Moreover, presumptive, bright-line rules of any kind are in conflict with the basic principles of equity, which by definition require a court to weigh and balance the inequities between the parties in determining whether subrogation is available in a particular case. *See Citizens State Bank v. Raven Trading Partners, Inc.,* 786 N.W.2d 274, 285 (Minn. 2010).

3. The case-by case method is more consistent with Minnesota's public policy of holding torfeasors accountable for their actions than the no-subrogation approach adopted by *Bruggeman*. In the absence of a lease provision to the contrary, a tenant is generally liable in tort to its landlord for damages to leased property caused by the tenant's negligence.

We are quickly wrapping up summer and are into the full thrust of Fall. Vacations are over, kids are back in school, farmers are starting their harvest, families are spending more time at home and cool nights are upon us. Cool nights mean that we all will be firing up our furnaces and fireplaces. Please take some time to insure that your home heating system is been inspected and ready for the winter season before us.

A few weeks ago, over 115 of our clients attended a one-day seminar that we hosted, "Identifying the Positive in the Negative Corpus and Other Aspects of Fire Investigation and Subrogation." I would like to take this opportunity to thank each of you who took time out of your busy schedules to attend this seminar. I hope that you all felt it was time well spent and that you found the information provided helpful. I also would like to thank our presenters, David M. Reddan, Timothy Poeschl, Michael Carmoney, Steven Pfefferle, Curtis Roeder, Alexander Jadin, David Yarosh and Brian Haag for their presentations. The quality of the legal representation is second to none in the Midwest, which was apparent at this seminar.

Once again, thanks to all of you for your continued support of Whitemore Fire Consultants, Inc. I do not take your support lightly, and am humbled and honored to call you my clients and friends.

Robert B. Whitemore, CFI
President

The Substantial Change to Landlord/Tenant Subrogation (Continued)

The court determined that the case-by-case approach achieves this purpose by allowing an insurer to bring a subrogation action when the reasonable expectations of the parties, as evidenced by the lease, reveal that he parties did not intend to limit application of the general rule of a tenant's tort liability. Therefore, the case-by-case approach is consistent with the policy that a lost should typically be borne by the person responsible for that loss.

Further, the court articulated the criteria that the district court should weigh, and therefore, articulated the information that the insurance subrogation department should investigate when determining whether to pursue a subrogation claim against a negligent tenant.

The district court must ascertain the expectations of the parties to which party bears responsibility for a particular loss. The case-by-case analysis begins with the written documents executed by the parties (typically the lease).

The district court therefore should interpret provisions in a lease governing a tenant's liability for a particular loss according to the fundamental principle that the "goal of contract interpretation is to ascertain and enforce the intent of the parties." *Valspar Refinish, Inc. v. Gaylord's, Inc., 764* N.W.2d 359, 364 (Minn. 2009). In determining the expectations of the parties as articulate in the lease, courts should look for evidence indicating which party agreed to bear the risk of loss for a particular type of damage.

Therefore, if a lease expressly provides that the tenant is not responsible for a particular loss, the landlord could not bring an action against the tenant in the first instance, and there would accordingly be no right of subrogation on the part of the insurer. Moreover, if the lease indicates that the landlord has agreed to procure insurance covering a particular loss, a court "may properly conclude that, notwithstanding a general 'surrender in good condition' or 'liability for negligence' clause in the lease," the landlord and tenant reasonably expected "that the landlord would look only to the policy, and not to the tenant, for compensation for … loss[es] covered by the policy." *Rausch v. Allstate Ins. Co.,* 882 A.2d 801, 816 (Md. 2005).

If, however, a lease obligates a tenant to procure insurance covering a particular type of loss, such a provision will provide evidence that the parties reasonably anticipated that the tenant would be liable for that particular loss, which would allow another insurer who pays the loss to bring a subrogation action against the tenant. *See Am. Family Mut. Ins. v. LaFramboise,* 597 N.E.2d 622, 626 (Ill. 1992).

In balancing the equities, the court may consider, among other factors, whether the lease is a contract of adhesion, and if the provisions allocating responsibility "are found to be unfair," may declare such provisions "invalid as being in violation of public policy." *Rausch,* 882 A.2d at 815.

[T]he fact that the leased premises are part of a large multi-unit structure may be relevant to the equities and the parties' reasonable expectations regarding responsibility.

Under the case-by-case approach, consistent with the principles outlined above, an insurer will be able to maintain a subrogation action where, based on "the lease as a whole, along with any other relevant and admissible evidence," the district court determines that "it was reasonably anticipated by the landlord and the tenant that the tenant would be liable, in the event of a [tenant-caused property] loss paid by the landlord's insurer, to a subrogation claim by the insurer." *Rausch,* 882 A.2d at 816.

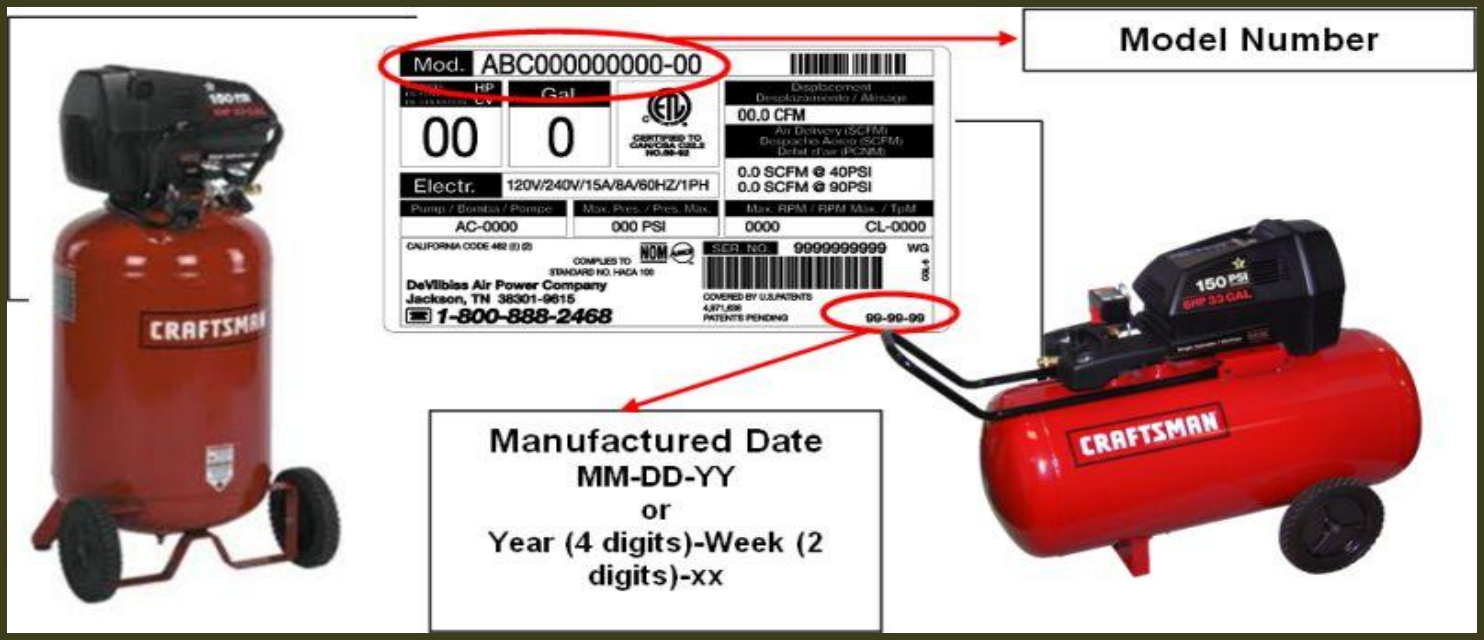
What does this mean to the insurance subrogation department? No longer can a subrogation department close a file simply because the negligent party was a tenant of the insured. Additionally, requesting the lease documents is a requisite first step in the investigation of a claim. This is a welcome expansion of the subrogation avenues for the insurer.

———

Mr. Jadin is an attorney with the law firm of Hellmuth Johnson and was a recent presenter at the WFC seminar. For more information regarding his practice and the firm, please visit their website at: www.hjlawfirm.com.

Recalls

DeVilbiss Recalls Air Compressors



The U.S. Consumer Product Safety Commission in cooperation with DeVilbiss Air Power Company of Jackson, Tennessee has announced a voluntary recall of the DeVilbiss air compressors. The air compressor motor can overheat, posing a fire hazard. The recalled compressors were sold under the Craftsman, EX-CELL, Porter-Cable, and Pro-Air II brand names and were sold by industrial and construction distributors (EX-CELL, Porter-Cable & Pro-Air II from July 2003 through December 2008 for between $259 and $299) and at Sears stores nationwide (Craftsman from July 2003 through December 2008 for between $279 and $329 and manufactured in the United States,.

Approximately 460,000 units were sold through the United States. DeVilbiss has received 10 reports of the motors overheating, no injuries have been reported.

Consumers should immediately unplug and stop using the recalled compressor and contact DeVilbiss Air Power Company or Sears for a free repair kit. For a complete list of the model numbers involved in this recall, please visit the firms website at www.porter-cable.com or www.devap.com or the Consumer Product Safety Commissions website at www.cpsc.gov.

Recalls

BatteriesPlus Expands Battery Packs Recall

The U.S. Consumer Product Safety Commission in cooperation with BatteriesPlus has announced a voluntary recall of the Rayovac NI-CD and Rayovac NI-MH Cordless Took Battery Packs. Approximately 65,300 units were sold (111,800 were previously re-called in December 2011) nationwide. The replacement battery pack can explode un-expectedly, posing a risk of injury to consumers.

This recall involves all RAYOVAC-branded replacement battery packs used with cord-less power tools and have part numbers beginning with "CTL." "RAYOVAC," "NI-CD" or "RAYOVAC," "NI-MH" and a part number beginning with "CTL" are printed in white lettering on the product. The battery packs were sold in voltages ranging between 2.4 and 18 volts in various sizes and shapes. They were sold as replacement batteries to the following brand tools: Black and Decker, Bosch, DeWalt, Makita, Lincoln, Milwau-kee, Panasonic, Ryobi and Skil. The battery packs were sold exclusively at BatteriesPlus stores nationwide between June 2008 and July 2012 for between $60 and $70 and were manufactured in China.

Consumers should immediately stop using and remove the battery pack from cordless tools and contact BatteriesPlus for instructions on how to return the product for a store credit.

For more information please visit BatteriesPlus website at www.batteriesplus,.com.

Recalls

Bluestem Recalls Range Rider Ride-On Toy Cars

The U.S. Consumer Product Safety Commission in cooperation with Bluestem Brands, Inc. of Eden Prairie, Minnesota has voluntarily issued a recall of approximately 4,700 Range Rider Ride-On Toy Cars. The battery can overheat, smoke, melt and catch on fire posing a fire and burn hazard to consumers.

This recall involves battery-powered Range Rider ride-on toy cars with an off-road vehicle body style and plastic tires. The ride-on cars were sold in pink and tan colors. The recalled Range Riders can be identified by their product code and model number. The model number is on the back of the seat of the ride-on toy car. The product code does not appear on the ride-on toy cars, but can be found on the product carton. Model numbers included are:

Model #	Product Code	Product
90407B	NI374	Tan Range Rider
90407G	NU640	Pink Range Rider

The ride-on toy was sold through Fingerhut catalogs and online at Fingerhut.com and Gettington.com from September 2010 through May 2012 for between $200 and $230.

Consumers should immediately stop using the recalled ride-on toys and remove the battery and contact Bluestem for a full refund of the purchase price plus reimbursement for shipping and handling. For more information, contact Bluestem through their website: www.fingerhut.com or www.gettington.com.

Images from "Identifying the Positive in the Negative Corpus & Other Aspects of Fire Investigation & Subrogation

Whitemore Fire Consultants, Inc. hosted its 15th Annual Educational Seminar at the Legend's Golf Course in Prior Lake, Minnesota. Over 115 insurance professionals, attorneys and other experts attended our one-day event which focused on issues pertaining to fire investigation, subrogation and the updates of NFPA 921 and NFPA 1033.

A special thank you to our presenters:

David M. Reddan, Attorney at Law
Arthur Chapman Law Firm
dmreddan@arthurchapman.com
NFPA 921 & NFPA 1033 2011 Changes & Overview

Michael A. Carmoney, Attorney at Law
Carmoney Law Firm
mike@carmoneylaw.com
Fire Litigation Success Despite Negative Corpus

Timothy S. Poeschl, Attorney at Law
Hanson, Lulic & Krall
tpoeschl@hlk.com
Conducting an Ethical Investigation & Hiring Experts

E. Curtis Roeder, Attorney at Law
Hellmuth Johnson Law Firm
croeder@hjlawfirm.com
New Fire Case Law

Alexander M. Jadin, Attorney at Law
Hellmuth Johnson Law Firm
ajadin@hjlawfirm.com
New Fire Case Law

Steven J. Pfefferle, Attorney at Law
Terhaar, Archibald, Pfefferle & Griebel
spfefferele@tapg.com
10 Steps to the Perfect Subrogation Case

David J. Yarosh, Attorney at Law
Yost & Baill Law Firm
jyarosh@yostbaill.com
The Ford Fix That Failed to Fix the Cruise Control Problem

Brian P. Haag, CFI
Whitemore Fire Consultants, Inc.
bhaag@whitemorefire.com
The Ford Fix That Failed to Fix the Cruise Control

We hope to see all of you next year at our 16th Annual.

PO Box 1261
Prior Lake, Minnesota 55372

info@whitemorefire.com

Submit a Loss Online …..

It's 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.

Want to be included on our distribution list? Just go to our website and register or send me an email at:

pwhitemore@whitemorefire.com

By registering, you will receive our quarterly newsletter, recalls and other information pertaining to seminars, etc.