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INSIDE FIRE

Subrogation Arising Out of Catastrophic Weather Events—Is God Solely to Blame? By John R. Schleiter, Attorney at Law



John R. Schleiter

When written in Chinese, the word "crisis" is composed of two characters: One represents danger, and the other represents opportunity. — John Fitzgerald Kennedy , 12 April 1959.

Large catastrophic events although true crises, are capable of presenting significant subrogation opportunities. Hurricanes, floods, and wildfires are just a few of the events which create such opportunities. Unfortunately, many times these opportunities are overlooked in the insurance industry, summarily deemed to the result of an Act of God.

When dealing with catastrophic events, the question is not "if" such an event will occur, but, rather "when" such an event will occur. Weather related catastrophes are an annual certainty. Consequently, insurers need to be ever vigilant in their preparation for such a catastrophic events so that they will be ready to immediately respond from a subrogation perspective.

The purpose of this article is to identify the types of events which may lead to a subrogation recovery, both on a and a small scale. We will also set forth a proposed course of action which carriers may adopt to advance the promot and effi-

large scale and a small scale. We will also set forth a proposed course of action which carriers may adopt to advance the prompt and efficient investigation of resulting losses so as to not prejudice subrogation potential.

Picking the Winners

When evaluating claims arising out of catastrophic events for subrogation potential, one must consider whether the underlying Continued on Page Two

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cause of the resulting damage can be partially attributed to the negligence of a third party. In other words, is there a third party whose negligence combined with the natural phenomenon in such a way as to cause or increase the damage. The following are but a few of the many examples of avenues for subrogation identified and pursued resulting from damages occasioned by catastrophic events.

In July, 2003 a rainstorm which was categorized by the local media as a "100-year storm" passed through Romeoville, Illinois causing significant property damage. One such casualty was the collapse of the roof of a 500,000 square foot warehouse which resulted in more than \$10 million in damages. The roof collapsed from the weight of the water which accumulated due to the inability of the roof drains to handle the amount of water produced by the storm over such a short period of time.

Despite the initial impression that the cause of the collapse was the massive rain event, investigators were retained by the involved property insurers to look further into the cause of the collapse. This decision was made for two reasons. First, the warehouse was only one year old. Second, the building was located in an office park wherein most other similar buildings in the park did not sustain any roof damage as a result of the storm.

Experts from a meteorological consulting firm were retained and confirmed that while significant, the cell which passed over the Romeoville area did not qualify as an "official" 100 year storm. A review of the local building codes and regulations revealed that buildings must be constructed with water remediation systems capable of withstanding rains "up to" a 100 year storm. Consequently, subrogation efforts were initiated against those involved in the design and construction of the building.

Back-up of Sewers & Drains

When floor drains in an athletic facility located at the University in Chicago backed up following a rain storm, the initial assumption was that due to the fact several of the neighboring businesses and homeowners experienced significant basement flooding, the cause of the loss was an Act of God. The back-up resulted in the destruction of a recently installed wood gymnasium floor.

However, a more detailed investigation was conducted and it was discovered that the University recently contracted for the installation of a system to control the flow of water from the athletic facility's gutters into the city's storm sewers. The purpose of the system was to avoid overwhelming the city sewers. However, a critical component of the system was defectively designed and installed. This defective workmanship was deemed a concurrent cause of the loss, and subrogation was pursued against the contractor responsible for the design and installation of the defective component.

Wind Storms

During another stormy Chicago summer, a microburst generating winds in excess of 100 mph blew the roof off of a large refrigerated warehouse. Once the roof was compromised, the walls collapsed. Resulting damages were in the millions of dollars, to both the structure and the contents.

Following the storm, certain of the refrigerated and/or frozen items being stored in the warehouse became spoiled as a result of ambient temperatures in excess of 90° F temperatures common in Chicago during the month of July. Analysis of meteorological data regarding the velocity of the winds led to the conclusion that the building was not, per se, constructed in violation of local building codes. Further, the building was several decades old. Therefore, even assuming, arguendo, a defect in the initial construction of the building, the age of the building would result in an action against the entities involved in the initial design and construction of the building being summarily dismissed due to the governing statute of repose.

Despite the foregoing, the law provides in Illinois – as it does in most other states - that when bailed property is lost or damaged while in the bailee's (warehouseman's) possession, the bailee is presumed negligent. Thus, it is the burden of the bailee to prove that it acted with due care under the circumstances. In the case at issue, through further investigation it was learned that immediately following the occurrence, certain of the bailors made demand upon the bailee for access to the building to retrieve their foodstuffs. Access was denied. Moreover, the bailee took it upon itself to transport certain of the foodstuffs to other warehouses owned by the bailee. The bailee would not have exercised due care and caution in the transport of the foodstuffs if they were at any point in time out of temperature during such transport. Consequently, subrogation efforts were initiated against the owner of the warehouse seeking recovery for the damages sustained as a result of the microburst.

Wildfires

In September 2011, the Bastrop County Complex Fire ignited in Central Texas and caused the most destructive wildfire in state history. The 32,000-acre inferno destroyed over 1,600 homes and killed two people. Resulting damages totaled in excess of \$300 million.

Upon investigation, it was found that the Bastrop County Complex Fire originated at power lines on the property of an electric cooperative. It was concluded that sagging and improperly placed power lines connected and fused together, causing sparks to communicate to dry brush below. Also, power lines became entangled with a large tree, which further produced sparks.

Following the fire, insurance companies made claims for subrogation against the electric cooperatives, and also the utility contractor responsible for maintaining the trees around those lines. By pursuing subrogation efforts beyond a hasty conclusion that the losses were the result of a "wildfire", several insurers were able to recover in the aggregate millions of dollars.

Surface Flooding

Thirteen hundred new automobiles being stored at an outdoor railway storage facility in Kenosha, Wisconsin found themselves in the path of a naturally occurring flood along the upper Mississippi River. The flood covered parts of nine states, lasted three months, and caused significant property damage. The manufacturer of the cars

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damaged in Wisconsin submitted a claim to its insurer, which ultimately paid over \$11 million.

Since the flood was the result of the "storm of the century," surely there was no subrogation potential. Luckily for the insurer's sake, during a quarterly file review of closed subrogation files, an adept examiner had a hunch otherwise. The examiner learned of a prior flood event in the area years earlier. A hydrological study was performed which, together with an analysis of topographical surveys, revealed that the vehicles may have been stored on a 100-year floodplain. Based on this information, suit was commenced against the owners of the land on which the vehicles were stored. Discovery resulted in the production of certain contractual documents between the car manufacturer and the owners of the land which contained provisions discussing requisite drainage requirements for the land. Ultimately, the land owner admitted that parking \$17 million dollars worth of automobiles on a floodplain was in breach of the drainage provisions, and agreed to paying a high seven-figure settlement to the plaintiffs.

Lighting Damage to CSST Gas Lines Contributing to the Spread of Fire

In the fall of 2010, a fire ignited at a residence located in McDonough, Georgia following a heavy rain and lightning storm, causing extensive damage to the dwelling. While neighbors in the area reported power losses, no other home sustained fire damage.

After further investigation was conducted at the home, it was discovered that lightning had struck the dwelling's metal chimney cap. This lightning strike energized the fireplace system, which used black pipe to supply natural gas to the firebox of the fireplace. Corrugated stainless steel tubing (CSST) gas lines were installed in the floor and walls of the family room area, which supplied the black pipe orifice with gas service. Therefore, when the lightning struck the chimney, the gas system was also energized and "arced" or jumped to an electrical branch circuit. Natural gas from the CSST was ignited and enhanced the fire damages to the dwelling. Subrogation was successfully pursued

against the business that designed, manufactured, marketed, sold, and distributed the relevant brand of CSST gas lines.

"Smaller" Claims

Claims which are "smaller," in terms of indemnity dollars, resulting from storm related events must also be considered for subrogation potential. The following are but a couple of the more common occurrences which may result in a reasonable basis to pursue subrogation.

This day and age, surge suppressors are common in many households. The purpose of these devices is to arrest high voltage spikes and prevent the resulting surge from damaging the electrical appliance plugged into the suppressor. Many times, lightning results in such spikes. If the suppressor fails, the surge may result in damage to the downstream electrical item. If this item is large enough for the homeowner to submit an insurance claim – say, for example, damage to several flat screen televisions – the failure of the surge suppressor may result in a successful subrogation recovery.

Another common occurrence out of which subrogation must be considered is hail storms. Every summer in the Midwest, hailstorms damage hundreds of homeowners' roofs. Very rarely is subrogation considered for claims resulting from a hail storm. However, such a conclusion should not be so hastily reached.

Perhaps the easiest way to identify possible subrogation arising out of hail damage is to have the claims adjuster determine whether neighboring roofs sustained a similar degree of damage. If, for example, one roof in a residential subdivision sustained significantly greater damage than other nearby roofs, a concurring cause of the damage may very well be faulty roofing materials, or the improper installation of those materials. We have seen this being the case not only with asphalt shingles, but also with other types of roofing materials, such as rubber membrane roofs.

Act Now – Act Fast

Too often, the opportunity knocks, but by the time you push back the chain, push back the bolt, unhook the two locks and shut off the burglar alarm, it's too late. --Rita Coolidge, Singer

In all of the above examples, the need for fast action in the investigation of subrogation potential is a pre-requisite to maximizing subrogation potential. From a recovery standpoint, two of the most troublesome issues are statutes of repose and evidence preservation. Of course, these two issues are far from being the only issues, and, therefore, as discussed in further detail below, it is prudent for the insurer to enlist the assistance of outside consultants and/or attorneys to assist in the timely identification of such potential pitfalls.

Statutes of Repose

The difference between a statute of limitation and a statute of repose is the point from which the limitation of time is measured. Statutes of limitation begin at the date of injury or the discovery of the deficiency. Statutes of repose, as they relate to deficiencies in improvements to real property, begin to run from the date of substantial completion of the improvement.

Consider for sake of example high winds resulting in structural damage to a building. If it is concluded that a concurrent cause of the damage was the defective construction of the building, there may be a basis to pursue a subrogation action against those involved in the construction of the building. One potential bar to such an action would be a governing statute of repose. If the involved jurisdiction has a statute of repose - for example a 10 year statute of repose - and construction of the building was substantially completed on July 15, 2002, the resulting subrogation action must generally be filed on or before July 15, 2012. Assuming an unconditional 10 year period of repose, the statute expires on July 15, 2012 regardless of when the loss occurs.

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The most problematic situations occur when a statute of repose is close to expiring. It is not uncommon for a loss to occur mere days prior to the expiration of a repose statute. The period of time between the substantial completion of the building and the expiration of the statute is the amount of time counsel will have to complete his or her investigation into causation and prepare and file the necessary suit papers. Therefore, it is critical that the age of the involved building immediately be identified.

Also, one must be mindful of "special" statutes of limitation embedded into statutes of repose. Take for example the shortened twoyear statute of limitation within the 10-year Minnesota statute of repose. *See*, Minn. Stat. 541.05 (2014). This statute replaces the otherwise applicable four or six year statute of limitation. *See*, Minn. Stat. 541.05 (2014). Thus, while one may believe they have four or more years to file a cause of after discovery of the injury, they may in reality only have two.

Evidence Preservation

Catastrophic losses also present problems relating to evidence preservation. Once damaged buildings are demolished, so too is the best evidence of defective workmanship, materials or design. Such evidence is critical in that it is necessary to support the concurring causal connection between the negligent improvement and the resulting damage.

Conclusion

In summary, losses resulting from catastrophic events should not be quickly and summarily dismissed as resulting solely from an Act of God. Further investigation may uncover a concurrent cause, such as the negligence of a contractor or product manufacturer. The contractor or manufacturer may very well constitute a viable subrogation target.

Outside counsel should be retained to assist in the identification of potentially viable subrogation opportunities and to assist the company in conducting a further investigation. The immediate involvement of counsel will minimize the chance of an impending statute of repose or hidden limitation barring an otherwise viable subrogation action. Further, counsel and his or her consultants will be able to readily identify eventual critical evidence and ensure its documentation and continued preservation. Any resulting recovery as a result of the pursuit of subrogation claims arising out of catastrophic events should certainly, in the short term, be considered "found money." This "found money" was money which for all intents and purposes the company had written off. Due to the very nature of catastrophic events, the resulting claims tend to be significant in terms of indemnity dollars. Consequently, this "found money" may very well equate into a substantial sum.

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A Message From Robert Whitemore



I just came in from a scene and the stifling 90° F that goes along with our dog days of summer. Is it just me or does it seem to get hotter and hotter? We're over half way through the year and the next newsletter will most likely discuss our preparations for the fall and winter.

Some of the best times my staff of investigators and I enjoyed this summer was participating in the various golf tournaments hosted by fire departments, insurance organizations and non-profit groups. We take our involvement with these groups very seriously and always try to arrange our schedules so all of us can participate in their fundraising efforts. It has become painfully clear to me during these times that I need to focus on my golf game little more. However, my staff seems to have two or three strokes on me????

Thank you to all of you who continue to invite Whitemore Fire Consultants, Inc. to sponsor and participate in your events. We are honored to be a part of your programs.

During our efforts to try and recognize everyone who received a Whitemore Fire Consultants, Inc. Leadership Scholarship, we inadvertently overlooked one very deserving individual. Mariad Kane, daughter of Tony (Terhaar, Archibald, Pfefflerle & Griebel) and Bridget Kane was presented a scholarship for her to continue her education. Mariad is planning on attending the University of Montana this fall. Congratulations on behalf of Whitemore Fire Consultants, Inc. It has been a joy to watch you grow into the young woman you have become.

> Robert B. Whitemore, CFI President

Inside Fire



Adventures of Lewey

Gotta love some wet dog! Yes, this is Lewey, 14-months old and running around like a summer-struck kid. School's out and he's chasing the geese (ick), swimming in the lake (more ick), fetching the ball and generally enjoying his life.

He's got this whole "protecting" the office down, except the afternoon naps seem to be a priority to him.

Stop by, come see our office mate! He's always happy to welcome our visitors.

NVIDIA Recalls Tablet Computers Due to Fire Hazard





The United States Consumer Product Safety Commission in cooperation with

NVIDIA Corporation of Santa Clara, California has voluntarily issued a recall of the NVIDIA SHIELD tablet computers. The lithium-ion battery in the tablets can overheat, posing a fire hazard.

Approximately 83,000 tablets were sold in the United States and an additional5,000 tablets were sold in Canada at GameStop stores nationwide and online at Amazon.com, BestBuy.com, GameStop.com, NewEgg.com, Tar-

getDirect.com and other websites from July 2014 through July 2015 for between \$300 and \$400.

This recall involves NVIDIA SHIELD tablet computers with 8-inch touch screens. Model numbers P1761, P1761W and P1761WX and serial numbers 0410215901781 through 0425214604018 are included in this recall. NVIDIA and the model and serial numbers are etched on the left side edge of the tablets. The SHIELD logo is on the back of the tablets.

NVIDIA has received four reports of batteries overheating due to thermal runaway, including two reports of damage to flooring.

Consumers should immediately stop using the tablets and contact NVIDIA for instructions on receiving a free replacement tablet. For more information, please visit the firm's website at: www.nvidia.com and click on "NVIDIA Tablet Recall Program" at the bottom of the page in green letters.



Cooper Lighting Recalls Fluorescent Lighting Fixtures



through April 2015 for between \$13 and \$67.

This recall involves indoor 2-light fluorescent light fixtures that range in size from 18 inches to 4 feet long. The fixtures were sold in white and can be mounted from heights between 8 and 12 feet. A date code between 182 11 (July 1, 2011) and 090 15 (March 31, 2015) is affixed to the fixture near the ballast in a DDD YY format. Catalogue and model numbers are located on the second line of a label affixed to the inside of the fixture. Catalogue and model numbers included in the recall: DLE217RLP, DLE217RLPB, DLE 232RLP, DLE232RLPB, SL232R, SL232R/1, SL232R/2, SL232R/1, SL232R/1, SL232R/1, SL232R/1, SL232R/1, SL232R/1, SL232R/1, SLNR232R/1, The United States Consumer Product Safety Commission in cooperation with Cooper Lighting LLC of Peachtree City, Georgia has issued a voluntary recall of the Cooper Lighting, Portfolio and Utilitech fluorescent lighting fixtures. The socket can overheat, arc and melt, posing a fire hazard.

About 1.62 million (in addition to 27,000 units were sold in Canada) were sold at Ace Hardware, Lowe's, Menard's, Mills Fleet Farm, True Value and other retail stores nationwide from July 2011



SLW232R, SLW232R/1, SNF115R, SNF117R, SNF125R, SNF217R, SSF217R, WP217R, WP217RN-KLLU, WP232R, WP232RLU, WP232RNKL, WP232RNKLLU and WP232RNKLRL.

Consumers should immediately stop using the light fixture and contact Cooper Lighting for a free replacement.

For more information, please visit www.cooperlighting.com and click on "Safety Notices" under the Resources tab.







Hearth & Home Technologies Recalls Gas Fireplaces



The United States Consumer Product Safety Commission in cooperation with Hearth & Home Technologies of Lakeville, Minnesota has voluntarily issued a recall of the Heat-N-Glo® and Heatilator® Corner Unit Series indoor gas fireplaces.

The back of the firebox can bow out, posing a fire hazard.

Approximately 2,500 units were sold at fireplace stores from

March 2008 through November 2014 for \$3,500 to \$5,000.

This recall involves Heat-N-Glo® and Heatilator® Corner Unit Series indoor gas fireplaces. The fireplaces are LP or NG-fueled corner units with tempered glass fronts. The following model numbers are printed on the unit rating plate, located near the controls used to operate the units, and in the instruction manual: LCOR-36TRB-IPI, RCOR-36TRB-IPI, GDCL4136I, GDCR4136I.

Consumer should immediately stop using t he gas fireplaces and contact the fireplace store where the unit was purchased to arrange for a free inspection and installation of a correction kit. The firm's dealers are contacting known purchasers.

There have been two reported incidents involving charring and minor property damage. No injuries have been reported.

For more information, please visit: www.hearthnhome.com and click on Notices.



Jake's Fireworks Recalls YoYo Sparklers

The Consumer Product Safety Commission in cooperation with Jake's Fireworks, Inc. of Pittsburgh, Kansas has voluntarily issued a recall of their YoYo Sparklers. The sparklers burn faster with a larger flame than normal and can burn down the stick towards the users' hands, posing a burn hazard. Approximately 651,000 units were sold nationwide.

This recall involves YoYo Sparklers. The sparklers are 13 1/2" long, metallic gray in color on a wire stick. They were sold in multicolored packages containing four individual sparklers. The front of the packages had a logo with the U.S. flag and the words World Class Fireworks at the top, the words YOYO Sparklers and two pictures of sparklers burning at the bottom.

Jake's has received 12 reports of incidents of the sparklers burning rapidly down the stick towards users' hands resulting in second degree and third degree burns to consumers hands.



Consumers should immediately stop using the recalled sparklers, take them away from young children and contact

Jake's Fireworks to receive a full refund. For more information, please visit the firm's website at: www.jakesfireworks.com and select the Blog on the menu at the top of the page, then click on YoYo Sparkler Alert Recall.

Monogram Beverage Mugs Recalled by Tri-Vista Designs

The Consumer Product Safety Commission in cooperation with Tri-Vista Designs, Inc. of Deer, Arkansas has voluntarily issued a recall of the Metallic Monogram Beverage Mugs. If used in the microwave, the metallic mugs can spark posing a fire hazard. Approximately 10,000 mugs were sold exclusively at Kirkland's stores nationwide from March 2015 through May 2015 for about \$7.

This recall involves 16-ounce white ceramic beverage mugs with metallic gold accents. A monogram letter A, B, C, D, E, G, H, J, K, L, M, R, S or T is printed in gold on the mug. A sticker on the bottom of the mug has "UPC# 698617673962," "SKU# 138837" and "Retail: \$6.99."

The firm has received one report of a mug that began to spark while in the microwave. No injuries have been reported. Consumers should immediately stop using the recalled mugs in the microwave and return them to any Kirkland's store for a full refund.

For more information, please visit the firm's website at: www.trivistadesigns.com and click on "Recall Notice."





GreenWorks Blower/Vacs Recalled by Sunrise Global

The Consumer Product Safety Commission in cooperation with Sunrise Global Marketing LLC of Mooresville, NC, who owns the GreenWorks brand, has voluntarily issued a recall of the GreenWorks blower/vacs. The blower/vac's motor can catch fire posing fire and burn hazards. Approximately 14,000 units were sold at Menards, Magic Mart and Mowtown stores nationwide and online at Amazon.com, atgstores.com, blishmize.com, build.com, chp.com, cpo-



outlets.com, globalindustrial.com, Greenworktools.com, hayneedle.com, homedepot.com, johnelandis.com, Kmart.com, Lowes.com, magicmartstores.com, maxtools.com, Menards.com, mowtownusa.com, overstock.com, powerequipmentdirect.com,

reisshardware.com, samsclub.com, scotsco.com, Sears.com, seventhavenue.com, smithssc.com, Target.com, thehardwarecity.com, unbeatablesale.com,Walmart.com, wayfair.com and 123greetings.com from February 2012 through June 2015 for between \$30 and \$70.

Sunrise Global Marketing has received three reports of the blower/vacs catching fire. No injuries have been reported.

This recall involves GreenWorks 12 amp electric blower/vacs. The blower/vacs have a green motor housing and a black blower tube and restrictor nozzle. They measure 12 inches high and 34 inches long. Recalled blower/vacs have model number 24022 with a serial number between GWS0350001 through GWS2280500 or model number 24072 with a serial number between GWR1310001 through GWS2281100. The model number, serial number, "greenworks" and "ELECTRIC BLOWER/MULCHER WITH BAG" are printed on the side of the motor housing. Mod-el 24022 has a two-speed switch. Model 24072 has a variable speed switch.

Consumers should immediately stop using the recalled blower/vacs and contact Sunrise Global Marketing for a full refund. For more information please visit the firm's website: www.greenworkstools.com and click on "Important Safety Notice."





Target Recalls Circo Night Lights Due to Fire Hazard





The Consumer Product Safety Commission in cooperation with Target Corporation of Minneapolis, Minnesota has voluntarily issued a recall of battery-operated Circo Night Lights. The battery can overheat and cause the nightlight to melt, posing a fire hazard.

Approximately 143,000 units were sold exclusively at Target stores nationwide and at Target.com from October 2014 through May 2015 for about \$15.

This recall involves battery-operated night lights with an AC adapter included. The night light collection includes a pink hedgehog, a blue bird, a yellow rocket, an orange dino egg, a white soccer ball and a green shark. The model numbers are printed on the bottom side of the night lights.

Name	Model #	Color	Size
Hedgehog	060-02-1397	Pink	3′5 x 5′5
Bird	060-02-1398	Blue	4')" x 6'5"
Rocket	060-02-1399	Yellow	6'0 x 4.75"
Dino Egg	060-02-1400	Orange	6′0″ x 4.75″
Soccer Ball	060-02-1401	White	5″ x 5.25″
Shark	060-02-1402	Green	3'5" x 6.9"

Target has received two reports of the night lights overheating, including one report of a fire that damaged a consumer's dresser, wall and plug-in. No injuries have been reported.

Consumer's should immediately stop using, unplug and return the recalled night lights to any Target store for a full refund.

For more information, please visit **www.target.com** and at the bottom of the home page, click on "Help" section, then click on "Product Recalls."

Polaris Recalls Youth RZR Recreational Vehicles Due the Fire





The Consumer Product Safety Commission in cooperation with Polaris Industries, Inc. of Medina, Minnesota has voluntarily issued a recall of the Youth RZR recreational off-highway vehicle. The vehicle's fuel pump retaining ring can leak, posing a fire hazard.

Approximately 4,300 vehicles were sold at Polaris dealers nationwide from October 2014 through June 2015 for about \$4,600.

No injuries or incidents have been reported at this time.

This recall involves Model Year 2015 Polaris Youth RZR® 170 EFI recreational offhighway vehicles with model number R15YAV17AA/AF and Vehicle Identification

Numbers (VIN) between RF3YAV170FT000076 and RF3YAV17XFT005141. To see the complete list, visit the firm's <u>website</u>. The VIN is on the left-hand front frame tube. They were sold in both blue and red. The blue models have a "170 EFI" decal on the right and left side of the hood and an "RZR" decal on the right and left front fenders. The red models have a "170 EFI" decal on the right and left front fenders and a "RZR" decal on the right and left rear fenders. Consumer should immediately stop using the recalled Polaris RZR vehicles and contact their local Polaris dealer to schedule a free repair. Polaris is contacting its customers directly

and sending a recall letter to each registered owner of an affected product.

For more information please visit the firm's website: **www.polaris.com** and click on "Product Safety Recalls."





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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.



