

INSIDE FIRE



Tony R. Krall

To Disclose or Not to Disclose: An Insurance Company's Dilemma

By Tony R. Krall, Attorney at Law

As attorneys retained by insurance companies, we are often asked whether there is any requirement to disclose the results of our origin and cause investigations revealing an incendiary fire. The simple answer to this question is: no, there is no legal requirement to disclose these investigations or reports. However, we recommend, in many circumstances, that insurance companies advise their insureds or origin and cause results when there is a finding of an incendiary origin.

The two most important reasons for advising an insured of the origin and cause results are to avoid a 'reverse spoliation' claim and attempt to avoid a bad faith claim. An insured should be notified if their origin and cause results show that the cause may have been an intentionally set fire so that they have the opportunity to take appropriate action with regard to those results. We recommend early disclosures because a court may be willing to allow an insured to recover under an insurance policy even after a finding of a set fire if the insured did not have an adequate opportunity to investigate the evidence.

Continued on Page Two

What's Inside this Newsletter

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To Disclose or Not to Disclose:
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Page 1-2

Back to the Basics Recap

Page 4-5

Message from Robert Whitemore

Page 6

Whitemore Fire Consultants, Inc. Scholarships

Page 7

Recalls

Page 8-9

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Reverse Spoliation and the Negative Implications for Insurance Companies

We are well-versed in the law of spoliation. Spoliation applies mostly to third party subrogation cases. Minnesota courts have not been clear on the application of spoliation in first party cases.

Reverse spoliation stands for the proposition that an insurance company may be held liable for the insured's destruction of evidence if the insured was not advised of an incendiary finding prior to that destruction.

In a little known criminal case called State of Minnesota v. Tollefson, the Tollefsons' home was torn down per a condemnation order, "authorized" by the county, approximately sixteen months after the fire. Four months later the county instituted an arson complaint against Tollefson. State v. Tollefson, 1991 WL 132774, 1 (Minn. Ct. App.) The defendant successfully argued reverse spoliation as a defense to his criminal prosecution. In other words, the defense argued that they were allowed or required to destroy their house and thus potentially destroyed exculpatory evidence prior to being made aware that the county considered the fire to be of an incendiary nature.

The court held that, "it is contrary to fundamental fairness to allow only the prosecution's expert the opportunity to conduct the examination for further exculpatory evidence." Id. The court reasoned that due to the defendant not having a chance for an independent investigation of the home prior to its destruction, reverse spoliation was warranted. The court held that the county attorney should have charged the defendant prior to the destruction of the structure so the insured could have retained experts and conduct their own investigation.

While not binding authority, the "reverse spoliation" theory has been argued by plaintiffs' attorneys in Minnesota and one other state based on the holding in Tollefson. Although Tollefson is not binding in civil cases, the case could be used as persuasive authority when arguing reverse spoliation. The Tollefson holding could potentially be extended to apply in civil

cases, wherein an insurer's cause and origin finding of incendiary evidence could potentially be excluded at trial on the basis of reverse spoliation. The argument would be based upon an insured's duty to mitigate the loss, which might include repairing or altering the fire scene. If the insured does so, unaware that the insurance company considers the fire to be of an incendiary origin, reverse spoliation can be alleged to have occurred.

Courts have become increasingly willing to impose sanctions on insurance companies that engage in spoliation of evidence regardless of whether the act by the insurer or by a third party is done negligently, recklessly or by bad faith. In King v. American Power Conversion Corp., 181 Fed. Appx. 373 (4th Cir. 1996) a court found that a party was liable for spoliation even though the evidence was destroyed by a third party (which could potentially be the insured in some cases). The court held that the plaintiff was culpable in that they failed to alert the defendant of the potential claim or location of the evidence. Due to some courts becoming aggressive with spoliation sanctions, insureds are beginning to seek these sanctions to exclude testimonial evidence regarding origin and cause findings at trial.

We generally recommend, as most insurance companies already do, to advise an insured of the investigation that is going to take place. If the investigation results in an incendiary finding, we certainly recommend early disclosure of this information, notifying the insured with a simple letter. This letter would inform the insured that it is the insurance company's opinion that the cause of the fire was an intentionally set fire and notifying the insured that they have the right to conduct an independent investigation and hire their own investigator. This disclosure need not provide details or reasons for the incendiary finding. By providing this early disclosure, the insurer in effect is giving notice along with a full and fair opportunity to investigate and inspect evidence in compliance with Minnesota law.

Under the new Minnesota Rule 26.02(a)(1) (A), parties are required to disclose these findings within 60 days of the service of the Answer, in the "initial disclosures that must be filed by both parties." Generally the court will look favorably upon early disclosures prior to deadlines.

When in doubt of whether to disclose a cause and origin investigation, consult your legal advisor on the specific circumstances of each individual case.

Utilizing Early Disclosures in Defending a Bad Faith Claim

A potential risk involved with denying coverage on a claim is the possibility of the insured asserting a bad faith claim. Advising the insured of the results of your origin and cause investigation may be useful in defending a bad faith claim.

In Minnesota, the standard for allowing a bad faith claim is pretty simple. Minnesota Statutes § 6-4.18, subd. 2(a) allows for extra contractual damages if the insured can show: (1) the absence of a **reasonable basis** is for denying the benefits of the insurance policy; and (2) that the insurer knew of the lack of a reasonable basis for denying the benefits of the insurance policy or acted in reckless disregard of the lack of a reasonable basis to do so. Under the first prong, courts consider whether the claim was properly investigated and whether the results of the investigation were subjected to reasonable evaluation and review. This is an objective standard. The second prong is subjective and turns on what the insurer knew or should have known and when. See Adam v. Stonebridge Life Ins. Co., 612 F.3d 967, 974 (8th Cir. 2010).

In our experience, informing the insured of incendiary findings early in the process has impressed the courts with regard to bad faith claims. It has shown courts that the company had a **'reasonable basis,'** both from an objective and subjective standpoint, for investigating the claim and rendering its claims decision. It can be argued that an insurance company is mandated to investigate suspicious fire claims but an early disclosure of these findings could rebut that argument. See generally, Minnesota Unfair Claims Practices Act. Minn. Stat. § 72A.201, subd. 4; see also State Farm Fire & Marine Ins. Co. v. A.P.I. Inc., 738 N.W.2d 401, 407 (Minn. Ct. App. 2007) (recognizing duty to investigate a claim in order to show good faith). Thus, disclosure of incendiary findings is often

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viewed by the court as the first step in establishing a 'reasonable basis' for a claims denial.

Early disclosure also helps shield a company from allegations of bad faith by helping it establish that it meets the exception to bad faith found in subd. 2 (c) of the statute. Minnesota Statutes § 604.18, subd. 2© provides: "[a]n insurer does not violate this subdivision by conducting or cooperating with a timely investigation into arson or fraud." Early disclosures of incendiary findings puts all parties on notice that there is an investigation into arson, thus providing for the exception under subd. 2(c).

Insurance companies could potentially have a complete defense to a bad faith claim under this exception, provided their investigation is timely.

In one recent case, the claims representative from the special investigation unit notified the insured of an inspection where potential destructive testing was going to occur. In that case, the origin and cause investigator was going to conduct an inspection with an electrical engineer. The special investigative unit notified the insured and invited the insured to attend the inspection. Later, once an origin and cause opinion was rendered, the insured was notified of that opinion and their rights to have their own investigator complete an investigation. Although none of these actions were mandated, it did prove very useful later in justifying the conduct of the company. When a bad faith claim was made, the company was able to successfully argue that they had kept the insured advised of the actions in investigating the claim and the fire scene. Further, when the attorney for the insured started mentioning bad faith, the judge, armed with the knowledge that the company had advised the insured of its origin and cause findings, made it very clear that she did not think this was a case of bad faith. The motion to add a bad faith claim was thus denied.

Early disclosure of incendiary findings is not an absolute bar to a bad faith claim, but can potentially be persuasive to the court. Making early disclosures will position insurance companies to argue that they had a **reasonable basis**, objective and subjective, for denying the insured's claim under subd. 2(a); and informing all parties of an investigation into arson shields insurance companies from bad faith claims.

Conclusion

In conclusion, we recommend insurance companies make early disclosures of the results of their origin and cause findings and let the insured know that they can retain their own experts. There is no downside and a potential upside to disclosing an incendiary origin finding to an insured.

Tony R. Krall, Attorney at Law, is a partner with the law firm of Hanson, Lulic & Krall. For more information regarding Hanson, Lulic & Krall and their practice, please visit their website at : www.hlk.com.



Please take a moment and pause to remember those that gave so much for us to enjoy the freedoms of this great nation. For all those that serve, thank you.

The Adventures of Lewey



It's a play date at Whitmore Fire Consultants, Inc.! Lewey's great uncle, 13-year old Cooper stopped by to spend the day with his more rambunctious 1-year old nephew. They both spent the day playing outside, sleeping under Amy's desk, and making sure that the UPS and the Fed Ex delivery people brought them both treats!

It's hard to believe that Lewey is one! So many changes, getting so big, and he is really understanding the rules of the office.

When you stop by . . . He will be here to greet you. Our one dog welcome wagon.

Sights from our Seminar—Back to the Basics!!



Steve Pfefferle and Jessica Allen of the law firm Terhaar, Archibald, Pfefferle & Griebel presented **Assembling Your Investigation Team.**



Jim Immattaio, Chief Investigator for the Minnesota Fire Marshal's Office presented **Interfacing with State and Local Officials.**



Doug Noah, CFI, Brian Haag, CFI and Brian Whitmore, CFI of Whitmore Fire Consultants, Inc. presented **Conducting the Origin & Cause Investigation.**



Matt Dubbin, PE of MSD Engineering presented on **The Role of the Forensic Electrical Engineer.**



Duane Wolfe, PE of Wolf Engineering presented on **The Role of the Mechanical Engineer.**

Sights from our Seminar—Back to the Basics!!



Larry D. Hanke, PE of MEE Engineering presented **The Role of the Metallurgical Engineer.**



Our esteem panel of professionals provided a forum to discuss the **Hot Topics in Fire Investigation.** L-R, Brad Ayers, Attorney at Law, Jim Immattaao, Deputy State Fire Marshal, Jim Onken, SIU Investigator, State Farm Insurance, Tim Poeschl, Attorney at Law with Hanson, Lulic & Krall, and Robert B. Whitmore, CFI, President of Whitmore Fire Consultants, Inc.



Dr. Robert Schroeder and Dr. Richard Pehrson of Schroeder Fire presented **The Role of Fire Spread/Fire Protection Engineers.**

On Friday, May 1st, 147 members of the insurance, legal, private and public investigation industries came together for a day of continuing education at our 15th Annual Educational Seminar, **Back to the Basics** held at the Legend's Golf Club in Prior Lake, Minnesota. The speakers and presenters are some of the most respected in the upper Midwest and the country and gave of their time and their talent to help educate not only the insurance industry, but also many local and state fire officials and investigators. Everyone who attended this seminar came away with the knowledge of the resources that are available here in the upper Midwest and how we all work together to come to our conclusions.

It goes without saying that the success of any educational seminar is definitely based on the quality of the presenters. We were so fortunate to have the best say "yes" when asked to give of their time and expertise. Thank you to Steve Pfefferle, Jessica Allen, Jim Iammatteo, Brian Haag, Doug Noah, Brian Whitmore, Matt Dubbin, Duane Wolf, Larry Hanke, Dr. Robert Schroeder, Dr. Richard Pehrson, Brad Ayers, Tim Poeschl, Jim Onken, and Robert Whitmore. The quality of your contribution to this program was significant to its overwhelming success.

So another year of our seminar is "in the books" and we look forward to next year. Stay tuned for our upcoming program announcement and invitation. Until then, thank you for your continued support. We value each of you as our business associate, but also our friend.

Note: Back to the Basics has been approved for "6" CLE credits. If you require credits for this program and tested, please provide your license # so we can submit on your behalf.

Minnesota International Association of Arson Investigators Present Award for Team Investigation



Congratulations to Jim Onken, SIU, State Farm Insurance, John Wehrs, State Farm Insurance, Brian Haag, CFI, Whitmore Fire Consultants, Inc., John Pagels, PE of Pagels Engineering, Detective David Watson of the Lakeville Police Department, Attorney Eric Woodford of the Olmstead County Attorney's Office for being recognized at the International Association of Arson Investigators Annual Meeting & Seminar held in St. Cloud this past March with the Team Investigation Award. This team of professionals were recognized for their outstanding investigation that led to the charging and conviction of an arsonist involving a vehicle in Olmstead County.

We are fortunate to have these type of investigators, engineers and county attorneys within our community. Terrific teamwork and diligent investigation resulted in a successful outcome. Congratulations from all of us at Whitmore Fire Consultants, Inc. for a great job!

News About Us

By Robert B. Whitmore, CFI, President Whitmore Fire Consultants, Inc.



So much of this newsletter has already been dedicated to the seminar, Back to the Basics, hosted by Whitmore Fire Consultants, Inc. on May 1st, but I wanted to add my few thoughts about the day and what we all collectively achieved. Bringing together the expertise and exceptional professionals to be a part of this day is no small task. This program was six months into the making and planning, ensuring that those that attend receive the highest quality of education and resources available and to obtain the CLE's needed for their continuing education requirements.

It simply amazes me that whenever we call and ask these busy experts to be a speaker at our seminars, they always say yes without hesitation. People often ask me why I bring in other experts to be a featured speaker at a seminar that we host at no charge to our clients as well as the public sector investigators in our communities and state? The short answer is that they're the best! It is our goal to be a leader in the industry not only in fire and explosion cause and origin investigations, but also be a good steward in our profession in providing the tools that each of us need everyday in order to perform our work in an ethical and responsible manner. By taking the time to teach the next generation of fire investigators, attorneys and fire department personnel and to provide insight in what we have learned during our collective years of experience, will ensure the viability and success of this profession, one that I love, far into the future.

The panel discussion, which is something we always try to include in our program, was a huge success as the questions to our panel members were as varied as the backgrounds of our attendees. A special thank you to everyone who played a role in this seminar, especially to Pam Whitmore and Amy Powell, as well as my team of investigators who walk the walk and talk the talk of team investigations everyday.

On another note, congratulations to Brian P. Haag, CFI and the other members of the Investigation Team Award presented by the International Association of Arson Investigators. Once again, teamwork and diligent investigation was key to the success.

I am humbled by the continued support and comradery of our colleagues in this profession and our clients. It is because of you that we are able to perform the jobs that we love with the people we respect.

Robert B. Whitmore, CFI
President

Whitemore Fire Consultants, Inc. Awards 2015 Leadership Scholarships



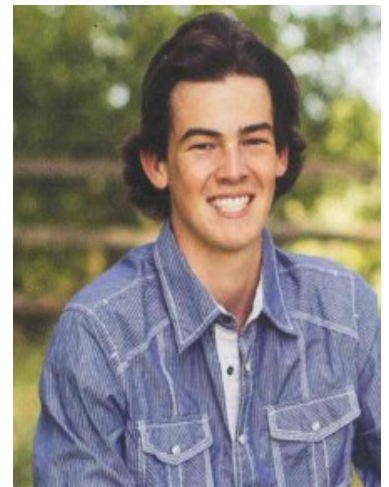
Spencer Haag



Jessie Emond



Michaela Emond



Carter Kes



Ryan Noah



Kevin Miller

Congratulations to this years '2015 Whitemore Fire Consultants, Inc. "Lead by Example" scholarship recipients. For the past 12 years, Whitemore Fire Consultants, Inc. has awarded deserving graduates with a monetary scholarship to assist in their higher education. This year, six students were recognized with this award.

Spencer Haag, Annandale High School. Spencer is the son of Rose and Brian Haag and a 2015 graduate of Annandale High School. Spencer will be continuing his education at Moorhead State University pursuing a degree in athletic training.

Carter Kes, Prior Lake High School. Carter is the son of Tana and Greg Kes and a 2015 graduate of Prior Lake High School. Carter will be continuing his education at Minnesota State College in Mankato, Minnesota.

Ryan Noah, Kenyon-Wanamingo High School. Ryan is the son of Jena and Doug Noah and a 2015 graduate of Kenyon-Wanamingo High School. Ryan will be continuing his education at Minnesota State College in Mankato pursuing a degree in law enforcement.

Jessie Emond, New Prague High School. Jessie is the daughter of Mike and Lynn Emond and a 2015 graduate of New Prague High School. Jessie will continue her education at North Dakota State pursuing a degree in forensic science.

Michaela Emond, New Prague High School. Michaela is the daughter of Mike and Lynn Emond and a 2015 graduate of New Prague High School. Michaela will continue her education at North Dakota State in the nursing program.

Kevin Miller, Lakeville North High School. Kevin is the son of Kelly and Al Miller and a 2015 graduate of Lakeville North High School. Kevin will continue his education at St. Olaf College in Northfield majoring in Economics.

It is an honor and a pleasure to recognize these young students for all of their achievements and hard work. Congratulations to both the graduate and their parents!

S L L C A L L S R E C A L L S

Viking Range Recalls Gas Ranges



The United States Consumer Product Safety Commission in cooperation with Viking Range, LLC of Greenwood, Mississippi has voluntarily issued a recall of certain models of their gas ranges. The ranges; ovens can turn on by themselves, posing a burn hazard to consumers.

Approximately 52,000 units were sold in the US and 8,300 in Canada at ABT, Ferguson, Morrison, Pacific Sales, PC Richard & Son and other stores nationwide from July 2007 through June 2014 for between \$4,000 and \$13,000.

This recall involves Viking Range freestanding gas ranges sold in stainless steel, black, white and 21 different colors and finishes. The ranges were sold in various surface configurations: All burners or burners with griddle and/or grill. The ranges are about 36 inches tall to the top of the side trim, 30, 36, 48 or 60 inches wide and 24.5 inches deep to the end of the side panel. The model and serial numbers can be found on a label in one of three locations: On the bottom of the control panel above the door, on the front of the oven cavity below the control panel, or on the inside of the left side panel; which can be seen by removing the left front grate and burner bowl. Consumers should only search for the model and serial number when the range is not hot. For a complete list of Model and serial included in this recall, please visit www.cpsc.gov and click on "recalls."

Viking Range has received 75 reports of gas ranges turning on by themselves, including three reports of burns and four reports of property damage claims, with one claim resulting in payment of \$850.

Consumers should immediately contact Viking Range to schedule a free in-home repair. For more information, please visit www.vikingrange.com and click on "safety recall information" at the bottom of the page.

SALES CALLS COFFEE RECALLS

Electrolux Recalls Kenmore Elite Ranges

The United States Consumer Product Safety Commission in cooperation with Electrolux Home Products, Inc. of Charlotte, North Carolina has voluntarily issued a recall of the Sears Kenmore Elite dual fuel ranges. The burner flame can go out while the gas is turned on. This can allow gas to escape and pose fire and burn hazards.

Approximately 250 units were sold at Sears stores nationwide from June 2014 through October 2014 for between \$3,200 and \$3,700.

This recall involves Sears Kenmore stainless steel slide-in ranges with gas cooktops and electric ovens. Model number 790.42603xxx with serial numbers ranging from AF42500601 through AF43000916 and model number 790.42613xxx with serial numbers ranging from AF42500541 through AF43103647 are included. The model and serial numbers are located on the inside frame of the range door on the left side. Kenmore Elite is printed on the front of the oven door. No reports of injuries or property damage have been reported.

Consumers should immediately stop using the ranges and contact Sears for a free inspection and free repair.

For more information, please visit www.sears.com and click on "Product "Recall" at the bottom of the page.



Kaldi's Coffee Roasting Recalls Cup Sleeves



The United States Consumer Product Safety Commission in cooperation with Kaldi's Coffee Roasting Company of St. Louis, Missouri has voluntarily issued a recall of the disposable cup sleeves. The cup sleeve can ignite if using a microwave posing a fire hazard.

Approximately 700,000 units were sold at Kaldi's Coffee Roasting stores in Missouri from February 2014 through March 2015 at not cost with hot drinks. Kaldi's has received two reports of the cup sleeves catching fire when heated in a microwave. No injuries have been reported.

This recall involves Kaldi's Coffee disposable paper cup sleeves used with 12- and 16-ounce paper cups. The

black paper cup sleeves have the "Kaldi's Coffee" and the company logo printed on the front, and "100% Recycled Paperboard" printed on the back.

Consumers should immediately stop using and discard the recalled cup sleeve. For more information, please visit www.kaldiscoffee.com and click on "recall".

WHITEMORE

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www.whitemorefire.com

Click on "registration", complete the form and press "submit". It's easy and you won't miss a thing!



Submit Your Loss Online

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.