PREPARING THE PRODUCT CASE FOR LITIGATION

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I.

II.INTRODUCTORY REMARKS

The first several days following a property loss in which a product is the suspected cause of the loss are the most crucial to the subrogation claim. Properly protecting and documenting the scene, hiring qualified experts, and preserving evidence in a product case immediately after the loss can strengthen a carrier's product liability case and prevent the defense from using a number of traditional tactics. Omissions in these areas can later prove devastating, or fatal, to a product claim.

This paper briefly summarizes Washington's Product Liability Act and the various claims it encompasses, and discusses a number of brief steps that a claims adjuster and/or subrogation specialist can take early in the adjustment process to maximize the overall efficiency and accuracy of the investigation, while minimizing potential defense arguments. These include securing and protecting the loss scene, retaining qualified experts, providing notice to potentially responsible parties, retaining applicable evidence and documenting the loss site, as well as evidence and exemplar examination. As a significant portion of product subrogation cases stem from fire losses, our focus here will be on fire claims.

III.

THE WASHINGTON PRODUCT LIABILITY ACT

Enacted in 1981, the Washington Product Liability Act codified a number of provisions of common law, altered others, and ultimately preempted all tort-based common law product liability remedies.[1] The Act defines a product liability claim as:

[1] Washington Water Power Co. v. Graybar Electric Co., 112 Wn.2d 847, 853, 774 P.2d 1199, 1202 (1989); Central Washington Refrigeration v. Barbee, 81 Wn. App. 212, 226, 913 P.2d 836, 843 (1996).

> [A]ny claim or action brought for harm caused by the manufacturer, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage or labeling of the relevant product. It includes, but is not limited to, any claim or action previously based on: Strict liability in tort; negligence; breach of express or implied warranty; breach of, or failure to, discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation, concealment, or nondisclosure, whether negligent or innocent; or other claim or action previously based on any other substantive legal theory except fraud, intentionally caused harm, or claim or action under the Consumer Protection Act ...[2]

The claims generally acknowledged to be authorized by the statute are for harm caused by the manufacture, construction, fabrication, production, design or marketing of the relevant product .[3]

The statute establishes a "useful safe life" of twelve years from the date of delivery, which creates a presumption that a product has exceeded its useful safe life after twelve years.[4] The statute does list several exceptions to this rule, however, in which a defendant may be held liable for harm caused by the product beyond the safe life period. These exceptions include situations in which:

> (1) The manufacturer or seller has expressly warranted the product may be safely used for a longer period;
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> (2) The manufacturer or seller intentionally misrepresents facts about the product, and the

[2] RCP 7.72.010(4).

[3] E.g., Stanton v. Bayliner Marine Corp., 123 Wn.2d 64, 866 P.2d 15 (1993).

[4] The presumption is rebuttable, however, and can be overcome by establishing - by a preponderance of the evidence - that the damage in fact occurred with the safe life period.

> misrepresentation proximately causes the damage complained of; or
>
> (3) The harm was caused by exposure to the product within its useful safe life, though the harm did not manifest itself until after the safe life had expired.[5]

In addition to satisfying the statute's useful safe life provisions, claims must be brought within three years of the date that the plaintiff discovered or should have discovered the damage and its cause.[6]

Though the elements of the different claims that can be brought under the Product Liability Act are not entirely uniform, they do overlap and share common characteristics. The standard for claims involving allegations of both defective design and inadequate warnings, for example, is one of strict liability.[7] Courts have routinely and uniformly applied a strict liability standard to these claims, despite the fact that RCW 7.72.030(l) does not specifically use strict liability language.[8]

The plaintiff in a product liability action alleging a defect in design must establish that the product was not reasonably safe as designed. In so doing, a plaintiff may utilize one of two different mechanisms: the risk-utility test, or the consumer expectation standard.[9] Under the

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[5] RCW 7.72.060(1)(b)

[6] RCW 7.72.060(3).

[7] Anderson v. Weslo, Inc., 79 Wn. App. 829, 906 P.2d 336 (1995); RCW 7.72.030(1).

[8] The relevant section of the Product Liability Act reads in pertinent part:

> 7.72.030. Liability of Manufacturers
>
> (1) A product manufacturer is subject to liability to a claimant if the claimant's harm was proximately caused by the negligence of the manufacturer and the product was not reasonably safe as designed or not reasonably safe because adequate warnings or instructions were not provided.

[9] Ayers v. Johnson & Johnson, 117 Wn.2d 747, 818 P.2d 1337 (1991); RCW 7.72.030(1)(a) and (3).

risk-utility test, a plaintiff must show that, at the time of manufacture, the likelihood and gravity of harm caused by the product outweighed any burden on the manufacturer to design a safer product.[10] Under the consumer expectation standard, a plaintiff must establish that the product, as contemplated by a reasonable consumer, is unsafe.[11] Either method can be utilized to establish that the product was not reasonably safe under the statute! [12]

Analysis of a failure to warn claim is nearly identical. A plaintiff alleging failure to warn must establish that the warnings were deficient to such an extent that the product was not reasonably safe. As with claims of design defect, either of the risk-utility or consumer expectation tests may be used to establish that the product was not reasonably safe.[13]

It is important to note that to successfully argue that a product is unreasonably unsafe, the plaintiff must establish that the product was in a defective condition, unreasonably dangerous to prospective users, at the time the product left the control of the manufacturer. [14] As such, it is incumbent upon the plaintiff to establish that the product was not damaged, misused, or altered in such a manner as to sufficiently change the condition of the item from that in which it left the manufacturer. As discussed later, examination and testing of the product, along with exemplar testing and analysis as appropriate, often prove crucial in this regard.

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[10] Bruns v. Paccar, Inc., 77 Wn. App. 201, 890 P.2d 469 (1995); RCW 7.72.030(1)(a)

[11] Id., RCW 7.72.030(3).

[12] It should be noted that the simple fact that a product is found not unreasonably dangerous does not necessarily preclude a finding of negligence on the part of the manufacturer. Accordingly, it is possible for a product to be deemed "reasonably safe", thereby removing the specter of strict liability, at the time it left the manufacturer's hands. The manufacturer, distributor, or seller, however, can still be found liable in simple negligence.

[13] Ayers, supra, 117 Wn.2d at 759-60; Anderson, supra, 79 Wn. App. At 838; RCW 7.72.030(1)(b)and (3).

[14] Davis v. Globe Machinery Mfg. Co., Inc., 102 Wn.2d 68, 684 P.2d 692 (1984).

Manufacturers are also strictly liable for defects in the assembly, construction, or fabrication of a product if the unit is not reasonably safe in construction or fails to conform to applicable warranties.[15] The statute provides that a given product is unreasonably dangerous in construction if -- when the product leaves the control of the manufacturer -- it materially deviates from design specifications, performance standards, or deviates "in some material way from otherwise identical units of the same product line.[16]

As is clear from the statute and the issues discussed above, the condition of the product itself is of paramount importance in the vast majority of product liability cases. Accordingly, the remainder of this paper focuses on simple steps that the insurance representative can take to ensure that the product and fire scene are properly safeguarded and investigated, and the product claim is thoroughly and properly prepared for litigation.[17]

IV.

PROTECTING THE LOSS SITE

Protecting the loss site is the first, and most important, step in the preparation of a product case for litigation. Absent proper scene preservation, determinations as to the cause and origin of the loss, as well as the accuracy of any future testing, can be severely compromised if not precluded entirely. Additionally, failure to properly preserve the scene will almost certainly be seized upon by a defendant as a primary defense in the litigation. It is therefore of paramount importance that the loss scene, particularly in those cases involving damage caused by fire, be preserved. There are a number of individuals and entities, not all of whom are always considered, from whom the scene must be protected.

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[15] RCW 7.72.030(2).

[16] RCW 7.72.030(2)(a).

[17] A checklist of those steps which should be undertaken by the insurance employee to properly preserve the product case for litigation is attached hereto as Exhibit A.

A. PROTECTING THE FIRE SCENE FROM THE INSURED

Scene and evidence destruction by the insured can be the most difficult -- and certainly most frustrating -- problem to avoid in protecting a loss scene. Particularly as to personal lines claims, insureds understandably seek an expeditious cleanup process and will often take matters into their own hands if they do not believe that restoration and repairs are proceeding quickly. It is therefore crucial that the subrogation process and the importance of maintaining the integrity of the loss site be explained to the insured shortly after the loss. Most standard form property policies have cooperation clauses which require the insured to cooperate with the carrier during the course of the adjustment. Additionally, subrogation clauses in many policies contain language forbidding the insured from performing any post-loss act that adversely impacts the carrier's subrogation rights. Both clauses certainly apply.

In addition to citing these provisions of the policy, a more practical (and positive) approach is to advise the insured that a successful subrogation action will ultimately result in the reimbursement of their deductible, and could potentially provide an avenue toward the recovery of any uninsured losses. If the claim is being handled by an outside adjuster, it is important to ensure that the adjuster relays this information to the insured. As the adjuster will likely speak with the insured on a regular basis in the days immediately following the loss, occasional reminders should be made to the insured about the need to preserve the integrity of the loss site.

B. PROTECTING THE SCENE FROM THE FIRE DEPARTMENT

Ironically, the agencies responsible for firefighting and containment in the typical fire loss are commonly culprits in destroying evidence crucial to a subrogation claim. Such is often the case because the interests of a property carrier and the agency responsible for fighting the fire are perceived as divergent. As a general matter, the responding fire department is first concerned with protecting life and property, and then determining if the fire was a result of criminal activity. The property carrier, while certainly interested in these issues, particularly as relating to insurance fraud, is also interested in preserving the scene as much as possible for a potential subrogation case, as well as determining if the loss was caused by a covered risk. Conflict most

commonly manifests itself when public officials treating a fire or loss scene as a potential crime scene exclude others including the carrier's cause and origin investigators - from entering the scene until the investigating agency's work has concluded. While this would pose little problem if the investigating agency did little or nothing to after the scene, it is the more common occurrence for the firefighting and/or investigative agency to remove or damage evidence, and otherwise significantly after the fire scene in its efforts to ensure complete suppression.

More experienced cause and origin investigators are well aware of these problems. Many have their own contacts within the local agencies and can ensure cooperation with little effort. This is even further the case when the fire is quickly determined to be accidental in nature and arson or foul play is ruled out. In these situations, public officials will often utilize the services of the cause and origin expert hired by the carrier as much as possible to compensate for their own staffing and resource limitations.

Particularly for local fire losses, the insurance representative can often overcome many of these potential obstacles by hiring cause and origin experts whom he or she knows from prior experience to have acquaintances within and a cooperative relationship with the local firefighting and investigative agencies. In the more difficult scenarios, it is best to suggest that the private investigator request an informal meeting of sorts with the public investigators to coordinate their respective investigations. Alternatively, if the scene is cordoned off as the result of a belief that a crime has been committed, requests should be made to the investigative officers in charge to alter the scene as little as possible.

C. PROTECTING THE SCENE FROM THE CURIOUS, THE MISCHIEVOUS, AND THE ELEMENTS

Particularly in populated areas, children and other curious sorts are often drawn to the scene of a fire. To properly preserve the scene, as well as avoid the risk of any potential for liability exposure as a result of individuals entering the damaged property and suffering injuries, steps should be taken to limit access to the scene. Additional damage from wind, rain, freezing,

or snow can also compromise the integrity of the scene and provide further grounds for attack of expert theories as to cause and origin.

Boards, fences, tarps and the like can usually serve the purpose in relatively small losses where the building is left with reasonable structural integrity. In larger dollar losses, it may be worth the several hundred dollars in expense to hire a security firm to patrol the protected area in the late night and early morning hours. Appropriate precautions should be evaluated on a case-by-case basis in consideration of the damage to the structure, the potential for compromise of the fire scene, and the perceived value of the subrogation claim.

Taking these and other steps to preserve the loss site will serve a number of functions. As an initial matter, it will ensure that the scene remains as similar as possible to that which existed prior to and during the loss, hopefully allowing cause and origin investigators to locate the point of origin, and allowing additional experts to be retained, as necessary, to pinpoint the precise cause of the loss. Additionally, preserving the loss site until a target defendant can be placed on notice of a potential claim and afforded an opportunity to conduct its own investigation generally serves to preclude later claims of evidence spoliation or scene preclusion. Early scene preservation also serves to diffuse any defense arguments that the cause and origin investigation was flawed in that the conditions examined were not accurate.

V.

HIRING APPROPRIATE EXPERTS

Many product liability cases ultimately become a battle of the parties' respective experts. It is therefore critical that the carrier hire experts that are reputable, experienced, and possess the specialized knowledge necessary to qualify him or her as a true expert in the particular field. Additionally, the proper investigation of a loss site and preservation and testing of evidence or exemplar units often requires more than a single cause and origin expert. Establishing and documenting the cause of a loss often requires the expertise of one or more specialists in a particular area.

In most subrogation cases, it is inadvisable to simply rely upon the conclusions of the investigative public agency. As referenced above, losses deemed "accidental" in nature are generally not investigated with the same rigor and degree of thoroughness as those fires in which criminal activity is suspected. Many rural and volunteer fire departments do not employ more experienced and skilled investigators. Other than in the simplest of fire losses, and perhaps not even in those situations, it is imperative to hire a private cause and origin investigator.

While a qualified cause and origin fire investigator, with the appropriate experience, is generally appropriate for a determination as to where a fire originated, these investigators are certainly not always competent to testify why the fire started. It is often necessary to retain the services of additional experts to further pinpoint the source and cause of the loss, and explain the causal mechanism that ultimately led to the fire. This is nearly always the case in the context of product subrogation.

As an initial matter, it is important to remember that the expert(s) hired by the carrier may ultimately be required to testify if the matter proceeds to trial. The Rules of Evidence establish certain prerequisites and conditions that a testifying expert must meet for his or her testimony to be admitted. ER 702 reads in pertinent part:

> **Rule 702. Testimony by Experts**
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> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

It is therefore important to ensure that the experts hired by the carrier in fact possess the requisite experience and training to ensure that they will in fact be deemed qualified to testify. Again, particularly with regard to product evaluation, many areas of expertise are quite specialized, and the insurance representative should therefore not assume that, by virtue of an engineering degree, a particular expert is qualified to testify regarding any particular product.

The case of Tokio Marine and Fire Ins. Co., Ltd. v. The Grove Mfg. Co. , 762 F. Supp. 1016 (D. Puerto Rico 1991) is illustrative of the need to ensure that appropriate experts are hired for their respective tasks. In this particular subrogation case, Tokio Marine moved for qualification of an expert to testify as to alleged design and manufacturing defects of a crane manufactured by defendant Grove Manufacturing. The offered expert, Alterman, "had many years experience in investigation of buildings, structures and civil works," and had a BS in civil engineering.[18]

The court determined that Alterman lacked sufficient specialized education and work experience to qualify him as an expert in the area of crane design and manufacturing, noting that a mechanical engineer would be a more appropriate expert witness. The court stated that a "true expert" on crane defects would be an individual with prior experience in the design and manufacture of cranes, a mechanical engineer, or someone with teaching experience in these subjects. The court, in a quotation that is particularly illustrative of our point here, stated:

> An investigator in accidents is not an expert in the fullest sense of the word.[19]

This case highlights the need to ensure that those experts hired to determine a precise defect - be it design, construction, or failure to warn - in a product case be sufficiently educated, experienced, and otherwise appropriate to later provide testimony. Obviously, the desired qualifications of any additional experts hired after the initial cause and origin expert will depend upon the suspected cause of the loss. Electrical and mechanical engineers are perhaps the most common specialized investigators that come into play in products cases. In the case in which a small kitchen appliance is the suspected source of the loss, for example, an electrical engineer will often need to trace the source of power to the unit back to a breaker panel or power box, to

[18] 762 F. Supp. At 1016.

[19] Id. at 1018.

determine if breakers were tripped before, during, or after the fire. If a gas powered water heater is the suspected source of the fire, a gas and fuel expert and/or a mechanical engineer with experience in investigating gas appliance failures should be hired to ensure that all applicable parts and equipment are removed, to test gas line pressures, and perform any other associated testing necessary in order to help him or her later reach a final determination as to the cause of the loss.

It is, unfortunately, a common occurrence for a specialized expert to receive a product that is the suspected cause of a loss for testing, only to find that appropriate on-site tests were not performed and necessary component parts were not retained that ultimately are crucial to the specialized expert's examination and investigation. It is therefore of paramount importance that specialized experts in product cases be hired as early in the process as possible, ideally providing the expert the opportunity to view the fire scene with the cause and origin investigator before the scene is altered.

VI.

PLACING POTENTIAL DEFENDANTS ON NOTICE

An emerging trend in product liability defense is the claim that the defense was not afforded a true and complete opportunity to conduct its own investigation by virtue of its exclusion from the loss site. While the most common case in which a defendant is not given an opportunity to view the loss scene involves simple oversight, or the fact that the defendant was not identified until some time after the loss, defendants often take the position that their absence from the loss site is manifestly unfair and ultimately prevents them from presenting a full defense. While this argument has generally been dealt with on a case- and fact-specific basis, there are a few simple steps that can be taken to obviate any potential problems. Notice is one such step.

It is generally easier to determine the identity of a potential defendant in a product case than in many other types of claims, as the product that is the suspected cause of the loss - if not

suffering too much damage - will often have the name of the manufacturer along with identification markings stamped or painted on the unit itself. The identity of a potential defendant in a product liability case is therefore often determined very early in the process. In such a situation, even if specialized experts have yet to conduct their examination and conclusively determine that the product is indeed the cause of the loss, the manufacturer should be placed on notice.

The process of placing a manufacturer on notice of a potential claim and affording representatives an opportunity to view the loss site can be performed relatively quickly and painlessly, and can prevent problems later in the litigation. It is recommended that the insurance representative simply contact the potential defendant by telephone, obtain an address and facsimile number for the risk management and/or legal department, and then briefly advise the a representative of the potential defendant of the situation by telephone. A one-paragraph confirmation of the conversation, sent via facsimile, will later confirm that the defendant was indeed put on notice shortly after the loss and provided an opportunity to view the scene. The notice letter should generally provide a fixed date until which the scene will be preserved for the manufacturer, and should explain the need to expedite the process so damages can be mitigated. A sample letter is attached hereto as Exhibit B. A copy of the letter should be kept in the claims file, and later forwarded to subrogation counsel.

VII.

DOCUMENTING THE LOSS SITE AND RETAINING EVIDENCE

When all experts have completed their on-site investigation and potential target defendants have been placed on notice and afforded an opportunity to view the scene, then the important process of removing items of physical evidence and further documenting the loss site should be undertaken. While it has historically been somewhat common for cause and origin investigators to simply remove the item that is suspected to have caused the loss, and little else, emerging defense trends indicate this approach is insufficient. Particularly in cases in which the

precise identification of -- and therefore notice to -- potential defendants is not possible, ensuring that sufficient physical evidence is retained and appropriate documentation is made is crucial to the litigation. Additionally, proper documentation and retaining of evidence will ensure that later testing, as necessary, will be as complete and accurate as possible.

As referenced previously, many of the steps discussed in this paper are undertaken for the purpose of avoiding later claims by the defense. One such claim that is gaining increasing notoriety is that of evidence spoliation. Spoliation is, generally, the destruction, loss, or material alteration of evidence or potential evidence by an act or omission of a party in pending or future litigation .[20] The subject of spoliation is an entire topic in and of itself, and is also addressed in part in the materials provided by Mark Anderson, supra. As such, a lengthy explanation of the spoliation doctrine is not provided here. Suffice it to say that the trend is increasing and one can expect defendants in product claims to continue to seek the exclusion of evidence offered against them as sanction for a plaintiff's failure to preserve evidence.

The Washington Court of Appeals has recently provided some guidance as to how the spoliation trend will affect litigation in the State of Washington. The Court of Appeals in Henderson v. Tyrell, 80 Wn. App. 592, 910 P.2d 522 (1996), suggested that several factors should be considered in determining whether discovery sanctions are appropriate for evidence spoliation. As an initial matter, the court noted that the spoliation itself must be in some way attributable to the party against whom the sanction is directed.[21] The significance of the missing or altered evidence to the parties' respective cases is to be considered.[22]

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[20] County of Solano v. Delancy, 264 Cal. Rptr. 721 (Cal. App. 1989); Miller v. Montgomery Cy., 494 A.2d 761, 767 (Md. Ct. of Special App. 1985).

[21] 80 Wn. App. At 606.

[22] Id. at 607.

Culpability of the party, including whether the party acted in bad faith or conscious disregard of the significance of the missing evidence, is also to be evaluated.[23]

By enunciating these factors to be considered, the court implied that the decision of whether to impose sanctions for the failure to preserve evidence is to be made on a case-by-case basis, considering the individual facts and circumstances of the particular case. As such, each step taken by the insurance company that indicates a good faith attempt to preserve all necessary evidence will serve to minimize any perceived culpability, and hopefully preclude sanctions. With this in mind, there are a number of steps that can and should be taken to minimize the potential for spoliation claims. These steps should be taken irrespective of whether the potential target defendant(s) participated in an on-site investigation.

A. DOCUMENTING THE SCENE WITH PHOTOGRAPHS

It is imperative that the scene be photographed extensively before, during, and after the site investigation and removal of physical evidence. General photographs of the exterior of the structure, from all directions, should initially be taken to provide perspective to experts and fact witnesses, as well as the trier of fact. The interior of the building should then be photographed from the very general to the very specific, eventually focusing on areas involving significant burn patterns or other critical evidence. Obviously, the area of suspected origin should be photographed extensively from a number of directions and angles. Areas that are not in the area of suspected origin should be photographed as well, however, to later provide visual documentation to further establish the point of origin and rule out other areas. The, suspect product should be photographed in its precise location and position from all angles, showing its relationship among other potential ignition sources, before being moved. Additionally, any other potential sources should be photographed extensively.

[23] Id. at 609.

There are a number of miscellaneous considerations that should be considered in photographing the loss site. It is important that items of interest that tend to provide further description of the situation be photographed, in addition to the general photographs of the loss site and area of origin. Examples are photographs illustrating a toaster oven on/off switch in the "on" position, or a photograph of a breaker panel showing one or more breakers tripped. Photographs such as these may ultimately provide the only illustrative evidence that fully document the loss site.

Additionally, photographs should be taken during the removal of any evidence that is ultimately retained. Again, these items of evidence should be photographed in their original position; additionally, photographs should be taken that illustrate what steps were taken in removing these items. The area in which the items rested before their removal should also be photographed after the items are removed from the scene.

B. REMOVING PHYSICAL EVIDENCE

As referenced throughout, it is critical that the carrier and its experts do all possible to create the appearance of good faith and cooperation to avoid potential defense arguments relating to spoliation and scene preclusion. Accordingly, as to removing evidence from the scene, "more is better." While the Henderson case cited previously suggests there are no clear rules as to precisely how much evidence needs to be retained in a given case, it is clear that the matter will be decided on a fact-specific basis. As a general matter, it is therefore suggested that experts retain any and all potential sources in the general area of origin.

By way of example, in a case where a coffee maker is the suspected source of the loss, the coffee maker should of course be retained.[24] Additionally, any and all electric appliances in

[24] Failure to preserve the product itself is, except in the rarest of circumstances, almost certainly fatal to a products claim. The likely remedy to a defendant who has not been given the opportunity to view or examine the product before its destruction or disposal is to preclude the plaintiff from presenting evidence regarding the product's alleged failure, effectively destroying plaintiff's case. The Ninth Circuit Court of Appeals affirmed such a sanction in Unigard Sec. Ins. Co. v. Lakewood Engineering & Manufacturing Corp., 982 F.2d 363 (9th Cir. 1992), in

the area near the coffee maker should be retained, along with any associated wiring. If the entire kitchen has suffered burn damage, it is safest to retain and store each appliance, and all associated electrical wiring, from the entire kitchen area. Again, it is irrelevant that the carrier's experts do not believe these additional items are responsible. Retaining these items will prevent the defendant from pointing the finger at other products, as these additional items can later be scientifically ruled out by appropriate testing and examination.

C. DOCUMENT MISCELLANEOUS ITEMS

Ensure that all component parts and miscellaneous factors are examined, tested, and documented as appropriate. Additional work needed to be performed will of course depend on the product that is the suspected cause of the failure. Factors to be considered in gas-powered appliance losses, for example, are gas line pressures, the condition of gas lines and pipes, the condition of regulators, and the like. In the case of a furnace fire, a photograph of the heat control showing the temperature setting, and the simple fact that the furnace was indeed non" at the time of the fire will provide further support for a later case. More experienced experts will generally undertake these tasks as a matter of course; regardless, the insurance representative should ensure that these miscellaneous items are considered, evaluated, and documented.

VIII.

PRODUCT AND EXEMPLAR TESTING

Simply establishing that a fire originated in or around a product is generally insufficient to carry a case under Washington's Product Liability Act. Most courts will require that a plaintiff in a product case present evidence as to why and how the particular product failed, with limited exceptions. As referenced previously, the Washington Product Liability Act requires, for strict

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which the plaintiff failed to preserve the heater that was the subject of the litigation. The court agreed with the district court's ruling that "Plaintiff's destruction of key evidence renders a full defense impossible," and affirmed the district court's preclusion of the plaintiff's expert testimony.

liability to attach, a showing that the product was defective and unreasonably dangerous when ft left the manufacturer's hands or, alternatively, that the manufacturer was negligent in some manner. Simply alleging that a fire originated within a particular product will generally be insufficient to meet this standard.

The case of Bombardi v. Pochel's Appliance and T.V. Co., 10 Wn. App. 243, 518 P.2d 202 (1974) may be partially to blame for any misconceptions in this regard. The Bombardi case involved a used television -set purchased by the plaintiffs from defendant Pochel's. The set was originally sold by the manufacturer, Admiral Corporation, to a non-party in February of 1967. Evidence established that Pochel's was the sole service company that performed work on the unfit until it was traded back to Pochel's by the original owner and resold to plaintiffs in January of 1970. Two months after plaintiff purchased the unit from Pochel's, she was awakened in the early morning hours by smoke and saw that the television set was on fire. Plaintiffs thereafter sued Pochel's and Admiral Corporation for property damage caused by the fire. After judgment was entered for plaintiffs, defendants appealed, alleging plaintiffs did not meet their burden of establishing proximate cause.

The television set was destroyed by the fire; accordingly, ft was not possible to determine what particular defective component was responsible for the malfunction and subsequent fire. The court pointed out that "the mere fact of an accident, standing alone, does not generally make out a case that a product was defective.[25] The court stated, however, that common experience dictates that some accidents do not ordinarily occur without a defect, and therefore permitted an inference that the product was defective. The court ultimately concluded:

> Under the circumstances, the conclusion is inescapable that the television was defective because it performed in an unreasonably dangerous

[25] 10 Wn. App. At 246.

> manner, and in a manner uncontemplated by any user or consumer. [26]

It is widely accepted that this case has little, if any,. precedential value. As an initial matter, the case was decided well before the enactment of the Product Liability Act. The Bombardi court noted that the term “defect" had not been uniformly defined, a problem remedied by the enactment of the Act. Additionally, the court pointed out that evidence presented at trial suggesting the set was in the same condition as when it left the control of the manufacturer was uncontradicted and not objected to by defendants, a rarity in modern-day product litigation. Additionally, in this particular case, plaintiffs witnessed, first-hand, the television set actually on fire.

It is therefore possible that the Bombardi case can, in a fire loss with substantially similar facts where an insured or another non-party witness actually witnesses the suspected product malfunctioning, prove helpful. As a general matter of course, however, it should be assumed that the Bombard case will provide little help and that, accordingly, a precise failure mechanism should be determined during the course of or prior to litigation.

It is therefore generally necessary for a specialized expert to conduct some level of testing of the subject unit, often including destructive testing and dismantling of the product, to conclusively determine that the product was indeed responsible for the fire. Consistent with the recent defense trends in product cases, the insurance representative should confirm with its experts, both orally and in writing, that the experts will retain the evidence and perform no destructive testing whatsoever until instructed otherwise. Destructive testing can be defined as that which materially alters the physical condition of the subject evidence. Again, potential target defendants should be afforded an opportunity to participate in any testing of the subject unit, and written confirmation of this opportunity to defendants should be made and retained. A sample letter to this effect is attached hereto as Exhibit C.

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[26] 10 Wn. App. At 246.

Particularly in cases alleging defective product design, exemplar testing is commonly necessary to conclusively determine the mode of failure. In that regard, it is important to identify and obtain similar or identical products and models for later testing. While this can usually be accomplished by a simple visit to a retail outlet that carries the subject product, or ordering the product from an unsuspecting manufacturer, it is often the case that the insured itself has another similar or identical product. It is recommended that experts photograph and videotape the testing performed on exemplar units. Videotape illustrations of a unit failing during exemplar testing can be particularly convincing and illustrative in the expert's presentation to the trier of fact.

IX.

CONCLUSION

Though the days immediately following a property loss are generally the most hectic during the adjustment and life of any particular. property claim, they are the most crucial with regard to product subrogation. The steps discussed above can generally be accomplished in very little time, with very little effort, but can make the difference between success and failure of the product claim.

PRESERVING THE PRODUCT CASE-THE FIRST 24-72 HOURS FOLLOWING A TYPICAL FIRE LOSS

I. FIRST STEP-PROTECT THE LOSS SITE

☐ **Fire Department**: Coordinate with investigators and obtain cooperation of agency in preserving scene.

☐ **Insured:** Inform insured of need to preserve loss site and their obligation to cooperate.

☐ **Vandals, trespassers, and the elements**: Utilize fences, barricades, and other precautionary measures as necessary to ensure access to the scene is restricted and the scene is protected from the weather.

II. SECOND STEP-RETAIN EXPERTS

☐ **General Investigator** -- To determine the cause and origin of the loss.

☐ **Specialist** -- To further pinpoint cause and ensure that proper items are retained, photographed and tested. If at all possible, have the specialized expert participate in the on-site investigation.

III. THIRD STEP-NOTICE TO POTEN11ALLY RESPONSIBLE PARTY

☐ **Locate appropriate representative** of party (e.g., legal department) and inform of the situation by telephone if possible.

☐ **Confirm the conversation** in writing via facsimile and regular mail.

☐ **Request,** in writing, that the potential target defendant inform their carrier of the situation, and emphasize that time is of the essence.

IV. FOURTH STEP-RETAIN EVIDENCE AND DOCUMENT LOSS SITE

☐ **Photograph scene extensively.**

1. Origin of the fire and specific evidence responsible for the loss.

2. Remainder of facility-portions of the loss site not necessarily in the area of suspected origin should also be extensively photographed. Other potential sources of the loss, even if not likely causes, should be photographed.

3. Miscellaneous considerations-photograph items of interest that tend to provide further description of the situation. E.g., toaster oven switch in "on" position, breaker panel with breakers tripped, etc.

4. Removal of evidence-ensure that photographs document the manner in which items of evidence were removed.

☐ **Removing physical evidence --** ensure that all potential sources, even those unlikely to be the actual cause, are removed from the general area of origin.

☐ **Document miscellaneous Items --** be sure that component parts and miscellaneous factors (eg, gas line pressure in a furnace explosion) are noted, tested, and documented as appropriate.

☐ Confirm with the expert in writing that he/she will retain the evidence, and win perform no destructive testing until instructed to do so.

First National Insurance Company
5678 Hillside Dr.
New York, NY 22011
(212) 333-4444

May 13, 1997

VIA FACSIMILE AND U.S. MAIL

ABC Manufacturing
Attn: Legal Department
1234 Center St.
New York, NY 22022

Re:	Insured:	George and Phyllis Johnson
	Claim No.:	55511122
	Date of Loss:	2/4/97
	Loss Location:	555 2nd St. Bellingham, WA 99085

Dear Sir or Madam:

This letter confirms my telephone conversation of earlier today with George Smith of your legal department regarding the above-referenced fire loss.

First National insures the Johnsons, whose home was recently destroyed by fire. This fire at 555 2nd St., Bellingham, Washington, broke out in the early morning hours of February 4, 1997. While we are still in the early stages of our investigation, it appears that one of your products, the Toastmaster 2000, may have been responsible for the loss.

Accordingly, we are affording you an opportunity to view the subject loss site before the scene is altered. Our insured, understandably, is eager to get the repair and restoration process underway. Accordingly, we will hold the scene for you for seven days, until May 20, 1997, for your review. We will begin renovations and repairs on May 21. If you or your insurer would like to have a representative visit the loss site, please contact me at the above number as soon as possible.

Very truly yours,

FIRST NATIONAL INSURANCE COMPANY

Michael Jones
Claims Representative

MJ/xyz

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5678 Hillside Dr.
New York, NY 22011
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May 13, 1997

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ABC Manufacturing
Attn: Legal Department
1234 Center St.
New York, NY 22022

Re:	Insured:	George and Phyllis Johnson
	Claim No.:	55511122
	Date of Loss:	2/4/97
	Loss Location:	555 2nd St. Bellingham, WA 99085

Dear Sir or Madam:

As you are aware, First National insures the Johnsons, who suffered a fire loss on February 4, 1997 at 555 2nd St., in Bellingham, Washington.

We have retained certain items of physical evidence from the fire scene, including a Toastmaster 2000 which, to our understanding, is manufactured by your company. Our experts plan to conduct additional evaluation and testing of these items of evidence, which may involve some disassembly, and currently have scheduled an examination date of July 21, 1997, at their offices here in Seattle. We invite you to participate in this examination.

Please contact me at the above number if you would like to have an expert present at the examination.

Very truly yours,

FIRST NATIONAL INSURANCE COMPANY

Michael Jones
Claims Representative

MJ/xyz

PHILA1\1310702\1 099991.000
09/28/00 6:35:00 pm