

SUBROGATION ACTIONS AGAINST MANUFACTURERS: PRACTICE TIPS AND PITFALLS TO AVOID

Presented By:

Jason Schulze

Rick Maleski

IDENTIFICATION OF POTENTIAL CLAIM

- Immediately after Loss: determine whether a scene inspection is necessary!
- If the evidence is in its original post-loss condition, a joint scene inspection may be beneficial.
- Considerations: Evidentiary value of inspection, spoliation concerns.
- If you decide a scene inspection is warranted: secure and identify manufacturer!

IDENTIFICATION OF PRODUCT

- Some products are easy to identify—they will have a manufacturer's name or mark prominently displayed.
 - If not, think about alternative methods to identify manufacturer.
 - Examples: purchase documentation from insured, model/serial number search in database, conversations with prior repair/installation contractors.
- Once identified, consider whether to notice other entities in stream of commerce.
 - Retailers, suppliers, importers, distributors, even installers who supply the product may all qualify. Consider placing them on notice and inviting them to participate in the investigation.

NOTICE CONSIDERATIONS

- Once identified, determine how to properly notice manufacturer/others.
 - Primary strategies involve searching the target’s website and searching state(s)’ corporations websites. The former will often have a mailing address and the latter will generally have both a mailing address and a registered agent’s address.
 - Generally, try to send notices to the primary mailing address—the registered agent should only be used when complying with statutory notice provisions and filing suit.
 - To speed up internal process, address notice letter to “Legal/Risk Management”, etc.
- Some states have statutes requiring disclosure of liability coverage information if requested in a notice letter. If yours does, include the request.

RESPONSE TO NOTICE LETTER

MANUFACTURER

- Often from an attorney/legal Department
- Large list of supplemental requests
- Often has own internal experts

CONTRACTOR

- Often from owner
- Immediate liability denial/refusal to acknowledge
- Refusal to submit to liability carrier common



Law Department

ADMINISTRATIVE CENTER • 2000 NORTH M 63, MD3603 • BENTON HARBOR, MI 49022

August 29, 2019

Cozen O'Connor
200 South Biscayne Boulevard Suite 3000
Miami, FL 33131
Attention: Richard Maleski

RE: Claimant: Pure Insurance a/s/o Judith Bostic
Our File #: M-19-273796
Date of Loss: 08/21/19
Your File #: FL016203

Whirlpool Corporation is committed to a policy of fair and cost efficient dispute resolution. In the event a resolution of this matter cannot be obtained through direct negotiation, it may be a candidate for mediation, arbitration or some other form of Alternative Dispute Resolution (ADR). **Before you file suit, please contact me about the possibility of pre-suit ADR.**

Dear Richard:

This office has received notice of a loss, that allegedly resulted from one of our manufactured products. If a Whirlpool manufactured product or component is involved, you must protect and preserve it for inspection. If this claim is based upon a fire loss, you must also protect and preserve the fire scene for examination by a Whirlpool representative. **ALL EVIDENCE, INCLUDING THE PRODUCT AND/OR PART, MUST BE PRESERVED AND MADE AVAILABLE FOR OUR INSPECTION.**

To process this claim, we need to receive the following information via regular mail. Whirlpool is unable to print multiple pages of subro documents. Please send it to my attention at Whirlpool Corporation, Law Department, 2000 North M 63, MD 3603, Benton Harbor, MI 49022:

- Theory of defect.
- Is the scene still available?
- A copy of the fire department report.
- A copy of your expert's report.
- Was the cooktop in use at the time of the fire? If not, when was it last used?
- Was there any flammable material being stored on the top of the cooktop at the time of the fire?
- Date purchased, date installed, name of installer & where purchased.
- A legible itemized list of damages, with age of the damaged items.
- Original prints of all photographs, videos, digital pictures taken of the product and surrounding area.
- Copies of all recorded statements, written and/or taped, of claimant(s) and witnesses.
- Service ticket naming the alleged defective part.
- Forward alleged defective part for non-destructive testing and/or identification of the supplier for tendering purposes.
- Proof of payment or copy of subrogation receipt.

Standards E 860-97 and E 1188-05 promulgated by the American Society for Testing and Materials (ASTM), and NFPA 921 promulgated by the National Fire Prevention Association, prescribe simple procedures regarding the preservation of evidence that, if followed, afford all interested parties a fair opportunity to examine evidence of incidents that may result in product liability litigation. In accordance with those standards, as applicable, Whirlpool asks that, in any future examination, testing, collection, handling, or movement of evidence that may become the subject of product liability litigation between you or your client and Whirlpool Corporation, you take the following steps:

1. Please document the nature, state, and condition of the evidence by descriptive, photographic, or other suitable methods prior to any test, examination, disassembly, or alteration, and determine and document whether the evidence has changed, or has been altered, since the incident.
2. If any test, examination, or other action to be performed by you or your representative is likely to alter the nature, state, or condition of the evidence so as to preclude or adversely limit similar, or further meaningful, examination

and testing, including any moving, disassembly, sampling, or removal of a fire damaged appliance or its contents, or any demolition or dismantling of, or removal of items from, fire-damaged premises, please:

- If you represent a client or an insured, notify that person that the action to be performed is likely to have the effect described above on the evidence;
 - Recommend that all interested parties be notified of the action you plan to perform; and
 - Recommend that Whirlpool Corporation and all other interested parties be given the opportunity to undertake the procedure described in numbered paragraph one above, and to witness and record any action to be performed.
3. If compelling reasons exist for the performance of unilateral testing, examination, disassembly or other action without notification to Whirlpool and other parties in interest, such as imminent change in the nature, state, or condition of the evidence with respect to time, please document the compelling reasons for such unilateral action.
 4. On the completion of any action, please preserve all parts and pieces of the evidence in such manner as to protect and maintain their identity and integrity, and original location.
 5. Please collect information in accordance with ASTM Standard E1188-87, Standard Practice for Collection and Preservation of Information and Physical Items by a Technical Investigator, which prescribes, among other measures, the collection and preservation of all available documents and the use of a photographic technique that provides negatives that can be reproduced and enlarged.

These procedures may be accomplished with minimal or no added burden to you and with no adverse effects on your investigation. In any event, it is essential that these procedures be followed to ensure fair trial of any litigation that may arise and failure to follow them would likely lead to judicial finding of improper spoliation of evidence. See, e.g. Allstate Ins. Co. v Sunbeam Corp., F 3d, 1995 W.L. 242567 (7th Cir., Apr. 27, 1995). If there is any reason why you believe you will be unable to comply with the ASTM and NFPA standards, please let me know immediately.

We cannot complete the processing of this claim until we receive the information requested above. This file will remain open for sixty (60) days pending receipt of same.

Sincerely,

Lorie Wilson
Sr. Claims Analyst/Cooking & Cleaning Products
Whirlpool Legal Department
269-923-7306 Phone
269-923-7299 Fax
Lorie_L_Wilson@Whirlpool.Com

HOLLYWOOD PLUMBING INC

2325 Roosevelt Street
Hollywood, FL 33020

March 16, 2019

Case Number: CACE-19-004862

Plaintiff: INDIAN HARBOR INSURANCE CO

Defendant: Hollywood Plumbing, Inc

This is to inform all that, Hollywood Plumbing Inc has completed all work per Florida Building Code and has passed all required City of Hallandale Plumbing Inspections for all plumbing work including shower pan (PL-INSP-16-15250).

Regards

Samuel Walrond (President)
Hollywood Plumbing, Inc

Response to manufacturer's response

- How do you respond to the requests in one like the example above?
 - Remember: no legal requirement that you comply with its requests.
 - Consider providing just enough information to allow it to participate in the initial inspection.
 - Issues like damages, additional information from insured, etc. can often wait until later.
 - Priority is to get the evidence secured and the investigation completed.

SCENE INSPECTION

- Allow manufacturer's representatives to photograph all areas of evidentiary value. Also allow inspection of any areas that may ultimately be claimed as damaged.
- No need to provide access to insured at this stage, but consider doing so if insured presents well and is likely to strengthen your claim.
- Secure all items of evidentiary value for future examination.
 - If manufacturer makes demands for evidence preservation that are unreasonable, consult with your experts regarding pros/cons of complying.
 - Alternatives: allow manufacturer to collect/store other items at own expense, agree to hold scene for a set time to allow further inspection, etc. Use judgment.
 - Exemplars—If exemplars are available at the property, consider securing them for comparative purposes.

DISCUSSION WITH INSURED

- Speak to the insured to obtain additional information regarding product.
 - Age, where purchased, maintenance/repair history, prior history/any problems, etc.
- Obtain copies of all documents regarding product in insured's possession.
 - Receipts/invoices, installation/maintenance instructions, owner's manual, warranty information, service history, etc.

LAB EXAMINATION

- Purpose: To determine actual failure mode that caused the loss.
- Exact protocol will vary depending on type of product. Generally defer to experts and only get involved if there's a lack of consensus between experts.
- Have experts provide photographs/data of evidentiary value for you to provide in a subsequent demand.
- Retain evidence after examination and continue to hold through the end of litigation if possible.

LAB EXAMINATION--FAQs

- Q: Should I invite others in the supply chain or just the manufacturer?
 - A: If you're in a state where all entities in the stream of commerce are potentially liable, you should consider this—particularly if you have reason to suspect issues recovering directly from the manufacturer (bankruptcy, foreign entity, no liability coverage/coverage exclusion, etc.)
- Q: What if a potential target requests an independent lab?
 - A: Normally, you'll complete the lab exam at your expert's facility. If the target requests an independent facility, ask why. If your expert's facility has all necessary equipment, likely not necessary. Rather, allow target to take a separate sample for independent analysis after conclusion of joint lab exam.
- Q: What if a potential target requests we ship the evidence?
 - A: Only if the target agrees to accept liability if the evidence is altered or lost. Get it in writing!

PRINCIPLES OF STRICT LIABILITY

- Varies by state, but generally: One who regularly manufactures an unreasonably dangerous product is liable for resulting injuries/damages if:
 - Manufacturer is engaged in business of manufacturing such products; and
 - Product reaches the consumer without substantial change in condition.
- Note: not a negligence action! Even if manufacturer used reasonable care in manufacturing the product, strict liability may still apply.
- In most states, privity is not required. Applies to injury/damages to third persons or even subsequent purchasers (“used” goods).

TYPES OF STRICT LIABILITY

- Manufacturing Defect
 - Defect involving the individual item, often caused by a one-time or infrequent issue during the manufacturing process.
- Design Defect
 - Defect involving the design process that affects the entire product line.
- Marketing Defect/Failure to Warn
 - Think of it as a hybrid strict liability/negligence theory. Failure to properly warn or instruct consumers regarding proper use of product.

WARRANTY CLAIMS

- Consider whether you have grounds to bring a warranty claim as well.
 - Generally privity is required—is the insured the original purchaser?
 - Ask insured for warranty documents.
 - If damage occurs during warranty period, look for limitations of liability in warranty language—many warranties will limit damages to cost of replacement product.
 - Enforceability of the limitation language varies by jurisdiction.
- Implied Warranty of merchantability—implies that product will be fit for particular purpose.
 - Requires privity and can be disclaimed via contractual language.

COMPONENT PART MANUFACTURERS

- If investigation reveals a failure of a particular component part, should you pursue the product manufacturer, the component part manufacturer, or both?
 - Assuming your jurisdiction allows you to pursue manufacturer for the component part defect, generally preferable to stick with the product manufacturer. Let the manufacturer file a third-party claim against the component part manufacturer.
 - One reason to consider pursuing the component part manufacturer is if admissions (discovery tool to establish simple facts) may be beneficial.

BUILDING YOUR CASE

- First and foremost, your experts make or break your case. The strongest claims will have competent experts who can point to physical evidence supporting your theory while also pointing to evidence to rule out alternative causes.
 - Exemplar Testing: If your expert can replicate the failure, you're in great shape!
- Recalls: A good expert will search for recalls. If your failure mode mirrors a known recall, your case is substantially strengthened.
 - Search to see if your year/model product is covered by a published recall, but also check similar recalls by that manufacturer. If yours is similar but not covered, you may have a negligence claim for failing to expand the recall to additional products.
- Class Actions/Prior Litigation: Search court records for similar failure modes. If they're substantially similar, they may provide admissible evidence. Even if not legally admissible, you may be able to obtain additional research or deposition transcripts to bolster your case.

LITIGATION ISSUES

- So you completed the investigation, finalized the adjustment, and sent a demand, but could not settle the claim. What now?
 - Litigation!
- First, make sure you have the correct manufacturer identified. As during the investigation, look for the proper entity on the product itself, the documentation, the website, etc.
 - Then, find the manufacturer. If it's an out of state manufacturer, there may be a personal jurisdiction issue—which is a whole other 60 minute presentation.

FOREIGN MANUFACTURERS

- What if the manufacturer is based out of the country?
 - This introduces several complications. First, service on a foreign entity can be difficult.
 - If the foreign country is a party to the Hague Convention, service is relatively easy—but may still cost several thousand dollars and take months.
 - If not, you'll need to play by the foreign country's rules. You'll likely have to have the pleadings translated and served. This can cost thousands if not tens of thousands and take a year or more.
 - Even if you manage to properly serve the foreign manufacturer, some countries (China!) may not recognize a U.S. judgment. This can make it difficult to execute on a judgment if the company does not have U.S. assets.
 - As you can see, suing a foreign manufacturer is an expensive and time-consuming process. This is the perfect time to sue a U.S.-based retailer, importer, distributor, etc. instead if your state allows. Let them seek indemnity or contribution from the foreign manufacturer.

이연방 법원

텍사스 남부 지구

프리드리히 보링거 &
리넷 맥킨지의 대외연사

참고
대
LG 전자

민사소송 번호 4:19-CV-00181

참고

민사소송 소환장

수신: (참고의 이송과 주소) LG 전자
서울 영등포구 여의도동
20 엘지 빌딩 404호
(우) 150-721

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1221 MCKINNEY ST.
HOUSTON, TEXAS 77010

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David J. Brasley, 법원 서기

날짜 2019년 6월 27일



s/ H. Lerma

법원 서기 또는 대리인 서명

COMMON DEFENSES

- Statute of Repose—In many states, product liability actions are barred unless brought within a certain time frame. The statute usually begins to run from date of original purchase or installation of the product.
 - Ex.: Florida has a 12-year statute of repose. If a product that is 12 years old fails and causes the loss, claim is barred regardless of how clear the defect is.
 - Not all states have a statute of repose. For those that do, the length can vary drastically. Check your jurisdiction.

COMMON DEFENSES

- Subsequent Alteration—Generally, strict liability will only apply against a manufacturer if a product is in substantially the same condition it was in when it left the manufacturer's possession.
 - improper handling by other entities in stream of commerce—Look for evidence of damage or improper use of product before it reached consumer.
 - Unknown History—A favorite defense for manufacturers when your insured is not the original owner of the product. If your insured cannot provide records prior to his/her ownership, it can be difficult to establish no subsequent alteration occurred.
 - Look for circumstantial evidence to suggest no modification. Physical evidence, testimony from insured regarding usage patterns, etc.

COMMON DEFENSES

- Misuse of Product—Remember, strict liability will only apply when the product was being used for its intended purpose or a reasonably foreseeable purpose.
 - If the product was being used for an improper or unforeseeable purpose, this could bar a products liability claim.
 - Often a “common sense” standard, but look for a lack of warnings to establish that the use was foreseeable/proper.

COMMON DEFENSES

- Economic Loss Rule—Jurisdiction specific, but generally a manufacturer cannot be liable under products liability when a product damages only itself.
 - Ex.: Insured is driving a riding lawnmower to cut his grass. He parks it and jumps off to grab another beer. While he’s at the beer fridge, the lawnmower catches fire in the yard.
 - Assuming it damaged only itself, you generally cannot sue the manufacturer for the damage to the lawnmower. But if it was in the garage and burned the house down, you could pursue for the damages to the house.
 - Building Materials—Some states have expanded the ELR to include component parts of a building. In those states, courts will look to what the purchaser bought.
 - Ex.: Insured purchases home that takes in water through defective concrete. Court barred the claim for damages to the home, noting that insured purchased the home, not the concrete component. Home was not “other property.” Casa Clara Condo. Ass’n v. Charley Toppino and Sons, 620 So. 2d 1244 (Fla. 1993).
 - Tip: Even if your jurisdiction prohibits recovery for the structure under the ELR, you can likely still proceed for other damages (contents, ALE/BI, etc.) under the claim.

COMMON DEFENSES

- Contractual limitation—Often, purchase contracts, invoices, etc. will have limitations of liability that limit liability to the value of a replacement product.
 - First, make sure the limitation was a material term of the contract. Probably will not be enforceable if it was just included in the product documentation after purchase.
 - If your insured is not the original purchaser, this may not apply—privity issue, similar to warranty claims.

SETTLEMENT

- Indemnity Requests—Most manufacturers will request indemnification. Watch this language carefully. If the indemnification is limited to a claim you presented in the litigation (i.e. the insured's deductible or other uninsured loss), limited indemnification may be acceptable.
 - If manufacturer wants blanket indemnification, make sure it negotiates for it prior to finalizing the settlement. It's essentially asking you to insure it against future claims, known or unknown. We generally don't recommend signing such a release, but if you do, make sure you negotiate a premium for it.
- Confidentiality Language—Most manufacturers will request confidentiality. Generally OK, but make sure there is an exception for outside attorneys, auditors, tax preparers, etc. Consider a blanket exception for “transacting the business of insurance.” If your carrier intends to return the insured's deductible (or a pro-rata portion), make sure this exception is included—it's difficult to explain a pro-rata reimbursement to the insured when you can't disclose the settlement amount.
- Evidence—Your expert has been holding the evidence for months or years. Before authorizing disposal, check with your insured and offer to return it. If you have reason to believe there are other outstanding or potential claimants, do your due diligence to offer to continue to store the evidence at their expense.

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