

Subrogation and Appliance Manufacturers

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If your design is involved in a subrogation case, your expertise and even that of your component manufacturers may become crucial to your company's defense.

Too many in the appliance industry think the concept of subrogation is a foreign one. However if the term "products liability lawsuit" is mentioned, the appliance manufacturer immediately takes notice. Subrogation is what drives many lawsuits against manufacturers, and this article is intended to help the uninitiated become familiar with this concept, and also learn how to respond accordingly.

In simple terms, subrogation is the assigning of one's right to file a lawsuit. Let us pretend that Mr. Jones has a house, and the house catches fire. His insurance carrier Amalgamated pays him \$500,000 to cover the loss. These funds cover the structure loss, the loss of contents and also for Jones's rented apartment and costs for food while the Jones house is being rebuilt. As part of the insurance contract between Jones and Amalgamated, Jones has assigned his right to subrogate to Amalgamated. If Amalgamated believes that the fire was caused by a defective dish washer made by Smith



Large kitchen loss due to appliance malfunction is the classic spark to a subrogation claim.

Manufacturing, Amalgamated will sue Smith Manufacturing, seeking reimbursement for the \$500,000. This seeking of reimbursement by an insurance carrier is known as subrogation.

Subrogation has been around for years, but in the last 30 years or so it has become very commonplace. Insurance carriers seek ways to improve their bottom line, and often subrogation is such an avenue. And while the above example dealt with fires, subrogation is also carried out for losses involving water damage (e.g. flood damage from a broken toilet or water filter), smoke damage (yes, some candles can severely soot a house and its draperies), and even pollution—a gasoline pump system was mis-wired and pumped thousands of gallons of raw gasoline into the ground.

When the Letter Arrives

Often an appliance manufacturer will not even be aware of a subrogation claim until a letter arrives via fax or certified mail. The letter, often written by a lawyer acting on behalf of the subrogating insurance carrier, will outline the nature of the claim, a general amount of damages, and will list contact information.

The best course of action is to notify one's in-house lawyer (or external counsel), and also one's own insurance carrier. If you are Smith Manufacturing and your General Liability carrier is Trustworthy Insurance, you should immediately notify Trustworthy. If you carry a separate Products Liability policy, you should notify that carrier, also. Some manufacturers in the past have been tempted to ignore notifying their carrier, under the belief that such a notification may cause insurance rates to rise. While this may or may not be true, we do know that your insurance carrier cannot help you if they are not informed of the potential claim. Moreover, if you fail to notify the carrier, you may lose the insurance coverage you have paid for.

What Not To Do

Just as important as being proactive, there are steps that should not be taken. One of those steps is to try and contact the restaurant personnel (as an example) directly. You need to remember that they perhaps have little to do with the claim, as the claim is being brought by the carrier, and not by the restaurant itself. A second unwise course of action is that of trying to hide or destroy documents. As in all of life, the best (and only) course of action is to be honest.

What Can Happen

Let's assume that a large restaurant burned, and that the fire started in the kitchen. Unless the carrier has determined that a given appliance has failed, the carrier may try a 'shotgun' approach. The subrogating carrier notifies ALL manufacturers of the kitchen equipment of the loss, as well as the electrician and fire suppression service company, of the loss. In that there has been no final determination, the carrier will also notify you (the manufacturer) of a time and place for a future examination of all the items.

This examination, often called a multi-party exam, is usually held at a forensics lab. At the lab inspection, each piece of equipment (evidence) will be thoroughly examined, and possibly include destructive testing. As a manufacturer, you want one of your representatives from the factory there, as well as an engineer or expert hired by your own insurance carrier. All pieces of equipment are photo documented, sketched, and (as may be necessary) disassembled. This may be your only chance to look at the equipment, so this is an opportunity not to be lost. Moreover, you will be afforded the chance to look at every piece of equipment (evidence) that was retained.

At the exam, it is important to note that as kind as everyone may be, someone in the room may be an adversary. For that reason, you need to identify who is on your team—lawyer, outside engineer, and the company representative. In that 'loose lips sink ships,' it is best to keep one's opinions or observations to themselves. No matter how innocent a remark is made, there may be someone present to misconstrue it. Talk quietly among your team, and no one else.

The author has attended some multi-party exams in storage sheds, in parking lots, in the offices of bank buildings, and at lawyers' offices. The truth is that there are engineering firms that do not want to invest in the necessary capital equipment in order to do an examination correctly. Before one reaches this point, your carrier needs to insist that all work be done in a properly equipped lab. While the makings of a good lab are beyond the scope of this paper, we refer you to the article written by Mark Goodson.[1] If the chosen lab for the exam is not properly equipped, your carrier should insist on going to a lab that can handle the tasks. There is no good excuse for conducting an exam for a multi-million dollar fire in a lab that is ill equipped.

As noted, the exam may be destructive in nature. For this reason, the exam should be carried out to the requirements of standard ASTM E860.[2] This standard calls for the notification of potentially adverse parties before a destructive examination is carried out. Moreover, a lab should try and exhaust NDT (Non Destructive Test) techniques before a destructive technique is carried out.

During the exam, it is important to take notes, as well as requisite photos. If a microscope or x-ray machine is used, you should request copies of the digital images. Do not be afraid to ask questions as to what is happening during the exam. However, it is improper to ask other engineers (from adverse parties) what their opinions are. Those opinions are the work product of their respective clients.

If you as an appliance manufacturer have reason to believe that your product is at fault, you need to consult with your attorney and your carrier. If you make an oven, and you know that your oven has a history of malfunctioning because of a poor thermal cutoff, you should consider 'inviting' the manufacturer of the thermal cutoff to the exam. As distasteful as that may seem, the component manufacturer will want to attend to make an independent assessment of their own culpability, if any. And you, as the manufacturer, want to be buying sub assemblies from companies that stand behind their products.

Pitfalls

The exam of the equipment should be carried out, and it must be carried out by all parties in earnest. There is a certain pride in being an engineer, and pride can get in the way of an accurate assessment of the product. We have met engineers who swore until they were blue that a given product could not have failed—and yet their product did. It is at this point that an assessment by your own outside engineer is of great value. The outside engineer should be seasoned in regards to appliance failure, and capable of assessing strengths and weaknesses.

One of the plaintiff's traps, however, is related to modification. Generally, a manufacturer is responsible for a product as it is designed. If someone takes out a safety device from your oven, and this alteration is causative of the loss, as a manufacturer you can find comfort. While laws vary from state to state, you need to be able to advise your carrier as to the nature of the modification (or repair) and the effect of the modification. Such a modification is a complete bar to recovery in many states.

In Closing

The subrogation process is really straightforward; your response as a manufacturer can be summarized as follows:

- Notify counsel and your insurance carrier
- Be honest
- Retain an independent engineer who routinely investigates appliance losses
- Gather data, both by way background and in the lab
- Fairly assess the data
- Insist that work be done at a qualified lab
- Learn what you can about the investigative techniques to be used.

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