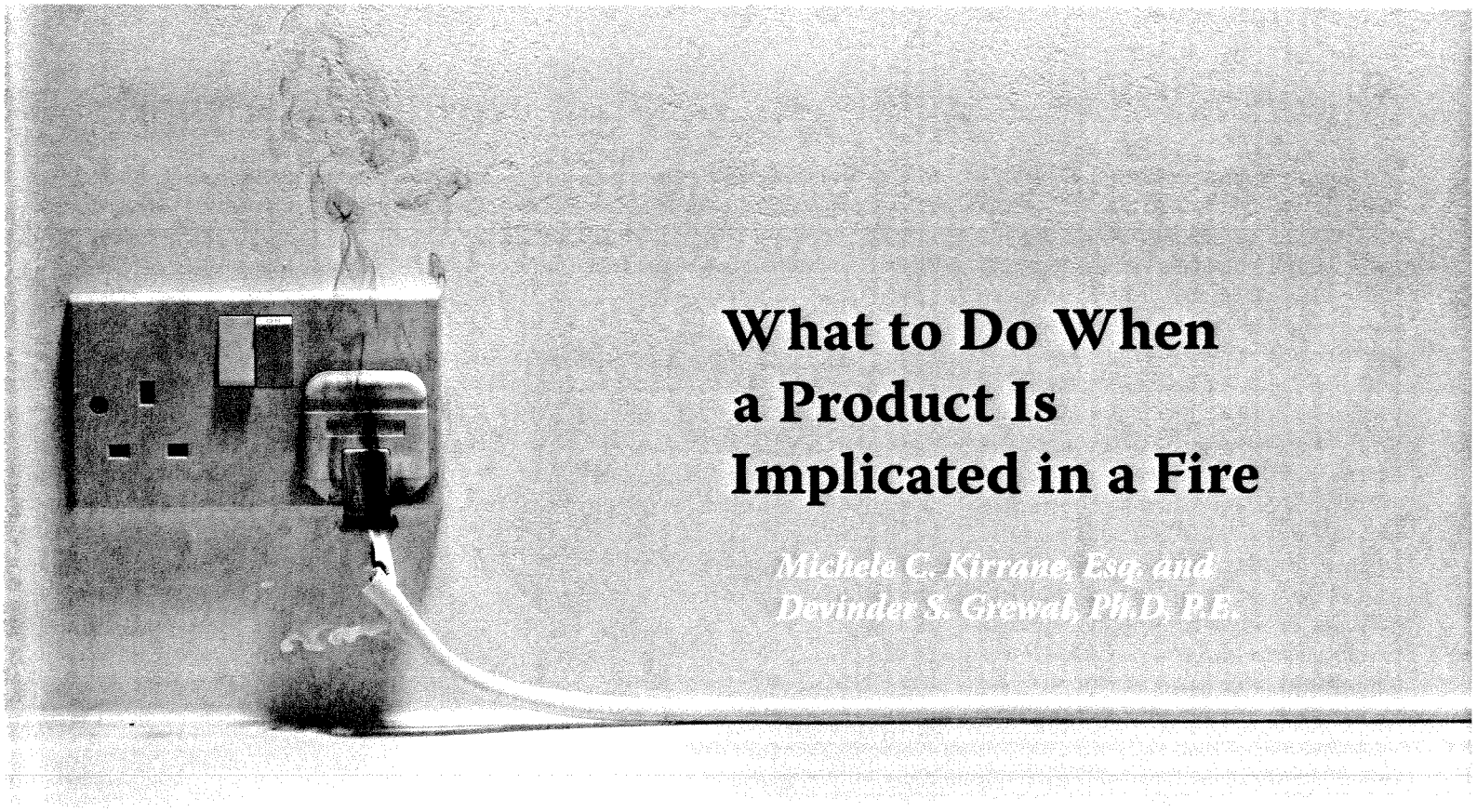

What to Do When a Product Is Implicated in a Fire

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For defense attorneys, the determination of product liability in connection with a structure fire can be a contentious issue. Very few structure fires are actually attributable to product failure – with the National Fire Protection Association (NFPA) citing unattended cooking, heating equipment and smoking as the chief culprits – but plaintiff's counsel often latches on to product liability as a convenient theory of culpability.

The assumption that a product is responsible for a fire is often buttressed by the initial "investigation" mounted by first responders who typically do not have the scientific and engineering knowledge to properly evaluate a product. They will often see a product such as an appliance at or near the location of the fire's origination and assume it was the cause without any further investigation.

So by the time a fire claim reaches the desk of an attorney, it has often been deemed a "products liability case." It is then up to the attorney to recreate the investigation to determine if there is any evidence that the product in question caused the fire. Thus, it is even more important for counsel to be aware of factors to be considered when defending a fire loss claim where a product is implicated.

CONSUMER PRODUCTS

Consumer products, in particular, are often implicated in structure fires, and may be cited as the ignition source, the source of the fuel burned in the fire, or as aggravating or accelerating a fire.

We are not surprised when gasoline stored in a garage starts a fire, but are usually surprised when some other product, such as a mobile phone, is the cause. In fact, gaining an understanding of the likelihood of a given product causing a fire is a good first step in developing a checklist of products that are likely to be encountered by defense counsel. The following grouping is based on the extent of manufacturers' fire loss experience and defense strategy:

- Products that are expected to cause fires even when properly used. These products have a mature defense strategy and the manufacturers are experienced in investigating losses. (e.g., gasoline, fireworks, firearms, ammunition).

- Products that are expected to cause fire when misused or abused. The manufacturers have experience with fire loss and there is usually a mature defense strategy. (e.g., automobiles, candles, barbeques, gas heaters, welders, batteries).

- Products that are not usually expected to start a fire, such as appliances, electronic gadgets, and garbage cans. Manufacturers, distributors and others in the chain of commerce in these product lines may not have experience with fire loss claims and consequently may not have a mature defense strategy.

While they rarely cause a structure fire, this last category of home products is the one that defense counsel is most likely to encounter. The following guidelines may be useful in establishing a defense.

PRODUCT IDENTIFICATION AND PRESERVATION OF PHYSICAL EVIDENCE

Product identification is perhaps the most crucial piece of information needed to defend a fire loss case, since a manufacturer cannot be liable unless its product was found to be both defective and to have caused the fire.

Product identification is often dependant on when a manufacturer is notified of a

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claim, but early notification of a product manufacturer depends on the ability of the original investigator to identify the product, and on the ability of plaintiff's counsel or subrogation counsel to be involved in the initial investigation. Due to the nature of initial structure fire investigations, this is not always possible, and notification and product identification may be delayed until a destructive examination uncovers the potential manufacturer of a suspected product.

Because of this, preserving evidence is crucial, and begins with the firemen or policemen who first arrive at the fire scene. However, once the fire investigation is completed, possession of the physical evidence is returned to the owner unless criminal activity, such as arson, is suspected. To ensure the preservation of evidence, counsel should determine who has possession of the evidence and make a specific request that all evidence be preserved. This includes properly storing the product and taking numerous photographs of both the product and the entire fire scene immediately after the fire. All interested parties should be given notice of the fire and have the opportunity to inspect the product and the fire scene prior to the removal or destruction of evidence.

Many times, the physical evidence is destroyed before a complete investigation can be performed. Surprisingly, there is no general tort duty to preserve evidence in jurisdictions like the California state court.[1] Federal district courts, on the other hand, recognize a duty to preserve evidence in cases where a party knows or should know it is relevant to pending or reasonably foreseeable litigation.[2]

In jurisdictions like California, there is also no tort liability for the spoliation of evidence.[3] However, the party responsible for the destruction of evidence may be subject to discovery sanctions or an adverse inference jury instruction in cases pending in superior court.[4] In federal court, however, three types of sanctions may be imposed for the destruction of evidence: (1) the court can instruct the jury that it may infer that evidence made unavailable by a party was unfavorable to that party; (2) the court may exclude witness testimony based on the evidence that was destroyed; and (3) the court may dismiss the claim of the party responsible for the spoliation.[5]

A typical structure fire scenario plays out as follows: The insurance company covering a particular structure is notified by their insured (a tenant or owner) that there was a fire. The insurance company sends an adjuster who in turn hires a fire investigator. However, both the adjuster and investigator have to wait until the authority-having-jurisdiction (AHJ), usually the local fire department, releases the scene.

By this time, much critical evidence is lost. The insurance company's investigator, or C&O investigator, will try to determine the origin and cause of the fire. If the C&O investigator believes a particular product is to blame, he or she may hire an engineer, but will often just photograph and remove the product from the scene so remediation can begin. The product may already have been removed from the scene by the AHJ during the suppression or investigation efforts, thus losing context (where was it, how was it connected, how was it installed, what else was near it).

For example, if a burned toaster oven is removed from the scene without documenting and collecting the associated power cord, one loses the ability to determine whether the toaster was actually plugged in at the time of fire, or if a defective power cord could have contributed to the fire.

An AHJ investigator may remove and preserve evidence they feel is important based on the initial on-site conclusions, but they rarely preserve the amount of evidence needed to develop a context for the product. Without context, it becomes very difficult to evaluate the role the product played in the fire.

Also, if the product is readily identifiable, the manufacturer may be notified immediately. But if the product is not easily identified, perhaps because of the transformative nature of fire, the notification may be delayed until a destructive examination or other research can tentatively identify the product.

Accordingly, it is essential to have the plaintiff or claimant make the implicated product available for inspection, assuming it is still in existence. In cases where the product was destroyed either during or after the fire, discovery should focus on identifying the specific product by brand, make and model number. This information will reveal whether the product was actually manufactured, designed or sold by your manufacturer.

One of the best sources of information in defending a products case will be your client. Once the product implicated in the fire has been tentatively identified, the following information should be gathered from the manufacturer:

- Manufacturing documents (internal or regulatory testing, inspection reports, repair records, description of manufacturing process)
- Design documents (schematics, specifications, engineering drawings, design change orders)
- Sales documents (invoices, purchase orders, contracts, warranties)
- Packaging (labels, warnings, instructions, installation/operation guides)
- Prior claims or recall information concerning the same product
- Exemplar

Getting an exemplar of the product is one of the most significant steps that can be taken early in an investigation. Fire tends to be transformative and rarely consumes all the evidence. Objects and features may still be there after the fire, but may look very different. When inspecting a product removed from a fire, even the smallest detail in its construction can be the key to determining if it is in fact your client's product; it will also help to learn about any modifications to the product, which may aid in the defense.

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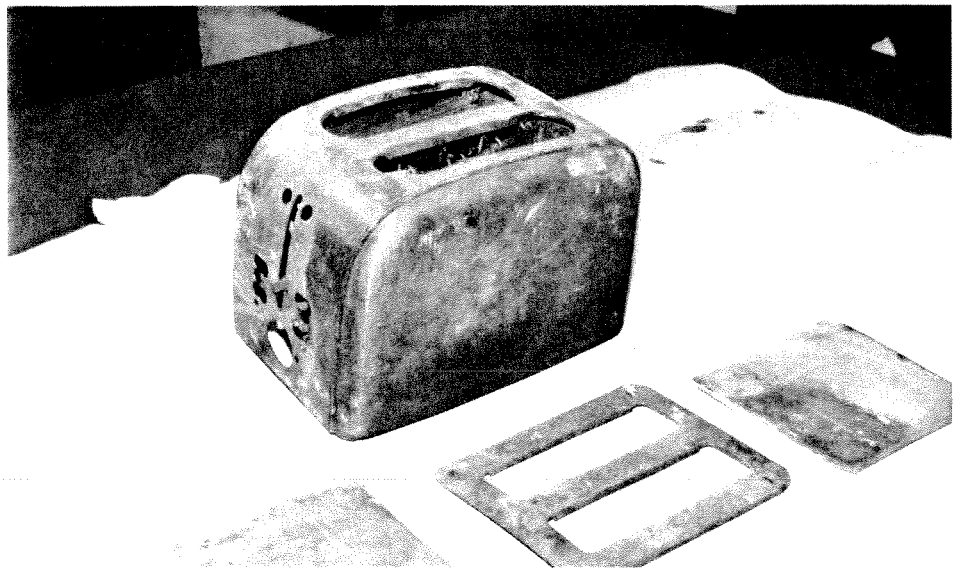
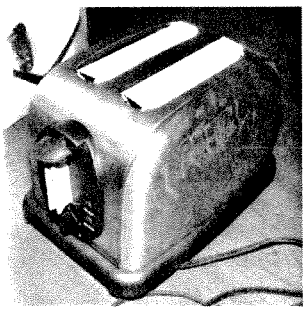
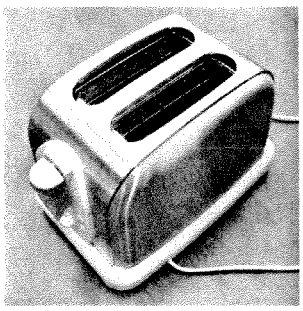
The photographs below show a toaster that was alleged to have started a fire along with three exemplar toasters made by different manufacturers and sold to different retailers by different importers. Although the general design and appearance of the toasters are similar, the true exemplar can only be identified by comparing internal construction details.







THEORIES OF LIABILITY AND DEFENSE OF THE PRODUCT

Commonly, a plaintiff will assert all possible theories of products liability (strict liability, negligence, breach of warranty) while assuming the fire was caused by a product failure, even if the plaintiff doesn't know the precise failure mechanism. Within these three broad categories of liability, there are specific product theories that should be fleshed out as early on in the case as possible. For instance, is the plaintiff alleging there was a failure to warn or inadequate warnings? Improper design? Manufacturing defect? Or is the plaintiff claiming the product was not fit for the ordinary purposes for which such goods are used? The answers to these questions will help narrow your defense and streamline the discovery process.

The defense strategy for the product typically falls into a few general categories:

1. Challenge the identification, condition, installation, and use of the product.

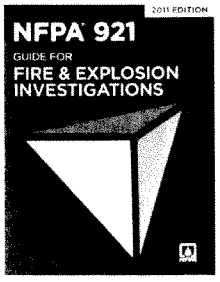
Many products have the same fundamental shape, size and design, even when they're made by different companies. The heat of a fire can alter or remove the manufacturer's distinctive labels, paint and other markings, making it difficult to easily distinguish a manufacturer's identification. Thus, it is necessary to compare details of the construction of the subject product with exemplars of your client's product and competitor's products to show that the product in question is not your client's, or that it was not capable of starting or accelerating the fire.

This is where sales records and an exemplar of the product will assist your defense, since this type of information will help identify any options that were ordered or sold with the product. For example, it may turn out that the subject product was not sold with the element that is capable of starting a fire.

This information also helps identify modifications to the product after it left the manufacturer, since any post-production changes may be used to support your defense and may lead to the identification of other responsible parties.[6] Misuse, or a modification made by the plaintiff, can be a defense for contributory negligence.[7] A product can be the cause of a fire not because of a problem with the product itself, but because of how it was installed or used. For example, a faulty gas line installation, a faulty electrical hook up to the product or a problem with the electrical system of the structure can contribute to a product starting a fire.

2. Challenge the quality of the initial investigation.

The on-scene fire investigation should be governed by the National Fire Protection Association's *NFPA 921: Guide for Fire and Explosions Investigations* (NFPA 921), which has evolved to become the standard for fire investigations. It addresses all aspects of the investigation, including those pertaining to specific products (e.g., fuel gas systems, appliances, motor vehicles). NFPA 921 also requires experts to follow a scientific method in their investigations and serves as a useful tool in challenging expert opinions.[8]



The main challenge to the initial investigation is in determining the origin of the fire. The guidelines in NFPA 921 concerning how to determine the origin of a fire can be used to introduce alternate origins that were not originally considered or to show that the method used to

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determine the origin is not scientifically sound.

Although NFPA 921 is followed by most fire departments, the details are often missed because of the nature of the initial investigation. For the AHJ, the cost of maintaining custody of the fire scene will limit the scope of the investigation. Although most AHJs in the United States have a mandate to investigate all fires within their jurisdiction, this mandate is usually interpreted as a limited investigation to determine whether arson was involved. Once arson has been ruled out, the AHJ investigator will usually truncate the investigation and leave it to the insurance company to complete.

Further, the C&O investigators hired by insurance companies are usually former AHJ investigators with limited experience in the engineering issues related to products. Additionally, these investigators are usually hired by a loss adjuster rather than a liability adjuster who may have more experience with subrogation claims and the level of investigative work needed to make a good legal case. All of these factors affect the quality of the initial, and sometimes only, fire scene investigation.

The suspected cause of the fire, in this case a product, can also be challenged using the NFPA 921 guidelines. Often, the C&O investigator determines or decides the product is the cause of the fire by "ruling out" all other causes of fire. This is referred to as the "negative corpus method" and is discouraged by NFPA 921. Ruling out all other sources of fire should be done in a way that is scientifically documented by the original C&O investigator. Consequently, one defense strategy is to show that alternate causes of the fire were not properly addressed.

3. Challenge the implication of the product

A product is usually implicated in a fire by the C&O investigator simply because it is burned up or found near the origin of the fire. This may be sufficient cause to investigate the product further, but it is not enough to conclude that the product caused the fire.

The product may have been attacked by the fire rather than being the cause. This can be shown through expert examination of the evidence and through fire testing. Testing of an exemplar can be used to demonstrate that the burn patterns would have been different if the product was the cause of the fire. Testing can also be used to show that a product attacked by fire looks similar to the subject product.

For electrical products, it is imperative to establish whether the product was energized or in use at the time of fire. For example, a product that was not plugged in at the time of the fire is less likely to start a fire. Similarly, an appliance like a toaster may be plugged in, but it does not have electrical current flowing through it until it is used.

CONCLUSION

Structure fires are seldom caused by product failures, but are often blamed on products because of the nature of initial fire investigations. The defense of a product manufacturer is dependent upon correct product identification and evidence preservation, but the unique challenges of a fire case make it both more difficult to properly identify a product and more important to verify the identification. Evidence preservation is just the first step in the process, and gaining knowledge about your client's product by looking at exemplars and competitor's products will help counsel to challenge the identification and to develop evidence of possible misuse of the product. NFPA 921 can also be a useful tool for challenging the investigative process and conclusions reached by the initial fire investigator.

ENDNOTES

1 *Rosen v. St. Joseph Hospital of Orange County* (2011) 193 Cal.App.4th 453, 460; *Cooper v. State Farm Mut. Auto. Ins. Co.* (2009) 177 Cal.App.4th 876, 894.

2 *In re Napster, Inc. Copyright Litigation* (N.D. Cal. 2006) 462 F.Supp.2d 1060, 1067; *Realnetworks, Inc. v. DVD Copy Control Ass'n, Inc.* (N.D. Cal. 2009) 264 F.R.D. 517, 523; *Apple Inc. v. Samsung Electronics Co., Ltd.* (N.D. Cal., Aug. 21, 2012, 11-CV-01846-LHK) ___ F.Supp.2d ___, 2012 WL 3627731.

3 *Coprich v. Superior Court* (2000) 80 Cal. App.4th 1081, 1089-1090.

4 *Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 Cal. 4th 1, 11; CACI 204.

5 *Kopitar v. Nationwide Mut. Ins. Co.* (E.D. Cal. 2010) 266 F.R.D. 493, 499-500.

6 *Green v. City of Los Angeles* (1974) 40 Cal. App.3d 819, 838; *Ortiz v. HPM Corp.* (1991) 234 Cal.App.3d 178, 189; *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 20; CACI 1245.

7 CACI 1207A.

8 To date there is no published opinion in California applying NFPA 921. However, at least one federal district court has discussed NFPA 921 application in other jurisdictions. *See e.g. Souliotes v. Hedgpeth* (E.D. Cal., Apr. 26, 2012, 1:06-CV-00667 AWI) 2012 WL 1458087 *report and recommendation adopted*, (E.D. Cal., July 6, 2012, 1:06-CV-00667 AWI) 2012 WL 2684972.