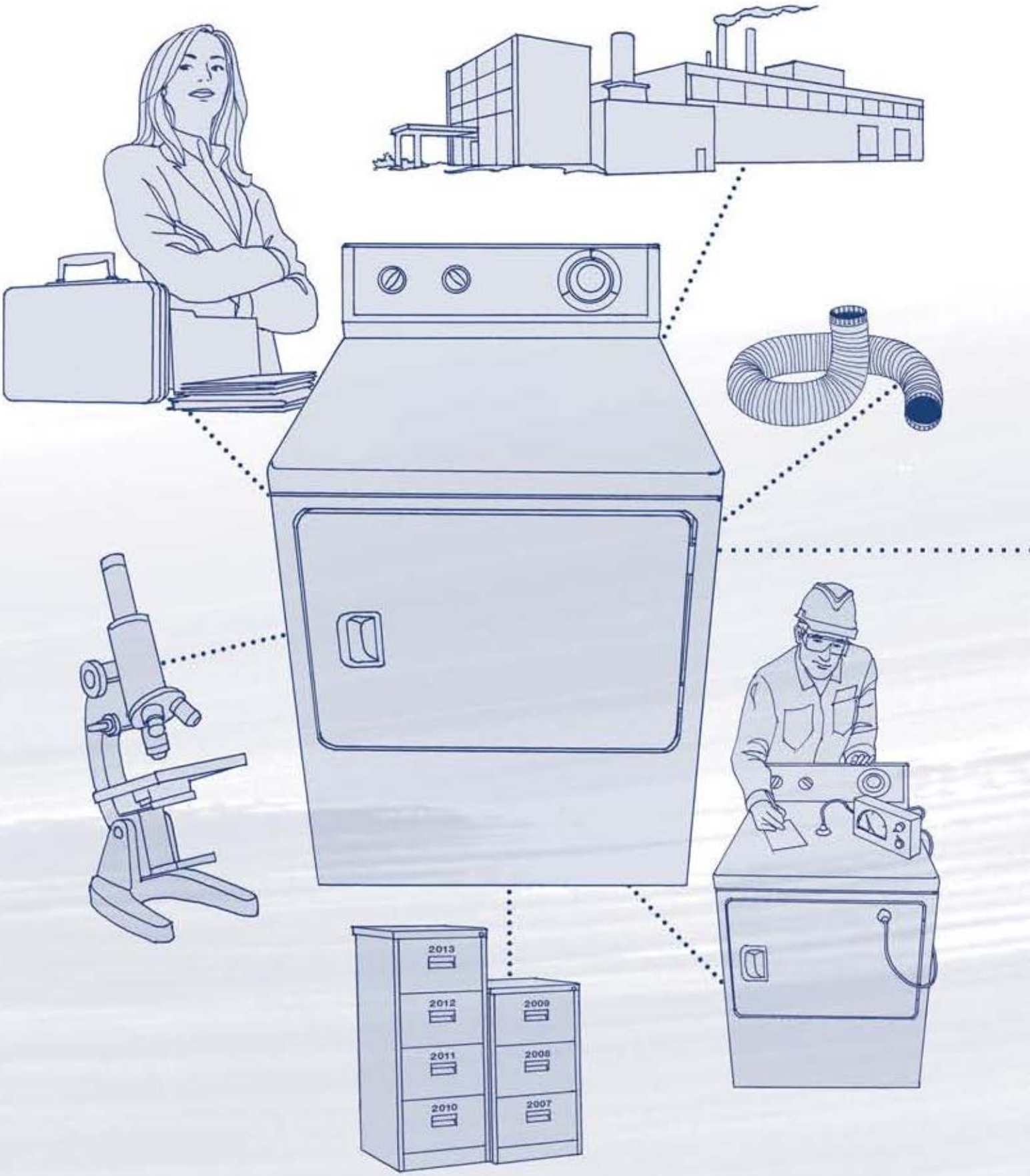

How to Properly Address "Corporate Discovery" Served Against The Subrogating Plaintiff

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You file suit in an otherwise "normal" dryer fire product liability subrogation claim for your client. The defendant manufacturer files an answer denying liability and various affirmative defenses including voluntary payment. Each party makes its initial disclosures and you receive on your desk a packet of written discovery from the defendant manufacturer. You get your cup of coffee, grab

your red pen, and sit back and take a look at the written discovery requests received. The written discovery starts out straightforward enough when, all of a sudden, you read a request for "the identification of the individual responsible for the subrogation of this claim, including the decision to pursue a subrogation claim." "All documents relating to the underwriting and creation of homeowner insurance policies concerning the risk assessments undertaken pursuant to actuarial analysis, policy premium costs, policy exclusions and other bases for the language in subrogee's homeowner policies covering fire loss." And if that wasn't enough, the manufacturer requests, "Identify any and all employees who ever attended a NASP seminar or conference wherein dryer fires were ever discussed." After you choke on your coffee, you read further requests including:

1. "Identify the number of home insurance claims the subrogee paid out from 2004 to present as a result of a dryer fire, including the dollar amount of the claims paid and the manufacturer of the dryers involved."
2. "Identify the number of subrogation claims settled since 1970 to the present which involved a dryer fire claim, including the dollar amount of the claims paid, the manufacturer of the dryer involved, and any dollars recovered in the subrogation."

Then you see a Rule 30(b)6 notice of deposition setting forth the following topics:

3. "The coverage analysis undertaken for homeowner policy claims involving dryer fire claims generally and with respect to the claim in this matter concerning coverage determinations, use of reservation of rights letters and/or memoranda to homeowners generally and the homeowner's in this matter."
4. "The subrogee's analysis, including testing, of dryers manufactured by the defendant or any other dryer manufacturer in the underwriting process."
5. "Exclusions in subrogee's insurance policies based on a dryer manufactured by the defendant, including any makes, models, or brand names excluded from coverage."
6. "The subrogee's webpage about Spring Maintenance Tips for your home, and published on the subrogee's website (attached as Exhibit I), including its creation, production, authorization for publication, and the basis, including testing, for any claims or statements made on the webpage regarding dryers, maintenance of dryers, lint, vents, exhaust ducts, and fires."
7. "All testing of dryer's relating to fire on any and all claims for which the subrogee ever pursued subrogation."
8. "All training materials and guidelines used in adjusting the first party insurance claim."

Welcome to the new world of "corporate discovery" which the defense bar has initiated against subrogees, specifically targeting product subrogation cases. Articles such as "Turning the Tables on Your Opponent – The Best Defense Is an Early Offense" published by DRI demonstrate that the defense bar is recommending an aggressive and expansive attack be presented on anyone who dares file suit against their client manufacturers. Electrolux's head legal counsel stated at a hearing before the MDL panel "Remember, these are insurance companies now.··These aren't injured plaintiffs.··These are the biggest litigious industry in the country who now want to gang up on Electrolux. Let's keep that straight. They've never been harmed by any of this." [1]

What should you do when you receive such "corporate discovery," seeking information unrelated to any of the facts or issues with the underlying subrogation claim, but rather the subrogee's business practices as an insurance company? Here are some practice pointers, tips and a summary of some of the relevant case law relative to this type of discovery which we hope you will find useful.

First, and of primary importance, is that you must advise your client of the receipt of this type of discovery immediately. Most major carriers have designated an attorney to deal with this type of discovery request to insure proper and timely responses. Check with your client to make sure that they understand the scope and breadth of the discovery sought and make sure that you have advised your client of the deadline to respond to the discovery. Perhaps your client has already produced documents to this defendant which are responsive the discovery requests and therefore the requests are merely to harass the subrogee.

Second, it is also important that you make your objections in a timely and thorough manner. In many jurisdictions failing to timely object to discovery constitutes a waiver of the objection. Advising a client that you will have to answer this type of corporate discovery or worse, produce witnesses responsive to a 30(b)6 Notice, because you failed to timely object is not a good situation for either you or the client. In a 30(b)6 setting you will want to strongly consider bringing a Motion for Protective Order striking the defendant from taking depositions on the topics listed in its 30(b)6 Notice as some courts have held that a party must unilaterally move for a protective order or they waive any objections.

Finally, and critically important, is your legal brief must address the lack of a proper basis for the scope of "corporate discovery" sought in a subrogation case. In general, "the right of discovery is limited to disclosure regarding matters relevant to the subject matter involved in the pending action." *Bass v. Cincinnati, Inc.*, 180 Ill. App.3d 1076, 1082 (1st Dist. 1989); Ill. Sup. Ct. R. There are limits to what types of information may be requested in discovery and requirements on how a party may discover such information. A party must make at least a preliminary showing of materiality and relevancy is required before it can seek discovery on a topic. *Martinez v. Pfizer Laboratories Division*, 216 Ill.App.3d 360, 576 N.E.2d 311, 315 – 316, 159 Ill.Dec. 642 (1st Dist. 1991), *following People ex rel. General Motors Corp. v. Bua*, 37 Ill.2d 180, 226 N.E.2d 6 (1967). Parties are not permitted to go on fishing expeditions into areas which are not relevant to any issue in the litigation nor are they reasonably calculated to lead to any evidence which may be admissible at trial. *Williams v. A.E. Staley Mfg. Co.*, 83 Ill. 2d 559 (1981). Discovery is not to be used to harass a party, but is to have the purpose to discover facts which may lead to relevant evidence.

The party Plaintiff insurance company's claim, as Subrogee, rest entirely on the legal rights of the named Subrogors. As this legal relationship is most often described, the Subrogee is simply standing in the shoes of its insureds and has acquired no greater or lesser rights than its insureds. *Am. Nat. Fire Ins. Co. ex rel. Tabacalera Contreras Cigar Co. v. Yellow Freight Sys., Inc.*, 325 F.3d 924, 936 (7th Cir. 2003) ("It is settled that, as a general rule, an insurer steps into the shoes of the insured and acquires no greater or lesser rights than those of the insured."). Subrogees do not stand in cases as a party Plaintiff in any other capacity. See *Am. Nat. Bank & Trust Co. of Chicago v. Weyerhaeuser Co.*, 692 F.2d 455, 461 (7th Cir. 1982) ("subrogee's rights are derived from and dependent upon the rights of the subrogor"). On the other hand, the

[1] Robert Shulman speaking before the MDL panel on September 26, 2013 in *In Re Electrolux Dryer Products Liability Litigation*

Defendant, as a manufacturer, has a non-delegable duty to manufacture a safe product. See *Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d 247, 270 (2007).

Furthermore, it is well-settled that an insurance company, as Subrogee, cannot be held contributorily negligent for an insured's loss. Where an insurer is otherwise entitled to subrogation, the subrogation defendant cannot raise as a defense that the insurer was initially negligent in underwriting the particular risk. See COUCH ON INSURANCE THIRD EDITION § 224:184 *Subrogee Insurer's Negligence* (citing *U.S. Cas. Co. v Bagley*, 129 Mich 70, 87 N.W. 1044 (Mich. 1901)). In *Industrial Risk Insurers v New Orleans Public Service, Inc.*, the court confirmed that a subrogee owes no duty to any defendant in a subrogation action and specifically found the subrogee, Industrial Risk Insurers, "may have owed a duty to itself or its shareholders to properly inspect its insured's premises in order to set rates or reduce its risk under the policy, it cannot be held contributorily negligent." CIV. A. No. 81–2635, 1990 WL 28182 *2 (E.D. La., March 13, 1990); Couch, CYCLOPEDIA OF INSURANCE LAW, § 61:221 at 282 (2d Ed.1983).

The defense bar is also attempting to expand the "voluntary payment" defense claiming that if an insured could somehow have been contributorily negligent in causing a loss by failing to maintain a product pursuant to the operating manual, that the insurer is choosing not to apply an exclusion in the standard homeowners policy and is therefore making a voluntary payment. This defense, has no merit because, first it is a false interpretation and improper application of the homeowners policy. In addition, a defendant manufacturer lacks standing to assert any claim or defense against a Subrogee in relation to the coverages or exclusions of Subrogee's underlying insurance policy. It is well-established that "[t]he defendant in a subrogation case cannot assert defenses available to the insurer when the insured's claim was made." 3 LAW AND PRAC. OF INS. COVERAGE § 42.41, Chapter 42, *Subrogation; See National Marine Underwriters, Inc. v Loring* 568 S. 2d 1007 (Fla. Dist. Ct. App. 3d Dist. 1990); *Dallas Gas Co v Bankers' & Shippers' Ins. Co.*, 53 S.W. 2d 130 (Tex. Civ. App. Waco 1932). A subrogation defendant has no standing to assert such a claim. *National Marine Underwriters, Inc.* 568 S. 2d 1007; *See* COUCH ON INSURANCE (2d. ed.) 61:59 ("[T]he insurer is not under any duty to the third person to raise every possible defense against the insured.") "Moreover, if the insurer has paid the loss the fact that it might have successfully contested the claim under the policy and relieved itself of liability to the insured does not affect its right of subrogation. The equities between the insurer and the insured are not matters with which the wrongdoer has any concern." *Fireman's Fund Ins. Co. v. Rowland Lumber Co.*, 186 N.C. 269, 119 S.E. 362, 363 (1923) (quoting BRIEFS ON THE LAW OF INSURANCE, by Cooley, vol. 4, p. 3896).

For purposes of determining insurer's subrogation rights, an insurance payment is not voluntary if it is made with reasonable or good-faith belief in obligation or personal interest in making that payment. 16 Couch on Ins. § 223:27 The Illinois Supreme Court has admonished that "the policy of this court is to apply the expanding doctrine of subrogation, which originated in equity, and is now an integral part of the common law, in all cases where its essential elements are present, and where it effectuates a just resolution of the rights of the parties, irrespective of whether the doctrine has been previously invoked in the particular situation." *American Nat. Bank and Trust Co. of Chicago v Weyerhaeuser Co.*, 692 F.2d 455 (1982) citing *Dworak v Tempel*, 17 Ill.2d 181, 161 N.E.2d 258, 263 (1959). "Various equitable principles, such as the denial of subrogation to a volunteer or to a subrogee who has not paid the claim in full, are not applicable to conventional subrogation." Id. at pg 460. In *Iowa State Ins. Co v Missouri Southern R. Co.*, 223 Mo.App. 148 (1928) defendant raised the same defense of voluntary payment raised by Electrolux in a fire subrogation case arguing that the plaintiff subrogee was under no legal obligation to pay a loss occasioned by a fire to its insured "because the policy had become void … that, in making such payment, plaintiff was a mere volunteer and not entitled to recover from defendant, and that the payment of the loss did not entitle plaintiff to an assignment and subrogation rights of the insured against the defendant." *Id.* at pg 255. The court denied the defendant's motion to vacate a trial judgment and held "plaintiff was under no obligation to defendant, and should not be compelled to resist a claim in order to save defendant harmless. There was no privity of contract between them, and defendant should have no concern as to the policy of insurance being voided, further than to be protected in any amount it should have to pay plaintiff. *…Moreover, if defendant were liable in the first instance for the fire damage, it should not be relieved of liability on account of the conduct of plaintiff in paying the claim.* When plaintiff paid the

fire claim, it became subrogated to the rights of the insured against defendant, and had recourse against defendant either by subrogation or under the written assignment, it makes no difference which." *Id.* at 256, *italic added for emphasis.*

Likewise, any discovery relating to the first party insurance adjusting procedure of the first party loss is not relevant either. Although the facts underlying the determination of how much the insurer actually paid its insured are discoverable, discovery related solely to an insurance company's procedures and protocols are not discoverable in a subrogation claim. In *Amica Mut. Ins. Co. v. W.C. Bradley Co.*, a property insurance subrogation case brought against a gas grill manufacturer as a result of a fire, the court denied the defendant's motion to compel the insurer's internal claims handling guidelines and checklists. 217 F.R.D. 79, 84 (D. Mass. 2003). The Amica court held that the documents were not discoverable. *Id.* The court reasoned that "the documents sought, which contain Amica's general loss reporting procedures, do not contain any factual information relating to this case, are not 'relevant to the claim or defense of any party' nor do they appear 'reasonably calculated to lead to the discovery of admissible evidence.'" *Id.* (citing Fed.R.Civ.P. 26(b)(1)). Accordingly, corporate discovery seeking adjuster and sales agent procedures and protocols are irrelevant and good cause exists for a protective order against discovery into these topics.

Recently, an Illinois Circuit Court Judge, Patrick Leston, denied a Motion to Compel "corporate discovery" brought by Electrolux against State Farm in *State Farm a/s/o Fulton v Electrolux.* The *Fulton* Court denied discovery into every single deposition topic contained in Electrolux's Notice, stating:

> [C]utting to the quick, I agree with State Farm in all respects. I think, basically, that the insurance company is not, cannot be contributorily negligent for the insured's loss in a subrogation case which is what we have here. I don't think this is even remotely close to the discovery I allowed State Farm [...] *it appears to be maybe merely a fishing expedition as to how State Farm does its underwriting and its claims and its claims adjustment. What State Farm knows, what State Farm's opinion of, opinion as to the value of the case is all irrelevant to this particular case.* [...] Whether Mrs. Fulton' s recovery should be reduced or precluded by her own contributory negligence is a question of fact that the jury is going to answer. *State Farm's opinion is irrelevant.*
> So I adopt all of the arguments and the interpretation of case law and policies suggested by State Farm.

We hope that this article has served somewhat to get you on the correct path to properly addressing "corporate discovery" which maybe served upon you or your client.