

CONSIDERATIONS
FOR FIRE AND EXPLOSION SUBROGATION CASES

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I. INTRODUCTION

Pursuing subrogation cases in the context of fire and explosion losses is unique and challenging. The loss site is frequently no more than a pile of rubble with charred and smoldering remains. It is important that the insurers assigning the loss, the adjuster, the origin and cause investigators, the forensic engineers, and the attorneys all be familiar with the various laws, treatises and guidelines that may apply from the loss investigation stage through trial.

Over the past few years significant developments have occurred in both the federal and state courts affecting experts who testify in fire and explosion cases. Trial court judges are scrutinizing expert testimony more than ever before. Experts who testify in fire and explosion cases also face close scrutiny under the document known as NFPA 921, *Guide for Fire and Explosion Investigations*. Failure to comply with the legal requirements imposed by the courts for expert testimony, and failure to adhere to guidelines recommended in NFPA 921, will jeopardize an expert's ability to testify and will jeopardize the entire subrogation effort.

In a similar vein, fire and explosion cases may be jeopardized if certain evidence is destroyed, raising the issue of spoliation of evidence. The sanctions and adverse effects for failing to properly preserve evidence are addressed in cases throughout the country and also in NFPA 921. The investigators and experts involved in fire and explosion subrogation cases need to be aware of the laws pertaining to spoliation and the guidelines identified in NFPA 921 pertaining to spoliation.

To assist those involved in the management of major fire and explosion investigations, the NFPA Committee has revised the chapter on handling major losses in the 2004 edition of the document. Adhering to the recommendations of new Chapter 27 will assist those pursuing

subrogation in fire and explosion cases to comply with the pertinent laws, rules, regulations and guidelines.

II. QUALIFYING THE EXPERT WITNESS UNDER THE RULES OF EVIDENCE

Expert witnesses are intimately involved in fire and explosion cases. Virtually every subrogation case in this area requires the involvement of a competent origin and cause investigator and one or more forensic experts. A number of origin and cause investigators in the United States are certified. The International Association of Arson Investigators has a rigorous Certified Fire Investigation® (CFI) program. A CFI designation for a fire investigator is recognized by the National Professional Qualifications Board through the National Fire Protection Association. To obtain CFI status, an investigator must have a designated amount of experience, training and education in order to take a test for the certificate. The test includes the investigator's knowledge of a broad range of recognized fire investigation manuals and treatises, including NFPA 921. Other investigators may obtain a Certified Fire and Explosion Investigation certification. To obtain this designation, an investigator needs to pass a test prepared by the National Association of Fire Investigators; the test is based entirely on NFPA 921.

All types of forensic engineers are involved in fire and explosion investigations, including electrical engineers, structural engineers, mechanical engineers, metallurgical engineers, fire protection engineers, fire safety engineers, etc. Various licensing requirements and standards are applicable to these engineering disciplines. However, licensure does not guarantee that Certified Fire Investigators or professional engineers will be allowed to testify in fire or explosion cases.

In presenting testimony in fire and explosion cases, all expert testimony is governed by the applicable rules of evidence of the federal or state court. Trial judges determine whether the expert may testify. The Federal Rules of Evidence apply in all federal courts, and most state courts have adopted similar rules. There are six rules of evidence that most directly pertain to the testimony of witnesses: Rule 401 entitled Definition of Relevant Evidence, Rule 402 entitled Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible, Rule 403 entitled Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time, Rule 701 entitled Opinion Testimony by Lay Witnesses, Rule 702 entitled Testimony by Experts, and Rule 703 entitled Bases of Opinion Testimony by Experts. The text of these rules is outlined in Appendix 1. Rule 702 most directly relates to this discussion and states as follows:

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, if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Several recent United States Supreme Court decisions have addressed the admissibility of expert testimony under the Federal Rules of Evidence. As a result, the trial courts now act as a gatekeeper to scrutinize whether the experts have satisfied subsections (1), (2) and (3) of Rule 702.

In the leading case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), the Supreme Court addressed the admissibility of novel scientific evidence pertaining to expert witness testimony about epidemiological matters and alleged adverse effects from the ingestion of the anti-nausea drug Bendectin. In prior cases involving novel scientific or expert

opinion evidence, the federal courts followed *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923), which stated that expert opinion based on scientific technique is inadmissible unless the technique is “generally accepted” as reliable in the relevant scientific community. The *Daubert* Court overruled *Frye*, stating that the Federal Rules of Evidence and particularly Rule 702, which post-dated *Frye* by approximately 50 years, liberalized the Rules for admissibility of expert testimony.

In *Daubert*, the Supreme Court outlined four “flexible” criteria for the trial court to consider in evaluating the admissibility of scientific testimony:

- (1) Whether the theory or technique has been tested;
- (2) Whether the theory or technique has been subjected to peer review and publication;
- (3) The known or potential rate of error and the existence and maintenance of standards controlling the techniques operation; and
- (4) The general acceptance of the theory or technique.

Daubert, 113 S. Ct. at 2796-2797. The *Daubert* Court limited its holding to “scientific” knowledge, and did not state whether the new standard applied to technical or other specialized knowledge. Though the stated reason for overruling *Frye* was that it was outdated by the liberal rules of the Federal Rules of Evidence, the net effect is that experts are subjected to greater scrutiny and fewer experts are allowed to testify.

For several years after *Daubert*, courts in various federal and state jurisdictions applied the new approach to scientific knowledge. With respect to technical or experienced based testimony, numerous jurisdictions applied the more general requirements of Rule 702 or the old standard of *Frye*. Those involved in fire and explosion subrogation cases questioned and

debated whether *Daubert* would apply to origin and cause investigations and to the testimony of forensic engineers involved in such matters.

Before this question was answered, the Supreme Court decided *General Electric Co. v. Joiner*, 118 S. Ct. 512 (1997). The trial court in that case had granted summary judgment for the defense, holding that the plaintiffs lacked scientific evidence that PCBs caused the plaintiff's lung cancer. The Eleventh Circuit overruled the trial court's grant of summary judgment, disapproving of the stringent standard of review applied by the trial court. In a significant ruling, the United States Supreme Court reversed the Eleventh Circuit and reinstated the summary judgment. In so doing, the Court applied an "abuse of discretion standard," holding that the appellate court cannot reverse a trial court's decision on the admissibility of expert testimony unless it is shown that the trial court engaged in an abuse of discretion in making its decision on the admissibility of the testimony. This decision gave great power to the trial court because its decisions would not be reviewed *de novo* by the appellate court.

In 1999, the United States Supreme Court addressed whether its holding in *Daubert* would apply to nonscientific cases. In *Kumho Tire Company, Ltd. vs. Carmichael*, 119 S. Ct. 1167 (1999), the Supreme Court addressed expert testimony provided by a mechanical engineering expert in an alleged tire failure case. The Supreme Court noted that Rule 702 specifically referenced testimony based on science, training and experience. The Supreme Court held that a trial court's gatekeeping obligation to scrutinize expert testimony applies to all expert witnesses and not just scientific experts. The Supreme Court left to the trial court's discretion how to go about determining whether a particular expert's testimony is reliable. The court recognized that the four specific factors outlined in *Daubert* may not be adequate, and that other

unidentified factors could be considered by the trial court. If there was any question before *Kumho* whether the gatekeeping role of federal trial courts would be applied to experts testifying in fire and explosion subrogation cases, that question is now resolved.

Hundreds of cases have been decided addressing these new rules on the admissibility of expert testimony. Consistency of results has not been a priority of the judiciary. Trial courts following *Daubert* will engage in the process of closely scrutinizing an expert's reliability and methods. Trial judges, armed only with their personal training and experience in matters of law, are now stepping inside the science labs and engineering departments to evaluate methods and procedures, and courts of appeal must apply an abuse of discretion standard when reviewing the trial judge's reliability determination. Simply stated, and with a few exceptions, the appellate courts will let the trial courts determine what constitutes good science and methodology.

All federal courts in the United States are obligated to follow the Supreme Court's pronouncements in *Daubert*, *Joiner* and *Kumho*. Approximately 30 states have decided to follow those rules articulated by the United States Supreme Court. The remaining jurisdictions follow a combination of the old *Frye* standard, or some specialized standard. A breakdown of the rules applied in the various state jurisdictions is contained in Appendix 2.

In pursuing fire and explosion subrogation cases, and in evaluating the potential admissibility of expert testimony, it is important to know whether the case will be in federal court or state court. If the matter is in a state court, it is important to know if the state follows the *Daubert* approach or some other standard. Two of the several states that have rejected *Daubert* and its progeny are Minnesota and Arizona.

In *Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000) the Minnesota Supreme Court addressed the issue of novel expert testimony involving allegations that plaintiffs were permanently injured by exposure to the insecticide Dursban. In Minnesota, expert testimony that is not generally accepted has traditionally been analyzed under *Frye v. United States*, and a slight modification under *State v. Mack*, 929 N.W.2d 764 (Minn. 1980). Under the *Frye-Mack* test, the court will analyze whether the methodology is generally accepted and whether the expert testimony lacks reliability. The Minnesota Supreme Court in *Goeb* chose to maintain its *Frye-Mack* standard of reviewing expert testimony and specifically rejected the United States Supreme Court's approach in *Daubert*. The Court expressed concern about judicial resolution of disputes between well credentialed scientists, as well as the potential of non-uniformity in the law under *Daubert*. The Court observed that cases built on similar facts and offering similar scientific techniques could have widely disparate results under the *Daubert* approach. The Minnesota Supreme Court also adhered to a *de novo* standard of review, as opposed to the "abuse of discretion" standard adopted in *Joiner*. According to the Minnesota Supreme Court, *de novo* review will ensure more objective and uniform rulings on a particular scientific method or technique. *Goeb*, 615 N.W.2d at 814.

The Arizona Supreme Court has also rejected *Daubert*. In the very lengthy and detailed opinion in *Logerquist v. McVey*, 1 P.3d 113 (Ariz. 2000), the Arizona Supreme Court strongly criticized the United States Supreme Court's analysis and holdings in *Daubert*, *Joiner* and *Kumho*. It also modified the *Frye* standard for determining the admissibility of expert testimony.

In *Logerquist*, the Arizona Supreme Court addressed the admissibility of expert testimony offered by a plaintiff patient in a medical malpractice and tort action against a

pediatrician based on repressed memories of childhood sexual abuse. The trial court had granted summary judgment for the defendants, but the Court of Appeals reversed and remanded the case. On remand, the trial court entered an order precluding expert testimony of the patient's alleged repressed memory. The Arizona Supreme Court then took review of the trial court's decision excluding the expert testimony.

In determining whether to adopt *Daubert*, the Arizona Supreme Court stated that the *Daubert* opinion appears politically naive about the "methods and procedures of both science and evidentiary admissibility." *Logerquist*, 1 P.3d at 126. The Arizona Supreme Court rigorously criticized the U.S. Supreme Court decision in *Kumho* as well, stating that the *Kumho* opinion read more like a jury argument than an application of legal principle. *Id.* The Court also cited with approval a treatise on scientific evidence which recognized that it will take at least the next several years to determine whether *Daubert* was an enlightened step forward in the way the law uses science, or conversely, a stumble backward into the darkness of a "Kafkaesque nightmare." *Id.* at 129. The Court concluded that the jury system and vigorous cross-examination of experts was the best method for assessing expert testimony, rather than allowing district judges to make that determination.

Finally, the Arizona Supreme Court held that it would limit application of *Frye* to a witness's opinion that is based on novel scientific principles or techniques that the witness has taken from others and applied to the case at hand. Conversely, the Court ruled that *Frye* has no application if the expert testimony is based on a witness's own observations or experience-based testimony. In that situation, the witness will be allowed to testify and the jury will be allowed to determine the weight and credibility of the testimony.

The *Logerquist* decision is particularly significant in the fire and explosion context. Cause and origin experts often rely on their own observations and experience. Under *Logerquist*, such testimony is not subject to the intense scrutiny suggested by *Daubert* and subsequent federal court decisions.

The Rules of Evidence and the court decisions applicable to the admissibility of expert testimony must be fully understood in pursuing fire and subrogation cases. Under the *Daubert* approach, the testifying experts may face close scrutiny before they are ever allowed to testify. Under other approaches, such as those in Minnesota and Arizona, the expert may be permitted to testify but the expert is still subject to all the rigors of cross-examination.

III. NFPA 921 AND THE ADMISSIBILITY AND CREDIBILITY OF EXPERT TESTIMONY

Whether in a jurisdiction where the origin and cause investigator is subjected to a *Daubert* challenge, or in a jurisdiction where the expert is subjected to the rigors of cross-examination, it is important that the origin and cause investigator and the forensic experts supporting the subrogation effort be familiar with and follow NFPA 921. The NFPA 921 Guide for Fire and Explosion Investigations is authored by the National Fire Protection Association Technical Committee on fire investigations. The pertinent introductory pages and table of contents of NFPA 921 are contained in Appendix 3. The purpose of NFPA 921 is to establish guidelines and recommendations for the safe and systematic investigation or analysis of fire and explosion incidents. *See* Chapter 1, Section 1.2. Many fire investigators agree and will testify that NFPA 921 sets forth the accepted methodology for investigating fires.

NFPA 921 is the only peer reviewed document relating to the proper methodology for investigating fires. The members of the committee are appointed by the NFPA Standards

Council and come from the fire service, the insurance industry, the legal community, private investigators and forensic companies, law enforcement agencies, the federal government, including representatives from the bureau of Alcohol, Tobacco and Firearms, the United States Institute of Standards in Technology and the United States Fire Administration. The NFPA 921 Committee is active and vocal. Language contained in the document is criticized, scrutinized, amended, and revised. The latest edition is 2004; the next addition will be available in 2008.

As with most authoritative works, NFPA 921 is not perfect. Not everyone agrees with all the information it contains. Despite some flaws, however, the document is highly regarded and most people in the field of fire and explosion investigation would call it an authoritative treatise.

A controversial chapter of NFPA 921 is Chapter 4, pertaining to “Basic Methodology.” Chapter 4 states that the basic methodology of the fire investigation should rely on the use of a systematic approach and attention to all relevant details. The systematic approach recommended in Chapter 4 is that of the ‘scientific method’ which is used in the physical sciences. Section 4.3 provides that the ‘scientific method’ is a principle of inquiry that forms a basis for legitimate scientific and engineering processes including fire incident investigation.

In outlining the scientific method, Chapter 4 identifies a multi-step process whereby the fire investigator must first identify the problem and recognize the need for the investigation. He must then define the problem. The next step is to collect the data and then analyze the data using inductive reasoning. The investigator is then required to develop a hypothesis, to test the hypothesis using deductive reasoning, and to finally select the final hypothesis.

The NFPA 921 Committee has debated whether the investigation of the fire scene really involves application of the scientific method or, conversely, whether it is limited to a “systematic

and logical” approach. One author, for instance, has stated that the scientific method described in Chapter 4 of NFPA 921 is inappropriate. Professor Vincent M. Brannigan, Department of Fire Protection Engineering, University of Maryland, believes that Chapter 4 “. . .does not actually describe the scientific method. It describes a logical method for investigating and explaining past events, but that doesn’t make it science. Science is a logical method for creating testable hypotheses. Science generally tests its hypotheses by their ability to predict future events.” Vincent M. Brannigan, *Arson, Scientific Evidence and the Daubert Case*, FIRE CHIEF, August 1998, at 104. Because the scientific method typically requires a hypothesis be repeatable, and because overhauling or digging out a fire scene is not a repeatable event, Chapter 4 may not accurately describe the scientific method.

It may, however, be irrelevant whether Chapter 4 defines the basic methodology of fire scene investigation as one that follows the scientific method or one that follows a systematic approach. What Chapter 4 requires of the fire investigator is logical and sensible. Nevertheless, this chapter has caused great confusion and concern among people in the fire investigation community. No changes are anticipated for Chapter 4 of NFPA 921; fire investigators should be prepared to follow the procedures outlined in the document and understand what it requires of them.

The impact of NFPA 921 and *Daubert* on the admissibility of origin and cause investigator testimony was made clear in the federal court decision in *Michigan Millers Mut. Ins. Corp. v. Benfield*, 140 F.3d 915 (11th Cir. 1998). That case involved an alleged arson fire in a single-family dwelling. The fire started on top of a dining room table where various debris had been piled. The fire itself was confined to the top of the dining room table, but soot and smoke

permeated the residence. The insurance company, Michigan Millers, alleged arson on the part of the insured. At trial, the insurance company's origin cause investigator held himself out as an expert in fire sciences and testified that he could determine the origin of the fire through his knowledge of the science of fires. The investigator also testified that he complied with the scientific method within his field of science, which was the determination of the origin and cause of fires. The testifying expert was attempting to conform his testimony to his perceived notion of the requirements of Chapter 4 of NFPA 921.

Benfield was decided before the United States Supreme Court ruled in *Kumho Tire* that the *Daubert* analysis would apply to experienced based or technical knowledge type witnesses. The trial court struck the investigator's testimony and directed a verdict for the insured on the basis that the origin and cause investigation was not science-based and did not follow any scientific method. At the appellate level, counsel for Millers Mutual argued that testimony from its origin and cause investigator was simply technical and experience based. The appellate court, however, noted that the testifying investigator actually claimed to be an expert in 'fire science' and that he claimed to comply with the 'scientific method.' The appellate court observed that the investigator stated his opinion that the fire was accelerated by the use of lamp oil, but the investigator did not take any samples from the fire debris. Indeed, the investigator did not take samples from the lamp oil bottle found near the dining room table to determine whether in fact the bottle contained lamp oil. In addition, the investigator had not eliminated another potential ignition source. A light directly above the dining room table, which was known to flicker prior to the event of the fire, had not been examined or tested.

The trial court applied the *Daubert* analysis, and the Eleventh Circuit affirmed on the basis that the methods employed by the fire investigator were not appropriate and did not rise to the scientific level represented by the investigator in his testimony. The appellate court also specifically stated that the use of science to explain how something occurs has the potential of carrying ‘great weight’ with a jury, which explains why counsel may seek to couch an expert witness’s testimony in terms of science and why the trial judge plays an important role as the gatekeeper in monitoring the evidentiary reliability of such testimony. *Benfield*, 140 F.3d at 920. The Eleventh Circuit held that the fire investigator was unable to rationally explain how he came to the conclusion that the fire was intentionally set, stating:

Nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert.

Id. at 921.

In *Benfield*, the origin and cause investigator’s testimony was stricken after he testified during trial. At that point a directed verdict was entered for the insured. In other cases, origin and cause investigators have been challenged and their potential testimony excluded before trial and stricken from the record after trial. For instance, in *Taepke v. Lake States Ins. Co.*,¹ an arson case pending in a circuit court in the state of Michigan, the trial court excluded the testimony of the origin and cause investigator because the investigator did not comply with various procedures outlined in NFPA 921. First, the court noted that with respect to Chapter 12, section 12.1, 1.2 of NFPA 921 1999 Edition (now section 18.1.2, 2004 Edition), the investigator admitted that the accepted methodology for reaching a conclusion as to the cause of the fire

¹ *Taepke* is not a reported decision, but the court’s order is published in *Fire & Arson Investigator* (July 2000, pp. 44-46).

requires the identification of the ignition source and the material first ignited. The investigator, however, conceded he did not know either, even though he concluded the fire was arson.

The court also observed that Chapter 17, section 17.4, of NFPA 921 1999 Edition (now section 22.4) states that the investigation of motive evidence is part of the process of identifying an arsonist and that the accepted methodology for investigation of motive be done *after determining* the fire to be an arson. In this case, however, the investigator investigated motive before determining the fire to be an arson. Moreover, as stated in Chapter 4, section 4.3.4, of NFPA 921 (Chapter 2, section 2.3.4 for the 1999 issue and 2001 issue), the court observed that the proper method of analyzing data in a fire investigation forbids the use of subjective or speculative information. The investigator admitted that he speculated in forming his opinion that high temperature accelerants were used.

Also in contravention of Chapter 4, and particularly section 4.3.6, the court observed that the investigator did nothing to test his hypothesis that the fuel load in the basement could not have accelerated the fire and could not have generated sufficient heat to ignite wood components in the basement. The investigator admitted in his deposition that he did not know the heat release rate of the combustibles located in the basement and did no testing of them.

Not only may an origin and cause investigator's testimony be excluded prior to trial, it may be stricken after trial for failing to comply with the procedures of NFPA 921. The recent decision in *Ficic v. State Farm Fire & Casualty Co.* is a good example of such an occurrence. *See* 804 N.Y.S.2d 541 (N.Y. App. Div. 2005). This case involved a car fire. During the trial, defendant's investigator erroneously testified that the fire was "suspicious". The investigator came to this conclusion even though he was unable to detect the point of origin or defect that

caused the fire or find any combustible material at the site of the fire. Moreover, on cross examination he was unable to rule out that the fire was caused accidentally or was intentionally set.

Based on the investigator's erroneous opinion that the fire was "suspicious", the court found that the jury was misled into making an irrational decision that a suspicious fire is proof of an intentionally set fire. The court relied on the sections 16.2 and 16.7 of NFPA 921 (now section 19.2.1 and 18.6). Section 16.2 states that a fire "may be classified as accidental, natural, incendiary (arson), or undetermined. Use of the term suspicious is not an accurate description of a fire cause." *Ficic*, 840 N.Y.S.2d at 546. Section 16.7 adds that "if confidence level of the opinion is only "possible" or "suspected" the cause should be listed as undetermined." *Id.* "Suspicious" is not an accepted conclusion. *Id.* at 547. As a result, the court held the investigator's testimony "be stricken and disregarded as being invalid and not reliable because [his] opinion [was] not based upon generally accepted classifications for the causation of fire." *Id.* at 548.

The orders issued in *Taepke* and *Ficic* are textbook examples of an origin and cause investigators being challenged under the procedures outlined in NFPA 921. The investigators failed the challenge, and either were not allowed to testify or had their testimony stricken after the fact.

Origin and cause investigators and forensic experts working on fire or explosion subrogation cases must be prepared to meet the challenges and requirements of NFPA 921. Whether the particular court applies the gatekeeping analysis outlined in *Daubert*, or whether the court follows the more liberal approach of the Arizona Supreme Court in *Logerquist*, any expert

testifying in fire cases will be challenged under NFPA 921. If *Daubert* and its progeny are applied, the expert may not be able to testify at all or the expert's testimony may be stricken at trial. Under *Logerquist*, though the expert may be permitted to testify at trial, the expert's credibility will be seriously challenged and criticized for failing to follow the outlined procedures. In either event, the ability to successfully pursue subrogation in fire and explosion cases will be jeopardized if NFPA 921 is not followed.

IV. NFPA 921 AND SPOILIATION OF EVIDENCE

Various complimentary definitions have been given to the term "spoliation of evidence." Spoliation of evidence has been described as the failure to preserve property for another's use as evidence in pending or future litigation. *Federal Mut. Ins. Co. v. Litchfield Precision Components Inc.*, 456 N.W.2d 434, 436 (Minnesota 1990). In section 11.3.5 of the NFPA 921 2004 Edition, spoliation is described as the loss, destruction or material alteration of an object or document that is evidence or potential evidence in a legal proceeding by one who has the responsibility for its preservation.

Chapter 11 of NFPA 921 includes several sections addressing spoliation issues that are unique to origin and cause investigations in fire and explosion subrogation cases. For instance, in attempting to determine the origin and cause of a fire or explosion, it is almost always necessary to overhaul or dig out the scene in an effort to get to the point where the fire started and determine what may have started the fire. Because this necessarily involves altering the fire or explosion scene, a question arises whether this in itself is spoliation of evidence. We have found no cases that are particularly helpful in answering this question. However, it is

specifically addressed in NFPA 921. As outlined in section 11.3.5.5.1 of NFPA 921 2004

Edition:

Fire investigation usually requires the movement of evidence or alteration of the scene. In and of itself, such movement of evidence or alteration of the scene should not be considered spoliation of evidence. Physical evidence may need to be moved prior to the discovery of the cause of the fire. Additionally, it is recognized that it is sometimes necessary to remove the potential causative agent from the scene and even to carry out some disassembly in order to determine whether the object did, in fact, cause the fire and which parties may have contributed to that cause.

Recognizing that safeguards need to be followed to protect the rights of those who may have an interest in the fire scene but are not available or even known at the time of the dig-out, NFPA 921 also provides as follows in section 11.3.5.3:

Efforts to photograph, document, or preserve evidence should apply not only to evidence relevant to an investigator's opinions, but also to evidence of reasonable alternate hypotheses that were considered and ruled out.

Section 11.3.5.3 of NFPA 921 goes so far as to identify for the investigator the potential ramifications if there has been spoliation of evidence. The ramifications include potential discovery sanctions, monetary sanctions, application of adverse evidentiary inferences, limitations on use of evidence under the rules, exclusion of expert testimony, dismissal of claims or defenses, and possibly independent tort actions for the intentional or negligent destruction of evidence and even potential prosecution under criminal statutes relating to obstruction of justice.

Numerous articles have been written describing the reaction of courts when presented with situations involving spoliation of evidence. One article specifically addresses spoliation of evidence with respect to fire and explosion cases. *See, e.g.,* Appendix 4, Richard B. Allyn & Michael P. McNamee, *Spoliation of Evidence: A Balancing of Interests*, MINNESOTA INSTITUTE

OF LEGAL EDUCATION, February 1998; *see also* Russ M. Herman & Steve Herman, *Understanding Spoliation of Evidence*, TRIAL EXPERTS & EVIDENCE, March 2001.

A case that illustrates the sanctions that may be imposed when spoliation occurs is *Barker v. Bledsoe*, 85 F.R.D. 545 (W.D. Okla. 1979). During the course of a pending lawsuit destructive testing of evidence was conducted by one of the parties without notice to the other party. The court noted that modern jurisprudence no longer fosters “trial by ambush.” The court held as follows:

When an expert employed by a party or his attorney conducts an examination reasonably foreseeably destructive without notice to opposing counsel and such examination results in either negligent or intentional destruction of evidence, thereby rendering it impossible for an opposing party to obtain a fair trial, it appears that the Court would be not only empowered, but required to take appropriate action, either to dismiss the suit altogether, or to ameliorate the ill-gotten advantage. A presumption as to certain evidence is simply not sufficient to protect against such conduct.

Id. at 548. The court chose not to dismiss the case on the merits, pointing out that the remedy would be too harsh for the party whose participation in the complained of actions went no further than his choice of counsel. However, the court prohibited the party from introducing any evidence of whatever nature arising out of the testing, and prohibited any testimony from the person conducting the test. Costs and attorneys fees were also awarded against the spoliator. *Id.* at 549.

In *Smith v. Superior Court*, 198 Cal. Rptr. 829 (Cal. App. 2nd Dist. 1984), the California Court of Appeals recognized a separate tort cause of action for intentional spoliation of evidence. The defendant in the case, a Ford automobile dealer, had promised plaintiff’s counsel that it would preserve certain automobile parts. The dealer, however, disposed of them, making it

impossible for plaintiff's experts to inspect and test the parts to pinpoint the cause of a failure. The court compared intentional spoliation of evidence with the tort of intentional interference with a prospective business advantage and concluded that a prospective civil action in a products liability case was an economic expectancy entitled to legal protection.

Almost 15 years later, however, the California Supreme Court disapproved *Smith*. In *Cedars-Sinai Medical Center v. Superior Court*, 954 P.2d 511 (Cal. 1998), the Court expressly held that no tort cause of action exists for so-called first party intentional spoliation of evidence, where the victim knew or should have known about the alleged spoliation before the decision on the merits of the underlying action. The court expressly refused to address whether a tort action exists either for third party spoliation or for first party spoliation where the victim neither knew nor should have known of the spoliation until after a decision on the merits of the underlying action.

The following year, in *Temple Community Hosp. v. Superior Court*, 976 P.2d 223 (Cal. 1999), the California Supreme Court picked up where the *Cedars-Sinai* court left off and ruled, for substantially the same reasons in *Cedars-Sinai*, that no tort cause of action exists for third party spoliation. Although the court did recognize that spoliation victims have fewer existing remedies against third party spoliators than against first party spoliators, the court nevertheless ruled that existing remedies were adequate to protect potential victims of third party spoliation. The *Temple* court, however, did not address whether a tort cause of action would exist for first party intentional spoliation of evidence where the victim neither knew nor should have known of the spoliation until after a decision on the merits of the underlying action. Additionally, the

Temple court expressly declined to determine whether a tort action will lie for negligent spoliation of evidence. These questions remain open in California after *Temple*.

Despite the California Supreme Court's pronouncements on intentional spoliation of evidence, however, courts in several other states have indicated that intentional spoliation of evidence may in fact constitute a viable tort claim. See, e.g., *Hirsch v. General Motors Corp.*, 628 A.2d 1108 (N.J. Super 1993); *Smith v. Howard Johnson Co.*, 615 N.E.2d 1037 (Ohio 1993) (recognizing tort action for intentional first-party and third-party spoliation). Moreover, several other courts have indicated that a cause of action may lie for mere negligent spoliation of evidence. See, e.g., *Smith v. Atkinson*, 771 So.2d 429 (Ala. 2000); *St. Mary's Hosp., Inc. v. Brinson*, 685 So. 2d 33 (Fla. App. 1996); *Anthony v. Sec. Pac. Fin. Servs., Inc.*, 75 F.3d 311 (7th Cir. 1996); *Barker v. Bledsoe*, 85 F.R.D. 545 (W.D. Okla 1979); *Holmes v. Amerex Rent-A- Car*, 180 F.3d 294 (D.C. Cir. 1999).

The most common sanction for negligent spoliation of evidence is an adverse inference with respect to the evidence presented. See, e.g., *Cedars-Sinai, supra*. However, the sanctions vary from state to state and circumstance to circumstance. The California cases, and cases from other jurisdictions, indicate that the courts are also looking closely at whether independent causes of action can arise out of spoliation of evidence. This has been and will continue to be an area of development in the law.

Those involved in fire and explosion subrogation cases must be aware of the pertinent case law pertaining to spoliation of evidence, and also aware of the guidelines set out in NFPA 921 concerning spoliation. Again, failure to follow such guidelines can result in cases being

dismissed, testimony being excluded, or adverse inferences with respect to the evidence presented.

V. NFPA 921 AND MAJOR LOSS INVESTIGATIONS

Chapter 27 of NFPA 921 is entitled Management of Major Investigations. This chapter addresses the investigation of major fire and explosion incidents as a management function from an organizational and managerial perspective. Although Chapter 27 recognizes that major incidents are not always large in size or magnitude, it notes that such incidents typically are large and tend to be complex. Multiple parties are frequently involved, often including multiple public and private agencies and entities, as well as investigation teams for each interested party.

Chapter 27 was written as a guideline for all parties interested in major fire and explosion incidents to protect the parties' rights and to facilitate the proper processing, evaluation and testing of the scene and the evidence. Section 27.2 expressly states that all interested parties should be allowed to participate in the investigation and allowed to examine the evidence in its undisturbed condition. In addition, it specifically outlines that no party should remove evidence or materials without adequate notice to other interested parties, and that the same applies to any subsequent testing of evidence. The chapter also contemplates that a memorandum of understanding be prepared and signed off on by the various parties, as follows:

Figure 27.3.2(a) Memorandum of Understanding

This Memorandum of Understanding relates to the investigation of the fire that occurred on July 1, 1998, at the Tall Building and Storage Facility, 1007 Main Ave., Any City, State, USA. It recognizes that a number of independent investigations are being conducted simultaneously and coincidentally and all with a common goal — to determine the origin and cause of the fire. All interested parties recognize that cooperation with one another will be beneficial to each party and will produce an efficient, quality outcome.

The parties agree to the following:

An origin and cause investigation is being conducted.

The investigation is being conducted by the Yourtown Fire Department, The Federal Fire Investigations, Payall Insurance Company, Any Storage Company, and the Tall Building Company.

All investigation procedures and the physical collection of the evidence will be coordinated through regular meetings. The evidence will be collected and stored in a location where access is monitored. No testing or examination of the evidence will be conducted until all parties are notified.

All requests for data of a nonproprietary nature from the Tall Building Company or tenants will be processed through their identified representatives. Nonproprietary information provided by any party will be shared by all parties if requested.

All releases of information regarding the origin and cause of the fire will be coordinated through the Yourtown Fire Department, and no predisclosure of information will be made by any party.

The protocol recognizes that to remove material or conduct testing will require the permission of the Yourtown Fire Department and the undersigned parties. The request should be in writing; however, verbal agreement followed by written request and approval of the parties will be acceptable when time frames are short.

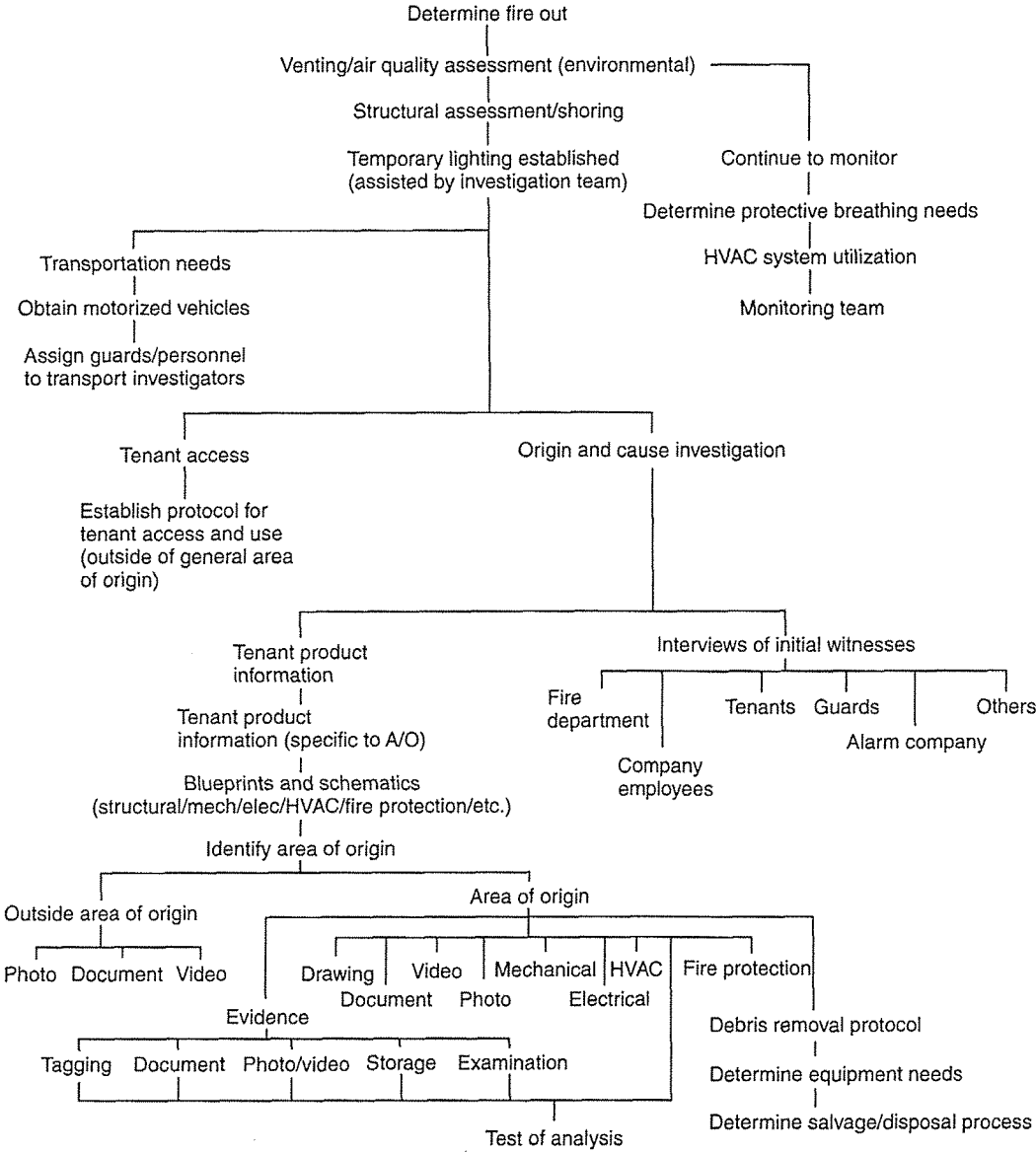
Testing and examination protocol of materials associated with this investigation are as follows:

- (1) All parties agree as to who will perform each examination and each test.
- (2) All parties agree to allow any other party to observe each test.
- (3) All parties agree to return any material remaining after each test to the storage facility.

Attached is an investigation flow chart to provide guidance for the general scope of the investigation.

Because of the nature and complexity of a major fire or explosion investigation, it is recommended that an investigation flow chart be prepared to identify all the items that need to be accomplished in processing the fire scene, securing evidence and testing evidence. A sample investigative flow chart is contained in the document as Figure 27.3.2(b) as follows:

Figure 27.3.2(b) Investigation Flow Chart



Section 27.18.2 even contemplates joint interviews of witnesses such as the fire chief, fire prevention personnel, suppression personnel, police officers, passers by, neighbors, property owners, employees, tenants and others who may have information about the fire or explosion. As stated in the document, if more than one party is participating in the investigation, a joint interview with a representative from each of the interested parties present will usually result in a more thorough interview and will not subject the persons being interviewed to multiple interviews.

The goal of cooperation outlined in this section of the chapter may be somewhat idealistic. Though some witnesses may be willing to give interviews, it may be unrealistic to expect that potential adverse parties will be willing to do so and counsel may advise against it depending on the circumstances. Nevertheless, the purpose of this section and of Chapter 27 is to encourage cooperation of various interested parties at the fire scene so that a full and complete investigation can be conducted by all interested parties.

Engaging all interested parties in major fire and investigation explosions will also facilitate compliance with the general procedures and guidelines outlined throughout NFPA 921. Following the spirit if not the letter of Chapter 27 will help insure that the various origin and cause investigators and forensic engineers will more likely comply with the rules and regulations governing their endeavors, facilitating the admissibility of their testimony and the presentation of evidence at trial. Another advantage to following the procedure outlined in Chapter 27 involves the sharing of expenses. Those who take part share in the costs. This can result in substantial savings for all concerned.

Chapter 27 of NFPA 921 should be considered when dealing with a major fire or explosion loss. All interested parties will benefit from a properly conducted scene investigation.

VI. CONCLUSION

In pursuing subrogation recoveries in the context of fire or explosion losses, the insurer must be certain that the origin and cause investigators, the forensic engineers and the attorneys are all highly qualified and experienced in handling such matters. Everyone involved needs to be familiar with the pertinent rules of evidence and the case law that has developed over the past several years. It is also essential that all concerned be familiar with guidelines outlined in NFPA 921. Pursuing subrogation in the context of fire and explosion losses may be difficult, but the potential for a favorable recovery will be enhanced if these points are followed.

APPENDIX 1

Federal Rules of Evidence Pertinent to the
Admissibility of Expert Testimony

Rule 401: Definition of Relevant Evidence

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402: Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the constitution of the United States, by act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403: Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time.

Although relevant, evidence may be excluded if its prohibitive value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 701: Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witnesses testimony or the determination of a fact-in-issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

Rule 702: Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier the 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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 703: Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

APPENDIX 2

State Court Standards for the Admissibility of Expert Testimony

States Applying *Daubert*

The following states apply the *Daubert* standard in determining the admissibility of expert testimony:

- Alaska (*Samaniego v. City of Kodiak*, 974 P.2d 836 (Alaska 2003));
- Arkansas (*Farm Bureau Mut. Ins. Co. v. Foote*, 14 S.W.3d 512 (Ark. 2000));
- Connecticut (*State v. Porter*, 698 A.2d 739 (Conn. 1997));
- Delaware (*M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513 (Del. Super. Ct. 1999));
- Kentucky (*Mitchell v. Commonwealth*, 908 S.W.2d 100 (Ky. 1995));
- Louisiana (*State v. Foret*, 628 So.2d 1116 (La. 1993));
- Massachusetts (*Commonwealth v. Lanigan*, 641 N.E.2d 1342 (Mass. 1994));
- New Mexico (*State v. Torres*, 976 P.2d 20 (N.M. 1999));
- Ohio (*Terry v. Ottawa Cty. Bd. of Mental Retardation & Dev. Delay*, 847 N.E.2d 1246 (Ohio Ct. App. 2006)).
- Oregon (*State v. Lyons*, 924 P.2d 802 (Or. 1996));
- South Dakota (*State v. Moeller*, 616 N.W.2d 424 (S.D. 2000));
- Texas (*E.I. du Pont de Nemours v. Robinson*, 923 S.W.2d 549 (Tex. 1995));
- Vermont (*State v. Brooks*, 643 A.2d 226 (Vt. 1993)); and
- Wyoming (*Bunting v. Jamieson*, 984 P.2d 467 (Wyo. 1999)).

States Applying *Frye*

The following states continue to apply the *Frye* standard in determining the admissibility of expert testimony:

- California (*People v. Leahy*, 882 P.2d 321 (Cal. 1994));
- D.C. (*Reed v. United States*, 828 A.2d 159 (D.C. 2003));
- Florida (*Murray v. State*, 692 So.2d 157 (Fla. 1997));
- Illinois (*People v. Basler*, 740 N.E.2d 1 (Ill. 2000));
- Kansas (*State v. Shively*, 999 P.2d 952 (Kan. 2000));
- Maryland (*Carter v. Shoppers Food Warehouse MD Corp.*, 727 A.2d 958 (Md. Ct. App. 1999));
- Minnesota (*Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000));
- Missouri (*State v. Swain*, 977 S.W.2d 85 (Mo. Ct. App. 1998));

- North Dakota (*City of Fargo v. McLaughlin*, 512 N.W.2d 700 (N.D. 1994)); and
- Washington (*Medcalf v. State, Dept. of Licensing*, 944 P.2d 1014 (Wash. 1997)).

States Applying a Combination or Specialized Standard

The following states apply a combination of *Daubert* and *Frye* or follow a specialized standard:

- Alabama:
 - o The Alabama legislature adopted § 36-18-30 to address the reliability of DNA evidence. This statute is modeled after *Daubert*, and the high court said that trial courts should use the flexible *Daubert* analysis in making the “reliability” analysis for DNA testing. For scientific testimony on subjects other than DNA techniques, *Frye* remains the standard of admissibility. (*Turner v. State*, 746 So.2d 355 (Ala. 1998)).
- Arizona:
 - o *Daubert* rejected by state high court; *Frye* applies to expert testimony that is based on novel scientific principles or techniques that the testifying expert has taken from others; experience based testimony is not subject to *Frye* and the jury must determine weight and credibility. (*Logerquist v. McVey*, 1 P.3d 113 (Ariz. 2000)).
- Colorado:
 - o *Frye* applies in cases where scientific evidence is based on novel scientific devices and processes involving the evaluation of physical evidence (i.e., DNA, polygraph and blood graphing). Less restrictive Colorado Rule of Evidence 702 (based on *Daubert*) applies in other cases using experience-based experts (i.e., canine scent tracking). (*Schultz v. Wells*, 13 P.3d 846 (Colo. Ct. App. 2000); *Brooks v. People*, 975 P.2d 1105 (Colo. 1999)).
- Georgia:
 - o Georgia Stat. § 24-9-67 applies to analyze expert scientific testimony. Section 24-9-67 provides: “the opinions of experts on any question of science, skill, trade or like questions shall always be admissible and such opinions may be given on the facts as proved by other witnesses. Provided an expert witness is properly qualified in the field in which he offers testimony, and the facts relied upon are within the bounds of evidence, whether there is sufficient knowledge upon which to base an opinion or whether it is based upon hearsay goes to the weight and credibility of the testimony, not its admissibility.” (*Jordan v. Georgia Power Co.*, 466 S.E.2d 601 (Ga. Ct. App. 1995); *Norfolk S. Ry. Co. v. Baker*, 514 S.E.2d 448 (Ga. Ct. App. 1999)).

- Hawaii:
 - o High court declined to expressly adopt the *Daubert* test; because the Hawaii Rules of Evidence are patterned after the Federal Rules of Evidence, federal court treatment of evidence is instructive and using *Daubert* analysis is permissible. (*State v. Vliet*, 19 P.3d 42 (Haw. 2001)).
- Idaho:
 - o High court has yet to rule on *Daubert*; lower courts and a supreme court dissenting opinion cited *Daubert* favorably. Lower court said that the Idaho Supreme Court uses an analytical method similar to *Daubert*. (*State v. Konechny*, 3 P.3d 535 (Idaho Ct. App. 2000); *State v. Merwin*, 962 P.2d 1026 (Idaho 1998)).
- Indiana:
 - o *Daubert* adopted by highest court but only as far as *Daubert* is “helpful to the bench and bar in applying Indiana Rules of Evidence 702 (b).” (*Stewart v. State*, 652 N.E.2d 490 (Ind. 1995)).
- Iowa:
 - o Iowa courts adopted a “variation” of *Daubert* that encourages, but does not require, use of portions of *Daubert*’s analysis. Iowa courts apply *Daubert* when appropriate in both scientific and technical expert analysis. (*Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525 (Iowa 1999)).
- Maine:
 - o High court cited *Daubert* when interpreting Maine Rule of Evidence 702 and used it to analyze evidence, but has not expressly adopted *Daubert*. (*State v. Tomah*, 736 A.2d 1047 (Me. 1999); *State v. McDonald*, 718 A.2d 195 (Me. 1998)).
- Michigan:
 - o The Supreme Court of Michigan noted that Mich. R. Evid. 702 has been amended explicitly to incorporate *Daubert*’s standards of reliability. (*Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391 (Mich. 2004), petition for cert. filed (U.S. Apr. 28, 2005)). Legislature enacted MSA § 27a.2955 to codify the holding in *Daubert*. (*Greathouse v. Rhodes*, 618 N.W.2d 106 (Mich. Ct. App. 2000)). Michigan Stat. § 27a.2955 applies to actions for the death of a person or for an injury to a person or property.
- Mississippi:
 - o The general acceptance test set forth in *Frye* no longer governs the admissibility of expert witness testimony; rather, the modified *Daubert* standard applies requiring a focus on relevance and reliability. (*Mississippi Transp. Com’n v. McLemore*, 863 So. 2d 31 (Miss. 2003)).

- Montana:
 - o *Daubert* adopted by highest court, but applies only to novel scientific evidence. (*State v. Hocevar*, 7 P.3d 329 (Mont. 2000)).
- Nebraska:
 - o For trials commencing on or after October 1, 2001, in trial proceedings, the admissibility of expert testimony under the Nebraska rules of evidence should be determined based on the standards first set forth in *Daubert*. (*Schafersman v. Agland Coop.*, 631 N.W.2d 862 (Neb. 2001)).
- Nevada:
 - o High court has not yet ruled on *Daubert* and will wait to see how case law develops in other jurisdictions. (*Yamaha Motor Co. v. Arnoult*, 955 P.2d 661 (Nev. 1998)).
- New Hampshire:
 - o High court applied *Daubert* analysis in a case where both parties stipulated to it. In a subsequent case, the Court applied *Daubert* to help interpret its Rule 702 but did not expressly adopt *Daubert*. (*State v. Hungerford*, 697 A.2d 916 (N.H. 1997)).
- New Jersey:
 - o New Jersey courts apply *Frye* to determine the admissibility of all scientific evidence, but *Daubert*, a more relaxed standard, is used in toxic tort litigation. (*State v. Harvey*, 699 A.2d 596 (N.J. 1997)).
- New York:
 - o High court applies *Frye*. On several occasion, the highest court cited *Daubert* but the court has yet to expressly reject or adopt *Daubert*. (*Selig v. Pfizer, Inc.*, 713 N.Y.S.2d 898 (N.Y. Sup. Ct. 2000); *Wahl v. American Honda Motor Co.*, 693 N.Y.S.2d 875 (N.Y. Sup. Ct. 1999)).
- North Carolina:
 - o High court does not apply *Frye* but has yet to expressly reject *Frye* or adopt *Daubert*. All courts use factors similar to *Daubert* and have cited *Daubert*. (*State v. Underwood*, 518 S.E.2d 231 (N.C. Ct. App. 1999)).
- Oklahoma:
 - o Oklahoma courts apply *Daubert* only to novel scientific evidence. (*Torres v. State*, 962 P.2d 3 (Okla. Crim. App. 1998)). *Daubert* principles also apply to non-scientific but otherwise technical and specialized expert testimony. (*Harris v. State*, 84 P.3d 731 (Okla. Crim. App. 2004)).
- Pennsylvania:
 - o High court deferred ruling on *Daubert*; lower courts apply *Frye*. (*Commonwealth v. Arroyo*, 747 A.2d 341 (Pa. 2000)).

- Rhode Island:
 - o High court said that *Daubert* is consistent with state law but citation to *Daubert* does not mean an abandonment of *Frye*. (*In re Odell*, 672 A.2d 457 (R.I. 1996)).
- South Carolina:
 - o High court declined to adopt *Daubert* and said that courts should follow South Carolina Rule of Evidence 702. Rule 702's reliability analysis is very similar to *Daubert* (analyzes methodology, peer review, general acceptance and rate of error). (*State v. Council*, 515 S.E.2d 508 (S.C. 1999)).
- Tennessee:
 - o High court said that Tennessee Rules of Evidence supersede *Frye*. Although the highest court has yet to expressly adopt *Daubert*, it said that the list of reliability factors from *Daubert* are useful in applying Tennessee Rules of Evidence 702 and 703. (*McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257 (Tenn. 1997)).
- Utah:
 - o High court held that *Daubert* and Utah Rule of Evidence 702 are similar but that Utah uses the more restrictive three-part “*Rimmasch*” test: inherent reliability; adequate foundation; probative/prejudicial balance. (*State v. Brown*, 948 P.2d 337 (Utah 1997)).
- Virginia:
 - o High court declined to adopt *Frye*. Instead, it held that the trial court must make threshold finding of reliability through reliance on expert testimony. (*Spencer v. Com.*, 393 S.E.2d 609 (Va. 1990)).
- West Virginia:
 - o *Daubert* adopted by high court in *Wilt v. Buracker*, 443 S.E.2d 196 (1993). High court later limited the applicability of *Daubert* to scientific testimony. (*Jones v. Patterson Contracting, Inc.*, 206 W. Va. 399, 524 S.E.2d 915 (1999)).
- Wisconsin:
 - o High court expressly rejected *Frye* but has not adopted *Daubert*. Wisconsin continues to use its own five-step analysis. (*Green v. Smith & Nephew AHP, Inc.*, 617 N.W.2d 881 (Wis. Ct. App. 2000)).

APPENDIX 3

Cases Referencing NFPA 921

Alabama:

- *Allstate Ins. Co. v. Hugh Cole Builder, Inc.*, 137 F. Supp. 2d 1283 (D. Ala. 2001).

Colorado:

- *Truck Ins. Exch. v. MagneTek, Inc.*, 360 F.3d 1206 (10th Cir. 2004) (Colorado).

Connecticut:

- *Travelers Prop. & Cas. Corp. v. GE*, 150 F. Supp. 2d 360 (D. Conn. 2001).

Florida:

- *United States v. Santiago*, 2006 U.S. App. LEXIS 26665 (11th Cir. 2006).

Illinois:

- *McDonald v. Vill. of Winnetka*, 2003 U.S. Dist. LEXIS 956 (N.D. Ill. January 23, 2003).
- *Abu-Hashish v. Scottsdale Ins. Co.*, 88 F. Supp. 2d 906 (N.D. Ill. 2000).

Kansas:

- *Workman v. AB Electrolux Corp.*, 2005 U.S. Dist. LEXIS 16306 (D. Kan. August 8, 2005).
- *103 Investors I, L.P. v. Square D Co.*, 2005 U.S. Dist. LEXIS 8796 (D. Kan. May 10, 2005).
- *McCoy v. Whirlpool Corp.*, 214 F.R.D. 646 (D. Kan. 2003).

Louisiana:

- *Bennett Mfg. Co. v. South Carolina Ins. Co.*, 692 So.2d 1258 (La. Ct. App. 1997).

Maine:

- *TNT Rd. Co. v. Sterling Truck Corp.*, 2004 U.S. Dist. LEXIS 13463 (D. Me. July 19, 2004).

Michigan:

- *Michigan Millers Mut. Ins. Corp. v. Benfield*, 140 F.3d 915 (11th Cir. 1998).

Minnesota:

- *Fireman's Fund Ins. Co. v. Canon U.S.A., Inc.*, 394 F.3d 1054 (8th Cir. 2005).
- *Wagoner v. Black & Decker (U.S.) Inc.*, 2006 U.S. Dist. LEXIS 55314 (D. Minn. August 8, 2006).
- *Am. Family Ins. Group v. JVC Ams. Corp.*, 2001 U.S. Dist. LEXIS 8001 (D. Minn. April 30, 2001).

Mississippi:

- *Nationwide Ins. Co. v. Johnson*, 2006 U.S. Dist. LEXIS 49460 (D. Miss. June 12, 2006).

Nebraska:

- *State v. Davlin*, 719 N.W.2d 243 (Neb. 2006).
- *Perry Lumber Co. v. Durable Servs.*, 710 N.W.2d 854 (Neb. 2006).

New Jersey:

- *Snodgrass v. Ford Motor Co.*, 2002 U.S. Dist. LEXIS 13421 (D.N.J. March 28, 2002).

New York:

- *United States v. Marji*, 158 F.3d 60 (2d Cir. 1998) (New York).
- *Royal Ins. Co. of Am. v. Joseph Daniel Constr., Inc.*, 208 F. Supp. 2d 423 (S.D.N.Y. 2002).
- *Ficic v. State Farm Fire & Cas. Co.*, 804 N.Y.S.2d 541 (N.Y. Misc. 2005).

Ohio:

- *Ind. Ins. Co. v. GE*, 326 F. Supp. 2d 844 (D. Ohio 2004).
- *Abon, Ltd. v. Transcon. Ins. Co.*, 2005 Ohio 3052 (Ohio Ct. App. June 16, 2005).

Pennsylvania:

- *Chester Valley Coach Works v. Fisher-Price, Inc.*, 2001 U.S. Dist. LEXIS 15902 (D. Pa. August 29, 2001).

Rhode Island:

- *Dodson v. Ford Motor Co.*, 2006 R.I. Super. LEXIS 113 (R.I. Super. Ct. August 17, 2006).

Tennessee:

- *Travelers Indem. Co. v. Indus. Paper & Packaging Corp.*, 2006 U.S. Dist. LEXIS 43851 (D. Tenn. June 27, 2006).

Texas:

- *Davis v. State*, 147 S.W.3d 554 (Tex. App. 2004).

Utah:

- *State v. Schultz*, 2002 UT App 366 (Utah Ct. App. November 7, 2002).

Virginia:

- *Tunnell v. Ford Motor Co.*, 330 F. Supp. 2d 707 (D. Va. 2004).

APPENDIX 4



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NFPA 921
Guide for
Fire and Explosion Investigations
2004 Edition

This edition of NFPA 921, *Guide for Fire and Explosion Investigations*, was prepared by the Technical Committee on Fire Investigations and acted on by NFPA at its November Association Technical Meeting held November 15–19, 2003, in Reno, NV. It was issued by the Standards Council on January 16, 2004, with an effective date of February 5, 2004, and supersedes all previous editions.

This edition of NFPA 921 was approved as an American National Standard on January 16, 2004.

Origin and Development of NFPA 921

NFPA 921, *Guide for Fire and Explosion Investigations*, was developed by the Technical Committee on Fire Investigations to assist in improving the fire investigation process and the quality of information on fires resulting from the investigative process. The guide is intended for use by both public sector employees who have statutory responsibility for fire investigation and private sector persons conducting investigations for insurance companies or litigation purposes. The goal of the committee is to provide guidance to investigators that is based on accepted scientific principles or scientific research.

The first edition of the document, issued by NFPA in 1992, focused largely on the determination of origin and cause of fires and explosions involving structures. The second edition of the document included revised chapters on the collection and handling of physical evidence, safety, and explosions. NFPA 907M, *Manual for the Determination of Electrical Fire Causes*, was withdrawn as an individual document and was integrated with revisions into this document as a separate chapter. Elements of NFPA 907M that relate to other chapters of this document were relocated appropriately. New chapters dealing with the investigation of motor vehicle fires, management of major investigations, incendiary fires, and appliances were added.

The third edition of the document included a new chapter on fuel gas systems in buildings and the impact of fuel gases on fire and explosion investigations. The chapter on electricity and fire was rewritten to improve organization, clarify terminology, and add references. In the chapter on fire patterns, several sections were revised. Other revisions were made in the chapter on physical evidence on the subject of preservation of the fire scene and of physical evidence. The edition also included new text regarding ignitable liquid detection canine/handler teams.

The fourth edition of this document included new chapters on building systems, fire-related human behavior, failure analysis and analytical tools, fire and explosion deaths and injuries, and wildfire investigations. An updated chapter on motor vehicle fires was written. The document was organized to group chapters into subjects that made it more usable.

The fifth edition of this document includes a revision of the document to comply with the new NFPA *Manual of Style* and a new chapter titled, "Analyzing the Incident for Cause and Responsibility," a rewrite of the chapter on Legal Considerations, and a revision in the chapter on Recording the Scene.

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Committee Scope: This Committee shall have primary responsibility for documents relating to techniques to be used in investigating fires, and equipment and facilities designed to assist or be used in developing or verifying data needed by fire investigators in the determination of the origin and development of hostile fires.

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APPENDIX 5

**Spoliation of Evidence:
A Balancing of Interests**

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I OVERVIEW OF SPOILIATION

Spoilation of evidence has increasingly become a subject of litigation over the past several years.¹ In response to the surge of such allegations by both plaintiffs and defendants, courts are increasingly being called upon to balance the tension created by the need for evidence preservation on the one side, and the need of fire departments and business owners to safely restore damaged property as quickly as possible to operating condition. While courts have begun to summarily dismiss claims brought by those who have intentionally spoliated evidence they knew to be material to the cause and origin of a fire,² under proper fact scenarios they have also approved the plaintiff's conduct in preserving evidence through alternative means such as photography and videotape.

The term spoliation is used to describe actions involving the destruction, alteration, concealment or loss of material evidence. Whether intentional or not, the resulting loss can impair a party's ability to prove or defend a civil action. Not only must parties refrain from destroying evidence during litigation,³ they have a general obligation to preserve material evidence after it becomes reasonably known that litigation will commence sometime in the future.⁴ Generally, in the cases we have surveyed, the courts have limited the application of the spoliation theory to evidence concerning the cause and origin of a fire and have not imposed sanctions as to evidence concerning fire spread.⁵ Moreover, courts do not require the plaintiff to guess at the various theories of defense which may be raised; rather, the courts require that the plaintiff provide the defendant with an adequate opportunity to evaluate the evidence that goes to the defendant's potential liability for the cause of the fire. (e.g., the product or, where applicable, burn patterns.)

Spoliators of material evidence face a battery of adverse consequences in civil litigation where courts find no justification for the change in the evidence. While the traditional remedy has been an adverse evidentiary inference and jury instruction against the spoliating party in appropriate circumstances, courts in recent years have imposed more substantial penalties for intentional

¹ Marshall H. Tannick, *Spoilation of Evidence*, BENCH AND BAR OF MINNESOTA, October 1996, at 30.

² See James L. Gilbert and Stuart A. Ollanik, *Evidence Destruction: Legal Consequence of Spoliation of Records*, ATLA 1997 WINTER CONVENTION REFERENCE MATERIALS (Association of Trial Lawyers of America, Washington D.C.), January 1997, at 43.

³ *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68 (S.D.N.Y. 1991).

⁴ *Thompson Co. v. General Nutrition Corp.*, 593 F.Supp. 1443, 1454 (C.D. Cal. 1984) (pre-litigation correspondence provided notice of lawsuit and duty to preserve evidence).

⁵ An extensive review of fire-related spoliation cases has yielded no judicial opinions in which sanctions or other penalties have been imposed for failure to preserve evidence related to fire spread.

spoliation. In some jurisdictions, unfavorable evidentiary inferences have risen to the level of a legal presumption of negligence and have resulted in shifting the burden of disproving alternative theories to the spoliator.⁶ Alternatively, expert opinions or testimony may be stricken. Spoliating parties who intentionally change or destroy evidence material to cause of a fire may also be subject to sanctions for discovery violations under Rule 37(d) of the Federal Rules of Civil Procedures and state statutes.⁷ One court has also used evidence of intentional spoliation to justify the award of punitive damages against a defendant. Although adverse consequences of some type may be applied regardless of the spoliator's intent, in almost every state the more serious sanctions are imposed only for intentional destruction of evidence known to be material to a fire's cause and origin.

In addition to the imposition of adverse evidentiary inferences and sanctions, courts in several jurisdictions allow direct causes of action for damages against spoliators. These actions can arise under state statutory schemes⁸ or under common law tort actions for intentional or negligent spoliation of evidence.⁹ Furthermore, one state court has held that a spoliation action can be maintained under existing negligence law,¹⁰ and another has recognized a contract remedy for destruction of evidence.¹¹ In the fire-litigation context, industry and professional standards may provide the basis of a duty to avoid spoliation.¹²

II SPOILIATION RULINGS IN RECENT FIRE LITIGATION

In the fire litigation context, spoliation is often the inadvertent or even necessary result of carrying out fire safety, hazardous material cleanup, or other mitigation duties by firemen, property

⁶ Gilbert and Ollanik, *supra*, at 50 (citations omitted).

⁷ *Id.* (Citations omitted).

⁸ See, e.g., *Rogers v. Mary's Hosp. of Decatur*, 556 N.E.2d 913 (Ill.App. 1990); *Bondu v. Gurvich*, 473 So.2d 1307 (Fla.App. 1984) (both cases dealing with statutes regulating retention of records).

⁹ Gilbert and Ollanik, *supra*, at 52-54 (summarizing case law in California, Alaska, Ohio, Florida and New Jersey).

¹⁰ *Boyd v. Travelers Ins. Co.*, 652 N.E.2d 267, 270 (Ill. 1995).

¹¹ *Miller v. Allstate Ins. Co.*, 573 So.2d 24 (Fla.App. 1990) (allowing contract action by insurance company where plaintiff's counsel breached an agreement to turn over a wrecked car for examination by insurer).

¹² See, e.g., American Society for Testing Materials (ASTM) publications E-1188, E-860 and E-678, and National Fire Protection Association (NFPA) publication 921, which provide guidance and standards for forensic and fire investigations.

owners, regulatory authorities as well as public and private fire investigators.¹³ The primary purpose of the fire service is to save lives and protect property. In the process of fighting a fire or overhauling a fire scene, it is necessary and inevitable that some material evidence will be damaged or destroyed. Moreover, property owners working in conjunction with state regulatory authorities may have duties to divert and pond or allow the fire to burn out, or contain and cleanup hazardous materials during and immediately after a fire. These activities inevitably causes a change to the fire scene and destruction to some material evidence. Moreover, property owners may need to clear the site for a rebuilding program, the implementation of which may be necessary to preserve the business as a going concern. In the end, the fire investigator must balance the desire to preserve fire scene evidence against these legitimate public health and safety needs and business concerns.

Courts have recognized these legitimate concerns. Most courts limit the imposition of severe sanctions to those cases in which the *only* evidence preserved by the fire investigator is that which supports his client's interests or his own opinions.¹⁴ As such, the cases we have surveyed focus on the plaintiff's failure to preserve evidence in a manner which permits the defendant to objectively evaluate the case. In that connection, the term "preservation of evidence" has some varying meaning; as noted *infra*, courts have characterized the use of photographic and videotape evidence as a valuable and adequate means of preserving evidence. This is particularly true where the evidence is an entire fire scene rather than discrete physical items which can be removed and stored.

One fire investigation expert recently summarized a common fire-scene spoliation scenario:

A common spoliation scenario is the discarding of all potential ignition sources except one appliance or piece of equipment an investigator finds at what he deduces is the fire's point of origin. This one item is retained and the scene repaired or torn down before litigation begins. The point of origin typically will have been determined by an analysis of fire patterns using a methodology as scientific as tea leaf reading. For example, only part of the fire scene will have been photographically documented; there may be no dimensions or identification of important factors such as interior finish, construction, etc. The single artifact is turned over to an engineer without the credentials, experience or equipment to determine why the equipment or the appliance started the fire or caused the explosion.¹⁵

¹³ See Peter A. Lynch, *Accidentally lose or destroy evidence at a fire scene? Watch out for civil tort liability for spoliation of evidence!*, FIRE AND ARSON INVESTIGATOR, June 1997 at 17.

¹⁴ John A. Campbell, *Standards Opposing Spoliation in Fire and Explosion Investigations*, Triodyne Safety Bulletin 5, No. 4, June 1997.

¹⁵ *Id.*

In the fire litigation cases we surveyed, the issue of spoliation has arisen only with respect to the cause and origin of the fire. In addition to negligence claims brought against on-site third parties such as electrical subcontractors, products liability claims based on defective electrical or mechanical devices are often implicated in subsequent litigation brought by subrogated property insurance carriers. In cases involving fires, spoliation issues have typically centered upon the plaintiff's failure to properly preserve either the device in question or other elements of the surrounding environment which may show that the fire resulted from causes other than the allegedly defective device.

The following cases highlight major decisions in which recent courts have upheld allegations of spoliation by both plaintiffs and defendants and have accordingly applied penalties and sanctions.

A. Minnesota Cases

1. *Federated Mut. Ins. Co. v. Litchfield Prec. Corp.*¹⁶

In *Federated*, the Minnesota Supreme Court indicated its potential willingness to recognize, on the proper facts, a direct tort action for intentional and negligent spoliation of evidence. In that case, a fire occurred at a manufacturing facility, during the course of which property belonging to a customer was also destroyed. The manufacturer's employees subsequently denied the customer's cause and origin investigator access to the scene, and the manufacturer's law firm and its investigators removed evidence from the fire scene.

Among the removed items were an exhaust fan and motor, and a pair of polypropylene tubs which had been located directly under the motor. The exhaust fan and motor were shipped out of state, while the remainder of the evidence, including the tubs, were stored locally at two different warehouse locations. Later, the items in one of the warehouses, including the tubs, were discarded. The parties disputed the conditions under which the items were lost; the manufacturer's insurer claimed that the customer's cause and origin investigator had represented that he was finished with the items, while the investigator claimed that the tubs were essential to prove his theory that the fire had originated underneath the exhaust motor.

The customer's insurer adjusted the loss and, believing that its subrogation claim was nullified with the loss of the tubs, instead brought an action for intentional and negligent spoliation of evidence against the manufacturer and its insurer's law firm. The trial court certified the question of the validity of intentional and negligent spoliation actions to the Minnesota Supreme Court. The court first noted that Minnesota already permits an unfavorable inference to be drawn from failure to produce evidence in the possession and under the control of a party to litigation. The court then went on to observe that the customer could have pursued a subrogation action based on its bailment relationship with the manufacturer; once it established a prima facie case, the burden of proof to disclaim negligence would have shifted to the manufacturer. Because it was highly speculative that

¹⁶ 456 N.W.2d 434 (Minn. 1990).

the spoliated evidence would have had an impact on the customer's subrogation action, the Court declined to adopt the spoliation tort on the facts before it.

2. *Patton v. Newmar Corp.*¹⁷

In *Patton*, the Minnesota Supreme Court upheld a trial court ruling that dismissal of the plaintiff's case was an "appropriate sanction" for the spoliation of evidence. The plaintiffs were traveling in their motor home across California when the vehicle started on fire. The couple subsequently stored the vehicle in a salvage yard, where they directed an expert to perform an investigation into the cause of the fire. The couple subsequently brought an action against the manufacturer of the vehicle, alleging that the fuel system was defective. Although the plaintiffs told the defendant that the location of the vehicle was unknown and that certain parts had been removed and lost, they nevertheless sought to introduce their own expert's testimony, including pictures of the damaged vehicle.

The trial court granted the defendant's summary judgment motion, holding that the plaintiffs knew that their intentional spoliation of evidence would prejudice the defendant's case. On appeal of an issue of first impression, The Minnesota Supreme Court ruled that the trial court had broad discretion in fashioning remedies for spoliation of evidence. The court was well within its authority to exclude the plaintiff's expert testimony and photographs, especially since there was undisputed evidence that the vehicle had been substantially modified or repaired prior to the fire. Because the vehicle was not available for the defendant's inspection, the effects of such modifications or repairs were unknown. As such, summary judgment was appropriate because the plaintiff's lacked sufficient evidence to establish a prima facie case.

3. Other Minnesota Spoliation Cases

In two non fire-related cases brought in federal court in Minnesota, the court has recognized the propriety of imposing penalties and sanctions for intentional spoliation of evidence. *Capellupo v. FMC Corp.* and subsequent efforts to disguise these actions¹⁸ involved the intentional destruction of documents by an employer in a gender-discrimination case. Although the court declined to dismiss the case, it stated in no uncertain terms that the defendant would not "be allowed to escape unpunished." The court ordered the defendant to pay the plaintiff for all costs and fees connected in any way with the issue of the document destruction. The court then doubled those costs, and for good measure fined the defendant for the two days wasted by the court in considering the plaintiff's motion for sanctions. Finally, the court ordered the plaintiff to produce a list of documents it believed had been destroyed by the defendant, to be used by the court in fashioning further remedies.

¹⁷ 538 N.W.2d 116 (Minn. 1995).

¹⁸ 126 F.R.D. 545 (D.Minn. 1989).

In *Lumber v. PPG Industries*,¹⁹ the court cited *Capellupo* in warning both parties to a products liability action that their recalcitrance in producing documents would not go unsanctioned. The court stated “[i]n our view, the failure to produce evidence, without just cause, which is relevant within the context of Rule 26, Federal Rules of Civil Procedure, bears a close relationship to the ‘spoliation of evidence,’ and should be sanctioned accordingly.”²⁰ The court concluded its warning by observing that “[a] word to the wise is enough.”²¹

B. Fire Related Spoliation Cases in Other Jurisdictions

1. *Graves v. Daley*²²

In *Graves*, the Illinois Court of Appeals dismissed an insurer’s subrogation action based on spoliation of evidence. In that case, the plaintiffs claimed that a defective furnace caused the fire that destroyed their home. The plaintiffs retained an expert who reached the same conclusion. The trial court found that the insurer permitted the furnace to be destroyed after it had decided that it would assert a claim against the furnace manufacturer. In the subsequent action by the insurer against the manufacturer, the court granted the manufacturer’s motion for an order barring use of the furnace as evidence and granted the manufacturer’s summary judgment motion. The court of appeals affirmed, ruling that the plaintiffs and their insurer knew or should have known that the defective furnace constituted crucial causation evidence; the court stated that “the preservation of an allegedly defective product is of the utmost importance in both proving and defending against a strict liability action.”²³

2. *Unigard Security Ins. Co. v. Lakewood Engineering & Man. Corp.*²⁴

In *Unigard*, the Ninth Circuit Court of Appeals upheld the trial court’s exclusion of spoliated evidence and accordingly granted summary judgment in favor of the defendant. In that case, a yacht owner’s insurer determined that a portable heater caused the fire that destroyed the yacht, but concluded that no subrogation action was possible based on a warning label on the heater which mandated that the heater not be left unattended. After disposing of the heater, the insurer changed its position and brought a subrogation action against the heater’s manufacturer. The appellate court

¹⁹ 168 F.R.D. 641 (D.Minn. 1996).

²⁰ *Id.* at 643 n.1.

²¹ *Id.* (citing Cervantes, *Don Quixote*, Part II, Book IV, Chapter 37, at page 692).

²² 526 N.E.2d 679 (Ill.App. 1988).

²³ *Id.* at 681.

²⁴ 982 F.2d 363 (9th Cir. 1992).

upheld the trial court's ruling precluding the plaintiff from introducing expert testimony related to whether the heater caused the fire. Because the plaintiff could not establish a prima facie case without the expert testimony, the appellate court also upheld the trial court's grant of summary judgment in favor of the defendant. The court held that the appropriateness of trial court's ruling was predicated on its inherent authority to impose sanctions for spoliation of evidence.²⁵

3. *American Family Ins. Co. v. Village Pontiac GMC, Inc.*²⁶

In *Village Pontiac*, the Illinois Court of Appeals upheld the trial court's exclusion of evidence and granted summary judgment in favor of the defendant. In that case, a homeowner's insurer brought a subrogation action against an automobile dealership, alleging that a short circuit in the wiring in the car's trunk started the fire which destroyed its insured's home. The insurer's expert retained the wires from the area where he believed the fire started, but the insurer sold the car itself for its salvage value before the defendant had a chance to examine it. The appellate court upheld the trial court's ruling prohibiting the plaintiff from introducing any evidence concerning the condition of the car. The court cited Illinois Supreme Court Rule 219(c), which allows the trial court to bar testimony in the case of a party's "unreasonable refusal to comply" with discovery rules. "Unreasonable refusal to comply" is defined as "a deliberate and pronounced disregard for a discovery rule." The court granted the defendant's motion for summary judgment based on the plaintiff's resultant inability to establish a prima facie case.

4. *Howell v. Maytag*²⁷

In *Howell*, the Pennsylvania Federal District Court granted the defendant's motion for a jury instruction on a "spoliation inference." In that case, an inspection by the plaintiffs' expert had yielded the likely cause of the fire (a microwave oven) but the plaintiffs, although retaining the oven, failed to notify the defendant of the results of the inspection prior to the demolition of the house. In addition, it was the plaintiffs' stated intention to proceed at trial under a theory of "circumstantial evidence of malfunction in the absence of abnormal use and after elimination of reasonably secondary causes." Due to the absence of opportunity to inspect the premises for such "secondary causes," the defendant's only defense to the plaintiffs' allegations would be to rely on the plaintiff's investigation. The plaintiffs provided evidence that the demolition was necessary for health and safety reasons but the court found that there was time for reasonable notice to the defendants since there was at least three weeks before demolition started. The court also found that the plaintiffs work in documenting

²⁵ The appellate court, however, found that the district court had erred, on the facts before it, in relying on Rule 37 of the Federal Rules of Civil Procedure as a source of authority to impose sanctions on the plaintiff. Rather, the court specifically held that the trial court could impose spoliation sanctions based only on its inherent authority.

²⁶ 585 N.E.2d 1115 (Ill.App. 1992).

²⁷ 168 F.R.D. 502 (M.D. Pa. 1996).

the fire scene with photographic evidence was important. However, the court found that the defendant was prejudiced because the plaintiffs were relying upon circumstantial evidence from the burn pattern at the scene which the defendant did not have an opportunity to see. Because the plaintiffs' conduct was not intentional, malicious or otherwise egregious enough to warrant dismissal or exclusion of their expert's testimony, the court held that a jury instruction on spoliation was the appropriate remedy and did not bar testimony from plaintiffs' expert.

5. *Allstate Ins. Co. v. Sunbeam Corp.*²⁸

In *Sunbeam*, the Seventh Circuit Court of Appeals affirmed the trial court's dismissal of an insurer's subrogation claim, where the insurer discarded parts of a defective gas grill and a spare propane tank in connection with its investigation of a house fire. The insurer subsequently admitted that it remained unsure of the cause of the fire even after the time it inspected the premises and discarded the items. Although the insurer claimed that its inspection indicated that the grill itself was the cause of the fire, the insurer discarded parts of the grill itself. The court held that the insurer knew or should have known that the discarded items, including parts of the allegedly defective product, may evidence alternative causes. Therefore, the insurer had a duty to preserve evidence of alternative causes. The Court noted that in an earlier case the Illinois appellate court had held that sanctions were not appropriate because the discarded evidence was not shown to be relevant to cause.

6. *Sentry Ins. v. Royal Ins. Co. of America*²⁹

In *Sentry*, an insurer subrogated to a policyholder's claim for fire damages removed critical parts of a refrigerator which allegedly caused a house fire. As a result, the defendant could not adequately inspect the refrigerator to determine if it caused the fire. As a sanction for the insurer's deliberate actions, the Wisconsin Court of Appeals excluded evidence of the refrigerator's condition.

7. *Vodusek v. Bayliner Marine Corp.*³⁰

In *Vodusek*, the Fourth Circuit Court of Appeals upheld a jury instruction allowing the adverse inference that certain spoliated evidence would have been unfavorable to the plaintiff's case. In that case, the plaintiff's boat exploded and caught fire. Before the defendant boat manufacturer had a chance to view the remains of the vessel, the plaintiffs' expert virtually "attacked the boat with a chain saw and a sledge hammer" in an attempt to ascertain the cause of the damage. This destructive "inspection" rendered the relevant portions of the boat useless for evidentiary purposes.

²⁸ 53 F.3d 804 (7th Cir. 1995).

²⁹ 539 N.W.2d 911 (Wis.App. 1995).

³⁰ 71 F.3d 148 (4th Cir. 1995).

8. *Mayes v. Black & Decker, Inc.*³¹

In *Mayes*, local fire inspectors determined that a defective coffee maker caused a residential fire. Representatives of the defendant manufacturer had an opportunity to inspect the coffee maker, but claimed that the plaintiff's removal of other electrical devices and the complete destruction of the residence a month after the fire precluded them from positing other potential causes of the fire. The New Hampshire Federal District Court denied the defendant's motion to dismiss based on the plaintiff's spoliation of evidence, holding that the defendant had ample opportunity to examine the coffee maker and photographs of the fire scene could therefore mount a challenge to the plaintiff's main trial theory that the coffee maker was the cause of the fire. The Court specifically noted that unlike cases imposing sanctions, this case did not involve destruction of the allegedly defective product and thus no sanction was necessary. The Court held that the defendant must lay the foundation of actual prejudice to get a spoliation jury instruction. If an instruction were given, the jury would be instructed that the adverse inference was permissive; e.g., the jury was free to reject the inference if it believed that the evidence was destroyed for an innocent reason.

III KEY STEPS TO AVOID SPOILIATION PROBLEMS

Aside from property owners and civil authorities, investigators representing potentially-subrogated insurers are often the first to arrive at the scene of the fire. It is in a subrogated property insurer's interest to assure that all potential evidence concerning cause is preserved to the extent possible, given safety and rebuild needs. It is also important, where practical, that all potential adverse parties are put on notice. The same rationale applies to potential defendants in possession of potentially material evidence. Observing the following steps immediately upon learning of a claim will help you avert later motions and potential sanctions.

A. When You Control the Loss Site

1. Get your investigator/subrogation counsel on-site as quickly as possible.
2. Determine the parties who had a role in causing the damage.
3. When there is opportunity to provide access to the site, put these parties on written notice of the loss and the possibility of a claim.
4. Where there is opportunity for a meaningful inspection, offer these parties a chance to inspect the defective product and, if reasonably practical, the loss site within the limited time frame available. If the conditions of the loss that have already been changed substantially by firefighting, hazardous material cleanup, or other safety efforts, or the loss site cannot be preserved because

³¹ 931 F.Supp. 80 (D.N.H. 1996).

of regulatory and/or safety considerations, document the conditions with photographs, videotape and/or other methods.

5. Where physical evidence on cause can be stored, do not dispose of damaged property until after the time to inspect deadline has passed, and negotiate storage expenses with the adverse party.
6. Secure and preserve evidence that supports any reasonable theory of causation; this might include evidence potentially useful later on to dispel other theories of potential fault.

B. When the Loss Site is Controlled by Adverse Parties

1. Upon any notice that your client's product is involved in causing the loss, promptly make your demand to inspect and preserve anything that you deem important in writing.
2. Do not miss deadlines for inspecting the site and/or product imposed by adverse parties.
3. Actively participate in negotiations for the storage and preservation of material evidence.