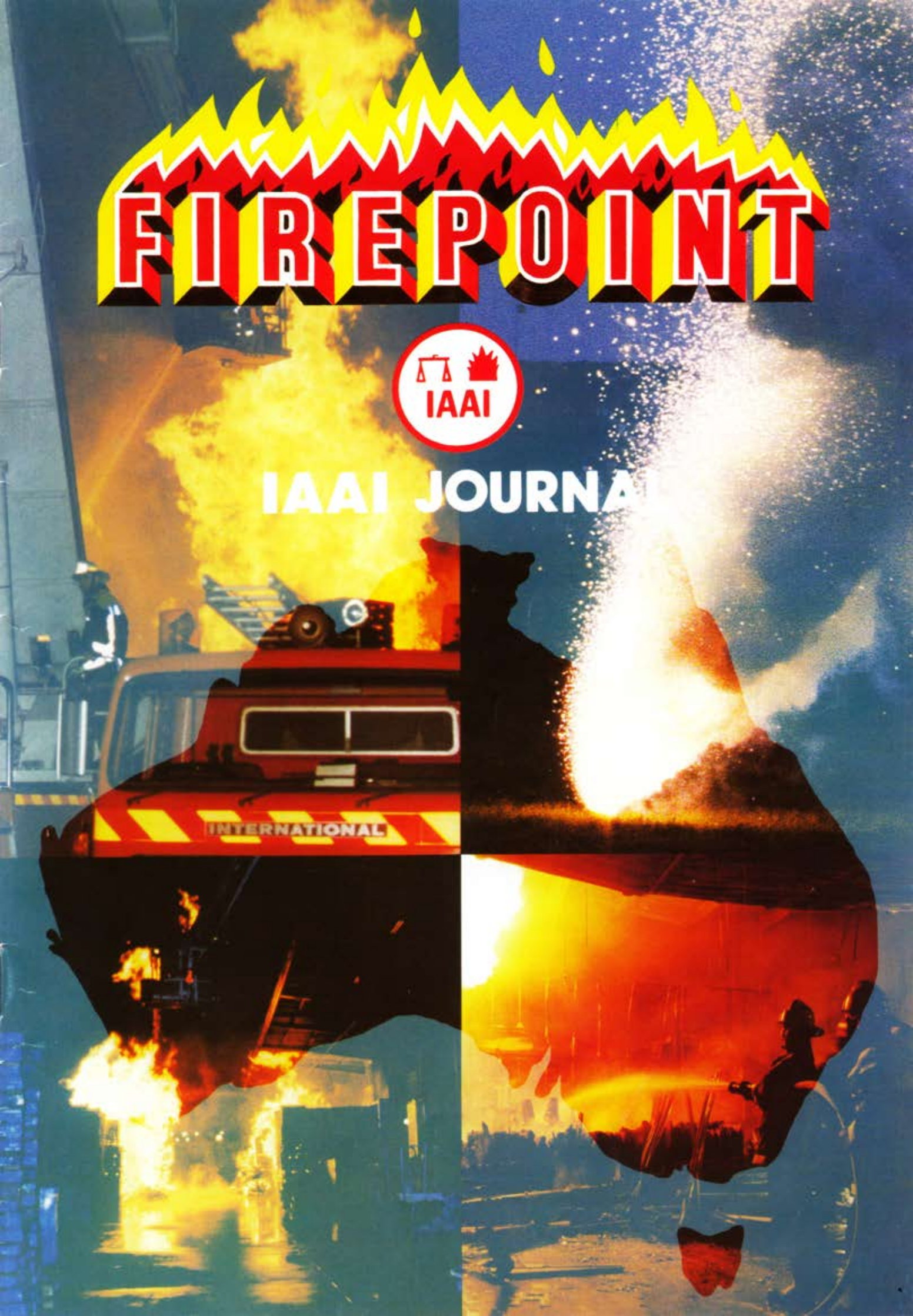
FIREPOINT

IAAI

IAAI JOURNA



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Firepoint

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EDITORIAL

I take over the position of "Editor" with a deal of misgivings. Firstly, I would like to thank John Boath, on behalf of all our members, for the sterling effort he put in. John assumed the position of Editor at a time when the NSW journal was almost defunct; he revived it, and went on to oversee "Firepoint" become a national magazine. We all owe him our heartfelt thanks.

My mission is quite simple: to make "Firepoint" a better journal, and to lower the cost of producing it. Almost contradictory goals. I am quite sure I can reduce costs, but I hope members will bear with me while I try to make improvements. It is a steep learning curve for me. I have much to learn in the months ahead, and whilst doing so hope I don't make too many botch-ups.

The objectives of "Firepoint" are easily defined; to keep members informed of past and future functions, and to provide education and training to all involved in fire investigation. At all times I welcome your comments and views as to how the journal can improve.

Our members are very varied: police, fire brigade officers, lawyers, investigators, adjusters, scientists, claims managers, etc. The journal needs to provide useful material for them all. A difficult task.

It is also imperative that the journal be, and be seen to be a national effort, not a NSW magazine which gets posted around the country. To achieve this end, it is imperative that we get lots of material from across the country. Come on, all of you. Get to it.

One of the first changes will be to have local articles reviewed, prior to publication. This month's articles come to us from overseas. The next issue will feature at least two local articles, but not before they have been reviewed. We want local articles (I urge you to submit something), but I believe we need to ensure local articles are as good as they can be.

Be it praise or criticism, I hope to hear from you.

Wal Stern

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International Fire Safety Science Symposium

Three hundred and fifty of the world's leading fire scientists are expected to attend the five day, Fifth Symposium of the International Association of Fire Safety Science. The symposium will be held in Melbourne, 3 - 7 March, 1997.

The symposium will see presented over 100 papers. Areas to be addressed include fire physics and chemistry, smoke and toxic hazards, risk assessment, human behaviour in fire, detection and suppression, structural behaviour and advanced application of fire science. The symposium will incorporate visits to fire testing facilities and social events.

Complete registration and hotel information is expected to be available in October 1995.

To ensure that an information package is mailed to you, you should register your interest with Professor Vaughan Beck, Victoria University of Technology,
c/- Waldron and Smith Management Group, 93 Victoria Avenue, Albert Park, Victoria, 3206.

IAAI - INTERNATIONAL SEMINAR

The IAAI held its AGM during May this year in Los Angeles, California, USA. Delegates participated in all aspects of the Seminar including training, meetings, displays, social events and outings. The following extract from the Training Program illustrates the diverse nature of activities offered to delegates :

- Task Force Operations
- Accelerant Detection - K9
- Fire Fatalities
- Ritualistic Firesetters
- Serial Arsonists
- Preparing to Testify
- Computer Evidence

Highlights included the Chapter Meeting, Casino Theme Night, LAFD appliances, Banquet Night with Awards and Vendor displays in the Sheraton Hotel. Some five hundred people including partners and families attended, which included for the first time a Spouses Program. This program presented two well attended sessions, Volunteerism and Juvenile Behaviour.

Australia was well represented by members from Queensland (2), NSW (2), WA (1) and myself from Victoria. The importance of having representation was reinforced: to expand the networking concept and facilitate the exchange of ideas. In pursuing these ideals the International Board of Directors stressed that it is only by bringing together all Chapters to communicate and train that the IAAI can be deemed a truly International Association.

Following my attendance I reported to the Chapter. I wish to express my thanks to the Chapter and Committee for their support.

Brian Neal (Victorian Chapter Editor)

A WORD FROM THE WEST.

The Western Australian Chapter has been asked to join the Arson Council of Western Australia, and to join a Committee to look at Certification of Fire Industry Workers, to discuss accreditation of people providing maintenance and installation of Fire Safety Systems .

The Chapter has organised a number of training seminars for the members and the Insurance Industry, and all have been well attended and successful. President Bill Mansas attended the Los Angeles AGM and was impressed with the calibre of speakers and topics on the program. The hospitality of the Americans also impressed him. He would like to assure Queensland members of every possible support in efforts to hold an AGM in Australia. He believed the feeling amongst delegates in Los Angeles was very positive about coming to Australia.

The problems of the Western Australian Chapter were in being able to increase the size of membership, and in creating a good liaison with members of the Police Arson Squad, who viewed the group with some suspicion. Any helpful advice or assistance in these areas would be welcomed.

The main aims of the committee for the remainder of 1995 would be to encourage growth, to offer value for membership, and in establishing good liaison with the Police arson Squad. he committee is very keen to make the organisation succeed, but is well aware that it will only succeed by encouraging people to join, and learn how to fight and understand the crime of arson.

Bill Mansas (WA President)

N.S.W. Association of Fire Investigators Inc.
(International Association of Arson Investigators (Chapter 47))

NSW PRESIDENT'S MESSAGE

(A *brief message from President Roger Bucholtz, compiled prior to his visit to the U.S)*

Welcome to another edition of Firepoint. In this issue you will notice we have a new Editor; congratulations Wal Stern.

I take this opportunity to thank John Boath for his efforts over the past 2 years in re-establishing the magazine to its former level. Since taking over as Editor, John has been involved in setting up the magazine as a National product, thus geneating input from all States. Again, thanks John.

By the time you read this issue the Annual Seminar will be over; currently registrations are on course to ensure a successful day.

Talking of making things successful, it is up to you, the membership, to make the organisation successful. To achieve this we need input from the members by way of articles, and if appropriate, case histories. By sharing your knowledge and experiences we may all become better educated in fire investigation.

FIRE INVESTIGATION UNIT REPORT

(Compiled by Alan Easy, Head of the NSWFB FIU)

Incendiary and Suspicious Fires 1987-1993

A recent study by the NSW Fire Brigades has shown an increase of 219 percent in these types of fires - 3,141 incidents in 1987, 10,027 in 1993.

These figures relate to all types of fires. Less dramatic is the increase in incendiary and suspicious structure fires which rose by eighteen percent. Certainly part of the increases can be attributed to better origin and cause investigation.

Motor vehicle fires of incendiary and suspicious origin increased by eighteen percent in the study period. The dollar loss for vehicle and structure fires in these categories amounted to nearly $400,000,000. This estimate is on direct property damage and does not cover consequential losses. A study by the National Fire Data Centre, USA, suggests that direct property losses account for only twenty five percent of the total cost of arson.

More recently the NSW Fire Brigade Statistical Report 1993/94 shows that Brigades attended 28,423 fires, which included 6,324 structural fires (down ten percent on 1992/93). Forty percent of the total fire incidents were recorded as incendiary or suspicious. Eighten percent of structure fires fell into this category and forty nine percent of vehicle fires.

How much did the January 1994 bush fires cost? Dollar loss has been estimated at $47,018,000.

Mandatory reading for all fire investigators is the National Fire Protection Association - NFPA921, Fire and Explosion Investigation. First published in 1992, the 1995 addition is now available. The code has been broadened to include new subjects :

- Electricity and Fire
- Motor Vehicle Fires
- Major Investigations
- Incendiary Fires
- Appliances

The cost for NFPA921 code is US$26.50 and handling charge of US$4.15 -National Fire Protection Association.- PO Box 9101, Quincy, MA02269-9101, USA.

The explosion in a Canley Vale restaurant showered debris to a distance of some eighty metres. Is this a record for what was reported in the media as a petrol vapour explosion?

The Coronial Inquiry conducted in Queanbeyan into a fatal cabin fire in a caravan park, which occurred late in 1994 has concluded. The Coroner found that the fire commenced in an air conditioning unit, but did not make a conclusion on the cause within the unit. No doubt civil action will follow, as the model of the air conditioning unit had been subject to a recall.

On the matter of recalls, fires continue to happen in exit signs in which a particular problem had been identified some six years ago. Two recent fires have occurred in Moree with minimal damage, but in North Sydney three years ago, an exit sign fire caused $60,000 damage to books in a library.

Models involved of exit signs are Bardic CFL 300M, M10, S10, and 10SLS110, and Lanson LM10.

Liability Exposure for Fire Investigators

..... *Is it Pandora 's Box?*

by
Michael A. McKenzie
Cozen and O'Connor
(a paper distributed at the May 1995 IAAI Annual Meeting in Los Angeles)

INTRODUCTION

Fire investigators are professionals. They operate in an environment where they regularly draw upon their education, training, and skill to provide clients with expert opinions concerning the origin and cause of fires. Like doctors, lawyers and other professionals, they owe their clients a duty of care commensurate with the degree of care, skill, and proficiency commonly exercised by ordinarily skillful, careful and prudent professionals.

Fire investigators have never been immune from liability to the clients they serve. Fortunately, however, professional investigators previously have never been a target of liability suits from irate clients as have doctors, lawyers, architects and other professionals. But, as our society becomes more litigious and as plaintiffs look for additional targets to place in their sights, the days of limited exposure and immunity from suit are over.

Liability exposures for an investigator are similar to those that doctors and lawyers face when treating a patient or representing a client. If the investigator negligently performs his or her work and, as a result, the client is damaged, a cause of action exists on behalf of the client. The exposure does not stop there, however. Investigators can be exposed to liability not only from their own clients, but also from third parties who are impacted by the investigator's work performed at a fire scene and in the course of an investigation.

Spoliation of evidence is a buzzword of the 1990's, and the emerging tort of spoliation has wide-reaching liability ramifications for investigators who regularly sift through, examine, discard or otherwise retain or handle evidence. At some point even the most conscientious investigator will inadvertently misplace a piece of evidence, be accused of not taking a piece of critical evidence or of failing to preserve enough evidence for evaluation by experts who are later retained by an opponent.

Liability issues are not limited solely to issues of spoliation. Libel, slander, trespass, negligent investigation, and intentional infliction of emotional distress all are areas of potential liability for investigators. Changes in the law are also occurring in the area of witness immunity, which should cause investigators to pause with concern. An issue presently being debated is whether an investigator who conducts an origin and cause investigation and then later testifies about it in court is immune from liability in a suit filed afterwards by an irate client not satisfied with the outcome. How far does witness immunity extend? In these days of "hired guns", do clients have a cause of action against those experts who misfire on the stand?

TORT of SPOLIATION

Anyone involved in the litigation process in the last five years has undoubtedly heard the work "spoliation" used in conjunction with evidence at a fire scene. Investigative techniques and discussions today between investigators concerning the management of a fire scene investigation necessarily involve issues of potential spoliation. Points of discussion include: 1) what evidence to take, 2) how much to take, 3) whether prospective opponents should be notified of being a potential target before the fire scene is bulldozed and 4) if the case of the fire is quite evident from the outset, whether that prospective adversary should be notified before any of the debris is moved.

Over the course of the last ten years a new **tort of spoliation** of evidence has emerged in cases decided in numerous jurisdictions all over the country. Spoliation cases arise when evidence disappears or is altered, whether intentionally or negligently. Plaintiffs argue

that they have been precluded from maintaining a cause of action, or have been adversely impacted in bringing one and seek damages for the spoliation. Rather than simply seeking some form of sanction against the party who caused the evidence to be spoliated, this new cause of action actually seeks to impose monetary liability on the alleged spoliator.

The tort has arisen in contests between parties in privity of contract, as well as in proceedings brought by third parties. One jurisdiction listed the elements of the cause of action as: (1) existence of a potential civil action, (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action, (3) destruction of that evidence, (4) significant impairment in the ability to prove the lawsuit, (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit, and (6) damages. Although the cause of action typically sounds in tort, the facts of the case will dictate whether it is brought in tort or in contract (e.g. a situation where one party promises another that the evidence will be preserved, and then it is destroyed or disappears, either negligently or intentionally).

Where does the fire investigator fit into all of this? Consider the following: (1) Investigator "A" conducts an origin and cause investigation and determines that the fire originated at a dryer, more specifically at the motor attached to it. He takes the motor as evidence. The insured is grossly underinsured and wants to vigorously pursue a cause of action against the motor manufacturer (as does the subrogated carrier). When it comes time to file suit, the investigator discovers that his staff discarded the motor by accident when the company's evidence locker was cleaned. Spoliation? Potential liability for the investigator?

Consider the fire listed in (1) above. The motor was not lost but now the electrical circuitry associated with the motor becomes extremely important in the ensuing litigation. It was there for the taking when the fire investigator performed the origin and cause investigation, but was not preserved with the motor. The motor manufacturer convinces the court that the circuitry was critical to its defense and persuades the court to dismiss the plaintiff's lawsuit. Spoliation? Is there potential liability on the part of the investigator back to his client (the carrier) or to the underinsured insured for not taking the circuitry? Where does the investigator draw the line between what is taken as evidence and what is left behind? How far does the investigator have to go in removing and preserving evidence to avoid being accused of spoliation of evidence or negligent investigation?

There are not easy answers; no clear-cut rules. Investigators must react quickly at fire scenes and make decisions that later will undoubtedly be criticized through the benefit of hindsight. Gray areas will always be present. The best advice may be to err on the side of taking a bit too much evidence and then make certain that it is catalogued properly so it can be retrieved easily when needed.

NEGLIGENT INVESTIGATION

Consider the scenario where the origin and cause investigator makes a call of incendiarism in connection with a residential fire scene investigation. The primary basis for the "call" is concrete spalling uncovered by the investigator when he cleared selected portions of the slab, which he claimed was undoubtedly caused by a flammable liquid poured in the areas where the spalling was found. As is so often the case today, the insured retains a fire expert of his own. The arson case against the homeowner proceeds to trial. The fire investigator for the insured testifies that he cleared the entire slab and found random spalling throughout. The incendiarism aspect of the case wilts in front of this countervailng testimony.

As you can well imagine, the "arson" case proceeds badly after that, especially in view of the fact that the original investigator violated a cardinal rule of fire investigation on by failing to clear the entire slab in the course of his investigation.

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Examine all Six Sides of a Scene

Donald Barry
Dee Insurance Investigations.
(Reprinted from March 1995 issue of "Fire and Arson Investigator).

When conducting a fire scene investigation, we often, and appropriately, find ourselves looking to find the most fire damage at the lowest level, sometimes the floor, and then look for an ignition source in that area. This is essential in order for us to possibly and properly determine the cause of the fire.

At or near floor level, we may find electric extension cords, electric devices, portable heaters, linseed oil-soaked rags, melted down trash baskets with smoking materials, and other heat sources which may be responsible for ignition of an accidental fire.

Should irregular shaped burn patterns, severe charring, and burned out areas of a floor or shelving near floor level be found with no apparent accidental ignition source located there, the investigator could possibly fall into the trap of labeling the fire "suspicious" or "arson," if the investigation was allowed to end there.

Not so fast! Was the irregular shaped burn pattern found on the floor caused by melting solids such as polyurethane foam, plastics, or similar material? Was the irregular shaped burn pattern on the floor caused by "drop fire" of falling ceiling or roof materials?

As pointed out in NFPA 921 (Fire and Explosion Investigations), many modern plastic materials will burn. The petrochemical based materials react to heating by first liquefying and then burn as liquids, producing irregularly shaped or circular burn patterns which can erroneously be identified as flammable and combustible liquid patterns and associated with an incendiary fire cause.

Similar to melted plastic material, asphalt roofing material must be considered when evaluating irregular burn patterns found at or near floor level. As a result of the Livonia, Mich. fire which destroyed a (35 acre) General Motors plant (1953), major attention has been paid to the combustibility of insulated metal roof decks as asphalt moppings, melted and vaporized, contributing significantly to the spread of the fire when forced down through the joints and other .penetrations. Studies conducted confirm that under certain conditions, metal deck assemblies can contribute to an interior fire. [Refer to Insulated Metal Roof Deck Fire Tests (FM 1955)].

NFPA standard #203 (Roof Coverings and Roof Deck Constructions), further points out that roof decks should be considered for their possible contribution to fire spread. That standard describes the asphalt as "combustible gases" and "flaming droplets" which contribute significantly to the fire by flame spread beneath the roof and ignition of combustible contents.

The investigative report of the Livonia, Mich. fire includes information from witnesses who observed molten tar dropping from the roof deck (100 ft.) or so in advance of the actual fire itself. The report also indicates that the fire was not continuous at the beginning, rather, molten tar of the "high level" fire dropped and caused spot fires which eventually were joined.

We too often, read news articles that authorities determined that a particular fire was "suspicious" which means, in most cases, that the fire was suspected of being arson.

The National Fire Incident Reporting System (NFIRS), in use in many jurisdictions, states the following regarding use of the term "suspicious:"

"Circumstances indicate the possibility that the fire may have been deliberately set, multiple origins were found, or there were suspicious circumstances and no accidental or natural ignition factor could be found."

Emphasis should be put on the lafter part of that statement, "...and no accidental or natural ignition factor could be found."

Similarly, the NFIRS report manual states that the ignition factor "incendiary" means: "Legal decision or physical evidence indicates that the fire was deliberately set."

Examine All Six Sides of a Scene
(continued from page 9)

Any good text book on Fire/Arson Investigation tells investigators to reconstruct the fire scene, examine the six sides, examine the exterior, and consider the effects of flashover, airflow, hot gases, melted plastics, building construction and building collapse and other factors.

In order to confirm suspected "multiple points of fire origin", or confirm "pour pattterns" on the floor, the investigator must eliminate all drop fires, which can often be done simply by looking up.

If the irregular burn pattern on the floor is mimicked by the outline of the remaining asphalt shingled roof, "drop fire" probably can't be completely eliminated without laboratory analysis. Should analysis show the presence of an ignitable liquid not common to asphalt processes, then an arson investigation should continue. If no ignitable liquid is detected, the burn pattern cause should remain "drop fire" until proven otherwise.

If irregular burn pattems on floors, or any flat surfaces are found immediately below a metal roof deck seam or a joist covered with asphalt, the patterns shouldn't be considered as other than "drop fire" without further analysis, especially if congealed deposits of tar are found nearby.

To avoid mislabehng a fire the investigation should eliminate all accidental causes in the actual areas of fire origin.

Liability Exposure for Fire Investigators
(continued from page 8)

Is the original investigator exposed to liability to the insurance carrier who hired him? On what grounds? For what amount, if any? The answers are: yes, negligent investigation and $3.5 million. Clearly, the original investigator owed a duty to that carrier to exercise a sufficient degree of care, skill and proficiency commensurate with that commonly exercised by ordinarily skillful, careful and prudent fire investigators.

It could be argued that the fire investigator breached that duty by rendering an opinion of incendiarism based upon concrete spalling, when he had never cleaned the entire slab and had no other indices for incendiarism other than the spalling. If, ultimately, that opinion proved to be the proximate cause of the adverse $3.5 million dollar verdict rendered by the jury, the investigator would be exposed to a suit brought by his client (the carrier) to recover those dollars paid to satisfy the verdict.

Would an insurance carrier pursue a fire investigator on a theory of negligent investigation after being socked with a multi- million dollar verdict? Why not? Why do disgruntled clients and patients sue lawyers and doctors for malpractice when cases and operations do not turn out as expected? Why should the carrier bear the sole burden of the loss? This scenario is not beyond the realm of reason. It could, unfortunately, begin to occur with regular frequency as the ranks of experienced investigators swell with those who lack the necessary skill and training to perform an adequate job on behalf of their clients.

There is no question that the investigator is exposed to the client who hired him because of the privity of contract that exists between them. But what about the insured whose fire was investigated? One would think that an investigator should not have to worry about liability in that context, but one court has held that investigators do owe a duty to insureds to conduct a fair and reasonable investigation of an insurance claim, despite a lack of privity. Breach of that duty can expose investigators to monetary liability never anticipated when the investigator accepted the assignment from the carrier.

(Editor's Note: How about within Australia? Have any fire investigators here been liable, in the manner described. Have any been sued? Is it possible, or likely, that they will be in the future? Your comments on the issues raised in this article are welcome.)

Queensland Chapter
June Luncheon

The decision, taken by the executive of the Queensland Chapter to seek high profile speakers for our luncheons, paid handsome dividends at our meeting on June 8, 1995. A new record number of members listened to an interesting address by Mr Paul Braddy, Queensland Minister of Police and Corrective Services. The contents of his speech was apparently prepared in conjunction with Assistant Commissioner Graham Williams, of the Fraud Squad, who was also a welcome guest.

The Minister, who had practised as a lawyer for twenty years before entering politics, indicated that a policy of "working smarter" had been instituted within the Queensland Police Service (QPS) since 1989, at which time the policy of recruiting 17 or 18 year olds was changed to that of seeking 25 to 26 year old recruits. Most of these recruits were tertiary qualified, many with degrees. This change in focus corresponded to a policy of increasing the number of operational police by two hundred a year which has been achieved since 1989, While crimes of violence had remained essentially static over the past few years, a massive growth in crimes against property has become evident. This growth prompted the formation of special squads to work within the QPS regions. An example is the Property Crime Squad which focuses on the recovery of stolen property and the identification of organisers within this crime group. It was estimated by the CJC that white collar crime accounted for more than ten million dollars annually; however, reported incidences of fraud have declined especially in southeast Queensland.

Along with the decline in reported incidences of fraud, a decline in the reported incidences of arson has also occurred in the last twelve months. Of the 70 fires recently investigated, 14 resulted in charges being laid. Of additional incentive was the successful conviction of an interstate arsonist who had set a substantial fire in the metropolitan area.

Mr Braddy indicated that more successful investigation of arson has followed the encouragement by the QPS of regional officers to attend specialist arson courses at Oxley. In addition, gains have been achieved in the use of sniffer dogs, Neighbourhood Watch, Crime Stoppers and increased school patrols. Other factors which were related to this increasing success were the use of the Police Service data management services and the development of strong links between the police and insurance people, as highlighted by the monthly meetings of police officers with the ICA.

July Luncheon

This luncheon was convened to take advantage of the visit of international directors of the IAAI, who form part of the site selection committee for the 1998 International Convention.

Bruce Sainsbury, an international director, member of the New South Wales Chapter and honorary member of the Queensland Chapter introduced the two speakers. Bruce announced that the New South Wales and Victorian chapters had each contributed $500 to assist in the financing of the Queensland bid for the 1998 Convention. We thank these chapters most sincerely for their early assistance.

Ben Cypher

Ben Cypher, now a private consultant in the U.S., following forty years with the fire services, has a degree in fire science, is a Past President of the International, was President of his home chapter in Pennsylvania, of which he is a life member. He was visiting Australia as the chairman of the Conference and AGM site selection committee. Ben took the opportunity of comparing the current situation within Australian chapters with that which existed some fifteen years ago in the United States, when there was little co-operation between the police, fire services, insurance industry, and private consultants. However, he highlighted the prominence the IAAI has in the USA by indicating that the current International President, Jack Yates was called to assist in

the investigation of the Oklahoma City bombing within hours of the explosion. He indicated that, while the FBI tend to assume a high profile role in fire investigation, it is an organisation which tends to draw in information and reveal little, whereas the Federal Bureau of Alcohol & Tobacco & Firearms, works in close association with the IAAI and other investigating agencies. The BATF underwent severe criticism of their involvement in the Waco, Texas incident, with Congress threatening its long term survival. However, the highly acclaimed work of the BATF in the investigation of the World Trade Centre bombing, and the recent Oklahoma City bombing have renewed the respect for this bureau and all but guaranteed its future as the only truly successful body in the USA involved in fire investigations.

In the early 70's, there were very few private investigators involved in fire investigations; most of this work would have been done by state bodies or by in-house staff of insurance companies. Currently most of the private fire investigators are ex-police and/or fire services, who enjoy a strong level of cooperation from police service and insurance groups. He indicated that the IAAI has played a big part in bringing together groups interested in fire investigation and are now in a position to provide an international data sharing facility.

Allan Clarke

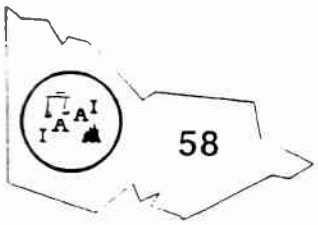
Allan Clarke, currently the first vice president of the International, heads up the Fire Investigation Unit within Grinell Mutual, one of the world's largest agricultural product reinsurers, based in Iowa. Allan began his comments by highlighting comparable statistics for 1993 for the US, and those produced by the ICA. He indicated that 15% of all structure fires were arson which had led to 500 deaths and over two thousand million dollars in damage, while the ICA figures indicated that 14% of structures fire in Australia were arson having a total damage bill of $400 million per annum. He indicated that NSW had, in the last 12 months, achieved 12 convictions on arson offences, but only one involved a prison sentence. Allan went on to describe a US Government program which inadvertently encouraged some less scrupulous members of the dairying Industry to commit arson. The story went something along these lines: as part of the US farm program, in response to an excess of milk production, the solution put in place by the government was to buy, for five years, the production of a number of the dairy producers on the provision that they ceased dairy operations during that period. In addition to the government payment, excess stock were available for slaughter or for their more lucrative export to Mexico of live animals. Part of the agreement with the government was that the producers who received payment were to keep no dairy animals nor undertake any dairy related activities in their specialised and highly instrumented dairy sheds. This provided an opportunity for the insurance industry to 'buy' these dairy sheds which the industry did following the inevitable fires. Now, five years later there are new high-tech sheds on the same locations and new cows which wait for a new farm program.

From a small start in 1949, Allan indicated that the IAAI has grown to 100,000 Members in 1995, associated with 60 chapters, 49 in the USA, 5 in Canada, 3 currently in Australia, 1 in New Zealand, and 1 in Israel and Sweden, The IAAI has grown in status so that it makes substantial inputs into training and legislation within the USA and also worldwide, where it has association with 24 other like minded groups, There are 15 international directors and an executive director who, with 3 other full-time staff members, service the Internationa.

Total Membership:
9,000 USA
1, 000 others (25% Australian)

	USA	Australia
Fire Service	49	23
Police	13	23
Insurance	13	9
Pte. Investig.	17	35
Lawyers & Forensic Professls.	8	10

IAAI promotes 5 to 6 regional seminars per year, which may be held by any chapter given adequate advanced notice. The IAAI Convention and AGM will be held in 1996 in St. Louis, in 1997 in Toronto and the current bidders for the 1998 convention are Michigan, Oregon, Israel and Queensland.



I.A.A.I.
Victorian Chapter 58

CONGRATULATIONS

The Committee and Members of the Chapter are delighted to learn that Alan Eley has been awarded the Australian Fire Service Medal. We extend our congratulations to Alan, who received his Medal in the Queens Birthday Honours List for service and dedication to both the MFB and CFA.

THE EVOLUTION OF FIRE

Despite the inclement weather another well attended event was conducted by the Chapter on 14 June. On this occasion about 100 people representing the Insurance Industry, Loss Adjusters, Police and Fire Services witnessed the staged razing of a house at McCormicks Road, Carrum Downs. The first stage involved a controlled burn of one room to allow for examination and instruction in fire dynamics, followed by total destruction, which highlighted the hazards and difficulties in suppression.

Everyone in attendance agreed that this was a most informative event, and the barbecue that followed was enjoyed by all.

None of this would have been possible without the splendid co-operation of the Officers and Members of the Carrum Downs Fire Brigade who made their facilities available to the Chapter. We are very grateful for their support and assistance.

(see photographs next page)

MORWELL VISIT

Members of the Committee conducted a discussion night at Morwell Fire Station on 4 July. The title for the night was " The Emergency Services Role in Fire Investigation", which drew an audience of some seventy from the Gippsland area. Contributions to a successful night were made by speakers from CFA, MFE, Victoria Police, Forensic and the Chapter, and our thanks to District Officer Bob Langridge and staff for their enthusiastic support and assistance.

MEMBERSHIP

The committee has approved the following new members and welcome them to the Chapter :

B Lancaster
D Avon
D Sullivan
B Braddon

It should be noted that those members who have not paid their subscription fees ($25.00) for the year 95/96 please forward as soon as possible as your membership is valued but not credited. The final payment date is 30th September 1995.

COMMITTEE NEWS

Following the successful House Burn and visit to Morwell the committee is now working towards the Chapter Seminar in October. A letter from Bruce Sainsbury was received regarding Postal Voting for International, and Queensland's bid for the International AGM & Seminar. The Committee determined to support both these proposals. Welcome to Scott Saunton onto the committee as our Legal Officer replacing Paul Duggan.

VICTORIAN CHAPTER ANNUAL GENERAL MEETING JULY 1995

The Victorian Chapter Annual General Meeting was held at the MFB College, 619 Victoria Street, Abbotsford, on 25th July, 1995.

Reports were received from the out going President and Treasurer, followed by the elections.

ELECTION RESULTS

The following members have been elected to your committee for the two year period 95/97 :

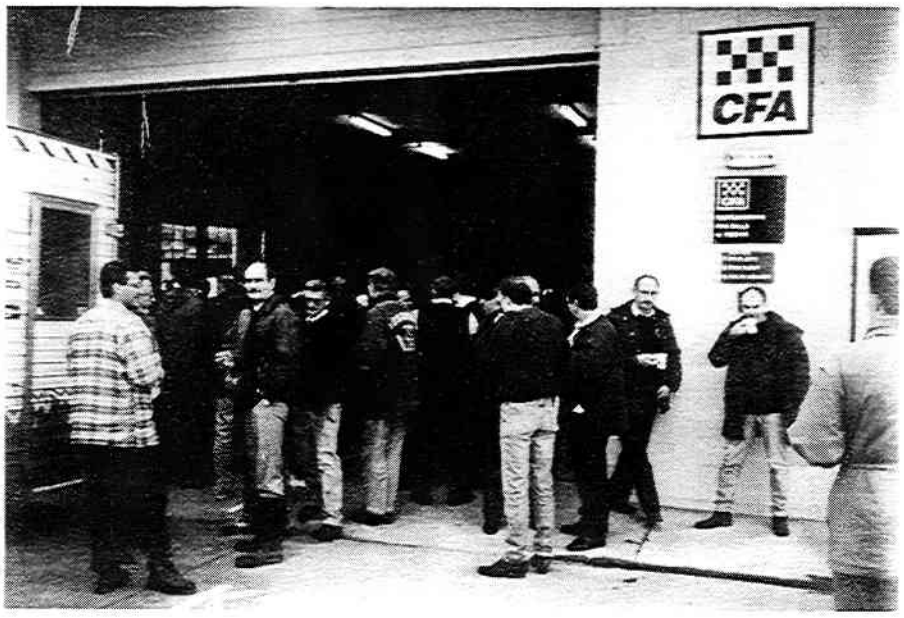
PRESIDENT- Adrian Edwards
TREASURER - Peter Hawkins
COMMITTEE - Neil Barnes
COMMITTEE - Colin Cortous
COMMITTEE - Tony MacKintosh
COMMITTEE - Jeff Burzacott

Congratulations to those elected and thanks to those who retired.

PRESENTATION

Following the formal part of the AGM, a presentation was given by Graeme Johnstone, State Coroner on the Role of the Coroner discussing the areas of injury and death prevention and the need for accurate investigation into all areas including fires and recording and retrieving of the correct data. Graeme also introduced the Fire Investigation, Policy & Procedures for Victoria.

Plaques were also presented by Adrian Edwards to Fred McCoach and Gary Martin for their dedication and work on the committee. He also thanked the previous committee on the effort and achievements completed and said he was looking forward to continuing with the same enthusiasm.



1995 VICTORIAN PROGRAM OF EVENTS

30TH AUGUST 1995
Dinner Meeting
Lexa Mann - Presentation
" Death by Misadventure "
Venue - TBA

12TH OCTOBER 1995 :
Chapter One Day Annual Seminar
"Win or Lose - Preparation for Court"
MFB Training College

MID NOVEMBER 1995
Golf/BBQ Day
Venue & Details - TBA

All members will be notified by mail of all coming events giving full details and should reply tendered by the indicated time.

Misrepresentations and Concealments in the Application for Insurance:

An Analysis of the Insurer's Right to Rescind Coverage

(A paper reprinted from the March 1995 issue of "Fire and Arson Investigator")

Rick Hammond
Partner, Chuhak & Tecson

BACKGROUND

Most property policies provide the insurer with the right to rescind a policy or to deny a claim to an insured who intentionally conceals or misrepresents material facts concerning the insurance. It is important to distinguish between a misrepresentation made by an insured before a loss, i.e., in the application for insurance, versus a misrepresentation made afterwards, i.e., in the presentment of claim.

Misrepresentations or concealments of material facts made by an insured prior to a loss will typically provide the insurer with a right to rescind the policy, whereas, those made after a loss will typically provide the insurer with a right to deny coverage for the submitted claim.

The applicable policy provision respecting the insurer's right typically provides as follows:

Concealment or Fraud. The entire policy will be void if, whether before or after a loss, an "insured" has:

a. intentionally concealed or misrepresented any material fact or circumstance;

b. engaged in fraudulent conduct; or

c. made false statements; relating to this insurance.

COMMON LAW APPROACH

Under Illinois law, an insurance policy may be revoked for the same reason as any other written contract,

i.e., when clear and convincing evidence compels a conclusion that an instrument, as it stands, does not properly reflect the true intention of the parties, and there has been either a mutual mistake or mistake by one party and fraud by the other. **Board of Trustees of University of Illinois v. Insurance Corp. of Ireland,** 969 F.2d 329 (1992).

Under the common law, an equitable claim for rescission on the basis of fraud voids the policy ab initio, i.e., at its inception, and may be asserted by establishing:

1) a representation in the form of a statement of material fact, made for the purpose of inducing the other party to act;

2) that the statement is false and known by the party making it to be false, or not actually believed by him to be true; and

3) the party to whom it is made is ignorant of its falsity, must reasonably believe it to be true, must act thereon to his damage, and in so acting must rely upon the truth of the statements.

Chapman v. Hosek, 86 Ill. 379 (1 Dist. 1985); Allstate **Insurance Co. v. National Tea Co.,** 25 Ill App.3d 449,323 N.E.2d 521 (1975).

In **Stone v. Those Certain Underwriters at Lloyds,** 81 Ill.App.3d 333 (5 Dist 1980), the court adopted the Restatement of Contracts, § 472 (1)(b), which requires the insured to disclose information not known to the insurer, and which is so vital to the contract that if the mistake were mutual the contract would be voidable. If the non-disclosing party knows the other party does not know the facts, nondisclosure is not privileged and is fraudulent. **Stone** at 336.

STATUTORY REQUIREMENTS

Most Illinois Courts strictly construe and adhere to the language of the Ill.Rev.Stat., ch. 73, 766, which provides:

Misrepresentations and False Warranties. No misrepresentation or false warranty made by the insured or in his behalf in the negotiation for a policy of insurance or breach of a condition of such policy shall defeat or avoid the policy or prevent its attaching unless such misrepresentation, false warranty or condition shall have been stated in the policy or endorsement or rider attached thereto, **or** in the written application therefore, of which a copy is attached to or endorsed on the policy, and made a part thereof.

An insurer satisfies the basic requirements of the statute if the insurer is able to establish **either** an intent to deceive or a material misrepresentation. The elements of "intent to deceive" and "material misrepresentation" should be read in the disjunctive, i.e., if a misrepresentation is deemed to be material, it need not have been made with the intent to deceive. **Campbell v. Prudential Insurance Co.,** 15 Ill.2d 308,155 N.E.2d 9 (1958); **Roberts v. National Liberty Group of Companies,** 159 Ill. App. 3d 706, 512 N.E.2d 792 (4th Dist. 1987); **Logan v. Allstate Life Insurance Co.,** 19 Ill. App. 3d 656,312 N.E.2d 416, 420 (2d Dist. 1974).

INTENT TO DECEIVE

Courts define "intent to deceive" as the intent of the insured to induce his acceptance as an insurance risk by false statements. Courts will typically examine a wide range of circumstantial evidence in order to determine whether there was fraudulent intent. **Roberts v. National Liberty Group of Companies,** 159 Ill. App. 3d 706, 512 N.E.2d 792 (4th Dist. 1987); **Fireman's Fund Insurance Company v. Knutsen,** 324 A.2d 223 (1974).

In Fireman's Fund, the Court held that similar fraudulent acts, if committed sufficiently near in time so that the same motive may reasonably be inferred to exist, are admissible to establish intent, on the sound logical principle that such similar acts diminish the possibility that an innocent mistake was made in an untrue and misleading statement.

MISREPRESENTATION

Illinois Courts have interpreted "material misrepresentation", as it pertains to insurance contracts, as an untrue fact which affects the risk undertaken by the insurer. Thus, the insured's misrepresentation must be shown to have caused a substantial increase in the risk insured against, and would have, if the misrepresentations were known by the insurer, caused a rejection of the application. **American Country Ins.** Co. **v. Mahoney,** 148 Ill.Dec. 438,560 N.E.2d 1035 (Ill.App. 1 Dist. 1990).

The Mahoney court concluded that an insurance applicant has a duty to act in good faith, and that an insurer is entitled to truthful responses so that it may determine whether the applicant meets its underwriting criteria. Nevertheless, a good faith mistake does not excuse a material misrepresentation on an insurance application and does not preclude an insurer from rescinding a policy under Illinois law. **Bageanis v. American Bankers Life Assur. Co. of Florida,** 783 F.Supp 1141.

It is interesting to note that an insurer is not required to attempt an independent verification of the information provided by the insured. **Allstate Insurance Company v. National Tea Co.,** 323 N.E.2d 521 (1 Dist 1975). For example, in **Bade v. Badger Mutual Ins. Co.,** 142 N.E.2d 218 (1966), the court allowed the insurer to rescind the policy even though the misrepresentations were discovered four years - and several renewals - after they were made.

MATERIALITY

Materiality is a question for a trier of fact and is judged by an objective standard. Accordingly, the insured must disclose any facts requested on the application that, objectively considered, might give rise to a claim, regardless of the insured's subjective belief.

However, materiality may also be proven by the testimony of an insurer's underwriter or employee regarding the significance of the information sought, or based upon the underwriter's experience or the practices of the insurance industry. It is important to note, however, that if the insurer fails to request the information in the application, such information may be deemed immaterial. **Garde v. County Life Insurance Co.,** 147 Ill. App. 3d 1023, 498 N.E.2d 302, 308 (4th Dist. 1986); **Ratcliffe v. International Surplus Lines Insurance Co.,** 194 Ill. App. 3d 18,550 N.E.2d 1052, 1057 (lst Dist. 1990); **International Insurance Co. v. Peabody International Corp.,** 747 F. Supp. 477,480 (N.D. Ill. 1990); and **Bowman v. Zenith Life Insurance Co.,** 67 Ill. App. 3d 393, 384 N.E.2d 949,950-51 (lst Dist. 1978).

In **Farmers Automobile,** the Court construed against an insurer a declaration in an insurance policy which amounted to a warranty that "NO INSURER HAS REFUSED TO ISSUE", because the language according to the Court, could have been misunderstood, and because, the insured would have to search through definitions, exclusions and conclusions many times more voluminous than the insuring agreement in order to

interpret the declaration. **Farmers Automobile** at 737.

CONCEALMENT

Courts have held that an insurance applicant's failure to disclose information to an insurer may rise to the level of a material misrepresentation. **Stone v. Those Certain Underwriters at Lloyds,** 36 Ill. Dec.781,401 N.E.2d 622 (Ill.App. 5 Dist 1980). Thus, representations in an application for insurance should not only be true but full; i.e., the insurer has a right to know the whole truth in order to make its own inquiries, and in order to determine whether or not the risk should be assumed. **Government Employees Insurance Co. v. Chavis,** 176 S.E.2d 131 (1970). For example, in Garde by Garde v. Country Life Insurance Co., 101 Ill.Dec. 120,498 N.E.2d 302 (Ill.App. 4 Dist 1986), the court allowed an insurer to rescind its policy based upon the insured's nondisclosure of twenty-two policies of insurance already in force.

The fact that an insurer conducts an independent investigation does not absolve an insured from speaking the truth. Nor, does it lessen the right of the insurer to rely upon the insured's representations, unless, the investigation disclosed facts sufficient to expose the falsity of the representation made, or, the misrepresentation was of such a nature as to place on the insurer the duty of making further inquiry. **Allstate Ins. Co. v. Meloni,** 236 A.2d 402 (1967).

it is important to note an exception to the general rule regarding an insured's duty to disclose. In **Boyles v. Freeman v. State Farm Mutual Automobile Insurance Company,** 315 N.E.2d 899 (lst Dist 1974), the Court held that where a prospective insured, in good faith, admitted that his driver's license had been suspended or revoked, but qualified his statement by saying that he couldn't remember whether it occurred in the preceding five years, and where the insurer had an election of ignoring the qualification or refusing the risk, but elected to ignore the qualification and issue the policy, it could not later seek to rescind the policy because the statement without the qualification was false.

APPLICATION MUST BE ATTACHED TO POLICY

Illinois courts have consistently upheld the statutory requirement that the application be attached to the policy if the insurer intends to rely upon the representations in the application.

As previously cited, the Illinois Insurance Code provides that no misrepresentation... shall defeat or avoid the policy ... unless such misrepresentation, false warranty or condition shall have been stated in the policy or endorsement or rider attached thereto, or in the written application therefore, **of which a copy is attached to or endorsed on the policy, and made a part thereof.**

The primary purpose of the law requiring that the application be attached to the policy is to give notice to the insured that he/she is to review all statements made and to correct any misstatements which appear therein. **Alperin v. National Home Life Assurance Company,** 336 N.E.2d 365 (1 Dist. 1975). It should be noted, however, that an insured is given the benefit of the doubt when the agent fills out the application because the agent may insert conclusions of his own or answers inconsistent with the facts. **Boyles v. Freeman v. State Farm Mutual Automobile Insurance Company,** 315 N.E.2d 899 (1 Dist 1974).

Courts generally require strict compliance with the statute, i.e., misrepresentations must be reduced to written form and attached to the policy in order to meet the requirements of the statute. **International Amphitheater Co. v. Vanguard Underwriters Ins. Co.,** 126 Ill.Dec. 808 (1 Dist 1988). Furthermore, Illinois Courts have concluded that no matter how egregious a misrepresentation that is made in an application for insurance, or how much a misrepresentation may have altered the nature of the insured risk, the insurer may not rescind the policy unless the application is physically attached to the policy. **Gibraltar Casualty Co. v. A. Epstein & Sons Int'l. Inc.,** 206 Ill. App.3d 272, 562 N.E.2d 1039,1042-43 (lst Dist. 1990).

In Gibraltar, the court held that the insurer must attach the written application to the policy, or include unambiguous language which specifically incorporates the application into the policy. The Court further held that a mere statement in the policy that the insured's statements were made part of the policy, or a general reference to the application in the policy does not

fulfil the requirements of the statute. Gibraltar at 239.

At least one Illinois Court has recognized an exception to the "attachment" requirement of Section 766, i.e., when the insured's continuing duty to supplement and disclose events that occur after submission of an application but prior to issuance of a policy. **Carroll v. Preferred Risk Insurance Co.,** 60 Ill. App. 2d 170,208 N.E. 2d 836,839 (1965). The Court in **Carroll** specifically concluded that Section 766 was inapplicable in such cases, stating:
We think the purpose of Section 766 is to preclude the insurance company from charging misrepresentation of facts which have occurred up to and at the time the application for insurance is executed. This Section does not alter the duty of the insured to disclose the existence of facts materially affecting the acceptance of the risk which come to the knowledge of the insured after the application is made and before the policy is issued. Id. at 839.

RESTORATION OF STATUS QUO

It is a general principle of the doctrine of rescission that a person demanding rescission restore the other party to the status quo existing at the time the contract was made. **Puskar v. Hughes; Luciani v. Bestor,** 106 Ill.App,3d 878, 882, 62 Ill.Dec. 501, 436 N.E.2d 251 (1982). Accordingly, if an insurer fails to give prompt notice of its election to rescind and fails to restore the insured to the status quo existing at the time the contract was made, it may lose its rights in that regard. **International Ins. Co. v. Sargent & Lundy,** 182 Ill.Dec. 308,609 N.E.2d 842 (1993).

It is important to note, however, that the granting of rescission is not necessarily precluded in those cases where it is impossible to restore the other party to status quo. Thus, restoration to status quo will not be required when the restoration has been rendered impossible by circumstances not the fault of the party seeking rescission, where the insured has obtained a benefit from the contract, and where, by the nature of the insured's fraud or other act, it is impossible to restore the status quo. **John Burns Construction Co. v. Interlake, Inc.,** 105 Ill. App.3d 19,27, 60, Ill.Dec. 888,433 N.E.2d 1126 (1982).

Conversely, however, rescission will not be granted where the actions of the party seeking rescission have created an impediment to the Court's ability to restore the status quo. **Klucznik v. Nikitopoulos,** 152 Ill.App.3d 323, 328, 105 Ill.Dec. 141, 503 N.E.2d 1147 (1987).

WAIVER AND ESTOPPEL

An insurer's right to rescind a policy of insurance is a privilege which may inadvertently be waived by the insurer, or, the insurer because of its conduct may be estoppel to deny coverage. Thus, an insurer's rights under the policy may be lost by waiver or ESTOPPEL where the conduct of an insurer induces the insured to believe that he need not comply with certain policy provisions or that such provisions will not be enforced. **Downing v. Wolverine Insurance Co.,** 210 N.E.2d 603 (2nd Dist. 1965).

An insurer may have a right to rescind a policy of insurance even though it failed to reserve its right of rescission in the policy. It must however, be shown by an insured claiming waiver that the insurer had at all relevant times knowledge, actual or constructive, of the existence of their rights or facts upon which they depended, i.e., waiver cannot be established by consent given under a mistake of fact. **Government Employees Insurance Co. v. Chavis,** 176 S.E. 131 (1970).

It is important to note that lack of good faith on the part of an insured does not prevent consideration of issue regarding whether an insurer waived a coverage defense based on misrepresentations in the application for insurance. Thus, a "lack of good faith" defense is applicable only to the doctrine of ESTOPPEL and not to waiver which involves acts or conduct of one of the parties to the contract. **Fireman's Fund Insurance Company v. Knutsen,** 324 A.2d 233 (1974).

CONCLUSION

The burden of making out a case for rescission is on the insurer, who must prove the grounds relied upon. Fraud, needless to say, can be established by a number of evidentiary factors. However, a verdict in favour of the insurer based upon rescission usually results when the burden of proof has been sufficiently satisfied by clear and convincing evidence.