I. INTRODUCTION

Whenever you are investigating or evaluating potential avenues for subrogation in connection with a loss at a manufacturing or processing facility operated by a party other than your insured, you should give some consideration to the manufacturer’s or processor’s compliance with OSHA and EPA “Process Safety Management” (“PSM”) regulations, which are set forth at 29 CFR §1910.119, and 40 CFR 68.1, respectively.

II. OSHA PSM REGULATIONS

The OSHA PSM regulations, which were adopted in 1992, impose extensive obligations upon processes involving highly hazardous chemicals in excess of specified quantities, or which involve in excess of 10,000 pounds of flammable liquid or gas on site in one location.
equipment under §500-3 of the National Electric Code (NFPA 70). This classification will, in turn, not only dictate the potential selection and use of “explosion-proof” electrical equipment, but may also give rise to obligations under other NFPA Standards and OSHA regulations, including a potential requirement for specialized forklift trucks under 29 CFR §1910.178 and NFPA 505. The compilation of information pertaining to the process equipment also includes information regarding relief system design, ventilation system design, design codes and standards employed, safety systems, such as interlocks and detection or suppression systems and, generally, requires that the processor “document that equipment complies with recognized accepted good engineering practices.”

2. The processor is also required to conduct a “process hazards analysis” (“PHA”), which is required to address not only the hazards of the process, but also “the identification of any previous incident which had a likely potential for catastrophic consequences in the workplace,” as well as engineering and administrative controls applicable to the hazards, such as appropriate detection methodologies. The process hazard analysis is required to be performed by a team with expertise in engineering and process operations, including at least one knowledgeable employee of the processor. Conscientious efforts to comply with PSM regulations typically require utilization of a specialized consultant with expertise in PSM to ensure proper performance of the PHA and compliance with the PSM regulations, generally.

3. Other elements of the PSM regulations include development of operating procedures, employee training, a “pre-startup safety review,” hot work permits, incident investigations, and emergency response. Additionally, processors are required to certify that they have audited compliance with the PSM regulations at least every three years, and a formal report of the compliance audit must be prepared. The processor is required to retain the two most recent compliance audit reports.

III. LEGAL/EVIDENTIARY ISSUES

As the preceding summary of the obligations imposed by the OSHA PSM regulations should suggest, the regulations impose many explicit obligations upon employers which, if fulfilled, could prevent a catastrophic fire, explosion, or other incident which could, in turn, foreseeably damage property of third parties, such as the landlord or neighboring tenants. However, the purpose of the OSHA regulations is to ensure workplace safety, and not to protect landlords or other third parties from suffering property damage. Therefore, it is doubtful that a manufacturer’s or processor’s non-compliance with the PSM regulations, standing alone, would constitute negligence per se in most jurisdictions. However, if the incident at issue was a foreseeable consequence of non-compliance with applicable PSM regulations, then there is certainly a logical argument that the regulations at least serve as evidence of a standard of care which the processor was required to meet. At least one case has accepted this argument, in the context of a different OSHA regulation. Avex Service Corp. v. Pakistan National Shipping Corp., 1982 U.S. Dist. LEXIS 9463 (S.D. NY 1982).
IV. EPA REGULATIONS

The EPA requires manufacturers and processors using regulated substances in excess of specified quantities to submit a Risk Management Plan (“RMP”) which essentially mirrors the obligations imposed by the OSHA PSM regulations. 40 CFR §68.1, et seq. In fact, the obligations imposed by the EPA RMP regulations are actually broader in several respects, because the RMP is required to set forth “worst-case scenarios” in terms of “off-site consequences.” The goals and policies underlying the EPA regulations, therefore, plainly encompass broader public safety considerations than do the OSHA regulations. Potential arguments for limiting the evidentiary relevance and legal significance of OSHA violations in the context of property damage claims are, therefore, less compelling when applied to violations of EPA regulations.

V. CONCLUSION

There are several potential benefits which a subrogation claimant can derive from the OSHA PSM regulations, as well as the EPA RMP regulations. First, the regulations impose many explicit, non-delegable obligations upon potential defendants which often would not exist under common law negligence standards. In particular, the regulations impose affirmative duties upon manufacturers and processors to investigate and familiarize themselves with many potential hazards and safety systems, including detection and suppression systems, about which they might otherwise plead ignorance.

Second, the regulations specifically require that compliance be documented, so that there should rarely be an issue about whether there was or was not an attempt to comply.

Third, in those instances where there was attempted compliance with PSM or RMP regulations, the resultant documentation will be a trove of valuable information to obtain during the discovery process, and can potentially map out the mistakes and omissions which led to a particular incident. Moreover, if PSM compliance was attempted but was inadequate or ineffectual, the consultants who typically assist employers with PSM compliance could be additional liability targets.