ELIMINATING THE “COMPARATIVE FAULT” OF YOUR INSURED IN FIRE SUPPRESSION FAILURE CASES

“When little spark may burst a mighty flame.” – Dante Alighieri

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Where a fire is caused by the acts or omissions of your insured, it is generally assumed that subrogation recovery is not possible. In cases where the insured itself causes a fire that could or should have been contained, the subrogation professional is faced with a seemingly insurmountable hurdle arising from the conduct of the insured. Strong arguments exist, however, to preclude the comparative fault of the insured. The claim may be framed in terms of a “spread” claim, focusing on the lapses of the third party that allowed the fire to increase in scope and severity, causing property damage that otherwise would not have existed.

Two recent efforts by Cozen O’Connor attorneys demonstrate that despite an insured’s negligence in causing the initial event, recovery may be possible under a “spread” theory, where the third party’s acts and omission increase the scope and severity of the damages sustained.

Peter Rossi of the Philadelphia office recently focused on the “spread” of the fire rather than its cause to exclude the comparative fault of the insured in a case arising from a fire that started in an industrial paint booth. To properly maintain the machine, the insured routinely ran acetone solvent through the paint head. Acetone is highly flammable in both liquid and vapor states. NFPA 33 requires that personnel working on the industrial paint machine be equipped with a grounding strap and that the machine and cleaning equipment be grounded to prevent static electricity from causing ignition of the acetone vapors. Our insured neither utilized grounding straps for its personnel, nor grounded the paint machine and cleaning equipment.

The industrial paint machine was equipped with a carbon dioxide fire extinguishing system that utilized dampers to cut off the oxygen supply when the system activated. The installation company for the carbon dioxide extinguishing system failed to install these dampers as is required by NFPA 12 and the fire code. As a result, the carbon dioxide extinguishing system was unable to contain the fire which quickly spread to other areas of the building and caused substantial damage.

The defendant fire suppression system installer argued that the jury should be allowed to consider evidence of our insured’s negligence in failing to have properly grounded its employees and equipment. According to the defendant, any negligence on its part should have been decreased by the percentage of the insured’s fault. Peter successfully countered this argument by establishing that the cause of the fire was irrelevant to the liability of the defendant. The Court entered a ruling in favor of Peter’s client, precluding any assessment of fault on behalf of the insured for failing to use proper grounding systems. After receiving this ruling, the defendant re-evaluated its settlement position, and the case ultimately settled for $1.5 million.

Mark Utke of the Philadelphia office also utilized these arguments in a New Jersey case involving a fire in a restaurant cook line. Our insured left a flat top grill in the “on” position prior to closing the restaurant for the evening. Residual grease ignited on the surface of the grill and an improperly placed fusible link in the exhaust system allowed the fire to spread into the ductwork and beyond, destroying the building.

The defendant fire suppression system maintenance company argued that our insured’s negligence in leaving the flat top grill in the “on” position should have been considered by the
jury for purposes of apportionment of fault. After briefing this issue to the Court, a favorable ruling was received, and the following jury instruction was issued:

“You have heard testimony in this case that the fire was caused by a restaurant employee inadvertently leaving a flat top grill in the “on” position prior to closing the restaurant. Since the fire suppression system located above this grill was intended to extinguish fires, regardless of their cause, you should disregard any fault associated with the ignition of this fire in reaching your verdict. In other words, this case focuses on the spread of the fire, as opposed to the cause of the fire.”

Ultimately, the jury found the fire suppression system company 100% liable for the damages sustained by our insured, resulting in a judgment in the amount of $829,000 which was 100% of our client’s replacement cost damages.

While there is a limited body of case law to support the rationale underlying these holdings, no court has specifically rejected the distinction between the cause and spread of a fire in terms of assessing negligence. Courts that have addressed this issue provide a supportive framework to buttress a separation of cause from spread.

For example, the Supreme Court of Iowa held that the cause of the fire was irrelevant to the plaintiff’s claims against the defendant for the spread of the fire in *Weyerhaeuser v. Thermo Gas Co.*, 620 N.W.2d 819 (Iowa 2000). In *Weyerhaeuser*, the buyer of a liquid propane tank brought a products liability action against the seller of the tank. The plaintiff alleged that a fire started on its property, spread to the propane tank, and because of defects in the tank, it exploded and increased plaintiff’s damages. The Supreme Court held that the trial court improperly refused to instruct the jury that as to “the LP gas tank manufacturer, the cause of the fire was irrelevant.” *Weyerhaeuser*, 620 N.W. 2d at 822. In doing so, the Court recognized that the plaintiff was not claiming that the defendant caused the fire, but that it increased the extent of damages sustained because of the defect in the tank.

*New England Mobile Fair, Inc. v. City of Boston*, 2 Mass. App. Ct. 404, 313 N.E. 2d 149 (1974) dealt with a fire in a bookstore that could not be extinguished because the city of Boston had improperly closed a water valve leading to the sprinkler system. At trial, the court had barred recovery on the grounds that the bookstore’s employees were contributorily negligent in starting the fire. On appeal, however, the court acknowledged that at least a portion of the damages resulted from the lack of water to the sprinkler system, and remanded the case back to the trial court to determine the amount of such damages.

In *Wollenhaupt v. Anderson Fire Equipment Co.*, 232 Neb. 275, 440 N.W. 2d 447 (1989), the plaintiff was working with highly flammable solvents when a fire erupted on his employer’s premises. The plaintiff tried to run, but the fire unfortunately caught up to him. The plaintiff sued the fire equipment company that was responsible for the maintenance and testing of the fire protection system, alleging that the fire equipment company had negligently serviced the fire protection system and, as a result, the system failed to extinguish the fire. The plaintiff further alleged that, had the system properly functioned, the plaintiff would have suffered only slight injuries. The defendant argued that the plaintiff caused the fire, and the trial court instructed the jury to determine whether the employer’s negligence was the sole proximate cause of the fire.

In reversing the trial court’s instructions, the Appellate Court held:

The plaintiff is not claiming that the defendant caused the fire that injured him. Instead, the claim is that if the defendant had properly serviced the fire protection system the fire, whatever its origin, would not have caused the plaintiff to suffer severe injury. The origin of the fire in this case was, therefore, irrelevant. Again, the claim is not that the defendant negligently started the fire, but that the fire, whatever its origin, would have been extinguished had the fire protection system been properly maintained and had it been so maintained, the plaintiff could not have suffered injury. If a defendant has a duty to foresee a particular type of harmful force, such as fire, and guard others against the harm that the force can do, and the defendant fails in its duty, the cause of the fire is irrelevant to the liability of the defendant.

*Wollenhaupt, supra*, at 56. (emphasis supplied).

In *Avoyelles Country Club, Inc. v. Walter Kidde & Co.*, 338 So.2d 379 (La. App. 3rd Cir. 1976), the appellate court rejected the lower court’s decision barring a restaurant owner’s products liability claim against the manufacturer of a fire suppression system which failed to operate when a fire occurred. (The court issued its ruling despite the club’s failure to maintain its fire extinguishing system, and to have instructed its employees in...
the manual operation of the system). The court found that there was significant evidence that the fire would have been extinguished if the suppression system had functioned properly. Based on the foregoing analysis, the Court ruled that the cause of the fire was irrelevant and should have been excluded from consideration by the jury. Wollenhaupt, supra. at 57.

In summary, the cases we have handled, and other relevant case law, make it clear that an experienced, knowledgeable subrogation practitioner should be alert to the need to educate adversaries and the courts regarding the distinction between fire causation and fire spread, and that in the context of deficient or malfunctioning fire detection/suppression equipment, our insured’s responsibility for causing a fire should not mitigate the liability of fire professionals responsible for design, installation or maintenance of fire safety equipment.

For additional information, please feel free to contact the author of this Subro Alert, or any members of Cozen O’Connor’s National and International Subrogation and Recovery Department.