

**THE FORENSIC INVESTIGATION - THE OBTAINING AND MAINTENANCE OF EVIDENCE
AND THE SELECTION AND USE OF EXPERTS**

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I. Introduction

A. Overview of presentation

It is clear that the resolution of any claim is dependent upon the gathering and assessment of facts. This basic proposition applies in every jurisdiction around the world. The insurer, who together with the insured, has the greatest financial stake in the outcome of the inquiry must promptly, efficiently and correctly go about the investigation. We will discuss here matters that we have found essential in the investigation of claims based principally upon claim handling and litigation in the United States. Whilst our focus is upon subrogation and recovery, the principles discussed certainly have far broader applicability.

B. Special Focus:

1. Selection and use of experts.
2. Determination of area of origin.
3. Determination of possible/probable causes.
4. Elimination of other reasonable possible causes.
5. Spoliation of evidence.
6. Evidence retention.

II. Early Investigation - The Key To A Successful Subrogation Case

A. Loss site Investigation

The precise procedure to follow in a particular case will vary depending upon the specific circumstances of a loss. The factors to take into account will include:

1. The extent of property damage suffered by the insured.
2. The extent of property damaged suffered by others.

3. The extent of personal injuries.
4. The extent of other interested parties.
5. The extent of any parallel investigations.
6. The extent of environmental or safety hazards at the site.
7. The extent of community/press interest.
8. The urgency of commencing site restoration activities.
 - (a) Pressure from insured.
 - (b) Pressure from public authorities.
 - (c) Balancing interests - rule of reasonableness.

B. Experts and Consultants

1. Selection.

(a) Qualification and competence. See:

- (i) Daubert v Merrell Dow Pharmaceuticals 509 US 579, 113 S. Ct. 2786 (1993) - Trial court has responsibility to determine whether proposed expert testimony is relevant and reliable. The court should consider four factors (1) testing, (2) peer review, (3) error rates and (4) acceptability in scientific community. Trial court to be flexible in consideration of standards.
- (ii) Kurnho Tire Company v. Carmichael 119 S. Ct. 1167 (1999) - Daubert factors were meant to be illustrative and must be applied flexibly. A trial court's gatekeeping function applies to all expert testimony, not just "scientific" testimony.
- (iii) Fed. R. Evid. 702 - "If this specialized knowledge... will assist the fact finder... qualified witness may testify in form of opinion...". Expert may be qualified by "knowledge, skill, experience, training or education."

- (b) Availability.
- (c) Ability to communicate with jury.
- 2. Reporting.
 - (a) Consultation with counsel.
 - (b) Consultation with other experts.
 - (c) Fed. R. Civ. P. 26(a)(2)(B) and Fed. R. Civ. P. 26(b)(4).
- 3. Licensing - See People v West 264 111. App. 3rd 176,636 N.E. 2d 1239 (5th Dist. 1994).
- 4. NFPA 921.

C. Type of Experts

- 1. General cause and origin.
- 2. Electrical.
- 3. Chemical.
- 4. Metallurgical.
- 5. Mechanical - heating, air conditioning, ventilation.
- 6. Plumbing.
- 7. Fire safety engineers.
- 8. Code compliance experts.
- 9. Damage experts.
- 10. Construction.
- 11. Architectural.
- 12. Materials.
- 13. Geo-technical.

D. Purpose of investigation - consideration of legal theories

- 1. "Proximate cause"

- (a) "but for" test.
- (b) "substantial contributing factor" test.

2. Consider "multiple proximate causes and/or concurrent causes."
 - (a) Delay in detection due to defects in fire alarm/notification systems.
 - (b) Inadequate fire suppression systems.
 - (c) Where cause of fire is at adjoining property same factors with respect to adjoining property.
3. Act of God.
 - (a) Snowload cases.
 - (i) Negligent maintenance re removal of snow.
 - (ii) Early investigation (measurement of snow).
 - (b) Meteorological data in wind cases.
 - (c) Design of storm water drainage systems in flood cases.
 - (d) Freeze up case - malfunctioning furnace (improper window or door opening), inadequate heat tape, unprotected pipe.
 - (e) Lightning cases. Fine spread and control.

E. Contact with the Insured.

1. Establish a relationship and enlist the cooperation of the insured.
2. Commercial interest of insured.
3. Insured's loss or damage not covered by insurance.
4. Communicate with broker.
5. Is a public adjuster involved?

F. Public Authorities. Cooperation encouraged. Make investigative information and support available. May aid by paying for investigative work to expose scene or test evidence.

1. Fire Department, Fire Marshal.
2. Police Department.
3. City or county investigators.
4. State investigators.
5. Federal investigators (ATF, FBI, FEMA, EPA).
6. Other public agencies - public safety, licenses and inspection.

G. Role of Lawyer.

1. Discovery issues - protection of work product.
2. Advice on expert retention.
3. Advice on prompt notification.
4. Development of legal theories.
5. Input re contact with insureds, broker, public authorities and potential adversaries.

III. Manner of Investigation

A. Statements and Interviews.

1. Who should be interviewed?
2. How should they be interviewed?
3. Record of the interviews.
4. Discovery issues.

B. Photographs and videotape.

1. Quantitative.
2. Qualitative.

3. Securing third party photographs.
- C. Gathering Relevant Documents.
 1. Warranties.
 2. Instruction booklets.
 3. Sales agreements.
 4. Installation manuals.
 5. Service records.
 6. Maintenance agreement.
 7. Labels, tags, etc.

IV. Evidence

- A. Retention - Critical evidence with respect to cause - the product or material believed to be the cause of loss and the product which "may have been" the cause of loss must be preserved. See Century Insurance Company v Royal Insurance Company N.W.2d 911 (1995) where plaintiff (subrogating insurer) was unable to produce a refrigerator which it alleged was the cause of the fire. The court precluded all testimony concerning the condition of the refrigerator. Summary judgment was granted for defendant and the case was dismissed. The party was held to have "a duty... to preserve evidence essential to the claim being litigated."

See also All State v Sunbeam 53 F. 3d 804 (7th Cir. 1995) - where the court dismissed claim because subrogating plaintiff failed to preserve evidence that it "knew" the defendant would want to have examined even if plaintiff did not believe it caused the fire.

- B. Spoliation of Evidence.
 1. Rapidly changing area of the law.
 2. Scope of evidence to retain - definitely a product we believe was responsible for loss, any of that products "twins" and any other item which might reasonably have been responsible for the loss - rule of reasonableness applies - **look at situation from defendant's perspective.**

3. Method of gathering, transporting and retaining evidence. Methodology must demonstrate chain of custody and fact that product has not been tampered with subsequent to its retention. Retention process should be photographed.
4. Remedies available in cases of spoliation.
 - (a) Separate cause of action. See Smith v Superior Court 151 Cal. App. 3d 491 2d Dist. (1984).
 - (i) International spoliation - See Hazen v Municipality of Anchorage 718 P. 2d 456 (Alaska 1986).
 - (ii) Negligent spoliation - See Velco v Commercial Building Maintenance Company 169 Cal. App. 3d 874 (2d Dist. 1985).
 - (b) Inference that evidence was unfavorable to party who failed to retain it.
 - (c) Sanctions: range from monetary to the ultimate sanction of dismissal of lawsuit.

C. How to Avoid Spoliation Problems.

1. Take and preserve all evidence reasonably related to the loss - being reasonable.
2. Document the process with photographs.
3. Tag all physical evidence, ensure a clear chain of custody.
4. Allow authorities and potential defendants to have access to the scene to conduct their own investigation.
5. Avoid destructive testing without notification to adverse party.
6. Photograph or videotape the testing if necessary.
7. If evidence is lost or destroyed:
 - (a) Was it in your custody or control?
 - (b) Was destruction part of routine process?

- (c) Had property been abandoned - conduct of "victim".
- (d) Attempt to minimize harm.

V. Conclusion

Fortunately, only a very small percentage of cases end up in litigation. The problem is we never know which one(s) it will be. The prudent insurer will investigate all cases as if each one will be litigated.

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