

Claims

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COVERING THE BUSINESS OF LOSS

Burning Issues in Fire Subrogation

— page 44

Subrogation in the Eye of the Hurricane

— page 38

**The Second Wave of
Asbestos Litigation** — page 28

**When Does Mold
Testing Make Sense?** — page 34

BURNING ISSUES IN FIRE SUBROGATION

By Peter A. Lynch

Another Accord form prints out of the fax machine. It is another fire loss claim. In 2002, 1.688 million fires were attended by public fire departments. Every 19 seconds, a fire department responded to a fire somewhere in the United States. It is estimated that those fires resulted in \$10.337 billion worth of property damages that year.

The hardest thing to learn in fire loss subrogation cases is which bridge to cross and which bridge to burn. What to do first? Mitigating the damage comes to mind, but, in doing so, can a potential subrogation claim be affected? The specter of spoliation of evidence rises

from the fire's ashes.

Take comfort that protecting the damaged property will not be spoliation of evidence, but viewed as mitigating the loss. Almost any action taken after a loss occurs can be tenuously argued as spoliation of evidence. However, common sense and developing guidelines recognize that investigation of any loss requires movement of evidence or alteration of the scene. Restoration contractors, who are not concerned with preserving any damaged evidence, usually hurry to restore sites to normal operations. They need to be supervised to preserve any necessary physical evidence.

It is imperative that evidence be removed from the scene in order to protect and preserve its integrity. Additionally, it may be necessary to partially disassemble the evidence to determine whether a particular object contributed to the loss. Steps taken to protect that evidence and identify manufacturers should not be considered spoliation of evidence.

In order to preserve a potential fire subrogation claim, the fire damage must be minimized and the failed causative evidence preserved in its original condition, if possible. Those responding to the scene should take pictures of the factual causative evidence in its original location prior to removal. They also should try to avoid altering or damaging the evidence during removal, taking care to document how the evidence was removed and any observable damage.

Getting Help

The selection of appropriate consultants is critical for potential successful subrogation recovery. Is a cause and origin



(AP Photo/Toby Talbot)

investigator necessary? A metallurgist? A mechanical engineer? A fire protection engineer or sprinkler expert? The type of fire loss determines the selection of experts, as does the loss amount.

Start with a basic expert to identify the source. Once the source is identified, selection of an appropriate consultant can be made. This decision, if time allows, should be made in consultation with subrogation counsel. Initial consultants should be advised not to disturb failed devices, unless it is absolutely necessary.

Product liability cases against large corporate defendants may simplify notice of loss issues. It is recommended that identified causal evidence be kept intact until identifiable defendants examine it. If manufacturers or installers are not identifiable until off-site examinations are conducted, so be it. The goal is to protect the evidence while ensuring its evaluation by an appropriate consultant.

Many fire losses involve evaluating product installation issues, product liability issues, maintenance, and fire, spread

issues. One manufacturer argues that common materials near its product can cause ignition, and that insureds' placement of those materials near the product that results in fires makes the manufacturer not liable. In this and similar cases, detailed investigations into the locations of materials near products need to be conducted early, in order to ensure that a viable subrogation product liability case exists to meet this defense. Selling a product that a manufacturer knows will be used near commonly found combustibles should support a product liability action against the manufacturer. This foreseeable alleged "misuse" should not foreclose an action against the manufacturer.

It is impossible to have enough photographs or videotape of a fire loss. Generally, litigated fire loss cases focus on one or two discrete locations that the parties are disputing as the origin of the fire. Shooting additional photographs before the site is repaired will help disprove any other failure scenarios.

Another issue to contemplate is available liability insurance. Previously, fire losses triggered broader liability coverage because of the resultant damage to other property. Now, some liability insurers seek to limit fire losses based on fire damage liability limits. That language will have to be tested in court to determine its effectiveness. Furthermore, as liability insurance premiums continue to escalate for fire losses, more defendants are becoming completely self-insured or adding large self-insured retentions. Hence, those subrogation cases likely will be more hotly litigated as the defendants do not want to pay for losses with their own funds.

Fire losses also can lead to mold complaints. The scientifically supportable health effects of mold continue to undergo study. The differences in human sensitivities to mold make quantifying any hazard difficult. An industrial hygienist or indoor quality specialist may be needed to determine whether the environment that exists is typical for normal human occupancy. Because mold growth occurs when spores, sufficient moisture, and nutrients exist, thorough drying is essential to combat mold growth. A contractor who has experience properly drying and dehumidifying property is a must.

Keeping the above issues in mind while evaluating fire losses will assist in preserving subrogation claims. Failure to do so may have a detrimental impact on potential subrogation. ▲

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LEADING INTERNATIONAL PROPERTY ADJUSTERS MEMBER PROFILE

Steven B. Sobol, A.I.I.C., has more than 30 years of property adjusting experience. In 1982 he formed S.B. Sobol & Associates Insurance Adjusters Limited, and in 1996, Steven purchased Canada's oldest adjusting firm, Adamsons Limited, and formed Sobel Adamsons Clements Insurance Adjusters Limited. Steven specializes in Commercial, Industrial and Residential property losses. His expertise includes arson and fraud, manufacturing, retail and wholesale distribution, jewelers and furriers block, business interruption, condominiums and apartment buildings.

Steven is Past President of the Ontario Insurance Adjusters Association and has served the association in many capacities. He is a seminar leader with the Insurance Advisory Organization and has conducted training courses at local colleges to members of the insurance industry.



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