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Undetermined Cause is the Beginning, Not the End

I. The Investigation Team

Claims Adjuster

One of the first issues that a claims adjuster faces when dealing with a fire or explosion related loss is identifying the size and scope of the loss. A residential fire with limited damages will require a much narrower response as compared with a large commercial risk. In either case, consideration to the investigation must be made in the earliest stages the loss response. Larger losses, such as in a multi-tenant commercial building, will create challenges in retaining experts as there will be a much higher demand. Having a vetted list of experts ahead of a loss will aid in insuring that an investigation will not be delayed due to the lack of an expert. A claims adjuster is always conscious about balancing the size of the loss with file expenses. A detailed fire and explosion investigation could be costly, and a team approach can aid in developing a budget and controlling investigation costs.

Fire/Explosion Investigation Expert

A fire and explosion investigation expert are different from their counterparts who investigate other types of losses such as in a water or roof related losses in that there is an exigency that exists in getting to a fire and explosion scene in order to control and protect any evidence that remains. A fire expert will be the first contact with the public officials and this interaction can greatly assist in protecting the fire/explosion scene. Documenting the conditions of the loss during or immediately following fire suppression activities will aid in the overall preservation of evidence and the scene. The fire expert should immediately begin to gather data and conduct witness interviews.

Initial theories as to the origin and potential ignition sources are critical to establishing the path for further investigation. Additional expertise might be necessary to support the initial fire investigation expert. Depending on the size of the loss, a full investigative team including fire investigators and engineering disciplines might be necessary. Event specific expertise may increase the chances for success in the determining cause and responsibility for a loss.

Subrogation Counsel

Successful subrogation requires cooperation and collaboration between all team members. The claims adjuster, cause and origin investigator, and subrogation counsel should be working together from the outset. Early retention of counsel is necessary to coordinate scene control, work with the local authorities, achieve notice to interested parties, and to communicate with the insurer(s) of the damaged property.

Consistent communication with all team members regarding the subrogation investigation should begin on the day of the loss and continue until resolution.

II. Understanding the Role of Public Investigators

Resources and Call Volume

The expertise and experience of public fire and explosion investigators varies widely throughout the country. A rural fire investigator will not investigate fire and explosions nearly as often as a one located within a city. The role of a public fire investigator is primarily to determine whether or not a crime has been committed. It is not often that a public fire investigator will have the time or resources available to investigate an “accidental” fire unless it is a high profile case such as in a fatal fire.

In many cases, local fire officials have duties beyond the investigation of a fire and explosion and simply do not have the time available in order to fully investigate a fire. Local officials will sometimes request the assistance of state or even federal investigative agencies such as the ATF or Chemical Safety Board.

Criminal Investigation versus Private Investigation

The immediate interaction with public fire officials by the private fire expert is essential in developing a relationship that focuses on the common goals of preserving the scene and evidence along with making an accurate determination of the origin and cause of a fire/explosion. In cases where a crime has been committed, access to the scene for the private investigators will be limited or fully forbidden. Reminding the public officials of the private interests is important during the initial contact.

Even in cases where a crime has been committed there exists the possibility of pursuing subrogation. It is important for the private investigators to document the conditions of the fire scene throughout the public fire investigation. The preservation of evidence in both a criminal and civil case are paramount to the success of both cases.

National Fire Incident Reporting

Public fire investigators are required to track fire and explosion incidents within their respective communities through the National Fire Incident Reporting System. Local fire investigators are required to track the types of property involved in a fire or explosion along with damage values and cause classifications. A fire incident report generated through this system in any way should be used as a definitive report as to the origin and cause of a fire or explosion incident.

Cause classifications within the NFIRS reporting system are Intentional, Accidental, Natural and Undetermined. These same cause classifications have been built into NFPA 921, the Guide to Fire and Explosion Investigation and are often confused with a specific ignition source identification or the process of determining how the first fuel and potential ignition source first came into contact with each other.

It is possible that for a fire to be classified as “Accidental” even when a specific ignition source has not been confirmed.

NFPA Standards versus Local Authorities Goal

The National Fire Protection Association has adopted two documents related to investigating fire and explosions. The first is NFPA 1033 which is the Standard for Professional Qualifications for Fire Investigator. This standard defines the job performance requirements necessary to perform as a fire investigator in both the private and public sectors. NFPA 921 details the way in which a fire/explosion investigation is to be completed utilizing the scientific method. Both of these documents are used in tandem for fire and explosion investigators. Though a public fire investigator may meet the requirements in both documents, it is important to remember that a full fire investigation might not be completed in the public sector due to the previously mentioned reasons. A cause classification of Undetermined by a public fire official does not necessarily mean that the cause and responsibility is undetermined but rather that an full investigation was not completed.

III. Flame Spread Issues

Subrogation and recovery efforts should not be terminated just because the specific cause of a fire or explosion has not been fully determined. There are several additional avenues for recovery beyond those related to cause determination including those related to flame/damage spread issues.

Building Construction

Building and fire codes are written to restrict the spread of fire, heat and smoke in a fire related incident. Each state has specific statutes of limitations related to building construction and these should be investigated in each local. A fire should be contained to the room/area of origin. Breaches in walls and floors can contribute to the spread of damages. In investigating a spread related issue, the dates of design and construction are important in determining whether additional investigation is warranted. The local building department is an excellent resource for data related to permits, drawings, code evaluations and beyond. The identification of parties involved will be identified through the collection of this data. A full code evaluation of standards used and complied with during the construction and potentially any renovation completed within a building will be required to support flame spread theories.

When identifying design professionals and contractors involved in the building or renovation process, it is important to identify the contractor versus sub-contractor relationships. Obtaining and reviewing contracts is paramount in confirming this relationship. Waivers of subrogation may be within these documents and such waivers need to be evaluated and, in some cases, challenged.

Fire Protection Systems

Beyond construction and building related conditions that contribute to the spread of damages, the improper design, installation and maintenance of fire protection systems can also greatly contribute the spread related issues. The requirements related to the design, installation and maintenance of automatic sprinkler systems are covered under NFPA 13. It is critical that the hazard classification of the building to be protected by an automatic sprinkler system are completely understood before the system is designed. A building consisting of professional office space will have a much different hazard classification than say an airplane hangar. If the design is not correct from the beginning, the chances of a fire spreading greatly increases. The proper types of sprinkler heads, number and spacing are dependent upon the proper hazard's classifications.

Any change in occupancy for a building also requires that the hazard classification be evaluated to ensure that the existing sprinkler system remains adequate to cover the new occupancy. A great example is a commercial retail occupancy being changed to a rack storage facility. The original system would no longer be adequate to protect the new storage areas.

Automatic sprinkler systems can be either wet or dry dependent mostly on climate. Systems subjected to freezing conditions would generally be protected with dry (air filled) systems to prevent the potential of water damages related to freezing failures. Both systems adequately protect an occupancy, but each has specific requirements related to their installation and maintenance. For example, a dry system is required to have a low point drain system that allows all water and moisture to be removed from the piping.

NFPA 13 requires intermittent inspections and testing of installed sprinkler systems. This requirement is the responsibility of the property owner who in turn generally defers to contractors on a contractual basis. A contractor who services and inspects these systems must meet the requirements of the applicable codes and standards. Should the contractors fail to meet their obligations, they would become likely targets for subrogation.

Similarly, to the above, automatic fire alarm systems must comply with NFPA 72 which covers the design, installation, testing and maintenance of these systems. Requirements related to the occupancy and maintenance of these systems are similar to those of the sprinkler systems. A fire alarm system may be simply installed to allow for the safe evacuation of an occupancy and may not contain any detection equipment such as smoke and heat detectors.

In evaluating the potential for subrogation issues related to the fire protection systems installed within a building, a complete collection of contracts, drawings, inspection reports and permits will be required. Additional and specialized expertise in these systems will also be beneficial to pursuing a path to recovery.

Building to Building Spread

Fires originating in occupancies outside of our insured can result in fire related damages. In some cases, access to the building or occupancy of origin might be severely limited. Proper notification to the owners/insurers of the origin property is essential in providing notice of interest and this notification can assist in allowing access for investigating experts. Issues related to the spoliation of evidence may be used to assist in recovery efforts. Subrogation potential exists even in scenarios where a path to recovery related to an ignition source cannot be pursued. An example could be related to excessive storage, improper storage or the failure to maintain the installed fire protection systems.

IV. Intentionally Set Fires

Recovering from Responsible Party

It is important to recognize that public investigators must prove beyond a reasonable doubt that a suspect had the motive, means and opportunity to intentionally set a fire. Civil requirements are much less stringent requiring in most cases just proving the probability. This could mean that a person who is not criminally charged with arson can still be pursued civilly for damages related to the loss.

Access to public reports related to the investigation are many times restricted from being released to anyone outside the public investigation. Delays of months or years can occur even when such reports are eventually released. It is important to engage a private fire investigation expert to aid in establishing the cause and responsibility of an intentionally set fire. A private investigator will be able to interact with public officials during the course of an investigation. There can be a parallel investigation, but it is absolutely critical that each investigation be independent. A private investigator should never put themselves in a position of becoming “an agent for” a public investigator.

Flame Spread Issues

As discussed in detail earlier, flame spread issues as they relate to the potential for subrogation should always be investigated. All of the scenarios discussed related to the contribution to flame spread such as building construction, fire protection system failures etc. remain viable avenues for subrogation. A full and detailed investigation of a fire and explosion loss allows for all avenues for potential subrogation to be fully evaluated.

Negligent Hire or Supervision

Another potential avenue for recovery involves the scenario where an employee intentionally sets a fire. The likelihood of recovering from a suspect is very small however; an investigation into their background should be completed. Mental health related issues for a suspect might have entailed previous care and supervision by a Mental Health Professional. The duties and responsibilities of the professional should be carefully evaluated to determine whether there is potential for liability.

Likewise, an evaluation of whether the employee was hired utilizing a third party recruiter or perhaps had come from a third party employment agency should be undertaken. Details related to vetting and background checks should be examined to determine whether all conditions were appropriate.

Inadequate Security

Similar to the third party recruiter and employment agencies, third party security may also be a target for subrogation. An evaluation of the adequacy of this service should be made and compared with written contracts detailing the services provided. Inadequate security may have contributed to damages by precluding the prevention of the act or delaying the detection of the fire. There are several documented cases where security personnel have been involved in the act of intentionally setting the fire themselves.

V. Discarded Smoking Materials

Presence (or lack thereof) of Physical Evidence

Discarded smoking related fires are an excellent avenue for subrogation. These types of fires can be tricky in that the actual material may no longer be present following fire suppression activities. NFPA 921 allows in these cases for an investigator to theorize about potential ignition sources even if the physical evidence is not present. An investigator must clearly examine all potential ignition sources and test the theories developed in order to succeed in a determination when the physical evidence is no longer present.

Identification of Responsible Parties

A detailed fire scene examination can aid in the identification of responsible parties in smoking related fires. When present, the physical remains of the smoking materials and their location can assist in this identification. The brand type and location found can be combined with witness interviews to confirm the identity of an individual who improperly discarded them.

Case Study

A delivery representative was driving by a large residential home and noticed a “campfire” on the front porch of the dwelling. Upon stopping to alert the occupants, the representative saw that the fire was “under” the porch as well and could not locate a garden hose. He was able to safely evacuate an older female who had been napping at the time. The occupant was the son’s mother who owns her own house which is covered by her own insurance. The subsequent public investigation resulted in the fire being classified as “accidental”.

The insurer of the dwelling retained the services of a private fire expert who determined the origin to be in the mulched flower bed immediately adjacent to the sidewalk and in front of the front porch lattice. The fire spread from the bed to the porch and eventually destroyed the house with an estimated value of approximately \$500,000.00.

No smoking materials were located within the area of fire origin, but several discarded cigarettes were found in the interior kitchen trash container. No one but “gram” smoked. She admitted to smoking out by the roadway bus stop but not anywhere near or within the house.

An opposing investigator was retained for “grams” insurance company and he later testified that he could not confirm the presence of smoking materials within the area of fire origin. A civil court jury took less than 30 minutes to decide that “gram” was less than truthful and a full recovery was awarded.

VI. Control of the Premises of Origin and/or “res ipsa loquitor”

One of the primary challenges following a large loss is establishing and maintaining control of the scene. From the outset, scene preservation is a “team effort” and is best accomplished with involvement from counsel, adjuster, and the fire cause and origin investigator. Often times, the subrogation team will balance the wishes of the insured to commence repairs with the need to preserve evidence and place the appropriate parties on notice. Prompt and efficient notice and involvement of interested parties is essential. Cooperation with the local authorities is not only necessary but also beneficial to subrogation pursuit. The primary goal of scene preservation is maintaining all potential evidence in its current condition until all interested parties have an opportunity to examine and observe the scene. Once the initial “scene exam” is complete, protocols for the removal and testing of all evidence artifacts should be circulated and agreed upon amongst all parties.