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Effective Loss Scene Investigation

I. Importance of Prompt and Thorough Investigation

A prompt and thorough loss scene investigation for fire, water and structural losses is imperative for a successful subrogation claim.

Cost considerations play an important role in the nature and the extent of the loss scene investigation and in the preservation and retention of evidence/artifacts. These costs are often “front end loaded”. Cost sharing with other similarly situated parties should be considered and, if no conflict exists and the parties agree, a written joint prosecution or common interest agreement should be prepared which memorializes the cost sharing arrangement, including the sharing of costs for loss scene preservation, expert expenses and/or storage costs.

II. Choosing the Correct Expert

There are many different types of experts to choose from depending on the type of loss being handled.

Fire losses often involve the retention of fire origin and cause experts. Once an area of fire origin is determined, the investigation, in order to move forward, may need to involve a specialized or "subject matter" expert to assist in determining fire cause. These subject matter experts often include electrical and mechanical engineers, material scientists/metallurgists and fire protection engineers.

Water and freeze losses will often require that a professional engineer and/or material scientist/metallurgist be retained to make an initial determination as to cause. Often laboratory testing/examination/inspection will be necessary to distinguish between a failure that is caused by improper installation and a material defect. If a defect is caused by improper installation then it may be necessary to retain a standard of care expert, most likely a plumber or a mechanical contractor, to opine as to the standard of care and breach thereof.

Building failures typically require the need to retain a professional engineer with expertise in the component failure involved, such as an engineer with expertise in structural load, roofing, building envelope, etc. Often, if a construction defect is caused

by improper construction or installation then it may be necessary to retain a standard of care expert, in the discipline involved, to opine as to the standard of care and breach thereof.

Once the expert discipline is established, it is then important to choose the best expert within that discipline for investigation and presentation of your case. Important criteria to consider in choosing an expert include the expert's qualifications, how the expert presents his/herself in deposition and trial, the physical location of the expert to the loss site, the expert's availability and what ties the expert may have to the community where the loss is located.

III. Securing the Loss Scene/Evidence/Artifacts

It is extremely important to make certain that the loss scene is preserved. Preservation of the loss scene typically does not pose a problem when the insured is in possession and control of the loss scene. The insurer should be careful to protect the loss scene from further damage from collapse, the elements, and third parties, such as restoration contractors. This protection may include fencing, tenting, boarding or shoring up the loss scene, 24 hour security, etc.

Insurers are often faced with a scenario when they are not in control of the loss scene, such as when the loss occurs on a neighboring property, the loss scene is extensive (wildfire or strip mall), the loss occurs on leased premises or the loss is caused by movable equipment. When an insurer is not in control of a loss scene, then it is imperative that actions be taken to make certain that third parties will secure the loss scene and that physical evidence/artifacts and exemplars be preserved to allow all parties a full opportunity to conduct a loss scene inspection. These actions may include seeking a temporary restraining order, jointly securing evidence with multiple locks, written agreement and the use of "hold" letters.

Evidence/artifacts removed from the loss scene must also be preserved. Most typically, the evidence/artifacts are removed by an expert who will make certain that the evidence/artifacts are not altered until examined or tested pursuant to an agreed upon protocol. Similar to a circumstance where an insurer may not have control of a loss scene, an insurer may be faced with a scenario where a third party seeks to remove evidence/artifacts. Under these circumstances, the evidence/artifacts must be preserved to allow all parties a full opportunity to destructively test, examine or inspect the evidence/artifacts pursuant to an agreed protocol. These actions may include seeking a temporary restraining order, jointly securing evidence with multiple locks, written agreement and the use of "hold" letters.

Maintaining a written record establishing chain of evidence/custody of the evidence/artifacts by the custodians is paramount. It is also extremely important that counsel and insurance representatives not become part of the chain of evidence/custody with respect to evidence/artifacts.

IV. Interaction with Public Authorities

Often, the public authorities are the first responders to the loss, whether it be a fire, water or structural loss. Their initial investigation and observations can be extremely important to the investigation. It is important to establish a strong working relationship with the public authorities and make certain that the private investigation and the public investigation proceed in an orderly and coordinated fashion.

The private investigation will often rely, at least in part, upon the investigation of the public officials. Requests should be made for all complete investigative materials generated by the public authorities – all photographs, statements, run reports, 911 transcripts, cause and origin reports, etc.

In circumstances where the public authorities may be investigating criminal activity in connection with a loss, the public authorities will often not allow private investigators into a loss scene until their investigation is completed. Under those circumstances, loss scene and evidence/artifact spoliation may be a significant issue. Under these circumstances, the private fire investigators will often need to document the loss scene, via photographs, videotape and survey from neighboring properties, take statements of percipient witnesses and then need to rely, at least in part, upon the investigation performed by the public authorities.

V. What Constitutes a Proper Investigation

A proper loss scene investigation will often require the private investigator to document the loss scene via photography, videotape, survey and sampling before removal of evidence/artifacts.

One open issue is whether statements of interested parties should be taken, and if so, who should take any statements and whether those statements should be written or recorded. Often statements need to be taken to address insurance coverage issues. As any statement taken will likely be discoverable in ensuing litigation, it is our general recommendation that verbal interviews first be taken, notes of those discussions be made by the fire investigator and then a decision be made whether to take a recorded or written statement of the witness.

A proper loss scene investigation involves gathering all relevant documentation and information. That may involve obtaining public authority records, pre- and post-fire photographs, YouTube videos, cell phone videos, building department records, building drawings and plans, product manuals, contracts, leases, insurance policies, CPSC records, Freedom of Information Act requests, arson immunity letters, etc.

A proper investigation should also consider anticipating the defenses of potentially responsible parties and the early collection of documents that potentially responsible parties may rely upon to exculpate or eliminate liability or damages or shift liability, including, but not limited to, the following: contractual limitations and waivers of

liability and damages, contractual waivers of subrogation, contracts and insurance policies that may grant a potentially responsible party additional insured status (insurance policy or contract) and documents, such as leases establishing a landlord/tenant relationship and property management contracts.

A proper understanding and analysis of statutes that potentially responsible parties may rely upon to limit or exculpate them from damages, including construction and product liability statutes of repose and statutes of limitation, needs to be considered early on in order to evaluate subrogation potential.

VI. Placing Parties on Notice of Loss

The insurer or subrogation counsel should immediately provide all potentially responsible parties with written notice of the loss. The notice letter should be transmitted in such a fashion that receipt of that notice by the potentially responsible party can be established. The notice letter should include general information about the location and type of loss, contact information for the person to be contacted to arrange for an inspection of the loss scene, a time limit for contacting that individual and should provide that should the party being placed on notice of the loss choose to not visit the loss scene the consequences for failing to visit the loss scene, including the fact that the loss scene and evidence/artifacts will be forever altered and that party will forfeit any right to choose what evidence/artifacts will be removed from the loss scene for further testing, examination or inspection.

Often, issues arise with respect to who to place on notice of the loss. These problem scenarios often arise in connection with construction defect losses in that it may be difficult to identify the general contractor, subcontractors, repairmen, engineers/designers and/or architects. It is better to be over inclusive as opposed to under inclusive. In these circumstances, it is recommended that the author of the notice letter affirmatively ask the parties placed on notice if they are aware of any other potentially interested parties and request that their contact information be provided so that notice can be provided to them as well.

Notice issues may arise in connection with losses caused by defective products. These issues may involve difficulty identifying the product itself and the designer, manufacturer, distributor and seller of the defective product, particularly when a product designer or manufacturer may be located outside the United States. In these situations, the purchaser/user of the product needs to be thoroughly questioned about where the product was purchased, by whom and whether an exemplar product exists. Follow-up internet research or visit to a local retailer may assist in determining the identity of the manufacturer of the product.

In connection with fire losses, an analysis of fire spread issues should be considered as part of the initial loss scene investigation to determine whether it is necessary to place a potential spread defendant on notice of the loss. Potential spread defendants may include fire sprinkler installation, design or inspection companies or the manufacturer of

a failed fire protection product. It is also important to consider whether to place on notice the manufacturer or installer of a particular building product, such as insulation, which may have hastened the spread of a fire loss due to a use that violated a building code or was contraindicated by a product manufacturer's instructions.

It is also important to be cognizant of statutory requirements regarding notification to governmental entities or quasi-governmental entities, including the importance of timeliness, following the prescribed notification format and supplementation of notice.

VII. Spoliation

Spoliation involves the alteration or destruction of evidence/artifacts. Jurisdictions have differing definitions of what may constitute spoliation. A finding of bad faith typically is not necessary for a Court to issue a spoliation sanction. Sanctions typically serve a remedial function by minimizing the prejudice suffered by the non-destroying party as well as a punitive function by deterring the destruction of evidence/artifacts by placing the risk that destroyed evidence may not have been detrimental on the party responsible for its destruction. Sanctions can vary from an adverse inference jury instruction to outright dismissal of a claim.

Spoliation claims can be avoided by identifying potentially responsible parties to place them on notice of the loss and preserving the evidence/artifacts so that the parties placed on notice have an equal opportunity to investigate the loss.

If a potentially responsible party cannot be immediately identified or is mis-identified or for some other reason are not present at the loss scene, it is important to preserve the loss scene loss via videotape, photography and/or loss scene survey.

With respect to losses suspected to be caused by products, whether a product defect or installation/repair issue, potentially responsible parties, if at all possible, should be given an opportunity to view the loss scene and product *in situ*. If that is not possible, the loss scene should be properly documented prior to the removal of items from the area of origin after a reasonable origin area has been identified and all potential sources of ignition within that origin area should be taken into custody for safekeeping so that it will be difficult for a party that may not have been initially placed on notice of the loss to claim spoliation.

The post-loss safekeeping of hard copies of documents and electronically stored information should also be preserved. This information may include purchase and repair receipts and invoices, warranty information, installation manuals, owner's manuals, documents reflecting maintenance, etc.

VIII. Subrogation v. Property Adjustment

In most circumstances, the property adjustment and subrogation investigation move together hand in hand in an expeditious manner.

Occasionally, there may be "tension" between moving forward with the property adjustment and protecting the loss scene for subrogation purposes. With respect to commercial losses, the insured typically wants to get back up and running in order to mitigate the business interruption and other damage losses. In connection with residential losses, the insured will typically want to reduce the disruption in his/her personal life in order to get back into his/her home as soon as possible.

The insurer of its subrogation counsel must make certain that neither the insured nor a third party, such as a restoration company, recklessly, negligently or intentionally alters or destroys the loss scene nor disposes of evidence/artifacts that may be important to the investigation will be discussed.

IX. Laboratory Testing/Examination/Inspection

Frequently it is necessary, after evidence/artifacts are removed from the loss scene, to perform laboratory testing/examination/inspection of the evidence/artifacts to either rule out or rule in the evidence/artifacts as a cause for a particular loss. Laboratory testing/examination/inspection often is necessary when dealing with fires that are suspected of being caused by electrical or mechanical devices or circuitry or water losses that may have occurred due to a fracture or failure of evidence/artifacts.

All potentially responsible parties must be placed on notice of laboratory testing/examination/inspection and those parties should agree in advance to a testing/examination/inspection protocol in order to eliminate a spoliation claim. In circumstances where a potentially responsible party cannot be identified prior to laboratory testing/examination/inspection, that testing/examination/inspection should be documented via photographs and videotape and all samples tested/examined/inspected should be preserved for subsequent testing/examination/inspection by those parties who are not present.