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“It’s Not IF, It’s When: Subrogating Catastrophic Industrial Accidents –
Practical Strategies for Maximizing Recoveries!”

I. Catastrophic Explosion: Crisis Management

As subrogates, we must explain to the insured what’s involved, the importance of their support, and that the subrogation team is committed to finding out what happened. With strong, confident leadership, your recovery team will be able to navigate the crisis to calm waters, and hopefully a recovery from the wrongdoers.

Notification of interested stakeholders is critical. The following is a list of those stakeholders to be considered immediately following a fire or explosion: Risk Manager – involved in managing risks that can endanger a business’s assets and earnings capacity. The risk manager will be responsible to ensure the company’s insurers are notified of the loss and assist in managing the crisis. Insurers – The insured should contact its broker to ensure all applicable insurers such as liability, property and worker compensation, are promptly notified. Corporate Executives & Officers - Proper crisis management requires that these individuals promptly receive accurate information and learn how to proceed positively on the organization’s efforts to manage the crisis. Corporate Spokespersons - The corporation should ensure that only authorized spokespersons speak for it. Governmental Agencies - Emergency Services (Police, Fire), Local Municipal Authorities, Fire Marshall, Occupational Safety & Health Administration (OSHA), Center for Disease Control (CDC), Environmental Protection Agency (EPA), National Transportation Safety Board (NTSB), Chemical Safety Board (CSB), Federal Emergency Management Agency (FEMA), ATF, FBI and State Emergency Agencies.

Assembling the Right Team

Engaging legal counsel quickly during a crisis is imperative. Counsel will immediately advise on your legal duties while also protecting your interests and ensuring that you proceed in a manner that places you in the best position for future litigation – as a claimant or as an anticipated defendant. Choosing the right counsel is key. When choosing experts, a vital concern is whether they are qualified. Generally, in fire and explosion matters, both a cause and origin expert and one or more forensic experts may be necessary. A damages expert will likely be necessary as well. Beyond being qualified, other “intangibles” should be considered.

Crisis Management

Crisis Management is critical for an industrial accident event. The process by which a major, catastrophic event is handled is essential to maintaining the credibility and reputation of the corporate insured. All organizations experience crises. What sets them apart is how they handle the crises that arise. Improper handling of an event can irreparably harm the organization, its stakeholders, its customers, or the general public. Such events often involve the element of surprise and short decision-making times. It is during this time of general chaos and uncertainty that entities outside the control of the organization impose themselves upon the situation, each with its own agenda. Dealing with those entities is key in successfully weathering a catastrophe. Success involves the ability to anticipate worst-case scenarios while simultaneously offering numerous, reasonable solutions.

In times of crisis, the media can be used to tell your story your way, if done properly. Keys to properly interfacing with the media include putting forth a consistent message, avoiding speculation, and embracing the facts even if (especially if) they are bad. Organizations that successfully handle the media during crises typically come across as cooperative and as transparent as reasonably possible. This helps diffuse the bad news before it takes on a life of its own. Have a plan. Whether your organization is big or small, do not assume that it is immune from crisis. Whether the crisis is large or small, you must have clear objectives to be obtained through a planned reaction. A written plan should set out specific actions that should be taken when crisis strikes. Pre-planning should encompass broad-brush strategies, focusing on the most likely scenarios, but also preparing for the worst.

In the court of public opinion, what your employees say about the organization or the crisis is powerful. In the digital age, where an employee can broadcast information essentially worldwide using a pocket device, managing employees and their expectations is essential.

Failure to notify a government regulator within the prescribed time could lead to fines, and even criminal charges in some circumstances. As with the media, the corporate organization should be open with government officials, and consistent with the information the organization puts out publicly.

Competing Interest at Stake: Investigation and Preservation versus Restoration and Repairs

At most scenes of a catastrophic event, there will be those interested in investigating and preserving the scene and those interested in restoring and repairing it. These competing interests will need to be managed.

Those interested in investigating the incident and preserving the scene typically are the insurers and the insured. They are focused on determining who is culpable for the incident and to what extent damages can be recovered from those culpable entities. In some circumstances, this takes time. Often, an initial investigation and inspection must be performed to determine who should be put on notice of potential liability. During that inspection, the scene should avoid being disturbed (or should be disturbed only to the least degree possible). Disturbing the scene can lead to claims of spoliation.

A second round of investigation and inspection usually occurs within a short period of time thereafter and involves other entities that have been placed on notice. That investigation might lead to the identification of other potentially liable third-parties, who would also want to inspect the scene. Therefore, to the extent that the scene must be disturbed, it must be documented and done for a significant reason, such as safety and mitigation purposes.

Mitigating damages is the focus of those who are interested in expediting restoration and repairs. They want to resume normal operations as soon as possible and often have little concern or appreciation for the legal effects of their actions. They often are company employees facing pressure from people much higher up in the organization, whose interests solely focus on the bottom line. From a legal perspective, however, mitigation of damages should be done as quickly as possible or recovery for certain unmitigated damages could be barred.

Balancing the needs of these two competing interests usually falls on the shoulders of external counsel, corporate counsel, and the corporate representative handling the recovery efforts. Communication and expediency are keys to properly managing expectations. Moving at rapid speed to secure the scene and to make sure it remains secure until the necessary inspections are complete is the first important step. Identifying the potentially liable parties and expeditiously notifying them of an immediate inspection are others. Most importantly, there must be communication with those interested in restoration and resumption of operations that they are not to disturb or dispose of any potential evidence. One man's junk is another's key piece of evidence.

II. The Early Days of the Large Loss Investigation

It is critical that the recovery team—the attorneys, the experts, and the insurer and their adjusters—develop the initial objectives for the investigation at the beginning of the engagement. The initial objectives will guide the development of the investigation scope of work, schedule, and budget. At the start of an investigation into a catastrophic fire or explosion there will be far more questions than answers and everyone on the team will need to be comfortable with the high degree of uncertainty and fluidity in the process.

Undoubtedly the first objective of the investigation is to determine what happened. The determination of cause is sometimes a long and difficult process. A first step in that determination is to establish a timeline or sequence of events. The timeline basically answers two questions: “what happened?” and “in what order did these events occur?” In a general sense, the timeline is the “story” behind the accident. Initially the timeline may be sparsely developed, but over time as new evidence is obtained the narrative should grow more detailed and substantive. The timeline often gives the investigators clues of what evidence is needed to drive towards the determination of the cause.

It is important to be mindful of investigation good practices. One source of good information on explosion investigations is NFPA 921 Guide for Fire and Explosion Investigations. NFPA 921 contains a wealth of information on evidence collection and preservation, documentation of the scene, and methods for the determination of origin and cause. An important element of good investigation practices is the use of the scientific method to guide the determination of the cause. The hallmark of the scientific method is the formulation and testing of different hypotheses to explain the cause. By testing hypotheses with the evidence developed during the investigation, you can have confidence that you are homing in on the actual event. By developing a scientifically defensible cause for the fire or explosion, you can be more confident that your experts will be better able to withstand any legal challenges to their investigation (e.g., Daubert challenges).

Early Phase: Finding the Critical Information

During the initial phase of the investigation, it is important to gather accurate information that will assist the forensic experts in their investigation. There are several pieces of information that will be critical to the investigation into the origin and cause, as well as the eventual legal strategy regarding potential recovery. During the initial phase of the investigation, it is important to gather as much accurate information regarding the incident as possible. This information includes, but is not necessarily limited to: Witness statements from people who may have observed the event, Security camera footage, Plant operations (particularly if something was recently changed or modified), A large number of high-quality digital photographs of the incident scene, Identification of the person(s) most knowledgeable regarding the facility design/operation, Identification of any individuals who might have potentially caused or contributed to the fire or explosion, Identification of installed relief/suppression systems on the involved equipment/system, Electronic data (alarm or process data) that is relevant to the involved system during the period of interest, Contracts, agreements, and documentation for installation, maintenance, and/or modifications of the involved systems.

Gathering Addition Facts: Onsite Investigation

After collecting the initial information, an onsite investigation is usually necessary. Onsite investigations can provide experts with information that is critical to the investigation. An appropriate budget should be established for the onsite investigation. The budget should be proportional to the severity and cost of the damages and must be fluid and dynamic. Onsite investigation budgets need flexibility to account for changes that may occur in terms of equipment, people (experts and support staff), and/or time that needs to be added or shifted to increase the overall efficiency of the onsite investigation.

Several items may need to be addressed prior to an onsite investigation, including personal safety/environmental compliance for a hazardous scene or operation, site accessibility and scaffolding, lighting or power availability, transportation to and around the site, and necessary equipment for conducting the investigation. Having flexibility built into the budget can help experts limit the amount of time required to complete the onsite investigation.

Preserving the Scene and Information

Before and after the scene investigation, it is important to establish scene preservation and control. There may be areas of a facility where remediation and cleanup activities can begin, while other portions should be preserved for the ongoing investigation. The site may need to be fenced off with access only through a gate supervised by a security guard who controls and records who enters.

In addition to scene preservation and management, proprietary information related to the investigation and process must also be controlled. Legal counsel should determine what type of non-disclosure agreement needs to be in place prior to the distribution of business confidential information. Establishing a chain of communication helps preserve any privileged and confidential work and helps a site limit potential rumors or misinformation.

Evidence Collection

Evidence collection is often necessary to facilitate further investigation into critical items. Evidence collection should be conducted and preserved as early as possible and is critical to legal recovery efforts. Removal of physical evidence should include appropriate tagging/labeling, documentation with photos and video, and plans for storage. All collected evidence should include a chain of custody process that identifies what is being collected, who is collecting it, where it is being shipped and who is receiving it. Many types of physical evidence are perishable, that is, their exposure to the environment or simply passing time may alter the physical appearance or chemical composition of the evidence. Ask the investigators to determine if any special preservation methods need to be used to prevent deterioration of the evidence.

Electronic data should be collected digitally. Relevant documents should also be collected either digitally or in hard copy form.

After collecting necessary evidence, additional debris may need to be removed with chain of custody procedures as necessary. A qualified demolition contractor may need to be hired to assist in debris removal.

Witness Identification

At the outset of a scene investigation, documenting the names and contact information of all potential witnesses is a necessary part of evidence collecting and important for future subrogation efforts. Consider including a broad swath of witnesses. Interviews should be conducted of eyewitnesses, first responders, injured individuals, and employees. Knowledgeable individuals at the facility should also be identified. All remotely relevant employees who could provide insight into the loss might be valuable

down the road. As always, document who is interviewed, when they are interviewed, and by whom. Determine whether legal counsel should interview certain witnesses. Certain information may need to be gathered under the protection of the attorney-client privilege.

Every interview will be contextually based on the witness's role in the loss. However, several questions can be universal when investigating an industrial accident: Background information of the witnesses and their relationship, if any, to the incident, what did you see or hear? When? Where were you when the incident occurred? Describe the moments leading up to the incident. What is your understanding of what happened? Explore the witness's knowledge of third-party involvement.

Chain of Custody

A "Chain of Custody" refers to the progression of people who have physical possession of various evidence items. Documenting who has what and when must be maintained throughout the collection, transport, examination and storage processes. Maintaining the chain of custody ensures that the evidence is handled only by authorized individuals who document their actions. Excellent record keeping is critical to avoid later spoliation challenges by potential targets. Retained personnel should always consider documentation strategies prior to handling potential scene evidence.

Spoliation

Spoliation is intentionally, recklessly, or negligently making evidence that may be potentially relevant to a legal proceeding unavailable to others, most commonly including the destruction of evidence. Spoliation typically results in an adverse inference that the party guilty of spoliation had a motivation to avoid the outcome of the evidence. The trier of fact may then conclude that the evidence would have been unfavorable to the spoliator.

The primary factors to consider in spoliation disputes are duty, relevance, and prejudice. To be guilty of spoliation, a party must have an affirmative duty to preserve the evidence. The duty is generally defined as the obligation to locate, maintain, and catalogue information that is relevant to foreseeable litigation. In some jurisdictions, this duty extends to evidence held by interested third-parties, including insurance companies. The duty can be taken on voluntarily.

Not all destruction of evidence leads to sanctions. The evidence must be relevant, and the opposing party must be prejudiced by the inability to examine that relevant evidence. If there is alternative information, photographs, or witnesses to mitigate the loss of evidence, the party seeking to take advantage of the evidence might

not be prejudiced. A party is harmed when it is precluded from presenting essential evidence to its claim or defense because of the spoliation.

Notifying Other Parties

Notice to any potentially interested parties and their liability insurers is critical. During the early days of the investigation, it may be unclear which parties might have a legal or economic interest in the loss. As the investigation unfolds, it may be necessary to notify potentially interested parties at various stages of the investigation. It is important to identify the correct parties and entities involved. When in doubt, error on the side of inclusion.

Claims of spoliation of evidence can also be minimized when notice is given to all known interested parties that an investigation at the site of the incident is going to occur so as to allow all known interested parties the opportunity to retain experts and attend the investigation. The following should be considered when providing notice: Such notice may be by telephone, letter, fax, or e-mail. Proceed with as many delivery methods as are available. Oral Notification should be confirmed in writing and Notification should include: date, type, and location of incident; the type and extent of loss, including damages, injuries, or death to the extent known; The interested party's potential connection to the incident; Next action date; Circumstances affecting the scene (such as pending demolition orders or environmental conditions); request to reply by a certain date; Contact information as to whom the notified person is to reply; The identity of the individual or entity controlling the scene; inspection protocol, as necessary; Relevant, identifying photographs; and Limiting time constraints based on the insured's commercial needs should be made expressly clear to potentially adverse parties.

Assembling Damages Documentation

Damages are often overlooked as the explosion investigation unfolds. As part of the ongoing investigation, damages documentation should be assembled and preserved concurrently. The risk management team needs to identify and discuss with those persons most knowledgeable on the losses suffered and the mitigation efforts. Keeping a running index of damages and impacted revenue streams will preserve the "value picture" at the end of the investigation and for eventual litigation and recovery.

IV. Recovery Theories

Determining Type of Explosion, Origin, and Cause

During the ongoing investigation, the experts will develop and test hypotheses for the explosion based on the available information. These hypotheses will aim to

explain how an explosion's fuel and ignition source came together and how the initial explosion propagated to create the damages. During this process, the expert will use several tools and approaches to develop and test hypotheses, combining the physical evidence with fire and explosion science (i.e., blast overpressure/wave properties, combustion chemistry, and/or pressure/flow dynamics). The expert will also consider several different types of explosions as part of the investigation, such as mechanical explosions, boiling liquid expanding vapor explosions (BLEVEs), chemical explosions, combustion explosions, electrical explosions, and nuclear explosions, as well as flash fires. The effects of these types of incidents will be combined with the damage and the available information regarding the system prior to the explosion (fuels, ignition sources, confinement/geometry, venting/protection systems, and blast dynamics) to rule in or to rule out various hypotheses and to determine an origin and ignition scenario for the incident.

Various Types of Explosion, Causation & Recovery Theories

Flash fires are generally sudden, intense fires caused by a combination of air and a dispersed flammable substance such as a solid (including dust), a flammable or combustible liquid (like an aerosol or fine mist), or a flammable gas. Flash fires can be characterized by high temperature, short duration, and a rapidly moving flame ignition. In a flash fire, the flame spreads quickly and the bulk of the damage comes from the thermal radiation and secondary fires.

Chemical Hazards - Chemical hazards are a broad category for any substance that can cause harm, primarily to people. Chemicals are required, by OSHA, to have symbols showing their possible hazards. Chemicals are grouped according to the types of effects they could have on their surroundings and can be classified as: corrosive; highly flammable; toxic; harmful to the environment; irritants; radiation risks; and carcinogens. Some chemicals are incompatible with other chemicals and should be stored separately from each other. For example, flammable chemicals should never be mixed with oxidizing chemicals as the result could be a large, uncontrollable fire.

Combustible Dust - Combustible dust is defined as solid material composed of distinct particles, regardless of size, shape, or chemical composition, which presents a fire hazard when suspended in air or some other oxidizing medium over a wide range of concentrations. Combustible dust explosions occur when dust particles are suspended in the air and confined in an enclosed space. These restrictions allow pressure to build up, increasing the likelihood of an explosion after an ignition source is introduced. The particle size of the dust, the method of dispersion, ventilation, ignition source potential, and dust confinement are variables that must be considered when assessing the risk of a combustible dust hazards. Ultimately, the best practice is to avoid fugitive dust accumulation as much as possible, while eliminating or carefully managing ignition sources in proximity to the dust.

Boiling Liquid Expanding Vapor Explosion - A boiling liquid expanding vapor explosion (“BLEVE”) is an explosion caused by the rupture of a vessel containing a pressurized liquid above its boiling point. If the pressurized vessel containing liquid at high temperature (which may be room temperature, depending on the substance) ruptures, the pressure preventing the liquid from boiling is lost. This circumstance causes the entire volume of liquid to instantaneously boil, generating hot vapor, which in turn causes extremely rapid expansion. Depending on temperatures, pressures, and the substance involved, that rapid expansion may be classified as an explosion, capable of severely damaging its surroundings.

Electrical Fires - Electricity often plays a large role as an ignition source and must be considered in any fire or explosion event, as well as other equipment-based losses. Ignition by electrical energy involves transferring sufficient heat to a fuel by passage of electrical current to ignite nearby material. Sufficient heat may be generated by a wide variety of means (short-circuits, ground-fault arcs, excessive currents, resistance heating, or failures of ordinary sources like light bulbs, heaters, and cooking equipment). Under NFPA 921, electrical fires require the following for ignition to occur: (1) the electrical wiring, equipment, or component must have been energized and (2) sufficient heat and temperature to ignite a nearby combustible material must have been produced by electrical energy at the point of origin by the electrical source.

Causation Considerations

Operator Error or Misuse - A wide variety of incidents occur as a result of operator error or equipment misuse. If human error is a possible cause and contributing factor, investigative efforts must be aimed at identifying the culpable individual. Factors such as inadequate training, inadequate procedures, ineffective equipment manuals, improper equipment designation, or lack of oversight, may have contributed to the mistakes.

Spills or Leaks - If there is evidence of a spill or a leak that caused the explosion, there are several broad investigation objectives to consider. First, the type of spill and type of release, whether sudden or long-term, must be determined. The spill location and identification type of product spilled are important for subsequent action steps (cleanup/containment). Then, the investigator must determine if another hazard exists relating to the spill that could threaten the soil, ground water, or other materials that necessitate immediate cleanup.

Design Defects - Design defects must always be considered when an equipment failure is involved in the explosion. Generally, there are two types of design defects—ones that directly cause harm and ones that make harm from other sources more likely. The two most common tests used to determine whether a design defect was present

are the consumer expectation test and the risk-utility test. Under the consumer expectation test, courts determine whether the product was dangerous to a degree not ordinarily contemplated by the reasonable consumer. Under the risk-utility test, courts determine whether the harm posed by the product outweighs the benefits associated with its use. Product designers need to account for all foreseeable users and uses/misuses to which the users might put the product. No absolute legal standard for foreseeability exists, though it is generally limited to reasonably anticipated contingencies.

Manufacturing Defect - Manufacturing defects occur when the product is manufactured in a way that departs from its intended design and is more dangerous than consumers expect the product to be. This generally means that, no matter how careful the manufacturer was when designing the product, choosing materials, creating the assembly line, and issuing quality assurance, the manufacturer is still liable for deviations that injure consumers. However, manufacturing defects can be difficult to establish. A plaintiff must show that the claimed defect was outside the product's design specifications. Furthermore, extracting the failed component(s) in a state that allows for further forensic analysis is challenging, especially when the malfunction caused internal damage to the product itself.

Improper Packaging/Inspection - Improper packaging is a subset of design and manufacturing defects. If a volatile chemical or combustible item is packaged in a leaking or poorly sealed container, it is reasonably foreseeable that the item will spill, potentially causing a fire. Manufacturers have a duty to inspect their packaging for defects or consumer hazards. Even with proper warning labels, courts have held manufacturers liable for improper packaging and inspections thereof.

Failures to Warn - Sellers and manufacturers have a duty to warn consumers when their products or equipment pose reasonably foreseeable risks of harm. Failures to warn are considered marketing defects, and a product can be defective because of inadequate instruction or lack of appropriate warnings. Factors to consider when evaluating whether there was an issue with warnings are: the severity of the likely harm; the ease of providing an appropriate warning; and the likelihood that the warning is effective. Even with proper warning labels, courts may hold manufacturers liable for industry knowledge or practices that indicate consumers disregard the warning.

Implied Warranties - Warranty claims are contract based, meaning that they can generally be brought when the plaintiff dealt directly with the defendant. However, some courts extended warranties to reach members of a buyer's household, to guests, and to people who borrow a product. There are two types of implied warranties: warranties of fitness and warranties of merchantability. However, both can be disclaimed explicitly within a contract.

Implied Warranty of Fitness - This implied warranty relies on the intentional representations that the buyer relies on. To establish this claim, the buyer has expressly or impliedly informed the seller of a particular purpose for which the product is required and relied on the seller's skill or judgment in selecting or furnishing a product to satisfy that purpose.

Implied Warranty of Merchantability - This implied warranty certifies to a buyer that the goods are fit to sell. "Fit to sell" just means that the product is reasonably fit for its foreseeable, ordinary purpose within the customer's reasonable expectations.

Express Warranties - An express warranty is any affirmation of fact or promise the seller makes to the buyer, relating to the goods, that becomes part of the basis for the bargain. A particularly sensitive area is created in statements made in advertisements, brochures, sales pitches, and instruction manuals. Vague statements may even be construed as express warranties, if a reasonable buyer would consider them in purchasing the product. Unlike implied warranties, express warranties cannot be disclaimed.

Protection/Suppression System Failures - Automatic fire suppression systems (wet or dry) are the most effective means of preventing fire damage. A fire suppression system can be design-specific and engineered for a particular application, like an industrial plant or computer clean room. Otherwise, the system is likely pre-engineered and has general application. Failure of the system should be considered at the outset of every fire and explosion investigation. Design documentation regarding the particular system or component of interest should be obtained. Installation documentation, invoices, contracts, service providers, alarm activation history, product literature, and maintenance records should all be examined.

IV. Conclusion

The key to a successful recovery pursuit is having the right team of professionals in place. The investigation and any recovery litigation must be based on credible evidence and good science. The recovery team should be effective, efficient and strategic in their efforts. While an industrial accident crisis is severe and chaotic, a strong thorough forensic investigation, with skilled leadership, affords the potential for maximizing your recovery opportunities.