



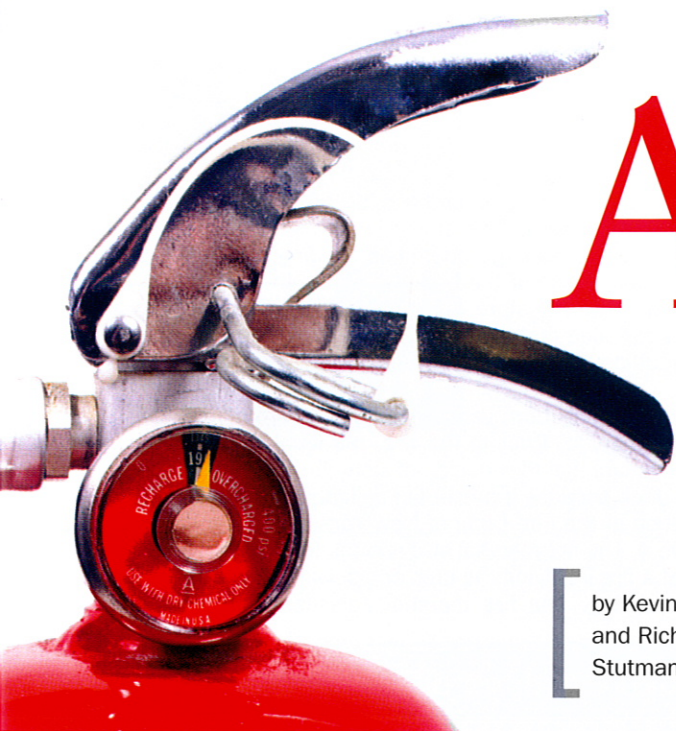
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PERSISTENCE LEADS
TO RECOVERY IN

Arson fires

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According to the Federal Bureau of Investigations, 43% of the 67,504 arson offenses reported in 2005 under the Uniform Crime Reporting Program involved buildings. Arsons of industrial and manufacturing buildings resulted in the highest dollar losses with an average loss of \$356,324 per incident. While up to 20% of these offenses result in arrest and prosecution, recovering significant damages through restitution from a convicted arsonist is unlikely. But recovery is not impossible. It simply requires a higher level of persistence and determination by everyone involved.

The following is one story of a successful subrogation recovery involving an arson fire. As you will see, success is not achieved in the first round of investigation and theory development. Here, a successful recovery for the owner and insurer of a building damaged by arson is the result of multiple levels of inquiry, many rounds of theory development, and aggressive litigation.

The Fire

In April of 2003, more than one hundred firefighters responded to extinguish a major fire at an industrial park in the Albany area of New York. What had started as a small loading dock fire quickly engulfed the entire building. Firefighters with high velocity hoses simply could not extinguish the blaze, which was fueled by thousands and thousands of discarded tires, a byproduct of the tenant's manufacturing process. Flames consumed the building and caused damage to adjacent businesses with total losses in excess of six million dollars.

Level One Investigation - Fire Caused by Arson

The preliminary investigation indicated that the fire originated on the exterior portion of the loading dock late at night. Witnesses reported seeing kids running from the site shortly before the flames were visible from nearby buildings. In short order, arson was confirmed. Suspect interviews were conducted, but no viable recovery targets were identified during this "first level" of the investigation. The evidence against the suspected arsonists was weak. But even if arson by these individuals could be verified, their ability to pay for the multi-million dollar damage

was unlikely. Recovery efforts then turned to a "second level" of investigation based on a fire spread theory.

Level Two Investigation - Arson Fire Spread Caused by Sprinkler System Inadequacy

Although the building was constructed in the 1940's, it was outfitted with sprinklers. Specifically, it was outfitted with sprinklers designed to 1940's specifications for the building's original use and occupancy as a dry goods warehouse in a military base operation. The second level recovery efforts now focused squarely on the performance of the sprinklers during the fire. Why did the fire spread so rapidly and consume the building so completely? Was the system designed properly? Was the system maintained in proper working order? Most importantly, who was responsible for ensuring sprinkler adequacy and performance? Even though the fire was caused by arson, the question of sprinkler adequacy warranted assignment to counsel for further investigation.

NFPA 25 Chapter 1-4.2 states specifically that "[t]he responsibility for properly maintaining a water-based fire protection system shall be that of the owner(s) of >>

the property."² As previously noted, the building was constructed in the 1940's with a sprinkler system designed for a dry goods warehouse. Although the pipe size, spacing, and sprinkler head distribution may have been appropriate for the building's original use, it was inadequate for the tenant's use and occupancy at the time of the fire in 2003.

In 2003, the building's occupant manufactured rubber mats and rubber bumpers from recycled car and truck tires. The raw materials consisted of used tires, and the manufacturing byproduct consisted of tire sidewalls and rubber dust. The materials used and byproducts stored in the building were high-energy materials. A fire involving such materials would be very severe and long lasting. It would spread quickly and be quite difficult to extinguish. This use and operation required the highest level of sprinkler protection. The existing sprinkler system, however, was designed for a less volatile exposure. Further, some parts of the building, such as the loading dock where sidewalls and tires were stored, were without any sprinkler protection at all. These facts seemed to point liability at the building owner and did not bode well for the insurer's chances of recovery. Fortunately, there were other contributing factors to investigate. The adequacy of the water supply from the street may have been another factor contributing to fire spread.

Level Three Investigation - Arson Fire Spread Caused by Sprinkler System Inadequacy and by Lack of Water Supply to the Sprinkler System

Firefighters initially had difficulty delivering water to part of the fire. It was later shown that the water supply to the sprinkler system had been shut off at the street prior to the fire, but the circumstances of who, when, and why were unclear. Interviews and work documents showed that water line work had been completed prior to the fire by the industrial park manager, the building owner, or the municipal water supplier. Aggressive investigation, however, could not clearly identify a specific person, event, or time associated with the water supply shut off.

The hurdles to the building owner and insurer's recovery seemed overwhelming. The fire was caused by arson. The arsonist could not be conclusively identified, and even if identified, would be unlikely to be able to make restitution. Although fire spread was a potentially viable theory, it was the building owner who was primarily responsible for ensuring the operation of the sprinkler system. Another potential cause of the fire spread was the lack of water from the street. But efforts to identify a potentially liable party for the water shut off had also turned up empty. The combination of an arson fire with complicated circumstances contributing to fire spread seemed to make recovery for the building owner and insurer all but impossible, unless there was some other angle. Fresh ideas were needed.

Level Four Investigation - Arson Fire Spread Caused Primarily by Excessive Fuel Load and Fire Code Violations by the Tenant

At this point, the case was assigned to new counsel for a "second look" at recovery potential. According to NFPA 25 Chapter 1-4.2, the building owner's responsibility to ensure sprinkler adequacy can transfer to the building occupant or manager through appropriate contractual language in a written lease, use agreement, or management contract.³ The lease with the building owner stated that the building owner did, in fact, agree to maintain the existing sprinkler system. However, if the tenant's use of the building required modification to the sprinkler

system, it was the tenant's responsibility to make the modifications. Further, the tenant was responsible for ensuring that their use of the space complied with all applicable codes. Accordingly, the investigation turned toward the actions of the tenant.

As noted, the tenant manufactured rubber mats and rubber bumpers from used car and truck tires. A byproduct of the tenant's operation was the unused sidewalls of the tires. The tenant had difficulty finding either a use for the sidewalls or way to dispose of the sidewalls. They stored large quantities of these tire sidewalls, as well as large quantities of whole tires, on the loading dock and inside of the building. While the tenant was specifically permitted to store up to 5,000 used tires on site, their records revealed that they had about 45,000 tire sidewalls on site, in addition to bags of rubber dust and whole used tires.

Tires and tire sidewalls burn very vigorously and are notoriously difficult to extinguish. Prior to the fire, the local fire marshal informed the tenant that they could not store tires or sidewalls on the loading dock because it presented a significant hazard and was in violation of the Fire Code of New York State Chapter 25 section 2505.4. The fire marshal also told the tenant of an arson risk and that a fire involving the tires or sidewalls could destroy the entire building. The fire marshal advised the tenant to

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consult with a fire protection engineer as to whether the building's sprinkler system needed to be modified and instructed the tenant to remove the tires from the building and loading dock. Over the course of several years, both the fire marshal and the building owner had in fact warned the tenant many times of the hazards of storing the tires and sidewalls

Although evidence did show that the water supply to part of the sprinkler system was off at the time of the fire, expert evaluation of the extent of the fire load concluded that the existing sprinkler system could not have extinguished the fire even if the water had been turned on completely. The primary issue was now the tenant's negligence in creating a substantial and dangerous fuel load, failing to modify the sprinkler system as required under the lease, and violating the Fire Code of New York State. Not surprisingly, the tenant disagreed. The tenant argued that they were not responsible because the fire was caused by arson, the building owner was obligated to maintain the existing system, and the water supply to the sprinkler system had been shut off at the street prior to the fire. Since the parties could not agree, the matter proceeded to trial in New York based on these differences. >>

Conclusion – Verdict for Building Owner Against the Tenant



The trial in Schenectady, New York began with hotly contested motions about the admissibility of expert testimony regarding design and maintenance of the existing sprinkler system and the lack of water from the street. It was undisputed that the fire was caused by arson and that the 45,000 tire sidewalls and tires placed by the tenant in the building and on the loading dock created a large and ferocious fire that was nearly impossible to

extinguish. One of the firefighters summed it up aptly in deposition testimony by stating that “you needed to dip the building in water to put it out.” It was clear that no amount of maintenance and no amount of water would have allowed the existing system to extinguish the flames, and the defendants could present no expert testimony to the contrary. Following oral arguments, the court permitted no testimony on the issues of sprinkler maintenance and water supply adequacy.

The building owner argued that the tenant violated Chapter 25 section 2505.4 of the Fire Code of New York State by storing tires and tire sidewalls in the building and on the loading dock. Ultimately, the court agreed to instruct the jury that the tenant's violation of the Fire Code of New York State was evidence of their negligence. Still, there remained the tenant's argument about lack of foreseeability.

The tenant argued that the occurrence of arson was an unforeseeable event because nothing of the sort had happened in this industrial park before the night of the fire. The tenant's argument was bolstered by standard jury instructions that said that foreseeability required the event to be not merely possible, but actually probable. The jury took this instruction to heart, asking that it be reread during deliberations. Ultimately, the jury agreed that an arson fire was foreseeable and the court had instructed the jury that the tenant's violation of the Fire Code of New York State was evidence of their negligence. The jury awarded damages to the building owner and their insurer from the tenant in excess of one million dollars.

Arson fires are too common, too large, and too significant to write off as viable cases for subrogation recoveries. Too often the investigation stops one or two levels short of a viable recovery theory. When this happens, subrogation professionals must push forward, probe deeper into the details, and demand a second look if necessary. Persistence leads to recovery in arson fires.

ENDNOTES

¹ Source http://www.fbi.gov/ucr/05cius/offenses/property_crime/arson.html. The FBI's UCR report of 2005.

² NFPA 25 Chapter 1-4.2. The occupant exception to this section is discussed later in this article.

³ NFPA 25 Chapter 1-4.2 See the occupant exception to Chapter 1-4.2.