

FIRE INSURANCE LAW

Part One

Few events are as traumatic as a fire that destroys a house or business. Even though the loss usually involves property that can be rebuilt or replaced, victims of fires are often emotionally and financially devastated. They have no home in which to live, no clothing, no furniture, no cooking utensils, and when a business has been destroyed by fire, no source of income.

Fire victims are invariably in a very vulnerable position. They need immediate financial assistance to try to get their lives back in order. Fire victims that were fortunate enough to have insurance look to their insurer for that help. In most circumstances, the help that was promised in the insurance policy is actually provided to the fire victims. But what happens when the insurance company, instead of helping the fire victims as it had promised, not only refuses to help, but turns on the victims and accuses them of arson? What rights do insureds have and how can they enforce those rights? And how can insureds left with virtually nothing after a severe fire successfully defend against an insurance company with unlimited resources?

The Fire Scene Investigation

Most fire victims do not seek the assistance of an attorney. They seldom see the need, at least until the claim is either denied or delayed several months without payment. Most often, the fire victim will report the claim to his or her agent who will then contact the insurance company. The insurance company will assign the matter to either one of its in-house adjusters or to an independent adjuster. The adjuster usually makes contact with the insured within a day or two of the fire. The adjuster may pay a small advance. He will ask the insured to obtain a repair estimate for the real property damage and to begin itemizing the damaged personal property.

The adjuster will also investigate the cause of the fire. He will obtain a copy of the local fire report and talk to the fire officials who responded to the call. If he obtains information that the fire was intentionally set, that is, arson, or that the cause of the fire is undetermined, but suspicious, then the fire investigation will commence.

An insurance company will not rely solely on the findings of the local fire investigators, even if the state fire marshal is involved. A private fire investigator will almost always be used to determine the cause and origin of a fire. These fire investigators may be ex-firemen, or ex-state fire marshals, or ex-insurance adjusters. In all cases, they are closely tied to the insurance industry. Most of their work comes from insurance companies. In fact, many work only for insurance clients. Bias is a concern. Another concern is the selective reporting of facts. Those facts that tend to confirm the suspicions of the insurance company are emphasized or misconstrued while exculpatory facts are ignored.

Most private fire investigators will review the fire scene with the insured, and probably take a tape recorded statement from the insured as well. There will never be accusations at this stage. Rather, the insurance company and the private fire investigator will explain that a thorough investigation is being done for the protection and benefit of the insured. Insureds seldom see the writing on the wall until it is too late.

The private fire investigator will also try to review the fire scene with local authorities, especially if the official cause of the fire is listed as "undetermined." Although the insurance company will not rely exclusively on the local authorities to determine cause and origin, it certainly wants them to agree with the findings of its private fire investigator. To accomplish this goal, the local authorities will often be invited to "assist" the private fire investigator during his inspection of the fire scene. This makes the findings of the private fire investigator seem like

the findings of the local authorities. It is not at all uncommon for the local fire authorities to adopt the conclusions of the insurance company's investigator based on the logic that the company's investigator spent more time investigating the scene than they did, so his or her conclusions must be right. This is especially true in smaller communities with volunteer or part-time firefighters.

The mechanics of a fire scene investigation are beyond the scope of this article. For some references see *Kirk's Fire Investigation* by John DeHaan (1991); *Fire Litigation Handbook* by Dennis Berry (1984); *Fire Investigation Handbook*, U.S. Department of Commerce (1980); *Fire Protection Handbook*, National Fire Protection Association (1986).

The basic goals of a fire scene investigation are to determine the cause and origin of a fire. Fire investigators first attempt to determine the area of origin, that is, where the fire started. This is generally the area of the most severe fire damage, or the lowest point of the fire, since fire usually burns upward.

Once the area of origin is determined, the next step is to determine what in the area of origin could have caused the fire to ignite. Some common ignition factors include electrical short circuits, lightning, sparks, cigarettes, matches, fireplaces, and cooking surfaces. Some examples of items that could be ignited by these factors include electrical insulation, wall studding, clothing, furniture, carpeting, papers, or cooking grease.

The primary focus of an arson investigation is to determine if the ignition factor was the result of an intentional act. When evidence of the ignition factor survives the fire, such as an electrical short circuit or a cigarette butt, the accidental nature of the fire may be obvious. When, however, there is no apparent ignition factor, the fire investigator will concentrate on the

question of whether the fire was spread by any intentional act. The most common method of accomplishing this is by the use of a flammable liquid, such as gasoline.

Sophisticated laboratory tests are available to screen fire debris for the presence of volatile accelerants. The most common test is gas chromatography. A finding after a fire of the presence of gasoline or some other type of flammable liquid in an area where it should not be found, such as the living room of a house or the dining room of a restaurant, is strong evidence of an intentionally set fire.

Insurance companies and their fire investigators, however, maintain that the opposite is not true, and this is the factual situation in many civil arson cases. Even when sophisticated gas chromatography tests fail to reveal the presence of a flammable liquid, some fire investigators still maintain that they can determine the cause of a fire to be arson based on burn patterns and other more subjective criteria. These fire investigators usually argue that burn holes in the floor, severe low level burning, or deep charring are signs indicative of a fire that was spread through the use of flammable liquids that were probably consumed in the fire.

A fire report that concludes a fire was intentionally set based only on the fire investigator's opinion concerning an analysis of the burn patterns is a much more suspect report than one that finds the presence of volatile accelerants through the use of gas chromatography. Expert fire investigators can look at the same fire remains and, in the absence of a positive test result for flammable liquids, it is not uncommon for them to reach different conclusions concerning the cause of the fire. In fact, some knowledgeable fire investigators take the position that if a flammable liquid was used to help start a fire, gas chromatography of the fire debris around the area of origin will almost always yield a positive result, especially if the area of origin was on a porous item such as a carpet which allows the flammable liquid to sink below the

surface of the fire. A negative result means that there is a strong probability that no flammable liquid was ever present.

A careful analysis of the insurance company's fire investigation report is probably the single most valuable service that an attorney can perform for a client at this stage of the litigation. However, insurers will usually not provide a copy of this report until after the claim is denied. It is important to try to preserve the fire scene so that a fire investigator hired by the insured will have an opportunity to inspect the scene before it is changed. Often, however, the scene is unwittingly changed by the insured after the insurance company's fire investigator is done with the inspection. The insured is told that the investigation is complete and it is appropriate to commence cleaning out the premises or doing repairs. Not realizing that he or she is the focus of an arson investigation, the insured may disrupt the scene and never think of calling an attorney until after the claim is denied.

The Background Investigation Of The Insured

Once an insurance company decides that the fire was intentionally set, it then commences its investigation to determine who set the fire. Unfortunately, however, what often happens is that the insurer focuses its investigation on gathering all available evidence.

Typically, the insurer will conduct a background check of the insured that will include the following:

1. Checking for the insured's prior criminal record;
2. Checking for past or present lawsuits in which the insured is a party;
3. Checking for prior insurance claims filed by the insured, especially prior fire claims;
4. Obtaining a credit report;
5. Checking for judgments and judgment liens against the insured, especially tax liens;
6. Checking with the landlord, the mortgage company, and the utility companies to see if the insured is current on his payments;

7. Checking with the insured's employer to determine his rate of pay and prospects for continued employment;
8. Taking recorded statements from all family members and other persons capable of verifying the insured's alibi; and
9. Performing a neighborhood canvas to determine whether neighbors saw or heard anything suspicious before the fire.

The insurance company will attempt to build a circumstantial case against the insured by finding evidence that the insured was in financial distress at the time of the fire and, thus, had a motive to commit arson. The evidence could consist of having judgments or liens against the insured, being behind on bills, receiving foreclosure notices or notices to disconnect the utilities, or being terminated from his or her place of employment.

The insurance company will also attempt to establish that the insured or someone acting on his behalf had the exclusive opportunity to set the fire. This is done by showing through the statements and investigation of the responding firemen and the fire investigator that the building was locked and secured at the time of the fire, and that the insured had the only key to the building. The evidence concerning the integrity of all of the doors, windows, and locks must be carefully analyzed to determine the strength of this defense, but, again, the insurance company will not usually provide the insured or his attorney with the information it has gathered until after the claim is denied and the lawsuit filed.

The Examination Under Oath

When the insurance company completes an investigation it will then have an attorney conduct an examination under oath (EUO) of the insured. A typical policy provision giving the insurance company the right to conduct such an examination is as follows:

The insured, as often as may reasonably be required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to

examinations under oath by any person named by this Company, and subscribed the same.

An EUO resembles a deposition in that the insured is placed under oath and questioned by an attorney in the presence of a court reporter who makes a record of the statement. However, there are important differences between an EUO and a deposition. The primary difference is that the insured must be very careful about refusing to answer any questions asked of him. Whether right or wrong, it commonly happens at depositions that an attorney representing the party being deposed instructs his client not to answer a question the attorney feels is irrelevant, objectionable, or for some reason improper. If the attorney posing the questions wants to force the party to answer, certain steps need to be taken to get the matter in front of the judge.

At an EUO, however, the refusal to answer a question posed by the attorney representing the insurance company will often lead directly to the denial of the insurance claim on the grounds of noncooperation. The areas that the insurance company is allowed to inquire into at an EUO are extremely broad, and include questions about the insured's financial status.^{1,2} A common problem is that the insured feels as though certain questions about his finances and taxes are irrelevant and refuses to provide the information. The consequences of this action include almost certain denial of the insurance claim and probably loss of the resulting lawsuit. It is much easier for the insurance company to prove breach of the cooperation clause than arson by the insured.

The critical part of any EUO comes before the first question is asked. The insured must be thoroughly prepared, and must understand what areas are subject to inquiry and what information the insurance company is hoping to uncover. A well-prepared insured is better able

1. *Gabor v. State Farm* (1990) 66 Ohio App. 3d 141.

2. *Moore v. State Farm* (1985), Court of appeals for Montgomery County, Case Nos. 9200 and 9376.

to cope with the demanding nature of an EUO, which could last from several hours to several days.

Typically, only the named insured may be required to give an EUO. Friends and family members may be asked to give statements voluntarily, but these are not EUOs.

Where there are multiple insureds, such as a husband and wife, the insurance company will try to insist on separate EUOs in an effort to obtain contradictory statements from the insureds. Unless a specific policy provision allows separate examinations, each insured has the right to be present at the EUO of every other insured.³

FIRE INSURANCE LAW

Part Two

Discovery

Once the insurance company decides to deny the claim, litigation is the only alternative. The primary source of discovery is the insurance company's claim file. Typically, the claim file will include the adjuster's notes, statements from witnesses, the results of the company's investigation, and reports from the insurer's counsel who conducted the examination under oath (EUO).

A request for a claim file is usually answered with numerous objections based on work product privilege and attorney-client privilege. These objections must be vigorously challenged, for the only way to know for certain what information the company had available to it when it denied the claim is to obtain the claim file. The claim file often contains facts exculpatory of the insured which are relevant in determining whether the denial of the claim was made in good faith.

³ *U.S.Fidelity and Guaranty v. Welch* (C.A. 11, 1988), 854 F.2d 459.

Insurance attorneys commonly respond to discovery requests for the claim file by making a broad objection to the request, and then providing the portions of the file that support the insurer's position or are innocuous. There is seldom a listing of the documents that are not being produced. The hope is that the insured's attorney will be satisfied to get some documents and will not pursue the matter further. Often this hope proves to be correct.

The law in this area, however, is quite clear. The party asserting an objection to discovery has the burden of establishing its claim of privilege.⁴ In order to preserve privilege claims, the party asserting them must prepare an index that itemizes each document and provides a factual summary of its contents and the justification for its being withheld.⁵ The insurer should be forced to produce such a "privilege log" which identifies each document being withheld, the name of the author, the name of the recipient, the subject of the document, and the basis of the privilege being asserted.⁶ Based on a review of the privilege log, counsel can often determine that non-privileged documents are being withheld. At the least, the log will force the insurer to carefully weigh whether to assert the privilege and will provide a summary of documents for the court to review if an in-camera inspection is ordered.

When a discovery dispute arises, the insurance company must establish that documents withheld on the basis of the work product privilege were "prepared in anticipation of litigation." However, the work product privilege does not extend to protect from discovery materials prepared in the ordinary course of business.⁷ Many cases have held that the materials in an

⁴ *In Re Shopping Carts Anti-Trust Litigation* (S.D. N.Y. 1982), 95 F.R.D. 299

⁵ *Pete Rinaldi's Fast Foods, Inc. v. Great American Insurance* (M.D. N.C. 1988), 123 F.R.D. 198

⁶ *Wei v. Bodnar* (D.N.J. 1989), 127 F.R.D. 91.

⁷ Notes of Advisory Committee on Amendments of Discovery Rules, 49 F.R.D. 487, 501

insurance company's claim file are discoverable since all of these documents are prepared in the ordinary course of business.⁸ In *Rinald, supra*, for example the court held as follows:

Because an insurance company has a duty in the ordinary course of business to investigate and evaluate claims made by its insureds, the claims files containing such documents usually cannot be entitled to work product protection. Normally, only after the insurance company makes a decision with respect to the claim will it be possible for there to arise a reasonable threat of litigation so that information gathered thereafter might be said to be acquired in anticipation of litigation.

When an insured is able to establish a prima-facie case of bad faith, discovery should be permitted of documents normally protected by the attorney-client privilege where such documents pertain to the bad faith dealing.⁹

Once full discovery is allowed of all relevant documents in the insurer's claim file, counsel can determine whether or not the information available to the insurer was sufficient to justify a denial of the claim. In this area, expert testimony is admissible to prove that an insurer acted in bad faith in denying a claim.¹⁰ A claim of bad faith allows the insured to ask for damages at the trial above and beyond those legally recoverable due to the breach of contract. Most courts allow insureds who are the victims of insurer bad faith to recover for emotional distress,¹¹ economic loss,¹² attorney fees,¹³ interest,¹⁴ litigation expense,¹⁵ and, when malice, oppression, or insult is proven pursuant to R.C. 2315.21, punitive damages.¹⁶

⁸ *Harper v. Auto-Owners Insurance Company* (S.D. Ind. 1991), 138 F.R.D. 655; *Pete Rinaldi's Fast Foods, Inc. v. Great American* (M.D. N.C. 1988), 123 F.R.D. 198; *Langdon v. Champion* (1988), 752 P.2d 999; *Henry Enterprises v. Smith* (1979), 225 Kan. 615, 592 P.2d 915; *Hawkins v. District Court* (1982), 638 P.2d 1372.

⁹ *United Services Automobile Association v. Werley* (Alaska, 1974), 526 P.2d 28.

¹⁰ *American Concept Insurance Co. v. Lochhead* (Utah 1988), 751 P.2d 271; *Neal v. Farmers Insurance Exchange* (1978), 148 Cal. Rptr. 389, 582 P.2d 980.

¹¹ *Bebault v. Hanover Insurance Co.* (R.I. 1980), 417 A.2d 313.

¹² *Delos v. Farmers Insurance Exchange* (1979), 155 Cal. Repr. 853.

¹³ *Brandt v. Superior Court* (1985), 210 Cal. Rptr. 211, 693 P.2d 796, *Sorin v. Board of Education* (1976), 46 Ohio St. 2d 177.

Trial of the Lawsuit

The trial strategy employed in an arson case will depend on whether a bad faith claim is being presented to the jury along with the breach of contract claim. Although the insured will usually seek a joint trial on both issues, there are occasions when the reverse will be true. This usually occurs when there is evidence in the insurer's claim file that would not be admissible on the breach of contract claim, but might be admissible on the bad faith claim. An example of this type of evidence would be an incriminating statement made to the insurer's investigator by a person who can not be located at the time of trial. This statement would clearly be hearsay if introduced in the breach of contract claim, but might not be hearsay if offered on the bad faith claim. The insurer could argue that it was not offering the statement to prove its truth, but, rather, to prove that it had a good faith reason for denying the claim.

Arson is an affirmative defense which the insurer must establish by a preponderance of the evidence. Arson may be proven by circumstantial evidence, but in order to overcome a motion for a directed verdict, the circumstantial evidence must establish:

that the fire was of incendiary origin, that the insured had a motive to burn the property to obtain the insurance proceeds and that the insured had the opportunity to participate in the arson; however, almost all the cases indicate that mere proof of incendiary origin and motive is insufficient.¹⁷

In a typical arson case, the insurer attempts to paint an inculpatory picture of the insured by introducing evidence of various "suspicious" facts. The insured must be prepared to explain these facts clearly to show that the facts indicate guilt only in the biased mind of the insurance company.

¹⁴ *Delos v. Farmers Insurance Exchange*, supra.

¹⁵ *White v. Western Title Insurance Co.* (1985), 221 Cal. Rptr. 509, 710 P.2d 309; *Spadafore v. Blue Shield* (1985), 21 Ohio App.3d 201, 486 N.E.2d 1201.

¹⁶ *Hoskins v. Aetna Life Insurance Co.* (1983), 6 Ohio St. 3d 272, 452 N.E. 2d 1315.

¹⁷ *Caserta v. Allstate Insurance Co.* (1983), 14 Ohio App. 3d 167

For example, in *Mize v. Hartford Insurance Company* (W.D. Vs. 1982), 567 F.Supp. 550, the insurer relied on the following circumstantial evidence to justify its denial of the insured's claim for fire damage done to her house:

1. the insured had previously lived with the admitted arsonist;
2. the insured was on vacation at the time of the fire and had taken her jewelry with her;
3. the insured had placed her pets in a kennel instead of leaving them at home;
4. the insured was slightly behind in her mortgage payment;
5. the insured had her important papers at her mother's house; and
6. the insured had been trying to sell the house.

The trial court, in granting the insured's motion for a directed verdict, summarily dismissed the points which the insurer argued constituted circumstantial evidence of arson:

The insurance company's view of the circumstances, whether viewed singularly or as a whole, is not impressive. Every circumstance listed by the company was a perfectly normal, everyday act and was fully explained by the Plaintiff as such. When circumstances admit of two equally plausible interpretations, they are insufficient to carry the burden of proof.

In *Southern Trust Insurance Co. v. Braner* (1984), 169 Ga.App. 567, 314 S.E.2d 214, the insurer relied on the following circumstantial evidence to establish that the insured had burned his home:

1. The insured had increased his coverage on the property two weeks before the fire;
2. The insured's checking account was overdrawn for several months before the fire; and
3. the house was locked when the fire occurred and the insured had the only key.

Despite these circumstances, the trial court granted the insured's motion for summary judgment on the arson defense:

Whether a fire loss resulted from arson caused or procured by the insured is normally a question for the jury. * * *

However, the evidence in the instant case was insufficient to raise even an inference of arson caused or procured by [the insured] that would have authorized a jury to find favor of [the insurance company].

The more “suspicious facts” the insured is able to successfully explain, the better the insured’s chances of defeating the arson defense. In addition, evidence should be introduced of any exculpatory facts such as:

1. the insured’s loss exceeded the policy limits;
2. the insured has no criminal record;
3. the insured has no history of submitting insurance claims;
4. the property was never listed for sale;
5. the insured lost personal items in the fire such as family photographs that cannot be replaced;
6. the insured lost a pet in the fire;
7. there have been other unexplained fires in the neighborhood;
8. the insured has sources of cash available if needed from friends or family members;
9. the insured has done extensive remodeling of the premises; or
10. part of the insured’s loss was uninsured, such as non-scheduled jewelry or a coin collection.

By introducing such evidence, the insured will force the insurer to confront the weakness in its circumstantial case. Hopefully, the jury will also focus on these facts and realize that there are at least as many circumstantial facts indicating innocence as there are indicating guilt. Since the insurer has the burden of proof, the insured can successfully argue that guilt has not been proven, but only has been used as a defense to give the insurer an excuse not to pay the claim.