INVESTIGATION AND SUBROGATION OF LARGE FIRE LOSSES

Presented By:
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PROPERTY AND CASUALTY INSURANCE

- Property Insurance
  - Personal Insurance
    - Covers Personal Property And Health
    - Home, Auto, Other Personal Insurance
  - Commercial Insurance
    - Covers Buildings And Structures – Real Property
    - Covers Personal Property Of Business And Others
- Casualty Insurance

PROPERTY AND CASUALTY DAMAGES

- Building (Real Property)
  - Repair Cost
  - Replacement Cost
  - Actual Cash Value
  - Fair Market Value
- Contents (Personal Property)
- Additional Living Expenses
- Loss of Rents/Loss of Use/Business Income

SUBROGATION GENERALLY

- Elements of Subrogation
- Origins of Subrogation
- Types of Subrogation
  - Contractual (Conventional) Subrogation
  - Equitable (Legal) Subrogation
  - Statutory Subrogation
- Purpose of Subrogation
- Anti-Subrogation Arguments
TYPICAL SUBROGATION CLAUSE

“If we pay a claim under your policy, we will take over your right to recover that amount from any other person or organization. You agree to cooperate with us and not do anything that will interfere with our chances of recovery.”

RECOGNIZING SUBROGATION

- Requires Training And Experience
- Must Put On Plaintiff’s Hat
- Understanding Of Tort Law
- Prompt Recognition And Action Required

SUBROGATION INVESTIGATION

- Why Investigate?
- How To Investigate?
- When To Investigate?
- Investigation Goals:
  - Preserve Evidence/Avoid Spoliation
  - Recognize Subrogation
  - Identify Key Players, Targets, Witnesses
  - Coverage Issues (Arson, Exclusions, Etc.)
  - Determine Damages
  - Notice Issues
  - Eliminate Alternate Causes Of Loss
WHY INVESTIGATE

- First Chance At Evidence
- Identify And Retain Evidence
- Catch Witnesses When Memories Are Fresh
- Lock Witnesses Into Positions And Testimony
- Identify Roadblocks (Indemnity, Waiver, Etc.) Early
- Essentially Walk-through Of Your Subrogation Lawsuit
- Identify All Possible Third Parties
- Prevent Insurance Fraud - $20 Billion Per Year

LARGE LOSS PROPERTY SUBROGATION

- Immediate Response by Expert
  - C & O, Engineer, Surveyor, etc.
- Obtain All Reports, i.e., Fire and Police.
- Talk to Fire Marshall or Police Investigator
- Obtain Names of All Potential Witnesses
- Obtain All Contracts
- Consider Private Investigator
- Goals of Defense
  - (1) Alternate Cause and (2) Spoliation

PRODUCT LIABILITY

- Design Defect
- Manufacturing Defect
- Marketing Defect
- Identify And Preserve Product
- Chain Of Custody
PRODUCT LIABILITY (CONT.)

- **Manufacturing Defect**: When the product bends, breaks, fails, leaks, ignites, explodes or does something different than as designed.
- **Design Defect**: Product does conform to its plans and specifications, but design itself renders product unreasonably dangerous.
- **Marketing Defect**: Seller fails to warn of product dangers or provide instructions for safe use of the product.

PRODUCT LIABILITY INVESTIGATION

- Design Defect, Manufacturing Defect/ Warning
- Immediately Engage Expert
- Obtain/Secure Product & Packaging
- Detailed Statement of Operator
- Who manufactured? Where purchased?
- Modifications? Repairs? Maintenance?
- Operator’s/Service Manual
- Economic Loss Doctrine
SELECTING AND HIRING EXPERTS

- When To Hire Expert?
- Choosing An Expert
- Cause vs. Origin
- Electrical/Mechanical/Chemical/Civil Engineer
- Accident Reconstruction/Human Factors
- Expert Databases/Referral Companies
- Being An Expert In Choosing An Expert
- Budget And Cost-effectiveness

EXPERT WITNESS ISSUES

- Selecting an Expert
  - *Lexus v. Hyundai*
  - Breadth of Training & Experience
  - Will Expert's Opinions Hold up in Court?
- Reports
  - Expert’s File Discoverable
  - No Preliminary Reports
  - Only When Ordered by Court

FIRE AND EXPLOSION CASES

- Investigation Is Key
- Cause And Origin – Investigation Protocol
  - NFPA 921
- First Origin, Then Cause
- Fire Spread Cases
- Fire Response Liability
- Sprinkler Systems/Burglar And Fire Alarms
- Eliminate Other Causes
- Limitation Of Liability
ELECTRICAL FIRES

- Electrical Engineer
- Electrical Wiring
- Electrical Equipment And Appliances
- Site Examination Protocol
- Identify Electrical Contractor/Builder
- Evidence Of “Unusual Electrical Activity”
- Notice And Preservation Of Evidence
- Identifying Defendants/Third Parties

OBSTACLES TO PROPERTY SUBROGATION

- Made Whole Doctrine
- Economic Loss Doctrine
- Statute of Limitations
- Statute of Repose
- Governmental Liability
- Subrogation Waiver/Exculpatory Clause
- Landlord/Tenant Implied Coinsured
- Insured Cooperation

SPOLIATION

- Definition: “The intentional destruction, mutilation, alteration, or concealment of evidence.” Black’s Law Dictionary
- Effect: Undermines the “truth-seeking” function of the judicial system.
EVIDENCE PRESERVATION AND SPOILATION

- Preserve the Scene.
- Notice To All Potentially Interested Parties
- Schedule a Joint Inspection
- Preserve the Key Evidence
- Establish a Protocol
- Chain of Custody
- Spoliation
  - Dismissal
  - Adverse Inference

PRACTICAL TIPS AND SUMMARY

- Subrogation Is An Investment
- Take Investigation Seriously
- Tag Large Losses For Additional Investigation
- Strive To Be Cost-Effective
- Who Else Owns This Loss?
- Think Subrogation

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