

Major Loss Subrogation – The Fire Analyst’s Viewpoint

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Large loss subrogation success is a goal shared by all team members in the recovery process. In other articles we have read there is much “spill-over” benefit to the general public, to use an economist’s term, when the team members do their job correctly. Maximizing subrogation recovery is not just about proper fiscal responsibility for our own company or clients. The public has a vested interest in what we do as well. This article will discuss problems that can ruin major loss subrogation success and will suggest solutions in the process. The concepts apply to other investigations as well and not just the \$20,000,000 inferno.

In the fire investigation community one of the primary sources used to guide the investigative process and to help assess responsibility is NFPA 921 – “Guide for Fire and Explosion Investigations” – 2008 Edition. A new one will be available in February, 2011. This document is must reading for claims professionals and it can be purchased through the National Fire Protection Association. Visit their web site: www.nfpa.org and you can follow the links to their publications.

NFPA 921 addresses major loss investigations in its 2004 Edition (the Edition used for the rest of this article, and consistent with the information in the 2008 edition also) in chapter 27: “Management of Major Investigations.” Various other sections of the document also guide the professional origin and cause (O&C) specialist when he is working a major loss. The ultimate goal of assessing responsibility is discussed in Chapter 19, “Analyzing the Incident for Cause and Responsibility.” The document has been around since 1992 and it behooves all of us to have a copy and to read it.

What is a major loss investigation? NFPA 921 defines it this way in the introduction of chapter 27. Chapter 27.1.1: “A major fire or explosion incident may include fatal fires, fires in high-rise buildings, incidents involving major damage to large complexes or multiple buildings, conflagrations involving a large monetary loss, or fires resulting in a large number of personal injuries. While major incidents are not always large in size or magnitude, they do tend to be more complex. As a result, the primary goals in such circumstances are to preserve the evidence and to preserve the interests of the different parties involved.”

One of the primary spill-over benefits for the public stems from assessing “Responsibility” properly. There is a lot packed into that word: “properly” and we will touch on that in due course. NFPA 921 discusses assessing responsibility also. Assessing responsibility for fires and their damages leads to their reduction both in frequency and severity, reducing both property loss and human suffering. Through these efforts fire has become less of a problem in America but just watch the nightly news, “America is still burning.”

Before we consider crucial aspects of a major fire loss investigation we first turn to the team members other than the fire analyst. In fact we will first turn to a short consideration of one of the major problems plaguing our industry today and that is spoliation: “Spoliation by fire department.” In the hands of a seasoned fire analyst and good “subro” counsel the insurance industry will net a fair recovery but this recovery could be much greater if it were not for spoliation.

Spoliation has a technical legal definition and is a term discussed in NFPA 921 as well but the concept of “something spoiled” is a matter of paramount interest to us all, including, and especially in fact, the public at large. The “something spoiled” is often the fire scene, before you even know about the fire, and while the technical legal definition of “spoliation” can be debated as to its applicability in this area of concern I submit that it does indeed apply.

Two departments of a local fire department can help you make or break your case – suppression and investigation. Public fire investigators may also become involved in your fire from the county, parish, state or federal level. Excellent opportunities to identify the “real” fire cause are sometimes, frequently in some jurisdictions, lost when fire suppression or fire investigation is done improperly by the public sector. This is not the venue for an in-depth analysis of the many things that should be done or those that should not be done by the public personnel, but I turn to two primary points:

1. Firefighters need to preserve evidence as much as possible; fighting fire correctly and conducting overhaul properly as well.
2. Fire Investigators need to bear the insurance industry’s interest (the public interest) in mind. They need to process fire scenes methodically and carefully. They need to know when to wait for concurrent but separate investigation (by insurance fire experts) to unfold. With a truly “proper” team effort the fire’s true cause, instead of some speculative, non-scientific cause can be assessed. AND private fire investigators need to take the lead in educating the public departments as to the proper procedures to insure everyone’s interest is best served. We provide such training to local fire departments and it is beginning to make a difference.

But what do we find in the real world of major losses? We find a growing number of agencies that seek to accomplish this type of preservation but very often we find the public’s interest is literally tossed right out the window by the fire department.

Oh the irony of it all! Here is the public, the taxpayer, funding the public fire service and the public fire service in many locations is the first and often, worst enemy. What can be done? For one thing, education. Education is why many fire departments are light years ahead of where they used to in fire scene preservation. Many departments know that major fire losses and in fact, almost all moderate fire losses, will be investigated by experienced fire and engineering specialists as we all go about “fighting fire.” Many preserve evidence and the scenes well. But many do not. We must get the word out.

Sadly, there are many fire departments, even in major cities, that disregard the public’s best interest, even when they know better, and scene after scene is spoiled during their suppression or investigation process, or both. Sometimes it is even on purpose when petty people pursue petty interests in their “turf” wars, forgetting the larger picture and forsaking their public duty. When wanton and where this should be avoided, the “spoilers” should be held responsible themselves. Education works for some; fiscal penalties for others. But alas, this is often not legally possible. What are we going to do about it? Education, PR and coordination will go a

long way to maximizing recovery potential. Joint educational efforts and discussions at the fire house help. Calling and engaging the proper officials early in the claims process is helpful.

It is true the public sector has a duty to investigate fires. They also must suppress fires and insure they don't rekindle. Both activities by necessity "alter" a fire scene. There are ways to maximize subrogation potential and this involves **minimizing** the alteration of a fire scene. NFPA 921 speaks to this and it is a document for ALL fire investigators, not just private or public ones. We in the private fire sector are often found in joint education with public departments about these issues and many agencies fully understand their public duties, but more needs to be done. There is still too much "spoliation by fire department" going on.

What can the other team members do to maximize major fire loss subrogation recovery? Adjusters can assign fire losses quickly and they can hire investigators/analysts who know the "ins and outs" of the subrogation process. The recently retired fire investigator often doesn't know many of the various recovery avenues, or the proper procedures, and when you try to save on the hourly rate it often costs you the whole opportunity to recover all or some of your monies. Care in the selection process of a fire analyst or engineer must be exercised. Does the company you use put their new analysts through a very lengthy educational process or are they "put on the street" in just a few short months after retirement from some of the very agencies who are tossing your evidence out the 5th floor window? Some only train their new personnel for a few short days. Some don't get any training. There are weeks upon weeks of education required for a fire expert to become properly prepared to serve an insurer's interest so as to maximize recovery potential. And they better be well trained in fire investigation as well as current legal issues. Subrogation avenues don't always jump up and say "Heh, look at me." We often have to dig them out and we need to learn about them through intensive study, training and experience. **You are paying an expert's fees, why don't you demand an expert's expertise?**

What else can be done? The insured can be quickly instructed to leave the fire scene alone, to preserve it, to have it fenced off, etc. Debris piles can be covered with tarps and maintenance personnel and risk managers can be told to preserve these items for the team investigators. And when we know of a potentially responsible party they should be put on notice quickly.

The adjuster can become even more pro-active and they can call the fire department directly, letting them know there will be a private fire inquiry and that preservation of the fire scene is appreciated. Often the fire department is happy to learn that engineers and trained O&C specialists are going to investigate.

In the event of a very large loss it may well be that insurers need to have counsel obtain a Temporary Restraining Order if private specialists are not being allowed on a scene, or sometimes when they cannot get their private experts out to the scene immediately and a destructive fire department operation is ongoing, post-fire. After all, whose money is it? If it is not incendiary, and somewhere around 85% of fire losses are accidental, it is the insurer's money, the insured's interest and the public's interest that are best served by having a team effort. A team effort includes having the fire officials "on board" with the private side, not in collusion, but in cooperation, and ready to take proper action in the event of a major loss.

Waiting one day for the insurance industry to marshal its forces will not usually adversely affect the final outcome of a fire investigation. In fact, a measured response actually enhances our chances of success. There are a lot of “pre-dig” steps that need to be tended to anyway. Contrarily, an uncoordinated, “against NFPA 921” process will often ruin everyone’s chances in getting to the root cause and responsibility of a fire. What does 921 say?

Chapter 27.1.2 of NFPA 921 advises: “Thorough investigations do not just happen, but instead are the result of careful planning, organization, and the ability to anticipate problems before they arise. Prior to actually beginning the scene investigation, numerous events, facts and circumstances should be identified and considered before decisions are made as to how the investigation will flow. (See Chapter 14.)”

This section is immediately followed by 27.2: “Interested parties should be allowed to participate in the investigation and examine the evidence in its undisturbed condition. No party should remove evidence of materials without adequate notice to other interested parties.” Obviously not all interested parties may be initially known but it is equally obvious that the property owner, our insured, will have an interest as will the insured’s insurer. Due care and preservation of the scene, even though it is processed, can be accomplished and other interested parties, such as potentially responsible parties, can be notified and sometimes the process has to be temporarily halted. The fine details of all of this are not the point of this article however so we shall move on.

What else does NFPA 921 discuss under chapter 27 (again the 2004 Edition)? Many pertinent things and you should secure the document and read this section as well as several other chapters. Here is a list of the points covered beyond the introduction in the Management of Major Investigations section:

- An Understanding between Parties
- An Agreement between Parties
- Organization of the Investigation
- Team Leader Committee
- Planning
- Occupant Access
- Organization of an Investigation team
- Regular meetings
- Special Resources
- Preliminary information
- Safety
- Lighting
- Access
- Securing the Scene
- Sanitation
- Communication
- Interviews
- Plans/Drawings
- Scene Documentation

- Evidence Protocols
- Information Release
- Adherence to NFPA 921 practices

It is like the book says, good investigations are planned investigations. Pre-planning is an absolute must and every team member needs to “think subrogation” because thinking subrogation should open our minds to be cognizant of various subrogation avenues, some having to do with fire code issues and various fire science issues. Its not just about properly assessing responsibility, its about fire safety – for everyone. If your expert isn’t well versed in these fields you are not going to maximize your recovery. On average we can determine the cause of about 80% to 85% of the fires we are assigned. The 15% to 20% that end up undetermined are often those major losses where the fire scenes have been brutalized “after the fire has been extinguished” by those who should know better. Let us join together to educate the public fire sectors as to the private, yet public interests that attend every fire. And let each of us on “the team” learn how to do our job by knowing the “ins and outs” of the global subrogation process.

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