

Exculpation of your product at the fire scene: A Case Study¹

On Monday morning, the General Counsel of a product manufacturer received a telephone call notifying him that a fire had occurred in a two-story structure in a Midwest state, and that it was suspected that the company's product was the cause of the fire. The structure contained a retail outlet on the first floor and warehouse storage for the retail outlet on the second floor. The photograph accompanying this article is an aerial view of the fire scene.

The product in question was a series of five high-intensity discharge lights (HID) hung in a single row across the middle of the second floor of the building. The General Counsel was advised that the fire began when there was a non-passive failure of one of the lights, and that product stored underneath the light was the first fuel to be ignited. The General Counsel was further told that the local fire chief had used an infra-red camera to locate the origin of the fire on the second floor in the area of the lights.

The General Counsel had previously formed a fire response team which included a corporate engineer familiar with the company's products, a fire origin expert, and a fire litigation attorney. He alerted the engineer and the attorney of the need to inspect the fire scene on the following Tuesday, and both were available for the inspection.²

Correspondence was issued by the attorney advising the claimant that spoliation would be asserted if any evidence was moved or altered in any way. The response team arrived at 9:00 a.m. and found a large rectangular metal building with a second floor collapsed into the first floor. The building had no basement. Initial observations revealed that the fire scene was a complete or total burn where all combustible materials were consumed in the fire, with the exception of a small portion of the first floor near the front of the building.

The response team was met by the subrogation company's expert, and he described the same facts as presented to the General Counsel. He advised that he had defined his area of origin as a nine-foot strip across the center of the second floor warehouse directly under the HID lighting. He advised that he based his opinion on the work performed by the fire chief using the infra-red camera, and on his opinion that the greatest burning occurred in that area.

Based on our examination of the fire scene, there was no area within the structure which appeared to be more badly damaged than any other area within the structure. There were no burn patterns which we could associate with the incipient phase of the fire. The second floor was completely missing. The products stored on the second floor were burned beyond recognition, and the ashes of those products fell to the floor of the first level.

¹ The facts of this case study are slightly altered to protect the identity of the product and its manufacturer, however, the substance of this case study has not been altered.

² If the response team was not able to respond to the fire scene on the date designated by the subrogation carrier's expert, the attorney would have proposed alternative dates for the inspection and the inspection would not have gone forward on the date which had been unilaterally set.

After superficially examining the fire scene, the response team began delayering the area where we believed the lighting fixtures would be found in an attempt to identify and examine each of the five arc tubes from the HID lighting, and to determine if any of them suffered a non-passive failure. That procedure lasted most of the first day and well into the second day of the inspection. In the meantime, I had an opportunity to walk through the fire scene with the expert for the subrogation carrier. We discussed the magnitude of the damage and the lack of any physical evidence identifying the early movement of the fire and/or its origin. I asked the expert “Why couldn’t the fire have started here? Or over there? Or over on the far side?”

On different fire scenes, the investigators respond differently to questions like that; some answer, some don’t. However, they all hear the questions and recognize the issues that are raised. In this instance, the expert responded that the coloring on a particular metal beam and the way it bent downward indicated to him that fire burned longer and hotter in that area than anywhere else in the building. I then was quick to point out that there were several other beams with the same coloring and the same bent appearance.

Later in the day, the fire chief arrived and I had an opportunity to talk to him. After identifying myself, I asked the fire chief to demonstrate where he was standing when he used his thermal imaging camera. He took me to the very spot where he stood and directed his camera across the front of the building. He determined that there was significant heat across the entire second floor of the building. I then asked the fire chief if he had used the camera at any other locations around the building or inside the building for that matter. The fire chief said that he had not.

A thermal imaging camera, such as the one the fire chief used, could identify the location of heat on the surface of a structure. The fire chief had determined that the front surface of the second floor of the building was hot; if he had gone to the side of the building and determined that the main source of heat was in the center of the building, perhaps then a conclusion could have been drawn that the origin was towards the center of the building on the second floor. Unfortunately, the chief had not done so. The fire chief only used the thermal imaging camera on the front of the building and this only provided information that the fire was somewhere on the second floor on the building. I then went back into the fire scene to locate the origin expert for the subrogation company, and I advised him of what I had learned from the fire chief and suggested that speak with the fire chief to confirm the information.

Several hours later, we were searching for the last light fixture when we noticed the expert for the subrogation carrier and his associates digging out the fire scene at a distant location. When we finally found the last arc tube we discovered that it was broken, although not in a way consistent with a non-passive failure. We notified the investigator for the subrogation company of our finding, and he responded they he no longer believed that the area of origin was in the area of the lights and that he was searching in another portion of the building for the cause of the fire.

Until that point the, the opposing investigator was pursuing the only identifiable manufacturer at the fire scene and had based his opinion as to the origin of the fire on misinformation and a subjective view of the burn patterns left after a total burn of the structure.

The fire chief was always readily accessible to the investigator, but it was not until I invited him back to the fire scene that the true facts became apparent. The chief told me that no one had asked him previously about his use of the camera, and that he was surprised that anyone was relying upon his work to locate the origin of the fire. All he was able to determine was that the fire started on the somewhere second floor.

The response team went home and the company has never heard another word about a follow-up to the claim against the company. (It is often the case that cases are dropped and companies are not notified that they are no longer being pursued for damages.)

Without confronting the opposing expert with additional evidence and a challenge to his interpretation of the on-scene evidence, that client would have been facing a suit. Although a “good” settlement might have been reached years later, such would be achieved only after expending significant assets for defense costs.