

Editorial:

Exculpating Your Product At The Fire Scene

“The Proof is In the Success”

We have decided to dedicate this issue of *Perspectives* to the subject of exculpating a client’s product from being blamed as the cause of a fire at the fire scene. While that subject may initially seem defense-oriented, it is just as crucial for a plaintiff to “Get it Right at the Fire Science” so as to avoid unnecessary costs and expenses associated with identifying the wrong cause for a particular fire. From either a plaintiff or defense perspective, the goal is and should be to avoid the time, expense, and hassle of incorrectly identifying a product as the cause of a fire it did not cause.

During our years as fire science litigators, we have come to understand the dynamics of the fire scene inspection. Although we are not psychologists, we recognize that that there is a ritualistic dance that takes place during the fire scene inspection between the “subrogation” or “plaintiff’s” expert(s),” the “defense” expert(s), the public-sector fire investigators and, last but not least, counsel for the potential defendant. From our perspective, the manner in which these various players interact at the fire science is the key to successfully exculpating a product at the fire scene examination.

The roles of the experts, private and public, are well understood. It is their responsibility to determine the origin of the fire and then, if possible, to identify its cause. Conversely, the role of the fire science defense attorney is generally not appreciated or misunderstood. The defense attorney armed with a clear understanding of fire science principles is in the best position to exculpate a particular product while all the players are still present at the fire scene inspection. The reason for this is simple: a qualified fire science attorney is the only individual at the fire scene armed with knowledge of both fire science principles and the legal hurdles facing claimants in a fire science case.

Being in the fire science business, we obviously represent many clients who are notified of potential exposure at fire scenes on a regular basis. Using the techniques which are outlined in this issue of *Perspectives*, we have successfully “exculpated” our client’s products in eighty-percent (80%) of claims presented to us in the past two-year period. This success rate has resulted in an enormous savings for our clients during this time period. These efforts have also presumably resulted in substantial savings for the subrogation claimants, who would have spent thousands of dollars pursuing the wrong fire cause in years of litigation and, instead, were given the opportunity to reassess the fire scenes prior to remediation to identify the correct cause of the fires.

The Exculpation Method that we outline in this issue of *Perspectives* has as its foundation the requirement that companies utilize qualified fire science attorneys, knowledgeable in fire science principles and the proper fire investigation methodology, to assist in the exculpation process. In their constant pursuit of cost-savings, both product manufacturers *and* insurers fail to see the clear value in the retention of competent fire science counsel at this early stage of the process. Such decisions, while premised on sound economic principles, have the exact reverse

effect, usually guaranteeing protracted litigation, costly attorneys' fees, and unnecessary settlement payments. In the case of such settlements, the truly unfortunate result is that both the product manufacturer and the subrogating insurance company fail to recognize the wasted expense, actually believing that the settlement was fair and appropriate, when the parties should not have been involved in litigation together at all. For the product manufacturer, an enormous amount of cost has been sustained. For the insurer, its recovery has likely been short-changed by the inherent deficiencies in attempting to prove a non-culpable product caused the fire.

At Tedford & Henry, we refuse to believe that paying tens of thousands of dollars in a settlement after years of litigation costs is a "good" settlement when the suit should never have been brought in the first place. Likewise, as a firm which also represents insurers in their subrogation efforts, we similarly refuse to believe that a nominal settlement after years of litigation is an acceptable result when the appropriate defendant was never pursued in the first place.

This philosophy is best exemplified in the work we do for our clients. For example, we recently were retained to assess the direction a fire litigation case was going years after it was initiated. The evidence we developed to exculpate our client's product had been available when the fire scene was first inspected several years previous, including eyewitness testimony, video recordings, and factual information placing the origin of the fire in a location remote from the product alleged to have caused the fire. Unfortunately for our client, who had spent millions of dollars in costs and fees prior to our involvement, this evidence was not "discovered" until we were asked to get involved with the case years after the fire. While there's no guarantee that the involvement of qualified fire science attorneys at the fire scene would have prevented litigation, it surely is a distinct possibility, and consideration should have been given to the idea at the time.

Additionally, fire investigators are generally overworked and operate on a very restricted budget, disallowing them from being as thorough as they could be in identifying the origin of a fire. This is especially true for public-sector investigators, and investigators hired by subrogation counsel where budgets are limited and the demand is great for the identification of a "deep pocket" to reimburse the carrier for its fire loss payments.

We routinely see complex fire scenes which are not thoroughly examined, and we are routinely provided "conclusions" as to the origin and cause of a fire which are not based not on a proper application of the scientific method as required by *NFPA 1033*, but are based on errant "factual" information from which the investigator decided upon the fire's cause before the origin was reliably determined. In those cases, the investigator then works backward to validate an "origin" based upon the presumed cause, rather than upon fire science principles. The frequency with which this occurs is unbelievable, and can typically be attributed to the pressures placed upon the subrogation investigator to identify a precise cause when the proper determination in many instances should be "undetermined."

We believe that the role of the fire science attorney defending a product is to ensure that fire science remains the focal point of the investigation by all sides. When a subrogation investigator understands that a competent attorney has become involved in the case at such an early stage, the investigator usually responds with a more thorough, more scientific investigation.

The time to ensure a thorough, scientific investigation is *not* after the scene has been remediated, but at the fire scene while the opportunity to put fire science principles to work still exists.

This principle is no less relevant to a public-sector investigator. With any fire scene examination, the public investigator should be invited back to the fire scene and given an opportunity to explain the basis of his or her conclusions and more importantly, to be appraised of the presumed defendant's observations and analyses. If this process is undertaken shortly after the fire, the public-sector investigator may not have memorialized his or her opinions in writing, making the investigator far more receptive to additional facts, hypotheses, and information. The fire science attorney on the scene should be the catalyst for these discussions, and that attorney should measure out the information shared with others at the scene.

The bottom line is that so much time and expense is wasted on both sides of the legal aisle by virtue of the fire scene examination not being conducted and supervised appropriately. The proper time for insurers to identify the correct cause of a fire, and the proper time for improperly-blamed defendants to exculpate their product, is at the fire scene examination. We suggest that you give this Exculpation Method a try for period of time, and assess the savings. If you have selected appropriate counsel, you likely will see substantial results.