

Undetermined Fire Losses

Do We Pay the Claim or Investigate Further?

By David Petrelli and Matthew J. Smith

UNDETERMINED! For those responsible for investigating arson and insurance fraud, that word may be one of the most dreaded in the English language. Not because insurers do not want to pay claims, but rather often insurers find themselves in the position of paying claims where all the evidence rightfully points toward an incendiary fire and fraudulent act, but the physical evidence at the fire scene does not permit a more definitive ruling on causation.

Historically, both insurance carriers and their legal counsel have taken the approach of simply paying claims when the origin and cause investigation is not able to specifically identify the fire as being an intentional hu-

man act. As with many other aspects of our modern society, new technology offers the ability to investigate these claims further, beyond simply the realm of how the fire occurred. Advances in technology, as well as new techniques claims professionals and lawyers are using to investigate, litigate, and win these claims, are all combining to help battle back against insurance fraud.

Arson Triangle

While it actually applies to all aspects of insurance fraud, what has been defined as the “arson triangle” identifies the elements necessary to prevail on a defense of arson. The burden of proof rests solely, as an affirmative defense, on the insurance carrier to prove the insured or an individual acting on their behalf possessed the means,

motive, and opportunity to set the fire. Especially after the financial collapse caused by the Great Recession, proving motive in many cases has become substantially easier.

New technologies exist that are dramatically affecting the ability to determine whether an insured had the opportunity to set a fire, and we are no longer in the world of simply having to rely upon Examination Under Oath testimony regarding a person’s whereabouts in the key time period leading up to the occurrence of the loss.

Perhaps then, the most troubling aspect of the triangle remains determining the means. No matter how thorough an investigation may be, no matter how well written the report or the number of digital photographs, an



arson defense fails if there is not scientifically verifiable evidence the fire was in fact incendiary in nature. Absent that determination, the means prong of the triangle fails and, in so doing, the affirmative defense of arson, or intentional act, alone fails as well.

NFPA 921

Whether you believe NFPA 921 is a guide or standard really does not matter. Although the cover of the document clearly itself identifies it as a Guide, it has become the most accepted standard for fire investigation by courts throughout the United States, and even beyond. Interestingly, for all of the fear and consternation an undetermined fire analysis may create, the word undetermined is never actually defined by NFPA 921. The closest NFPA 921 comes is

in Section 20.1.4 under the heading “Undetermined Fire Cause.” In that section, the investigator is advised:

Undetermined fire causes include those fires that have not yet been investigated or those that have been investigated or are under investigation, and have insufficient information to classify. However, the fire might still be under investigation and a cause may be determined later with the introduction or discovery of new information.

Undetermined or Accidental

One of the most important distinctions many insurance professionals and even legal counsel make is misinterpreting the difference between an undetermined fire and an accidental fire classification. Finding the fire to be accidental is in fact determining

how the fire occurred and ruling out intent, even if the fire occurred due to a human act. Not every fire started by a human is intentionally set to cause harm, as is evidenced by simply leaving a candle unattended, which may truly be accidental or intentional, depending upon the mindset of the individual when lighting the candle.

An undetermined fire cause leaves open the opportunity to later classify the fire as being accidental or intentional, should further evidence come to light. For this reason it is important any origin and cause report specifically define what an undetermined classification means and why it is so classified to permit the insurer and counsel to continue the investigation. The report should further state the investigator’s willingness to recon-



sider the classification and determination should additional information come to light.

Duty to Investigate

Even when a fire is classified as undetermined, it does not mean the insurer has an immediate duty to pay the claim in full and cease further investigation. Rather, it is incumbent upon every claims resolution professional to remember the duty to investigate and stop insurance fraud is most importantly done to protect the interests of innocent policyholders who pay premiums and not solely to deny coverage to those who commit fraud. The Coalition Against Insurance Fraud estimates the cost of fraudulent insurance claims to exceed \$80 billion every year. If insur-

ance fraud were its own industry, it would rank 17th among the Fortune 500 in yearly income.

Virtually any insurance contract that contains an “intentional act” exclusion also contains policy conditions voiding all coverage under the policy, and often to all insureds, when material misrepresentations are made concerning securing of the policy or making a claim. This is an important distinction, as it affords a much broader basis for potential denial of coverage than the intentional act exclusion, which in some states is limited to the named insured only or to the insured committing the act of arson while still mandating the insurance carrier issue payment to any other potential insured under the

policy. Material misrepresentation provisions have been interpreted by courts much more broadly, and may deny coverage to any insured under the policy or even declare the entirety of the insurance contract null and void from its inception. Enter now the world of new technology.

Technological Advances

Several recent claims with high national profile have demonstrated how cellular technology and GPS tracking are assisting insurers in determining a person’s whereabouts leading up to the time a fire loss occurred. Keeping in mind material misrepresentation exclusions may be invoked if the insured intentionally provides false or misleading information to the insurance carrier

concerning their claim, the issue of the insured's whereabouts in the key time period leading up to the occurrence of the fire is one of the most material aspects of any investigation.

In a recent jury trial in Missouri federal court, the fire investigator was unable to determine the actual cause of the fire, but suspected arson. The investigator classified the fire as undetermined. The insureds claimed damages exceeding \$1 million. In EUO testimony, the insureds testified they left the home at 7 p.m. to go for dinner with the house fully secured, and no missing keys. The insureds called to check on their daughter as they were leaving. This time was noted on the cellular records, and while en route to dinner calls came from their neighbor, and 911 dispatch, informing them of the fire.

With recorded times for these calls, and the ability to locate the cellular towers processing each call, the timeline showed the fire had to be burning before the insureds left the home. Photographs of the fire by a neighbor and the first-responders were date and time-stamped, and a simple GPS analysis map showed the insureds could not have been as far away from the home as they claimed.

At trial, the insurance carrier was prohibited from calling the fire arson, but the fire investigator was allowed to identify the origin area of the fire and the time frame of fire spread. Combined with the cellular timeline, the investigator testified the fire would have been actively burning when the insured exited the residence. The claim was denied for material misrepresentation and the jury returned a defense verdict.

In a nationally reported \$12 million mansion fire in the Midwest, the extent of the fire debris field, combined with adverse weather conditions and other factors, led the insurance carrier to make a decision to not pursue an intentional act fire defense even when

their expert ruled the fire intentional. Federal and state agencies also investigated but listed the fire undetermined.

In EUO testimony the insured admitted to his smartphone being with him throughout the day of the fire and provided a timeline for his whereabouts. The insurer retained a nationally recognized cellular expert who, working in conjunction with counsel, developed a computer model tracking the insured's whereabouts throughout the day. The cellular data matched exactly the insured's whereabouts for the entire 24-hour period on the date of loss except the 90 minutes before the fire. Tower baseline data from before and after the fire, showed when the insured was at the residence to which cellular towers the smartphone connected. In the crucial 90 minutes leading up to the fire, the insured claimed he was at a jobsite miles away.

The cellular data placed the insured at or near the residence within approximately 15 minutes of the fire being discovered. Under oath the insured agreed with the cellular tracking information for the entirety of the day, but claimed for the crucial time surrounding the fire the data was simply wrong, with no further explanation. The carrier proceeded with denial of coverage based upon material misrepresentation.

Criminal Prosecution

While these claims dealt with civil insurance investigation matters, this same information is being used by prosecutors to pursue criminal prosecution for insurance fraud. In a highly publicized case near Philadelphia, multiple parties face trial for conspiring to defraud an insurance company of in excess of \$20 million arising from the third fire in five years at a multi-million dollar mansion. The insured, her husband, children, and others were indicted in a 47-page grand jury report summarizing over 80 witnesses and more than 100 exhibits. While none of the three fires were classified as incendiary, evi-

dence clearly pointed to highly questionable causation.

Video showing the insured exiting the home near the time of the fire, inconsistent statements throughout the investigation to both public and insurance investigators, assertions of expensive jewelry allegedly stolen from the home, and inflated values of the items damaged all established a pattern of material misrepresentation. The insurance company, after previously paying millions of dollars for prior losses, denied coverage based upon material misrepresentation, and the defendants await trial on the pending criminal charges.

Cost of Fraud

These three cases alone, all occurring within the past several years, represent more than \$50 million of combined potential insurance fraud. Innocent policyholders pay the cost for those who commit fraud. Despite the fact the cause of any given fire may not be able to be proven scientifically, this does not mean claims associated with such fires should automatically be paid. Old-fashioned claim investigation efforts combined with new technologies permit further investigation of these claims where necessary.

The reality is insurance carriers must be willing to invest the time, personnel, and resources necessary to investigate these losses utilizing well-trained staff, counsel, and experts. Ultimately, it also takes the courage to be willing to fight back in the battle against insurance fraud. The next time a report comes in marked UNDETERMINED, it does not necessarily mean it is the end of the investigation, if we are truly committed to battling fraud and seeking the truth. [LM](#)

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