

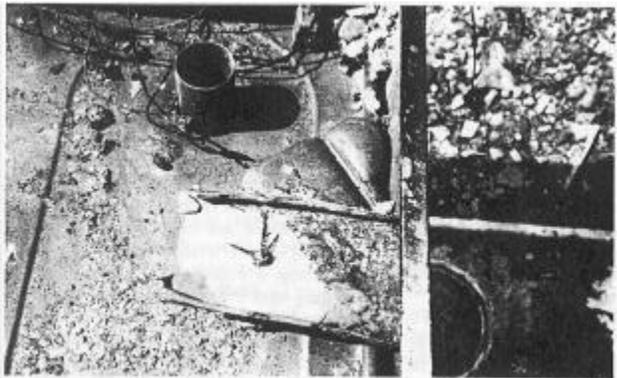
# Fire Investigation and The Private Investigator

By Carter D. Roberts

Police and fire departments very often do not understand the reason an insurance company will send a private investigator to investigate a fire. Criminal investigations and civil investigations, while similar at the outset, reach a point where each must travel its own road, and differences between the two should be understood by both the public and private sectors so that cooperation and communication will be more effective.

It is not uncommon for a police officer or a fire marshal to assume—erroneously—that an insurance company does not have any faith in his ability when a private investigator is hired. This article is written in an effort to give the law enforcement official a better understanding of the role of the private investigator in fire investigations.

Most misunderstanding arises when there is a failure to recognize some of the basic differences in the tasks of civil and criminal investigators.



When did the power go off and when was the fire discovered?

## Defenses Not Related To Criminal Activity

When a fire investigation establishes the impracticality or impossibility of pursuing a criminal action, the work of the insurance investigator is often just beginning. In order for a criminal prosecutor to succeed in a trial, he must establish the commission of the crime beyond a reasonable doubt. If a District Attorney cannot establish all the elements which comprise the crime, the defendant must be acquitted. An insurance company defending a civil action, however, needs to establish a defense only by a fair preponderance of the evidence.

In a suit under a policy the company may have defenses which are not related to criminal activity and do not require proof of arson or fraud. If the fire is accidental, the city, state or county arson investigator often concludes the investigation. The insurance company, however, will often be keenly interested in liability or subrogation possibilities.

Subrogation is misunderstood as often as it is used. Subrogation is mainly an insurance word meaning “the substitution of one person in the place of another with regard to lawful claim, demand or right.” Subrogation is the right of an insurance company, after paying a loss to the insured, to acquire all rights related to the loss possessed by the insured against third parties, to the extent of the loss payment. For example, if sparks from a railroad locomotive ignited Mr. Jones’ barn, Mr. Jones’ insurer would pay the claim and then proceed against the railroad company for indemnification.

With insurance available as a social and economic device for reducing risk, the doctrine of subrogation permits a person to insure his property without relieving wrongdoers of their

responsibility should they cause damage to the property. Insurance companies pursue subrogation vigorously and cannot rely upon the tasks being performed by a fire marshal when criminal prosecution is no longer being pursued.

### **Contractual Agreement**

Private investigators are not subject to the same constitutional restraints as those in the public sector. The Arson Reporting Immunity Bill allows members of the insurance industry to share information with agencies in the public sector without the threat of civil suits and punitive damages. Private investigators employed by insurance companies are free to enter the property based on the insured's contractual obligation under the policy. Most states follow The New York State Standard Fire Insurance Policy. The "Plain Language" policy has been coming on strong and coverage and conditions vary from state to state. Most insurance people will be happy to furnish a copy of the policy in effect in your state. To understand the role of the private investigator, it is important to be conversant with the conditions of the policy and the contractual obligation between the insurance company and the insured.

### **Basic Insurance Policy**

The Basic New York Standard Fire Insurance Policy states in lines 1-5, "This entire policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material, facts or circumstance concerning this insurance or the subject thereof." This would refer to concealment or misrepresentation before or after a loss. It is not uncommon for an insured to embellish his claim even after an accidental fire and, therefore, the insurance company is interested in heading off potential fraudulent claims by proper investigation. It is unreasonable to expect an overworked law enforcement officer to investigate such possibilities. The insured tempted to inflate a claim might drop the idea when he becomes aware that a private investigator is documenting statements which may be considered a material fact.

Lines 28-35 refer to the fact that when the hazard is increased, the insurance company is no longer liable for the loss. Most policies will also contain a vacancy clause which limits a company's liability in cases where a building is left standing vacant. Some "Plain Language" policies eliminate this clause.

Lines 90-99 simply state the insured must cooperate after a loss, and there are certain actions he must take. The named insured must submit a Proof of Loss within 60 days after the loss and if does not cooperate, a defense under the policy exists. Lines 113-122 are self-explanatory, and the insured must produce records, accounts, bills, invoices, etc. If requested, he must also submit to an examination(s) under oath. The insured must talk to and submit to an examination under oath by a representative of the insurance company if requested, but he has no binding contract to submit to an interview or interrogation by a law enforcement officer.

The insurance company has legal obligations to pay a mortgagee under a loss payee contract, regardless of what crime the insured may be guilty. Often a fire marshal will make the erroneous statement that the insurance company has paid the claim while an arson investigation is still ongoing. Most of the time what has occurred is that the insurance company has fulfilled its contract and paid the mortgagee, regardless of whether or not a defense of arson exists. The insurance company has no choice but to fulfill its contractual obligations to an uninvolved mortgage holder.

## **Bad Faith**

Insurance companies are interested in preserving insurance funds by thorough, in-depth investigations where fraud is suspected. Losses are normal to the insurance business, and the insured is entitled to a fair and unbiased investigation. The company is as interested in determining his innocence as his guilt.

Bad faith is a popular new tort that accompanies practically every suit where a claim is denied. In defeating a bad faith claim, one element of defense is to show that a prompt, fair and factual investigation was made. Hiring an independent investigator to render a factual opinion is a factor in the insurance company's favor. The tort of bad faith, if upheld, usually results in tremendous punitive damages to the insurance company. Hiring a private investigator is the first step in combating such claims.

In "Trimper V. Nationwide Insurance Company", 540F.Supp.1188(1982), a United States District Court in South Carolina decided the South Carolina Supreme Court would recognize a first-party action for bad faith. In refusing to grant the insurer's motion for judgment notwithstanding the verdict, the court observed that "the insurer made virtually no effort to investigate the claim", much less a good faith effort to do so. The court said that the insurer did not reasonably know, nor did it care to know, whether its cause or excuse for refusing to pay the claim was just. As a result of this failure to investigate, the court concluded it was reasonable for the jury to believe that the insurer's conduct was "callous, willful and reckless". The insurer can avoid the adverse economic effects of bad faith torts by careful in-depth, independent investigations.

## **The Decision For A Private Investigator**

In many parts of the country fire and police personnel are simply not qualified by training and experience to render an expert opinion as to the cause and origin of fires. In such cases, if an opinion as to cause and origin of the fire cannot be rendered in court, the insurance company has no basis for denial or a legal defense in court.

Police and fire departments are often overworked, understaffed and have priorities that differ from those of the insurance industry. Many fire marshals are given nebulous assignments not related to arson investigation. I belong to several arson investigation associations where the usual program or topic of conversation is about fire inspections, code enforcement, or establishing new fire codes. Arson investigation normally takes a back seat in the topics of conversation. In many areas the question of who has the ultimate responsibility and authority to investigate crimes of arson goes unanswered. Police and fire departments do not owe a contractual duty to the insured and often stop their investigations when a criminal action is no longer practical.

A public agency, police department or fire department rarely takes the detailed and necessary photographs of the remaining and/or undamaged contents, a procedure often very important to an insurance company. Such photographs are critical in dealing with a suspected fraudulent inventory claim.

Since the insurance company is also working under a time limitation, the public investigating agencies often do not complete their investigation within that period. Reports are often confidential and cannot be obtained by the insurance company in order for a claims manager or adjuster effectively to make an evaluation of the claim. A private investigator is hired not only to document needed data but to be available in the event of civil litigation. The city, county or state

investigator is not always available should the insurance company's attorney exercise the right for an examination under oath or for a civil trial.

### **Civil Vs. Criminal Investigation**

The following is the difference between a criminal and civil investigation:

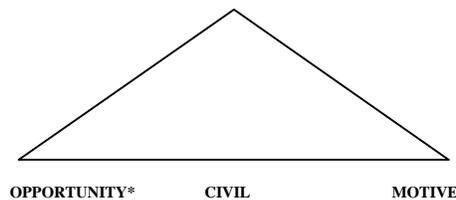
—Criminal Proof— Beyond a reasonable doubt. —Civil Proof— Preponderance of evidence.

Preponderance: "the condition of preponderant; superiority in amount, weight, power, influence, importance, etc.

—Criminal Corpus Delecti— Must be established. Incendiary fire must be established. —Civil Corpus Delicti— Same for fire, different in a fraud defense.

—Criminal Defendant— Arsonist is the defendant. Must be convinced beyond a reasonable doubt that defendant set the fire. —Civil Defendant— Insurance Company is defendant if sued by the insured. —Criminal Motive— Technically, motive is not an element of arson (is not an essential ingredient of the proof of a crime). —Civil Motive— Motive is necessary in defense in case of a suit.

### **Incendiary Fire**



\*(could have been set by or under the direction of insured)

### **Proof**

The rules of procedure are quite different in civil case from those in a criminal case, particularly when considering admissible evidence. Accordingly, material evidence vital to one case might not be allowed in the other.

In a criminal trial the defendant is normally the arsonist, whereas in a civil trial the insurance company is normally the defendant. Corpus delicti is established primarily with circumstantial evidence. In a civil trial the insurance company does not have to establish a commission of the crime of arson beyond a reasonable doubt. They need to establish a defense only by a fair preponderance of the evidence: incendiary fire, motive, and opportunity.

### **Corpus**

Most arson trials rely upon circumstantial evidence. For example, if a witness saw two people go into a closet, heard a gunshot and shortly thereafter one of the actors walked out of the closet with a gun in his hand, and the witness discovered the other person that entered the closet was dead with a bullet hole in his back, he could not testify that he saw A kill B. He could simply relate the

circumstantial evidence which would infer that A shot B. The above is an example of very strong circumstantial evidence.

In civil court, there is an even more reasonable circumstantial evidence requirement that is not recognized in criminal court. Many law enforcement agencies do not teach their investigators the difference in civil trials but mainly offer training in criminal procedures. In a civil case the insured is not risking a prison sentence, but only the nonpayment of his claim if it is fraudulent.

Technically, motive is not an element of arson in a criminal trial. In a civil trial, motive is extremely important and the insurance company must prove with a preponderance of evidence the fire was incendiary and the named insured had motive and opportunity.

Obviously, the task of a private investigator is much easier than that of a criminal investigator. In addition, there are many possible policy violations and considerations such as subrogation, liability, and property adjustment procedures that create different priorities between the criminal and private investigator.

Arson investigators, both public and private, must be aware of immunity laws in their jurisdiction. The insurance company has the right to send in representatives to examine the damaged property, and this right does not normally allow law enforcement authorities to go with the company reps.

The private investigator is not hampered by the "Michigan V. Tyler" law and cannot afford to be a quasi police rep. If a private investigator is held to be acting as an "agent" of a law enforcement officer, he is also held to all conditions and restrictions of that officer. The private investigator cannot afford to photograph or collect evidence acting under the instruction of a law enforcement authority. If he does he is subject to the "Michigan V. Tyler," Miranda, etc.

## **Conclusion**

In civil investigations, as in all professions, there are people who should not be doing what they are doing. There are those who are not qualified, are not professional, do not have the skills, training or experience, and do not understand the needs or complexities of the industry. In the private sector, unqualified people do not last long and the private investigation profession should not be judged on the basis of those few who only copy fire marshals' reports.

The private investigator can be a great asset to law enforcement agencies. Identifying, describing, and understanding the roles and responsibilities of all involved in fire investigation is a big step in the fight against arson.