

RESOLVING FIRE & ELECTRICAL LIABILITY ISSUES: THE ARMSTRONG TEASDALE STEP-BY-STEP APPROACH

Successful resolution of an explosion, fire, electrocution or similar catastrophic event requires much more than experienced trial attorneys. Although your attorneys' trial expertise is an essential element of success, it is imperative that they also possess an intimate understanding of the information gathering process that should immediately follow the event. At Armstrong Teasdale, our Fire and Electrical Liability attorneys offer much more than the necessary trial expertise. Our attorneys offer a full-service, step-by-step approach from the moment the event occurs to the conclusion of trial.

Our attorneys will work with you to complete an in-depth information gathering process to include: investigation of the scene, evidence gathering, protocol review, development of a response plan, a resolution plan and finally, draft insurance plans. Below, Jerry King, Fire and Electrical Liability Practice Group Leader, explains the process in-depth.



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STEP 1: INVESTIGATION

Legal factors pervade the scene-investigation process. From the selection of scientific professionals that will satisfy legal standards to the presentation of expert opinions that will pass judicial muster, law and science combine to achieve a desired result.

There are guidelines and standards that apply to the scene-investigation process. These regulatory devices will measure the quality and the efficacy of the scene-investigation results. From the results, other standards will be identified and applied to reach conclusions about contributing factors and ultimate financial responsibility. Knowing the standards, (and understanding what differentiates a guideline from a standard) and knowing the application and elimination of the standards are legal considerations. Scene investigation and the proper utilization of scene-investigation findings are a team undertaking. Evidentiary factors must be addressed at every step. Accurate legal direction is essential to producing a usable, effective result.

The Investigation of a scene requires the combined knowledge and experience of several professional disciplines all working together in an effective and time sensitive manner. The origin and cause of the explosion, fire or electrical event must be accurate and supportable. Compliance with applicable standards has to be guaranteed. The engineering, chemical and structural analysis demands accuracy and supportability. If the investigation leads to gathering of physical evidence it will be transported to laboratories, libraries and test centers. The methods and results of the scientific research must be preserved for years.

Lives, property and business will be impacted by these efforts, therefore scientific conclusions will be relied upon for legal advice and these conclusions can be determinative evidence in subsequent civil and, some times, criminal proceedings. The qualifications of these professionals must withstand scrutiny; their procedures must be valid, and conclusions must survive attack.

STEP 2: EVIDENCE

Critical decisions involving evidence preservation have to be made following every event, as these decisions can have long-term and potentially dangerous consequences if not addressed accurately. The circumstances in which these decisions are made are seldom conducive to debate, casual reflection or time-out for legal research.

While virtually all scene investigators are aware of the need to preserve evidence and, similarly, many attorneys know (at least generally) the consequences of evidence spoliation, awareness of the need to preserve evidence and a precise knowledge of the legal consequences of evidence spoliation are just the beginnings of the decision-making process.

To effectively conduct the decision-making process, the below questions should be addressed and answered:

- ***Who owns the evidence?***
- ***Who has the duty to preserve it?***
- ***Who has the right to preserve it?***
- ***Can the evidence be preserved?***
- ***How is the evidence to be preserved?***
- ***What standards (or guides) are applicable to preservation?***
- ***Are there risks of spoliation?***
- ***What constitutes spoliation?***
- ***What are the consequences of spoliation?***
- ***When is it best to enter the decision-making process?***
- ***What law applies and what does it provide?***

Once these questions, among others, have been answered, the results become vital to the overall outcome, shaping the investigation moving forward.

STEP 3: PROTOCOLS

While trying numerous cases over the span of up to 30 years and handling countless more resolved prior to trial, our attorneys have compiled the strategies and tactics that have led to successful results. The compilation included strategies and tactics they had employed and strategies and tactics they had observed employed by others. Decades of actual experience and observation led to a considerable list of mechanisms, ranging from fairly obvious (yet often overlooked) activities to extremely complicated legal procedures. All of the collected protocols have proven to be effective in helping to keep a disastrous incident under relative control and to progress from the first days of an event to a successful conclusion in a realistic and efficient manner.

These procedures were refined, researched and implemented with improvements and variations over time. The procedures were developed into protocols to address the problems and opportunities that frequently arise in explosion, fire and electrical cases. Always, the approach was to find a more expedient way or a better result. The process is ongoing and is an area of legal practice in its truest form.

Protocols are used to assist clients in managing a catastrophic explosion, fire or electrical event to a successful resolution. The resolution can be trial, settlement, recovery, cost avoidance or risk sharing mechanism, total risk transfer, or any one or more of a number of ends compatible with the available, obtainable goals.

Our services are utilized by our clients in the energy, chemical, gas and petroleum industries; product manufacturers; insurers; and individuals and businesses that are impacted by these industries.

Our attorneys are actively involved in the day-to-day management and trial of explosion, fire and electrocution cases. Each one is committed to the continued advancement of the practice and all are active members of the legal and professional organizations that influence these areas of science and law.

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- ✓ Protocols are used to assist clients in managing a catastrophic explosion, fire or electrical event to a successful resolution

STEP 4: DEVELOPMENT OF A RESPONSE PLAN

Problems presented by the physical damage or destruction of property and its resultant loss of use are unavoidable. Personal injuries and business losses pose unique issues, but they do not always occur. Property damage is frequent. It can be temporary or permanent. Damage can result to real estate, personal property, fixtures and certain intangibles and rights. A response plan must identify the variables to be used to determine what property was damaged and what damages are compensable (Scope). A plan must identify the variables to be used to determine the cost of repair or replacement and what costs are required to repair or replace the damaged property (Estimate). It is the identification and evaluation of these variables that distinguish a successful response plan.

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- ✓ A response plan must identify the variables to be used to determine what property was damaged and what damages are compensable

STEP 5: SUCCESSFUL RESOLUTION

There is no one key to successfully resolving a catastrophic explosion, fire or electrical event. Often there are multiple keys and the keys can vary from incident to incident. Effectively managing such an event is neither an impossible nor overwhelming task. It can seem that way at times. However, with the right approach, successful management can and does occur.

Many of the impediments to successfully resolving a catastrophic event are recurrent. They are not always readily discernable. They are not necessarily easy to address. While each one may not arise in every instance, they occur with sufficient frequency to warrant special attention and specialized expertise.

Achieving a complete grasp of the issues, understanding what circumstances caused them and knowing what to do about them all require experience. That experience must be extensive. It must be coupled with imagination. It must evolve, incorporating advances in law and science that impact the value and utility of that experience.

Nothing substitutes for trying an explosion, fire or electrocution case before a jury. Having done so multiple times and in a variety of jurisdictions and factual circumstances, our attorneys know it is essential to building the experience base from which to develop the expertise to manage and resolve catastrophic occurrences. Even in the current era of mediation, arbitration and other forms of alternative dispute resolution, trial experience and trial ability are paramount. Trials still take place. Trial is still the “alternative” that makes alternative dispute resolution work.

- ✓ Achieving a complete grasp of the issues requires experience
- ✓ Nothing substitutes for trying an explosion, fire or electrocution case before a jury
- ✓ Managing a catastrophic event for desirable resolution includes managing for a favorable outcome at trial

Managing a catastrophic event for desirable resolution includes managing for a favorable outcome at trial. However, a catastrophic incident should also be managed to create and take advantage of opportunities to achieve a successful closure without the costs, exigencies or fortuities of trial.

Successful resolution without trial or, in some instances, independent of the outcome of trial, requires recognition of the potential for implementing effective strategies, preparedness to implement those strategies and the capability to effectuate the strategies selected. Just as forming and implementing a strategic plan are essential to successful resolution, so is evading the numerous obstacles that can halt the steady progress of any plan. The plan for resolution must be realistic, it must be directed toward obtainable goals and it must be guided by the foresight to avoid errors.

A catastrophic explosion, fire or electrical event will be resolved, eventually, at some loss or cost, it will end. When it is resolved, how it is resolved and the expense and results of resolution are matters that can be controlled.

STEP 6: INSURANCE NEGOTIATIONS

Seldom does a disastrous event occur that resulted from a single mistake or for which financial responsibility lies with a sole party. Usually losses result from a series of events ranging from seemingly innocent acts to outright wanton conduct.

For effective loss management, potentially liable parties must be identified and notified as early as possible. The relationships

between potentially liable parties must be determined and the legal rights and obligations assessed. Agency relationships, contractual indemnity clauses, common law and statutory rights of fault allocation and contribution need to be considered before critical decisions can be made.

Independent of potentially liable parties, the tiers of financially responsive parties must be identified and their contractual requirements met to assure proper loss allocation.

- *Is there a self-insured retention and what rules apply to its reduction?*
- *Are the excess carriers apprised of the exposure?*
- *What can the reinsurer do to protect its rights?*
- *Are joint defense arrangements possible?*
- *Who benefits and who will pay for a public relations response?*

These are but a few of the questions that have to be asked and correctly answered for effective management and successful resolution.

Determination of the duties of insurers and insureds and their respective rights under contracts of insurance are inseparable from the substantive issues that emerge when managing catastrophic loss events. While some interests are aligned, others can be adverse. Common interests do not always generate common strategic or tactical goals. Where adversity exists, separate interests must be recognized and protected.

Insureds can be multiple by definition, endorsement or addition. Similarly, several insurers can have contractual interests with a single insured or among themselves, due to addition, successive policies, co-insurance clauses and excess, surplus and reinsurance relationships. Into these relationships, self-insured retentions, deductibles, declining balance coverages and third-party administrators must be factored to sort respective interests. Only after the multitude of interests, rights and obligations have been identified can they be effectively engaged.

As daunting as these tasks may seem, knowing who and what to ask, where to look and what to do with the information collected alleviates much of the effort and expense that would be incurred addressing these issues for the first, second or even more times.

Catastrophic events cause enormous losses. Insurance contracts spread risk. They allocate costs for covered losses. The preparation to identify covered losses and the knowledge and experience necessary to achieve full allocation of those losses are essential for a successful response plan.

This article is a publication of
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