

ABSTRACT OF SUCCESSFUL SUBROGATION IN A MEGA LOSS

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On September 2, 2013, Labor Day, Dugan, Brinkmann, Maginnis & Pace (“DBMP”) was hired by a major insurance carrier to investigate subrogation in a massive fire that would completely destroy a 9-year old 266,000 square foot refrigerated warehouse. The fire started on September 1st and received extensive local news coverage. Our client ultimately paid its insured over \$147 million.

We immediately mobilized a team to investigate this catastrophic loss and deal with the myriad issues involved at the scene. A DBMP partner was on-site daily for more than 7 weeks during the site investigation. We retained numerous highly qualified experts to assist in the investigation. There were typical tensions at the site between our client-carrier, the insured’s public adjuster, and the insured, with mounting pressure from local and state authorities to clean up the scene quickly, exacerbated by the scope of the loss and the inconvenience and offensiveness to neighbors.

The warehouse was built in 2004 for dry storage by its original owner. The facility was purchased by our insured, a regional distributor of deli meats, cheese and other food products, in 2006. It was converted to a refrigerated warehouse by a contractor who specified the addition of 7” of extruded polystyrene insulation to the majority of the roof. The conversion resulted in a freezer section along with partially refrigerated space and unrefrigerated offices. Over the freezer section in particular, the highly flammable extruded polystyrene was added without the addition of a coverboard or thermal barrier.

Following the conversion, the insured owner had a rooftop solar electric or photovoltaic (PV) system installed. The PV contractor associated with an electrical engineer in the system design. The solar components installed were obtained from several major manufacturers. The components included over 7,000 solar modules, approximately 100 “combiner boxes”, several

junction boxes to be added to the roof and three ground-based inverters which converted the direct current (DC) generated by the system to alternating current (AC). The installer and component suppliers failed to consider the suitability of the roof as a platform for a PV system and the several PV components lacked appropriate warnings. The highly flammable insulation on the roof made it uniquely unsuitable for the addition of a potential high heat source such as a PV system and created a “disaster waiting to happen.”

The disaster began around 1:00 p.m. on September 1, 2013, when an electrical event occurred in the PV system, resulting in rooftop fire which continued to burn for several days. Firefighters were stymied by the presence of the PV system, and the entire building and all contents were lost. The level of destruction made it impossible to determine the precise point within the PV system where the fire originated. Our experts were able to limit origin to a 10’ x 10’ area of the roof that contained numerous PV electrical connections.

The sprinkler system inside the building was not designed to extinguish an exterior fire. As the fire burned through the thin layer of TPO membrane and ignited the extruded polystyrene insulation, the burning insulation liquified and “rained fire” into the building through seams in the roofing substrate igniting the contents of the warehouse and ultimately resulting in collapse of walls and sections of roof. The section of the roof that had not been modified in the conversion process was left standing and the solar panels on top of that section of the roof remained intact.

Our team ultimately retained twenty nationally known experts in their respective fields including origin and cause, electrical engineering, solar energy and PV systems, fire science, architecture and construction. Through analysis of building records, many gained through public records requests, potentially responsible third parties were identified quickly. Notice letters and continuing investigation ultimately resulted in the involvement of twelve parties on the defense and numerous additional lawyers, experts and insurance personnel. For approximately 7 weeks,

our team of lawyers, experts and consultants developed protocols, arranged evidence removal and storage, and controlled the investigation as efficiently as possible.

Because of the absence of a precise fire origin, our case became a “spread case” based primarily on “failure to warn” against the multiple parties who were ultimately defendants in the subrogation lawsuit filed in July 2014. Early action taken by team members to scour social media, news footage and internet sources and preserve data, photographs and video was essential in identifying parties and drafting a comprehensive, provable complaint.

The PV industry in 2013 was a developing one. Technology was outpacing the existing standards(contained in NEC, NFPA, and UL). Our industry consultants provided invaluable information on the evolution of knowledge and bolstered our “failure to warn” case against several of the entities. The dangers of extruded polystyrene insulation were well known in several industries and provided another basis for “failure to warn” claims against those responsible for its presence on the roof.

At the first case management conference with the Judge, we proactively requested an order setting an aggressive deposition schedule (one week per month to be set aside in which no counsel could claim unavailability). We also convinced the Court to order the use of a carrier approved discovery vendor for all depositions as well as hosting a document production repository. We understood the importance of having as much organization and structure as possible for discovery. The Judge appreciated our efforts and granted the orders. This streamlined discovery and allowed us to keep pressure on defendants that would not have existed otherwise and greatly assisted us in concluding this complicated, multi-party case in less than four years from filing and less than five years after the fire.

Over the course of discovery (approximately 30 months), our office deposed over 125 witnesses, during which approximately 1,500 deposition exhibits were marked. We produced over 250,000 documents and approximately 18 expert reports. Thousands of discovery requests

and answers were drafted, received and reviewed. Hundreds of thousands of pages of document production and subpoena responses was reviewed and catalogued. Diligent investigation into the roofing and solar industry, extensive research, and consultation enabled us to aggressively conduct discovery and develop viable theories against the 12 defendants.

We successfully defended numerous motions for summary judgment including defeating claims of the applicability of the anti-subrogation doctrine, waivers of subrogation, and other claimed contractual bars to recovery. We filed and answered dozens of pretrial motions.

We participated in numerous mediations with various defendants and groups of defendants at times separating the “roof” case from the “solar” case. Tactically, we limited each of our expert opinions to only one defendant so that when settlements occurred, we could drop an expert and not worry about providing cross-examination fodder for the non-settling defendants at trial. We eventually went to a jury trial against 2 recalcitrant defendants, both of whom settled after a few weeks of trial.

Ultimately, in a case where the precise cause of the fire could never be determined and the installer of the PV system which caused the fire had minimal liability coverage, the confidential settlements resulted in total gross recovery in excess of \$50 million. The recovery resulted from outstanding effort on the part of attorneys, legal staff, experts, subrogation professionals and the insured. The lessons and insights gained cannot be overstated and our subrogation team continues to benefit from what we learned during the handling of this mega loss.

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