Law Update

By Eric Moch

Seventh Circuit Affirms Conviction of Serial Arsonist: Evidence of Prior Fires Admissible to Prove Scheme and Modus Operandi

BACKGROUND

Arson for profit has plagued the insurance industry since its inception. The law and sensible claims operational guidelines favor payment of even suspicious-seeming fire claims unless clear evidence compels a denial. Many arsonists know this, and the shrewd ones know how to cover their tracks well enough after they set fire to their own property to secure claim payments. Sometimes, however, investigations reveal that a policy holder set a fire for financial gain. A claim denial is the standard industry response to insured-involved arson, but whether an insured who burns his own property for financial gain faces prosecution is far less certain. Prosecutors may not view an insurance company as a compelling victim, and they may view the claim denial as adequate punishment. Does this calculation change when the same individual ends up the focus of multiple suspicious fire investigations? Can an increasing number of prior suspicious fires reach a critical mass warranting criminal prosecution for an ongoing arson scheme? According to the Court of Appeals for the Seventh Circuit, the answer is yes. This is good news for the insurance industry, especially in this challenging economic climate, as the number of suspicious fires seems to be increasing.

UNITED STATES OF AMERICA V. MICHAEL THOMAS (19-2969; 3:18-cr-45 U.S.Dist.Ct. N.D. IN)

Born's Trailer Park in North Judson, Indiana, did not experience many fires before Michael Thomas moved there: three, to be exact, in over twenty years before Mr. Thomas came along. In the nine years Mr. Thomas resided there, however, he ended up connected to eight fires. He presented insurance claims after each, and over the years, received hundreds of thousands of dollars in claim payments.

His final fire in April 2013 prompted heightened law enforcement and insurance investigations. Those investigations revealed that in the days leading up to the fire, Thomas stated to his estranged wife about the eventual loss address, "*you better get out what you want that's important to you.*" Investigators learned that he moved a motorcycle away from the home shortly before the loss. The fire damage actually occurred in two separate, unconnected blazes eight hours apart, both of which Thomas claimed were the result of a pizza box catching fire on the stove top. After the fires, Thomas pressured his wife to help him "*max out*" the value of a contents claim. It all worked; after the fire he received four claim payments totaling $426,227.31.

Local investigators remained skeptical and kept looking into Thomas' prior fire claims. Eventually, they connected enough dots to interest the federal government in the case. In 2018, a federal grand jury indicted Thomas for mail fraud in connection with an ongoing scheme to defraud insurance companies with intentional fires. The government went to work proving that Thomas was a serial arsonist and insurance fraud perpetrator.

Prior to trial, Thomas moved to exclude evidence of fires in 2004, 2010 and 2013. The government sought to inform the jury about those fires as evidence of Thomas' ongoing scheme of arson and insurance fraud over the years. Thomas argued that the prior losses were impermissible character evidence, intended to inflame the jury into viewing him as a villain. The magistrate reached a compromise; he ruled that the 2004 fire was too remote to support evidence of a scheme but that it was nevertheless admissible as evidence of Thomas' modus operandi.

A jury convicted Thomas on all counts and he received a 90-month prison sentence. He appealed.

EVIDENCE OF SIMILAR PRIOR FIRES: ADMISSIBLE TO PROVE OPPORTUNITY, INTENT, PLAN, ETC.

Thomas argued on appeal that admission of his prior fire claims violated Federal Rule of Evidence 404(b)(1), which prohibits evidence of other crimes to prove a defendant's bad character. The appellate court rejected the argument, reasoning that Rule 404(b)(2) makes that same evidence admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or lack of accident. The prior fires did not further an impermissible argument that Thomas was a bad guy, the court reasoned, but rather a wholly admissible argument that the 2013 fire was similar enough to the prior losses to prove Thomas was perpetrating an ongoing scheme to defraud insurers with fire claims. The government offered the evidence in support of

an appropriate argument that Thomas was following an established modus operandi in setting the fires and then presenting insurance claims as part of an ongoing scheme.

The court also affirmed that the government enjoys wide latitude in proving the existence of a scheme as a whole, as a continuing course of conduct during a discrete period of time and is not confined to isolated instances of conduct. Especially in a mail fraud prosecution like this one, the government may rely upon evidence of the scheme that existed well before the defendant's commission of the act that ultimately triggers federal jurisdiction. This is why the evidence of the prior fires was relevant and admissible. The court affirmed the conviction and the sentence.

LESSONS FOR SIU INJURY CLAIM INVESTIGATORS

Mr. Thomas sits in jail today, guilty of mail and insurance fraud, because a team of investigators coupled their initial suspicions with a dogged investigation and followed each lead to its end point across years and multiple claims. They relied upon a skillset indispensable to suspicious fire investigations: thorough origin and cause investigations, detailed witness statements, scrutiny of claim documents and a willingness to collaborate with law enforcement.

Seasoned SIU investigators probably all have a story to tell about "the one that got away," a fire claim that ended in payment despite strong but ultimately unsubstantiated suspicions of insured involvement. The *Thomas* case should provide investigators with hope that when they conduct thorough, good faith investigations of fire losses that just seem "off," the State will reward those good faith investigations with prosecutions in appropriate cases, perhaps even federal prosecutions.

This is especially vindicating when as in this case the subject of a claim investigation appears to have perpetrated multiple prior suspicious claims, some of which resulted in payments. Within insurers, there can be an institutional resistance to looking backward at closed claims. And among law enforcement agencies, there can be a frustrating resistance to prosecuting property crimes when the victim is an insurance company. Yet the COVID-induced financial troubles we find ourselves in now ring familiar to investigators and attorneys who remember all too well the Great Recession. And just as then, the numbers of suspicious fire, theft and other property loss claims are climbing. Among the ranks of these claimants are, undoubtedly, a few individuals who will fabricate as many claims as willing insurers will pay. This behavior is not just wrong, it is a scheme, and every consumer of insurance has a vested interest in these schemes being prosecuted.

CONCLUSION

The skillset necessary to bring serial fraud perpetrators like Mr. Thomas to justice is not complicated. Fundamentally, it takes curiosity, healthy scrutiny and dogged pursuit of appropriate evidence, in good faith. But the skillset requires regular exercise and training, as does any skillset. For SIU investigators, this should mean at least annual training in witness interviewing, principles of origin and cause investigations, document review and legal trends and strategies. The industry has not seen the last Mr. Thomas, and these investigative skills have not seen their last useful day.

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