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Combating Modern Terrorism

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Arson Reporting Immunity Laws

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While collecting evidence in a complex arson-for-profit case in a mid-Western State, Federal agents walk into an insurance claims adjusting company armed not with subpoenas or documentary search warrants, but with merely a simple letter of request asking for the information they need. These Federal agents know that a key element in the detection and prosecution of arson is the expedient exchange of information between insurance companies and law enforcement agencies.

Arson reporting immunity laws foster such exchange because they are designed to protect insurance companies from the threat of lawsuits when they share arson-related information with law enforcement officials.¹ In fact, insurance industry officials report that this exchange of information has a significant impact upon their companies' denial of civil arson-fraud claims and an increase by law enforcement agencies of the number of successful criminal arrests and convictions.²

This article informs fire and law enforcement agencies, which are tasked with investigating the crime of arson, about the existence of these laws in the 50 States and the District of Columbia.³ Agencies interested in the application of immunity laws in arson investigations should, however, consult their legal advisor, due to the subtle State-to-State differences.

BACKGROUND

In 1976, the Ohio legislature enacted the first law granting insurance companies immunity from lawsuit when they share arson-related information with law enforcement officials.⁴ Using the Ohio statute, the Alliance of American Insurers, in 1977, authored model legislation entitled "Arson Reporting-Immunity Law." This model law is presently supported by numerous insurance industry groups, including the National Association of Independent Insurers, the American Insurance Association, and the members of the Insurance Committee for Arson Control.

The law's major purpose is to increase the flow of vital and timely investigative information between insurance companies and law enforcement agencies. The law requires insurers to inform the State fire marshal or other authorized agencies about fires that appear to be suspicious in origin. Specifically, the model law:

- Allows authorized agencies (defined on a State-by-State basis to include local, State, and/or Federal law enforcement officers, insurance commissioners, and/or prosecuting attorneys) to request from insurance companies all information concerning a policy holder involved in a fire loss. This information includes history of premium





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payments and previous claims, as well as investigatory files.

- Requires insurance companies to notify appropriate law enforcement agencies of suspicious fire losses. Such notices may constitute a request for an official investigation of the fire loss.
- Provides for the exchange of information between the insurance company and the law enforcement agencies, as well as exchange among those agencies.
- Grants limited civil and criminal immunity to those insurance companies and authorized agencies who exchange information.
- Safeguards the confidentiality of the released information.

PROVISIONS OF THE MODEL IMMUNITY LAW

Obtaining Information

Time is of the essence in an arson investigation. Removing the road block of requiring a subpoena or court order hastens the flow of information between the insurance companies and the investigating agencies.

In criminal probes of suspicious fire losses, it is vital that law enforcement agencies have access to all information relevant to the case under investigation. While much of the preliminary information developed by insurance companies may be unsubstantiated, it can assist the investigating authorities to develop leads, establish motive, and uncover other significant documentary evidence.

Most State-enacted immunity laws permit the release of information to authorized agencies at critical stages of the investigation by protecting the insurer from legal action, harassment, or punitive damages regarding any information it provides in good faith. Without this immunity law, or similar provisions, insurers would be inclined to withhold all but proven facts in order to avoid vulnerability to a civil lawsuit.

Reporting Requirements

The mandatory requirement that companies notify agencies is twofold in purpose. First, it removes the element of discretion on the company's part and ensures that authorized agencies are notified of suspicious fire losses. Second, and perhaps more important, this requirement provides the company with added protection.

Because notification is statutorily mandated, it may be considered a qualified, privileged communication. Thus, it provides an extra blanket of security from libel or slander suits. However, mandated notice does not provide adequate incentive for releasing information if it stands alone—without concurrent immunity protection.

Immunity From Prosecution

Immunity from civil and criminal liability is absolutely necessary for the success of these laws. Unless companies are allowed to release information to law enforcement without fear of liability, the statute's stated purpose can never be achieved.

In all immunity laws to date, civil or limited civil immunity is provided. In all but six States, criminal or limited criminal immunity is also covered by the stat-

utes. Four States enacted immunity protection, but did not use the terms "criminal" or "civil."

The immunity provision removes the climate of uncertainty which previously hampered cooperation in States prior to the enactment of immunity laws. To date, no insurance company has reported a test case regarding the release of unsubstantiated information to law enforcement agencies in cases of suspected arson.

Reciprocity

Reciprocity gives a company an extremely important tool for combating arson. In many cases, a company had only a suspicion and circumstantial evidence that arson occurred. Now, it may confirm suspicions of arson based on information requested from a law enforcement agency that has also investigated the fire. The investigating agency's opinion on the incendiary nature of an arson fire may also provide sufficient evidence for the company to deny a fraudulent claim.

The model immunity law provides that an insurer is entitled to request and receive information from law enforcement agencies. Although 34 States presently permit insurers to receive information from these agencies, several States have restricted this access by permitting agencies to refuse providing sensitive information, by denying insurers any access to specific kinds of information obtained by law enforcement personnel, or by permitting the agency to delay the exchange of information.

Minnesota has amended its laws to adopt the model immunity law language on reciprocity.⁵

However, the legislature added definitive language which denied insurers the right to receive "non-conviction criminal history," the identity of a confidential source, or information which would be detrimental to another ongoing criminal investigation.

The timing of the information exchange is also a factor in reciprocity. Nevada, which provided for arson reporting and immunity in its fraudulent claims law, now entitles an insurance company to receive relevant information generated by an investigative or law enforcement agency. However, the information will not be made available until completion of the investigation or prosecution.⁶

The possible risks inherent in two-way exchange provisions are outweighed by the benefits. If arson schemes are to be curtailed or controlled, insurers and law enforcement officials must be legally authorized and empowered to mutually assist one another.

Testimony in Civil Cases

This is a critical element of the model immunity law. Too often, if the criminal conviction is not pursued or fails, the civil action also fails for lack of ready access to the evidence and testimony available from investigators.

For example, testimony by investigating officers could include an expert opinion about the cause and origin of a fire, about the results requested and received from forensic laboratory examinations of fire debris, and about the significant statements made by witnesses. A majority of this information may already be a matter of public record; however, the testimony of law enforcement officials in civil court or by deposition may greatly assist the insurance company in its defense of a fraudulent claim.

Under the model immunity law, authorized agencies that request information from insurance companies may be later requested

“Immunity from civil and criminal liability is absolutely necessary for the success of these laws.”

This law allows the full resources of both the insurance industry and law enforcement agencies to be combined in a concerted program of detection and prosecution. Without such accessibility to information, both law enforcement agencies and insurers are compelled to make decisions with incomplete information.

to testify in civil depositions and/or trials about the information uncovered in their probes. However, officers do not normally testify to information which could identify a confidential source or which could be detrimental to another ongoing criminal investigation. Through this provision in immunity legislation, the States are better able to keep the arsonist

from profiting, even when criminal charges are not possible.

OTHER ISSUES

Privacy Act Issues

The arguments most frequently used opposing immunity laws involve State and Federal privacy issues. The model immunity

from insurance companies should be aware that the insured may be notified of this inquiry. Three States—Arkansas, Florida, and Oklahoma—require insurers to provide notice to the insured about exchanges of information with authorized agencies. Arkansas' law requires insurance companies to provide an authorized agency

remove this potential barrier to the free exchange of information contemplated by arson reporting immunity laws will continue.

CURRENT DEVELOPMENTS

Presently, all 50 States and the District of Columbia have passed some form of arson reporting immunity legislation. Twelve of these laws reflect all of the important elements of the industry-developed model law. The trade associations are working to bring the existing laws in conformity with the model. Recent surveys conducted by several insurance trade associations indicate that the existence of immunity statutes had, in large part, relieved their member insurance companies' concerns about liability for releasing information on suspicious losses.¹¹ A majority of the firms surveyed now regularly comply with the legislation and report that cooperation with law enforcement authorities has resulted in higher arson convictions.

A frequent problem cited by responding companies was the lack of interest and follow-through by some local officials. For this reason, officials need to establish clear procedures for the reporting and transferring of information and to fund and staff adequately the agencies responsible for the collection and use of information.

PREDICTING ARSON-PRONE STRUCTURES

The FBI's National Center for the Analysis of Violent Crime (NCAVC) maintains an active role in the use and dissemination of the Arson Information Management System (AIMS) technology. The NCAVC uses AIMS computer

“ ... officials need to establish clear procedures for the reporting and transferring of information.... ”

law provides law enforcement agencies with the power to compel disclosure of information relating to insurance company investigations. This provision may permit the disclosure of personal information to legal authorities without the traditional protection afforded by subpoenas or other court orders.

Through the Right to Financial Privacy Act of 1978, Congress established a series of procedures by which law enforcement officers could obtain access to banking records.⁷ While the model law makes no direct attempt to circumvent this system, it does not include any specific provisions regarding privacy. Opponents argue that there is a need for specific provisions to protect the privacy rights of individuals similar to the system of balances established by Congress regarding banking and other financial information.

Notifying the Claimant

Authorized law enforcement agencies that request information

with “relevant information.”⁸ Until 1983, the insurer was also required to provide its insured with a copy of the “report” sent to the agency within 30 days. While the language is not precise, apparently “report” means anything sent to the agency.

Florida's law provides for written notice to the insured, between 45 and 60 days, unless the agency finds that such disclosure would jeopardize lives, property, or the investigation.⁹ In that case, the notice would be sent no sooner than 180 days, but before 190 days after the information is sent to the agency.

Oklahoma's law states that an insurance company must notify the insured if it wants information from an authorized State agency.¹⁰ If the insured requests, the company is required to provide copies of all information received.

Industry efforts to repeal or amend these provisions of the laws have met with limited success. Undoubtedly, the commitment to

analyses to, among other things, profile arson-prone structures within a community.

With the development of AIMS projects by State and local police and fire investigative agencies, additional interest has been placed on the prediction of arson-prone structures.¹² Research by various jurisdictions, insurance companies, and Federal agencies using AIMS analyses have produced "profiles" to predict arson-prone structures and to recommend fire prevention measures.¹³ Some of the very data needed to predict potential targets are contained within insurance company underwriting files.¹⁴

“The possible risks inherent in two-way exchange provisions are outweighed by the benefits.”

In response to this novel approach to arson prediction and prevention efforts, some States have modified their immunity laws to address these requests for information from local authorities. For example, Connecticut law grants companies immunity for reporting to law enforcement officials information regarding "potential" or actual losses due to fires of suspicious or incendiary origin.¹⁵ This law does not contain objective criteria for determining a "potential" arson risk. Although it is clear that an insurer is not obligated, under Connecticut law, to report information regarding

potential losses, some insurers believe that without objective criteria or a clear definition of potential arson, divulging pre-fire information may expose them to civil liability.

The laws of Hawaii, Illinois, Kentucky, and Ohio now contain provisions similar to those of Connecticut.¹⁶ However, without such a clear definition of potential arson, a number of insurers believe the model arson reporting immunity law should not be amended to include the potential arson provision.

RECOMMENDATIONS

The authors make the following recommendations to both government and insurance industry representatives tasked with combating arson:

- Fire and law enforcement officials should familiarize themselves with the Arson Reporting Immunity Law in their States.
- Insurance industry claims personnel should expeditiously notify the appropriate fire and law enforcement officials when they suspect arson or fraud during their preliminary probes.
- States which have adopted an immunity law which does not contain all the provisions of the model should bring their laws into conformity, with special emphasis on reciprocal exchange of information, notice to a single agency, provisions to allow authorities to testify in civil

cases, and requests of information on potential losses.

- State officials should establish clear, timely reporting procedures of information by insurance company personnel so that such information can be quickly disseminated to the appropriate fire or law enforcement agency.

For further information on the topics discussed in this article, write directly to the National Center for the Analysis of Violent Crime, FBI Academy, Quantico, VA 22135.

FBI

Footnotes

¹Insurance Committee for Arson Control, "State-by-State Summary of Arson Reporting-Immunity Laws," 1985.

²Bradley L. Kading, "Statement from the Alliance of American Insurers," Washington, DC, 9/8/88.

³Officials should refer to their individual State immunity law for further information and guidelines.

⁴Ohio Rev. Code Ann. sec. 3737.16.

⁵Minn. Stat. sec. 299F.052-057.

⁶Nev. Rev. Stat. sec. 686A.281-289 and 679B.157.

⁷Right to Financial Privacy Act of 1978, Title XI of Pub. L. 95-630.

⁸Ark. Stat. Ann. sec. 66-5601 et seq.

⁹Fla. Stat. sec. 633.175(1)-(8).

¹⁰Okla. Stat. tit. 36, sec. 6301 et seq.

¹¹Supra note 2.

¹²D.J. Icove and M.O. Soliman, "Arson Information Management System: Users Guide and Documentation," International Association of Arson Investigators, U.S. Fire Administration Agreement EMW-K-0812, Marlboro, MA, 1983; D.J. Icove, "Principles of Incendiary Fire Analysis," Ph.D. dissertation, 1979.

¹³R. Cook, J. Roehl, and A. Harrell, "Predicting and Preventing Arson," Institute for Social Analysis, 9/86.

¹⁴"Resisting Arson-Fraud," Allstate Insurance Company, 1/83.

¹⁵Conn. Gen. Stat. sec. 38-114h.

¹⁶Hawaii Rev. Stat. 132-4.5(a)-(e); Ill. Rev. Stat. ch. 73, sec. 1153; Ky Rev. Stat. sec. 304.20-150 et seq.