

Saving Through Subrogation

Making the Process a Profitable Venture



Today, the practice of subrogation law is also seeing considerable growth, owing to insurance companies' desires and need to recover as much financial restitution as possible in the aftermath of paying out a claim — only to discover that a third party was more than 50 percent at fault.

Because subrogation is sometimes confused with contribution and assignment, it is important to highlight the differences between the three. Contribution, by definition, is a right based on equitable principles and as a result of a joint liability. It is enforceable after the party seeking contribution has paid in excess of his share of costs resulting from joint liability.

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Not to further muddy the subrogation waters, it should also be mentioned that assignment differs from the act of subrogation. Assignment, unlike contribution, is not typically based on legal principles of fairness, but rather on a contractual agreement between two parties. An insurance company, therefore, might seek a voluntary assignment of rights from an insured individual if the insurer believes its position in court as an assignee will be stronger than as a subrogee.

The act of subrogation, which essentially means transferring the right to collect from a third party, allows insurance carriers the potential to recover what is rightfully theirs. Under subrogation, an insurance company steps into the shoes of its insured to benefit from the insured's rights and remedies against the third party. It is an equitable remedy under the law. Failure to utilize this fundamental action for recovery in effect translates into paying a claim twice.

Equitable subrogation — this once underused form of recompense — has experienced increased activity over the past several years as casualty insurance companies work to recover money paid out for accidents that were not predominantly the fault of their clients.

File it under the “everything old is new again” category, as the first reported subrogated case involving insurance dates back to *Randall v. Cockran* in 1748, when an English insurer subrogated against a prize fund accumulated from the sale of captured Spanish ships.

Playing the Game

The process of recovering losses owed under subrogation is more complex than determining subrogation rights. Contract law and statutory rules govern whether a claim can be subrogated. However, few formal rules apply to the process of negotiating a subrogation recovery. The hopeful outcome — from an insurance carrier’s perspective — is a rapid recovery greater than the amount expended to achieve that recovery.

The casualty claim professional will likely want to achieve a basic outcome: receive the maximum recovery in the shortest period of time without outsourcing the claim to an attorney or other subrogation specialty vendor. While some casualty claim professionals might see outsourcing as a sign of “weakness,” the truth is that working with an attorney or law firm that specializes in subrogation law can produce desired results sooner than later. That said, there are times when negotiating a settlement can work and the need to retain an attorney is unnecessary.

One of the most common subrogation recovery situations seen by those in the personal and casualty claim industry is an automobile collision with disputed liability. In cases where two moving vehicles are involved in an accident, it is rare when one party is completely at fault. Typically, both drivers bear a portion of responsibility. Repair costs will represent the actual cash value of damages and, once paid, there is little to negotiate in the way of actual damages. This is when the primary area of negotiation becomes the percentage of negligence assigned to each party involved in the collision.

Liability is determined by four fundamental factors: who had the legal right of way; whether the drivers were traveling at or below the posted speed limit or at an appropriate speed for existing conditions, such as snow, ice, or heavy rain; if the drivers exercised appropriate control of their vehicles; and if the drivers were aware of other traffic conditions and chose suitable action accordingly.

Negotiations for settlement can occur when the insurer of a vehicle involved in a two-car collision pays repair costs and subsequently gathers information that the second vehicle holds the lion’s share of fault for the accident. Often, an insurer looking for a 75/25 negligence split

Benchmarking Success

According to the National Association of Subrogation Professionals (NASP), most insurance carriers recognize the financial impact of subrogation recoveries on overall financial performance as a key strategic initiative. However, until recently, there was never a benchmarking study dedicated just to the field of subrogation.

NASP says its benchmarking studies help identify realistic and achievable targets and best practices needed to improve. Each study is comprised of the following:

- ▶ Executive Summary — Profile of participants and a snapshot of the study’s results.
- ▶ Analysis of Subrogation Philosophies and Practices — Personnel benchmarks, organizational practices, service level standards and operating practices.
- ▶ Analysis of Subrogation Performance by Line of Business — Analysis of net subrogation results by participants’ size.
- ▶ Analysis of Subrogation Performance by State — Analysis of gross and net recovery results by state, noting negligence laws.
- ▶ Best Practices Summary — Hints provided by participants that summarize their best practices for subrogation performance.

For a complete list of studies as well as ordering information, go to www.subrogation.org.

can successfully negotiate an offer close to that target, but when negotiations fall apart or fail to even begin, subrogation recovery may require legal services.

Naturally, the likelihood of recovery increases significantly if subrogation action is taken against a party who has insurance coverage. However, within the realm of motor vehicle subrogation, an alarming number of uninsured drivers exist. There are many reasons for this, but today’s increasingly difficult financial atmosphere is certainly one of them.

Collection Strategies

Without the proper amount of homework,

an insurance company may find itself in an uphill battle as it attempts to recover from one of the uninsured masses with little ability to pay. Attorneys then find themselves in the position of listening to judges and arbitrators regurgitate the overused proverb, “You can’t get blood from a stone.” Therefore, it is in both an insurance company’s and a law firm’s best interest to conduct prompt and thorough research upfront to avoid spending valuable time, effort, and money on an unrecoverable action.

It is paramount to first determine whether a paid-out claim is worth subrogating. Increasingly, insurance compa-



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Feature Story

nies are becoming more aggressive with subrogation measures, but they should always weigh the cost of hiring an attorney, filing a law suit, and incurring costs associated with litigation against the likelihood and amount for recovery. There are obviously times when it is in a company's best interest to pursue a subrogation claim. There are also times where an insurance company's best interest is to simply write off the claim.

The more information an insurance company has before calling in an attorney the better, as this will no doubt expedite the recovery process. Time is of the essence to guarantee maximum recovery. It is critical that an investigation is initiated as early as possible for a number of reasons. Recollection of the incident will still be fresh in the affected parties' minds; the chance for availability of all witnesses is increased; and perhaps most importantly, crucial evidence will not yet have been altered or destroyed. Generally speaking, the more time that elapses from an accident, the more time and effort will be required to build a sound case for recovery.

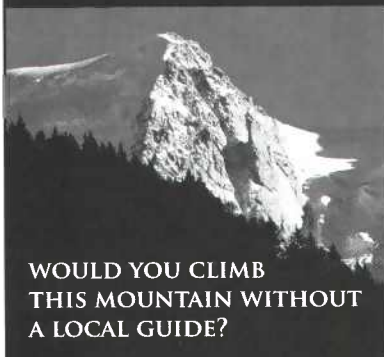
As addressed earlier, P&C claim insurance professionals often attempt to negotiate subrogation settlements with other P&C carriers before electing the services of an attorney. Negotiating a settlement does require both planning and preparation, beginning with a telephone call, letter, or fax that will serve to document the request for settlement. Most subrogation negotiation attempts fall somewhere between settlement and litigation. However, the process of negotiating a subrogated claim represents what is known as an application of alternative dispute resolution — an option other than the use of the court system and litigation.

Courting Decisions

In many cases, subrogation recovery can only be made effectively through litigation. Once a decision has been made to pursue a subrogation action, an initial consideration prior to filing suit is the venue. In small claims court — the venue of choice for many motor vehicle accident disputes — recovery is usually much quicker since there is little or no discovery. A judgment in small claims court can be delivered in as little as a couple of

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