

INVOLVING SUBROGATION COUNCIL

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**INSURERS WILL HANDLE A TYPICAL CLAIM
ACCORDING TO THE ROUTINES THAT ARE
CONSISTENT WITH THE COMPANY'S BUSINESS
MODEL. SOME MAY RETAIN SUBROGATION COUNSEL
IMMEDIATELY, KEEPING IN-HOUSE COSTS LOW.**

OTHERS, DEDICATING MORE RESOURCES TO SUBROGATION

recovery, may retain counsel only when in-house efforts are not fruitful. Most employ a combination of the two, depending on the situation.

Some losses, however, including particularly complex, multi-party, high-stakes claims, are worthy of the immediate involvement of subrogation counsel. Consider three scenarios:

1. You receive a claim that your insured's commercial building has been damaged by a fire during reconstruction. Several contractors may be involved as well as the products they use. There is also the possibility that the fire was caused by arson. Damages are going to be in the millions.
2. Your insured's home is flooded by a broken water main in the street.

Several other homes are damaged. The City has crews digging up portions of the pavement and removing pipes. There is going to be a large payout and large out-of-pocket loss to your insured in addition to numerous third party claims.

3. Wildfire. Hundreds of homes are damaged or destroyed, including many of your insureds' properties. The fire is still being fought and the area of origin and potential causes are unknown. The losses will run into the tens or hundreds of millions of dollars.

What is your best method of protecting subrogation recovery? Involve subrogation counsel immediately. Here's why:

IT'S FREE

Your trusted subrogation counsel is available anytime to give you advice or guidance. Not only are they there to counsel you on ongoing matters when the need arises, but they encourage you to contact them from the outset of a claim so that you can have the best chance of recovering on your own. Alternatively, should you be unable to effectuate a recovery for whatever reason and need to refer the matter, then the preservation and presentation of the claim is largely perfected.

Most importantly, the service provided by counsel is either without charge or built into the value added by their involvement. The idea being that a client who recovers on their own is a very happy client, and the client who refers a matter which has been guided by subrogation counsel from the outset, stands a much better chance of recovery than a client lacking that guidance.



ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK PRODUCT

When you contact subrogation counsel at the first notice of a claim, you establish attorney-client privilege over your communications with counsel. This protects from later disclosure the decisions you make based on discussions with counsel regarding the direction of your investigation. Further, the involvement of counsel in retaining experts creates attorney work product protection for both the identity of and opinions generated by those experts. Any unfavorable

opinions will then not be discoverable by any adverse party in a legal proceeding. When counsel is not involved from the outset, often the conversations and thought processes of the field adjuster and upper management as reflected in the diary notes become fodder for the very parties you may ultimately attempt to collect from. What may have been an honest opinion of the case at one point may change as investigation progresses. And yet, because those thoughts are written in a portion of the claim file and are not part of any attorney involvement, the other side will discover the notes and use them against you. Getting counsel involved early protects those communications and thought processes.

THE RIGHT EXPERTS

Oftentimes the potential for recovery depends on selecting the right expert not only in terms of profession or discipline but also based upon track record and experience. It is not uncommon for experts to be chosen because they are readily available, extremely personable, submit reports quickly, or charge the lowest rates. These criteria do not always guarantee, however, that the expert is the best person for identifying and preserving subrogation potential on a claim. As a result of working with experts on a myriad of claims and seeing how they perform in the field as well as in the courtroom, your subrogation counsel is well suited for the task of identifying the expert that should give you the best chance of recovery on a particular loss. If any of the aforementioned criteria are important to you as a client, subrogation counsel will take those into consideration when selecting the right expert for you.



**WHEN CONTACTED EARLY, SUBROGATION COUNSEL
CAN READILY SPOT THE NEED FOR A PARTICULAR
TYPE OF EXPERT AND CAN MAKE ARRANGEMENTS
TO GET THAT EXPERT TO THE SCENE.**

THE RIGHT EXPERTS PART II

Everyone knows that having an origin and cause investigator go to a fire scene is a basic first step. But what happens when the O&C Investigator gets to the scene and finds herself faced with an unusual product or potential cause? What about the need for an expert in scenario 2 above where the City is in the middle of removing potential evidence and the street is soon to be repaved? How as an adjuster do you go outside of your usual roster of experts and find someone right for the task? Or perhaps the responsible party is a public entity liable under inverse condemnation, and they would be willing to stipulate to liability (as

opposed to damages) in order to avoid unnecessary delays with evidence inspections.

When contacted early, subrogation counsel can readily spot the need for a particular type of expert and can make arrangements to get that expert to the scene. If immediacy is needed, counsel can send someone to preserve crucial data, take important photographs, and interview witnesses until the expert can get there. Whether the need is for a hydrologist, metallurgist, astrophysicist, or human factors engineer, your subrogation counsel is well suited for selecting the right one. It has been said you shouldn't send a boy to do a man's job; likewise, you shouldn't send just any expert to do the right expert's job.

PRESERVING EVIDENCE

Once your expert is on the scene, a crucial aspect of protecting a subrogation claim is making sure evidence does not get lost, altered, destroyed, or left behind. Most counsel will ask for a call or verbal report from the on-scene expert at the time of investigation, which allows for a discussion with the expert on the layout of the scene, the potential causes of the loss, and any items of evidence to be included or excluded. Direction is then given to the expert as to how to best proceed with preserving the scene for additional investigation in addition to collecting items of importance for future use and investigation. Sometimes what is most important to recovery may not be known until much later. Subrogation counsel can help to identify those particular items which should be safeguarded.

IDENTIFICATION OF POTENTIALLY INTERESTED PARTIES

Once you have an idea of not only the potential cause of a loss but also those potential causes that can be excluded, it is often important to place others on notice so that they have an opportunity to inspect the scene and the evidence. While your expert may have eliminated, for example, two of three electric appliances in the area of origin as having caused a fire, often the manufacturer you ultimately pursue will turn around and try to blame those excluded parties.

Subrogation counsel is able to assist with identifying all potentially interested parties and placing them on notice for a site investigation within a given timeframe and under specified conditions. Often this notice results in contact from counsel for the parties placed on notice, and subrogation counsel is able to coordinate the interests of all involved. Having all parties involved helps to limit situations where the manufacturer of a faulty product creates an impediment to settlement or recovery by blaming the “empty chair” for the fire.

COORDINATION OF EXAMINATIONS

After potential parties are identified and have visited the scene, evidence is typically collected and maintained at a laboratory facility. Your subrogation counsel is able to work with the parties, their counsel, and experts to set up forensic examinations of the evidence to see if items of interest can be eliminated or identified as a cause. This often involves the drafting of protocols by experts for the examinations and decisions by the interested parties as to what means and to what degree destructive examination is permitted. Counsel is well versed in these decisions and can best guide the process while maintaining the prospects of recovery.

REASSURING THE INSURED

Having a loss can be traumatic or create anxiety whether the loss occurs to a homeowner or a commercial client. Subrogation counsel can keep the insured apprised along the way of the process being undertaken, the timeframe in which things typically occur, and the need for doing certain things in a certain manner. Counsel can also work with the insured or their counsel assuring them that everything being done will potentially benefit both the carrier and insured in the end.



A SUBROGATION PACKAGE WITH A BOW ON IT

When subrogation counsel is retained at the outset of the case, all of the above benefits are received immediately. The additional aspects of counsel's involvement include being a conduit for the expert, reporting to the subrogation department, and freeing up the field adjuster's time. For instance,

communications with the expert – or experts as the case may be – can take several days of phone calls. Subrogation counsel is able to distill those calls into a form which is cohesive, organized, and easily understood without the need for a discoverable or pricey written expert report.

Moreover, the updated reporting by subrogation counsel often gets placed into the client's diary notes, and those confidential reports become a nice historical timeline of

the subrogation investigation and everything that was done to identify the cause. These notes can then be used by the client to draft their own demands and have a discourse with the adverse party in attempting to recover on a claim. If those attempts prove unsuccessful then the package is easily transferred to subrogation counsel for additional attempts at recovery. It is a win-win for all involved.



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