

The Adjuster's Role In Subrogation Claims

BY SHAWN BURNETT



In most cases, the adjuster is the first person on scene on behalf of insurers. It is critical for the adjuster to begin handling the claim properly in order to ensure the best possibility for successful subrogation against a negligent third party. The adjuster will rely on a variety of experts, including forensic engineers, accountants, investigators and legal counsel, to prepare and prove their case. However, there are many things that must be done at the very outset of the claim to properly document the file.

When it comes to subrogation, you don't want to lose before you even get started.

First arrival on Scene:

Whether it is fire, water damage or equipment/product failure, it is imperative to not make unsubstantiated assumptions on the origin and cause of loss. Survey the entire scene and try to identify the suspected origin, and identify what evidence needs to be retained. Interview and obtain signed statements from any witnesses, and the owner or person responsible for the subject property.

Statements should contain the interviewee's full personal contact information, including all current addresses, phone numbers, date of loss, and date of birth. The person may be needed years later and this information will help locate them if they have moved or changed employers.

When dealing with commercial or industrial losses, you must identify who owns the property/object deemed to be the "evidence," in order to determine if you have the legal right to retain it. With Landlord/Tenant or Condominium Corporation/Unit owner relationships ownership of the evidence must be established at the outset.

If possible, prior to any emergency remediation or major scene overhaul,

the entire scene should be photographed and/or videotaped. With digital photographs it is just as easy to take 100 photos as it is to take 10. Shoot as many photographs, from all angles, as you can.

Retention of Experts:

After the adjuster has conducted interviews, surveyed the scene, identified the suspected area of origin and potential cause of loss, the right expert can be identified and engaged. It is important to hire the best expert for the particular loss – someone who is a specialist in the required field. If needed, seek a court-certified expert consultant. Try to avoid hiring a "Jack of all Trades" consultant.

An adjuster should develop a library of expert's C.V.'s in all disciplines for ease of reference. If circumstances allow, preserve the scene until your preferred expert is available, if they are unavailable immediately. The type of claim exposure will dictate if a delay in starting the origin and cause investigation is possible. If a claim has an ongoing Business Interruption exposure, it may not be practical to prolong an investigation.

Removal and Handling of Evidence:

Whether collected by an adjuster or a retained expert, any evidence removed from the site should be properly photographed "in situ" prior to removal. The item(s) should be tagged, identified and dated. A Chain of Custody letter should be drafted identifying the evidence removed, by whom, and when. The letter should confirm who had the evidence in their possession prior to releasing it to the current party. This letter should be signed by both parties involved in the transfer of evidence.

If any evidence requires further examination, it is crucial that no destructive testing is done until all potential subrogation third parties have had a reasonable opportunity to inspect, and



arrange for their own experts to attend. Spoliation of evidence must be avoided at all times.

Coordination with Subrogation Legal Counsel and Claims Examiner:

An early identification of the need for subrogation counsel leads to better legal privilege on all expert's reports. Some insurers request that an adjuster provide two separate reports on a file involving a subrogated action: one report dealing with quantum, coverages and first party loss adjustment issues. The second report deals specifically with origin and cause findings and subrogation investigation details.

The independent adjuster and assigned counsel should provide the insurer with timely, preliminary opinions on realistic chances of recovery. A claims examiner may have to authorize expensive cause and origin investigation costs at the onset of a claim. All parties must communicate to determine claims investigation dollars are being well spent.

It is important to have all inclusive expert meetings with the claims examiner, independent adjuster, forensic accountants, engineers and subrogation counsel in attendance to review the full file and subrogation investigation. Often, the file handling is limited to the interaction between the independent adjuster and claims examiner. However, other participants on the file may have

important questions and answers to add or have a different perspective on the file.

A well documented claim file – outlining the physical evidence removed, how the evidence was retained, procedures followed and first party quantum calculations – makes the final third party settlement negotiations much easier.

Placing Third Parties on Notice:

All effort must be made to identify all potential third parties, and not just the obvious ones. A full understanding of the Canada Sale of Goods Act is essential in identifying which potential entities may have liability exposure when it comes to a product defect or breakdown causing resultant damages. This is becoming more important each year with the growing trend of products being manufactured overseas, but distributed and/or supplied by local Canadian companies. While it may prove prohibitive to pursue an overseas manufacturer, if the product has been sold or distributed by a Canadian com-

pany the avenue of subrogation against this firm is far easier under the Sale of Goods Act.

Where applicable, an adjuster must obtain copies of all contracts, purchase orders, bills of lading, etc. Confirm if the original documents were double sided with terms and conditions printed on the back.

On commercial losses, it is important to obtain all related documents which may possibly tie in to a contract, i.e. electrical engineering drawings or fire sprinkler system designs etc. These addendums to a contract are often just as important as the contract itself.

By reviewing the terms and conditions of all contracts, an adjuster will be able to identify early on if third parties have little or no liability exposure due to hold harmless agreements, limitations of liability clauses or no “special damages” clauses contained within the agreements. While a third party may be negligent for the insured’s damages, if the negligent party is legally protected it is best to know at the beginning of

the claim to avoid costly subrogation handling costs.

All third parties should be placed on notice for a subrogated action as soon as possible.

Finally, an adjuster must be aware of all limitation periods that may apply to the situation. In addition to the Limitations Act (2002), a private contract between the insured and a third party may contain a limitation period on commencing an action, and/or limit the monetary amount of recovery.

By doing thorough and proper claims investigation from the beginning of a claim, the possibility of successful recovery from a negligent third party can become a reality. 🍁

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