

TRIAGING SUBROGATION CLAIMS: Methodologies and Financing Subrogation Programmes

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What Constitutes a Successful Subrogation Programme

- Solid Recoveries with Limited Costs and Expenses



What constitutes “Solid Recoveries”

- Not only the Amount of the Recovery BUT:
 - Leaving no stone unturned
 - % of Recovery vs. Recoverable Damages



How Obtain Solid Recoveries

- Early Investigation
- Retention of the “Best” Experts
- Notice to *and involvement of* interested parties
- *Appropriate* Retention of Evidence
- Avoid Mentality of “*It’s only a subro claim*”.



When do you call Ghostbusters?

- If a ghost started the fire . . .
- What's the point? Who is the *best* expert?
 - Fire cause and origin investigator
 - Electrical engineer
 - Mechanical engineer
 - Other disciplines (hydrology, materials sciences, *etc.*)



Involve the “Other Guy”

- Why?
 - Spirit of Cooperation Goes a Long Way
 - “We’re not hiding anything”
 - You’ve seen the same thing we have.
 - Experts who “work together, play together”
 - Difficult to claim prejudice – spoliation of evidence on down the road
 - At trial – jury will perceive you as being fair



“The Right Stuff”

- *Appropriate Retention of Evidence*
 - Keep what you need
 - Keep what they want
 - Caveat: WITHIN LIMITS!
 - Keep what someone else may need and want.
 - Anticipate



Get What You Deserve

- Avoid Mentality of “*It’s only a subro claim*”.
- Always Remember: You stand in the shoes of the little guy.



Limiting Costs and Expenses

- TRIAGE THE CLAIM
 - “Using limited resources so as to obtain the maximum benefit”



The Early Bird doesn't have to Pay the Worm:

- Cost containment is more readily achieved when the threshold recovery issues are examined thoroughly at the outset of a claim.



Identify Pitfalls Early

- Don't Throw Good Money after Bad -- Before you spend a single shilling, inquire as to whether there are any statutory obstacles to asserting a claim.



Limitation Act 1980 and U.S. Statutes of Limitation

- These statutes limits the time within which an action may be brought **after** a loss has occurred.



U.S. Claims: Statutes of Repose

- A statute of repose limits the period of time within which an action can accrue, without regard to whether injury has actually occurred. Can bar recovery before the loss even occurs.



PRACTICAL EFFECT OF REPOSE STATUTES

- Can completely bar a claim
- OR
- Can limit the time in which you have to file your claim
 - Can create a nightmare: Have to file civil action claim within months, weeks or even days of a loss.



Other Bars to Claims

U.S.: Economic Loss Doctrine

U.S.: Sovereign Immunity

Contractual waivers of subrogation

Co-insureds

Express or Implied

Other Contractual Hurdles:

Limitations of liability in contracts

Liquidated damage clauses



CAVEAT: DON'T LEAVE MONEY ON THE TABLE

- Waivers of Subrogation are enforceable as written.
- Evidence disposal does not necessarily constitute evidence spoliation.
- Municipalities may not enjoy immunity or have liability up to coverage limits.
- Insured being the cause of the loss may not be the end of the story – Secondary theories.
 - (Restaurant Fires, etc.)



What's the Best Way to Save Money?

- Limit Legal Fees!
- How limit fees?
 - Cap Lawyers costs
 - Downside: you will get a bill for those costs
 - CFA's (U.K.) or Contingency Fees (U.S.)
 - Under either scenario, should not incur atty fees pre-litigation.



Why CFA or Contingency Fee?

- Encourages investigation of ALL claims without financial risk to insurer.
- Increasingly, the Market is expecting subrogation recovery potential to be examined.
 - Standard Operating Procedure in the States
- Any recovery is pure profit



Managing Your Experts

- “Should I prepare a report for you?”
- NO!
- “Can I mount these photographs for you?”
- Maybe.
- Control Investigation and Testing
 - Caveat: Don’t hamstring your expert (Penny wise but Pound foolish)



When do I get another expert

- Paying an expert to educate himself.
 - Is he the right expert?
 - More cost effective to retain another expert.
- If more than one discipline involved.
 - Or a specific field within a discipline
 - Materials Scientist vs. Polymer Materials Expert
- When get involved?
 - Depends (Hopefully after initial “call” made)



Agreements with Insured

- Recovery and Cost Sharing Agreements
 - Almost Always Necessary
- Why necessary
 - Determine recovery payments
 - U.K. Underinsured/uninsured damages – Id first
 - U.S.: made whole states
 - Help share costs
 - Prevents future problems/conflicts



How do I know if my subrogation programme is successful?

- Analyze the data! BENCHMARKING

