Successfully Subrogate Claims Within Your Self-Insured Retention

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Merriam-Webster defines subrogation as "the assumption by a third party (such as a second creditor or an insurance company) of another's legal right to collect a debt or damages."

However, that definition omits an entire section of the business community that utilize self-insured retention (SIR) or a large deductible to reduce the cost of property insurance premiums. When a company uses either of these sensible financial tools, the company, like an insurer pursuing subrogation, can pursue at-fault parties to recover the amount of money the company incurred for a particular loss.

With the continuing hardening of the insurance market, a reasonable approach for companies is to increase the level of the SIR or deductible. Claims falling within higher SIR levels are no longer small claims; but even historically small claims should not be ignored. What follows is a road map for successful recovery efforts for property losses not paid by insurers.

The Basics

Quite simply, all losses are caused by something. A timely investigation is needed to figure out what caused the loss and to identify any potential at-fault parties. Start with the simple question: Does a recovery opportunity potentially exist? Until proven otherwise, the answer should be yes. The key is to identify a viable theory of recovery and a target party. Couple that with the existence of liability insurance or sufficient assets by the responsible party, and you are on your way.

Investigations

A critical factor in the recovery process, both for uninsured claims and subrogated claims, is a timely and thorough investigation of the facts. As the party pursuing a potential wrongdoer (tortfeasor), the burden of proving your theory is on you. Your claim is unlikely to succeed without a clear picture of what took place and the supporting evidence. For many claims, the recovery blueprint lies in the physical evidence.

Having a post-loss investigation procedure in place, preferably in writing, will create a consistent approach and improve identification of potential recovery opportunities. Providing field staff with a checklist or questions that ask the "who, what, when, where, why, and how" of each loss will identify claims to pursue, and help to identify and eliminate cases with no recovery potential. Those 15 minutes of focus on recovery or subrogation rights after damages occur will prove to be very valuable. As the old adage states, "an ounce of prevention is worth a pound of cure." In the recovery and subrogation business, you aren't likely to find a potentially responsible party without an investigation.

For example, assume one of your locations suffers water damage and the only detail about the loss indicates “water line to refrigerator leaked.” On the surface, this may not look like a claim with recovery potential. However, asking a few additional questions may reveal the refrigerator was recently serviced and the repair person crimped the water line. Securing a copy of the repair invoice will help support your claim and identify the target. Asking those two to three extra questions early on will get you results, but if questions are not asked early, the opportunity to subrogate may be lost.

Evidence

If possible, try to preserve the entire scene until the subrogation investigation is complete. This may not always be possible or practical, especially on smaller losses or in situations where repairs are needed to continue to operate your business. If a full scene preservation is not possible, preserve the area of origin and secure the evidence (the part or item you believe caused the loss), as well as key evidence that was ruled out but others might claim caused the loss

Losses caused by faulty products often require examination by an expert. The use of an expert may depend on the extent of damages. It does not make sense to incur a $1,000 expense for an expert on a $2,500 claim. However, spending $1,000 on a potentially viable $25,000 claim makes perfect sense.

As the potential plaintiff in the case, you have a legal obligation to preserve relevant evidence. Failure to preserve evidence allows the target party to assert a spoliation argument. You are required to preserve the evidence and allow the target party the opportunity to conduct a joint inspection or an inspection of their own.

Other forms of evidence include, but are not limited to, the following:

- Photos of the scene, failed part or item believed to have caused the loss
- Documents outlining ownership, maintenance, and control
- Diagrams and plans
- Contracts, leases, security system data, warehouse receipts, and bills of lading
- Police and fire reports
- Weather reports
- Inventory records
- Warranty documents
- Recall data (See Consumer Product Safety Commission)
- Notification to Adverse Party

With your initial investigation complete, a theory of liability developed, and a potential target party identified, it is time to place that party on notice of the loss. The “notice letter” outlines the facts of the loss (date, time, location) and informs the recipient of why you believe they or their product contributed to the loss. You should also place the target on notice for it to preserve relevant evidence. If you know the full extent of the damages, include that information in the letter. However, if the damages total remains unknown, simply state that the full repair or replacement costs are not final.

If the scene was preserved, clearly provide that detail in the notice letter. Provide a specific but reasonable time frame for the other side to complete an on-site inspection. If evidence was removed or secured, an offer to allow the other side's expert an inspection of the item (with non-destructive testing) is warranted.

Follow up as the other party may not respond to your initial request. Once a response is received, let the responsible party tell you why they will not pay. The responsible party may have knowledge about their actions of which you may not be aware.

Getting to the Finish Line

Once you completed the investigation, identified the facts and the at-fault party, and placed them on notice of your intent to pursue recovery, one of three outcomes is likely to occur:

1. The other party will ignore your notification letter;
2. The other party (or their representative) will deny any responsibility;
3. The other party's in-house claim department, third-party administrator (TPA), or insurer will contact you to discuss the matter further.

Outcome one requires a bit of reflection on your part. Weigh the overall strength of your case and the damages sustained against the expenses you are likely to incur. As mentioned previously, spending $1,000 to pursue (with no guarantee of success) $2,500 is not economically sound.

Outcome two, which is a straight denial from the other party, should not be too surprising. Here too, consider the strength of your claim and the costs you may incur continuing to pursue the recovery. If you believe that you have a legitimate theory of liability and the economics warrant continuation of your efforts, reach out to the other party for specifics on the denial. You may get information that supports the other side. While this may be bad news for this particular claim, ending your pursuit on this non-viable claim allows you to focus on other more promising claims. Having numerous open files with no chance of recovery does not help you.

Outcome three is a favorable sign. While not a guarantee of future recovery, it opens the door to discussions and potential future negotiations. With a timely and complete investigation, you will be in a position of strength when it comes time to discuss settlement.

There is also a fourth possible outcome not listed above, which is receiving a check in the amount requested from the responsible party. While rare, it does happen. Again, following the steps outlined above will help. In golf there is a saying that 100 percent of short putts don't go in." In the recovery and subrogation business, 100 percent of cases not pursued do not result in a recovery.