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Gathering Pebbles: Subrogation's Burden of Proof

By Gary Wickert | August 1, 2013

The recent New York Supreme Court decision of *American International Ins. Co. v. A. Steinman Plumbing & Heating Corp.*, 2012 WL 952782 (N.Y. App. 2012) and an ancient parable wouldn't seem to have a lot in common. But, they do. In that case, American International Insurance Company ("American") insured a tenant of the 950 Fifth Avenue building known simply as "950 Fifth." The limestone pre-war co-op has only seven units and has a reputation for its billionaire bachelor tenants, including Boston Properties CEO Mort Zuckerman, Tyco's Dennis Kozlowski, and Jonathan Tisch of Loews Hotels. However, in 2011, it was the scene of a major leak which caused damage to the apartment of one of American's insureds.

The leak occurred when the float device regulating the flow of water into the water tank on the top of the 950 Fifth Avenue building failed, causing the tank to overflow. At the same time, the overflow alarm designed to warn those responsible for maintaining the building also failed. American paid its insured's claim for water

damage and filed suit against 950 Fifth Avenue Corporation and A. Steinman Plumbing & Heating Corporation, the building owner and its plumber, respectively.

The defendants filed a Motion for Summary Judgment alleging that they did not have actual or constructive notice of a defective condition in the water tank and that both the float device and alarm system spontaneously and simultaneously failed. They produced evidence that the water tank was inspected and cleaned annually and that there had been no prior problems with either the float or the alarm prior to this incident. In short, they presented the typical defense subrogating carriers and their subrogation counsel face in the vast majority of subrogation cases.

The plaintiff argued that the defendant was understaffed on the day of the loss, that the overflow alarm actually worked, and that nobody was around to hear it. However, they were unable to come up with any evidence to support these contentions. Their argument that the doorman should have heard the alarm was purely speculative. As a result, the court dismissed the plaintiff's lawsuit. The court also denied the plaintiff's request for spoliation of evidence sanctions against the defendant, who had quickly thrown away the subject alarm system and float. The court correctly pointed out that the defendant repaired the problem on an emergency basis and nobody requested that they retain any evidence.

This case serves as a stark reminder to subrogation professionals that the burden of proving someone or some thing has caused property damage or personal injury is squarely on the subrogated insurance carrier. From the moment a claim is made, the claims handler should continually think in terms of preserving evidence and proving fault. Waiting weeks or even days before taking steps to obtain and/or preserve evidence is almost always fatal to future subrogation efforts.

Whether a claim is large or small – the burden is the same. The subrogated carrier has the burden of proving: (1) that the defendant was negligent (or that a product was defective); (2) that this negligence proximately caused the damages which the carrier paid for, and (3) the amount and nature of those damages.

If it fails with regard to any one of these elements, there will be no subrogation recovery. Liability carriers are quick to latch on to weaknesses in subrogation files and often deny claims simply because the demand letter doesn't address these three elements satisfactorily. Like a chain, a subrogation claim is only as strong as its weakest link and that weakest link is almost always created early in the claim, when

memories are fresh and evidence is available. The first few days after a loss are critical – the first and often only chance anyone may have to identify, retain, document, investigate and record valuable information on which a future subrogation lawsuit will depend. Things which may seem to have little or no meaning or importance may turn out to be the lynchpin of an entire subrogation action. An ancient parable is relevant here and goes something like this:

A group of traveling nomads was preparing to make camp for the evening, when suddenly they were surrounded by a great light. They knew instantly they were in the presence of a celestial being. A loud voice spoke from the heavens, "Gather as many pebbles as you can. Put them in your saddle bags. Travel a day's journey. Tomorrow night you will be both glad and sad." Then, as quickly as it had appeared, the voice and the light disappeared. The nomads looked at one another in disbelief. They had expected the revelation of a great universal truth – the key to great wealth or happiness. But instead, they were given a menial task that made no sense. Dejected, each one did pick up a few pebbles and put them in their saddle bags. The following morning they broke camp and traveled a day's journey. That evening, while making camp once again, they reached into their saddle bags and discovered that the few pebbles they had gathered the night before had turned into beautiful and brilliant diamonds! Indeed, they were both glad and sad, just as the voice had promised. They were glad they now had beautiful and valuable diamonds. But, they were very sad they had not gathered and filled their saddlebags with pebbles when they had the opportunity.

Subrogation investigation is much like the opportunity the nomads had to gather pebbles. You don't know which pebbles might turn out to be valuable, so you conduct your investigation promptly as though they are all valuable. It is important to lock witnesses into positions and testimony favorable to your subrogation case, before the other side gets a hold of them. It is sometimes urgent and legally necessary to place government entities on notice of your claim. Early and thorough investigation often uncovers additional third parties and sources of recovery, including the occasional existence of other insurance which may be available to contribute to the loss.

When the cause of a loss seems apparent, don't stop with simply securing the evidence needed to prove your case. Bear in mind that the targets of your investigation will almost always find alternate causes and persons to blame, and will

quickly cry spoliation if evidence which they claim may exonerate them is gone or damaged. Think like the defendant. Take efforts to disprove and eliminate the alternate theories your subrogation counsel will ultimately face. If the claim is significant, engage subrogation counsel or an investigator to conduct the investigation and take thorough statements of all witnesses and, if called for, timely engage experts who are qualified and experienced.

The extra work of properly investigating a claim often deters claims handlers from stuffing their saddlebags full of pebbles, but every case is different and it is often the pebble you leave behind that turns out to hold the key to a full recovery. The pebbles might not turn into brilliant diamonds as in the parable, but they literally can and often do translate into subrogation dollars realized.

About Gary Wickert

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