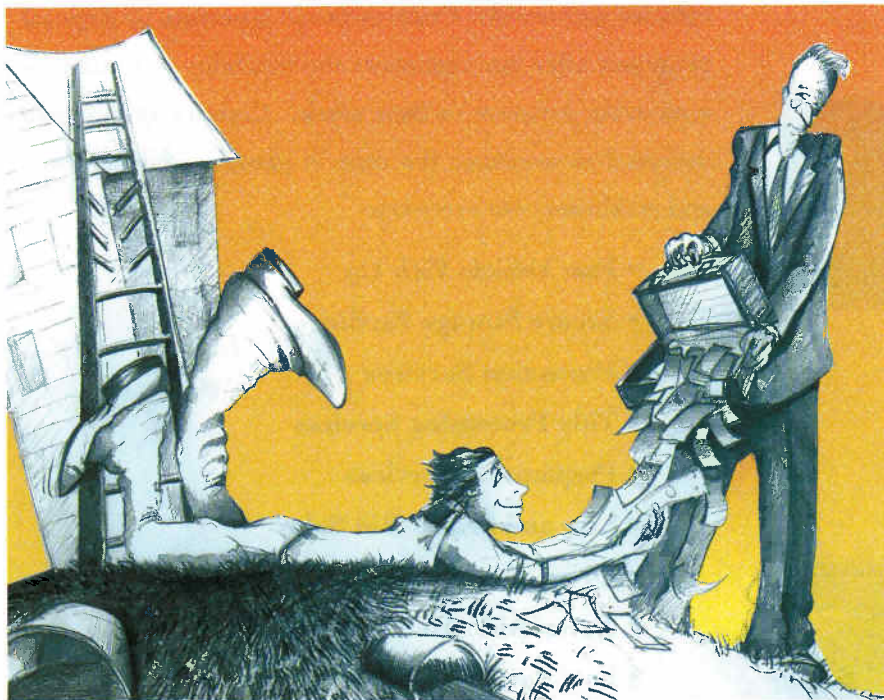


Many Insurers Overlook Advantages of Subrogation

by Gary L. Wickert and Stan. F. Nelson



Ammond DeLaBruere

PERSPECTIVE

Subrogation is an often overlooked but excellent strategy for recouping insurance losses, and it tends to be underutilized for two reasons. The first is the basically defensive mindset of the insurance industry. Insurance companies tend to think about protecting themselves against attack, rather than about actively seeking out solutions that benefit their bottom line.

Subrogation calls for insurance companies to think like plaintiffs, and this isn't something they're used to doing. In fact, historically the insurance industry often has done little more than pay lip service to its subrogation rights. Companies often send a notice to a potential third-party tort-feasor but don't follow up.

Second, insurance companies

often are shoddy in their investigation of a case's subrogation potential. For instance, in 1989 a 22-year-old electrician's apprentice was standing on a ladder's third rung while installing a ballast in a fluorescent light fixture at a Houston health care facility. The young man received an electrical shock and fell backward off the ladder. The accident left him brain damaged and a spastic quadriplegic. His employer's workers' compensation carrier quickly paid out seven-figure benefits and was faced with catastrophic reserves.

A preliminary investigation by the claims handler revealed that the young man had failed to turn off the power to the electrical grid on which he was working. Although the investigation was still in its infancy, the claims handler marked the file "no subrogation potential" because he assumed that the injured person had been at fault. Subsequently, however, a full-service subrogation firm was brought into the investigation. Its research revealed that the electrical

grid had been designed and installed in a way that made it impossible to shut off power in entire sections of the building without also cutting off power to critical care facilities. There even had been incidents in which journeymen electricians received shocks after their request to shut off certain power grids was denied.

A subrogation suit was hastily filed on the evening before the statute of limitations was to run out. The carrier eventually recovered \$1.5 million in satisfaction of its lien and an additional statutory credit of more than \$5 million.

Cases like this aren't unusual. In fact, three of our largest subrogation recoveries came in cases where the files read, "No subrogation exists!"

Proactive, aggressive subrogation programs and policies make sense for major insurance companies, third-party administrators, small claims handling offices and insurance agencies alike. Increasingly, clients and insureds are calling for the recovery of every possible dollar, and subrogation is an effective way to respond to this demand.

A strong subrogation strategy has four basic elements.

First, it's necessary to educate claims handlers, adjusters and agents about the importance of subrogation. It's often a good idea to send employees to accredited continuing-education seminars on subrogation, where they learn not only how to recognize subrogation opportunities, but what actions to take that will maximize any subrogation potential.

Employees need to be reminded that in many types of subrogation, more is at stake than the actual dollars collected. For instance, in workers' compensation subrogation, the real value of subrogation may lie in the extent to which it may allow a large reserve takedown.

Some employees may not feel it's important to know about the benefits of subrogation. How, for instance, do you convince defense-minded claims managers, whose only aim is to keep their department's costs down, that it's actually in their interest to implement an aggressive subrogation plan? The answer is by encouraging them to look at the bigger picture. Remind them that every dollar recovered erases a dollar paid out and not only increases the profitability of their own depart-

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ment, but of their company as well.

And what of the claims handlers who view subrogation as an onerous duty, not an opportunity? Use the "carrot approach" and show them how successful subrogation actions on their part are good not only for the company, but can benefit them personally. You will need to have a reward or recognition program in place to use this approach effectively. Or, by using the stick approach you can make it clear that subrogation is an important company policy and employees are falling down on the job if they ignore it.

Second, subrogation action should be taken as soon after the loss as possible. Claims handlers usually receive prompt notice when a loss has occurred. It's important to take advantage of this by getting the right subrogation counsel, investigators and experts involved while the evidence is fresh and memories are clear.

The third key to a strong subrogation program is to set clear goals. A system of rewards and/or recognition for subrogation efforts will send a clear signal to a company's employees about its strategic importance. So will setting monthly or annual subrogation goals and insisting that they are met.

It's critically important to work with the right firms and people. A

case in point involves a worker who suffered a lingering death after becoming entangled in a heavy-duty conveyor system. The employer's workers' compensation carrier hired a local "expert" to investigate the loss for purposes of subrogation. A few days later, the carrier received a report

from the expert detailing a complex web of relationships among the corporations that were variously involved with the facility as its owner, its operator and as a lessor of employees. Assuming that Company A was the employer of the fatally injured worker, the expert's written report went on to opine that Company B had been negligent and Company C had been grossly negligent with regard to the worker's death. Imagine

the look on the claim supervisor's face when, after the report had already found its way into the hands of the plaintiff's attorney, it turned out that the actual employer of the deceased employee at the time of the accident was Company C! The employer's carrier promptly settled the gross negligence claim and there was no subrogation recovery.

SUBROGATION SPECIALTY FIRMS

More and more companies are turning to full-service subrogation specialty firms to aggressively seek out subrogation opportunities. Defense law firms frequently assign subrogation claims to junior associates, often with disappointing results. Small firms and sole practitioners often lack the time, and sometimes the know-how, to pursue subrogation possibilities vigorously. Full-service subrogation firms pose neither of these risks. They have the requisite expertise, and they also bring a "plaintiff's-bar" mindset to the job, aggressively seeking ways to recoup current and prospective claims.

Look for a firm that provides the following services:

- Presents accredited continuing-education seminars to educate claims handlers
- Provides intelligent, useful feedback about specific subrogation issues
 - Works under creative, common sense fee arrangements
 - Provides expert witness information and witnesses
 - Offers high quality subrogation litigation services in venues from coast to coast
 - Helps set up and/or implement subrogation procedures, policies and evaluation programs

It will not be easy for the insurance industry to alter its attitude toward subrogation. As E.B. White said, "The only sense that is common, in the long run, is the sense of change—and we instinctively avoid it." But there's motivation for the change. It comes neatly gift wrapped in the form of recovered subrogation dollars.

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something they're
used to doing.**

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