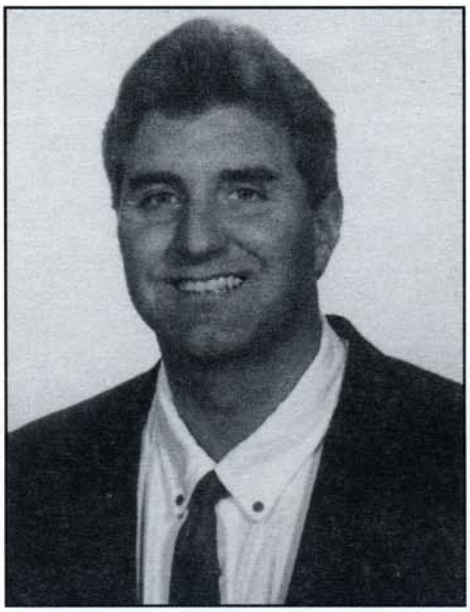
Subrogation and the Self-Insured



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Subrogation is an excellent way for self-insureds and companies with large self-insured retentions to recoup losses paid in connection with workers' compensation, property and casualty, and other claims. It is a vehicle by which the company can mitigate or completely eradicate a significant loss, thereby increasing profits and reducing the company's loss ratio.

Workers' Compensation Claims

In 1991, the Texas Workers' Compensation Act underwent a major overhaul. One of the major changes in the new Act was the express authorization for companies to become self-insured for workers' compensation. Chapter 407 of the Labor Code sets forth the rules and regulations relating to self insurance for workers' compensation. The primary reason for becoming self-insured is to avoid the prohibitive premiums associated with traditional insurance policies. It is important that human resources personnel and general counsel with Texas companies understand their subrogation rights under the Texas Workers' Compensation Act. Chapter 417 of the Labor Code sets forth a self-insured's right of subrogation. If an employee is injured on the job, thereby obligating the self-insured to pay benefits and medical expenses in connection with the employee's workers' compensation claim, the self-insured may be able to recover the benefits and medical expenses it has paid from the party responsible for the employee's injuries. The potential is there for a self-insured to recover every dollar it has paid in connection with a workers' compensation claim from the responsible tortfeasor.

Since most companies do not have the expertise to adjust workers' compensation claims, they hire insurance carriers and/or third-party adjusters to act as servicing contractors to handle workers' compensation claims. Many believe that the servicing contractor will take steps necessary to protect the self-insured's right of subrogation. Don't make the mistake of totally relying on the servicing contractor to investigate subrogation potential and to pursue subrogation on your behalf. The self-insured is in the best position to investigate the claim since it has access to the employee, accident site, and instrumentalities involved in the claim. Many subrogation dollars are lost because neither the self-insured nor its servicing contractor promptly investigate subrogation potential. When faced with investigating large losses, self-insureds should immediately consult with subrogation counsel. The Texas Workers' Compensation Act provides that the injured employee's attorney can make a claim for attorneys' fees and a proportionate share of expenses against the self-insured in connection with the self-insured's recovery, if the self-insured does not actively participate in obtaining the recovery.

Property & Casualty Claims

Like workers' compensation claims, the self-insured has a right of subrogation in property and casualty claims. However, unlike workers' compensation claims, the self-insureds' right of subrogation in property and casualty claims is equitable, not statutory. The distinction between a statutory right of subrogation and equitable subrogation may be negligible for the self-insured. With property

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and casualty subrogation, like workers' compensation subrogation, the key to making a successful subrogation recovery depends upon the investigation conducted by the self-insured. Immediate subrogation investigation is especially important in fire cases where the origin of the fire may be altered almost immediately after the fire is extinguished. Valuable evidence can be destroyed or lost within hours after a fire. Cargo and inland marine claims can occur virtually anywhere. In these cases, it is vitally important to obtain subrogation counsel and the appropriate experts immediately to visit the scene of the loss before it is altered and before evidence is removed. Many companies now have a very high self-insured retention on their property and casualty insurance policies in order to lower their yearly premiums for this coverage. As a result, many property and casualty claims will fall within the self-insured entity's self-insured retention. Although the company's insurance carrier may investigate the claim, the carrier faces no exposure if the amount of the claim falls within the self-insured retention. As such, it may have limited motivation to evaluate and investigate subrogation potential adequately, and this responsibility then falls on General Counsel.

Other Subrogation Opportunities

A self-insured's right of subrogation is not limited only to workers' compensation or property and casualty settings. Fidelity and surety cases and group health claims are also fertile ground for subrogation recoveries. In the recent case of *Lancer Corporation vs. Murillo*, 1995 WL 521148 (Tex. App. — San Antonio, September 6, 1995), a subrogating self-insured company that had paid health benefits on behalf of an employee was ordered to pay the plaintiff's attorneys' fees equal to one-third of its subrogation recovery, together with significant litigation expenses, all because it did not actively pursue its subrogation interest. Prior to *Lancer*, all a self-insured had to do to recover all of its subrogation interest was simply contribute to the subrogation effort. However, after *Lancer*, self-insureds who recognize subrogation, but who do not actively pursue the claim, will find a smaller pot at the end of the subrogation rainbow.

Retaining Subrogation Counsel

More and more companies are turning to law firms that specialize in handling subrogation to assist them in recognizing and promptly acting on subrogation opportunities. Defense firms frequently assign subrogation claims to junior associates, often with disappointing results. Likewise, small firms and sole practitioners often lack the time, and sometimes the expertise, to pursue subrogation possibilities vigorously.

Whenever your company suffers a potentially large loss, take steps immediately to insure a complete investigation of the claim in anticipation of subrogation. If you have a self-insured retention, immediately notify your insurance agent and/or carrier. Document your investigation of the claim in anticipation of subrogation litigation. Interview witnesses, injured parties, and even potential target defendants as soon as possible to nail down future testimony. You may want to consider retaining an expert qualified in the particular discipline involved, and arrange for an immediate visit to the scene, instructing the expert not to reduce any opinions to writing until advised to do so by subrogation counsel. Photograph and/or video every aspect of the claim and surrounding area and preserve any evidence, products, or other tangible documentation, owner's manuals, training manuals, or other paperwork relating to the incident. Instruct your employees not to discuss the case with any outside source unless it is approved by you. You should consult subrogation counsel early and involve them in the investigation. Subrogation speciality firms normally provide comprehensive investigative services and their services should be considered in potentially large claims. Failing to pursue subrogation possibilities aggressively could be the difference between making a full recovery and no recovery at all. ■

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