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Ten Subrogation Mistakes Insurance Companies Keep Making

By Gary L. Wickert

"Show me the money."* – Rod Tidwell in *Jerry Maguire

This year is the 20th anniversary of the 1996 romantic comedy *Jerry Maguire.* Its director, Cameron Crowe, just published the entire 5,000-word mission statement he wrote for his crisis-hit sports agent played by Tom Cruise. The memo, entitled *The Things We Think and Do Not Say* laments some of the dysfunctions within the world of sports agents and endeavored to improve the profession. In many ways, this article is also a mission statement revealing critical mistakes we see with some frequency within the industry and providing suggestions as to how to avoid repeating them. Subrogation is the necessary evil of recovering as much of our insureds' claim dollars as possible in order to help hold down insurance premiums and soften the blow a claim event might otherwise have on them. No industry is perfect, and insurance is no exception. Thirty-three years of subrogation litigation experience has distilled ten of the most common mistakes which we see clients continuing to make when it comes to recognizing and acting on subrogation potential. I divulge and discuss them in this article, much like Jerry Maguire did, not as a criticism of the clients to whom we owe the living we make, but as a healthy reminder to those who do not wish to repeat them. The following are the ten most common mistakes we see repeated within our industry in order of the frequency with which we see them made.

(1) DELAY OF GAME PENALTY: Waiting Too Long To Involve Subrogation Counsel

The dollars lost because claims with subrogation potential are referred to subrogation counsel mere weeks, days, or even hours before a statute of limitations or other deadline is about to expire, is almost incalculable. I refer not to cases in which subrogation potential is discovered late or notice of a pending third-party action filed by the insured or claimant is received late in the game. Rather, I refer to files in which subrogation potential is obvious, but a conscious decision is made to avoid incurring subrogation attorneys' fees or costs resulting in the wholesale avoidance of referring the file. Claims deteriorate with age and we see far too many files entrusted to us at the very last moment which contain literally dozens of identical demand letters – with little or no substance or subrogation "proof" to support them – sent to the third-party carrier every six weeks like clockwork for years, each a carbon copy of the one which preceded it. When the file is submitted to subrogation counsel with very little time left on the clock, there is frequently no opportunity to conduct a thorough investigation. Evidence has disappeared or been destroyed. Deadlines have passed. Lawsuits have been settled. Releases have been signed. Witnesses have vanished or been "reached" by the other side. Money has been lost. It is the number one subrogation-killer we have seen over the years, in terms of the volume of dollars lost and the number of claim files.

The most surprising aspect of this particular insurance practice is it appears to transcend file size. It is one thing to sit on a $3,500 med pay claim – quite another on a $350,000 workers' compensation claim. Trial lawyers have developed a well-known body of law in almost every state which allows them to take tremendous advantage of carriers who protect their interests either passively or not at all. Subrogation is a serious investment that deserves both respect and a dedication of time and resources. A successful subrogation program is never an accident and it cannot be developed as an after-thought or a last resort. It is always the result of a commitment to excellence, informed decision-making and planning, subrogation knowledge, an investment of time and money, and an intensely-focused effort and perseverance.

(2) A HOT CUP OF MCDONALD'S COFFEE: Failure To Recognize Third-Party Liability

The biggest obstacle to larger and quicker subrogation recoveries is us. We are our own worst enemy. Our industry is, by design, steeped in the mind-set of limiting liability. Even the most experienced claims adjusters see the comparative fault of their insured before they see the liability exposure of the tortfeasor. Your defense lawyers see a myriad of ways to defend a claim, but very few ways to aggressively prosecute one. It is what makes them good at what they do. Our industry shares a defense myopia that has served us well in the defense of claims of all types and sizes. Human nature dictates that we sing for life the song we learn in our youth. As stated so poignantly in the Suzzy Kassem anthology, *Rise Up and Salute the Sun*:

> *If the Creator stood before a million men with the light of a million lamps, only a few would truly see him because the truth is already alive in their hearts. Truth can only be seen by those with truth in them. He who does not have Truth in his heart, will always be blind to it.*

Claims professionals are often blind to liability. Your greatest strength is also your greatest weakness. As subrogation counsel, we are plaintiffs' trial lawyers for the insured industry; hired guns that push your subrogation claims to the maximum – the only way to achieve maximum recovery in each file. It is what makes us good at what we do. Claims professionals reminisce at the water cooler about the ridiculous verdict in the McDonald's hot coffee case – a case which has become the poster child for tort reform across America. Yet, the true facts of the case reveal a well-litigated claim, an aggressive trial lawyer, and a brash, cavalier defense in which the defense witnesses gave off an air of indifference to the 700 serious burn cases which preceded those of the 79-year-old grandmother named Stella Liebeck, whose full thickness third-degree burns over 6% of her body, including her inner thighs, perineum, buttocks and genital and groin areas, put her in the hospital for eight days while she underwent skin grafting and burn debridement treatment. They looked past the fact that Stella lost 20 pounds (nearly 20% of her body weight), reducing her down to 83 pounds. They ignored the fact that her grandson was driving and he had pulled over in a McDonald's parking spot while attempting to pull the far side of the lid toward her to add sweetener, when the cup exploded in her hands. Two years of medical treatment and extensive medical bills followed. The creativity and aggressive pursuit of that infamous case should be the poster child for aggressive subrogation programs rather than a case to be ridiculed as emblematic of an out-of-control civil justice system.

Subrogation opportunities are most frequently disguised as hard work, so it is no wonder they are often not recognized. Our industry is no stranger to hard work. But, human nature is such that the over-worked claims professional with a full plate simply adjusting claims will rationalize away subrogation opportunities because it means willingly accepting more work and more responsibility. Compound this with the fact that recognizing third-party liability often requires thinking like a plaintiff's attorney and having a working knowledge of tort law from premises liability to product liability. It requires in-depth knowledge of statute of limitations and repose, and an ability to make quick and accurate decisions regarding engaging experts, putting the right people on notice, and taking steps to preserve rights which could easily be lost. Wearing two hats is never easy, but subrogation requires exactly that. Dedicated subrogation staff makes overcoming the fatal mistake of not recognizing recovery potential from day one. Irony is a word often misused. But, it is truly ironic that the four largest subrogation recoveries our firm has ever made were all made in cases in which the insurer or their designated TPA had indicated in the file that there was no subrogation potential.

The best way to overcome an innate inability to recognize third-party tort liability is training. A claims handler doesn't have to agree with enforcing third-party product strict liability, but they do have to take every reasonable effort to produce a recovery on behalf of their insured employer. Our firm presents a series of webinars and training programs dedicated to immersing the claims professional in a thorough overview of tort law and tort opportunities. Graduates recognize opportunity and know how and why the fact that simply because your insured does the rear-ending in a rear-end collision doesn't necessarily foreclose the potential for third-party subrogation. Understanding and being familiar with statutory and case law in all jurisdictions gives them the tools to recognize and take appropriate action on subrogation potential that the average claims professional might otherwise overlook. Hard work doesn't guarantee success – but, a lack of hard work almost always leaves significant claim dollars unrecovered.

(3) THE PARABLE OF THE PEBBLES: Lack of Timely/Thorough Subrogation Investigation

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.

Some cases are virtually worthless – even with the best of liability facts - unless some investigation and preservation of evidence is undertaken almost immediately. Premises liability cases involving slip and falls, ice and snow, or dangerous conditions on property require some sort of preservation or recording of the conditions existing at the time of the fall. Such cases depend entirely on whether the condition was "unreasonably dangerous" and "open and obvious." In most cases, relying on the claimant's or insured's memory in order to meet our burden of proof guts such files of virtually all value. Cases involving livestock which escape a fenced-in area and wander onto a busy highway almost always require the subrogated carrier to prove that the livestock owner was negligent. This means proving in court that a broken fence or gate that wasn't repaired or other negligence on the part of the owner caused the accident. This type of evidence can only be preserved at or near the time of the loss and before repairs or spoliation take place.

If a product is involved in a subrogation claim, it is our burden to prove a defect or that there was negligence by a third party in maintaining the product. We also have to prove that the condition of the product was unchanged at the time of the injury or damage from the date it was manufactured. These are impossible burdens to meet if the product is not preserved and the chain of custody is not carefully documented and protected. When an appliance which causes a fire is still under warranty and the repair technician (often an "authorized service company") takes the appliance or the faulty part, this evidence is often misplaced in the shuffle. Sometimes we are able to argue spoliation by the manufacturer, but it much easier and cheaper to simply preserve the part.

When the cause of a loss seems apparent, don't stop with simply securing only the product or evidence bearing most directly on the 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.

Even in inspecting the loss, the client (and sometimes even the expert) doesn't keep any of the evidence. This is especially true when insurance clients try to cut corners by not having an expert out to the loss scene, but instead rely on plumbers or technicians to tell them what failed. The plumbers or technicians may uncover what failed, but they are not qualified to testify to that in court. Unless they preserve the product and other possible suspects the defendant is sure to blame the loss on, an expert retained at a later date will not be able to offer an opinion and the case will be rendered worthless.

Spoliation – the defense that a party to a suit has somehow damaged or lost evidence which is crucial to the defense of a case – is becoming a very popular claim today, even if it doesn't exist. Creative theories which blame products located across the room from a point of origin are frequently used to create doubt in the mind of jurors – often with great success.

Investigate cases early and thoroughly. Choose the right expert and insist on reports which pinpoint a cause and an origin of a fire or a water loss. Ben Franklin's aphorism, *"An ounce of prevention is worth a pound of cure"* is very accurate when it comes to describing the value of investing early in subrogation potential. Kicking the can down the road frequently leads to significant recovery potential being lost or seriously compromised. As Ayn Rand famously said, *"We can ignore reality, but we cannot ignore the consequences of ignoring reality."*

(4) GETTING WHAT YOU PAY FOR: Using Cut-Rate Vendors And Low Bidders Is More Expensive

Many corporate decisions made with the best of intentions can be some of the most detrimental to subrogation performance. This is irony at its purest. When making decisions on ways to "save" money when it comes to subrogation, the real, total cost often looks very different. This "mistake" must be assessed when taking into consideration total costs of out-sourcing subrogation. John Glenn was often asked what he was thinking as he was about to be launched into orbit in the nose of a giant rocket. His reply is instructive: *"Well, the answer to that one is easy. I felt exactly how you would feel if you were getting ready to launch and knew you were sitting on top of two million parts – all built by the lowest bidder."* The trend today is seemingly to fall victim to slick marketing promotions by third-party adjusting companies and subrogation vendors – often owned by larger law firms with control over the employees.

Litigation is rarely cheap, but it is often necessary. Nowhere is this truer than in the area of insurance subrogation, where those who resist paying subrogation claims assume that insurance companies are loath to pull the trigger and file suit. As a result, liability insurers almost never pay full value on subrogation claims with even the clearest liability facts. For decades, the insurance industry have paid special attention to the attorneys' fee line item in their claim department budgets and have gone to great lengths to find the perfect balance between keeping litigation fees and costs in check and maintaining high quality representation. Insurers have turned to litigation budgets, in-house counsel, litigation management guidelines, litigation vendor databases, and law firms with lower hourly rates. An entire litigation cost management cottage industry has sprung up and some insurers have even turned over the distasteful task of disallowing certain lawyer time entries and expenses to cost management vendors whose very existence is justified by cutting as much as possible from fee bills.

The problem of runaway fees began and remains primarily within insurance defense litigation, but the mindset of cutting costs has quickly spread to other areas of litigation, including subrogation, where cost-effectiveness is a built-in requirement. It is difficult to assess whether a large hourly attorney's fee in a defense case resulting in a defense verdict is justified, because it is an open-ended evaluation. Defense lawyers must react to and defend against the case asserted by the plaintiff, whether it has merit or not. A fee of $100,000 which saves $1 million on

a defense file is worth it in hindsight. In subrogation cases, however, cost-efficiency must be built into the handling of every file because subrogation is only as successful as it is profitable. If you spend $5,000 to recover a $5,000 subrogation claim, the only winner is your lawyer.

Subrogation files are most frequently handled on a contingency fee basis, which makes the cost containment goal less elusive, but limits the litigation management options available to the insurer. As a result, one illusion which the insurance industry seems to be operating under is the specious notion that lower contingent fee percentages translate into higher net recoveries and, therefore, a more successful subrogation program. If 33 years of subrogation litigation experience has taught us anything, it is the fallacy behind that premise. The only path to true subrogation success is a genuine partnership between an insurer and a law firm it trusts.

A new generation of opportunistic subrogation and claims vendors, often owned by lawyers who have experienced firsthand the cost-conscious insurance industry's attraction to low rates, have had great success by offering contingent fee rates too good to be true. Idioms which have weathered the test of time usually have a basis in fact and the pejorative phrase "built by the lowest bidder" is no exception. The lowest contingent fees guarantee that many files will be settled for less than their true value and that larger files that should see the inside of a courtroom in order to get top dollar never will. Like insurance catnip, however, the low contingent fees serve up the mirage of fee containment while simultaneously devaluing an entire book of business. The only winner here is the short-lived vendor, who profits by selling short the wheat and leaving the client with the devalued chaff.

The infamous businessman John Ruskin once said, *"It's unwise to pay too much, but its worse to pay too little. When you pay too much, you lose a little money – that's all. When you pay too little, you sometimes lose everything, because the thing you bought was incapable of doing the thing it was bought to do. The common law of business balance prohibits paying a little and getting a lot – it can't be done. If you deal with the lowest bidder, it is well to add something for the risk you run, and if you do that you will have enough to pay for something better."*

We know the above to be true because we are approached weekly by vendors desperate to find lawyers capable of accepting the files that won't settle on an even lower percentage contingency fee basis. We regularly hear from frustrated claims professionals who are being told that files which did not settle quickly and without litigation suddenly have no subrogation potential and should be closed. Decision makers are sold on a PowerPoint presentation and the lure of quick results at bargain basement prices. Without exception, they are later universally disappointed and must scramble to salvage what they can. It is similar to the unfortunate phenomenon of "sign and settle" trial lawyers who advertise using celebrities or sports figures, but try no cases. If a case doesn't settle, they must try to refer the case out and retain a percentage, all but ensuring the further devaluation of the poor victim's case.

A $75,000 recovery in a $90,000 subrogation claim litigated on a 1/3 contingency fee is preferable to a $30,000 recovery on a 15% contingency fee. The subjective nature of subrogation success allows a good file to be easily misrepresented as a bad file in order to justify a quick settlement. Unfortunately, it is often easier for subrogation claims managers to sell an 18% contingent fee than to assess the true recovery potential of a large case which is settling for little or nothing at all. Far too many in our industry go for the quick buck – skimming the cream while leaving behind a treasure trove of subrogation potential to slowly decay until statutes of limitations are mere weeks from running. Taking the road less travelled means that the bulk of files referred by such vendors have less than 30 days left before being time-barred. Lawyers know the number of hours necessary in order to ready a file for trial and, if that number exceeds the potential profitability of success based on a reduced contingency, they won't stay in business long. The subrogation vendor working on cut-rate contingency fees is faced with that stark truth when they try to assign to counsel the majority of files that do not settle quickly at discounted value. When even lower rate vendors undercut the cut-rate vendors, the result is disaster. For these entrepreneurial opportunists it is not about getting good results across a wide spectrum of files for their client – it's about making any promise necessary to get the business in the door and milking the files for settlements the client could have achieved with just a phone call. Unlike law firms, subrogation vendors don't have to follow attorney ethics rules and obligations and owe no fiduciary duty to ensure that the client's best interests are being served. Time and

time again we see independent audits revealing millions of dollars unrecovered and left on the table and, by then, it's often too late.

The argument against entrusting your subrogation files to a vendor who will only be paid 22% as opposed to one-third is counter-intuitive. But, intuitive isn't always right. For example, if a bat and a ball together cost $1.10, and the bat costs $1.00 more than the ball, how much does the ball cost? Most people's quick answer – ten cents – like most people's instinct on the value of sending off your valuable subrogation files to the lowest bidder – is wrong.

Cheaper is rarely better. My favorite ice cream store has a sign: *"You can find cheaper ice cream somewhere else; if you want cheap ice cream, go there."* Litigation is not a "commodity". It is a professional service like brain surgery and engineering. When you need it, you have to get it right. If your adversaries win by paying significantly less than what they owe, the entire industry suffers. You cannot lose when subrogating on a contingency fee, but those who fall for the idea that this isn't enough, can lose everything to cut-rate percentages. As a law firm, we sell expertise, value, and proven results. The three go hand-in-hand. Clients who think they want cheap rates occasionally go elsewhere, but we inevitably see them back again – wiser and more determined to understand what it means to win. It takes hundreds of hours to properly develop a case for trial and to try it. Law firms know their margins and, try as they might to avoid doing so, the 22% file is rarely worked aggressively enough to give the client a fighting chance at trial. All parties end up relying on reducing a subrogation demand deep enough to resolve a file. In the end, money is lost – not saved.

Successful subrogation requires that the pointy end of the subrogation sword – a genuine threat of litigation – must always be hanging over your adversary's head. Value, experience, legal knowledge, availability, prompt and thorough reporting, and the willingness to strong-arm top dollar recoveries in every matter entrusted to it are the trademarks of a good litigation law firm and a good subrogation department. Everything else is smoke and mirrors. Successful subrogation requires the best – not the cheapest. Recall the story of the engineering consultant who was called to repair a broken machine that had brought a factory to a stand-still. He tightened a single screw and within about five minutes the whole factory was back on line. When a $1,000 bill was received, the factory owner was outraged, "You spent just five minutes here, tightened one screw, and we received a bill for $1,000!" The consultant smiled, "The tightening of the screw was free. The $1,000 was for knowing which screw to tighten!"

There are no short cuts in life, and that includes subrogation. Fast food is popular because it's convenient, it's cheap, and it tastes good. But, the real cost of eating fast food never appears on the menu and is rarely discovered until it is too late.

(5) SLEEPING WITH THE ENEMY: Relying On Plaintiff's Counsel To Protect You

"From a place you will not see comes a sound you will not hear", is the famous line dealing with special forces snipers. It describes the inevitable when insurers think they have "teamed up" with plaintiff's counsel for protection of their lien. The illusion which many insurers operate under is the perceived "savings" which result from not engaging counsel and relying instead on the plaintiff's or insured's attorney to protect and safeguard their subrogation interests. Trial lawyers are shrewd and suggest such arrangements because they know their victims. The idea of a plaintiff's attorney protecting your valuable subrogation interests runs contrary to the ethical duty these lawyers have. They are ethics-bound to zealously and aggressively represent their client's interests, not yours. Their number one mission is to make sure you take as little of your subrogation interest home with you as possible, and then bill you for the privilege of succeeding. When relying on plaintiff's counsel for their "take" on litigation, it is almost always dismal, and trial lawyers know that when the hen comes to the fox for advice, the result is never pretty. One of the most common type of subrogation files we see is one in which our client thought they had an "understanding" with the plaintiff's attorney that he or she would protect their interests. Everything goes well right up to the point where it doesn't. Frequently, motions to eliminate the lien or subrogation interests are filed just a few days before a hearing date. Scrambling to protect interests this late in the game almost always result in lost recoveries.

If your claim is small enough that entrusting plaintiff's counsel with your interests, despite the above, is still the more cost-effective course of action, make sure that you have, in writing, an agreement which spells out that you are a "client" of the attorney just like the claimant or your insured. This will go a long way toward deterring the attorney from not keeping your best interests protected.

(6) DETECTING AND CURING SUBROGATION CANCER: Failure To Discover Indemnity/Waiver of Subrogation

A frequently-seen obstacle to successful subrogation is the waiver of subrogation. Waivers of Subrogation are a necessary evil of underwriting, but their application and effect on subrogation are rarely understood. One of the ways to avoid subrogation is through the implementation and enforcement of waivers of subrogation. Just as the insurer has a legal right to pursue subrogation, so too does a party to a commercial transaction have a right to structure the transaction so that the party's legal rights of recovery against another party are abrogated or somewhat limited. Such clauses, known as exculpatory clauses, have as their intent and effect, to limit a party or that party's insurer from subrogating against another party to a transaction. Obviously, the existence of contractual limitations to subrogation must be discovered during the due diligence investigation of subrogation potential and should be revealed to subrogation counsel as soon as possible. Spending significant time and money on recovering large subrogation dollars only to discover that a waiver of subrogation endorsement to an insurance policy cuts us off at the knees is worse than if subrogation had not been pursued at all.

A "waiver of subrogation" actually involves two separate provisions:

1. A waiver of subrogation clause contained in the contract between the parties; and
2. A provision in the insurance policy, or an endorsement to that policy, granting permission to the insured to waive in writing, recovery rights against the others prior to loss.

Waivers can be found in CGL policies, commercial auto policies, workers' compensation policies, and commercial property, builders' risk, and inland marine policies, to name a few. In the workers' compensation context, however, even if a waiver of subrogation exists, a sin worse than not discovering the waiver in the first place is giving up on subrogation because of a waiver which technically would not bar you from seeking a subrogation recovery or a future credit. The first mistake might be issuing a waiver of subrogation endorsement without adequate consideration or premiums charged. However, once issued, it is important to understand what a waiver does and doesn't do. We see far too many companies giving up on subrogation because of a waiver which will not prevent them from subrogating, seeking reimbursement, and/or, at least in the area of workers' compensation, obtaining a significant future credit.

Typical waiver of subrogation endorsement language reads as follows:

> *We have the right to recover our payments from anyone liable for an injury covered by this policy. We will not enforce our right against a person or organization named in the Schedule, but this waiver applies only with respect to bodily injury arising out of the operations described in the Schedule where you are required by a written contract to obtain this waiver from us.*

As you can see, there are lots of conditions which must be in place for the waiver to be applicable. Even if it is applicable, clients routinely think that their right to reimbursement and their right to a future credit are also waived. This is not always the case, and failure to act on subrogation due to a misunderstanding of when rights are waived and when they aren't continues to be a problem we see costing the industry a lot of money.

(7) SHARING THE GOOD NEWS: Giving Notice To Carriers, Government Entities And Product Manufacturers

Refraining from doing some of the simplest acts can result in some of the largest subrogation potential being lost. Notice requirements necessary to preserve and protect subrogation claims are very common, and vary from state to state. They present a procedural trap and a pitfall for the unwary subrogation claims handler. We frequently see significant claims lost because notice requirements with short fuses receive a back seat to the busy activity of adjusting a new loss – especially early in the claim. Notice is required in many states in as short a time as thirty (30) days. A notice of claim against the city of Austin must be filed within forty-five (45) days or be lost forever. An intervention for workers' compensation subrogation must be filed within thirty (30) days of the carrier having

notice of a third-party complaint being filed, or it can recover nothing. If our insured settles a personal injury claim with a tortfeasor prior to us giving notice of our subrogation interest to the liability carrier, no matter how quickly the settlement occurs, our subrogation rights as against the tortfeasor are lost forever. In almost every state, if the claimant settles a third-party bodily injury action before we have placed the claimant's attorney on notice, our right of reimbursement may be jeopardized and the ability to pursue the only entity with money left in the bank – the attorney – might be barred.

Notice to governmental entities must strictly conform to statutory guidelines and contain specific items of information in order to be valid. Frequently, we see "form" notice letters being sent to such entities, and only months or years later do we receive the file, and by then it is too late. Notice to a plaintiff's attorney that we will not need his services and do not want to contribute toward common fund attorneys' fees is necessary in order to avoid significant portions of our subrogation interest going into the bank account of the insured's attorney. Yet, we often see notice – or notice in the incorrect form and with insufficient information – not given in a timely manner. These become expensive letters that we didn't bother to write, and quite often, there is nothing subrogation counsel can do to turn back the hands of time and fix the problem.

In the workers' compensation arena, notice is frequently required in order for the carrier to file suit, intervene, or settle a subrogation claim. Notice against the federal government must be filed on a government-prescribed form, or, in the alternative, it must contain precisely the same information as requested on the form.

The failure of clients to give adequate notice to the property party in a timely manner remains a common mistake leading to the elimination of subrogation potential across all lines of insurance. Unless our client knows that notice required, how to file it, what must be included, and who to serve it on, the notice is often simply overlooked.

(8) CROSSING STATE LINES FOR MORAL PURPOSES: Multi-Jurisdictional Opportunities And Pitfalls

Under the U.S. Constitution, each state is still considered sovereign and each state controls the laws within its boundaries. Things get complicated, however, when a vehicle insured and garaged in one state is involved in an accident in another state. The legal issues involving conflicts of law, at least with respect to subrogation rights, concern themselves with one question: "Which state's subrogation law should be applied to a particular lawsuit?" The actual process by which a court determines which state's law to apply is sometimes referred to as "characterization" or "classification." The actual determination of which state's law is to apply must be made in accordance with the law of the state in which the court is sitting, which is most often the state in which the accident occurred.

Courts have used a variety of approaches to determine which state's law applies to an auto insurance carrier's subrogation interest in a lawsuit filed in a state other than the state in which a vehicle is insured and garaged. This area of law is known as *Conflict of Laws.* The three main approaches used to determine which state's law applies in situations such as these are the following:

(1) *Lex loci delecti* – applying the law of the forum state in which the tort or accident occurs;

(2) *Larson Rule* – (workers' compensation) applying the law of the state where the benefits are paid (enabling state) to a recovery made in a different state in which the third-party action was filed (forum state). This is the same as the *Restatement (Second) of Conflicts of Law* § 185; and

(3) *Most significant contacts* – applying the law of the state with the most significant contacts to the incident.

Some states have not declared what their rule is, and handle extra-territorial situations on a case-by-case basis. In fact, some states which apply rule number (3) above must look at the facts and circumstances of each case to determine which law applies.

Opportunities to game the subrogation system frequently present themselves in the area of workers' compensation insurance. In today's national and global economy, employees are routinely traveling in the course and scope of their employment throughout the country, and are getting injured in states other than the state

where the employer is based. Employers with multi-state operations are regularly encountering workers who are being injured and claiming benefits in states other than the state where their home office is located. When attempting to subrogate for workers' compensation benefits, this can lead to a wide array of confusing results. Most state workers' compensation laws are extra-territorial. This means that an employee in the enabling state (the state in which he was hired and under whose laws he recovers benefits) who suffers an occupational injury or disease while outside of its boundaries in a forum state (the state in which the worker is injured and files a third-party action), is still eligible for workers' compensation benefits under the laws of the enabling state. In some circumstances, the employee who is injured in another state may choose to collect benefits either in the enabling state or in the forum state.

We frequently see clients who have the ability to select the payment of benefits under one jurisdiction picking a different jurisdiction even though the selection forecloses any possibility of future subrogation. For example, one state may give an employer and its workers' compensation carrier first money rights of recovery (such as Texas) while another state may disallow your subrogation interest unless and until the worker is "made whole" (such as Georgia). Knowing which state's subrogation law to apply is critical in evaluating your subrogation potential and recovering your subrogation interest. If Texas benefits are selected relative to a Georgia accident and a Georgia third-party lawsuit, however, subrogation is destroyed because Georgia only allows subrogation when benefits are paid under Georgia law. Therefore, the littlest decision – often the very first decision made – can have devastating consequences and cost literally millions of dollars in subrogation dollars, all because the necessary homework with an eye toward subrogating was not performed ahead of time.

(9) STEPPING OVER DOLLARS TO PICK UP DIMES: Waiver of Lien To Settle Comp Claims Or EL Claims

Whether it's a case of the tail wagging the dog or the simple fact that insurance companies see their primary responsibility as that of adjusting and concluding "claims", we all too often see a client with significant subrogation potential waive a $500,000 workers' compensation lien in order to take down $75,000 in reserves on a pending claim. It is simple and quick, and because they do not yet have the $500,000 in hand, it becomes Monopoly money. The importance placed on closing a file often clouds the more economically sensible decision to wait until the subrogation claim settles and take a large future credit which will have the effect of closing the workers' compensation claim without having to waive half a million dollars in potential recovery.

Sadly, decisions such as these are often made at levels far above those of the front-line subrogation professional, who learns after-the-fact, that despite significant efforts spent to effect a large recovery, the lien is waived and subrogation is gutted. Left holding the bag, of course, is the employer, who has a vested interest in seeing a large subrogation recovery and a reserve takedown, so that its risk modifier is favorably affected and future workers' compensation premiums do not go through the roof.

States which allow employer liability claims, including contribution claims (*e.g.,* Illinois and Minnesota), also present "opportunities" for a carrier to waive a significant lien in order to settle an EL claim worth considerably less. While there are other considerations at play, such as attorneys' fees for the defense of the EL claim, large liens are often abandoned for the settlement of much smaller contribution claims without much financial analysis. Defense counsel's job is to resolve the EL claim or the compensation claim, so their recommendation to the client usually consists of waiving subrogation – without regard to the net effective gain or loss.

(10) SUBROGATION AND THE FLAT EARTH SOCIETY: Hiring The Right Expert

In modern litigation – especially subrogation litigation involving defective products, premises liability, negligent maintenance, or medical negligence – expert testimony may be necessary to prevail. The first rule of subrogation is "Do no harm." This rule is violated when experts who are not qualified to support a subrogation claim area are engaged. Experts represent an expense of litigation – a necessary evil for subrogating carriers. However, in an effort to minimize costs, many carriers rush into broad agreements with "expert" vendors who offer "cut-rate" fees and a sliding menu of services. All too often, we see "expert" reports authored by investigators and technicians who are not qualified to offer testimony in court. It is human nature to tend toward the path of least resistance, and engaging the same company over and over, regardless of their areas of expertise and credential,

to author a report which does nothing more than state "the fire started somewhere under the hood", has become quite common. Unfortunately, the failure to hire the right expert is often worse than hiring no expert at all. At the same time, subrogation professionals cannot afford to hire the best available expert in smaller cases. Compromises must be made. All too often we see our clients settling for experts who are not experts and who author reports which say little or nothing at all. Such an effort is a complete waste of time and money. More importantly, it damages recovery potential.

Manufacturers of defective products know their products much better than you do, and they have a routine of responding to a defective product allegation down to an art. They are familiar with their electrical schematics and engineering diagrams, while our expert may have to learn from scratch. It is said that an expert is one who knows more and more about less and less. Every state has specific requirements about what is necessary in order to allow an expert to testify.

Subrogation counsel should be prepared to provide you with a number of potential experts immediately after a loss occurs. They should be able to walk you through the process of setting up an inspection and destructive testing of a potentially-defective product. In the right case, choosing the best available expert means the difference between a large recovery and no recovery at all.

HONORABLE MENTIONS

- Signing Releases With Indemnity
- Ignoring The Subrogation Duty We Owe To Our Insured
- Ignoring The Small Files
- Giving Up Too Early Once Indemnity or Waiver Agreement Discovered
- Get Appraisal in Residential/Dwelling/Building Total Losses
- Grading On A Curve: Giving Yourself an "A" for "D" Work

SUMMARY

The above ten areas are areas in which we most commonly see costly mistakes being made. Over the years, we have learned that good decisions come from experience, and experience comes from bad decisions. That may sound like making bad decisions is a good thing, which isn't true. However, bad decisions permeate every industry and every profession. Making the most of those bad decisions – learning from them and taking steps to avoid remaking them – is the hallmark of a progressive company. They can be expensive lessons to learn. *"Experience is simply the name we give our mistakes,"* Oscar Wilde famously said. Quite frequently, the subrogation mistakes we see from even the most experienced claims professionals are actually disguised as corporate efforts to save money, streamline, or consolidate. We understand that they are not made in a vacuum and they often begin with the best of intentions. The mistakes we see repeated are sometimes benign. Quite often, however, they turn into very expensive lessons. Whether we learn from these lessons is the true test of both our desire to optimize the recoveries we make and the lengths we will go to in order to fulfill the service – and in some states the "duty" – we owe to our insureds and our clients, for it is often our insured which pays the price for missed subrogation opportunities. As the industry becomes wise to the significant savings which aggressive, cost-effective subrogation can provide, we can no longer ignore the best subrogation practices and techniques available to us. We can only take advantage of our mistakes if we recognize them and strive to avoid repeating them.

If you should have any questions regarding this article or subrogation in general, please contact Gary Wickert at gwickert@mwl-law.com.