

2016 CLM Midwest Conference
June 23, 2016 Omaha, NE

Special Delivery: What Type of “Package” Does the First Party Adjuster Deliver to Your Subrogation Department?

I. Communication Between the First Party Adjuster and Subrogation Specialist is Critical

Insurance professionals are always working to improve subrogation recoveries. Many of those efforts are focused specifically on an insurer’s subrogation program and may gloss over the key role the first party adjuster plays in obtaining recoveries. Whether it be an in-house adjuster or an independent adjuster, the boots on the ground have an important role in the subrogation process. Increasing communication between first party adjusters and the subrogation specialists with whom they work is one easy way to boost recoveries.

The First Party Adjuster is an Important Part of the Subrogation Process

The first party adjuster’s primary responsibility is to adjust the indemnity claim while providing excellent customer service to the policyholder. However, the first party adjuster also serves an important role in the subrogation process. For an insured, the first party adjuster is the face of the insurer. They are the clearinghouse for all questions and concerns through the adjustment process. Many insureds are submitting claims for the first time, or are not familiar with the claim process or subrogation in general. It is important that the first party adjuster help to explain the insurer’s intent to investigate the potential for subrogation and inform the insured that he/she will need to assist with the investigation. By properly managing the insured’s expectations regarding the subrogation process, a smooth foundation is laid for all future communications. This is a critical first step to putting together a well-supported subrogation claim.

First Party Adjusters Should Provide Prompt Notification of Subrogation Potential

In addition to laying the foundation for a smooth subrogation investigation, first party adjusters are the only ones in a position to identify subrogation potential during the first few days after a claim is reported. To the extent relevant evidence needs to be preserved, this can only be done if the first party adjuster promptly notifies the appropriate parties of the potential for subrogation. To facilitate prompt notification, the referral process should be as simple as possible, so that the first party adjuster can easily involve the subrogation specialist and start working together toward their related goals.

Early referral to a subrogation specialist alone can help to improve recoveries. Subrogation claims are often abandoned simply because the evidence has been discarded. For example, a residential water loss may only have subrogation potential if the pipe or appliance that leaked is preserved for further inspection. A first party adjuster can help to secure evidence and seek guidance from the subrogation specialist as to how much evidence to preserve and for how long. The first party adjuster is also the first representative of the insurer to visit the loss site. If a first party adjuster recognizes the potential for subrogation, the site and relevant evidence can be documented with photographs just in case the scene cannot be held. If the scene is later compromised, the adjuster's photographs will be critical to the subrogation claim and a subrogation specialist can help identify what needs to be photographed.

Identifying the potential for subrogation does not mean all first party adjusters should be required to have an in depth understanding of all potential claims. The involvement of the first party adjuster does not supplant the role of the subrogation specialist. However, providing awareness training to first party adjusters allows adjusters to flag certain common claims and promptly get the subrogation specialist involved. Early recognition and awareness is all about getting the subrogation investigation up and running as soon as possible. With varying circumstances and legal issues, the subrogation specialist can work with the first party adjuster to quickly narrow the focus of an investigation, and possibly even quickly identify reasons why subrogation is not viable. Regardless, the sooner the first party adjusters notify the subrogation specialists, the better.

One suggested method for encouraging early recognition of subrogation potential is the inclusion of recovery outcome announcements in periodic meetings or company-wide correspondence. While subrogation specialists continuously track recovery figures, first party adjusters may not realize the difference their participation truly has. Insurers should take the time to recognize an adjuster's role in significant recoveries and also recognize trends showing an overall increase in recoveries for those cases involving first party adjusters who are actively engaged in the subrogation process.

First Party Adjusters are in the Best Position to Obtain Loss Information

First party adjusters are the main line of contact with the insured and in the best position to gather information from the insured. Gathering this information during the adjustment process often yields better results. After the adjustment is complete and the first party claim is finalized, an insured may be frustrated with the process if they feel they were not paid enough, or not paid in a timely manner. This frustration sometimes makes it difficult for the subrogation specialist to obtain assistance from the insured after the claim is complete. The pending adjustment also acts as an incentive for insureds to cooperate and provide information. After the final payment is made, the incentive is gone. Thus, if facts are not verified and documentation not gathered during the adjustment process, the claim may ultimately have a lower recovery potential because of the difficulty in obtaining this information at a later time.

Additionally, early communication with the insured by the subrogation specialist may complicate the insurer/insured relationship. This is especially so if there are coverage issues. The insured may be confused if on the one hand they are being told the insurer may not pay for certain damages, and on the other hand they are being told that the insurer is attempting to be reimbursed for the damages. When investigating claims with potential coverage issues, it may be best to have all subrogation related requests go through the first party adjuster until the coverage issues are resolved.

II. An Easy Way for Adjusters To Positively Impact the Subrogation Claim is to Obtain Additional Claim Documentation

Many times the documentation needed to help prove a subrogation claim is not the same documentation required to adjust a first party claim. Again, this is where the relationship between the first party adjuster and the subrogation specialist is key. The adjuster can help to obtain documents at the request of the subrogation specialist so that the demand to the adverse party is as impactful and persuasive as it can be.

Gather the “Who,” “When, and “Where,” for the Claim

Since the first party adjuster is the main line of communication with the insured, details about the claim are often reported verbally to the adjuster. Additional details may also come from various other sources throughout the adjustment. Many adjusters do an excellent job of reporting these facts via formal adjuster reports or claim file notes. Even more persuasive than an adjuster’s retelling of the facts, is documentation from the source itself. For this reason, it is helpful to include in the claim file police reports, fire department reports, and witness statements.

Additionally, for business entities with commercial relationships, all agreements and contracts between the interested parties is helpful. If a management company is making claim for damaged property on behalf of the owner, the management agreement between the two entities will likely be needed to establish the insured has an insurable interest and the payment was not voluntary. If the claim involves construction, the contracts and change orders with the general contractor and all subcontractors may be needed. A further example relates to claims by public entities. Work for these entities is often done through a request for proposal and bidding process—these types of documents may also be needed. Regardless of the type of claim, the first party adjuster can help the subrogation specialist navigate through the various relationships to obtain the necessary documentation. Early and frequent communication between the first party adjuster and the subrogation specialist helps this process, because it allows the subrogation specialist to identify what documents may be needed and communicate that need to the first party adjuster while all the interested parties are still engaged in the aftermath of the loss.

Gather Documentation Related to Damages

One of the biggest “gaps” between what is needed for a subrogation claim and what is needed to adjust a first party claim relates to the documentation of damage. In the

property context, policies sometimes pay for the replacement cost of real or personal property. However, when asserting a subrogation claim, the responsible party is likely only required to pay the fair market value of the damaged property, which takes into account applicable depreciation. This is akin to an actual cash value calculation. If the first party adjuster has a vendor or specialist out on the scene looking at the damages anyway, it is a great idea to have them go ahead and include an actual cash value assessment with their opinions. Not only will it benefit the subrogation claim later, but it will also save money in the long run, because there will be no need to retain a separate consultant, or have the original consultant re-open their file after they have forgotten most of the factual details.

A valuation of damaged contents involves the same consideration regarding applicable depreciation. If a subrogation specialist sees that there may be a payment for damaged contents, it may be helpful to let the first party adjuster know that detailed information for each item will be necessary for a subrogation recovery. The subrogation specialist may even want to create an itemized chart for the first party adjuster to give to the insured so that all the necessary information is collected. The chart should include columns for the date the personal item was purchased or the age of the item, and another column for how much was paid for it. A column for repairs, upgrades, and maintenance is often helpful as well.

Another category of damage occasionally under-supported is payment for additional living expenses. If a policy covers these expenses, coverage is likely for living expenses similar to that which was in place before the loss. For example, if the insured owns a 2000 square foot condo that suffers fire damage, the insured is generally paid for a 2000 square foot rental during the repair period. On the subrogation side of things, it is helpful to have documentation showing that the rental is actually similar. Sometimes a letter from the rental company or even an email string discussing possible rentals can be enough, but the more detail, the better the chance of recovery. Also needed is proof that the insured actually incurred the rental expense. If invoices aren't provided, a liability adjuster may deny payment because of the possibility that the insured simply stayed with a friend and pocketed the insurance proceeds. Similarly, a savvy liability adjuster is not going to accept a subrogation claim with a blanket stipend for meal expenses without the actual receipts.

The importance of receipts and invoices, as opposed to mere estimates, applies to all other types of damages too. While estimates are sufficient for adjusting the first party claim, many liability adjusters (and some courts) do not accept estimates as proof that the damages were actually incurred. First party adjusters can help the subrogation claim by collecting any invoices from the insured, even if the adjuster disagrees with the reasonableness of the invoiced amount. The additional document is still helpful in pursuing a subrogation recovery.

For increased expenses claimed by an insured, claim files often contain the extra expense being paid, such as the water bill for the month after the loss, or the invoice for extra security or household help. In the subrogation context, only the amount in excess

of a typical invoice is recoverable. Therefore, it is necessary to establish a base line for the expense in addition to documenting the immediate expenses after the loss. For example, recovery of a water or electric invoice requires proof of what the invoices were in the months leading up to the loss. While the insured is collecting invoices for the months after the loss, it is helpful to request invoices for the months before the loss too.

Another very contentious and frequently challenged part of a subrogation claim is a claim for lost profits. The legal standard for recovering lost profits in a subrogation claim is different than the standard often used to calculate business interruption under an insurance policy. For example, the period of business interruption permitted under the policy may be much longer than that which is supported under tort law. The documentation needed to support a claim involving an established business may also be different than the documentation needed to support a new or unique business. For first party claims involving significant business interruption losses, it is helpful for the first party adjuster to put the subrogation specialist in contact with the CPA doing the calculations. This allows the subrogation specialist to get a preview of the methodology utilized and discuss with the CPA whether additional work may be needed to support the subrogation claim.

Let the File Tell the Story, the Whole Story

The ultimate goal in gathering all this documentation is to allow the insured's story to be told. Subrogation demands are scrutinized by liability adjusters. The subrogation demand needs to show the liability adjuster how the claim will be presented to a jury if litigation is necessary. A compelling story with no missing parts is more persuasive than a single estimate itemizing the damages paid. An added benefit of a thoroughly documented claim file is also that it often helps to avoid the first party adjuster being deposed later on in the subrogation claim. The more information provided in the subrogation demand, the more likely the claim will be resolved without the need for additional time and expense.

A big part of telling the *whole* story is including photographs. As the saying goes, a picture is worth a thousand words—especially with catastrophic losses. The photograph of a fully involved fire makes it very difficult for a liability adjuster to claim the building or vehicle may not have been a total loss. Photographs also can depict a corroded pipe or fire pattern far better than any written description. As such, they are helpful for establishing liability and proving damages. In an era where nearly everyone can take a picture with their phone, photographs are almost always expected. The inclusion of photographic documentation of the loss may be one of the most important parts of the package that the first party adjuster turns over to the subrogation specialist.

Sometimes, certain documentation is simply not available. For example, many documents are lost in the very fire that is the subject of the claim. Simply knowing that the documentation is unavailable is helpful too. This allows the subrogation specialist to inform the liability adjuster of the circumstances and present a complete story that explains any perceived “holes” in the claim.

III. The First Party Adjuster Can Help Improve Recovery on Claims Involving Negotiated Settlements and Policy Limit Payments

Often times, the adjustment of a first party claim resolves via a negotiated settlement. In the broadest sense, the entire claim could be disputed and the entire payment issued could be a negotiated settlement. In a more limited sense, there may only be smaller portions of the claim where coverage is disputed, or where the amount of damage is disputed. Insurers often make the business decision to pay on the disputed portions of the claim to avoid litigation costs or a drawn out process. The question then becomes, how does that good business decision on the adjustment side impact the subsequent subrogation claim?

Negotiated settlements often make obtaining a subrogation recovery a bit more difficult. This is because a basic element of any subrogation claim is that the payments made were owed under the policy and not merely voluntary payments. Adverse parties often take the position that the negotiated payments should not be recoverable, because the insurer has already taken the position that the damages are not covered under the policy. However, negotiated payments do not have to be automatically written off as unrecoverable. With the help of the first party adjuster, these damages may be recoverable.

Gather Documentation for Both the Insured and the Insurer's Calculations

Recovering a negotiated payment requires allocating the payment to specific damages. In order to do this, a comparison of the first party adjuster's calculations and the insured's submitted claim must be performed. This is more than a comparison of final figures. This requires a comparison of line item amounts claimed and line item amounts paid. If the claim file contains only the supporting documents for the adjuster's calculations, this cannot be done. Thus, even if claimed damages are not believed to be covered, a first party adjuster can help the subrogation process by thoroughly documenting the claimed damages in the file. If payments are later made via a negotiated settlement, the documentation can be used to support the payments made beyond the adjuster's original calculation of the total damage.

Gather Documentation for Damages Over Policy Limits

A first party adjuster can also help improve the likelihood of recovery on claims involving policy limit payments. With regard to the adjustment process, calculation of the damages incurred sometimes stops when it is clear the policy limit is reached. For example, many policies include limitations on mold related claims. If an entire house is damaged by water, and the policy contains a mold limitation of \$5,000, a first party adjuster may not spend the time to calculate damages related to mold, because the claim will clearly exceed \$5,000. Spending the little extra time to ask for an estimate or gather the invoice for the entire mold related claim though, is likely to increase recovery when the subrogation specialist is required to support the claim for damages.

Similarly, with auto claims, the claim file sometimes includes an estimate up to the value total threshold amount. This is sufficient for adjusting the claim. However, a subrogation demand is more persuasive, and more likely to be paid, if there is an appraisal or estimate that is complete and includes a full review of all damages.

Although many specific examples have been discussed, the theme throughout has been early and frequent communication between the first party adjuster and the subrogation specialist. Regardless of the path that the subrogation investigation takes, if the subrogation specialist is involved and informed, there is an increased likelihood that relevant evidence will be preserved, relevant documents will be collected, and relevant questions answered. This will in turn increase recoveries. The likelihood of recovery further increases when first party adjusters utilize their unique relationship with the insured and the claim to help put together a comprehensive package of materials to pass along to the subrogation specialist. All claim professionals should work towards this truly synergetic approach to the subrogation investigation.