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DAMAGES: Maximizing Your Recoverable Property-Damage Claim

I. Introduction

Meet the Panelists

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Setting the Stage

We have all been there. You have a solid liability case that should resolve for a high percentage of the paid claim, but the subrogation target's carrier is challenging every aspect of your damages. With so much effort and expense put into proving liability, we sometimes overlook the importance of developing "provable recoverable damages," which are necessary to secure large subrogation recoveries.

This intermediate-to-advanced presentation for subrogation representatives and attorneys will focus on the aggressive strategies and tactics that subrogation professionals, front-line claims adjusters and attorneys can pursue to maximize the provable recoverable property and related damages.

Recommendations and discussions will cover the full scope of recovery efforts: from the initial claims adjusting; through effective and persuasive pre-suit presentation of damages; to the appropriate measure of recoverable damages and how to negotiate; right on up to the best logistics for maximizing your damages at trial.

Throughout the presentation we will be interacting with the audience about their past and present cases, and how they may have handled them better, and how they can be more proactive going forward.

II. Making Damages a Priority from the Outset

Always Begin with Early Identification of Subrogation

As with all aspects of pursuing a subrogation claim, early identification of the existence of subrogation is crucial in proving liability, but is also beneficial with regard

to establishing and ultimately proving damages. The earlier the carrier and its first party adjuster are aware that subrogation is likely, the sooner they can begin implementing the best practices needed to ensure the presentation of a strong damages claim (be it to an opposing carrier, arbitration panel, judge or jury).

The Front Line – It All Starts with the First-Party Adjuster

Upon notification of potential subrogation, it is imperative that the subrogation professional, including counsel working on the carrier's behalf, communicates immediately with the first-party adjuster as to the particular damages that were sustained. This is even more essential when the first-party adjuster is an independent or TPA firm. This begins with an identification of the type of damages, including real property, personal property, business interruption, additional living expenses ("ALE"), and code upgrades to ensure the proper consults and/or experts are being retained to support the damages.

It is important that the subrogation professional handling the case have knowledge of the vendors being used in the first-party adjustment to assist in proving damages, as these vendors will likely be used to prove damages. These can include remediation contractors, appraisers, contractors, and accountants, engineers (structural or otherwise). Along with the first-party adjuster, these outside vendors will be making crucial decisions related to the adjustment process that might later be challenged in the subrogation claim.

While there are an infinite number of decisions that can be questioned, some of the more common are size and scope of remediation efforts and whether the proper resources were applied to mitigate the damages, as well as whether the mitigation efforts were appropriate under the circumstances. These kind of issues typically arise in large water-damage claims. In such cases, another judgment call that will be made and ultimately challenged is: (a) whether the damage to property, equipment or other items is permanent, and therefore needing to be replaced anew, or (b) whether the property, equipment or other items can be repaired or cleaned.

Subrogation Best Practices for the First-Party Adjuster

Do Complete the Adjustment

While it is understood that a first-party adjuster's primary goal is to adjust the first-party claim, it is also necessary that the he make subrogation a priority so as to maximize recovery dollars. In order to ensure best practices are employed, a subrogation professional must ensure that such practices are followed. For example, first-party adjusters need to document and provide supports for all damages paid, including supports for damages that will clearly exceed policy limits. It is not uncommon for a first-party adjuster not to document or depreciate each content damaged in the fire when the contents claim will obviously exceed available coverage. While documenting of these items may not be necessary to pay the first-party claim, such documentation will definitely be

needed to resolve the subrogation claim or prove the damages claim at the time of trial.

Therefore, it is important to discuss with the first-party adjuster the need to complete his adjustment in full in instances similar to the above and beyond.

Don't Document the Investigation

While it is important to be detailed in documenting the claim file, first-party adjusters can negatively affect the subrogation claim by providing preliminary or incomplete facts and information that may hinder a recovery in terms of proving liability. Subrogation professionals should make it a priority to remind first-party adjusters that, with regard to the information they put into the claims notes and reports concerning liability, less is more (and, often, none is most).

In order to properly protect the carrier's subrogation interest, adjusters must appreciate that any information put into the claims file/reports is discoverable information. A first-party adjuster's job is to adjust the loss by way of employing his area expertise; however, he is not an expert in fire investigation or any other forensic discipline. Thus, to whatever reasonable extent possible, he should eliminate (or at least minimize) references to specific loss facts, circumstances, and – especially – liability theories that involve the cause of the loss.

Oftentimes, particularly before the subrogation investigation begins, preliminary thoughts as to a loss's cause end up being wholly inaccurate. Even if the cause is obvious, there is always preliminary information that turns out to be incorrect. Documenting speculation or incorrect information can only hinder subrogation recoveries, and can increase the length and intensity of a first-party adjuster's deposition.

Therefore, it is important for subrogation professionals to communicate with the first-party adjusters to ensure that they are not jeopardizing the subrogation case by unnecessarily memorializing liability-related details by putting them into the claims file. Thus, first-party adjusters should defer to the experts or counsel involved with the subrogation claim. For example, when counsel is involved, a first-party adjuster should simply limit the subrogation discussion in any note or report to something like: "Counsel from de Luca Levine is handling the subrogation investigation."

Organization Gets You Paid More, Faster

An organized first-party adjustment goes a long way toward resolving claims promptly, and for more money. Organization starts with the first-party adjuster. No liability carrier wants to make the effort necessary to organize

damage documents and figure out for herself how you paid the claim. Therefore, it is important to stay on top of the first-party adjuster to ensure the estimates match-up with checks, proofs of loss, etc. The more information being provided to the tortfeasor's carrier, the more likely you are to get the case resolved.

The opposing adjuster needs to get authority to pay claims; make it easy for her to do so. This is why summaries and organized documentation greatly assist in timely recoveries. Why should a liability adjuster settle a large loss if she harbors uncertainty as to the damages? Thus, proving damages being the subrogating carrier's burden, don't allow confusing supports to limit pre-suit recoveries (particularly with larger claims).

Whether or not the first-party adjuster is organized, the subrogation professional sending a damages packet must make sure supports are carefully arranged and easy to read. Along these lines, the presentation will offer examples of well-organized demand packages.

III. Recoverable Damages

Real Property- The Eternal Battle of Repair Cost versus Actual Cash Value

Have you ever been told by an opposing adjuster or attorney when trying to resolve a case involving real-property damages, that only Actual Cash Value ("ACV") is recoverable? Or that code upgrades are not recoverable?

Most subrogation professionals who have tried to settle claims have had such frustrating exchanges with opposing parties, however the argument that only ACV – and not Repair Cost ("RC") – damages are recoverable is a myth. In fact, most states allow for recovery of RC in certain circumstances pertaining to real-property damages. Otherwise, they allow for recovery of diminution in fair-market value ("DFMV") from before the loss to after the loss.

Nonetheless, many in the insurance industry insist that only ACV is recoverable on subrogation claims. In fact, ACV – repair cost minus depreciation – is technically irrelevant to what is recoverable in real-property subrogation claims. While a similar formula typically applies to contents and business-personal-property claims, ACV is merely an insurance-industry term of art, and only pertains to the first-party insurance context.

Most of the authority across the country supports RC or DFMV as the recoverable measure of damages. Given this legal support, recovery professionals should be emboldened in their RC arguments and should not accept ACV on real-property claims. In instances where RC is arguably not recoverable, the alternative recovery measure tends to be DFMV, a measure that is difficult – and sometimes impossible – to measure.

Generally, state law allows a party asserting real-property damages to recover either the property's DFMV or the cost to repair the property. One method distinguishes between the measures of damages based on a factual inquiry into the nature of the damage, whether "permanent" or "repairable." Where damage is permanent, i.e. not capable of repair, the plaintiff may only recover the DFMV; however, when the damage is temporary and capable of repair, the plaintiff may recover repair costs.

Another method focuses on an economic inquiry into the amount of damage. In such states, a plaintiff will be limited to the DFMV of the property when the RC exceeds that diminution. However, if the RC is less than the property's DFMV, the plaintiff can recover RC. Other states are less stringent in their analysis, and will allow RC as long as it is not "disproportionate" to the DFMV.

Other states blend the factual inquiry and economic inquiry approaches. First they will distinguish between injuries that are temporary and permanent. However, even when an injury can be characterized as temporary and capable of repair, the court will not allow recovery of repair costs if it exceeds the property's DFMV.

Although many states preclude the recovery of RC that exceeds DFMV, many states allow an exception to the rule. A plaintiff may sometimes recover the reasonable RC when the plaintiff has a "personal reason" for repairing the property. An example of a personal reason for repairing the property would be a homeowner who attaches a sentimental value to the property. Courts allow such a recovery even when RC exceeds DFMV in these situations because, otherwise, the plaintiff would not be fully compensated.

Further, many states will allow for the owner of damaged property to recover RC when there is no reasonable way to measure the market value of the property injured. For example, the owner of a damaged bridge could recover the cost to repair the bridge because there is no reasonable way to measure its market value.

Finally, some states take a liberal approach to damages and will award either DFMV or RC depending on the facts of each case or what is necessary or appropriate to fully compensate the plaintiff.

Leverage and Negotiating Real-Property-Claim Recoveries

Do not accept ACV for real property damage just because an opposing adjuster claims it is the law, particularly when she cannot provide any legal support or other basis upon which she believes ACV is the measure of recovery.

The greater benefit of making RC recoveries is why it is important to know what is recoverable in a particular jurisdiction, i.e. the basis upon which courts favor RC over DFMV. If one is able to argue why the amount that yields the greater recovery should apply (typically RC), the bigger the ultimate recovery – even if the RC amount

is compromised to reach a settlement. As such, when faced with an adjuster who lacks legal authority to support her ACV position, it is important to mold the facts of the case to fit a given jurisdiction's RC recoverability criteria. While finding the seminal case on a specific issue is always beneficial, perhaps the most persuasive authority is a jury instruction for that jurisdiction that aligns with the facts of the RC argument.

For example, certain kinds of damaged properties do not lend themselves to a DFMV construct. Among these are condominium properties, where repairs are required (as an association cannot choose to do otherwise). Moreover, a condominium association building has no real "market value" for the common areas because they never go on the market (only the individual units do). Thus, because a damaged condominium building cannot be sold, a DFMV analysis is a non-starter. Other such examples include institutional properties such as schools, churches, or hospitals that do not commonly "go on the market."

In addition, there are other arguments that can be made as to why RC should be the applicable measure over DFMV, including those that relate to "betterment" and code upgrades. Code upgrades are often covered by insurance policies and become a contentious issue with regard to evaluating a subrogation claim. Defense adjusters commonly identify these as non-compensable because, so they argue, they are improvements over what pre-existed the loss. However, code upgrades merely reflect advances in building materials' safety features; they do not actually increase value or enjoyment. Furthermore, without code upgrades, a rebuilding project cannot get the local municipality's approval. In that case, the property does not get repaired at all, or at least no use can lawfully be made of it.

IV. Presenting Damages at Trial

It is always a best practice to develop the damages case as if it will someday need to be presented to a jury. Even if the whole case – or perhaps only its damages aspects – is resolved prior to trial, such an approach will ensure that the damages aspect of the claim is as strong as it can be.

Owner Can Prove Damages

Fortunately, there are many ways to present and prove damages at the time of trial. These different approaches will vary for a variety of reasons, and will often be dictated by the size of the claim, the type of damages, the complexity of the claim, and the trial's circumstances (such as witness cooperation and availability). For example, most jurisdictions will permit the owner of a property to testify as to damages, as the owner is competent to testify as to the value of his own property. While not ideal, this is an acceptable way to prove damages.

Experts Are Best

Still, the preferred approach is to use expert testimony to prove the damages claim – whether it be the first-party adjuster being offered as an expert in property adjustment, or third-party vendors/consultants (such as accountants or appraisers) being qualified as experts in their specialized fields. In addition, actual contractors who generated estimates and actually remediated, repaired or rebuilt the property are also quality witnesses that can testify at trial to support damages claims.

And, while unconventional, another effective strategy can be to call the insured's public adjuster in the subrogating carrier's case in chief, or even as a rebuttal witness to an opposing expert who opines that the subrogating carrier overpaid the claim. While calling public adjusters is counterintuitive (as they are often viewed as adverse to the first-party claim), their role in the claim's adjustment almost axiomatically positions them to opine that the first-party carrier underpaid the claim. Of course, while the public adjuster could bolster the damages claim at trial, circumstances will dictate whether using such "experts" is appropriate in your case.

V. Conclusion

In order to secure large subrogation recoveries, subrogation professionals need to focus on and assist with the development of "provable recoverable damages" from the outset of losses. This means working with the first party adjuster to implement best practices and to bolster areas of weakness in the damages claim so as to get the most out of the paid claim when it becomes time to negotiate or try the subrogation case.

Moreover, given the importance of a strong damages claim to any negotiation, it is a must for any subrogation professional involved in such negotiations to be well-versed in the applicable law so as to effectively advocate for the highest amount of damages possible. By having a full understanding as to what damages are recoverable, such as whether repair cost for real property is the measure of damages or being armed with the knowledge that ACV is not an appropriate measure of damage for real property, a subrogation professional can mold the facts of each case to fit a given jurisdiction's recoverability criteria, making them a better advocate for that claim.

With a concentration on developing recoverable damages from the outset, as well as focusing on presenting and arguing damages in a succinct and persuasive manner, when necessary, you will be fully prepared to present a strong damages case at trial, particularly given the variety of ways that damages can be proven.

With an increased emphasis on damages, you will no doubt be able to better maximize your recoverable property-damage claim!