As part of the adjustment of a loss, an insurer will sometimes require the insured to sign a release in exchange for the settlement proceeds under the policy. It is critically important, however, that any release entered into during the adjustment stages between an insured and the insurer does not also contemporaneously release the tortfeasor in a subsequent subrogation claim. In at least two jurisdictions that have directly addressed the issue, Pennsylvania and Maryland, the Supreme Courts of those states have held that a general release entered into by the insurer and the insured served to release a third party tortfeasor in a subsequent subrogation case brought by the insurer.

In Republic Ins. Co. v. The Paul Davis Systems of Pittsburgh South, Inc., 543 Pa. 186, 670 A.2d 614 (1995), the Pennsylvania Supreme Court held that a release signed by a homeowner releasing his own insurer acted to preclude his insurer from pursuing subrogation against a tortfeasor responsible for the homeowner’s loss. In that case, Republic issued a homeowner’s policy which provided coverage for various types of casualty losses. The homeowner suffered property damage when his contractor failed to take appropriate steps to protect the home during a rainstorm. Upon completion of the adjustment of the loss, Republic asked its insured to sign a “General Release in Full and Final Settlement of Claim.” After the General Release was signed and the insured was paid, Republic filed a subrogation lawsuit against the contractor. The contractor successfully argued that the wording in the General Release was so broad that it barred any causes of action that the homeowner would have had, including those against the tortfeasor/contractor. Since the
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Subrogating insurer always “stands in the shoes of its insured,” the Court found that the General Release also barred Republic’s subrogation claim against the contractor.

In addition, in Pemrock, Inc. v. Essco Co., Inc., 249 A.2d 711 (Md. 1969), the Maryland Supreme Court reached the same result. Pemrock involved a building collapse resulting from a windstorm. Pemrock had contracted with Essco to erect a prefabricated warehouse of a design that eliminated most vertical supports. After construction, a storm with high winds and heavy snow struck causing the warehouse to collapse. New Castle Mutual Insurance Company insured Pemrock for up to $40,000 against direct loss by wind damage. New Castle denied coverage alleging the damage was the result of faulty construction and not the windstorm. Pemrock sued New Castle and shortly thereafter settled for $10,000 and signed a release in favor of New Castle “and all other persons, firms, corporations, associations or partnerships of and from any and all claims . . . .” Pemrock then sued Essco for its uninsured losses. Essco successfully argued that the release given to New Castle discharged not only New Castle but Essco as well.

No other jurisdictions have yet directly addressed the issue of the effect of a first party insurance adjustment release on a subsequent third party subrogation claim. Other jurisdictions have, of course, addressed the issue of the effect of a general release of one tortfeasor on claims against other tortfeasors. The issue becomes whether the analysis in these cases equally applies to a release given from an insured to his insurance carrier since the carrier is clearly not a “tortfeasor.”

Most cases involving a dispute over the scope of a release are decided pursuant to the Uniform Contribution Among Tortfeasors Act (“UCATA”). The UCATA provides in relevant part:

A release by the injured of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides, but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release or in any amount where proportioned by which the release provides that the total claim shall be reduced if greater than the consideration paid.

Most jurisdictions have adopted some form of the UCATA but, like other statutes, disagree over its interpretation. A review of cases from various jurisdictions reveal that there are three different views as to whether a general release containing boilerplate language such as, “all other persons, firms or corporations,” discharges all other tortfeasors.

The three different interpretations are known as the “flat bar,” “specific identity” and the “intent of the parties” rules. (A jurisdiction comparative chart indicating which rule each state follows can be accessed by clicking on the second icon in our letter.) “Flat bar” jurisdictions hold that a general release of “all other persons, firms or corporations,” without limiting or restrictive language, absolutely bars a plaintiff from proceeding against unnamed tortfeasors. “Specific identity” jurisdictions have reached the opposite conclusion, holding that the release of one tortfeasor does not discharge other tortfeasors unless the latter are either named in the release or specifically identifiable from the face of the release. Jurisdictions that follow the “intent of the parties” rule take a middle road and hold that while the release of all “persons, firms or
corporations” does not in and of itself discharge unnamed tortfeasors, it will serve that purpose, if and to the extent that the parties who negotiated the release intended it to do so.

Because first-party insurers are not tortfeasors within the Uniform Contribution Among Tortfeasors Act, releases given by a policyholder in favor of his insurer will not likely be given the favorable treatment of the “specific identity” and “intent of the parties” rules. On the other hand, it is likely that the jurisdictions following the “flat bar” rule, would interpret a release given by a policyholder to his insurer in the same manner as a release given by a policyholder to a tortfeasor. This is because “flat bar” jurisdictions view a release of a tortfeasor like any other contract despite the UCATA. “Flat bar” jurisdictions hold that where the language of the release is clear and unambiguous, the language of the release should be given effect; no extrinsic evidence may be admitted to determine the intent of the parties.

**PRACTICE TIPS**

First and foremost, claims handlers should not enter “general” releases with insureds upon conclusion of the adjustment of the loss. Second, under no circumstances should an insured’s release and assignment to his insurer use the language “and all other persons, corporations, and entities whether named herein or not.” Such language, unless otherwise clearly and unambiguously limited, would likely be interpreted to release others who are not a party to the agreement.

The better approach to follow, if a release is required, is to specify that the only party being released is the insurance company and its representatives. Moreover, if the potential tortfeasor is known, the release language can state specifically that the release is not intended to release the tortfeasor or in anyway compromise the insurer’s subrogation rights.

Other potential pitfalls include possible anti-subrogation issues. In today’s global economy many smaller insurance companies are wholly owned subsidiaries of conglomerates. For example, Company A, is the property insurance carrier and subrogee, Company B is the casualty insurer and defendant, and Company C wholly owns both Company A & B. Sometimes the subsidiaries, and the adjusters responsible for recoveries, cannot resolve the subrogation issues without counsel. In such situations, a release including the clause, “and any companies or entities which are or were affiliated with [insurer’s name] or are or were its subsidiaries, or parent corporation, anywhere in the world” may preclude any potential subrogation action.

Likewise, carriers should be cautious of including a “denial of liability clause.” Defendants may argue such a clause provides evidence that payments were “voluntary” and thus no right of subrogation exists. It is also important that every release agreement include a clause that unambiguously preserves the insured’s right to recover uninsured losses. Failure to include such a clause may result in an argument that the insured is barred from proving any third party claims for its uninsured losses.