

A PLAYBOOK FOR PROTECTING VIABLE WINTER WEATHER SUBROGATION CLAIMS YOU MAY NOT HAVE CONSIDERED

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The purpose of this subrogation alert is to provide a timely wake-up call to potential subrogation claims for winter weather related losses. Despite the fact that Old Man Winter is not a viable subrogation target, there may be more subrogation potential than you think in your claims involving pipe freeze-ups, structural collapses due to snow load, etc. In short, the best way to preserve these potential subrogation claims is get your experts and legal counsel involved as soon as possible.

I. BACKGROUND

Too often, media outlets describe winter weather and storms with extreme adjectives that lead us to believe the storm was of an intensity observed only once in a decade, century, or lifetime. Rather, it is more often the case that these are average storms for the season and the region. The winds, temperatures, and precipitation levels usually are not outliers but instead are within the standard deviation of a winter storm for that region. It is more likely than not, for example, that the amount of snow on the roof which caused it to collapse was actually within the “factor of safety” in the roof’s design specification or local building codes.

Because you will likely face many more of these claims throughout the rest of this and future winter seasons, this alert seeks to provide a few helpful tips and reminders as you conduct your investigations.

II. PLAYBOOK

We recognize the multitude of concerns that need to be met when dealing with a catastrophic property damage claim due to winter weather. Often times, it is not practicable to preserve the site for an extended period of time. Following this playbook can help you take the necessary actions immediately and *efficiently* to preserve your claim. By undertaking certain steps immediately, you can release the loss site for overhaul and repairs much sooner than you think and with a greater chance of successful subrogation.

Any adjuster handles a multitude of losses. Each loss brings with it a myriad of responsibilities. We recognize that not everything can happen at once. Therefore, this playbook breaks down the necessary actions into three subsections so that you may pursue these claims realistically and efficiently: (A) Immediate Action, (B) Action Taken Promptly, and (C) Other Necessary Actions.

A. IMMEDIATE ACTION

These initial steps and procedures are numbered as a way of ranking their importance. However, to be completely effective, all four of these steps should happen simultaneously.

1. Preserve the Loss Site.

It is all too easy for your target to defend against a subrogation claim based upon the fact that the loss site was spoliated before they had a chance to inspect it. Additionally, it is extremely difficult for your expert to develop a failure mode and negate defenses raised by your target if he was not able to inspect the loss site personally. When a loss like a pipe freeze-up or structural collapse occurs, it is often catastrophic. Time is therefore of the essence to begin repairs and/or return the structure to a safe condition. For that reason, and as discussed *supra*, Step 1 should be undertaken in conjunction with Steps 2, 3 and 4.

2. Take Measurements.

Precipitation levels and temperatures can vary greatly over a short distance. Often, the recorded meteorological data for the region may not accurately represent the actual data at the loss site. It is therefore important to take a measurement of the exact temperature or precipitation levels as close to the moment when the failure occurred as possible. Your expert will help you do this correctly (Step 4).

3. Hire Subrogation Counsel.

Targets may need to be placed on notice. Given the need to quickly begin repairs, this needs to be done promptly.

Notice is immediately followed by a joint site inspection. Getting subrogation counsel involved early moves this crucial step along quickly while also guaranteeing that (a) all possible theories of liability are considered early on while the scene is still preserved, (b) communications regarding subrogation potential are better protected from discovery, and (c) the lawyer who will be protecting your subrogation rights is building your case from the very beginning.

4. Get an Expert.

Subrogation counsel can help you identify the best expert for the loss. Often times, a pipe didn't freeze-up just because it was "extremely cold." Similarly, what seems like a large snow load might still be insufficient to collapse a roof had it been built properly. Getting your expert to the loss site instead of sending them physical evidence to analyze will allow them to identify additional theories of liability and negate any defenses raised later on in litigation by your targets. Additionally, they can help you take accurate measurements, discussed in Step 2. Get your experts involved early.

B. ACTION TAKEN PROMPTLY

Preserve Evidence.

Every step taken in the investigation of these claims is important. However, the exact physical evidence that is retained, who was present for its removal, and how it was removed can make or break your subrogation claim. In a pipe freeze-up, for example, the actual pipe that split may not be relevant to your claim other than to show the source of the damage. Rather, the proximate cause of the failure most often occurs within a component which is part of a much larger system.

For example, a pipe freeze-up may be caused by a failure in an HVAC system located on the other side of the building and not due to a deficiency in the pipe itself. A roofing collapse may be caused by a deficiency throughout the entire roof and not just the section of the collapse. Because identifying the correct evidence to preserve in these cases is not always obvious, get your experts involved early so they may take all necessary photographs and be on site to determine the evidence preservation that is necessary to prove your subrogation case.

Additionally, removing the evidence prematurely or incorrectly can also significantly weaken, if not eliminate, your subrogation claim. All potential targets should be present to view the physical evidence before removal then be in consent about the manner of its removal. Involving subrogation counsel immediately can help you quickly identify your targets and get them on notice right away. Counsel can then exert pressure to expedite a joint scene examination and evidence removal, allowing your insured's property to be repaired as soon as possible.

C. OTHER NECESSARY ACTIONS

Get Documents and Information from Insureds.

By verbally interviewing your insured when the loss occurs, you can quickly gain information about proper entities to place on notice. These entities could be those who rented the property, worked on the property recently, made improvements, installed components, manufactured components, designed components, etc. All of these entities can be placed on notice and invited to attend a scene exam.

Once notice is given and the scene exam is moving along expeditiously, work with your insured over the days that follow to gather the necessary facts, documents, invoices, estimates, and other records that substantiate the involvement of the noticed entities and which will be necessary to prove your subrogation claim. Also, involving subrogation counsel early will further assist in keeping the information that is exchanged protected from discovery as privileged information.

Additionally, these documents contain important dates. These documents should be provided to counsel as soon as they are received, as the dates within may trigger time limitations to filing your subrogation claim that arrive much sooner than you think. For example, although the statute of limitations for a property damage claim in your state may hypothetically run two years from the date of loss, there may be a statute of repose that will bar a claim completely against one of your targets much sooner. Armed with the right information and documents, counsel will quickly identify these important dates as the investigation develops.