# GETTING ALONG WITH THE PROPERTY INSURER - PRACTICAL APPROACH TO PROTECTING THE RIGHTS OF SUBROGEES AND POLICYHOLDERS

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When the last smoldering embers of a fire have been extinguished or the last bucket from a water damage loss has been bailed, the policyholder who has suffered the loss may be faced with one or more of the following immediate concerns: Getting his or her home or business premises repaired or rebuilt, finding a temporary resident or place of business, replacing damaged personal property or business inventory, meeting outstanding orders, taking care of employees, etc. Depending upon the type of coverage held by the insured, these items will be coordinated through the adjuster representing the insurer. In this crisis-laden atmosphere, often the last thing on the policyholder's mind is the insurer's subrogation investigation. Nevertheless, the policyholder is contractually obligated to cooperate with it insurer.

This article discusses a pragmatic approach whereby the insurer and its policyholder can work together to preserve necessary evidence so that a successful claim can be asserted against responsible third party tortfeasors, while at the same time fairly apportioning rights of recovery from the tortfeasor between the policyholder and insurer.

Subrogation is based upon the equitable principle that the party ultimately responsible for a loss should pay for it. Subrogation rights arise both equitably and contractually, the latter by reason of language in the insurance policy, or a subrogation receipt or similar document signed by the policyholder when the claim is paid. In many instances the policyholder may not be entitled to full reimbursement from its carrier for all of its losses. The policy may contain a deductible or a coinsurance penalty. The policyholder may be underinsured or may not have coverage for certain items such as business interruption. Of course, in those instances where the policyholder is reimbursed in full by its carrier, no issue of apportionment of proceeds recovered from the third party will arise between the insurer and the insured. However, the majority of instances apportionment will be an issue.

Courts throughout the country which have addressed this issue have come to different conclusions; some say the insurer is entitled to full compensation from the third party before the insured recovers anything, some say the insured is first entitled to full compensation, and a few have wisely upheld a pro rata approach to recovery. The Supreme Court of New Jersey, in Culver v. INA, 115 N.J. 451, 559 A.2d 400 (1989) recognized that the insured and insurer can agree by contract to apportion recovery between themselves and thereby alter any equitable right that the insured may have had to be made whole first. The Pennsylvania appellate courts have not addressed this issue in the property insurance context; however, in Allstate Insurance Company v. Clarke, 364 Pa. Super. 196, 527 A.2d 1021 (1987), the Superior Court intimidated (in footnote 5) that it would give its imprimatur to apportionment of recovery proceeds.

Assume that the policyholder and its insurer cannot reach an agreement as to apportionment of recovery from the tortfeasor, and each decides to institute its own action against the tortfeasor. This course is fraught with peril. By starting its own lawsuit, the policyholder loses the ability to take advantage of the many resources that the insurer can provide. Most of the time the insurance carrier will be willing to advance the costs and expenses of the subrogation litigation. In the absence of a cooperative effort with its carrier, a policyholder has to retain its own counsel, hire its own experts and pay for all of this. The policyholder does not have the use of the expert consultants whom the insurer has retained, whether they be in the field of cause and origin of fires, engineering, or damage appraisal, such as builders, salvors, or forensic accountants.

From the insurer's perspective, by not participating in the same litigation as its policyholder, the insurer loses the immeasurable advantage of heaving a "real" plaintiff. Although suit may be brought either in the name of the insured or insurer as a real party in

interest under Fed.R.Civ.P. 178 or Pa.R.C.P. 2002, when suit is brought in the insurer's name, it loses whatever sympathy the "legal fiction" of subrogation may generate from the jury. The insurer also loses the benefits which the enthusiastic participation of its policyholder can add to proof of liability and damages. Most significantly, if the insured proceeds with its own action and the insurer fails to intervene, a verdict adverse to the insured may collaterally estop the insurer form proceeding with a second "bite of the apple". See, e.g., M. London, Inc. v. Fedders Corp., 306 Pa. Super. 103, 452 A.2d 236 (1982).

Conversely, there are many advantages to have the policyholder and its insurer jointly prosecute an action against the responsible third parties. By having a financial stake in the litigation, the insured becomes a motivated plaintiff. Presentation of evidence and witnesses is facilitated with an enthusiastic policyholder. The legal fiction of subrogation is maintained. Collateral estoppel is not a problem when everyone participates in the same lawsuit.

In order that counsel representing both the policyholder and insurer may avoid the potential of a conflict of interest, it is essential that an apportionment agreement be prepared. The Superior Court has noted that concurrent representation of both an insured and its subrogee is not inherently a conflict of interest. Molitoris v. Woods, 422 Pa. Super. 1, 618 A.2d 985 (1992). A negotiated apportionment agreement acts as a prophylactic measure which prevents conflicts from arising when a settlement offer is made or a verdict is recovered.

A workable apportionment agreement should contain the following provisions:

1. A mathematical formula which apportions recovery from third parties between the policyholder and the insurer. A multi-tiered approach may be used; the same percentage need not be applied to all sums recovered. For instance, the agreement may provide that the insurer and policyholder apportion recovery on an 80/20 basis up to the first $250,000.00

recovered, with any amounts recovered in excess of $250,000.00 payable to the policyholder. Such an approach be used in a case where the insured had a $200,000.00 policy limit, where the insurer agreed on an adjusted loss figure of $250,000.00, yet the insured claimed items of damage in excess of $250,000.00 which the insurer did not recognize.

2. A provision which apportions costs and expenses of litigation. In most instances this will follow the same formula used to apportion recovery. The nature and type of these costs and expenses should be enumerated in the agreement. The insurer may agree to advance all expenses and to only seek reimbursement from the policyholder of its pro rata share of such expenses in the event of a successful recovery from the third parties.

3. A provision stating that in consideration for the insurer providing the policyholder with the fruits of its subrogation investigation, the work product of its expert consultants, and the undertaking to advance all costs and expenses of litigation on the insured's behalf; the policyholder agrees to waive any right it may claim to the first sums recovered from third parties.

4. A provision for payment of attorney's fees by each party out of the recovery proceeds on a stated contingent fee basis.

5. A provision giving the party with the majority stake in the litigation control over acceptable or rejection of any settlement offer. If such a provision is unacceptable to the minority stakeholder, an alternate provision would give either party the right to reject a settlement offer

acceptable to the other if and only if the tortfeasors permit the non-settling party to continue to prosecute the action on its own behalf, and agree to waive any defenses based upon any release of claims by the settling party.

Experience has shown that with an apportionment agreement in hand, the policyholder achieves a comfort level with its insurer's subrogation team, and obtains a clearly-defined financial stake in litigation which is originally brought for the insurer's benefit. This team approach results in maximizing potential recovery from the responsible parties, inuring to the financial benefit of both the policyholder and its insurer.

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