NEW YORK SUBROGATION PRACTICE: A BLUEPRINT FOR EXPEDITING RECOVERIES

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Recovery professionals are posed with the daunting task of obtaining recoveries by recourse to a legal system that seems at times to be hopelessly slanted against them. Various legal issues such as the anti-subrogation and economic loss rules, the implied co-insured doctrine and waivers of subrogation pose significant hurdles on the road to recovery. Unfortunately, in New York the difficulty does not end there. In addition to the substantive legal hurdles, there are equally ominous procedural hurdles. As the vast majority of practitioners would agree, New York is a unique jurisdiction fraught with innumerable institutional barriers and seemingly endless procedural gamesmanship This paper will focus on the practical steps that can be taken to limit the delays inherent in litigating subrogation cases in New York in order to move as quickly as possible to the endgame of recovery.

Initially it is essential to promptly complete a thorough investigation which should include a determination of the cause of the loss and an identification of all potentially culpable parties. As soon as possible, the potential defendants and their insurance carriers should be put on notice of the claims and given an opportunity to examine critical evidence. A detailed demand letter outlining both the nature of the claim and damages then should be forwarded to the defendant's carrier in the hope of initiating meaningful settlement discussions. In the event that such discussions are not fruitful, litigation should be commenced promptly.

The ultimate problem is that it takes no less than three to six years to proceed to trial in New York Supreme Court. A whole host of reasons can be cited, including an overburdened legal system, New York's unique labyrinth of procedural rules and an ingrained attitude of complacency. We can do nothing about the overburdened system or the overall complacency of the bench and bar; however, we can employ strategies to either avoid or minimize the attendant delays.

The most effective way to avoid the delays inherent in the New York State court system is the most obvious; file suit in federal court. For reasons that will be discussed in detail below, it typically takes less than half the time (between one and two years) to proceed trial in federal court. Obviously, if the goal is to obtain the most favorable result in the most efficacious manner, then availing ourselves of federal court jurisdiction is paramount.

The United States Code permits the federal courts to exercise diversity jurisdiction in any case where the parties are citizens of different states and the amount in controversy exceeds $75,000.00. 28 U.S.C.A. §1332. Fortunately, subrogating insurers are in a unique position in that they can file suit in either their name or the name of their insured. Since many insurance companies are neither incorporated nor headquartered in New York, they are not deemed to be New York citizens and can file suit against a New York citizen or corporation in federal court on the basis of diversity jurisdiction. By taking this simple step, we can take advantage of the expedited processes available in federal court and dramatically reduce the time it will take to obtain a recovery.

Conventional wisdom has been that it is preferable to file suit in the name of the insured to avoid the potential prejudice that jurors may have against insurance companies. However, in our experience federal court judges with the assistance of experienced and selective trial counsel have done a fine job of ferreting out and eradicating potential prejudice during *voir dire* and, as a

result, the benefits associated with the expedited processes available in federal court far out weigh any potential detriments.

The following table illuminates the distinctions between practice in state and federal court:

STATE COURT	FEDERAL COURT
1. Courts are overburdened. 2. Typically discovery is not closely supervised. As a result, counsel rarely are held accountable and are forced to abide by court imposed deadlines. The state courts are much more tolerant of delay. 3. Structural Impediments: 4. Labyrinth of procedural rules that defendants used to their benefit to delay and confuse proceedings: myriad discovery devices. (a) Automatic adjournments on unopposed motions in New York County. (b) Cases typically sit dormant for as long as 18 months once they are on the calendar, ready for trial. (c) Lengthy, unsupervised voir dire. (d) Endless motion practice. 5. No court annexed Arbitration/Mediation program. 6. Appellate practice. Virtually every order is immediately appealable. CPLR 5501, *et seq.* 7. Different Judges for discovery and trial.	1. Court of limited jurisdiction with relatively smaller caseload. 2. (a) Activist magistrate judges who closely monitor discovery. (b) Sanctions - court enforced accountability. F.R.C.P. 11. 3. Structural Advantages: (a) Limitations on use of written discovery devices. Southern District: Limits interrogatories to those seeking names of witnesses and custodians of records. Eastern District: Limits the number of interrogatories served at the commencement of discovery to 15. Automatic disclosure of identity of witnesses, general description of documents and insurance information within thirty days of the service of an answer. (b) Depositions: Strict limitation on types of objections and manner in which counsel can interfere. Much more difficult to delay; judges will intervene and force recalcitrant or dilatory counsel to participate. (c) Typically no more than three month delay between completion of discovery and trial. (d) Voir dire typically conducted by the judge in two hours or less.

	4. Expedited process for the resolution of discovery disputes. No formal discovery motions permitted without preliminary efforts to informally resolve the issue. 5. Court annexed mediation and arbitration programs. 6. Appellate Practice: Only final orders are generally appealable. 28 U.S.C. §1291, *et seq.* 7. Same judge throughout the litigation.

In light of the differences between state and federal court it appears clear that federal court is the ideal forum; however, there are times when there is little choice but to file suit in state court. The following list identifies those factors that typically mitigate against filing suit in federal court:

(1) No diversity - insured, insurer and defendant are all from the same jurisdiction.

(2) Total claim is less than $75,000.00

(3) Substantial uninsured loss and insured is not diverse from defendant. If the insured files its own suit in state court, the federal court may abstain or refuse to hear the case before it, effectively forcing all of the parties to litigate in state court. Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976).

(4) Particular prejudice against the insurance company plaintiff under the facts of the case.

(5) Favorable substantive caselaw.

> Spoliation - State court more likely to strike a pleading for destruction of evidence; if there is a basis for making such a claim against defendant, this factor may warrant proceeding in state court.

(6) Discovery advantages if weak experts:

> CPLR 3101(d) vs. F.R.C.P. 26, Daubert, et al.

Regardless of whether suit is filed in federal or state court there are certain strategies that can be employed by counsel to expedite the resolution of the case. The following table lists various strategies that may be employed during the respective stages of a case:

	STATE COURT	FEDERAL COURT
Pleading	Select venue carefully Expect delays if suit must be filed in New York City, notwithstanding new initiatives. Shorter calendar delays in some counties. Suburban counties tend to move discovery faster, although this is by no means a hard and fast rule.	File direct action against third party defendants under F.R.C.P. 14(a) rather than seeking to amend to add claims.
Discovery	File request for preliminary conference as soon as Bill of Particular is served. Uniform Court rule §202.12. Involve the court early in discovery dispute to avoid motion practice.	Pursue ADR - see below. Request short deadlines but be prepared to stick with them. Rule of thumb - one adjournment. Keep the judge involved.
Trial	Seek supervised jury selection	Consent to try the case before a magistrate judge. Usually allows for an earlier trial and more control over scheduling.
Settlement	(1) Incentives for defendants to settle: Mandatory prejudgment interest of 9% per year. CPLR 5001, *et seq.* Joint and several liability still applies in property damage cases. CPLR 1601. (2) Defendant must remit the settlement proceeds within 21 days of receipt of an executed release and stipulation of discontinuance. CPLR 5003-a. Involve the court in negotiations. Request that representatives of the respective carriers appear at the settlement conference.	(1) Rules regarding interest and joint and several liability apply with equal weight in federal court. (2) CPLR 5003 does not apply in federal court; however, apply the same period and conference with judge if the distribution of proceeds is delayed. Involve the court in negotiations. Request that representatives of the respective carriers appear at the settlement conference.

Court annexed alternative dispute resolution programs which have the full support of the federal bench are a key tool for the expeditious resolution of claims in federal court. All of the programs are extremely low cost and can be pursued contemporaneously with discovery so that the litigation will not be delayed. The following alternative dispute resolution programs are available and should be considered:

(7) Eastern District Court Annexed Arbitration Program

Mandatory arbitration program for cases under $150,000.00.

Arbitration occurs within 120 days of the date that the Answer was filed.

Voluntary arbitration for cases in excess of $150,000.00.

Right to trial de novo; however, loser must pay the arbitrator's fees if a less favorable decision is rendered at the subsequent trial.

(8) Eastern District Early Neutral Evaluation Program

Attorney from court appointed panel essentially acts as a mediator and assesses the cases before the parties proceed with disclosure.

No cost to the parties.

Voluntary and non-binding.

(9) Court Annexed Mediation

Available in both the Southern and Eastern Districts.

No costs to the parties.

Depends on orientation and philosophy of mediator.

Non-binding.