Life of a Complex Subrogation Case

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By: Elaine M. Rinaldi, Esquire[1]

I. INTRODUCTION

Corporate America is increasingly faced with complex insurance programs. Given ever increasing premiums, corporations are procuring insurance with large self-insured retention limits and multiple layers of coverage. Large self-insured retention limits are now used as a tool to reduce premiums on insurance policies while still providing insurance coverage at a level that is comfortable for the insured's particular circumstances. Insureds will often maintain a large self-insured retention limit with both primary and excess coverage beyond those limits.

Take, for example, K-Wal, a well-known commercial retailer of goods located throughout the United States. Although K-Wal maintains its corporate headquarters in Philadelphia, K-Wal has 1,000 stores located throughout the United States. K-Wal has a complex property insurance program providing for $1 million dollars as its self-insured retention limit; primary coverage for the next $5 million through Arrow Insurance Company; the next layer of $5 million in coverage through Barrow Insurance Company; and excess coverage in the amount of $50 million through Carrow Insurance Company. K-Wal has secured this insurance program through its broker, Darrow, Inc.

On April 15, 2001, a fire occurs at K-Wal's downtown Chicago store. The Chicago store manager immediately contacts corporate headquarters in Philadelphia which notifies its broker, Darrow, Inc. Though the estimates are uncertain, Darrow responds by placing all of the insurers on notice. The primary insurer with the first layer of exposure retains the famous Jack Investigator to conduct the origin and cause

investigation. Jack Investigator contacts the Chicago store manager and arrives at the fire scene on the afternoon of April 15, 2001. After several days at the fire scene, Jack Investigator determines that the fire originated in the gourmet coffee bar at a cappuccino machine. Jack Investigator reports his findings to the Chicago store manager and advises that the fire scene should be secured pending further investigation. The store manager, having received the "Best Sales" award for the past five years, instructs his employees to begin overhaul and clean up so that the store can promptly reopen. In doing so, the store manager saves the cappuccino machine but discards everything else. Demolition and debris removal begin with the intent of opening the store in the next 30 days.

The above scenario is more commonplace than one might think. Notwithstanding the sophistication of the insured and the existence of a comprehensive insurance program, the fear of lost profits often dictates a course of action directed towards resuming business without concern for potential third party recovery. A thorough investigation should be undertaken to fully explore the potential for a third party recovery regardless of whether the damages sustained from such a fire are within the insured's self-insured retention limit or well beyond those limits.

There are a myriad of issues that impact on third party recovery efforts in the context of a complex insurance program. If, for example, the loss appears to fall within the self-insured retention limit, then the insured itself should be prepared to conduct a thorough investigation in order to preserve its rights to a recovery from a third party who may be responsible for the loss. If the loss is above those limits implicating both the primary and excess insurers, multiple issues arise regarding the loss investigation and

any consequent subrogation litigation. In this context, important issues can arise regarding who controls the initial investigation; how the litigation is commenced and by whom, who controls the litigation, cooperation or lack thereof between the insured and insurers, apportionment of any recovery funds particularly in a limited fund context; who is responsible for paying the costs of the investigation or litigation, or both; and conflicts of interest in the context of multiple representations. This article will explore all of the above issues and the law that may impact a successful recovery.

II. LOSSES WITHIN THE SELF-INSURED RETENTION LIMIT

Loss profits are inevitable no matter how much effort is directed to loss prevention. When losses do occur, too many risk managers overlook real possibilities for recovery, choosing instead to walk away from what may be erroneously viewed as an "act of God" or mere accident.

While corporate risk management departments will never become true "profit centers," there is an often ignored legal means by which creative risk managers can enhance the corporate bottom line. Risk managers can implement third party recovery programs to insure the recovery of damages sustained against any third party potentially responsible for the loss. Recovery by risk managers is an important and viable method to recoup a substantial loss when examined against the background of current corporate insurance trends.

In recent years, large corporations have been securing larger deductibles or self-insured retention limits in an effort to reduce insurance premiums. As such, the corporation faces a significant exposure in the event of a property loss within the self-insured retention limit. Risk managers may incorrectly assume the loss as a cost of

doing business without considering the opportunity for recovery against culpable third parties. This is so even in those situations where the corporation maintains a legal department.

Despite the urgent need to undertake post-loss debris removal, claim documentation and resumption of business operations, risk managers, in conjunction with in-house legal departments, should ensure that the corporation maintains a Corporate Investigative Policy. Such policy should allow for a thorough and complete investigation of all property losses and, where appropriate, the pursuit of claims against culpable third parties responsible for causing the loss. By doing so, the corporation will maximize the recovery potential of its losses, including business interruption losses that can have a devastating effect on a corporation's bottom line. This is by no means a suggestion to pursue a reckless "sue anyone and everyone" approach. Certainly, there may be valid reasons to refrain from pressing a claim against a responsible tortfeasor. However, unless a proper and thorough investigation is performed, and performed promptly, the corporation will forever lose the recovery opportunity. Why the urgency? Primarily because the condition of the loss site will soon change due to a variety of factors such as: variable weather conditions; debris removal; cleanup efforts; scavengers and reconstruction. In addition, witnesses who may hold valuable information in the accident reconstruction process will move and memories will fade. Important records and relevant documentation necessary to prove the cause of the loss will be misplaced or simply disappear. In order to ensure the successful pursuit of a third party recovery action, a corporation should develop and implement a Corporate Investigative Policy that becomes standard operating procedure for the corporation.

A Corporate Investigative Policy should address the following considerations:

- Identify employees in the corporation responsible for receiving notice of property losses;
- Identify employees in the corporation responsible for implementing a prompt and thorough investigation;
- Contact the insurance broker and place all insurers on notice of the loss.
- Identify all witnesses to the incident and secure detailed statements of their observations.
- Cordon off and protect the accident scene.
- Photograph and videotape the accident scene with critical dimensions sketched out on a diagram or drawing.
- Identify all documents that may be relevant to the accident - - invoices, product literature, operation manuals, etc.
- Identify and preserve all relevant physical evidence.
- Select and retain appropriate experts.
- Notify potentially culpable third parties while the accident scene is still available for inspection.
- Work cooperatively with public authorities.

- Document, in conjunction with the legal department, the accident scene.

The above considerations are by no means exhaustive. Corporate risk managers should give careful thought to the unique nature of the corporation's business that may require further investigation or whether specialized outside counsel should be consulted. Furthermore, the insurance broker utilized by the corporation can be a valuable asset in implementing an investigation following a property loss. Insurance brokers often take the lead in implementing the investigation and ensuring that all necessary actions are taken and critical evidence preserved. Insurance brokers or subrogation counsel can be a valuable source of information, particularly with respect to the retention of experts familiar with the corporation's business or the product or processes which may have played a role in the cause of the loss.

A. The Need to Preserve the Evidence

Preserving the evidence, both physical and documentary, is one of the most critical aspects to the successful pursuit of a third party action. If critical evidence relevant to the action is lost, destroyed or altered, recovery efforts become increasingly more difficult. Spoliation of evidence is the legal doctrine addressing lost or destroyed evidence. Essentially, spoliation is the destruction or failure to preserve evidence for another's use in pending or future litigation.[2] The loss, alteration or destruction of a product that is alleged to have caused a property loss may raise spoliation issues in any property loss when a party to a lawsuit (or third party) fails to preserve or intentionally destroys any evidence, physical or otherwise, that may be deemed relevant to that action. During the last decade, the concern over spoliation has resulted in courts imposing a range of sanctions to either deter or punish spoliation including an adverse

inference charge at trial, preclusion of evidence or testimony and the outright dismissal of a claim or part of a claim.[3] Criminal sanctions may also be imposed.[4] In determining the sanction to be imposed for spoliation, particularly the dismissal of a cause of action, courts typically consider the degree of fault of the party who altered or destroyed the evidence, the degree of prejudice suffered by the opposing party and whether a lesser sanction will avoid substantial unfairness to the opposing party while simultaneously serving to deter such future conduct by the offending party.[5]

Courts have also increasingly recognized a cause of action for negligent or intentional spoliation of evidence where the spoliator undertook a duty to safeguard the evidence and failed to perform that duty.[6] Notwithstanding this trend, many courts are unwilling to recognize such a cause of action[7] and a number of jurisdictions have not yet addressed the issue of an independent cause of action in tort for spoliation of evidence.[8]

Increasingly, insurers also face potential liability to their insureds for spoliation of evidence relating to uninsured losses, either in the form of a tort action or bad faith liability. Liability may arise from of an insurers' (or their agents') possession, investigation or testing and the consequential loss or destruction of evidence essential to the policyholder's claim.[9]

In summary, one of the most critical aspects of any investigation is the preservation of all evidence that may possibly impact on liability. In our factual scenario, this includes not only the cappuccino machine but all other evidence in the area of origin, including other products, wall outlets, building wiring, circuit breakers and the like. It may also include items from any area that the public sector fire officials

believe may have been responsible for the fire's origin if different than Jack Investigator's. Importantly, this includes the need to preserve and protect documentary evidence that may implicate or, for that matter, free a potential defendant from liability. Any corporate investigative policy should specifically address the need to preserve and protect evidence as the key to any investigation.

B. Photographs, Witnesses and Other Considerations

Safely navigating the spoliation minefield only keeps you in the game. It does not win the case. Taking precautions to prevent critical evidence or even an entire case from being thrown out based on spoliation allegations should not overshadow the more mundane, but equally important, task of gathering the evidence, documents and information in the immediate aftermath of a loss that may bolster the case, while the evidence is still available.

It is crucial to thoroughly photograph and videotape the accident scene. Critical dimensions should be measured and sketched out on a diagram or drawing. Photographs and videotapes taken by others should be sought and obtained. For example, news stations frequently take footage of an accident scene even though that footage may not necessarily play on the evening news. Freelance photographers who monitor emergency radio bands and bystanders who happen to have camcorders handy often videotape fires and other catastrophes while they are still in progress. You can never have too many photographs and videotapes of an accident scene.

Identifying potentially important witnesses is critical to reconstructing the accident scene. Because memories fade quickly, witnesses should be identified and interviewed as soon as possible. It is important to record not only the facts and observations

conveyed by the witness but also the personal information of the witness that will enable you to contact the witness if needed later. Also, deciding whether to record a witness' facts and observations in writing should be carefully considered. If a written or recorded statement is obtained from a witness, that statement may be discoverable in any subsequent litigation. This would also hold true with respect to any summary of a witness statement prepared by a corporate employee outside the legal department. However, if an attorney prepares the summary or notes of the witness interviews, those summaries and notes may be deemed privileged or non-discoverable work product even though such document may not be used to impeach a witness or refresh their recollection. Careful consideration must be given to the manner and method used to record facts and observations obtained from witnesses.

Gathering pertinent documentation, particularly from public authorities, is imperative. For example, the dispatch records of the local fire and police department, the recordings of "911" calls and fire department incident reports all contain valuable information which, if not obtained immediately following an incident, may not be available later due to the purging of records in the normal and ordinary course of business. Also, burglar and fire alarm records and activity logs should be obtained. Corporate records should be searched for product information, invoices for product purchases, operating manuals and the like to ensure that such critical information is not destroyed as part and parcel of a normal corporate record retention policy. Also, in today's computer world, information retained on computer systems should be downloaded and retained in hard copy form to ensure that such information is available in the event of a computer crash.

In addition to the preservation of physical evidence discussed above, consider preserving exemplar products that may have been located in another portion of the premises or another location. For example, light fixtures are typically similar throughout a structure. If a light fixture is suspected as having caused the fire, it is important to secure other undamaged light fixtures that may have been purchased and installed on the premises at the same time as the one that is suspected to have caused the loss. Examining such undamaged exemplars is of invaluable assistance in identifying the failure mode in the accused product and will assist in leveling the playing field against a product manufacturer who is going to be immediately familiar with the product. Exemplars that have the same model and vintage as the accused product are often hard to come by. Thus, any that may already exist at the accident location or another location within the company should be preserved. In light of Daubert and the increasing need to test the expert's hypothesis, having an exemplar available may make the difference in getting to the jury.

C. Retention and Use of Experts

The selection and retention of appropriate experts to investigate the accident scene is critical. Experts should be retained immediately following the accident in order to ensure a thorough and prompt investigation. In view of Daubert[10] and Kumho Tire,[11] experts should be carefully selected based upon their qualifications, including where necessary, licensing requirements, and the scientific and technical knowledge possessed by the expert. Whereas in the past an expert could testify if he was qualified and his opinions were "generally accepted" in his field of study[12], Daubert and Kumho Tire have changed the landscape regarding the admissibility of expert testimony. The

United States Supreme Court's opinion in Daubert sought to purge "junk science" from federal courtrooms by holding that federal trial judges were obligated to make a threshold determination as to the admissibility of "scientific" expert testimony. The Daubert decision directed trial judges in the federal courts to evaluate the methodology underlying proposed expert testimony, but also cautioned the lower courts not to usurp the jury's role in evaluating the accuracy of the conclusions derived from that reasoning or methodology.[13] The Daubert decision set forth what was supposed to be a non-exhaustive list of factors that trial judges could consider in evaluating expert testimony:

> 1. Whether the technique or theory used was capable of being proved or disproved through testing;
>
> 2. Whether the technique or theory had been subject to peer review and publication in the scientific community;
>
> 3. The known or potential rate of error of the scientific technique or methodology employed by the expert; and
>
> 4. Whether the technique or methodology was "generally accepted" in the scientific community.[14]

Although Daubert was initially viewed as a decision that would liberalize the standards for the admission of expert testimony, the cases since Daubert have only served to more stringently apply its standards such that Daubert is almost universally regarded exclusively as a weapon for the exclusion of expert testimony.

Subsequent to Daubert, the United States Supreme Court in Kumho Tire further expanded the trial court's obligation to evaluate the reliability of expert testimony by applying the Daubert factors to all expert testimony and not just to "scientific" testimony. As such, experts used in fire investigation and forensic engineering now must be

evaluated in light of Daubert and Kumho Tire. Although Kumho Tire made it clear that the district court should adopt a flexible approach in evaluating the admissibility of expert testimony and should only attempt to apply as many or as few of the Daubert factors, if any, as fit a particular situation, many recent federal court decisions have effectively required that expert testimony comply with some or all of the Daubert factors.[15]

Because the trend of the federal courts is to closely scrutinize the qualifications and methodology used by experts as the basis for their opinions, careful evaluation must be used in the selection of testifying experts. Also, in the context of fire cases, some jurisdictions now require that fire cause and origin experts must be licensed as private detectives or private investigators.[16] Further, violations of the licensure requirements may constitute a crime.[17] Importantly, Rule 702 of the Federal Rules of Evidence, recently amended in response to Daubert and Kumho Tire, does not address licensing as a prerequisite for qualification of a witness as an expert. As such, while an expert's conduct in investigating a matter might violate state licensing requirements, such violations should only affect the weight of the expert's testimony, if anything, but should not deprive the expert's testimony of all probative value.[18] Notwithstanding, courts have more recently taken a more restrictive view disqualifying unlicensed individuals from offering expert testimony at trial.[19] Still, courts in other jurisdictions have given short shrift to the argument that fire investigators must comply with state licensing requirements in order to qualify as expert witnesses.[20]

Given the numerous issues today regarding licensing of experts, qualifications and methodology under Daubert and Kumho Tire, it is important to recognize and be

sensitive to these issues at the outset of any investigation. Only properly licensed and qualified experts who follow an accepted methodology can testify at trial. Retaining an expert to conduct the initial investigation who is precluded from testifying at trial severely limits any chance of recovery in a third party action. Because a motion in limine moving to exclude an expert is filed immediately prior to trial, it will be too late to retain another more qualified expert if granted.

III. Losses Falling Outside the Self-Insured Retention Limit

While the above discussion focused upon the actions an insured should take to preserve its rights to recover losses falling within the self-insured retention limit so as to minimize losses to the bottom line as the result of catastrophic events, the following discussion will focus on losses implicating both the self-insured retention limit and the primary and excess insurer coverages. In this context, the insured will be seeking to be made whole (recovering its self-insured retention limit) while the insurers who are deemed obligated to make payment to the insured will be seeking to recover those payments in the form of subrogation. Numerous issues therefore arise as to the rights and duties as between the insured and insurers seeking to recover their losses. Although the insured and insurers often cooperate together to maximize their recovery, occasionally cooperation is lacking and disagreement arises regarding the litigation and, in particular, who controls the litigation. Although most property policies provide that the insured must cooperate with the insurer in the pursuit of subrogation and not prejudice the insurer's subrogation rights, such policies typically do not address the respective duties and responsibilities of the parties when there exists both a significant uninsured loss such as a large deductible or self-insured retention limit and, as well, a significant

payment by the insurers giving rise to subrogation rights. Therefore, the insured and insurers are often left to their own devices in determining whether a third party action will be pursued and, if so, how. In many jurisdictions, the insured and insurers may pursue their own separate causes of action without having to join the same action. However, in other jurisdictions, a cause of action arising out of the same underlying incident may not be split and, therefore, only one action may be filed for all damages.[21]

The general rule against splitting a cause of action reflects the principle that a cause of action arises from a single incident and not the various forms of harm that ensued. The penalty for violating this rule is that the adjudication reached in the first action is, under the doctrine of res judicata, a bar to the maintenance of the second claim.[22] In a jurisdiction adhering to the rule that a cause of action may not be split, the insured and insurer suffering property losses have three options: 1) cooperate in the pursuit of the action against the third party tortfeasor; 2) the insurer can intervene in the action commenced by the insured; 3) or the insurer must sit back and be bound by the results of the insured's action. Most importantly, the insurer must inform the insured early on of its subrogation rights and its intent to pursue its rights against responsible third party tortfeasors.

Although most cases addressing the splitting of a cause of action rule involve personal injury and property damages which in many jurisdictions are deemed to be two separate and distinct causes of action,[23] many cases involve purely property damages suffered by both the insured and insurer. In some jurisdictions, the general rule against splitting a cause of action does not preclude the insured and insurer from filing separate actions for property damage.[24] On the other hand, several jurisdictions specifically

preclude splitting a cause of action in the property damage context. In Travelers Insurance Company v. Hartford Accident and Indemnity Company, 222 Pa. Super. 546, 294 A.2d 913 (1972), the Pennsylvania Superior Court addressed the issue of splitting a cause of action in the context of a subrogation claim and held that "as a subrogee derives his right of recovery from the injured party, the prohibition against splitting causes of actions is no less binding where the interest of a subrogee is involved."[25]

Following this same rule, the Pennsylvania Superior Court in United National Insurance Company v. M. London, Inc., 21 Phila. 323 (1990), Aff'd, 23 Phila. 598 (1992), upheld a trial court ruling holding that the insured and not the insurer maintained the right to bring an action where the insured had not been made whole by the insurer. The M. London holding is unique and, in many respects, poorly reasoned. The court accorded all rights to control the litigation to the insured refusing to allow the insurer to participate in the litigation notwithstanding its substantial subrogation claim. Taken to the extreme, M. London could erroneously be relied on to support an insured having total control of the litigation when, in fact, the insured's only claim is its de minimis deductible. Although M. London is a good example of the pitfalls that can occur when there is no cooperation between the insured and insurer, reliance on its holding should be cautiously exercised.

M. London, the insured, suffered a fire loss resulting in damages of $150,000. Because M. London was seriously underinsured, United National paid to M. London $55,034.62 in satisfaction of its claim. M. London conducted an investigation into the cause of the fire and subsequently commenced a products liability action against the manufacturer of a defective refrigerator claiming damages in the total amount of

$150,000. The damages claimed by M. London represented both the insured and uninsured losses.

While the action was pending, a dispute arose between the parties as to whether the insurer maintained the right to have its own counsel directly participate in the litigation. M. London refused repeated requests by its insurer to inspect the refrigerator believed to have caused the fire and for information concerning the case. As such, the insurer sought to intervene in the action. The trial court denied the insurer's petition for intervention which decision was affirmed by the Pennsylvania Superior Court. M. London proceeded to try the case and lost.

Subsequently, the insurer commenced an action against M. London, asserting that M. London's failure to permit the insurer to directly participate in and control the litigation constituted a breach of the cooperation clause of the policy. The insurer contended that, as a matter of law and contract, M. London maintained a duty to cooperate fully with the insurer in the prosecution of its claim against the third party tortfeasor. United National alleged that M. London breached its duty in the following ways: 1) despite knowledge that the insurer was exclusively represented by its own counsel, M. London asserted that it would represent all parties and refused to make arrangements for the insurer to inspect the refrigerator; 2) M. London instituted an action seeking recovery of both insured and uninsured losses without the knowledge or consent of the insurer or its counsel and against the direction of the insurer and its counsel; 3) M. London refused to disclose any information to the insurer and its counsel regarding the lawsuit; and 4) M. London opposed United National's petition to intervene in the underlying action.

The Court found in favor of M. London holding that:

> (1) Subrogation rights do not arise until the insured has been made whole;
>
> (2) Where the insured has not been fully indemnified, the insured and not the insurer has the right to bring and control the action;
>
> (3) The participation of attorneys representing an insurer's subrogation interests in litigation brought by the insured almost always prejudices the interests of the insured; and
>
> (4) When the insured files its own lawsuit against a tortfeasor with its own attorney, so long as the insurer's subrogated interest is part of the claim, such action does not constitute a breach of the policy of insurance requiring the insured to return the payments made by the insurer.[26]

Interestingly, the M. London court distinguished its holding from the Pennsylvania Superior Court holding in Paxton National Insurance Company v. Brickajlik, 522 A.2d 531 (Pa. 1987) where the Pennsylvania Supreme Court held that an insured's refusal to sign a Complaint in a subrogation action brought in the insured's name constituted a material breach of the policy and entitled the insurer to a return of the insurance proceeds paid by the insurer. There, the Court held that in view of the prejudice inherent in the disclosure of insurance, the insurer maintained the absolute right to insist upon proceeding in the name of the insured. The M. London court distinguished Paxton on the basis that M. London commenced its lawsuit seeking recovery for not only their uninsured losses but also for the insurer's subrogated claim.[27] As such, the M. London court found that Paxton was distinguishable and that the insurer was not prejudiced as in Paxton.

In those jurisdictions adhering to the general rule against splitting a cause of action, some courts have held that a defendant who is on notice of a subrogation claim but nonetheless settles the insured's claim must defend the second cause of action filed by the insurer.[28] These courts refused to allow a defendant to prejudice an insurer's subrogation claim by settling the first action and thereafter arguing that the doctrine of splitting a cause of action bars the second action. These courts presumably place the onus on the defendant to either work with multiple plaintiffs to resolve the entire claim or suffer the risk that it may have to defend two separate actions arising from the same accident.

Similar to Pennsylvania, New Jersey adheres to the "Entire Controversy Doctrine" which requires all persons who have a material interest in the controversy to be joined in one action.[29] The Entire Controversy Doctrine mandates that all claims for property damage arising out of the same incident must be filed in one action. Notwithstanding, the courts in the New Jersey are mixed in their rulings on whether property damage and personal injury claims arising from the same accident must be filed in one action or whether such claims are separate and distinct.[30]

In order to avoid the adverse consequences of a M. London situation, it is important that the insurer immediately communicate to the insured that 1) no action should be taken by the insured to restrict, release or prejudice the insurer's subrogation rights; 2) no settlement should be entered into with a third party tortfeasor and no release executed; and 3) notice should be given to the insurer of any uninsured losses and whether the insured wishes to have those losses asserted in the insurer's subrogation action. If the insured advises of the existence of uninsured losses, then, at

that time, consideration should be given to negotiating a thorough and comprehensive litigation agreement setting forth the rights and duties of the respective parties.

If cooperation is lacking and the insured proceeds to file suit, it is important that the insurer 1) notify the insured, its counsel and the third party tortfeasor of its subrogation claim; 2) seek to intervene as an additional party plaintiff so as to actively participate in the litigation and obtain a direct award from the third party tortfeasor; or 3) seek to enter an appearance as co-counsel on behalf of the insured to protect the subrogation claim. The goal should be to participate in the litigation so that the insured is not in sole control thereby enhancing the recovery potential.

A. Conflicts of Interest

Conflicts of interest in subrogation cases typically arise out of the potentially adverse relationship between an insurer and its insured. Concurrent pursuit of recovery for both the subrogated claim and the uninsured loss involves certain issues that must be addressed at the outset of a joint recovery effort so that the advantages of the joint recovery effort can be fully maximized and the potential dangers avoided.

The ABA Model Rules of Professional Conduct contain various rules addressing the multiple representation of clients in the same matter as well as other rules covering an attorney's conduct in any number of circumstances. These rules generally address the circumstances under which an attorney may represent multiple parties in the same case and the potential ethical issues that must be a primary concern to the subrogation practitioner. Rule 1.7[21] of the ABA Model Rules is frequently implicated in the context of subrogation and is a rule that should be carefully followed by the subrogation practitioner. Comment 7 to Rule 1.7 provides, in relevant part, as follows:

> An impermissible conflict may exist by reason of substantial discrepancy in the party's testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantial different possibilities of settlement of the claims or liabilities in question.

When a subrogation practitioner represents both the insured and uninsured losses, Rule 1.7 becomes pertinent, particularly where their respective interests may differ. In the subrogation context, the following conflicts may arise in the multiple representation situation: (1) the insured inflates its uninsured claim well beyond that which is reasonably recoverable; (2) total damages exceed the available funds from the third party tortfeasor; (3) the insured's loss is grossly disproportionate to the insurer's loss; (4) the parties disagree in whose name the action should be filed; (5) the parties disagree over who has the right to control the investigation and/or litigation; or (6) the parties disagree regarding who has the right to control settlement.[32]

If the above issues have not been addressed in the form of a litigation agreement, then the subrogation practitioner should be particularly concerned in proceeding with a multiple representation. Although the ABA Model Rules permit multiple representations, when any of the above issues exist in the matter and an attorney reasonably believes that the representation will adversely affect the attorney-client relationship, multiple representation should be discouraged.

As the duty of loyalty prevents an attorney from concurrently representing clients with adverse interests in the same matter without an informed and written waiver, these potential conflicts of interest should be addressed in writing by the insurer and insured prior to commencing the joint recovery effort and, as well, by counsel prior to undertaking the concurrent representation. The most effective method of doing so is in

the form of the previously discussed litigation agreement. Such an agreement would typically set forth that the insured and insurer consent to, among other things, 1) counsel concurrently representing the insured and insurer; 2) the respective rights and obligations of the insured and insurer in the litigation; and 3) respective rights of the parties to a recovery including a specific mathematical formulation as to the pro ration of any recovery. Such an agreement should reduce or eliminate the potential for any adversarial interest as between the insurer and insured during the recovery efforts and avoid potential conflicts of interest from developing for the subrogation practitioner. If, for any reason, a litigation agreement is not advisable and counsel agrees to proceed to represent both the insured and insurer, a waiver of the potential conflict should be entered into and signed by both the insured and insurer. This will ensure that counsel is not implicated if, and when, the interest between the insured and the insurer become adversarial. However, to insure that such conflicts do not arise during the litigation process which are problematic for counsel and disruptive of the ability to resolve the claim, separate representation should be encouraged. At that juncture, it may be obvious that the insured and insurer cannot agree to the terms of a properly negotiated litigation agreement and, therefore, the likelihood of an adversarial interest arising during the litigation is probable. Counsel at that point should take heed and encourage the other party to retain separate counsel to resolve these issues if possible or, if not, to become co-counsel.

B. Litigation Agreements

As a general rule, the insurer has no right to reimbursement until the insured has been made whole. Exactly what constitutes “made whole” is subject to differing

interpretations. The majority rule is that the insured is entitled to be "made whole" out of any funds recovered from a tortfeasor before the insurer receives any portion of its recovery.[33] This may be the case even where the clear and unambiguous language of the insurance policy indicates otherwise.[34] Only a minority of jurisdictions follow the rule that the insurer is entitled to be made whole first before any proceeds pass to the insured.[35] Importantly, there are still many jurisdictions that do not have a definitive rule regarding whether the insured or insurer are entitled to be made whole first from proceeds obtained from a third party tortfeasor.[36]

Because of the divergent and often untenable rationales employed by the courts in apportioning recoveries, a litigation agreement is an excellent method to address the issue early and maintain cooperation between the parties. Commonly referred to as a pro ration agreement, it is the best way of addressing cooperation between the parties, control of the litigation and apportionment of costs and any recovery by way of settlement or verdict. The key to enforcement of the litigation agreement is that it be fair and reasonable.[37] Where possible, a fair arm's length litigation agreement that recognizes the insured's provable damages should be negotiated. In this regard, it is important for the insured and insurer to assess the total damages of the case, including the insured's claimed uninsured loss. Since the uninsured loss oftentimes relates to damages exceeding the policy limits, it is important that the insurer adjust the total loss both on an actual cash value and replacement cost basis. For those losses for which there was no insurance coverage, such as business interruption, loss of good will or loss of rental income, it is important that an accountant be retained to closely evaluate the loss to ensure its legitimacy and provability under state law. A properly negotiated

litigation agreement that clearly sets forth the damages of the insured and insurer as well as the pro rata sharing of recovery and costs acts as a prophylactic measure preventing conflicts from arising when a settlement offer is made or a verdict is obtained. A properly negotiated litigation agreement should contain the following provisions:

1. A mathematical formula which apportions recovery from third parties between the insured and insurer as well as, if necessary, excess insurers. 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 insured apportion recovery on an 80/20 basis up to the first $250,000 recovered, with any amount recovered in excess of $250,000 paid to the insured. Such an approach can be used in a case where the insured had a $200,000 policy limit where the insurer agreed on an adjusted loss figure of $250,000, yet the insured claims items of damage in excess of $250,000 which the insurer did not recognize.

2. An apportionment of costs and expenses between the insured and insurer. In most instances, the apportionment will follow the same formula used to apportion the recovery proceeds. The nature and type of these costs and expenses should be enumerated in the agreement. Importantly, the insurer may agree to advance all costs and expenses and to only seek reimbursement from the insured in the event of a successful recovery from the third party tortfeasor. By doing so, the insurer obtains the full cooperation of the insured by minimizing their expenditures during the litigation. This is a particularly important provision in an insured whole jurisdiction where the insured may be giving up an arguable claim to be made whole first.

3. A specific provision stating that in consideration for the insurer providing the insured with the fruits of its subrogation investigation, the work product of its expert consultants and undertaking to advance all costs and expenses of litigation to the insured, the insured agrees to waive any right it may claim to be made whole first.

4. The payment of attorneys fees by each party out of the recovery proceeds on a specifically stated fee basis;

5. The party with the majority stake in the litigation controls acceptance 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 the settlement offer acceptable to the other party if and only if the tortfeasor permits the non-settling party to continue to prosecute the action on its own behalf and agrees to waive any defenses based upon any release of claims by the settling party.

Experience has shown that with a litigation agreement in hand, the insured 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 insured and the insurer. Just as a house divided against itself cannot stand, it is more difficult to prevail in a subrogation claim where the insured and insurer are at odds.

C. Settlements

When an insured has a large self-insured retention limit or deductible, an issue may arise whether the insurer can settle its claim against the tortfeasor, leaving the insured to proceed against the tortfeasor for any uninsured losses. If settlement has not been addressed in a litigation agreement but the parties have agreed to jointly prosecute the claim, the issue may be critical once offers are made that may be unacceptable to either the insured or insurer. This issue can arise in jurisdictions adhering to the rule against splitting a cause of action as well as those jurisdictions that permit splitting a cause of action. For example, in Winkelman v. Excelsior Insurance

Company, 85 N.Y.2d 577, 650 N.E.2d 841 (N.Y. App. Div. 1995), the court was confronted with the narrow issue of whether an insurer who had paid its insured the full amount due under a fire policy but less than the insured's loss, could proceed against the third party tortfeasor responsible for the loss before the insured had been made whole by the tortfeasor. Winkelman involved a fire loss with damages totaling $319,359.26. The insurer, Excelsior, paid the insured $221,882 after the deductible and reductions for co-insurance penalties. Excelsior advised its insured of its intent to pursue subrogation against the tortfeasor. Subsequently, both parties sought recovery from the third party tortfeasor.

The third party tortfeasor then settled with Excelsior in the amount of $180,000 and Excelsior released its claims against the third party tortfeasor. Thereafter, the insured brought a claim against Excelsior in the amount of $97,477.26 alleging that Excelsior acted in derogation of its rights by settling its subrogation claim against the third party tortfeasor before the insured had been made whole. The insured claimed that its ability to obtain payment from the third party tortfeasor was diminished. The insured also argued that such action prejudiced its position and that the insurer should be precluded as a matter of law from settling with the third party tortfeasor until the insured had been made whole.

Finding that the insured had a clear right to resolve its claim with the third party tortfeasor since its subrogation rights accrued on payment of the loss, the Winkelman court held as follows:

> At that point, an insurer who has paid the policy against the limits possesses the derivative and limited rights of the insured and may proceed directly against the negligent third

> party to recoup the amount paid. This is so even though the insured's losses are not fully covered by the proceeds of the policy [citation omitted]. The claims of the insurer for amounts paid by it and the insured's claim for uninsured losses are divisible and independent, and permitting the insurer to sue . . . as equitable subrogee does not affect the right to sue for the amount of the loss remaining unreimbursed.[38]

The Winkelman court specifically rejected out of state cases holding that an insurer's rights as equitable subrogee does not arise until the insured has been made whole.[39] The Winkelman court found that none of the proffered cases stood for the proposition that an insurer must delay seeking recovery from the tortfeasor until the insured has exhausted its efforts to collect from the third party tortfeasor. The court observed that such a result may cause the insurer's action to be time barred.[40] It is important to note that New York, the jurisdiction in which the Winkelman case arose, permits splitting a cause of action.[41]

A similar result occurred in Julson v. Federated Mut. Ins. Co., 562 N.W.2d, 1997 S.D. 43 (1997). The Julsons operated a van conversation company located in South Dakota. In December of 1988 the primary manufacturing facility burned to the ground causing more than $950,000.00 in damage. Federated, which insured the Julsons, paid its policy limits of $639,316.92 leaving the Julsons with an uninsured loss of $324,797.45.

Following the fire, Federated notified the Julsons of its intent to assert its contractual and equitable subrogation rights against potential third party tortfeasors. Federated commenced an action against the alleged tortfeasors and Julson

subsequently joined the action. Before trial Federated settled its case leaving Julson to proceed against the tortfeasors. Julson eventually settled its case against the tortfeasors for $202,333.00, almost $125,000.00 less than its claimed damages.

Julson then commenced an action against Federated claiming bad faith in that Federated breached its duty of good faith and fair dealing when it settled with the tortfeasors prior to Julsons being "made whole." In essence, Julson argued that its bargaining power was prejudiced by the Federated settlement.

The court in Julson first examined the plain and unambiguous language in the policy of insurance and determined that Federated was contractually permitted to subrogate and settle after making full payment to the Julsons.[42] Likewise, the court distinguished several cases holding that common law subrogation rights do not accrue until the insured is made whole.[43] The court distinguished those cases on the grounds that they involved an insurer settling its subrogation action from a pool of funds that was thereafter insufficient to satisfy the claimed damages of the insured. Unlike those cases, after Federated settled its claim, Julson presented no evidence that there was insufficient funds for Julsons claimed damages. Nothing prevented the Julsons from proceeding to trial in an attempt to recover their total loss. Thus, in Julson the Supreme Court of South Dakota affirmed the trial court that no prejudice was sustained by Julsons because Federated settled the lawsuit with the third party tortfeasors.

Both Winkelman and Julson underscore the importance of addressing the settlement quagmire before it arises. A litigation agreement and the foresight to identify such issues in advance can go a long way in avoiding needless and costly litigation between the insured and insurer after resolution of the third party action.

D. Recoveries as Between Primary and Excess Insurers

In the life of a complex subrogation case, there are primary insurers and excess insurers. As a general rule, the excess insurer is entitled to recover first before the primary insurer can be reimbursed.[44] Typically, the last to pay is the first to recover.[45]

In Century Indem. Co. v. London Underwriters, 12 Cal. App. 4th 1701 (Cal. Ct. App. 1993), the court was called upon to address the issue of whether the excess insurer was entitled to first recovery of the proceeds before the primary or whether the recovery proceeds should be prorated between the primary and excess insurers. Donald Wells, an employee of Cates Transportation (Cates), was electrocuted while working on a site operated by Montgomery Drilling Company (Montgomery). Prior to Wells' death, Montgomery and Cates entered into a "Master Service Contract" under which Cates agreed to defend and indemnify Montgomery for certain losses, including the accident resulting in Wells' death.

The Wells family commenced a wrongful death action against Montgomery. Montgomery maintained two policies of insurance, the primary policy covered the first $500,000 and the excess covered the next $5 million for each occurrence. In the wrongful death action, Montgomery and its primary insurer negotiated a settlement in the amount of $1,080,648.46. The primary insurer paid $476,548.46 and the excess insurer paid $604,100. Although Cates was protected from a direct suit by Wells because of the exclusive remedy of workers compensation, Cates was ultimately responsible for any liability by virtue of the indemnification agreement. Because of the indemnification agreement between Cates and Montgomery, Cates' insurer offered its policy limits totaling $500,000.

Thereafter, a dispute arose, and litigation was commenced, between the primary and excess carrier over which of the two insurers was entitled to be reimbursed with the $500,000 obtained from Cates' insurer. Montgomery's policy with the excess insurer provided that the excess insurer would be given preference, over any primary insurer, to any available reimbursement from a third party tortfeasor. Montgomery's primary policy was silent on this issue. In holding that the excess insurer was entitled to be reimbursed first before any proceeds were made available to the primary insurer, the court relied on common law subrogation principles and the language of the policies of insurance. The court reasoned as follows:

> We note as the trial judge on remand that this is the same result that would be reached if Cates had abided by its Master Service Contract with Montgomery and had named Montgomery as an additional insured on Cates' policy of primary insurance. The Wells' heirs could then have gotten $500,000 from London [primary insurer]; $500,000 from Cates' insurer and the remaining $100,000 from Montgomery's excess insurer, Century. The trial judge, on remand, also expressly stated that "if the subrogation clauses were to be irreconcilable, the court would have decided the matter on equitable principles and would have come to the same conclusion."[46]

In Highlands Ins. Co. v. New England Ins. Co, 811 S.W.2d 276 (Tx. Ct. App. 4th Dist. 1991), a first level excess carrier and third level excess carrier litigated their dispute over which of the insurers was eligible to recover the monies obtained by their insured from its co-defendants in a suit for wrongful failure to defend and provide coverage. The underlying suit arose in 1983 and 1984 when several plaintiffs sued for injury and death resulting from the use of a product called E-Ferol.

E-Ferol was manufactured by Revco and Carter Laboratories (manufacturers) and distributed by O'Neal, Jones & Feldman, Inc. (O'Neal). The dispute arose from the manufacturers refusal to provide a defense for O'Neal, their distributor. Ultimately, O'Neal and its insurers settled with the plaintiffs and thereafter sued the manufacturers and their insurers. O'Neal was successful and recovered monies from the defendants and their insurers for their failure to defend and provide coverage.

The court in Highlands examined the language in the policy of insurance for both the first and third excess insurers as well as the prevailing common law view as enunciated in Couch on Insurance. The court held that both policies of insurance contained nearly identical subrogation clauses that establish the reimbursement priorities. Based on the policy language, the court held that "those who pay last are first to recoup subrogation monies."[47] Likewise the court observed that "this construction of the subrogation clause is consistent with the following principle stated by Professor Couch":

> Where the insurers' coverage is in the nature of layers, the excess carrier should recover under subrogation before primary insurers can be reimbursed. One can look at a subrogation recovery as reducing the net loss, in which the excess carriers would not be obligated to pay the loss.[48]

As is evident from the above, excess insurance policies typically provide that the excess insurer is to recover first from any third party tortfeasor before the primary insurer. This policy language has been central to the analysis of the priority of payments as between a primary and excess insurer. Likewise, most courts have found that the excess insurer who pays last is the first to recover. Out of that recovery, the excess insurer should be responsible for the payment of counsel fees on its share of the

recovery as well as the payment of costs and expenses necessitated in obtaining the recovery. Obviously, the primary and excess insurers are free to negotiate different contractual terms, particularly in a situation where the primary insurer takes the lead in the subrogation investigation, retention of experts and prosecution of the subrogation action. In those situations, the primary and excess insurers would be free to negotiate a litigation agreement providing for a pro rata sharing of any recovery given the consideration put forth by the primary insurer.

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[2] See Minn-Chem, Inc. v. Richway Indus., Inc., No. C1-99-1963, 2000 W.L. 1066529 (Minn. Ct. App. Aug. 1, 2000).

[3] See, e.g., Donohoe v. American Isuzu Motors, Inc., 155 F.R.D. 515 (M.D. Pa 1994); Sipe v. Ford Motor Co., 837 F. Supp. 660 (M.D. Pa. 1993); Graves v. Daly, 526 N.E.2d 679 (Ill. Ct. App. 1988).

[4] See, e.g., Ohio Rev. Code §§ 2921.32(a)(4), 2921.12 (obstructing justice, tampering with evidence). "A court need not have issued an order barring evidence destruction for sanctions to be imposed." See Lawrence v. Harley-Davidson Motor Co., Inc., No. 99 C 2609, 1999 WL 637172 at *2 (N.D. Ill. Aug. 12, 1999). See also American States Ins. Co. v. Tokai-Seiki H.K., Ltd., 94 Ohio Misc.2d 172, 704 N.E.2d 1280 (C.P. Ct. Miami County 1997).

[5] Schmid v. Milwaukee Electric Tool Corp., 13 F.3d 76, 79 (3rd Cir. 1994); Gordner v. Dynetics Corp., 862 F. Supp. 1303 (M.D. Pa. 1994).

[6] Smith v. Atkinson, No. 1980433, 2000 W.L. 127181 (Ala. Feb. 4, 2000) (negligent spoliation cause of action permitted); Hazan v. Mun. of Anchorage, 718 P.2d 456 (Alaska 1986) (negligent or intentional spoliation cause of action permitted); Holmes v. Amerex Rent-A-Car, 180 F.3d 294 (D.C. Cir. 1999) (negligent or reckless spoliation is an independent and actionable tort); Brown v. City of Del Ray Beach, 642 So. 2d 1150 (Fla. Dist. Ct. App. 1995) (tort of spoliation may be permitted); Boyd v. Travelers Ins. Co., 652 N.E.2d 267 (Ill. 1995); Thompson v. Owensby, 704 N.E.2d 134 (Ind. Ct. App. 1998). Other jurisdictions permitting an action for spoliation include Kansas, Montana, New Jersey, New Mexico, North Carolina, Ohio, Pennsylvania (intentional spoliation permitted, negligent spoliation not permitted) and Wyoming.

[7] La Raia v. Superior Court, 722 P.2d 286 (Ariz. 1986) (tort of spoliation not recognized); Reiley v. D'Errico, 1994 W.L. 547671 (Conn. Super. Ct. 1994) (tort of

spoliation not recognized); Gardner v. Blackston, 365 S.E.2d 545 (Ga. Ct. App. 1988); Murray v. Farmers Ins., 796 P.2d 101 (Idaho 1990); Meyn v. State, 594 N.W.2d 31 (Iowa 1994); Monsanto Co. v. Reed, 950 S.W.2d 811 (Ky. 1997), reh'g denied (Oct. 2, 1997); Edwards v. Louisville Ladder Co., 796 F. Supp. 966 (W.D. La. 1992). Other jurisdictions include Maine, Maryland, Massachusetts, Michigan, Minnes ota, Missouri, New Hampshire, New York, South Carolina, Texas, Virginia, Washington, West Virginia and Wisconsin.

[8] Hawaii, Mississippi, Nebraska, Nevada, North Dakota, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah and Vermont.

[9] See Cooper v. State Farm Fire and Casualty Company , No. 93L3898 (Ill. Cir. Ct., Cook Cty. January 19, 1999) (insurer who failed to preserve a gas range responsible for a fire was sued by a building tenant); Thompson v. Owensby, 704 N.E.2d 134 (Ind. Ct. App. 1998) (claim permitted by dog bite victims against liability insurer of the dog owner for breach of the duty to preserve a dog restraining cable in the insurer's possession during investigation); Weiss v. United Fire and Cas. Co., 197 Wis. 2d 365, 541 N.W.2d 753 (Wis. 1995) (insurer liable for bad faith arising from spoliation); Upthegrove Hardware, Inc. v. Pennsylvania Lumbermen's Mut. Ins. Co., 146 Wis. 2d 470, 431 N.W.2d 689 (Wis. Ct. App. 1988);(jury verdict for intentional spoliation against insurer upheld).

[10] Daubert v. Merrell Dow Pharmaceuticals , 509 U.S. 579 (1994).

[11] Kumho Tire Co. Carmichael, 526 U.S. 137 (1999).

[12] Frye v. U.S., 293 F. 1013 (1923).

[13] Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579, 595 (1993).

[14] Id. at 592-95.

[15] See Oddi v. Ford Motor Co., 234 F.3d 136 (3rd Cir. 2000) (expert excluded from testifying in regard to crashworthiness because expert had not conducted any tests of his proposed alternative design); Pride v. Bic Corp., 218 F.3d 566, 578 (6th Cir. 2000) (expert excluded because of failure to conduct replicable laboratory experiments demonstrating that explosion and resulting damage were consistent with proffered manufacturing defect); Weisgram v. Marley, 169 F. 3d 514 (8th Cir. 1999)(although decided before Kumho Tire, 8th Cir. reversed a verdict in favor of plaintiff holding that all of plaintiff's experts should have been excluded from testifying based upon the lack of sufficient physical evidence and testing to support the expert opinions offered at trial; Booth v. Black & Decker, No. 98-6352, U.S. Dist. LEXIS 4495, * (court precluded expert from testifying in product liability action finding that his methodology was flawed because he failed to test his own hypothesis).

[16] See e.g., People v. West, 264 Ill. App. 3d 176, 636 N.E.2d 1239 (5th Dist. 1994) Appeal denied, 157 Ill. 2d 519, 642 N.E.2d 1300 (1994).

[17] See e.g., 225 ILCS 446/190; 22 P.S. § 26.1; N.J.S.A. 45:19-10; DEL. CODE § 24-1303(b).

[18] See Bowser v. Publicker Indus., Inc., 101 F. Supp. 368, 388 (E.D. Pa. 1951) aff'd 192 F2d 933 (3rd Cir. 1951).

[19] People v. West, 264 Ill. App. 3d 176, 636 N.E.2d 1239 (5th Dist. 1994) Appeal denied, 157 Ill. 2d 519, 642 N.E.2d 1300 (1994); Pennsylvania Lumbermens Ins. Corp. v. Landmark Electric, Inc., 1993 W.L. 541644 (Ohio Ct. App. 2nd Dist. 1993).

[20] Doochin v. U.S.F. & G., 854 S.W.2d 109 (Tenn. Ct. App. 1993); Eagle Pet Serv. Co., Inc. v. Pacific Employers Ins. Co., 175 A.D.2d 471, 572 N.Y.S.2d 623 (3rd Dept. 1991) appeal denied, 580 N.Y. 2d 199, 79 N.Y.S.2d 753, 588 N.E.2d 97 (1992); INS Investigations Bureau v. Lee, 709 N.E.2d 736 (Ind. Ct. App. 1999); Owens v. Payless Cashways, Inc., 670 A.2d 1240 (R.I. 1996).

[21] Boston, Bates & Holt v. Tennessee Farmers Mut. Ins. Co., 857 S.W.2d 32 (Tenn. 1993) (Single tort gives rise to one cause of action, which is not severable and which must be asserted in one suit, which suit is subject to general control of the insured); Jenkins v. Skelton, 192 P. 249 (Ariz. 1920); McKibben v. Zamora, 358 So. 2d 866 (Fla. Dist. Ct. App. 3d Dist. 1978); Ga.-Story v. Rivers, 138 S.E.2d 304 (Ga. 1964); Fiscus v. Kansas City Public Service Co., 112 P.2d 83 (Kan. 1941); Travelers Indem. Co. v. Moore, 201 S.W.2d 7 (Ky. 1947); Coniglio v. Wyoming Valley Fire Ins. Co., 59 N.W.2d 74 (Mich. 1953); Hayward v. Vollbrecht, 293 N.W. 246 Minn. 1940; Farmer v. Union Ins. Co., 111 So. 584 (Miss. 1927); Long v. Walters, 833 S.W.2d 38 (Mo. Ct. App. 1992); Smith v. Hutchins, 566 P.2d 1136 Nev. (1977); Simpson v. Robert's Express, 182 App.2d 449 (N.H. 1962); Rush v. Maple Heights, 147 N.E.2d 599 (Ohio 1958); Lowder v. Oklahoma Farm Bureau Mut. Ins. Co., 436 P.2d 654 (Okla. 1967); Crumley v. Travelers Indemn. Co., 475 S.W.2d 654 (Tenn. 1972); Moultrup v. Gorham, 34 A.2d 96 (Vt. 1943).

[22] 1 AM. JUR.2D Actions § 110.

[23] 1 AM. JUR.2D Actions § 129; Andrea G. Nadel, Simultaneous Injury to Person and Property as Giving Rise to Single Cause of Action-Modern Cases, 24 A.L.R.4th 646 (2000).

[24] Travelers Indem. Co. v. Moore, 201 S.W.2d 7 (Ky. 1947); Underwriter at Lloyd's Ins. Co. v. Vicksburg Traction Co., 63 So. 455 (Miss. 1913); Fidelity & Guaranty Fire Corp. v. Silver Fleet Motor Express, Inc., 7 So. 2d 290 (Ala. 1942) (A judgment for truck owner suing defendant for damage to truck not covered by insurance, was not "res judicata" in action against defendant by owner's cargo insurer paying cargo loss, since there was

no "splitting of cause of action" but two distinct causes of action); see also N.Y. C.P.L.R. § 1004 (2001).

[25] See also United Nat'l Ins. Co. v. M. London, Inc., 21 Phila. 323 (1990), Aff'd, 23 Phila. 598 (1992), Supra, (direct participation of attorneys representing an insurance company's subrogation interests in litigation brought by the insured almost always prejudices the interest of the insured.); U.S. Fidelity & Guaranty Co. v. Glass, 545 S.W.2d 924 (Ark. 1977) (Although Worker's Compensation carrier and claimant have separate rights to institute action against a third party tortfeasor, there is but one cause of action and it cannot be split).

[26] United Nat'l Ins. Co. v. M. London, Inc., 21 Phila. at 323.

[27] Id. at 328.

[28] Southern Pacific Transp. Co. v. State Farm Mut. Ins. Co., 480 S.W.2d 59 (Tx. Ct. App. 1972) (A State Farm insured filed suit against Southern Pacific in an action arising from a collision with a truck owned by Southern Pacific. Southern Pacific was on notice of a potential subrogation claim but settled the action with the insured in return for a release from all claims arising from the accident. State Farm was not on notice of the action between its insured and Southern Pacific. The court held that when a third party is on notice of an insurance company's subrogation claim he cannot destroy that claim by entering into a settlement with and obtaining a release from the company's insured).

[29] R. 4:30 A; Cogdel v. Hospital Ctr. at Orin, 116 N.J. 7 (1989).

[30] R. 4:30 A; Cogdel v. Hospital Ctr. at Orin, 116 N.J. 7 (1989).

[31] Rule 1.7 Conflict of Interest: General Rule:

(a) a lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

[32] See also Thomas S. Brown and M. Jane Goode, Conflicts of Interest in Subrogation Actions , 22 Tort & Ins. L.J. 16 (Fall 1986).

[33] COUCH ON INSURANCE § 223:133(3d ed. 1997); For an extensive discussion of this issue see Rinaldi, Apportionment of Recovery Between Insured and Insurer in a Subrogation Case, 29 Tort & Ins. L.J. 803 (1994).

[34] Garrity v. Rural Mut. Ins Co., 253 N.W.2d 512 (Wis. 1977)

[35] This minority rule has been followed in some instances in California, Idaho, Wyoming and South Dakota. See e.g., Julson v. Federated Ins. Co, 562 N.W.2d 117 (S.D. 1997) (subrogation insurer has no duty to continue a cause of action against a tortfeasor rather than settle the claim. The court considered that insured failed to establish that it could not be made whole.)

[36] Within a property damage context, these jurisdictions include Alaska, Arizona, Delaware, Kansas, Missouri, Nebraska, New Mexico, North Dakota, Oregon, and Virginia.

[37] Culver v. Insurance Co. of N. Am., 535 A.2d 15 (App. Div. 1987), Rev. on other grounds, 559 A.2d 400 (N.J. 1984) In Culver, the New Jersey Supreme Court offered a substantial number of comments on subrogation issues that were raised and discussed by the lower court. Initially, the court recognized that subrogation rights are created in one of three ways: 1) through an agreement between the insured and the insurance company; 2) by statute; and 3) judicially through equitable principles that compel the wrongdoer to undertake the obligation that is ought to pay. See also Ex Parte State Farm Fire & Cas. Co., 764 So. 2d 543 (Ala. 2000); Hayes-Albion Corp. v. Whiting Corp., 459 N.W.2d 47 (Mich. Ct. App. 1990); Lutkus v. Lutkus, 692 A.2d 958 (N.H. 1997); Demick v. Lewis, 497 A.2d 1221 (N.H. 1985).

[38] Winkelman v. Excelsior Ins. Co., 85 N.Y.2d 577, 582, 650 N.E.2d 841, 844 (1995).

[39] See also United Nat'l Ins. Co. M. London, Inc., 21 Phila. 323 (1990), Aff'd, 23 Phila. 598 (1992), supra.

[40] See also Julson v. Federated Mut. Ins. Co., 562 N.W.2d 117 (S.D. 1997) (rejecting a claim that a subrogating carrier has a duty to continue a cause of action against a tortfeasor rather than settle the claim.)

[41] See N.Y. C.P.L.R. § 1004 (2001) ("Except where otherwise proscribed by the court . . . [an] insured person who has executed to his insurer either a loan or subrogation receipt . . .may sue or be sued without joining with him the person for against whose interest the action is brought.")

[42] Julson v. Federated Ins. Co., 562 N.W.2d 117, 121, 1997 S.D. 43 (1997).

[43] Rimes v. State FarmMut. Auto. Ins. Co., 106 Wis.2d 263, 316 N.W.2d 348 (1982); Garrity v. Rural Mut. Ins. Co., 77 Wis.2d 537, 253 N.W.2d 512 (1977).

[44] See 16 COUCH ON INSURANCE § 61:48, at 133 (2d ed. 1983).

[45] See Highland Ins. Co. v. New England Ins. Co., 811 S.W.2d 276 (Tx. Ct. App. 4th Dist. 1991); Vesta Ins. Co. v. Amoco Prod. Co., 986 F.2d 981 (5th Cir. 1993).

[46] Century Indem. Co., 12 Cal. App. 4th at 1709.

[47] Highlands Ins. Co. v. New England Ins. Co, 811 S.W.2d 276, 278.

[48] Id, citing, 16 COUCH ON INSURANCE, § 61:48, at 133 (2d ed. 1983).