HOW TO HANDLE CATASTROPHIC LOSSES FROM A SUBROGATION PERSPECTIVE
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Catastrophic losses present unique challenges for subrogation professionals. Oftentimes, a loss occurs and is immediately assigned to outside, independent adjusters who do not focus on subrogation potential. This article will address recommendations for handling large, catastrophic type losses so as to maximize subrogation potential.

It is useful to look at catastrophic losses in two distinct phases: 1) initial investigation; and 2) development of a cause of action. Each of these phases includes unique opportunities to maximize subrogation recovery.

This article does not address what issues arise once the decision is made to place a matter into suit. Once suit occurs, decisions are driven most often by your counsel, the facts of the case and the theories of liability. Oftentimes, these decisions are out of your control, and it is difficult to determine the “best practices” in such situations.

INTRODUCTION

Any analysis of the “best practices” in handling catastrophic losses must be judged in light of your ultimate goal. All subrogation professionals share the same goal: maximizing recovery in a quick and efficient manner. Catastrophic losses, unlike more run-of-the-mill subrogation claims, require the initial devotion of resources and attention in order to maximize recovery. Each of the “best practices” discussed in this article is designed to maximize your recovery and minimize delay.

Any analysis of “best practices,” particularly in catastrophic loss cases, must realize that there is a natural incentive for product manufacturers and defense counsel to slow down a subrogation investigation and suit. There is no incentive for their clients to pay large sums of money without a complete and painfully thorough investigation. Often, defense counsel operates under the mantra that there is no deposition not worth taking, nor is there discovery not worth conducting. On the other hand, we, as subrogation professionals, are interested in pushing the parties toward a decision point. The decision point of a subrogation claim is the point at which the parties determine whether to defend the claim or to resolve it through a negotiated settlement. In order to reach a decision point, the defending party must be aware of your theory of recovery, in addition to fully understanding and comprehending your damages. It is also important for the defending party to appreciate their own strengths and weaknesses. The steps outlined below are designed to help ensure that your opponent is aware of these issues.

PHASE ONE: INVESTIGATION

If you are immediately notified of the loss following the occurrence, there are several things that you, as a subrogation professional, can do to maximize your recovery. Although each case presents a unique set of facts that you must carefully evaluate, the following are general rules that will help you to maximize recovery.

Immediately determine the scope of the scene
While each loss presents unique factors that must be considered, it is essential that an early and accurate determination of the scope and nature of the loss be made. It is therefore incumbent upon the subrogation professional to make sure that the scene is visited early in the loss and that appropriate precautions be taken. This will include determining the type of loss, what type of expert consultants to employ and beginning to identify potentially responsible parties.

Avoid spoliation

Early evaluation of a loss must necessarily include avoiding spoliation of the scene.¹

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¹If the scene is destroyed, a claim may be made against the party who destroyed the evidence. The factors for spoliation of evidence are: 1) the degree of fault of the party who altered or destroyed the evidence; 2) the degree of prejudice suffered by the opposing party; 3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party, and, where the offending party is seriously at fault, will serve to deter others in the future. See *Trigon Ins. Co v. United States*, 204 F.R.D. 277, 285 (E.D. Va. 2001), citing *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76 (3rd Cir. 1994).

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Most subrogation professionals realize that they cannot do destructive testing or dispose of evidence without notifying adverse parties. However, spoliation often occurs on another level. For example, a fire department may clean up a fire scene to prevent citizens from getting hurt. Although not your fault, such action may well doom your subrogation efforts. There are countless examples of this type of inadvertent spoliation, but all will have adverse effects on your claim.

In your early determination of the scope of the loss, you must also take the steps necessary to prevent inadvertent spoliation. This may involve hiring security to control access to a scene. It will certainly involve your on-site representative notifying all parties, including the insured and the public authorities of your intent to complete a full investigation and not to alter the scene. Whatever the scene dictates, it is incumbent upon you to make sure that the scene is preserved so that you can complete your investigation.

Take control of the scene

As indicated above, it is important that you control the scene. This means that you are in a position to decide who gets on the scene and under what circumstances. Obviously, you cannot interfere with public authorities in their investigation. However, by interfacing with them at an early point, you should be able to coordinate with the public authorities in their investigation. Starved of resources, local and state authorities will often gladly trade control of a scene for access to equipment and resources that you are able to offer in furtherance of the investigation.

The goal of early control of the scene is to identify all potentially responsible parties and facilitate the gathering of the evidence that you need to prosecute your case of action. This requires determining potential causes of the loss. Employing experts will certainly help in this process. Also, place parties on notice, and promptly schedule inspections. Do not let the defense unnecessarily delay the process! Do not let anyone on the scene alone! Document who is on the scene and what is done there.

Get appropriate experts on the scene immediately. Taking control of the scene early allows you to have your experts on the scene expeditiously. It helps build the credibility of any expert to be on scene. Selling your experts’ credibility obviously helps convince your opponent of your theory.
Controlling the scene also involves making sure that the scene itself is documented properly. Defense counsel will seize on any hole in scene documentation and will use this error to argue that there is an alternative cause of the loss. Scene documentation involves documenting not only causes of loss, but also gathering the evidence necessary to eliminate any cause that the defense may come up with. This may involve the normal types of scene documentation that you normally require of your experts: photographs, videotape and scene diagrams. In certain situations, documentation may involve more extreme (and expensive) measures such as hiring a surveyor or other professionals to make a to-scale, three-dimensional diagram of the scene, computer animation or creating a grid of the scene and documenting it square by square.

**Research**

During the initial phase of a loss, there is much that can be done in terms of research. For example, you can check with public databases maintained by groups like the United States Consumer Product Safety Commission to determine if there are other similar losses. The Internet provides a wealth of information for subrogating parties. Network with other companies, subrogation counsel and experts. Either you or your counsel can begin this type of research as soon as the cause of the loss is identified.

You should immediately begin gathering all of the documentation in the possession of your insured. Oftentimes, crucial information lies in the hands of your insured, and the insured does not know it. Crucial information includes product documentation as well as important damage information. The natural inclination of an insured is to dispose of this type of information after a catastrophic loss, as the insured sees no reason to keep it. You should immediately gather whatever information your insured has. Do not neglect the documentation of the damages sustained by your insured, including tax records, original receipts, etc. If the crucial documentation has been damaged by fire or water, consider alternative means to salvage the documents (Xeroxing fire damaged documents before they deteriorate or freeze-drying water-damaged documents). If not done immediately, they may be destroyed.

**Retention of counsel**

One of the most important decisions in pursuing a subrogation claim is the retention of counsel. Although seemingly self-serving, it is this writer’s opinion that early retention of counsel is an important step in pursuing a subrogation claim and even more so in claims involving catastrophic losses. Large losses are complicated and oftentimes demand immediate and sustained attention. The practical reality of claims in today’s subrogation environment is that company personnel often lack the time and resources that large losses demand. Retention of counsel can, to some extent, ease this burden. You should demand that your counsel visit the scene and organize the investigation. Consider not only when to retain counsel but also who to retain. Selection of proper counsel early will help ensure that the loss is pursued vigorously and that no mistakes are made in the process.

**PHASE TWO: DEVELOPING A CAUSE OF ACTION**

After the initial determination of the cause of the incident, additional work needs to be done before placing the matter in suit. We generally refer to this as phase two or developing a cause of action. In a fire case, for example, simply determining the cause of the fire is not always enough to allow the
commencement of suit. Rather, there are other issues to consider, such as the chain of distribution, the producer of the machine in question and its component parts (in a product liability case), jurisdiction and venue and finalizing damages. Phase two of a catastrophic loss investigation need not take long but should be thorough. During this phase, you can answer many of the questions that will arise later in the handling of the claim by the defense and accelerate your recovery.

**Completing the adjustment - damages**

During this phase of the investigation, you need to make sure that proper damage documentation is retained and developed. Payment under the insurance policy is not necessarily what you can recover in your subrogation claim. Most courts limit your recovery to the fair and reasonable value of the property damaged. This usually translates to an actual cash value determination. Even if your policy pays the replacement cost, you should make sure that you have also made an ACV determination. This may be supplemented by independent appraisals and use of other experts not normally involved in the adjustment process. They can be just as important to recovery as an origin and cause expert can.

**Determination of jurisdiction and venue**

You should consider where the suit will be filed and in what court. Your counsel should address these issues, considering local laws governing your cause of action and the theories that you intend to pursue. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993), is an important consideration in evaluating your expert testimony and in evaluating the value of your claim.

**Legal research - legal theories and causes of action**

You should determine what your potential causes of action are during this phase of the investigation. You should also determine the statutes of limitation that will apply to your cause of action. An ironclad cause determination and liability assessment is worthless if it is time barred by the applicable statute of limitation or repose.

**Work with your insured**

Cooperation of your insured may well be a crucial part of the ultimate case. During this stage of the investigation, you should develop a rapport with your insured. You will likely have concluded the payments under the policy by this time. Work with the insured to determine if there is an uninsured loss, and include it in the subrogation claim (if possible). Keep your insured advised of the status of your investigation. They will be interested, even if they have been fully compensated. Ultimately, your insured may be deposed or need to offer testimony when your case is put in suit. It is better to have a friendly insured than a hostile one.

**Write a demand letter**

The last step in phase two of your investigation is to write a demand letter. Usually your counsel will perform this duty. An effective demand letter should contain the information necessary for your opponent to fairly evaluate your claim. At a minimum, it should include your damages (valued at
what you can fairly recover), as well as your theory of recovery. It is easy to overlook this step. After all, how often does a defendant roll over and pay your claim based on a demand letter?

In our experience, however, the demand letter sets the tone of the claim. A demand letter that overreaches or overstates your claim is instantly suspicious. Initial suspicion will likely result in continued distrust during the claim. While rare, some companies, when given notice and an opportunity to investigate a claim before receipt of the demand letter, will evaluate a claim and offer payment. At the very least, your demand letter will provide much of the information that would otherwise be obtained in discovery. Present this information early, and your subrogation suit will likely move more quickly.

CONCLUSION

The goal of every subrogation professional should be to maximize recovery in an expedient manner. By employing some of the suggestions above, you should be able to move the parties to a loss to a decision point, i.e., deciding whether to settle or to try the case. The net result will allow you to avoid mistakes, pushing the case to a favorable resolution.

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