I REMEMBER WHEN…

By George T. McCaskey, Chairman of Thomas George Associates, Ltd., East Northport, New York

(Who while rewriting and editing this piece, fell on the kitchen floor and broke both his arms)

I remember how excited I was to be hired as a claims representative for what was then called the “Big Aetna.” This was my first non-supermarket job after college. The office was located at the corner of Fulton and William Streets in Manhattan. Across William was Royal Insurance; down the block was The Hartford and a block away on John Street was the Travelers. The big four stock companies. The year was 1952. A couple of early observations: claim departments were all on the third floor, underwriting had wood desks and carpeting, claims had what appeared to be used metal desks and cheap tile flooring and all claims people were men. At Aetna, new people were assigned to the “A4” unit handling third party property damage claims. Wall-to-wall tin desks with matching swivel chairs. At one of the desks on an aisle was an old timer who rocked back and forth while talking animatedly on the phone. I later learned that his name was Madden or Madigan and that he handled an area of claims called subrogation.

After initial training, I was fortunate to be transferred to the “A11” unit supervised by “Harry” Garnier, a saint of a man whose first name was really Henri. Those of you involved in arbitration might recognize the name. After retiring from Aetna, Harry took a position with Arbitration Forums and became well-known in the industry. The A11 unit was composed of Harry, his secretary and five outside investigator/adjusters. Each was given a car, an expense account, a book of drafts and releases and enough writing pads for taking statements. We had one day in the office to dictate reports. The rest of the time we were in the field investigating claims. Many excellent golfers developed as a result of the arrangement. A11 covered Brooklyn, New York, before drugs and before computers – lots of paper.

At that time Aetna’s claim department outsourced - a word not in our vocabulary then - quite a bit of work. Auto damage appraisers got a lot of business, as did photographers who specialized in insurance claims work. There were several who had police radios in their vehicles and responded to accidents. They took on the scene photos of wrecks, skid marks and sometimes people being placed in ambulances. It was very lucrative, especially if there were injured passengers; the photos could be sold several times.

Many close relationships developed among the troops and many of us went to law school. The fifties and sixties was also the era where one could bounce around the industry for a higher salary or for a supervisory position. One of my closest friends went to a national insurance company before practicing law and when I spoke with him recently, he told me he still had the company claims manual from the 1970’s. I asked him to lend me the parts covering subrogation.

The date shown on the pertinent pages reads February 1971. Many paragraphs cover procedural directions to “claimsmen.” The amounts are also a bit startling: $200 maximum coverage for wearing apparel and luggage destroyed in the collision, not covered by a homeowners policy; ten dollars per day for a rental car.

At this point, I am inserting quotations from the manual which, are as dry and as dull as dust, as are most manuals.

Subrogation is an important phase of our business. The amount collected has been and will continue to be in proportion to the interest taken in the activity. All claim representatives are expected to recognize the importance of subrogation and to assume their responsibilities to obtain adequate credits and refunds by way of subrogation.

The collection of an amount that can be considered adequate in the light of our substantial loss payments to policyholders requires the cooperation of every person having any responsibility in the handling of claims.
Our subrogation system places the major responsibility for the handling of subrogation claims on supervisory and office claimmen, but it is recognized that subrogation by field claim representatives will be more effective in some situations. Since material damage claims are handled by both field and office claimmen, both are responsible for identifying and designating files as subrogation claims.

When the claim is handled by a field claimman and should be subrogated, the field claimman should so indicate on the facing sheet or in the closing report. When this indication is given, the person responsible for follow-up action will institute subrogation collection activity. In some cases, when effective handling requires, the case may be reassigned to the field claimman for additional investigation and/or collection.

Office and field claimmen should keep in mind that one of the most important steps in the subrogation procedure is the identification of the file as a subrogation claim. If the file is not classified as a subrogation claim it will be placed in the paid files and no action will be taken. Claimmen never should slight this activity.

**ESSENTIAL INFORMATION:**

When the facts of the accident indicate subrogation should be pursued, the following information must be secured and documented:

1. Investigation and evidence to support subrogation demand.
2. Correct name and address of owner and operator of the other car or instrumentality responsible for the accident.
3. Name of insurance company insuring other car or instrumentality.
4. If other car is uninsured, whether a judgment could be collected from party responsible.
5. Bodily injuries in the other car.

**PROCEDURE:**

The subrogation procedure is outlined in detail in the Procedures and Systems Manual. The procedure outlined therein has particular reference and application to the procedure to be followed by the office personnel handling subrogation claims. However, field claimmen should be familiar with these procedures since field claimmen may, from time to time, be involved in the initiation and closing of subrogation claims.

**SETTLEMENT OF SUBROGATION CLAIMS:**

**Where Responsible Party Uninsured:** Claimmen have authority to use their individual judgment in deciding whether a claim should be compromised if it cannot be collected in full. When the party responsible for the damage is insured, the claimman does not need to be concerned about the collection of a judgment if the subrogation claim is placed in litigation. If the party responsible is uninsured, the claimman has to be concerned with the collection of the judgment, as well as with the legal liability. If a judgment will be collectible, the claimman should handle the case on the same basis as he would if the wrongdoer had insurance. If a judgment could not be collected, or if there might be some doubt about its collectibility, the claimman must be guided accordingly as far as a compromise or installment payments are concerned. In aggravated cases, the claimman might want to invoke the provision of a Financial Responsibility Law, but this should be discussed with the claim superintendent before a decision is made.

**Where Responsible Party Insured:** This company has a substantial volume of collision insurance in many states and in some of those states there are competing carriers who have a large volume of collision.
insurance. This results in a large number of subrogation claims. When these claims can be handled by correspondence it is advisable to do so. If correspondence does not result in an agreement, it is suggested that arrangements be made to have a personal conference to handle those cases that are not closed by correspondence.

All subrogation claims are to be handled on a merit basis. It is contemplated that claims having full merit and to which there is no defense will be collected in full.

Every endeavor should be made to dispose of each subrogation claim through negotiation. Litigation or arbitration should be a last resort. Subrogation conferences and agreements with other companies are effective in settling subrogation claims short of suit or arbitration. Operating divisions may make such agreements with other companies which are limited in their scope to the territory, or to some part of the territory, serviced by the operating division. Such agreements must not provide for settlement of claims on a fixed percentage basis. The company is a party to several standing agreements and conference arrangements on a company wide basis. These are discussed elsewhere in this section of the Manual.

Even in the absence of special agreements, claimsmen within an operating division should confer from time to time on inter-company relations so that uniform treatment will be received and accorded. It has been the experience of most automobile insurance companies that cooperation between the companies on subrogation claims results in cooperation between the companies in the handling of bodily injury claims and that a feud on subrogation results in a feud on bodily injury claims, to the detriment of the companies. When friction develops, an attempt should be made to eliminate it in a personal conference.

A claimsman may consider payment of the subrogation claim of another cooperative insurance company prior to the disposition of the BI claim or claims. Such action should only be considered on cases of clear liability with companies who give our subrogation claims the same consideration.

When such a subrogation claim is paid, the other company must agree to cooperate in keeping their property damage claim out of litigation. It should be understood that if the claimant’s attorney includes the property damage in a bodily injury suit, the other company will do everything reasonably possible to have the property claim removed from litigation and failing in this, they will reimburse us for any duplicate payment we are forced to make.

SUBROGATION ATTORNEYS:

The claim superintendent is responsible for the employment of Company attorneys with the Unit. Claimsmen should use the attorneys employed by the claim superintendent. If an attorney employed by the superintendent does not take the interest he should take, or if he is not getting the results the claimsman feels he should obtain, the matter should be discussed with the claim superintendent.

The claim superintendent should discuss our subrogation program with the attorney. It has been our feeling that the attorney who handles our business under the bodily Injury and Property Damage coverages and our business for the Life and Fire companies, also should handle our subrogation claims. Some law offices are not equipped to handle subrogation claims and under those conditions the claim superintendent has authority to switch our account to another attorney or law firm equipped to handle all of our business. If it is not advisable to switch the entire account, the claim superintendent has authority to make arrangements for another lawyer to handle our subrogation account. This requires an understanding with all of the attorneys representing the company at the same location so that there will not be any misunderstanding.

SUBROGATION LITIGATION:
A specific rule cannot be established to govern whether a claim should be referred to attorneys when efforts to collect by correspondence have been unproductive. As a general rule, it is not practical to refer claims to attorneys when a small amount is involved. On the other hand, if an insurance company denies small claims repeatedly without regard to the facts, it might be advisable in some instance to file suit to try to force a change in their company policy. Insofar as the amount involved is concerned, the claimsman must use his best judgment.

Another fact that enters into the decision to refer a case to an attorney is the attitude of the insured. The insured might be adverse to pressing his claim. If the facts are very favorable and we should recover, the indifferent attitude of the insured should not influence our decision, particularly if we can get along without his cooperation.

If the insured insists that collection be pressed, we should cooperate with him unless his claim has no merit and there is little possibility of a collection. When the insured insists on pressing the claim and the claimsman feels that no action should be taken, it would be proper for the Company to reassign the subrogation right to the insured, with the understanding that if he fails to collect he must stand the expense, but if he collects he is entitled to the full amount of the recovery.

SUBROGATION ARBITRATION:

When both parties to a loss are insured and the insurance carriers involved cannot agree as to the disposition of the subrogation interests involved, arbitration proceedings may be substituted for litigation when the contending companies agree to do so. Arbitration agreements are made in the best interests of the public and the industry since they help to avoid court congestion and the costs and delays of litigation. The Companies are parties to standing arbitration agreements which are discussed elsewhere in this section of the manual. In arbitration proceedings, the controversy is submitted to a committee of qualified members of the industry for review of the facts and law involved. This committee renders a decision which is, by agreement, binding upon the contending companies.

DISTRIBUTION OF COLLECTIONS:

When a recovery is made the collection expense is deducted. Collection expense includes attorney fees and court costs. The balance is pro-rated between the insured and the Company, in proportion to the loss of each to the total damage. A draft is issued in payment of the insured’s share. The collection is sent to the Accounting Department, in accordance with the instructions in the Procedures and Systems Manual.

SUBROGATION COLLECTIONS:

Subrogation remittance should be made by check or money order, payable directly to the Company. Payment of cash should be avoided if at all possible. If there are circumstances justifying the acceptance of cash, the cash received should immediately be converted into a money order or cashier’s check. All remittances should be forwarded immediately for deposit.

COLLECTIONS BY AGENTS:

A fee can be paid to an agent for collection of a subrogation claim under the following circumstances:

1. The agent MUST have permission from the claim representative in charge of subrogation before proceeding.
a. An exception is permitted where the responsible party is a transient, or for some other valid reason that makes it necessary to act without permission so that the opportunity of collecting will not be lost.

2. The collection must be forwarded to the Reporting Office for credit to the file, thus permitting the Company to make distribution of the proceeds through issuance of its drafts.

Both of these conditions must prevail before a fee can be paid to an agent for the collection of a subrogation claim.

Policyholders frequently collect for the damage to their cars and agents request a fee because they cooperated with the insured in collecting from the other party. Fees are not payable in this type of case unless authority has been granted.

If we cannot get the adverse carrier to settle our insured’s claim, including his medical bills and our insured calls on us to settle under our medical payments coverage, we should take either a subrogation receipt (Form G 4073.4 and subsequent versions) or a loan receipt (Form G 4163), as is appropriate based upon the law of the state and settle the medical payments claim. Your superintendent will advise you on the form to be used in your state.

The other carrier should be put on notice immediately of our subrogation receipt or loan agreement by the claimsman handling the file. If our insured has, or later secures, an attorney, the attorney must be furnished a copy of the subrogation receipt or the loan agreement and notified the Company is pressing its claim directly against the other carrier.

Compensation will be based on an actual invoice or invoices from a rental agency or garage which rents automobiles as its regular business.

The benefit is not an automatic or blanket $8.00 per day for 10 days. This is the maximum. If the rental charge per day is less than $8.00, reimbursement will be based on the actual rental fee.

SUBROGATION: Coverage R is subject to the subrogation condition of the policy. In appropriate cases we should pursue subrogation on Coverage R claim payments. Coverage R subrogation claims are included in arbitration agreements.

MEDICAL PAYMENTS SUBROGATION

POLICY FORMS: This discussion applies to all policy forms which have a policy condition permitting the subrogation of medical payments claims. The Standard Policy written in most states contain such a provision. Care must be taken to determine whether the policy form involved contains a subrogation condition when handling a medical payments claims.

COMPANY INTENT: The Company intent is to avoid the duplicate payment of medical bills and to shift the burden of loss to the wrongdoer or his liability insurer.

ENFORCEABILITY: Although the case law varies from state to state, the MPC subrogation provision is enforceable in nearly every state, either on the theory of subrogation to the cause of action or on the theory of subrogation to the proceeds of any money collected.

Subrogation of medical payments claims is a relatively new field of automobile insurance law and there are not many published cases. Accordingly, the claimsman should consult with his superintendent regarding the law in his particular state.
The fact that the courts may have held that we are not subrogated to the cause of action against the wrongdoer does not mean that we may not be subrogated the proceeds of anything collected from him, either by way of settlement or judgment. Furthermore, lack of a right to enforce subrogation does not prevent our obtaining and enforcing a loan receipt.

CAUTION: In subrogation of MPC claims against other insurance companies, it should be our policy never to instigate, promote or encourage any B.I. claim or lawsuit or employment of attorneys, or do anything which will aggravate the B.I. claim, or interfere with the handling of it by the other insurer. Our function should not be to force payment by the other company, but rather to notify that company of our subrogation rights and then, after taking steps to protect our rights, to expect and require that company to honor our interest if and when any settlement or payment is made for the injury. Consult with the claim superintendent if a company refuses to recognize and protect our interest in a meritorious case.

As against uninsured tortfeasors, self-insurers and units of government, we should subrogate aggressively.

PROCEDURES: In order to provide uniform handling of MPC subrogation claims throughout the Company, certain procedures have been adopted. Reference is made in the following guidelines to Exhibits A, B and C, which are pattern letters that can be found in Chapters 3000 and 3057 of the Procedures and Systems Manual.

1. Subrogate only those claims where the liability of the other driver is quite clear.

2. If the adverse liability carrier is not known, the Claim Representative handling the file will send the owner and driver a letter patterned after Exhibit A designed to fit the coverage involved; i.e., MPC or MPC and collision. Note: If collision coverage only is involved, use the present subrogation procedure for that coverage.

3. The Claim Representative handling the file will also send the named insured a letter patterned after Exhibit B. If other persons, not members of the named insured’s family, present medical payments claims and the Claim Representative is in touch with them because of his handling the potential B.I. liability claim, he can convey the information as to our subrogation rights to them personally, confirming by letter after such personal discussion. If the claimsman will not be in personal contact with the injured party, the above letter should be sent.

4. When the name and address of the adverse liability insurance carrier is known, an Other Insurance Letter designed to fit the coverages involved and patterned after Exhibit C should be prepared by the Claim Representative handling the file.

5. If we do not receive an acknowledgement of our subrogation rights from the adverse carrier, our Field Claimsman should contact the claimsman for the other carrier to see if an understanding cannot be reached, either that they are settling our insured’s claim including his medical bills, or that they will honor our subrogation rights if we pay the medical bills under our medical payments coverage and they deduct them from their settlement.

6. If we cannot get the adverse carrier to settle our insured’s claim, including his medical bills and our insured calls on us to settle under our medical payments coverage, we should take either a subrogation receipt (Form G4073.4 and subsequent versions) or a loan receipt (Form G4163), as is appropriate based upon the law of the state and settle the medical payments claim. Your superintendent will advise you on the form to be used in your state.
7. The other carrier should be put on notice immediately of our subrogation receipt or loan agreement by the claimsman handling the file. If our insured has, or later secures, an attorney, the attorney must be furnished a copy of the subrogation receipt or the loan agreement and notified the Company is pressing its claim directly against the other carrier.

How much has the business changed? Well the third floor no longer has the ruddy-faced “old timer” sneaking off at about 3 p.m. for a “pick me up.” Or the guy on the aisle rocking back and forth while negotiating a five-dollar a week payout from an uninsured motorist. I cannot visualize Mr. Madden (or Madigan) using a computer, or taking a telephone statement.

Does your office have carpeting? Wood desks? Any men? Let me know. Send your responses to George McCaskey, TGA, PO Box 30, E. Northport, NY 11731 or e-mail me at TGAFLA@aol.com.

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