

## **Navigating Claim Subrogation in Your Self-Insured Retention**

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Many companies use self-insured retention (SIR) or a large deductible to keep property insurance premiums low. The trade-off for lower premiums is higher exposure on property loss. Subrogation is potentially available for companies using SIRs or large deductible insurance policies to avoid the high costs that can arise as a result of these plans. Knowing how to navigate subrogation claims is key to mitigating the risks associated with SIR and high deductible plans and maximizing their benefits.

Subrogation allows third parties to assume another person or group's legal right to collect a debt or damages. For example, an insurance company that has paid out a policy to a party injured in a car accident can get a subrogation interest to pursue the party who was responsible for the accident. This allows the insurance company to recovery against the amount it paid out. Typically, subrogation is deployed by insurers to shift costs to the responsible party in an accident or injury in order to minimize the cost to the insurer. The steps below lay-out how to successfully subrogate claims for property losses that are not covered by insurers.

### **Investigate the Claim**

The first thing to do after suffering any property loss or accident is to notify your insurer. It might be the case that the loss exceeds SIR levels. By notifying your insurer before taking any other steps you solidify your chances of successfully mitigating costs to your business.

Property loss is not spontaneous- it always has a cause. Conducting a timely investigation into how and why a loss occurred is the first step in the subrogation process. An effective investigation will identify all potentially liable parties. Until the cause of an accident has been clearly determined it should be assumed that the opportunity for recovery from one of the parties involved in the loss exists. Subrogation is only useful if the party responsible for the accident has insurance of enough assets to actually cover the loss. There are public resources available to investigate the ability of third parties to pay for claims, a good place to start is looking into judgments and liens against the party in question. Once a potentially liable party that can cover the loss has been identified it is important to create a clear narrative that shows how and why the party is responsible for the loss.

Parties pursuing subrogation are responsible for proving that the narrative they believe explains the loss is actually true. Timely and detailed investigations are therefore critical to subrogation claims. Whether a subrogation is successful rests on whether there is enough evidence to support the narrative offered by the party pursuing the loss.

Clear policy and procedure for post loss investigations is one of the best ways to ensure that potentially liable parties are easily identified and that evidence of the narrative that supports your claim is captured early in the process. Providing employees with guidance in the form of checklists or questionnaires to fill out after an accident or loss is a great place to start. Having this documentation pinpoint what occurred, who was present, the time and place of the accident or loss, and how exactly the loss unfolded will give you a great place to start your subrogation claim. The thoroughness of post-loss forms can make or break your subrogation claim. Generating easily navigable forms and training your employees to use them is of the utmost importance.

### **Save the Evidence**

If a subrogation case is available for your loss, you have a legal obligation to preserve relevant evidence. Failure to do so makes your claim vulnerable to spoliation arguments- and less likely to win out in litigation. Additionally, as the party pursuing the claim you are required to preserve evidence so that the party you are bringing the claim against has the chance to conduct a joint investigation or their own inspection of the evidence. Beyond legal obligations a well-preserved record and organized evidence make the claim process run more smoothly.

The best way to preserve evidence is to leave the scene as-is until the subrogation investigation is fully complete. This is not always feasible- especially if repairing the loss is necessary to continue business. If preserving the whole scene is not possible, preserving any portion of the scene, especially any portion of the scene that relates to the cause of the loss, is valuable in the investigation process and should be prioritized. Outside of preserving the scene other forms of evidence include:

- Photos of the scene, or of any part or item that you believe is responsible for the loss
- All documents that related to ownership, oversight, management, or control of materials involved in the loss
- Any police reports, fire reports, or any other official documentation
- When relevant, weather reports
- Contracts and recipes that relate to the materials involved in the loss
- Inventory records
- Any product recall data
- Any warranty documentation

Claims based on faulty equipment usually require some form of expert testimony to identify the cause of equipment failure. Remember that the goal of subrogation is to mitigate costs. The investigatory process comes with expenses, especially when experts are involved. Keeping an eye on costs is an important part of taking advantage of the benefits of subrogation.

### **Give Notice to the Responsible Party**

Once you have completed your initial investigation and you have identified a third party that might be partially or fully responsible for the loss, the next step is to notify that party of the loss. A notice letter outlines the events that led up to the loss (the date, time,

location, and other similar information) and lets the recipient know what evidence supports your claim that they or their product is responsible for the loss. The letter should also make it clear that evidence has been recorded and is being preserved. Finally, if you know the full extent of the damages the letter should also include this information.

The party receiving the letter should also be given the opportunity to examine the scene or any other preserved physical evidence. You should provide a specific timeline for the other party to examine the evidence.

### **Concluding the Process**

Generally, recipients of notice letters respond in one of three ways. First, they might entirely ignore the letter. Second, the party or their representative will respond with a general denial of responsibility. Or, third, the party might use an in-house claims department or third part-administrator (TPA) or insurer to respond and discuss the matter further.

If the recipient ignores the letter you should pause to consider your options. Subrogation is about cost and following up an ignored notice letter typically means incurring more costs. Before deciding if you should follow up, you should weigh the potential costs of pursuing the claim, potentially hiring counsel, and dedicating additional man-hours to the process, against the value of the claim.

If the recipient issues a general denial in response to your notice letter you should start to consider the strength of your claim and costs of continued pursuit. If you have a strong narrative supported by evidence, responding to the general denial by requesting additional information as to the party's reasoning for the denial is a good place to start. Responses to these requests will either support or undercut your understanding of what caused the loss, either way you have more information, and you are in a better position to decide what to do next. This is particularly valuable in situations where multiple parties could potentially be recovered from. The more information you have the easier it is to separate strong subrogation claims from weak ones, and to focus on the strong claims.

If the recipient responds by referring you to an insurer, TPA, or in-house claims department your claim is in good shape. While this response is not a guarantee of recovery, it does open the door to negotiations. These negotiations are when your timely and detailed investigations will pay dividends. A solid investigation will strengthen your settlement position and set you up for success when dealing with insurers, TPAs, and in-house claims departments.

By following the steps out-lined above, especially the process for investigating claims and saving evidence, you can maximize the possibility of successful subrogation. Once a claim has been subrogated the party responsible for the loss is required to bear their portion of the blame. Successfully subrogating claims is the key to maximizing the value of SIR and large deductible plans.