

Is an Expert Really Necessary on a “Small” Subrogation Claim? One Lawyer’s Perspective

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Some of my most challenging files involve construction defect or product liability subrogation claims under \$10,000.00. These are the type of cases in which my clients often determine that it is not cost-effective to hire an expert. It is important to understand that regardless of the amount of the claim, your subrogation counsel must still meet her burden of proof, and may need an expert’s opinion to prove liability at trial. On the other hand, there are claims in which you can rely on the information gathered by the claims professional or by hiring a flat-fee, low cost vendor to determine the origin and cause of the loss. When referring small property claims to counsel, it is important to understand the limitations of such claims, and that there may be some claims which are not cost-effective to litigate due to the expense of hiring an expert or lack of other evidence. This article will discuss the role of claims professionals, flat-fee experts, and non-traditional experts in pursuing small property subrogation claims, as well as how to determine whether it is cost-effective to retain an expert.

Getting By Without an Expert: The Role of A Claims Professional

While experts are certainly important to successful subrogation, there is another person who can be instrumental to a successful claim: the claims professional. Many adverse carriers ask for basic information from my client’s claim files to support the loss, which I sometimes cannot easily provide. In many cases, the information obtained by a claims professional during the initial claims handling can maximize subrogation potential and paint a clear picture of how the loss occurred. Some examples of easily obtained information are fire and police reports, including any supplemental reports and photographs taken by officers. Photographs taken by officers, who are often the first people on the scene, can be the only visual evidence available depicting the fire or other loss scene immediately after the loss. Copies or prints can often be obtained for a small administrative fee and an authorization signed by the insured (or victim).

Claims professionals can also be very helpful in obtaining written or recorded detailed statements from all persons who witnessed the loss. Claims professionals who inspect the loss scene can also take detailed notes of their observations, and use either diagrams or detailed photographs to document the loss. Dozens of photographs of a loss scene can be meaningless, however, if they are blurry, or have no accompanying description of what they depict. Ideally, a claims professional would take photographs of the scene, take notes of what each photograph depicts, and create a photo log to include in the claim file. I am occasionally confronted with claim file photographs which merely depict the damage caused by the fire or water loss, not of the origin of the fire or water loss. For example, in one washing machine hose failure case, I had dozens of photographs of the areas of the home damaged by the water, but none of the hose installed on the washing machine, location of the washing machine in the laundry room, or diagrams of the

laundry room in relation to other rooms in the home. Similarly, in a recent defective roof case, I had a handful of blurry photographs of insulation in the attic. The adjuster intended to show that the insulation was damp, but that was not obvious in the photographs. It would have been more helpful to take a few clear photographs of where the moisture allegedly entered the attic to help establish the origin of the loss.

Another interesting wrinkle from a lawyer's perspective is that many subrogation departments are now paperless, and are sending files to counsel electronically. This often means that photographs taken of the loss scene have been scanned and the negatives are not available. A better practice would be to provide counsel with actual prints, or digital copies of the photographs via email or on a CD from which prints could be made, along with information regarding when the photographs were taken and by whom. I am sometimes surprised to learn that some of the photographs in my client's files were actually taken by the insured, and that digital copies are available for the asking from the insured.

Flat-Fee Experts

In my practice, I have handled many claims under \$10,000.00 involving plumbing or valve failures, leaky newly-constructed roofs, aquarium fires, and others which involve specific product failures or construction defects. Even though the claims are small, it is sometimes essential to retain an expert to determine the origin and cause of the loss.

In an ideal world, each of my files would come with an origin and cause report, and an expert report prepared by a specialty engineer, with clear theories of liability, clear, supportable conclusions, and detailed, labeled photographs. In the real world, many of my under-\$10,000.00 files come with no expert report, or a report obtained by a flat-fee vendor. These reports (which often cost several hundred dollars) can be helpful in eliciting a settlement offer, or as persuasive evidence of liability in arbitration. The reports often include good, clear photographs of the alleged defect, a theory of liability, and the identity of the product manufacturer or recommendation on which contractor is liable.

The flat-fee vendor reports do have limitations, however. Due to their reasonable cost, the reports are often based on a visual inspection of the construction defect or product and do not generally involve destructive testing. If the claim is litigated and involves a product defect claim, the subrogating insurer should be prepared to incur further expenses associated with destructive testing of the allegedly defective product. Counsel can and should develop relationships with local experts in various fields who can offer many services, such as a quick evaluation of your small subrogation claim, advise of the potential cost involved in further testing, and if needed, provide you with a second, informed opinion on the potential (or lack thereof) for successful subrogation.

Think Outside the Box: Alternatives to "Traditional" Experts

Assume you have a small construction defect claim in which you or your client did not have authority to hire an origin and cause or other expert, and the loss is not well-documented in the file. Does that mean you should close your file? Sometimes, the answer is yes. However, a creative subrogation professional can also rely on non-traditional experts, such as the contractor who performed the repairs to the insured's residence following a water or fire event. The claims professionals again can have an important role in gathering information to use against the adverse parties. The adjuster can obtain the names of the contractors performing repairs and ask them to provide written statements describing the construction defect requiring repairs. If asked, the contractor may even be willing to take photographs during the course of repairs. While these types of evidence may not be enough to sustain a burden of proof in court or survive challenges related to admissibility, they can be enough to convince an adverse party to submit the matter to its insurer, obtain a settlement offer, or create a colorable claim for arbitration.

How Small Is TOO Small To Hire An Expert?

This is the million-dollar question which each subrogation professional must occasionally confront, and the answer is usually determined on a case-by-case basis. Obviously, expert expenses will vary depending on the complexity of the issues, the type of loss, and the type of expert retained. I have had clients reluctant to spend \$500.00 on a report from a flat-fee vendor on a \$10,000.00 product defect case. I have also had clients who have been willing to spend up to \$2,000.00 on a \$10,000.00 product defect case.

Due to the volume of files which cross my desk each year, I have developed an unscientific system of evaluating subrogation potential of my various files. If I have a file which is well documented with detailed facts of the loss, clear, labeled photographs, a cooperative insured, and intact, professionally removed evidence (by an expert, repair technician, or experienced claims professional), I may advise my client to incur a higher expert expense because the claim may well justify it. On the other hand, if the facts of the loss are confusing or conflicting, poor photographs are available, and the insured is reluctant or disinterested, this may be a claim in which I would advise my client not to incur the expense of an expert or just incur a minimal expense in the hopes of obtaining a compromised settlement offer. The question I consider is how efficiently we can recreate the evidence of how the loss occurred, and whether that effort will result in any payment of the claim without throwing a client's good money after bad. If there are too many cold trails to follow, it is simply not cost-effective from the attorney's point of view to develop evidence which could have been gathered during the early stages of the claim.

A report from a qualified expert can be essential to success in any subrogation claim. In the absence of such a report, a little creative thinking at the claims level and by subrogation counsel can result in successful recoveries, in even the smallest property claim.