

# Confessions of an Insurance Subrogation Attorney

After 33 years of practicing in an esoteric area of the law, it is time to explain what my career and the subrogation industry is all about. In order to give the appropriate picture, I really need to start at the beginning.

**Confession number one:** I have become comfortable with the idea that very few people have any idea what subrogation means, including many lawyers and judges.

This leads me to the great elevator speech that my children could give on cue by the time they were eight years old: "If the furnace in your house malfunctions, explodes, and

burns your house down, your insurance company pays to rebuild your house. It assumes any rights you have. Subrogation, the substitution of one's rights to another, enables the insurance company to make a claim against the manufacturer or installer of the furnace to recover the money the insurance company paid to re-build your house."

This right is not new. It has existed since the 1700s, when it was created in English law by Lord Mansfield.<sup>1</sup> It has been recognized by common law and equity, and exists specifically in most insurance contracts in the United States. It has been recognized and analyzed by Minnesota courts in countless cases.<sup>2</sup>

The genesis of the doctrine is that without it, an insured could double recover—once from the tortfeasor and once from the insured's own insurance carrier. In order to prevent such a windfall, the courts granted the insurance carrier a right of reimbursement.

The reality is that few people have ever heard of the word, aside, of course, from law students who hear it during one session of their contracts class. Based on many experiences, that one day of contracts class was not a memorable one for many judges who get assigned to a subrogation case. Challenging as it might be, I have tactfully had to give the elevator speech to judges (and juries). Indeed, I have encountered the phrase "it's just a subrogation case" on more

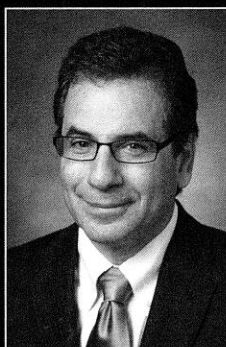
occasions than I can remember. Thankfully, our Minnesota Supreme Court is making great strides in recognizing and explaining the importance of subrogation. The Court, in a recent opinion, has begun to rely on the idea that subrogation achieves an important result by holding tortfeasors responsible for their actions.<sup>3</sup> From my perspective, this is helpful analysis by the Court.

The obscurity of the concept of subrogation to the general public becomes problematic when an insured first hears the word. Because many subrogation claims require involvement and cooperation of the insureds, it is imperative that they understand how the right is derived. To the insured, it is easiest to refer to the language of the insurance policy and the clause that requires the insured to cooperate with the carrier in its subrogation efforts.

Despite the clear language of the contractual insurance language, subrogating carriers are often accused of trying to take money out of their insureds' pockets when a settlement is reached.

**Confession number two:** I really believe subrogation is a good thing and am proud of what I do.

There are three entities that benefit from a subrogation recovery; the carrier, the insured, and society as a whole.



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## THE CARRIER

The benefit to the insurance carrier should be obvious. Any dollar the carrier brings into the company is a positive. Whether the company is a publicly-held company or a mutual company owned by the policyholders, the benefit is the same. More revenue enhances the company's bottom line.

There are three main ways an insurance company brings in revenue: premiums, investments, and subrogation recoveries. With over 3,000 insurance companies competing with each other for the premium dollar, the advertising, marketing, and other promotion costs make this dollar an extremely expensive dollar to bring in.

Every insurance company is a prisoner to the general investment market environment. When the market is rising, most carriers make money on their investments. When the market crashes, as happened in 2008 and 2009, carriers will probably lose money on this side of the business. Carriers can do better than their peers at the margins, but are generally limited by the general market performance.

Subrogation is an area where an insurer has a right to recover dollars. The question becomes whether carriers are set up to properly identify and execute on opportunities. The subrogation dollar is almost always cheaper to obtain than the premium dollar. When the stock market is down, subrogation may be the second largest source of income for a carrier. Subrogation recoveries can easily make the difference between a company being in the red or the black in any given year. In the auto subrogation world, companies can recover between 12 and 22 percent of their paid losses in a given year.<sup>4</sup> This is a huge opportunity for an insurance company to improve their financial performance.

Over the last thirty years, as carriers have come to recognize the financial impact of a successful subrogation program, they have begun to dedicate increased attention and resources to their subrogation departments. They are now actively managed, benchmarked, and analyzed to maximize revenues.

## THE INSURED

Subrogation exists in many lines of insurance, including auto, health, property and workers' compensation. In each arena, the insured benefits from a recovery in different ways:

In an auto subrogation claim, the insured usually suffers a loss of his or her deductible when a motor vehicle accident occurs. The carrier's subrogation efforts are the most effective method of recovering that loss. When both parties to an automobile accident have insurance (which is required under Minnesota law), the carriers each pay for their own insured's damages, less the deductible. They then negotiate the claim. If they cannot agree to a resolution, most carriers belong to an arbitration agreement. The claim is submitted and a decision on liability and damages is rendered. The insured deductible is recovered from the liable carrier through this process.

Unfortunately, many individuals in Minnesota drive without insurance. In the circumstance where the uninsured person is at fault, the carrier's subrogation efforts are the best chance the insured has of ever getting back any part of his or her deductible. As deductibles continue to increase in size, insureds become more interested in this process. I rarely meet an insured who understands why she or he has incurred a deductible when the other party is at fault. Recovery of the deductible becomes an important customer service issue where insureds do not expect to have any financial loss because the accident was not their fault.

In property loss cases, deductibles are also increasing rapidly. Some insureds have deductibles that are a percentage of their coverage. It is not unusual to see a deductible on a homeowner's claim in excess of \$10,000. On a commercial loss, there may be very large deductibles or self-insured retentions. In all of these cases, the insureds are usually very concerned about the carrier's attempts to recover these losses.

In the workers' compensation area, a business's premiums are based on an experience rating. This means any loss can cause

premiums to rise. A recovery will have the effect of lowering rates. Companies have a vested interest in the recovery efforts.

In addition to deductible recoveries, insureds benefit when an insurance carrier's investigation into the cause of a loss creates the evidence necessary for the insured to make his or her own claims for uninsured losses. A homeowner who loses her or his house to fire may be paid for his insured loss, but what about the portion of the loss that exceeded available coverage? Without the subrogation investigation, such an insured might reluctantly accept the policy limits and absorb the uninsured loss that should be paid by the party that caused the fire. Subrogation investigations yield evidence, theories of liability and viable third parties to pursue.

## SOCIETY

Whenever there is an airplane crash in this country, the Federal Aviation Administration conducts an investigation. One purpose is to find out the cause of the accident so that other accidents can be avoided.

When a fire occurs in a home in Minnesota, fire officials usually make one determination: Was the cause of the fire intentional or accidental? If intentional fire is ruled out, most officials leave the actual determination of cause to the insurance investigators. If there was no right of subrogation, there would be no need for any further investigation.

Let us assume there is a defective brand of furnace that is causing fires around the country. It is often the subrogation investigations conducted by insurance companies that identify this defect and make it public. If these investigations never occurred, how much longer would it take to get these products off the market? How much additional property damage or personal injury would occur?

One example of an insurance investigation resulting in a safer society was written about in the *Wall Street Journal* (Sept. 6, 2000). A researcher at State Farm received multiple reports of Firestone tires on Ford

vehicles that were failing and causing property damage, injuries, and deaths. He ultimately reported his findings to the National Highway Transportation Safety Administration, which helped lead to the recall of over 14 million tires, and undoubtedly, safer vehicles.

In many insurance claims, the subrogation investigation is the only inquiry into the cause of a loss. The community as a whole benefits each time a defective product or procedure is identified.

While the benefits of subrogation seem quite obvious, it may surprise you that there is often great opposition to the practice by the plaintiffs' personal injury bar.

**Confession number three:** Subrogation counsel can assist plaintiffs' personal injury counsel, and have a positive effect on a case.

I often work with lawyers for injured parties who are making auto accident, worker's compensation, or health insurance claims. Some are adversarial from the outset, worried about one thing: Is my client going to take money out of their clients' pockets when settlements are reached with the tortfeasor?

Plaintiffs' counsel have the ethical duty to represent their clients' interests. I have the ethical duty to represent mine. I firmly believe that these two goals can co-exist, and that by working together, plaintiffs and subrogated carriers can maximize results. Below is a list of benefits that a subrogation attorney can provide:

1. Subrogation counsel may have access to more information about what happened initially than any other participant in the case.
2. Because of the volume of claims that subrogation attorneys handle, they work with a cadre of experts around the country on a regular basis who are often leaders in their field of forensics.
3. Subrogation attorneys may have more experience with product liability cases than most plaintiffs' firms. Subrogation attorneys develop specialized expertise in the handling of product cases due to

the volume of cases they receive from insurance carriers.

4. In injury cases involving a work-related injury, workers' compensation subrogation counsel can often obtain the cooperation of the employer, and therefore gain easier access to relevant evidence which can be important to a case.
5. Subrogation counsel may have better relationships with the defense counsel than plaintiffs' counsel might have. Subrogation counsel has a high volume of cases and can develop relationships over time that assist in moving cases towards resolution.
6. Subrogation counsel is sometimes viewed as a neutral observer by a mediator and may help the mediator find an avenue to reach consensus.

**Confession number four:** I am a plaintiff's attorney.

In my early days of practice, I used to belong to the plaintiffs' trade associations. I firmly believe in the power of organizations to make professionals better at their jobs. I have always viewed my practice as a plaintiffs' practice. I do plaintiffs' work for the insurance industry. However, when I attended the plaintiffs' bar meetings, I was always asked why I was there. I would reply that I handled plaintiffs' cases. The response from the other plaintiffs' lawyers was always that I worked for insurance companies, as if that disqualified my participation.


I never had any interest in belonging to the defense bar associations. I was not a defense attorney. It became clear to me that subrogation was perceived by others as a world unto itself. The only solution was to create an association for the subrogation community. In 1998, the National Association of Subrogation Professionals (NASP) was born. Approximately 2,500 professionals belong to the association, including lawyers, insurance professionals, and others who support the industry.

Interestingly, people at the insurance companies who worked in subrogation had the same isolated feeling. They were that one

percent of people in the insurance business who made claims instead of defending them. There was very little understanding of the world of subrogation by the rest of the claims world. NASP has helped our industry by creating a sense of unity and understanding. One constant about subrogation nationally, leads me to my last confession.

**Confession number five:** Truth is stranger than fiction.

Many people may view the work of an attorney representing an insurance company as boring and mundane. I can tell you without a doubt that representing an insurance carrier in a subrogation case can be anything but boring. The factual scenarios giving rise to a subrogation claim can range from the case of turkey bowling in a super market aisle, to fire caused by spontaneous combustion of oil rags, to something as tragic as the 35W bridge collapse. The work of a subrogation lawyer requires ingenuity, creativity, and open-mindedness as the subrogation team develops and follows through on a theory of liability aimed at a recovery.

It is the experience of working through the challenging and unique cases, often with other lawyers representing the injured parties and defendants, that gives me satisfaction in my field. Most Minnesota lawyers really do good work for their clients, even subrogation lawyers. 

<sup>1</sup> *Mason v. Sainsbury and Another* (1782) 3 Doug. 61.

<sup>2</sup> *Westendorf by Westendorf v. Stasson*, 330 N.W.2d 699 (Minn. 1983); *Travelers Indemnity Co. v. Vaccari*, 310 Minn. 972, 45 N.W.2d 844 (1976); *Time Ins. Co. v. Opus Corp.*, 519 N.W.2d 470 (Minn. Ct. App. 1994).

<sup>3</sup> *RAM Mut. Ins. Co. v. Rohde*, 820 N.W.2d 1 (Minn. 2012).

<sup>4</sup> (National Association of Subrogation Professionals Automobile Subrogation Benchmarking Study, 2008).