

Damages: Flying under the Radar

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In my practice and I suspect in most of our readers' we spend most of our time focusing on liability issues. There is a tendency for us to be lulled into the old myth that if our insurer paid the claim, the amount must be correct. I have learned over time that this is not necessarily so and good subrogation practitioners spend time evaluating the damage issue early. They practice something my malpractice carrier calls "claim repair." Essentially that means buttressing the damage claim with support where no such substantiation exists in the file.

I never thought too much about damages until I sat in on a deposition of my adjuster on a large property loss. Fortunately for me this claims person was extremely bright and had an uncanny memory of our file. The exceptionally competent defense attorney ran my witness through the mill on every conceivable damage item in the file. No harm was done, but my view of our files changed forever. From that date on I questioned damage issues from the beginning. I now try to identify who my damage witness will be if I need one. I try to ascertain how much our insured can testify to and how much I need independent support for. If my adjuster is no longer with the company I try to figure out an alternative. All of these issues become critical because they may dictate my approach with the defendant.

In a case where the defense lawyer typically ignores damages I may take a different approach than with a lawyer who focuses on the issue. Fortunately for subrogation professionals, most defense lawyers do not focus on damages. But we need to be prepared in case they do. If I have problems with proof on significant issues I try to steer our discussions towards stipulating to damages even at a discount to avoid other issues. In a case where I have brought the action in the name of the insured, I don't want to have to bring in an insurance company representative and let the cat out of the bag on insurance being involved.

One other reason I have found to look at damages closely and early is there are times when you may discover additional damages that were not claimed or were not covered. My goal is not create new claims for the insurer to handle. However any additional amounts that can be added to the claim may give us more leverage when trying to settle the case.

Too often damages are ignored until the end of the case when it is difficult to "repair" the cases. By looking at the issue early, later problems can be avoided. It reminds me of the advice I give to front line adjusters to "just think subro for a moment when you are assigned the claim." We all need to remind ourselves to pay attention early on to the damage component of the case. Don't wait until a competent defense attorney demonstrates the problem for you.