AVOIDING SIX PHANTOM ROADBLOCKS

TO SUBROGATION CLAIMS

As we begin the new century, claims handlers, recovery specialists and subrogation counsel can expect new and varied challenges to subrogation claims. For the past several years, the courts have viewed subrogation claims with some disdain; and have issued peculiar and in some instances legally insupportable opinions that limit a subrogee's rights to recovery. See, e.g., Home Insurance Company v. Pinski Bros., Inc., 160 Mont. 219, 500 P.2d 945 (1972) (precluding a property subrogation claim where the subrogating carrier also provides liability insurance coverage to a defendant under an unrelated policy). There is no reason to believe that the judiciary will refrain from limiting subrogee's rights to recovery in the future. It is most important, therefore, that subrogation counsel and recovery specialists preemptively act to preserve subrogation claims and avoid actions that may encourage development of bad law. The purpose of this presentation is to offer practical tips in six problematic areas that could prove to be fodder for an overreaching judiciary. These areas include:

(1) Spoliation of evidence
(2) Statutes of limitation and statutes of repose
(3) Post-adjustment releases
(4) Splitting causes of actions
(5) Choosing the "right" expert
(6) Prorating recovery.

The law is unsettled in some of these areas; and in other areas, is inconsistent or conflicting from jurisdiction to jurisdiction. The key to resolving problems that arise in each of these six areas is simple and self-evident; early action prevents later problems. A summary of the issues raised in the six areas and some practical pointers follow.

1. **Spoilation of Evidence**

A. Background and Law

A party or its representative having custody or control of any item of physical evidence has primary responsibility for its preservation. That responsibility has been recognized and embodied in federal and state jury instructions permitting the factfinder to conclude that whichever party loses, damages or destroys physical evidence does so because its condition adversely affects its case.

Most state and federal courts have been besieged with motions to dismiss cases and, in some instances, motions to impose sanctions on parties who fail to fulfill their obligation to preserve evidence that is or reasonably can be expected to be used in litigation. As case law has evolved, courts have fashioned various remedies to respond to a spoliator's conduct. These remedies include:

> (1) Exclusion of evidence, including test results or reports of examinations based upon spoliated evidence. See Puritan Insurance Co. v. Superior Court, 171 Cal. App. 3d 877, 217 Cal. Rptr. 602 (1985) (where plaintiff's expert lost physical evidence, the Court ruled that the testimony based upon physical examination of the evidence should be barred although testimony based upon photographs which were still available to both sides would be permitted).
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> (2) A preclusion of expert testimony which is based upon the examination of spoliated objects without case dismissal. Hirsch v. General Motors Corp., 266 N.J. Super. 222, 628 A.2d 1108 (Law Div. 1993) (motor vehicle not retained following plaintiff's expert examination and conclusion of a product defect existed; the Court permitted preclusion of the expert and any testimony as to findings and conclusions without an outright dismissal of case).
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> (3) Exclusion of expert testimony coupled with case dismissal. See Fire Insurance Exchange v. Zenith Rio Corporation, 103 Nev. 648, 747 P. 2d 911 (1987) (where plaintiff's expert lost a television set that he

determined started the fire, the Court barred the plaintiff's expert's testimony and granted summary judgment.
(4) Outright dismissal of the lawsuit. See Graves v. Bailey, 172 Ill. App. 3d 35, 526 N.E. 2d 679 (1988).

Rather than imposing discovery sanctions or dismissing a case, the Court may instead choose to instruct the factfinder as to certain evidentiary inferences and presumptions based upon a party's lack of production of evidence. The responsibility of a party to preserve evidence is recognized and embodied in most federal and state form jury instructions which permit factfinders to conclude that whichever party loses, damages or destroys physical evidence does so because its condition adversely affects its case. Although presumption may be rebutted by evidence explaining why the destruction, tampering or alteration occurred, as a practical matter, these inferences and presumptions are difficult to overcome at trial. See L. Packel and A. Poulin, Pennsylvania Evidence §419 (1987).

Regrettably, some local court have extended the spoliation doctrine beyond its own outer limits. For example, in Butler v. Samsonite Furniture Co., 131 Mont. Co. L.R. 348 (1994), a Pennsylvania Court of Common Pleas judge granted summary judgment to a manufacturer based upon lost evidence. The plaintiff was injured when she sat in a chair that was in the possession and control of a third party. The third party discarded the chair before the manufacturer's expert had the opportunity to undertake an examination. The Court myopically focused on the prejudicial effect on the manufacturer in dismissing the plaintiff's case even though the plaintiff was proceeding upon a design defect whereby any of the manufacturer's chairs could be examined for the same defect. The Court did not seem to balance any equity in reaching this extraordinarily harsh result; certainly, imposing the most severe penalty upon the

plaintiff was not warranted where the plaintiff did not lose the evidence and did not control the third party.

Fortunately, other courts are far more enlightened in evaluating spoliation motions. In Schmid v. Milwaukee Electric Tool Corp., 13 F.3d 76 (3d Cir. 1994), the manufacturer sought to strike the testimony of the plaintiff-husband expert witness in its entirety on the ground that the expert altered the allegedly defective product during the course of his examination. The Court noted that the expert probably should have timed and videotaped his examination; and perhaps should have notified the potential defendant of his exploratory investigation. Nevertheless, the Court refused to impose an across-the-board rule that requires identification of all potential defendants at the nascent stage of pre-suit process investigation. The Court also noted that the potential for prejudice is much less in a design defect case. The Third Circuit reversed the District Court's striking of the expert evidence. Schmid, 13 F.3d at 79.

Similarly, in Travelers Indemnity Co. v. TEC America, In., 909 F. Supp. 249 (M.D. Pa. 1995), the defendant filed a motion to preclude a plaintiff from introducing at trial evidence concerning light fixtures and overhead electrical circuit as being eliminated as the possible cause of the fire. The plaintiff's expert concluded that the defendant's cash register started the fire; the defendant contended that the fire started in the ceiling above the cash register. The defendant filed this strategic motion to preclude the plaintiff from eliminating light fixtures in the ceiling as the cause of the fire since the light fixtures were not safe. Judge McClure refused to bar the expert testimony and ruled that the evidence not preserved involved items identified much later by the defendant's expert as a potential cause of harm. Interestingly enough, Judge McClure also offered an earlier opinion discussing a spoliation motion. In

Gordner v. Dynamics Corp., 862 F. Supp. 1303 (M.D. Pa. 1994), Judge McClure found that under Pennsylvania law, an injured worker could use circumstantial evidence to maintain an action against manufacturers of an allegedly defective machine pin under a malfunction theory even though the worker could not produce the pin for inspection or testing where there was no allegation that the plaintiff/worker caused the loss of the pin at issue.

Finally, in Austin v. Nissan Motor Corp., 1996 WL 117472 (E.D. Pa. 1996), Judge Robreno noted that the "drastic" measure of outright dismissal of plaintiff's action should be used as a last result when evidence is lost. The Court required discovery to be undertaken to identify the degree to which a product manufacturer was prejudiced by the spoliation of key evidence.

B. Practice Tips

While these cases provide a framework within which to evaluate a lost evidence issue, they provide little guidance as to how a court will actually rule. Some practical tips should be followed in every case immediately filing notice of loss.

First and foremost, a thorough and detailed identification, documentation and preservation of physical evidence should be considered and pursued whenever and wherever possible. Identification can occur through photographs, videotapes, documents, and — most importantly — actual retention of the physical evidence.

Second, notification should be afforded to potential adversaries when any destructive testing is anticipated.

Third, consider retention of the "twin" when identical products may be involved, particularly when a design theory is asserted.

Fourth, make certain that your expert is educated and apprised of her or his duty to maintain the evidence, to properly document when the evidence is received, how the evidence is stored and who has access to the evidence, and to proceed with testing only if you authorize the testing.

Fifth, make certain your insured is apprised of your evidential needs. Documents, maintenance records, service reports, warranties, advertising brochures, contracts, invoices, pre-accident photographs, plans, specifications, drawings and blueprints are some items that should be immediately requested from your insurd promplty following a loss.

Finally, when in doubt, save the evidence. The relatively minor costs of preserving evidence pales in contrast to the potential risks attendant with the lost evidence. Counsel and recovery specialists must make certain that their representatives and consultants are fully apprised of the need to identify, document and preserve physical evidence and its chain of custody.

2. Statutes of Limitation and Statutes of Repose

A. Background and Law

The statute of limitation defense can be one of the most problematic defenses to a subrogation claim. Consequently, every claim handler mechanically computes the statute of limitation from the date that the loss occurred since most statutes of limitation commence on that date.

However, in some instances, the cause of action may be time-barred shortly after the date of loss, or for some cuases of action, before the loss even occurs. With creative research and thought, however, that defense can be avoided even though, at first blush, it appeasr that that the case is time-barred.

When receiving a new claim, the file handler should keep in mind certain statutory limitations that may impact upon the claim.

First and foremost, the file handler should identify the date of the commencement of the statute of limitation. As noted above, statutes of limitation typically commence on the date of loss. In Pennsylvania, there is a two-year tort statute of limitation for property damage claims. 42 Pa.C.S. §5525(3) & (4). In contrast, New Jersey has a six-year tort statute of limitation for property damage claims. N.J.S.A. 2A:14-1. Causes of action based upon written and oral contracts in New Jersey also have a six-year statute of limitation. N.J.S.A. 2A:14-1. However, Pennsylvania has a six-year statute of limitation for written contracts and a four-year statute of limitation for oral contracts. 41 Pa.C.S.A. §5529(b)(1) and 5525(8).

Second, after identifying the commencement date, the file handler should make certain the claim is not barred by any statute of repose. This is typically the most troublesome and overlooked statutory limitation. While a statute of limitation typically commences on a date of loss, the statute of repose may begin on an earlier date, such as the date of the sale of a product or completion of improvemnets to real properties. Some courts have held statutes of repose as unconstitutional as violations of the "open court" provisions of various statute constitutions or violations of due process and equal protection clauses of the 14th Amendment and the Bill of Rights of state constitutions. Hopefully, your cause of action will be filed before these types of arguments need be made.

In New Jersey, there is a ten-year statute of repose which states:

> No action more than ten years after the performance or furnishing of services and construction against persons involved in improvements to real property, whether in contract, in tort or otherwise, to recover damages for any deficiency in the design, planning, supervision or construction of an improvement to

> real prpoery, or for any injury to property, real or personsal, or for any injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvemnet to a real property, nor any action for contribution or idenmnity for damages sustained on account of such injury. N.J.S.A. 2A:14-1.1.

The New Jersey statute does not apply to a person in actual control of the property, such as the owner of the property.

Pennsylvania has a twelve-year statute of respose which provides:

> An action against a person involved in design, planning, supervision or construction of an improvemnet to real property must be commenced within twelve years of completion for any deficiency resulting in property damage, personal injury or wrongful death. An additional two years (up to a total of 14 years from completion) is allowed if an injury occurs in the twelfth year. 42 Pa.C.S.A. §5536.

Similiarly, under the Pennsylvania statute, an owner or occupant is not entitled to claim this defense.

Finally, under both the Pennsylvania and New Jersey Uniform Commercial Code, there is a four-year statute of limitation that commences from the date of sale of goods. Typically, this statute of limitation is important when filing claims for breaches of implied warranty of fitness for a particular purpose, implied warranty of merchantability, or an express warranty. This statute is most important to remember in any claim involving "economic loss." Unfortunately, there are various definitions of the "economic loss doctrine" from jurisdiction to jurisdiction. It is crucial, therefore, to understand and identify the parameters of the economic loss doctrine in the state where you intend to pursue your claim.

B. Practical Tips

After identifying when your potential statute of limitation runs, you must identify any potential statutes of repose. If it appears your staute of repose has run, use the several creative arguments that have been advanced in other courts to overcome the statute of repose. As noted above, some states have ruled statutes of repose as unconstitutional. Perkins v. Northeastern Log Homes, 808 S.W.2d 809 (Ky. 1991); Berry v. Beech Aircraft Corp., 707 P.2d 670 (Utah 1985).

Next, you may avoid the limiting effects of those statutes by reading them closely and demonstrating they do not apply to your case. For example, if a certificate of occupancy is not issued, or certain punch items not completed in any construction project, query whether there has been "substantial completion" as required under the New Jersey statute. Also, See Russo Farms, Inc. v. Vineland Board of Education, 144 N.J. 84, 675 A.2d 1077 (1996). Or, argue that certain actions do not qualify as "improvements to real property". [installation of telephone lines are considered extensions of the utility-distribution system rather than improvemnets to real property. Atlanta Gas & Light Co. v. Atlanta, 287 S.E.2d 229 (1982) and Washington v. The City of Elizabeth, 245 N.J. Super. 325, 585 A.2d 431 (App. Div. 1990)].

Some plaintiff's lawyers have been successful in arguing that statutes of repose do not bar counts based in negligence although they bar counts based in strict liability. Dintelman v. Aliance Machinery Co., 117 Ill.App.3d 344, 453 N.E.2d 128 (1983). Another way to avoid the statute of repose is to show that improvemnet continue after date of completion, or that the target product was reconditioned by a manufaturer. Denu v. Western Gear Corp., 581 F.7 (S.D.Ill. 1983) (a reconditioned product becomes a new product for statute of repose purposes).

When all else fails, you may attempt to save your case by filing suit in another state that may have a longer statute of limitation or repose period of time. You should consider filing suit in jurisdiction such as (1) the domicile of the defendant/manufacturer of product; (2) the domicile of the manufacturer of the component that failed; (3) the state in which the defendant committed a negligent act; (4) the state of incorporation of the defendant; and (5) the state in which the defendant has a registered agent for service of process.

3. Post Adjustment Releases

A. Background and Law

In Pennsylvania, it is most important that any release entered during the adjustment stages between the insured and the carrier does not also contemporaneously release the tortfeasor in a subsequent subrogation claim. In the poorly decided Republic Insurance Company v. The Paul Davis Systems of Pittsburgh South, Inc., 543 Pa. 186, 670 A.2d 614 (1995) case, the Pennsylvania Supreme Court held that a release signed by a homeowner, releasing his own insurer, acted to preclude his insurer from subrogating against a tortfeasor responsible for the homeowner's loss.

The facts of that case are typical of any property damage subrogation case. Republic issued a homeowner's policy which provided coverage for various types of casualty losses. The homeowner suffered property damage when his contractor failed to take appropriate steps to protect the home during a rain storm.

Upon completion of the adjustment of the loss, Republic aksed its insured to sign a "General Release in Full and Final Settlement of Claim." After the General Release was signed and the insured was paid, Republic filed a subrogation lawsuit against the contractor.

The contractor successfully argued that the wording in the General Release was so broad that it barred any causes ofa action that hte homeowner would have, including those against the tortfeasor/contractor. Since the subrogating insurer always "stands in the shoes of its insured", the General Release also barred Republic's subrogation claim against the contractor. The Pennsylvania Supreme Court seemed most concerned with the use of the term "Genreal Release" as being one that is extremely broad and served to release "any and all persons". Althogh the result is absurd since neither Republic nor its insured intended to release the tortfeasor, the result now is the law of Pennsylvania. There is no doubt that clever defense attorneys will attempt to invoke his defense in other jurisdictions.

B. Practice Tips

First and foremost, claims handlers should not enter "general" releases with insureds upon conclusion of hte adjustment of the loss. Second, releases should not include language that "any and all other persons" are released; that "any and all actions" are released; and that the release pertains "whatsoever in kind or nature" as to the claims released.

The better approach to follow (if a release is required) is to specify that the only party being released is the insurance company and its representatives. Moreover, if the potential tortfeasor is known, the release language can state specifically that the release is not intended to release tortfeasors. Careful drafting of releases will avoid these types of potential arguments.

C. Instituting Claims During Adjustment Before Payment is Made

Occasionally, a statute of limitation or statute of repose will run during the adjustment and before a payment is made to an insured. In some states, the carrier's subrogation rights do not arise until a payment is made. Consequently, causes of action may expire after a loss but before a payment is made.

To avoid this dilemma, consider instituting a declaratory judgment action against a tortfeasor in order to toll a statute of limitation. In Allendale Mutual Ins. Co. v. Kaiser Engineers, 804 F.2d 592 (10th cir. 1993), cert. denied 482 U.S. 914, 107 S.Ct. 3185 (1986), an insurer of a uranium mill was permitted to seek declaratory judgment regarding its rights as a subrogee of its insured against tortfeasors who cause damage to the insured's uranium mill even though no payments had been made by the insurer to its insured. The insurer had appealed a state court award of damages in favor of its insured, but wished to preserve any claims against a tortfeasor in the event its appeal was unsuccessful. The 10th Circuit found that an actual controversy existed between the insurer and tortfeasors even though the insurer had not yet paid its insured's claims. This mechanism protects any inchoate claim that may lie against responsible third parties.

4. Splitting Causes of Action

A. Background in Law

In most states, a cause of action cannot be split. Travelers Insurance Co. v. Hartford Accident & Indemnity Co., 222 Pa. Super. 546, 294 A.2d (1972) (subrogee cannot split a cause of actions from its subrogor). In New Jersey, the "entire controversies doctrine" requires all persons who have a material interest in the controversy to be joined in one action. R. 4:30 A; Cogdel v. Hospital Center at Orin, 116 N.J. 7 (1989). There are conflicting cases as to whether a plaintiff cna file separate actions for property damage and personal injury where the claims arose from the same accident. Compare Humble Oil & Refining Co. v. Church, 100 N.J. Super. 495 (App. Div. 1968) (separate actions may be filed) with Burrell v. Quaranta, 259 N.J.Super. 243 (App. Div. 1992) (holding that a defendant in a personal injury action represented therein by his carrier has the obligation to assert in that litigation any affirmative claims he may have arising

out of the same occurrence). See also Prevratil v. Mohr, 279 N.J. Super. 652 (App. Div.), cert. granted 141 N.J. 97 (1995).

B. Practice Tips

At the onset, it is most important for the file handler to communicate with the insured. The insured should be advised (1) that no action should be taken by the insured to relesae or restrict the insurer's potential subrogation rights; (2) that no settlement can be entered with a tortfeasor, and no release be entered between a tortfeasor and the insured; (3) that the insurer should be apprised of any "uninsured" losses to the extent and scope of the uninsured losses, and whether the insured wishes to have those claims asesrted in a subrogation action instituted by the insurer.

In the event that the insured institutes suit, or the insurer is informed of the suit, it seems that the carrier has three options: (1) give notice of the claim to the tortfeasor and the insured, then stay out of the case thereby leaving in tact the duty on the plaintiff's counsel to seek funds on behalf of the insurer; (2) follow proper procedures to intervene as additional plaintiff and seek a direct award from the tortfeasor; or (3) enter an appearance as co-counsel on the "cause of action." Gallashaw v. Bruce Streaty, 24 Phila. 73 (1991). Choosing the first alternative is not wise. The control of the litigation is then left in the hands of the insured and his counsel. Consequently, there is no review or control over the claim that the property insurer should have. The second and third alternatives are recommended. In both instances, the carrier can actively participate and monitor the claim to make certain that its subrogation rights are fully protected and asserted.

5. Choosing the "Right" Expert

A. Law

Under the Federal Rules of Evidence and local rules in almost every state, the minimum standards imposed to qualify as an expert are typically not hard to meet. Under Federal Rule of Evidence 702:

> "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine the fact or issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise."

While Rule 702 and its companion state court rules have been liberally interpreted by the courts, recent attacks raising two challenges to the admission of expert testimony have been raised and should be noted.

First, most practitioners can expect to encounter the "Daubert" defense challenging plaintiffs' experts on the basis that their opinions lack sufficient scientific foundation because they are not supported by the industry-cultivated scientific community. The genesis of the United States Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993) was the so called "junk science" testimony typically presented in personal injury cases involving peculiar toxic torts. The Daubert Court determinted that trial courts must serve a "gatekeeper" function in reviewing opinion testimony by focusing upon principles and methodologies used in determining what constitutes "scientific knowledge". The Supreme Court offered a laundry list of various factors that a trial judge could consider in deciding admissibility of scientific evidence including:

(1) whether the expert's proposition is testable, has been tested, and has been subject to peer review and publication;

(2) whether the methodology or technique has a known error rate;

(3) whether there are standards for applying the methodology; and

(4) whether the methodology is generally accepted in the scientific community.

The defense bar has embraced Daubert in an effort to restrict both traditionally accepted expert testimony as well as "junk science". While some courts have been swayed by inappropriate application of the Daubert doctrine, the Second Circuit aptly summed up the true goal of the Daubert doctrine:

> Trial judges must exercise sound discretion as gatekeepers ... [the defendant], however, would elevate them to the role of St. Peter at the gates of heaven, performing a searching inquiry into the depth of an expert witness' soul .... Such an inqury would inexorably lead to evaluating witness credibility and weight of evidence, the ageless role of the jury.

McCullock v. H.B. Filler Co., 61 F.3d 1038, 1042 (2nd Cir. 1995). See also Smith v. Ford Motor Company, 882 F.Supp. 770 (N.D. Indiana 1995) (noting that a fire accident investigator will not be barred under Daubert as his opinions were based on fact, and investigation and traditional cause and origin fire investigative accident expertise.)

The second ground for attacking experts involves the issue of "licensing". Most states have a Private Detective Act that requires a licensing of an investigator into the cause and origin of fires. Only one state has ruled that a cause and orgin investigator who was not licensed under the Private Detective Act is precluded from testifying as to his investigation as to the cause of a fire. People v. West, 264 Ill. App. 3d 176, 636 N.E. 2d 1239 (5th District 1994). Not all states have agreed with this finding. Doochin v. United States Fidelity & Guaranty Company,

854 S.W. 2d 109 (Tennessee 1993); Eagle Pet Service Co. v. Pacific Service Employers Insurance Co., 175 A.D.2d 471, 572 N.Y.S. 2d 623 (N.Y. 1991).

B. Practice Tips

Every practitioner should expert a Daubert challenge to experts offering opinions in property damage subrogation cases. In matters of cause and origin fire invesetigations, there is no doubt that expert testimony is well-recognized by the Courts. Indeed, the fact that such expertise has been widely accepted in the past weighs heavily in the Daubert calculi. Nevertheless, it is advisable to have your expert undertake a thorough and detailed analysis before rendering an opinion.

With respect to licensing objections, it is advisable to have your expert licensed under the Private Detective Act if she or he is conducting a cause and origin investigation in Illinois. To the extent possible, you may wish to advise experts you use to apply for licenses in states where she/he frequently practice. Otherwise, there are strong arguments that should be advanced that your expert need not be licensed in order to offer testimony under Rule 702. Owens v. Payless Cash Ways, Inc., 670 A.2d 1240 (R.I. 1996) (reversed trial court preclusion of engineering expert on grounds that he was not licensed as required by Rhode Island law).

6. Proration of Recoveries

A. The issue of apportionmenet of recoveries between an insured and an insurer in a property damage context vary from state to state. In a few states, a subrogating insurance carrier is permitted to be paid first before an insurer is made whole. Peterson v. Ohio Farmer's Insurance Co., 175 Ohio 34, 191 N.E. 2d 157 (1963).[1] However, the majority rule is that an insured must be fully compensated for its losses before an insurer can be reimbursed.

[1] This minority rule has been followed in some instances in California, Idaho, Ohio, Virginia and Wyoming.

Garrity v. Rural Mutual Insurance Company, 77 Wis. C. 2d 537, 253 N.W. 2d 512 (1977).[2] While there are some newer decisions that hvae favored a "proration" approach if agreed among hte parties, See Aetna Life Ins. Co. v. Martinez, 454 N.E. 2d 1338 (Ohio Ct. App. 1982) (upholding a medical reimbursement agreement that provided for proration of recoveries); Hayes-Albion Corp v. Whiting Corp., 459 N.W. 2d 47 (Mich. App. 1990), there are other states that prohibit any contractual attempt to modify the insured-whole rule. Powell v. Blue Shield, 581 So.2d 772 (Ala. 1990); Allum v. Med Cener, 371 N.W. 2d 557 (Minn. Ct. App. 1985); Wimberly v. American Cas. Co., 584 S.W.2d 200 (Tenn. 1979). The remaining states have not yet definitively ruled on hte issue of apportionment of recoveries in the absence of an agreement.[3]

Unfortunately, Pennsylvania has no definitive rule regarding apportionment between an insured and an insurer; and New Jersey has not issued a final ruling although it has approved apportionment agreement under certain circumstances.

In Pennsylvania, the lead case appears to be Allstate Insurance Company v. Clark, 364 Pa. 196, 527 A.2d 1021 (1987). In Clark, an insured recovered for personal injury; and its automobile collision insurer saw a recovery of a portion of those sums. While the court rejected arguments that the insurer is compensated first, it also seem to suggest that a proration approach should be followed. By way of footnote, the court illustrated what it felt could be an appropriate proration formula:

[2] The majority rule has been followed in Alabama, Arkansas, Colorado, Connecticut, Florida, Illinois, Indiana, Iowa, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington and Wisconsin.

[3] These states include Alaska, Arizona, Delaware, Georgia, Hawaii, Kansas, Kentucky, Maryland, Missouri, Nevada, New Mexico, New York, North Dakota, Oklahoma, Oregon, South Carolina and South Dakota.

> ... consider for example a situation where an injured insured receives a judgment in his favor for $500,000 which encompasses his pain and suffering, lost wages and earning capacity and medical bills. Assume further that the individual accumulated $100,000 in medical bills and that, because of the effective limitations on recovery, only $100,000 is recovered from the tortfeasor. Given the $100,000 recovery, logic and equity would require treating the insured as having recovered 20% of every dollar of damage suffered. Hence, the insured would have recovered only $20,000 of the $100,000 of medical bills incurred. There would be nothing inequitable in awarding the entire $100,000 recovery to the medical insurer. To do so, would require diveresion of the insured's recovery for his loss of earnings and pain and suffering and to completely defeat the insured's recovery for damages. It also will allow the insured to recover 100% of its expenditures while the insured only recovered 20% of his damages. Where stated alternatively, and to use an earlier analogy, if the subrogee stands in the precise position of the subrogor, the subrogor has only received 20% or $20,000 of its medical bills from the third party tortfeasor, consequently, the subrogee can receive no more than $20,000 from the subrogor.

While there is some case law in New Jersey that an insured-whole first formula applies,[4] the state has also issued the seminal decision on the enforceability of proration agreements in Culver v. Insurance Co. of North America, 535 A.2d 15 (App. Div. 1987), rev. on other grounds, 559 A.2d 400 (N.J. 1984). In Culver, the New Jersey Supreme court offered a substantial number of comments on subrogation issues that were raised and discussed by the lower court. Initially, the Court recognized that subrogation rights are created in one of three ways:

(1) through an agreement between hte insured and the insurance company;

(2) by statute; and

(3) judicially, through equitable principles that compel the wrongdoer to understake the obligation which it ought to pay.

[4] Providence Washington Ins. Co. v. Hogges, 171 A.2d 120 (N.J. Super. App. Div. 1961).

The court next noted that the lower court improperly subordinated the contractual nature of subrogation rights between the Culvers and INA (the insurance policy granted such subrogation rights to INA) to the equitable considerations stemming from the third method of creating subrogation rights. The Supreme Court determined that the lower court erred in ruling that subrogation agreements are unenforceable as a matter of law, and upheld the principle that parties can vary by contract the common law "insured-whole first" rule. Thus, subrogation agreements in New Jersey are enforceable.

B. Practice Tips

Without a doubt, the adjustment of a loss must undertake an evaluation of the entire claim. This should include an assessment of all the insured's property damage claims to the extent possible. Many times, however, certain losses will not, and as a practical matter cannot, be calculated. For example, business interruption losses, loss of business goodwill, claims for personal injuries and the like may not be readily identifiable.

Where possible, a fair arms-length proration agreement - recognizing the insured's proveable damages - should be negotiated. Such agreement should not permit the insurer to obtain greater than 100% of its payments without an insured being treated similarly. If a proration agreement is entered, there should be some legal contractual consideration flowing between the parties. To the extent contractual consideration exists, the chances of a proration agreement being upheld is enhanced.

CONCLUSION

In conclusion, these several persnickery problems will continue to vex the subrogation practitioner as we approach the twenty-first century. Simply put, early and decisive

action following receipt and notice of a claim can resolve many of these problems so that the file handler can focus upon the true issues of the case and maximize recovery from the tortfeasor.