



# The I-ENG-A Report

*Investigative Engineers Association  
Nationwide Investigative Engineering Expertise: (800) 523-3680*

## An Adjusters Guide to Subrogation Recoveries

The word subrogation comes from the Latin word 'subrogee' meaning, 'to substitute'. Subrogation therefore is a substitution of one creditor, the damaged insured, for that of another, the insurer.

The concept of subrogation arises out of the property-casualty insurance policy being a contract of indemnity; a contract with the purpose of putting someone back in pre-loss condition. No subrogation exists in life insurance. This is because a life insurance policy is not a contract of indemnity. As the right of subrogation arises out of the property-casualty policy being one of indemnity, this right would still exist without the subrogation clause contained in the policy.

This raises an interesting question:

Why is the subrogation clause contained in the policy? The answer is two-fold:

1. It prevents the insured from waiving subrogation rights after the loss; and
2. It permits "pro tanto" recovery; meaning to the extent payment has been made. The subrogation clause allows an insurer to subrogate as soon as a loss has complete indemnity.

Most subrogation clauses allow the insured to waive rights of recovery before a loss. However the policy should always be reviewed to make sure this is the case. Nearly all insurers allow the insured to engage in pre-loss waivers of subrogation. This is done to allow the insured to engage in some non-insurance transfers (e.g., hold harmless agreements) and is seen as necessary allowing the insured to

conduct its business affairs. On the other hand, nearly all policies do not permit the insured to waive rights of recovery after a loss. If the insured does this it could have the effect of voiding the policy.

In the end, what is the impact of subrogation? Subrogation helps to create an equitable rate structure. It reduces first party losses and ultimately first party premiums (it has been estimated that auto collision premiums would increase by 31 percent if there were no subrogation). Conversely, subrogation increases third party losses and liability premiums. In the final analysis the party responsible for a loss is made to pay for it.

### SUBROGATION RECOVERY TIPS

Prompt recognition:

All losses are caused by something! Always ask yourself the questions, "What caused this loss"? Most subrogation is missed because someone failed to recognize it.

Develop a theory of liability:

Is this a products case, one of negligence or possibly breach of warranty? The theory of liability indicates the various issues that must be proven and will become the blueprint for investigation.

Investigate:

The closer to the loss the investigation occurs, the better the chances of recovery. Your goal in investigation should be to preserve how the loss occurred.

## Subrogation Recoveries continued...

### SUBROGATION TIPS:

**Get the evidence:** The burden of proof rests with the plaintiff. Unless you can prove how the loss occurred, you are out of luck. The adjuster should avoid picking up physical evidence (e.g. defective products). If at all possible this should be done by the investigative engineer. Why? This avoids any allegations that the insurer altered the evidence. It also avoids the adjuster having to testify at trial, thus avoiding the identity of the insurer.

If the adjuster has no choice but to pick up physical evidence, the adjuster should document his custody with photos to be kept on file and a three-part receipt for documentation. One copy should be attached to the evidence, a copy should be placed in the claim file and a copy should be given to the person who is the owner of the evidence. The evidence should be kept in a place that only the investigative engineer or adjuster has access to, such as a locked desk drawer or file cabinet. This helps to establish that control has been maintained and that the evidence has not been altered.

**Take statements:** The more the better. Statements help to pin witnesses down as to what happened and can be used to refresh their memories later. Have you ever heard a claim manager complain that a claim file

contains too many statements? Some people from whom statements are obtained may even be classified as experts by the court. For instance, the television may not have worked in that particular model many times before and technicians may be aware of problems associated with it.

Is there really an equitable way to have investigative assistance for this claim?

Not all losses require an expert - but many do. Do you want to retain an expert who charges \$1,000 to write a report on a \$1,200 subrogation claim? Hopefully not. Members of the Investigative Engineers Association (I-ENG-A) understand the needs of the insurance industry and have skills to assist in solving both small and large subrogation issues equitably.

Of course, one must remember to provide clear guidelines and as much information as possible to the investigative engineer; generally speaking, the better the quality of the request, the better the quality of the report.

Networking with experts across the country provides I-ENG-A members with access to information quickly, saving both time and money.

[www.ienga.net](http://www.ienga.net)

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