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Technical Advisory

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Subject: Waivers of Subrogation

Background: “Life’s not as simple as it used to be.” While progress has its rewards, it also brings a plethora of complications. A prime example is the ubiquitous presence of lengthy and complex contracts that are utilized in most areas of business operations today.

For the insurance professional, wading through the endless variations of waivers of subrogation and hold harmless agreements our insureds encounter can be taxing, to say the least. While agents must prudently avoid giving legal advice about the contracts insureds sign, they must still deal with the insurance implications.

Main Points: The Virtual University of the Independent Insurance Agents & Brokers of America has an excellent article on its web site that provides an in-depth analysis of waivers of subrogation, as they relate to general liability, commercial property, business auto, and workers compensation. The article is reprinted below.

The Virtual University has hundreds of outstanding articles posted. The VU is a free service for all member agencies. While the VU is password protected, all employees of member agencies can obtain a password for free. Check out the great articles, and all the other excellent resources from the VU. The web site is www.independentagent.com/VU.

Necessary Action: Circulate this Technical Advisory to all appropriate commercial lines staff. In addition, encourage all agency staff to frequently check the Virtual University for new articles, or to use it as a resource for information on technical subjects, agency operations, automation, and other important subjects.

Waivers of Subrogation

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One of the most common contractual requirements your commercial insureds face is a requirement to waive a right of subrogation. Most often, these waivers are one-sided when it comes to general liability, but mutual with regard to property damage under lease agreements. They can also arise under business auto, workers compensation, marine, umbrella, and other exposures. In this article, we'll explore some typical provisions and how they can be effected under various insurance policies.

So far this year, our "Ask an Expert" service has received 15 questions relating to waivers of subrogation in everything from property insurance to workers compensation. In this article we'll address subrogation waivers and how they are treated in various types of insurance policies.

Losses typically arise through someone's negligence. In general, and as a matter of equity, the negligent party should be liable for such negligence. For example, a tenant may damage the building he/she is renting. The building owner's policy would pay for such damage, assuming the loss is covered by the policy. When payment is made, the building owner will typically then be required to transfer his/her rights of recovery against the negligent party to his/her insurer who then "subrogates" to recover the amount paid.

However, if the tenant has a long-term lease or is otherwise a highly desirable occupant, as a matter of goodwill or as a contractual provision of the lease agreement, the building owner may want to waive the insurer's right of recovery, or subrogation. Similarly, other leases may require the tenant to hold the building owner harmless and waive rights of subrogation against the owner. In either case, some policies permit subrogation before and/or after loss and others don't. Some permit it only in writing, while others are silent on this point. Some policies effect a waiver of subrogation by endorsement or include it within the policy language.

Subrogation waivers are neither good nor bad necessarily, but they're often a part of doing business. Almost all hold harmless agreements will have some requirement for a waiver of subrogation; otherwise the hold harmless provision has little meaning. Sometimes subrogation waivers are unilateral, most often when the parties have unequal bargaining positions. For example, construction contracts often require subcontractors to waive subrogation against general contractors, but not vice versa. In property insurance, mutual waivers of subrogation are more common, particularly in lease agreements.

There is no standard subrogation waiver language, so it is important to determine the nature and extent of such agreements in order to determine if the policies being procured will comply with any contractual requirements. Here are a couple of examples of waivers of subrogation language:

"Waiver of Subrogation: The parties release each other, and their respective authorized representatives, from any claims for damage to any person or to the premises and the building and other improvements in which the premises are located, and to the fixtures, personal property, Lessee's improvements, and alterations of either Lessor or Lessee in or on the premises and the building and other improvements in which the premises are located that are caused by or result from risks insured against under any fire and extended insurance policy carried by the parties and in force at the time of any such damage."

"Mutual Waiver of Subrogation: It is covenanted and agreed by and between the parties hereto that Tenant shall relieve Landlord of all liability for loss or damage to Tenant's property, whether real or personal, caused by fire and/or the perils covered in a standard form fire insurance policy with Extended Coverage, due to any acts of commission or omission of Landlord; and Landlord shall relieve Tenant of all liability for loss or damage to Landlord's property, whether real or personal, caused by fire and/or the perils covered in a standard form fire insurance policy with Extended Coverage, due to any acts of commission or omission of Tenant."

For additional information, here's a mutual subrogation waiver court case that illustrates the nature of such agreements and how the courts sometimes consider them:

<http://www.umkc.edu/dirt/dd2000/DD01132000.htm>. Here's a CD with sample forms that allegedly include a mutual waiver: <http://www.ali-aba.org/aliaba/BCDPREL-02.htm>. For additional resources, check the end of this article.

So, let's take a look at various types of policies and how each treats the issue of subrogation and waivers.

Property Insurance

In the February 2005 issue of *American Agent & Broker* magazine, VU faculty member Terry Tadlock wrote an excellent article on "[Analyzing the Lease Exposure](#)" that discusses waivers of subrogation and other important lease provisions.

ISO's CP 00 90 - Commercial Property Conditions addresses subrogation as follows:

TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US

If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you may waive your rights against another party in writing:

1. Prior to a loss to your Covered Property or Covered Income.
2. After a loss to your Covered Property or Covered Income only if, at time of loss, that party is one of the following:
 - a. Someone insured by this insurance;
 - b. A business firm:
 - (1) Owned or controlled by you; or
 - (2) That owns or controls you; or
 - c. Your tenant.

This will not restrict your insurance.

The first two sentences grant the insurer the right of subrogation. The remainder of this condition establish the bases for waiving this right. The insured may waive the insurer's rights of recovery against the liable party only if done so in writing, though the insurer's express permission is not required. If the waiver is effected PRIOR to loss, the right of subrogation may be waived against ANY party.

However, if the waiver takes place AFTER loss, it only applies to an insured under the policy, a business owned or controlled by the named insured, a business that owns or controls the named insured, or a tenant. No endorsement is needed...the subrogation waiver is granted within the policy itself. The same is true for ISO's Businessowners Policy.

Note that, after a loss, the building owner can waive the right of subrogation against any tenant, but a tenant cannot waive the right of subrogation against the landlord unless he/she is an additional insured under the tenant's policy or there is an ownership interest between the parties.

General Liability Insurance

Unlike property insurance, many (if not most) liability policies require the insurer's permission to waive subrogation, at least AFTER loss. That express permission is often granted by endorsement, sometimes with an additional premium associated with it.

The ISO CGL policy grants the insurer the following right of subrogation:

Transfer Of Rights Of Recovery Against Others To Us

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

Note that this subrogation right only applies to acts that take place "after loss." There is no explicit grant of subrogation to the insurer for a waiver of subrogation that takes place BEFORE a loss...and no requirement that it be in writing. However, in order to expand the time frame and/or clarify this, ISO provides a waiver endorsement.

The CG 24 04 - Waiver of Transfer of Rights of Recovery Against Others To Us endorsement waives subrogation as follows:

We waive any right of recovery we may have against the person or organization shown in the Schedule above because of payments we make for injury or damage arising out of your ongoing operations or "your work" done under a contract with that person or organization and included in the "products-completed operations hazard". This waiver applies only to the person or organization shown in the Schedule above.

Business Auto Insurance

The Business Auto policy, CA 00 01 (as well as other ISO auto and garage coverage forms) includes the following subrogation provision:

Transfer Of Rights Of Recovery Against Others To Us

If any person or organization to or for whom we make payment under this Coverage Form has rights to recover damages from another, those rights are transferred to us. That person or organization must do everything necessary to secure our rights and must do nothing after "accident" or "loss" to impair them.

Note that, similar to the CGL policy, this subrogation right only applies to acts that take place "after loss." There is no explicit grant of subrogation to the insurer for a waiver of subrogation that takes place BEFORE a loss...and no requirement that it be in writing. However, unlike the CGL, there is no endorsement to modify this policy provision. One reason for that could be that the omnibus insured provision is broad enough to include the vicarious liability of others that is often the subject of subrogation...an insurer generally cannot subrogate from an insured under a policy except in the most extreme circumstances such as intentional losses.

Workers Compensation Insurance

Here is a typical scenario: An insured is doing work for another firm when one of the insured's employees is injured on the job. The insured's WC carrier pays the claim, then seeks recovery from the firm for whom the work is being performed on the basis that it was liable in some way for the injury. In order to avoid such claims, the contract between the parties stipulates that the insured will waive rights of recovery against the firm if the insured's employees are injured on the job.

Whether or not subrogation can be waived in such circumstances is often governed by statute, so there is no clear answer as to whether or not subrogation may be waived. While most states appear to have no prohibition against waivers of subrogation, some do and specifically prohibit blanket waivers. Whether a waiver is possible may also depend on the relationship between the injured party and the customer at the time of the accident, along with the unique circumstances of the situation.

Therefore, it is typically a contractual provision that subrogation be waived "to the extent provided by law" so that, if permitted, there will be no subrogation. If permitted, the NCCI WC policy grants the insurer the right of subrogation:

Recovery From Others

We have your rights to recover our payment from anyone liable for an injury covered by this insurance. You will do everything necessary to protect those rights for us and to help us enforce them.

There is no provision for waiver of subrogation within the NCCI WC policy...it must be provided by attaching the WC 00 03 13 - Workers Compensation Waiver of Our Right to Recover From Others Endorsement:

We have the right to recover our payments from anyone liable for an injury covered by this policy. We will not enforce our right against the person or organization named in the Schedule. This agreement applies only to the extent that you perform work under a written contract that requires you to obtain this agreement from us. This benefit shall not operate directly or indirectly to benefit anyone not named in the Schedule.

Keep in mind, though, that just because a waiver of subrogation is permitted, the insurer may not be compelled to do so. According to one of our faculty members:

"The reasons that carriers do not (and, in the minds of some, possibly should not) waive subrogation is that subrogation is a component of the rate structure for WC. To waive subrogation, the carrier should charge a higher rate for the exposure (some speculate as much as 50% to 60% higher).

"Secondly, the experience for these losses will go from net of subrogation to gross losses for experience modification purposes. While the insured may want to do the work for these customers, they will certainly not like the increased cost of WC due to losses for which there is no recovery. Insureds requesting waiver of subrogation on their WC policies may be surcharged if permitted by law or the governing rating organization."

Other faculty members report that some states do not allow a premium charge to be made, while others specify it explicitly (e.g., a maximum of 2% of the manual premium, subject to a \$250 minimum charge).

As to whether subrogation can be waived without the carrier's permission (as it can in most other lines of insurance under the right conditions), one of our faculty members provides the following:

"I have always wondered if subrogation can be waived under WC without the carrier's permission. I actually wrote to NCCI on this topic for the first time in 1998. I never got an answer. I continued to send the same letter for three straight years. I never got an answer. I finally got a call from someone saying they were not sure.

"The crux of the problem is that Item H. 'Recovery from Others' does not include the classic "after loss" language that allows waivers without the carrier's permission in lines like GL and Property.

Hence, we all presume that permission is necessary. However, when you look at Item 5 under Part 4 of the WC policy, it does include the classic "after loss" language which definitely implies that the insured can do whatever they desire PRIOR to the loss. It is classically ambiguous which, as we all know, favors the insured. I have had a couple of agents/brokers tell me that they tell their clients that they can waive subrogation under WC without the carrier's permission as long as it is done prior to the loss. Neither has had it tested however."

As an aside, another common question that comes up in this line of insurance involves requests to be named as an additional insured on someone's WC policy. By and large, an insurer will refuse to do this since it may effectively be assuming that firm's entire WC exposure. Aside from an Alternative Employer Endorsement, the carrier is highly unlikely to be willing to add someone as an AI to a WC policy.

Other Types of Insurance

With regard to inland marine forms, umbrella policies, and various E&S contracts, there are no standards. One must examine each policy form individually.

Additional Resources:

"[Analyzing the Lease Exposure](#)" by Terry Tadlock, CPCU, CIC
American Agent & Broker Magazine, February 2005

"[Subrogation Can Spell Trouble](#)" by LeRoy Utschig, CPCU, CLU, ARM
Rough Notes Magazine, January 1998

Feedback:

Do you have an opinion on this or any other VU article? If so, feel free to send your comments to Bill.Wilson@iiaba.net. If you would like your name, agency and city/state to be included if we post your comments, please include them.

Subscriber Response

I read your article on Waivers of Subrogation. Nice job. As you well know, this concept is poorly understood by risk managers and attorneys as well as agents and brokers. I have attached an article I wrote earlier this year for Risk Management Magazine.

As you can see in the article, I believe that it is misleading to state that a policyholder has waived their right of subrogation. While this may seem to be just semantics, if our industry uses terms ambiguously, confusion usually results.

Only the insurer can waive their right of subrogation, which can only done by endorsement to the policy. Insurers generally allow policyholders to waive their rights of recovery against a tortfeasor as a policy condition. Although closely related, waiving a right of recovery is distinct from subrogation. While in many cases the effect may be the same, that is not always the case. Thinking of recovery rights as being identical to subrogation can result in unwelcome surprises, not to mention some confusion and ultimately failure to transfer risk.

The importance of not distinguishing between subrogation and rights of recovery is that it may lead to an unexpected result. If the risk management technique chosen is to have the insurer waive their rights of

subrogation by endorsement, the policyholder is not affected by such a waiver and therefore can recover from the tortfeasor for any amounts not paid by the insurance (such as a large deductible, inadequate limits, uninsured claim, etc.). It is likely that the tortfeasor will be unpleasantly surprised by such a result.

Craig

Subscriber in Massachusetts

Subscriber Response

Excellent Subro Newsletter.

As companies automate their BOPs, many try to avoid endorsements which would require further programming. Last year, I asked a company for their position on the GL Waiver of Subro under their BOP. This was the answer from their Product Management Dept:

"The portion of the provision that applies to the liability coverage section of the BOP requires that the insured 'do nothing after loss' to impair the insurer's right to recover in the insured's place. That language has traditionally been read as implicit consent on the part of the insurer to the insured's waiver of recovery rights against another party as long as such waiver is effective before a loss. The insurer has only the same right of recovery that its indemnified insured has against a liable third party. If the insured has already waived its own recovery right before the loss takes place, then the insurer's right of subrogation has been waived as well."

The underwriter made the Product Management email part of the underwriting file and no endorsement was issued.

Michael

Subscriber in Connecticut