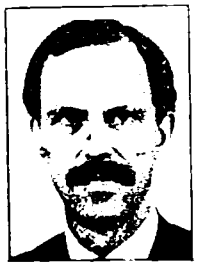
JAN 1990

Practice Tips...

Subrogation strategy

There is considerable confusion about inter-company arbitration—when it is proper for an insurer to use that forum, and when it is not. Inter-company arbitration is an arrangement by a number of insurers to resolve disputes among themselves in an arbitration forum in which they have created the rules.



Robert Dawson

If a dispute is between two insurers *only* then those insurers can choose whatever forum they wish to resolve their dispute. The fact that they choose to resolve such a dispute in an arbitration forum rather than the courts is proper and should be encouraged.

However, in a typical automobile case the subrogation issues involve more than just the two insurers. The injured party has an interest in subrogation matters, and is entitled to present evidence in support of his or her position. An insurer who tries to use inter-company arbitration to collect its subrogation in a typical automobile case is probably acting inequitably towards its own insured and may forfeit its subrogation interest entirely. More on that later.

Most subrogation claims can be negotiated, including those claims where the insurer seeks to collect its subrogation claim through inter-company arbitration. There are times and specific fact situations where both sides should compromise their positions.

However, a number of automobile insurers are now taking the position that they will resolve all subrogation disputes in inter-company arbitration and they refuse to discuss or compromise subrogation claims. If your client's insurer takes such a position, here are some issues you might want to raise with that insurer in your correspondence and discussions.

1. By what authority does the insurer

seek to split a lawsuit into two parts and resolve the subrogation claim in inter-company arbitration and the remaining claims in another forum?

I have written to numerous insurers asking by what authority they seek to split a claim in two. So far no insurer has ever responded. What authority there is on this subject is to the contrary.

> The general rule is that a person is not entitled to be subrogated... until the claim... has been paid in full; the creditor in the meantime is left in control of the debt, and all remedies for collection. A pro tanto assignment of subrogation will not be allowed.

Jensen v. American Bank of Spokane, 157 Wash. 240 (1930). *See also Chapman v. Ross,* 152 Wash. 262 (1929).

2. What does the insurer expect to resolve in an inter-company arbitration proceeding?

Your client is not a party to inter-company arbitration proceedings and is specifically excluded from participating in that forum. The proceedings are not binding on one who could not participate and could not present evidence in support of his or her position.

Also, I find it difficult to see how any subrogation issues can be decided in an inter-company arbitration proceeding. Subrogation is an equitable claim that is available only if the client has been fully compensated, if the insurer acts equitably, and if the insurer lives up to all of its contractual duties. Subrogation is reduced to the extent the insured's efforts benefited the carrier in its recovery. Each of these issues must be determined in a forum that allows the insured to present evidence.

3. By what authority does the first party carrier seek to release its insured's private medical records to the insured's adversary?

By bringing a personal injury action the insured waives his or her physician/patient privilege to the extent required by statute. There remain certain privacy interests in the insured's medical records which s/he may seek to protect through a protective order. Simply because an insured releases medical records to a first party carrier in order to obtain first party benefits does not mean that the first party carrier can thereafter automatically release those records to the third-party carrier.

4. What about the case law that says the plaintiff is to be reimbursed for his or her efforts that benefit the insured in recovery of its subrogation interest?

If the plaintiff's actions, or the actions of plaintiff's counsel, were necessary and benefit a subrogated insurer in recovery of its claim, then that subrogated insurer is to pay a reasonable reimbursement for the benefit received. *Pena v. Thorington,* 23 Wn. App. 277 (1979); *Richter, Wimberley & Ericson v. Honore,* 29 Wn. App. 507 (1980); *United Pacific Ins. Co. v. Boyd,* 34 Wn. App. 372 (1983); *Hardware Dealers Mut. v. Farmers Ins.,* 4 Wn. App. 49 (1971). This is true even where the insured seeks to collect its subrogation through inter-company arbitration. *United Pacific Ins. Co. v. Boyd,* 34 Wn. App. 372 (1983). In one case where the insurer sought to use inter-company arbitration, the Court of Appeals upheld a reimbursement to the plaintiff that totaled 39 percent of the subrogation amount. *O'Neal v. Legg,* 52 Wn. App. 763 (1988).

5. By what right does the insurer take steps that will prejudice settlement of the third-party claim?

First party carriers that pay benefits usually notify the third-party insurer that they claim a subrogation interest. In addition, the first party carrier will often write to the third-party carrier saying not to pay the insured directly. Actions such as this will prejudice your efforts to settle a claim on your client's behalf. Here is why.

Since the insurer has no authority to split the claim, plaintiff's counsel will generally want to present all special and general damages to the third-party carrier during negotiations and at trial. The collateral source rule permits you to present those special damages at trial without reference to insurance company payments, and it is generally in your client's interest to do so. Since two parties are making claim for the same benefits from the third-party carrier, this will make settlement more difficult.

6. Subrogation is an equitable claim and is subject to equitable defenses.

Subrogation is an equitable claim and is subject to equitable defenses. *Coy v. Raabe,* 69 Wn. 2d 346 (1966), *Transamerica Title v. Johnson,* 103 Wn.2d 409 (1985). Trying to split a claim without the authority to do so, and taking steps which make settlement more difficult seems like inequitable conduct, especially by a first party carrier that owes fiduciary duties to its own insured. An insurer who seeks to recover an equitable claim from its own insured, and then acts inequitably while doing so, will forfeit its subrogation claim.

When your client's own insurance company demands the "right" to collect its subrogation through inter-company arbitration, refuses to compromise its claim when the facts support it, and then takes steps which prejudice its insured's ability to settle the case, you can reasonably take the position that the insurer forfeits its subrogation entirely.

Robert K. Dawson is a partner in the Seattle firm of Pence & Dawson; his practice is limited to plaintiff's personal injury cases.