



Subrogation

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Introduction

- Subrogation a lost art or forgotten science?
 - Neither
 - But in difficult times it is more important than ever to maximise potential recoveries.
 - Subrogation is not just a bonus but a key decision making process for insurers.
 - Easy to pick the low hanging fruit.
 - What of the marginal cases?
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Outline

- Points to cover:
 - Some key principles
 - Practical issues
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Key principles

- Subrogation extends only to indemnity insurance; there is no right of subrogation where the Policy is not an indemnity policy.
 - Only able to recover the amount paid out and nothing more.
 - Same rights as the insured
 - Cant be put in any better position than the insured was.
 - If the Insured forfeits a right before Insurer is subrogated then little Insurer can do.
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Key principles-
Who has
control?

- Recovery Proceedings – Who has control?
 - Full Indemnity
 - If the Insured is fully indemnified by the Insurer, the Insurer has control of any recovery proceedings
 - The Insurer can issue proceedings in the Insured's name
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Key principles- Who has control?

- Partial Indemnity
 - Insured can control the proceedings
 - In doing so must have regard to the Insurer's interests
 - Failure to do so may result in a claim for damages by the Insurer against the Insured (West of England Fire Insurance Co v Isaacs)
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Who gets what and when?

- *Lord Napier & Ettrick v Kershaw & Ors:*
 - Claim by names against their syndicate alleging negligent underwriting
 - Alleged to have lost £160,000 per name
 - Many of them had been insured by stop loss insurers for £100,000 in excess of £25,000
 - Made a recovery from the syndicate's E&O insurers of £130,000
 - House of Lords treated the uninsured losses as though they were also insured
 - Recovery moneys were to be applied top down:
 - First £35,000 to cover the uninsured portion of the loss over and above the stop loss
 - Next £95,000 to cover the portion of the loss insured by the stop loss
 - This is known as the top down principle
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Proprietary right in recoveries?

- An Insurer does have a proprietary right in recoveries. This means:
 - Recovery monies attributable to losses insured and paid by the insurer are in equity the property of the insurer, not the insured.
 - If the insured goes bankrupt (or, in the case of a company, into liquidation), the recovery monies still belong to the insurer
 - If the insured has assigned the recovery to a third party, that assignment will be ineffective.
 - If the recovery monies are in the hands of a third party (e.g. broker or solicitor), who has notice of the insurer's claim, the third party is under a duty to account to the insurer for the recovery.
 - The insured who has held recovery monies will be obliged to account to the subrogated insurer for any interest or profit on them
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- Practical Points
- Before the Policy is entered into
 - Provision for subrogated claims
 - Assureds' obligation to preserve rights vs. 3rd parties
 - Insurer's power to control proceedings
 - Co-assureds
 - Scope of cover: underlying contracts
 - Identification – specific declarations
 - "waiver of subrogation rights" clauses
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Following a Loss

- Early consideration of subrogation issues pays dividends.
 - Secure evidence.
 - Don't ignore 'difficult' targets:
 - Shipbuilders / repairers
 - Classification societies
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No cure no pay
– help or
hindrance?

- Clearly helpful in many cases. But beware!
 - Can encourage ‘cherry picking’.
 - Be imaginative with litigation funding.
 - Small investment can reap big dividends.
 - Discriminating claims handling is as important as ever.
 - Some of the tastiest fruit can be found higher up the tree!
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