SUBROGATION:

CONSIDERATIONS FOR A SUCCESSFUL RECOVERY

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At Sloane and Walsh, LLP, we focus on maximizing our clients' subrogation recovery efficiently and quickly. Our goal is to partner with our clients and establish subrogation procedures and protocols (the first days after the event being the most important) that directly lead to outstanding results. Our attorneys are well-versed in providing subrogation services to the insurance companies and institutions we represent.

When approaching a potential subrogation claim, giving consideration to the following four steps may help maximize the chances of a successful recovery: (1) take a "team approach"; (2) investigate whether subrogation potential may exist; (3) provide notice of a potential claim; and (4) prevent spoliation and preserve evidence.

I. The "Team Approach"

Assemble your "team" at the outset. Successful subrogation is most easily accomplished with a team working towards a common goal (*i.e.*, recovery from a liable third-party). The "team" includes the claims representative, attorney, insured, and expert.

It is important to secure the cooperation of the insured at the outset. A claims representative should take time to educate the insured about subrogation and what a successful subrogation can mean to him or her (*e.g.*, recovery of a policy deductible). The claim representative also should discuss any policy requirement concerning his or her cooperation. Although the insured may want to begin repairs as soon as possible, the claim representative should explain the need to document and preserve evidence and to give potentially responsible parties an opportunity to examine evidence. Our office will work with the claim representative to ensure that the insured cooperates with the subrogation effort.

The right expert is critical to successful subrogation and can assist with all elements of a subrogation matter, including preservation of evidence and prevention of spoliation, investigation of the cause and origin of a loss, reporting on facts and opinions, and testifying at trial. Our office has strong relationships with experts in a variety of fields, including fire cause and origin, plumbing, HVAC, construction defects, accident reconstruction, environmental engineering, electrical engineering, mechanical engineering, and product engineering.

II. Investigate Subrogation Potential

It also is important to determine whether subrogation potential exists as soon as possible. The subrogation investigation should be initiated quickly, while the scene and evidence remain available. The insured, claim representative, attorney, and expert should work together to investigate the potential cause of loss (*e.g.,* fire cause and origin) and identify potentially responsible parties (*e.g.,* contractor, distributor or manufacturer).

III. Provide Notice of a Potential Claim

After identifying the potentially responsible party or parties, provide written notice of a possible liability claim as soon as possible, and offer the party or parties an opportunity to inspect the scene. At Sloane and Walsh, our attorneys are experienced in acting quickly to contact all parties and arrange site inspections.

IV. Prevent Spoliation

Spoliation of evidence is a major concern in all subrogation matters. It is important to act quickly to provide proper notice to potentially responsible parties so that a scene inspection can be carried out as soon as possible. Measures to protect the scene will help avoid claims of spoliation of evidence. In addition, all evidence should be handled using best industry practices.

It is good practice to document the scene with photographs and notes. Additionally, gather, review, and analyze relevant documents, which can include state and local building codes, contracts, subcontracts, certificates of occupancy, building permits, drawings, plans, specifications, receipts, and/or invoices.

Our office is uniquely qualified to address all issues relating to spoliation and preservation of evidence. Along with the expert, our attorneys work to ensure proper preservation and documentation of evidence.

Following these four simple considerations should help maximize your recovery in a subrogation matter.

SLOANE AND WALSH'S SUBROGATION GROUP

Sloane and Walsh has been serving the subrogation needs of insurance companies for decades. The law firm is one of the oldest and most respected trial firms in New England. Sloane and Walsh maintains offices in Massachusetts, Connecticut, New Hampshire, and Rhode Island and has an active subrogation practice throughout the United States.

The firm is committed to maximizing subrogation results. Sloane and Walsh's subrogation group is a dedicated team of experienced trial attorneys who concentrate in the trial and settlement of all types of subrogation matters, including fire losses, construction-related losses, freeze-up losses, environmental clean-up, and product liability claims.

APPRAISAL AND REFERENCE:

CASE LAW UPDATE

In addition to large loss subrogation, our firm's practice is dedicated to all types of first and third-party insurance matters, including civil litigation, insurance policy interpretation, coverage analysis, coverage-related litigation, and appraisal and reference. We have included summaries of three recent decisions on the matter of appraisal and reference which we thought you may find of interest.

In Wayne DeCosta v. Allstate Insurance Company, 2013 WL 5290030 (1st Cir. 2013), the United States Court of Appeals for the First Circuit held that a homeowner could not recover additional funds under his Standard Flood Insurance Policy (SFIP) because he failed to comply with the policy's proof of loss requirement.

Plaintiff, Wayne Decosta's property was insured under a SFIP issued by Allstate Insurance Company (Allstate), a private insurer participating in the federal government's National Flood Insurance Program (NFIP), which provides subsidized flood insurance. The Federal Emergency Management Agency (FEMA) promulgates regulations governing NFIP policies. The SFIP proof-of-loss provision states: "Within 60 days after the loss, send us a proof of loss, which is your statement of the

amount you are claiming under the policy signed and sworn to by you." Any waiver of SFIP requirements must be approved by FEMA.

After a flood damaged Decosta's property, Allstate's adjuster assessed the damage and forwarded two proof-of-loss forms related to building damages, for $7,529.98 and $95,119.05. DeCosta signed and returned these forms, while at the same time submitting an estimate prepared by his own adjuster, setting out building damages totalling $212,071.32. The estimate was not sworn to or signed by DeCosta. Allstate paid DeCosta only the amount sworn to in the proof-of-loss forms provided by Allstate's adjuster. Allstate later mailed two additional proof-of-loss forms to DeCosta for personal property and building damages. DeCosta signed and returned these proof-of-loss forms. Because over sixty days had passed since the loss, when Allstate obtained the additional signed proof of loss forms, it requested a waiver from FEMA. FEMA granted the waiver and Allstate paid the amount claimed in the second set of forms.

DeCosta filed suit, claiming the remaining amount listed in his adjuster's estimate, and sought appraisal. The U.S. District Court for the District of Rhode Island granted appraisal, and the appraisers awarded DeCosta an additional $99,805.67. The District Court upheld the award. Additionally, the District Court stated that Allstate had waived the argument that DeCosta's claim was barred by the proof-of-loss requirement when it paid on the allegedly improperly filed claim.

On appeal, the First Circuit noted that it had previously held that federal law mandates strict compliance with the SFIP, including its proof-of-loss requirement. See McGair v. Am. Bankers Ins. Co. of Florida, 693 F.3d 94, 100 – 01 (1st Cir. 2012). The First Circuit identified a number of reasons in support of the strict compliance requirement.

First, the Court stated that "because the federal government is liable for claims brought under SFIPs issued by private insurers, the United States Constitution mandates strict compliance with the SFIP." Congress, through delegation to FEMA, authorized payment only to claimants submitting a signed and sworn to proof of loss within 60 days. The Appropriations Clause in the Constitution mandates strict compliance with the SFIP. ("No Money shall be drawn from the Treasury, but in Consequences of Appropriation made by Law." U.S. Const. art. I, § 9, cl. 7).

Additionally, the court noted that the Doctrine of Sovereign Immunity supports strict compliance. The government cannot be sued without a waiver of sovereign immunity, and it is established that this waiver must be strictly construed. The Court further noted that the need for uniformity in federal law and the need for clear rules for insurance companies and policyholders support strict construction. Finally, strict construction of SFIP balances the need to pay claims and the need to ensure the sustainability of NFIP.

By strictly construing the SFIP proof-of-loss provision, the First Circuit held that it was clear that DeCosta did not sign and swear to the additional damages set out in his adjuster's estimate. DeCosta's failure to comply with the proof-of-loss requirement barred any recovery under the SFIP, and the District Court should not have ordered the parties to appraisal. Additionally, the Court rejected the District Court statement that because Allstate paid on the allegedly improperly filed claim, it had waived its argument that the claim was improperly filed. The payment of claims properly submitted does not waive objections to further sums submitted incorrectly, and furthermore, FEMA must provide express written consent in order to waive any requirements of the SFIP.

In Shree Hari Hotels, LLC d/b/a Quality Inn & Suites v. Society Insurance, 2013 WL 4777212 (S.D. Ind. Sept. 5, 2013), the United States District Court for the Southern District of Indiana set aside an appraisal award because the policyholder's appraiser had a financial interest in the outcome of the appraisal in violation of the policy's appraisal provision. The appraisal provision read in pertinent part as follows: "If we and you disagree on the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire . . .."

The insured, Shree Hari Hotels, LLC d/b/a Quality Inn & Suites ("Shree Hari"), demanded appraisal pursuant to the appraisal provision and the court granted Shree Hari's demand. Shree Hari's appraiser calculated the actual cash value of the loss at $1,358,901.60, while the appraiser hired by the insuer, Society Insurance ("Society"), calculated the actual cash value of the loss at $77,191.93. The umpire adopted Shree Hari's appraiser's figure and entered an award. Society moved to set aside the award and argued that Shree Hari's appraiser was not "impartial" as required by the policy. Notably, the Appraisal Agreement between Shree Hari and its appraiser stated "(We) hereby appoint Jay Hatfield of Indiana Public Adjusting, Inc. to serve as appraiser of . . . (our) . . . loss and agree to pay Jay Hatfield . . . $250.00 per hour with the maximum fee not to exceed 10% of the claim payment(s)."

The Court held that, based on the language in the Appraisal Agreement, Shree Hari's appraiser had a clear financial interest in the outcome of the appraisal and therefore, he was not impartial. Specifically, the appraiser had an incentive to ensure that 10% of the appraisal award exceeded his fee as calculated on an hourly basis. Accordingly, the Court set aside the Appraisal Award.

In Ginsburg v. Charter Oak Fire Insurance Company, 2013 WL 5340381 (N.Y. App. Div. Sept. 25, 2013), the court considered whether a homeowners insurance policy entitled the insureds to interest on an amount awarded by an independent umpire.

The homeowners' insurer initially paid over $2 million on the plaintiff homeowners' fire loss claim. The insureds subsequently sued the insurer for breach of contract and claimed that they were entitled to additional coverage under the policy. During the pending lawsuit, pursuant to the policy terms, the parties submitted the matter to an independent umpire to resolve a dispute between the parties' appraisers regarding the value of the loss to the plaintiffs' real property. The umpire awarded the plaintiffs an additional $508,304.17 under the homeowners' policy and the plaintiff's claimed interest on this amount.

The court determined that the lower court was correct and held that the policy did not entitle them to interest on the umpire's award. The "Loss Payment" provision in the policy obligated the insurer to pay the policyholders within 60 days of receiving the "proof of loss" and the "filing of an appraisal award." The insurer timely paid the plaintiffs the amount of $508,304.17 within 60 days of the filing of the appraisal award. Accordingly, it did not breach the "Loss Payment" provision in the insurance policy. The court stated that "since '[i]nterest upon a loss payable under a fire insurance policy is not recoverable before the payment of principal is due pursuant to the policy,'" the lower court "properly declined to award the plaintiffs interest on the difference between the appraisal award and the amount already paid by [the homeowners insurer]."

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