GUIDELINE AND CHECKLISTS FOR SUBROGATION RECOVERY

Prepared by

JOHN W. REIS

Fox Rothschild LLP

101 N. Tryon Street, Suite 300

Charlotte, NC 28246

Phone: 704.384.2692 | Fax: 704.384.2800

Email: jreis@Foxrothschild.com | www.foxrothschild.com

Fox Rothschild

About the E-book

This resource serves as a guideline for understanding subrogation recovery and the insurance claims processes in specific subrogation cases. From case intake and investigation to filing a suit and negotiating a settlement, I delve into the end-to-end procedures for game planning claims and executing recovery strategies. A key aspect of subrogation recovery is investigating the facts and details of the incident, which attorneys take into strong consideration when determining relevant case laws. This e-book provides comprehensive checklists that help identify the investigative information shaping water loss, fire loss, vehicle fire, wind/weather loss, sinkhole loss and CSST cases. For any questions or assistance, Fox attorneys stand ready to help you or your company navigate subrogation recovery issues.

About this Author

John W. Reis
jreis@foxrothschild.com
704.384.2692

John is a partner in the Litigation Department of Fox Rothschild, a national law firm with more than 1000 attorneys in 29 offices, coast to coast. He litigates subrogation and commercial claims involving loss or damage to structures, heavy equipment, trucks, motor coaches, vehicles, vessels and other property damaged by fire, water, collision or collapse. These cases require his particular experience in product liability, construction, commercial, maritime and admiralty law. He also litigates commercial contingency disputes involving business torts such as fraud, deception and misappropriation. He is licensed to practice law in four states and 12 federal district courts across the South.

John has taken leading roles in mass tort cases, including serving as co-lead counsel in a multidistrict litigation proceeding against a product manufacturer. He has published articles and conducted seminars on several of the complex issues that arise in his fields of practice, including the economic loss doctrine, the malfunction theory, the proper measure of damages, trial techniques, CSST failures, expert qualifications and other issues. He values responsiveness, resourcefulness and results.

A Guideline for Subrogation Recovery

The life of a subrogation case depends on the depth and quality of the investigation and analysis. This provides an overview of the steps and procedures for moving your subrogation case from soup to nuts.

Step 1 – Case Intake

When initially retained, the intake process should capture the following basic, but critical, information:

- Adjuster
- Claim Number
- Contact Information for Insured(s)
- Correct Legal Name of Insured(s)
- Expert(s)
- Full Legal Name of Writing Company
- Initial Estimate of Loss
- Initial Facts
- Loss Date
- Loss Location
- Policy Number
- Potential Third Parties

When you assign the case to us, we then take that information and flesh it out more fully to provide you with a game plan for either moving on to the next case or going forward with this one.

Step 2 – Acknowledgement Letter

Immediately after a new loss is received, we send the client an acknowledgement letter and/or email confirming the assignment and agreed terms of engagement.

Step 3 – Investigating the Claim

Hiring the Expert

You may not need an expert at all, based on the initial facts or legal issues. But if one is needed, we can provide guidance. Each loss will involve some issue different from the next. Some experts may be preferred based on community contacts, particular specialties relative to the nature of the case, reputation and/or other issues. In fire cases, we can provide particular screening of the expert's qualifications under NFPA 921 and NFPA 1033. In water loss cases or marine losses, we have a database of plumbing experts, mechanical engineers and marine surveyors. In earth collapse or wind loss cases, we can direct you to the right geotechnical engineer, structural engineer or meteorologist.

Special Protocols for Catastrophic Losses

Below is an outline of important considerations in catastrophic loss site management:

- Identify all parties in interest
- Create notice letters with loss location, loss date, dates to examine scene/evidence and proof of service
- Identify area of interest for investigation
- Delineate area perimeter for security and evidence preservation
- Develop protocols for site access, investigation, demolition and evidence removal/preservation
- Budgeting and cost sharing for the considerations above
- Detailed site documentation (photographs and/or video)
- Establish communications systems
- Develop protocols for testing, examining and other handling of saved evidence and debris

Step 4 – Identifying Your Theories

Identifying a theory of liability cannot be done in a cookie cutter fashion. It requires careful investigation and creativity that factors in the complexities of the case facts and case law. Your attorney can make all the difference in fully delving into the facts, the law and how they work together to get you to a result. Our attorneys have years of experience discerning the nuances, for example, of whether the fixture leak or house fire or structural collapse was from a defect in design or manufacture or error in installation, maintenance or use, or a combination of factors. We then apply the developed facts – what failed, why and by whom – to available legal theories, such as strict liability, gross negligence, implied warranties, inverse condemnation and a host of other potential legal theories. We also consider potential defenses and practical barriers to recovery and how to work through them.

Step 5 – Evaluation Reports

As a general rule, we believe status letters/emails should be provided to the client within 30 days of the initial assignment, every 60 days for the first few months and every 90 days thereafter, to include:

- Name of Insured
- Loss Location
- Loss Date/Statute of Limitations/Repose

- Claim Number/Policy Number
- Writing Company
- Amount Paid/Reserves
- Potential Targets
- Nature of the Claim
- Projected Recovery Amount/Target Settlement Range (to be completed 6 months after loss)
- Facts/Basis for Projection (strengths and weaknesses)
- Projected Budget (sample budget available from Fox Rothschild upon request)
- Jurisdiction of the Suit or Proposed Suit
- Recommended Next Steps/Request for Information/Approval

We will follow your reporting format or work with you to develop a format of your preference.

Step 6 – Pre-Suit Demand Letter

Some cases call for no pre-suit demand letter, either because the case resolves by simple exchange of calls or emails or because prior dealings make it clear the effort would be futile. However, when appropriate, a carefully drafted pre-suit demand letter by retained counsel can go a long way to avoiding protracted and expensive litigation. Our pre-suit letters are written to be user friendly with a professional tone, incorporating meaningful headings and short narrative facts that tell the story. We will usually include back-up documents organized for ease of reference and a draft of a complaint that sets out the theories of liability. We offer a reasonable response date before filing. When appropriate, we project the defense litigation costs and fees. The point is to capture the reader's attention with an understandable theory of the case that inspires serious settlement discussions.

Step 7 – Filing Suit

When it becomes clear that the case is heading to arbitration or litigation, we follow through with important details:

- Confirm the party is properly named
- Confirm date of loss and statutes
- Adhere to the elements of the causes of action
- Consider the optimal venue for action (which state or federal forum)
- Send draft to client
- Send filed version to client

Step 8 – Handling Intrusive Discovery Issues

Defendants will sometimes send interrogatories and requests for production of documents that can be extremely broad and intrusive, seeking such items as your entire claims file notes and communications, the underwriting file and even your claim procedures and guidelines and beyond. In addition, under Rule 30(b)(6) of the Federal Rules of Civil Procedure, a rule adopted by most state courts, a defendant can seek to take one deposition of your entire company. The rule requires that your company designate a person or persons to testify under oath on issues designated in the notice. These can be extremely burdensome and difficult to address. We are experienced at handling these types of notices in a way that can potentially narrow down the issues, lessen the burden and properly prepare you for how to address them.

Step 9 – Getting the Money

Effective subrogation means money–either saving it on the front end by an efficient analysis of why to close it, or making it on the back end by settlement or judgment. We have years of experience seeing unique and complex cases through to closure, often facing fierce opposition along the way. If the case is being mediated, we will provide a detailed pre-mediation report to you well in advance so you can evaluate your settlement range. We will often provide the other side with a pre-mediation brief that can be forwarded to the decision-maker in time to maximize their settlement authority. If the case needs to be tried, we try it. From start to finish, we know how to develop a winning theory of liability and how to turn that theory into a recovery through creativity, ingenuity and hard work.

Water Loss Cases – Checklist of Questions

Questions	Answer
Is there a product involved?	
Type of product?	
Brand name?	
Model and serial number?	
Manufacturer?	
Seller (store where purchased)?	
Age of product (date purchased)?	
Original to house?	
Installed after original construction?	
Purchased new or purchased old?	
If used, from whom purchased?	
Was product being used properly?	
Any outward signs of defectiveness?	
Prior problems with the product?	
Prior repairs to the product?	
If repairs, by whom, when and why?	
Proper maintenance to the product?	
Maintenance logs on the product?	
Have warranty, instruction manuals?	
Any alterations to the product?	
Exemplars of product in the house?	
Exemplars of product still available?	
Able to point it out at the store?	
Preserve product, exemplars, manuals, etc.	

Maintenance/Repairs Issues

Who did the work? _____

What prompted need for the work? _____

What was intended scope of work? _____

When was the work performed? _____

What workers did the work? _____

Who witnessed work being done? _____

Did owner participate in the work? _____

Any documents reflecting the work? _____

Factual Scenario

Where did the water come from? _____

When first notice a problem? _____

Nature of the problem _____

Steps taken to address the problem? _____

If from a product, see above checklist _____

If from improper repairs, see above checklist _____

Fire Losses (for Expert, Witnesses and Yourself) – Checklist of Questions

Questions	Answer
Is there a product involved?	
Type of product?	
Brand name?	
Model and serial number?	
Manufacturer?	
Seller (store where purchased)?	
Age of product (date purchased)?	
Purchased new or purchased old?	
If used, from whom purchased?	
Was product being used properly?	
Any outward signs of defectiveness?	
Prior problems with the product?	
Prior repairs to the product?	
If repairs, by whom, when and why?	
Proper maintenance to the product?	
Maintenance logs on the product?	
Have warranty, instruction manuals?	
Any alterations to the product?	
Exemplars of product in the house?	
Exemplars of product still available?	
Able to point it out at the store?	
Preserve product, exemplars, manuals, etc.	

Maintenance/Repairs Issues

Who did the work? _____

What prompted need for the work? _____

What was intended scope of work? _____

When was the work performed? _____

What workers did the work? _____

Who witnessed work being done? _____

Did owner participate in the work? _____

Any documents reflecting the work? _____

Fire Cause and Spread

Where is damage most severe? _____

What was owner doing during loss? _____

Where was owner during the loss? _____

Who else was present during loss? _____

Where was the fire first observed? _____

What alerted you to the fire? _____

First to see smoke or fire? _____

Color and smell of smoke at first? _____

Color and smell of fire at first? _____

Sounds of fire when first observed? _____

Size of the fire when first observed? _____

Dimensions of fire when first seen? _____

What burned in the beginning? _____

Lighting conditions during fire? _____

When did electricity go out? _____

Vision blocked or obstructed? _____

How much time spent observing fire? _____

Dimensions of the fire as progressed? _____

Describe direction/spread of fire? _____

Color of fire as it progressed? _____

Did color vary as it progressed? _____

Height of the flames? _____

What materials were burned? _____

Wind conditions during fire, if any? _____

Did it spread evenly in all directions? _____

Did fire spread rapidly or slowly? _____

Did fire "jump" from place to place? _____

Efforts to extinguish the fire? _____

Windows/doors open during fire? _____

Time chronology of fire's progress? _____

How many alarms issued and when? _____

Time it took firefighters to arrive? _____

Time for firefighters to apply water? _____

Fire's size when firefighters arrived? _____

Fire's size when water first applied? _____

When was fire placed under control? _____

Did closest fire sprinkler function? _____

Accumulated trash, waste, debris? _____

Unsafe storage of hazardous materials (e.g., paint thinners, lacquers, gasoline, etc.)? _____

Unsafe storage or warehousing practices? _____

Defects in sprinkler systems (failure of the system to activate, failure of the system to operate pursuant to its design, sprinkler heads which are blocked, control valves which are inoperable and the existence in and of itself of a sprinkler system)? _____

Did smoke or heat detectors work? _____

Did burglar alarm systems work? _____

Were alarm systems monitored? _____

Did outside monitoring company receive alarm and respond to it? _____

Was there security guard protection? _____

Other security issue (areas of access into the building, locked doors, glazed windows, vacant buildings, deteriorated neighborhood conditions, broken windows)? _____

Did fire doors operate? _____

Were there fire walls and/or fire-rated walls? _____

Were there fire stops between units? _____

What type of insulation? _____

Commercial cooking or painting (Ansul systems)? _____

Lightning strike protection? _____

Vehicle Fire Cases – Checklist of Questions

Model year _____
Manufacturer _____
Make of vehicle _____
Color _____
VIN _____
License number _____

Mileage _____
When last driven or run? _____
Who last drove or ran vehicle? _____

How far driven when last driven? _____

Where driven? _____
When parked? _____
Circumstances of parking vehicle? _____

Circumstances of the fire? _____
Time of fire? _____
Where vehicle was situated _____

Recalls _____
Repairs _____
Damage from extinguishing fire? _____

Area of greatest damage (check) Engine_____Trunk_____Passenger_____ Dash_____Other_____

_____

Wheels/tires/rims match?
Tire condition (tread, inflated, deflated, burn marks) _____

Driver side front tire _____

Driver side rear tire _____

Passenger side front tire _____

Passenger side rear tire _____

Doors (open or closed, locked or unlocked, doorjamb, stickers) _____

Driver side front door _____

Driver side rear door _____

Passenger side front door _____

Passenger side rear door _____

Hatch _____

Windows (up or down, broken, soot, flow direction) _____

Driver side front _____

Driver side rear _____

Passenger side front _____

Passenger side rear _____

Trunk

Spare tire _____

Flammable contents _____

Personal property _____

Contents _____

Components (note manufacturer; condition, if original or after-market; purchased where, when and from whom; if repaired or serviced and where, when and by whom)

Antenna _____

Mirrors _____

Battery _____

Driver side airbag _____

Passenger side airbag _____

Side airbags _____

Speakers _____

Air conditioner _____

Stereo _____

Satellite radio _____

CB _____

TV _____

CD _____

DVD _____

Charger _____

Global positioning unit _____

Cigarette lighter _____

Others _____

Interior items

Carpet _____

Floor mats _____

Underlayment _____

Dash board _____

Ashtray _____

Console _____

Loose papers _____

Underlayment

Seats (covers, loose items, bucket or bench, up or down, degree of burn)

Driver side front _____

Passenger side front _____

Driver side rear _____

Passenger side rear _____

Vandalism/theft/missing items? _____

Glove box

Open or closed _____

Contents _____

Steering column

Interlock _____

Keys _____

Ignition position _____

Lock location _____

Power steering _____

Standard steering _____

R & P _____

Engine

Size _____

Cylinders _____

Transmission

Auto _____

Manual _____

Speed _____

Overdrive _____

4-wheel drive _____

Front wheel drive _____

Turbocharger (yes or no, type) _____

Fuel system

Gasoline or diesel _____

Fuel tank location _____

Fuel pump location _____

Is there a carburetor? _____

Is there fuel injection? _____

Cylinder _____

Throttle body _____

Cold start injector _____

Fuel line routing _____

Fuel line hoses _____

Tank examinations

Eruptions _____

Fuel level _____

Brake fluid level _____

Cooling fluid level _____

Washer fluid level _____

Oil level _____

Exhaust examination _____

Air pump exhaust control _____

Check valve _____

Piping _____

Mech _____

Proximity _____

Communication to rear _____

Vapor control system

Canister #1 _____

Canister #2 _____

EGR valve _____

PCV valve _____

Electrical examination of the engine compartment

Battery

- To power distribution _____
- To starter _____
- To alternator _____
- Grounds _____
- Alternative paths _____
- Loose connections _____
- Fusible links _____

Starter condition _____

Alternator _____

- Electrical connections _____
- Any loose connections _____
- Bearings _____
- Fan blade condition _____
- Casting condition _____

Power distribution box

Condition _____

Wire faults _____

- Beads? _____
- Sharp edges? _____
- Overloads (acting (like fusible links)? _____ _____

Ignition system

Ignition type _____

Ignition switch circuit _____

Coil _____

Plug wires _____

Fuse box wiring to f/b _____

Fuse box fuses _____

Flexible hoses

Brake lines _____

Fuel lines _____

Power steering lines _____

ATF lines _____

ATF radiator _____

V patterns from leaking liquid? _____

Surfaces with combustible fluids? _____

Hot spots

- Exhaust manifold _____
- Catalytic converter _____
- Wiring _____
- Smoker _____
- Other _____
- Ashtray _____
- Upholstery _____
- Dashboard _____
- Friction _____

Draw oxidation/burn patterns _____

System in area of most fire intensity _____

Source of fuel _____

Source of ignition _____

Material to sustain combustion _____

Review of the checklist _____

Fire scenario _____

Wind/Weather Losses – Checklist of Questions

What were wind speeds in the area? _____

Wind speeds per building specs? _____

Wind speeds per building codes? _____

Load specifications for failed part? _____

Wind speeds within specs or codes? _____

Proper adherence of roof membrane? _____

Proper brackets for roof material? _____

Proper spacing of trusses, brackets? _____

Proper number of trusses, brackets? _____

Proper size of trusses, brackets, etc.? _____

Proper connection/welding of joints? _____

When was the building built? _____

Any significant upgrades and when? _____

Other nearby buildings
similarly damaged? _____

Condition(s) of storm drains, culverts,
downspouts or gutters? _____

Need a structural/civil engineer? _____

Need a metallurgist (e.g. brackets)? _____

Need materials science expert
(bad concrete, polymers,
roof membranes, etc.)? _____

Need weather expert? _____

Need mechanical engineer? _____

Need hydrologist? _____

What is the statute of repose, if any? _____

Any special notice requirements (to

contractors and government entities)? _____

Any waivers of subrogation (AIA contracts, other construction contracts)? _____

Any limitations in lease agreements? _____

Any other written limitations? _____

Retain pertinent documents _____

Retain key physical evidence (e.g., defective brackets,Roofing, materials, bracing) _____

Obtain pre-loss photographs, diagrams, schematics _____

Obtain data on prior hurricanes _____

Obtain post-loss photos including possible aerial photos to compare damage of surrounding buildings _____

Obtain building officials' files if pertinent _____

Obtain witness statements of events of and leading up to incident _____

Obtain copies of contracts and subcontracts for those involved in the construction or post-construction inspections (General contractors, engineers, architects, roofing contractors, mechanical contractors, property inspectors, realtors, and others) _____

Sinkhole Cases – Checklist of Questions

Most naturally occurring sinkholes present subrogation challenges, unless there are good signs of prior sinkhole activity in the same area. However, sinkholes with a human hand behind them can present real opportunities if properly investigated early. Ironically, sinkholes will often form during drainage projects, such as the digging of a retention pond or digging to install large drainage pipes. The failures usually relate to over dewatering or driving penetrations too deep into land and puncturing an aquifer. Some states have codes, statutes and other standards that can be used to impose liability on a contractor undertaking such earthwork projects or other construction affecting the groundwater and soil conditions. It would be well beyond the scope of this article to articulate them all. Below, however, are tips for the investigation of whether there is potential subrogation related to a structure affected by a sinkhole.

The history of prior sinkhole activity (in a one-mile radius) _____

What standards apply to area? _____

What was the depth of excavation in area including depth of penetration of any pilings or retaining walls in the area? _____

Was depth of ground and groundwater study conducted before digging and/or driving into the earth? _____

Did the actual construction depth match pre-construction studies? _____

Anyone research on the history of other projects affecting the river systems, stream systems, marsh systems, above-ground water systems, aquifer systems or underground water systems? _____

If such research was conducted, what were the results? _____

What tests were done to obtain data on the ground composition or the existence of a potential aquitard and/or aquifer? _____

Standard penetration test borings? _____

If so, who took borings, how deep did they go and what were results? _____

Penetrometer probe soundings? _____

If so, who did tests, how deep did they go and what were results? _____

Ground penetrating radar investigation? _____

If so, who did tests, how deep did they go and what were results? _____

Analysis of sloping and depressions on surface of the area intended to be served by the project? _____ _____

If so, who did tests and what were results? _____ _____

Any capacitively-coupled resistivity tests (CCR) to detect raveled soils in the area intended to be served by the project? _____

If so, who did tests and what were results? _____ _____

Anyone use monitors or other measuring devices to measure relative crack movement in nearby structures? _____

If so, who did studies and what were results? _____

Any surveys or photos of surrounding homes and other structures in advance of the groundwork? _____ _____

Other nearby buildings similarly damaged? _____

Need a structural/civil engineer? _____ _____

Need a metallurgist (e.g. brackets)? _____ _____

Need materials science expert (bad concrete, polymers, roof membranes, etc.)? _____ _____

Need weather expert? _____ _____

Need mechanical engineer? _____ _____

Need hydrologist? _____

What is the statute of repose, if any? _____

Any special notice requirements (to contractors and government entities)? _____

Any waivers of subrogation (AIA contracts, other construction contracts)? _____

Any limitations in lease agreements? _____

Any other written limitations? _____

Retain pertinent documents _____

Retain key physical evidence (e.g., defective brackets, roofing materials, bracing) _____

Obtain pre-loss photographs, diagrams, schematics _____

Obtain photos/satellite images of area _____

Obtain data on prior sinkholes _____

Obtain post-loss photos including possible aerial photos to compare damage of surrounding buildings)

Obtain building officials' files if pertinent _____

Obtain witness statements of events of and leading up to incident _____

Obtain copies of contracts and subcontracts for those involved in the construction or post-construction inspections (General contractors, engineers, architects, roofing contractors, mechanical contractors, property inspectors, realtors and others) _____

CSST Cases – Checklist of Questions

See checklist for fire claims _____

CSST brand name and manufacturer? _____

Applicable Design and Installation Guide (D&I Guide) as of:

- Date of manufacture? _____
- Date of installation? _____

Was CSST directly electrically bonded and grounded by ground wire? _____

As to the bond wire,

- What was the gauge? _____
- Length of the bond wire? _____
- Location at the CSST? _____

Was the CSST indirectly grounded by connection to a grounded appliance? _____

Did authority having jurisdiction inspect the connection and pass it? _____

Was the strike direct or indirect? (e.g., hit the house v. tree) _____

What contractors were involved? (GC, plumbing, mechanical, HVAC, electrical) _____

Was installing contractor certified by the manufacturer to install and/or electrically bond the CSST? _____

Was the ground rod properly installed into ground? _____

- How deep? _____
- Nature of the soil? _____

What is the extent of grounding of other systems in the home (TV or satellite cable, phone system, electrical system)? _____

Number and location of the holes? _____

What did the CSST arc to/from? _____

See signs of arcing or other electrical activity (e.g., slag, spatter, scoring, etching) or something metal near the hole(s)? _____

See signs of arcing or other electrical activity of any electrical wiring in the home, with particular emphasis on any wiring near the CSST? _____

Any signs of lightning directly striking and setting fire to other aspects of the house itself independent of the CSST holes? _____

Other similarly damaged nearby buildings? _____

Need fire investigator? _____

Need an electrical engineer? _____

Need a metallurgist? _____

Need weather expert? _____

Need lightning expert? _____

Need human factors expert? _____

What is the statute of repose, if any? _____

Any special notice requirements (to contractors and government entities)? _____

Any waivers of subrogation (AIA contracts, other construction contracts) _____

Any other written limitations? _____

Retain pertinent documents _____

Retain key physical evidence (e.g., CSST, nearby brackets, bracing, wire) _____

Obtain pre-loss photographs, diagrams, schematics _____

Obtain photos/satellite images of area _____

Obtain post-loss photos (including possible aerial photos to compare damage of surrounding buildings) _____

Obtain building officials' files if pertinent _____

Obtain witness statements of events of and leading up to incident _____

Obtain copies of contracts and subcontracts for those involved in the construction or post-construction inspections (General contractors, engineers, plumbers, HVAC, mechanical, electrician, property inspectors) _____

Fox Rothschild