

Waivers of Subrogation

An Insurance Professionals Guide

Waivers of Subrogation

What Are They and How Do They Help Manage Risk?

Subrogation Defined

- **ORIGINS:** Late Middle English (in the general sense) ‘substitution’ or ‘in place of another’
- **According to Websters:** The assumption by a third party (such as a second creditor or an insurance company) of another’s legal right to collect a debt or damages
- **According to Legal Dictionary:** *The substitution of one person in the place of another with reference to lawful claim, demand, or right, so that he or she who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies*

Subrogation and Insurance Contracts

- The legal concept of subrogation allows for the insurer to “step into the shoes” of the insured in order to recover damages from a negligent 3rd party
- This type of clause appears in nearly every insurance contract
- Subrogation is most commonly seen in property damage claims. - Here is a common example:

An insured driver is rear-ended by a distracted driver. The insured has collision coverage on his/her auto policy that covers property damage to their vehicle. The insurance company pays for the auto's repair.

- The insurance company can then “step into the shoes” of the insured and subrogate against the distracted (and negligent) third party to collect the damages
- In general, common policy language will also state that the insured cannot act in any way that will diminish the insurer’s right to collect the damages

Waiver of Subrogation

- Subrogation itself is a pretty easy concept to grasp, but it gets a little more complex when an insured decides to waive the right of subrogation
- It is a contractual agreement between two parties
- The insured waives the right of the insurer to subrogate against the other party to the contract
- This contractual provision prevents the insurance company from pursuing the (likely) negligent party to recoup on a paid claim
- Waivers of Subrogation are generally upheld by the courts

Most Commonly Used Waivers of Subrogation

- The most simple types of waivers are between Lessor and Lessee - The lessee waives the right to sue or make the claim against the lessor
- More complex waivers commonly occur in construction project relationships with multiple parties and multiple contracts:
 - Project Owner
 - General Contractor
 - Architects and Engineers
 - Sub-contractors

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Common Waiver of Subrogation Endorsements

CG 2404 - Waiver of Transfer of Rights of Recovery

Against Others to Us - Designated Person or Organization. - Applies when the insured has a written contract in place requiring a Waiver of Subrogation

BR 605G - Waiver of Transfer of Rights of Recovery Against Others to Us - (Aspire proprietary form). Designated Person or Organization. It requires a written contract to be in place between parties

BR 609G - Waiver of Transfer of Rights of Recovery Against Others to Us - (Aspire proprietary form). Automatic Status When Required in Contract of Agreement - Blanket Waiver. - It requires written contract to be in place between parties

How can you help your clients?

- When you are reviewing a client or potential client's coverage, you should always ask if they have any waivers in place. In addition, you should find out what contracts they have in place that might require subrogation to be waived
- Present the information to your company underwriter so they can properly underwrite the risk and assess the exposure
- The underwriter will likely ask for a copy of the contract in order to make sure the correct Waiver of Subrogation endorsement is added, or they may decline if the exposure presents too much risk
- If the endorsement is added, it will typically result in increased premium because the insurer is taking on the additional risk
- The insured should also consult an attorney who specializes in waivers and contracts that include waiver clauses

Additional resources can be found at:

IRMI Expert Commentary, Subrogation and the CGL Policy: <https://www.irmi.com/articles/expert-commentary/subrogation-and-the-cgl-policy>

IRMI Design Liability, What is Subrogation and Why Is My Contract waiving it?:
<https://www.irmi.com/articles/expert-commentary/what-is-subrogation-and-why-is-my-contract-waiving-it>

Hirschler Fleischer: Waiver of Subrogation: What Does it Mean?: <https://www.hirschlerlaw.com/newsroom-publications-waiver-of-subrogation-what-does-it-mean-to-you>