

Developing a Winning Case for Arbitration

**By: Fred Westbrook, SCLA, President
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A recent posting on the NASP List Serve (July 8, 2003):

Can anybody share ideas on how they improved subro recognition in the field? I'm looking for promotional ideas, something that might fire the adjusters up and get them excited about looking for subro opportunities.

*Thanks,
Nena Wynne, CPCU, AIC
Claims Manager
Republic Underwriters Insurance Co*

The field of subrogation recovery is becoming quite competitive as insurance carriers recognize that subrogation units are revenue generating profit centers and no longer just a service to its customers. Closing cases and winning higher award amounts is paramount to company growth. A few key tactics and practices will lead to winning more arbitration cases and have a dramatic impact on recovery amounts.

To Start – Who handles the case?

Recovery awareness and the development of a winnable case must start with the investigating claim representative in the field or in the claim office. Today's claim management systems may flag claims that have recovery potential and that is a great safeguard but the claim representative should be way ahead of that feature. To begin with, claim representatives should understand basic principles of tort and contract law and be trained to recognize recovery potentials while developing the file that documents the facts of the loss. Some fact situations are obvious i.e., "other vehicle rear ended the insured's stopped vehicle" or, "other vehicle hit the insured's parked car". The tricky situations may be reported as "insured rear-ended another vehicle". However, by asking the right questions the Claim Rep discovers the driver of the other vehicle slammed on the brakes to avoid an armadillo or an opossum crossing the road. In a pure comparative negligence state, recovery for the front-end damage, or a percentage of it, is probable. Another situation involves an owner of the other vehicle is uninsured and unable to pay. Subrogation would normally be a write-off but when investigators are trained in "Recovery Awareness", detailed questions are asked to determine if the driver had liability coverage, or if he / she was on a mission for an employer or a parent or for anyone that may have secondary coverage that will apply or has the ability to pay.

Ideally, cases where the first party claim is paid and the carrier has subrogated rights, assigning a seasoned Recovery Specialist, someone who knows how to negotiate and make an effective case filing for adjudication, should increase case closure rates and lead to higher award amounts. However, in many cases, the claim representative handling the investigation also manages its subrogation file. Experience has shown a downside to this methodology because claims not yet paid usually take priority and the processing of recovery claims tend to suffer with lack of attention. That is unfortunate as for many cases it means leaving unclaimed dollars unaccounted.

In the real world, many cases received in the Recovery Office are lacking the elements that are required to convince the other side that they owe, or, to win the case if the claim leads to adjudication.

Case Documentation

In Utopia, the investigating Claim Representative thoroughly investigates and documents each claim assigned to them. The Recovery Specialist can then pick up the assignment and drive the claim to a proper conclusion.

In the real world, many cases received in the recovery office often lack the elements required to convince the opposing party that they do owe or there is insufficient evidence to win the case if the claim leads to adjudication. Fact; the insurance carrier is subrogated to the recovery rights of an insured to whom payment has been made for damages sustained in an occurrence. To have a recoverable case, the insured had to have a legally protected right and a wrongful invasion of that right by a third party; that is, a cause of action against a responsible party and damages. The cause of action may be in tort; *negligence on the part of a third party*, or in contract; *liability assumed through a contractual agreement*. The Applicant or Plaintiff has to be able to prove their case to extract a payment or an award through arbitration or litigation.

In years past, to develop a case, adjusters would travel to the scene of the occurrence and perform an extensive investigation securing signed statements, photos, hand drawn diagrams and copies of contracts if applicable. This is still the procedure with some insurance carriers; others apply this methodology in the event of catastrophic losses. Most companies have developed in-house claim representative teams that investigate cases by mail and over the telephone. Even with the in-house approach, creating a properly documented case and a persuasive argument will evolve if the claim representative is aware of recovery potentials, takes the time to secure documents that establish the facts of the loss and the negligence or culpability of the responsible party or parties.

To the contrary, a private study of cases that lost during arbitration, revealed that many cases are improperly developed or supported and fell short of convincing evidence to argue and win the case. Examples included disjointed recorded statements that led up to a critical question and then skipped to another topic; many statements were so poorly organized they were hard to follow and lacked weight. In some situations, witnesses were not contacted, or if they were, notes of the conversation appeared in the activity log but there was no formal statement. Some files submitted to arbitration contained nothing more than hearsay documents such as a police report and an activity log to support a cause of action. These simply will not meet the burden of proof required to win.

What happens next? Some Recovery Specialists send a poorly documented file back to the investigating claim representative for additional input or clarification. This usually results in delays and even failure to secure the needed documentation; often the case goes unresolved. Other Recovery Specialists take the initiative and secure the proof necessary to make a case winnable but many simply work with the product they are provided. They seem to have the "Oh well" or "It's not my fault, I did the best I could with what I had to work with" attitude. Again, this leads to stagnant files and recoverable funds go unclaimed.

The Change Agent

To overcome the obstacle of poor case development and a lackadaisical attitude among your staff, consider creating a Recovery Supervisor who is also a Change Agent. The responsibility of this person would be to challenge their team, field adjustors, and management to improving the profitability of the company's subrogation claims. As a team leader, they should work with management to create high but realistically achievable goals on improving case closure rates and award amounts.

A good Change Agent possesses the ability to track the win/loss ratios for the team members under their management. The most successful Change Agents carefully study the win/loss ratios and look for trends among the statistics during case reviews. They analyze the type of case assigned, critical situations, legalities, etc., for areas of improvement in future cases. Another

area often untapped post arbitration is analyzing the arbitration results summary and any comments from the Panelist to obtain additional information to explain the win or loss. Experienced Change Agents use this information to accentuate the positives and explain the negatives by highlighting mistakes or poor tactics. Each case review brings out knowledge that helps the supervisor praise good results or notice poor tactics and either mitigate or eliminate negative trends.

Change Agents also recognize the value of leveraging technology to aid them in their quest to win more cases. They seek out and assist with implementing tools that make the team more efficient and effective – examples include software for statement recording that follows a customizable script and diagramming software to recreate a visual representation of the scene. Utilizing and fine-tuning these tools will enhance the overall case and allow the agents to close a higher number of cases in a shorter amount of time with larger award values.

What about incentives, what role do they play? The carrot approach for individuals and for the team is encouraged. Who does not like recognition for outstanding work? Baseline improvements in case closures and award amounts are crucial to tracking success. The Change Agent will detect what motivates the team; is it simple peer recognition on a monthly scoreboard or is it monetary? Creative incentives range from embroidered sports shirts, cash, trips, and luncheon with the company President, to dinners and awards banquets. More ambitious recovery units have created electronic newsletters and chat boards to discuss winning techniques that encourage information exchange. Typically, the cost for creating and distributing these types of incentives will pale in comparison to the awards retrieved from winning more cases.

On the other hand, the Supervisor as a Change Agent will sometimes have to play a heavier hand in dealing with underperforming staff. A good supervisor will insist that when negotiations fail, a properly documented case be presented for adjudication even if the Recovery Specialist has the “Oh Well” attitude. Success breeds enthusiasm; soon these attitudes will convert to “Oh Yeah”!

Get the Process Rolling

The key to winning arbitration begins with proper and convincing documentation that articulates your case. In many cases, simply reminding Recovery Agents of the necessary steps to win a case will improve the documentation process. In other situations, incentives may do the trick to increasing unit profitability. Other departments may require a significant overhaul of their recovery services and processes. Every office is unique and has its own challenges.

A Change Agent is that special person who recognizes the value to creating winning cases and has the experience to guide the team is invaluable. To get the process rolling, the sidebar “Six Steps to Winning More Arbitration Cases” and a sample “Change Agent Supervisory Memo” are enclosed.

Six Steps to Winning More Arbitration Cases:

1. Use claim management systems to quickly and effectively flag prospective cases
2. Create a Change Agent to educate, supervise, document wins/losses, and motivate the recovery teams for increased performance and profitability
3. Educate Claim Reps to recognize and organize data that leads to winning cases; develop Change Agents within the unit to review cases and provide guidance
4. Provide productivity enhancement tools such as software for interview statements with logically developed scripts; use diagramming software to visualize the accident scene
5. Incentive – Provide motivation to the troops with monetary or peer recognition awards for winning cases and improving unit profitability
6. Document what works and what does not; this develops a model of success and enables forecasting case closures/win ratios.

Following these key steps will enable your subrogation teams to implement winning strategies resulting in higher profitability for the unit.

Team:

I have been reviewing our filings before submitting them to AFI and the Panelist's comments from the Hearings. It is extremely important that we are more professional in our preparation than our adversary.

Think about an attorney wording a lawsuit Complaint better than a Claim Rep could word and organize it. The AFI Application is our "lawsuit" and the Contention Sheet is our "Complaint". We are the "Applicant".

Our filing must be for the proper company of a group to include the AFI Code for the subsidiary. We also must file against the specific Respondent carrier that wrote the coverage for their insured. You will find a directory of member companies and AFI Codes at www.arbfile.org.

I have attached a copy of a Contentions Sheet that I rewrote. In this example please note that Applicant was not traveling eastbound, Applicant's insured or insured driver was. The Respondent was not negligent but the Respondent's insured driver was.

Also, in order to establish a right of recovery, we must present damages and evidence that negligence on the part of a third party was the proximate cause of our insured's (or our client's) damage. Our presentation must make the Panelist understand what the acts of negligence were and contend that those acts were the proximate cause of our insured driver's loss.

Finally, please organize the documentation so that it is easy for the Panelist to rule in our favor. I suggest grouping the check copy, estimates, and photos of I/V to support damages. Arrange the statements, scene photos, diagram, police report, etc. to establish the proximate cause.

This may seem to be a little picky but this will set us above the average and I believe you will see positive results. In my experience, these presentation formats will have a positive impact on the Panelist and equally important, I want the excellence of our work to be obvious to all that have the pleasure of seeing it.

Timely filings also improve the recovery bottom line so do not let your arbitration files sit in a procrastination stack. There is no less expensive or better way to resolve disputes and move a controversial case to conclusion.

If you have any questions, please do not hesitate to call me.

*Regards,
Mover And Shaker
Recovery Supervisor*

About Fred Westbrook

T. Fred Westbrook, SCLA, has over 38 years of claim and managerial experience with a major carrier; 22 of those years were directly involved with supervision and management of subrogation recovery offices. As a Territorial Recovery Manager, Fred gained first hand experience in the consolidation and centralization of recovery offices. He was the carrier's Claim Department Representative to the DISA, ASC X12 EDI Standards Organization, serving on the X12N Insurance Subcommittee for Property & Casualty Subrogation.

Fred is currently the president of Verbatim Claim Services. He has written and taught "Recovery Awareness" educational seminars and continues to remain current on legal changes that impact recovery through his membership in the National Association of Subrogation Professionals (NASP), the Society of Claim Law Associates (SCLA) and as an associate member of the American Bar Association (ABA).

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