
Fire Damage Was Just The Beginning

After a fire destroyed his warehouse and inventory, a Florida rep came away from the experience with the firmly held belief that reps had better learn the definition of “subrogation.”



Here's how his ordeal developed and how he learned to appreciate what “subrogation” means. A few years ago, the rep suffered the misfortune of a fire that destroyed his warehouse. Since he didn't have title to the inventory — it was held by his manufacturers — his principals filed claims with their respective insurance companies. In short order the manufacturers were reimbursed for their loss, but that wasn't the end of it for the rep. The insurance companies then turned to him for compensation for the claims they paid the manufacturers. Ultimately, he found himself the subject of seven different lawsuits aimed at recovering those funds.

Thus, he found himself faced with the word “subrogation.” Starting with the basics, here's how *Webster's Dictionary* defines “subrogate”: “To substitute (one person) for another.” But things related to business and life are not as simple as they might be defined in the dictionary.

Here's how the rep describes his own real-world experience: “Generally, the manufacturer's insurance policy would cover this type of event, but after sitting in the middle of a group of attorneys, I learned a little bit more. And what I learned should be of value to other reps.”

Care, Custody and Control

Three elements that this rep became acquainted with weigh heavily in this matter. “I learned that he

who exercises care, custody and control over the inventory could be held liable. In this case, and in other cases, the rep very often is that person.”

According to the rep, here’s how he thought the scenario should progress and then how it actually did unfold. “In an event such as I experienced, damage occurred to the inventory. I got on the phone with the manufacturers, informed them of the damage and told them to contact their respective insurance carriers to notify them. They got on the phone with their carriers, and an adjuster came down to determine the extent of the loss. They negotiated with the manufacturer, and based on the terms of the policy, issued a check in the amount of the loss. Most of us reps believe that’s the end of it — but not in this case.”

What happened next, he continued, “is that once the check cleared, the insurance companies, seven of them in this case, turned around and sued me because I had care, custody and control over the inventory.”

He continued that in the absence of a quirk in the law in his state, he would have been liable. Thankfully, there is a prohibition on insurance carriers litigating against someone like myself when a crime has been committed against me. In my case, the fire started as the result of arson. If not for that, I could have been held liable, and I wouldn’t be a rep today.”

With his experience fresh in his mind, this rep maintains that the subject of subrogation is something his peers should know about and pay attention to. “In an ideal world, when a manufacturer who knows what he’s doing purchases an ‘all-perils’ policy, what they should do is ask for a waiver of subrogation. Normally there is no fee for this. When they ask for and obtain the waiver, the insurance company lists the people who have care, custody and control. But it also lists those whom the insurance carrier would have no right to go after in order to recover losses.”

Lack of Understanding

That’s what happens in an ideal world — but he continues that’s not what always happens. “For too many of the principals we deal with, the presidents of the companies don’t understand what I’m talking about. Maybe it’s just because I got involved in a case that could have put me out of business, but I’ve found that manufacturing executives know less about this than I do. It’s generally the CFO who insures goods and gets involved in product liability and facility insurance matters. But he generally relegates the mat-

ter to someone else. The only way the seriousness of the matter comes to light is when there’s a tragedy such as what I went through.”

As a result of his experience, this rep explains that he’s been working overtime at educating his manufacturers and requesting subrogation waivers. “I’ve been asking my manufacturers for these waivers for years now. Sometimes I get them, but most of the time I don’t. You can only ask so many times, and then you begin to wear out your welcome with your principals. What manufacturers have to realize is that getting waivers for their reps is a virtual non-event. It costs nothing or is a very nominal amount. But in the end, it’s very important for the welfare of the rep.”

Having heard what this rep went through, Jim Schmidt, JLT Services Corp., Chicago, Illinois, offered a number of observations. JLT Services, which has been working with MANA for more than eight years, specializes in providing insurance programs to associations.

According to Schmidt, “there are a couple of recommendations I’d offer to reps who are concerned about subrogation:

- “Look at what your contract with your principals says. There are no two contracts that are alike, so reps who hold inventory for their principals should check to see exactly what it is that their insurance and their manufacturer’s insurance covers.” Rather than checking it themselves, he recommends that it’s best to go over the contract with their insurance agent or broker. “They’ll go through it with you and explain exactly what your coverage is.”

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- “Next, ask for a waiver. The waiver of subrogation is fairly common. Now, does that mean the company will give it to you? They don’t have to. If you get the waiver, then make sure your manufacturer has coverage on a blanket basis and that your location is a part of that coverage. Also, if you get the waiver, seek evidence of insurance.”
- “It’s also important to know that there can be differences on a state-by-state basis. Learn about the insurance laws in your state.”
- “In the end, it’s very important to go to your broker or agent. They’ll answer your questions and give you the needed guidance.”

The Legal View

Weighing in from the legal side on the subject of subrogation are two attorneys familiar with rep law and regular participants in MANA’s Annual Legal Symposium.

Responding to the question of what reps should know and do to protect themselves in the area of subrogation, Barbara Kramer, Kramer & Kramer, LLP, Ann Arbor, Michigan, explains, “In a legal sense, subrogation means that one party has the right to ‘step into the shoes’ of another party for the purposes of bringing a claim for damages. A typical example of a subrogation claim occurs if you are involved in an automobile accident where the other driver is at fault. Your insurer will pay to have your car repaired and then is ‘subrogated’ to your rights to recover against a third party (the person who smashed into you) for the property damage. Your insurer can ‘step into your shoes’ and seek payment from, or even sue, the other driver that caused the damage. In the situation that the rep described, the manufacturer’s insurer apparently ‘stepped into the shoes’ of the manufacturer and

sued the rep for the damage to the inventory.

“A rep can do several things to try to ensure that this doesn’t happen to him:

- “First, and simplest, the rep should, if possible, have adequate insurance that covers the inventory.
- “Second, a warehousing rep should seek to be named as an additional insured on the manufacturer’s policy. This should be spelled out in the warehousing or sales representative agreement. This is not as simple as it sounds since you must know what the manufacturer’s insurance protects, i.e., protection for property off premises.
- “Third, the rep can seek an agreement from the manufacturer to hold the rep harmless from any claims for damage to the manufacturer’s property while it is in the rep’s possession. Of course, it may be tough to get such an agreement.
- “Finally, the rep may, in the warehousing or sales representative agreement, seek a waiver of subrogation provision. Waiver of subrogation clauses have been enforced by courts, but may not provide iron-clad protection against an insurer trying to assert a claim for subrogation. It is necessary to closely review all relevant contracts, including insurance policies.

“As with all such complex contractual issues, it is advisable to consult an attorney. The types of contract provisions discussed above must be carefully drafted and care taken to ensure that they are enforceable.”

And finally, Gerald Newman, Schoenberg, Fisher, Newman & Rosenberg, Ltd., Chicago, Illinois, maintains that while subrogation is certainly something reps should be knowledgeable about, it probably ranks a little below product liability in the legal pecking order. According to Newman, “It’s always best to consult with your insurance carrier and legal counsel on these matters.” □

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