

WHEN A RELEASE DOESN'T RELEASE

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Our firm has been involved in a number of cases where the tortfeasor's insurance company works quickly to obtain a release from the adverse insured in exchange for a nominal sum – most often the amount of the deductible – and then attempts to use that release offensively arguing that the release effectively extinguishes all related claims including claims for subrogation. More problematic for a subrogating insurance carrier is where the release includes indemnity language obligating the insured to personally indemnify the unscrupulous carrier for all claims allegedly released by the insured. At first glance, the subrogating insurer may be inclined to accept the release so as to avoid the potential risk to the insured and close the file; however, these types of cases deserve a second look.

Fortunately, Texas courts do not reward such conduct. The law is well-settled in Texas that a release obtained from the insured by an insurance company who has notice of the subrogation rights does not affect or prejudice the rights of the subrogating insurer.¹ There is certainly no universal protection afforded to the subrogating insurer. Rather, the crux of this protection turns on the issue of notice. In other words, the insurer who obtains the release must be on notice of the subrogation interest before obtaining the release for this protection to apply.

A subrogating insurer can and should be proactive in protecting its subrogation claims by doing any of the following:

1. **Send notice of potential subrogation claims immediately to the claimant's carrier.** The sooner in the claims process that notice is given to the offending party's insurance company the better. It is also critical that you can prove notice was given. A fax transmittal report or certified mail confirmation are the two best forms of confirmation.
2. **Send the formal notice to an individual rather than an entity.** Subrogation demand letters that are addressed directly to a mammoth organization without sufficient identifying claim information reduces – if not extinguishes – the validity of the notice.
3. **Inform your co-workers about companies that implore these release tactics.** Putting co-workers on notice of an unscrupulous insurance company's tactics will help others avoid similar problems.
4. **Remind your insured (or their attorney) of their contractual obligation not to take any action that would prejudice the insurer's subrogation interest.** Most insurance policies include provisions expressly prohibiting the insured from taking any action to prejudice the insurer's right to subrogation recovery. Good communication with the insured can help alert them to potential pitfalls.

In the event that actual notice of a subrogation claim has not been provided to the claimant carrier who has obtained the release, review the claim to determine whether there is constructive notice of the potential subrogation interest. For example, a Texas accident report that includes insurance information of the involved parties is arguably notice of the subrogating insurer's potential interest.

In Texas, it is not difficult to invoke the protections afforded to subrogation insurers by law. By closing a subrogation claim without a fight, a subrogating carrier may not only be rewarding bad behavior but may also be giving the unscrupulous carrier incentive to repeat their bad actions.

Endnotes

¹See *Wichita City Lines v. Puckett*, 156 Tex. 456, 295 S.W.2d 894, 900 (1956); *Filipp v. Ochoa*, 340 S.W.2d 847 (Tex. Civ. App.—Waco 1960, writ ref'd n.r.e.).

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