RATHBONE GROUP

**1100 Superior Avenue, Suite 1850**
**Cleveland, Ohio 44114**

**800-870-5521**

**www.RathboneGroup.com**

***Tales from the Kids Table: Overcoming Impediments when Asserting Subrogation in Your Insureds' Case*** **– Mark Demian, Rathbone Group, LLC**

When you think of impediments to subrogation recovery, you think of the more typical scenarios: an uninsured or underinsured tortfeasor, an unsympathetic Judge, a missing witness, or spoiled evidence. I rarely think a meddling, overzealous attorney representing the insureds. Certainly counsel for the insureds can be difficult when asking that a carrier compromise a lien, but rarely do they create serious impediments to recovery. That's what I was faced with in a recent jury trial when asserting a claim in a suit brought by the insureds.

The case involved a fuel-delivery company dumping 600 gallons of diesel fuel into the basement of the insureds' home. Unbeknownst to the **fuel delivery** company, the insureds had removed the fuel tank from the basement of their home. The fuel company delivered fuel like it normally did and disaster ensued. The home was rendered virtually uninhabitable and its contents ruined. The insureds, unfortunately for them, had recently downgraded insurance covering their home and its contents.

My client was sued by the insureds for coverage and ultimately settled. The insureds were pursuing large out of pocket and uncovered losses. The fuel-delivery company was also sued, and presented various defenses, including the insureds failing to tell the company about removing the tank and failing to lock the fuel gauge on the outside piping of the home that led to the basement tank. With the coverage issues resolved, I asserted a subrogated cross-claim against the fuel-delivery company.

So far, so good, right? When a case goes to trial where an insured sues another party for personal injuries, and I have a medical payments subrogation claim, I typically try to reach stipulations with insured and defense counsel to be bound by the jury's verdict to the extent of the medical payments claim. Often, that requires making separate deals with insured's counsel in the event that there is a verdict insufficient to cover all claims and make the insured whole. Judges like these stipulations since they cut down on the length of the trial, the number of attorneys involved, and avoid confusing a jury with subrogation principles.

In this fuel delivery case, however, this sort of approach was not in my client's best interest since we were pursuing a large property damage and additional living expense claim. This wasn't a case to stipulate and then hope for a good result. Oddly, the insurance policy did not have the conventional written subrogation provision; therefore, I was forced to rely on equitable subrogation principles – that is, the relationship between the parties. I wanted to be sure the jury understood this relationship so I wanted to appear to present

the claim. Insureds' counsel, however, wanted it both ways – he wanted insurance coverage from my client, but also did not want the jury to know the insureds had been paid a substantial sum of money by an insurance company. He said that he would gladly protect my interest for a fee if I dropped my claim against the fuel delivery company. "Well, then, you shouldn't have sued my client," I politely said to him. I declined his offer and was glad that I did. I was forging on with my **cross claim** for subrogation. Impediment 1.

Insureds' counsel needed me and my claims representative to help him prove an unreimbursed additional living expense claim. I was agreeable to assisting him and making the representative available for telephone calls and meetings as the trial date approached, and even during trial. I thought that I was creating goodwill; after all, we were on the same side trying to hold the **fuel delivery** company responsible. As testimony was presented at trial, however, counsel turned to me and said "If I lose this case because of your involvement and confusing the jury, we are going to have a big problem." So much for the goodwill. Rather than repeating "Well, you shouldn't have sued my client," I replied that I felt the trial was going well for everyone, and it was. He just didn't want me around, and neither did the Judge as you will see. Impediment 2.

Jury selection provided another challenge. Insured counsel and the Judge were convinced that my client would not be entitled to the typical peremptory challenges. "You're just subrogation" – the Judge said – and added "Why exactly are you here?" That became a running joke with all counsel and the Judge. But I wasn't going anywhere even though my client and I were relegated to sitting at a makeshift kids table near the bailiff and court reporter. While the Plaintiffs' and my client's interests were aligned, a juror may have perceived the other in different ways. After educating counsel and Judge that an insurance company's interest and concerns when selecting a jury were much different than an individual's, the Judge reluctantly allowed me to exercise separate challenges – but only if I could articulate the basis as jury selection was taking place. When a prospective juror said he did not feel an insurance company deserved to be paid back ("That's the risk they run" – the juror said), I had a basis to assert my challenge. The Judge agreed, and was then able to answer his own question as to why I was there. Impediment 3.

My next conflict with insureds' counsel came over jury instructions, interrogatories and verdict forms. He took issue with my instructions concerning vicarious liability against the fuel-delivery company for negligence of its employees. He was trying to make a trespass claim against the company which would have allowed him to recover punitive damages. The company couldn't be responsible for trespass under a vicarious liability theory. Realizing his intent, rather than insist on my instruction, I reached a stipulation with defense counsel that the employees were in the course and scope of their employment at the time. More goodwill on my part, but insureds' counsel did me no favors here. And just to be difficult, he objected to instructions on subrogation saying it was a concept too confusing for the jury to understand. "I think Mr. Demian explained it pretty well in jury selection," said the Judge. Insureds' counsel also did not like that my verdict forms had distinct awards for my client as opposed to being lumped into overall damages proven by the insureds. He wanted my client's damages lumped with his so if the case settled, he could try and negotiate those liens down. That's what was foremost in his mind throughout the case – how could he position the case to have control over the purse strings, and litigation overall, and get my client to reduce liens, allowing him

to pocket the recovery. My verdict forms were accepted. More impediments overcome.

The jury rendered a significant verdict for the insureds and separately for my client. It was a pretty joyous moment in the courtroom. I was so pleased for the insureds who had endured years of heartache and pain from the loss of their home and belongings. Defense counsel was quick to say the verdict was a result of undue passion and emotion by the jurors. The company filed an appeal based on myriad issues, mostly related to the verdict rendered for the insureds.

Before briefs on the appeal were due, the appeals court set the case for mediation. The day before the mediation, insureds' counsel called to tell me to be prepared to compromise the claim. "Why would I do that? I have a separate and distinct verdict against the company. The issues of the appeal are entirely based on the verdict of your claims." Silence. "But I did most of the work in the case." "Yes, you had a lot at stake and did a lot for your clients, but I actively participated in the case and at trial for my client's interest. And, by the way, you should be proud of what you did for your clients. It was a great result."

When the parties arrived at the mediation, the mediator gathered us together and asked how we wanted to approach things. Insureds' counsel was quick to suggest global discussions rather than separate caucuses among the three parties. I knew again where he was going – he wanted to be able to negotiate down on what he believed was my client's lien on his verdict and any settlement. Defendant's insurance carrier said it only had a certain sum to discuss settlement among the parties, but took no position on how mediation was handled. Naturally, I wanted to be able to discuss settlement of my case without insureds' counsel's interference so I was happy that the mediator suggested separating us all. When Defendant's counsel realized he was not getting far settling with the insureds, he turned to me. After lengthy back and forth negotiations, we settled the claim. My client and I dashed out of the courthouse. As I drove away from the courthouse, I thought that I could hear insureds' counsel saying, "Where did subrogation counsel go?"

A week later, I learned from Defendant's counsel that he settled the claims with the insureds' counsel. I should not have been surprised when shortly thereafter I got a call from insureds' counsel asking for $50,000 as fees for his efforts in leading the litigation against the **fuel delivery** company. "My clients are flexible, however." When I told him that his clients were fully compensated under the terms of the insurance policy, and had given a release to my client and my client was not going to pay anything further, he said he would be reviewing with his clients to consider legal remedies. I have not heard from him since. I keep harkening back to counsel and Judge's comment "Why are you here?" and was pleased more than ever to think "That's why" after that call with counsel. I protected my client's interest to the fullest, and no one could question it. No more impediments!

The moral of my story is staying actively engaged in a case where the insured is leading the litigation. The client hired you, not insureds' counsel. Attend all the depositions and hearings, and be actively engaged in discovery and motion practice. Educate the judge and counsel on your purpose and intent throughout the case. When it comes to actually proceeding with trial, assert your rights, get a seat at counsel's table, make your concerns known and protect the court record in jury selection and throughout trial. Be certain jury interrogatories and verdict forms specify your claims. Do not let subrogation get lumped into the insured's overall damages.

Our jobs are hard enough making a case for liability against a responsible party. This was the rare instance where defense counsel was actually easier to deal with than anyone else. As more and more states attempt to limit subrogation rights or, in some states, attempt to legislate permitting the insured to have control over the litigation, don't give the court or counsel another reason to discount or demean subrogation. Be bold, be dynamic, be the best subrogation counsel you can be.