



# NATIONAL ASSOCIATION OF PUBLIC INSURANCE ADJUSTERS 2018 ANNUAL MEETING

Hotel Hershey  
Hershey, PA

Presented June 14, 2018

## *A Tale of Two Cases – Subrogation & Litigation in the Fire Context*

Panelists:

BRIAN S. GOODMAN, ESQ., KRAMON & GRAHAM, PA &  
RANDOLPH H. GOODMAN, SPPA, GOODMAN-GABLE-GOULD/AI

# General Overview of Issues

- › Fire Started in Home Was Caused By Contractor.
- › Insured Physically Injured During Fire.
- › Significant Property Damage Exhausting Limits on Building & Personal Property.
- › Insured Advised by their Insurer Before The Fire That Limits Were Sufficient.
- › In Maryland – Insurance Company's Subrogation Rights Come Before Insured.
- › Is Medical & Emotional Distress of Insured Subordinate to First Party Insurers Subrogation Rights?



07.06.2016









07.06.2016

From: [REDACTED]

Sent: Tuesday, July 12, 2016 3:38 PM

To: Randy Goodman <[RGoodman@gggco.com](mailto:RGoodman@gggco.com)>

Subject: [REDACTED]

Hey Randy,

As the Home Protector portion of the policy does have conditions that need to be satisfied prior to activating, and the member did have renovations done to his home and also is not insured to value, we will need to complete a supplemental recorded statement, just discussing these points. It should be brief but is needed for review by our underwriting department.

We can do this interview by phone if you'd like, and you can certainly be on the call if you wish, but all answers must be provided by Mr.

[REDACTED]. Please let me know when we can make this happen.

Thanks.

**SECTION I - LOSS SETTLEMENT**

We will not pay more than the amount of insurance that applies to the damaged, destroyed or stolen property as stated on the Declarations page unless such amount is increased due to ADDITIONAL COVERAGES or the Home Protector Coverage. Subject to the amount of insurance covered losses are settled as follows:

1. For the following property:

- a. Structures that are not buildings; and
- b. All covered structures whether or not they are buildings, if located away from the "residence premises".

We will pay the lesser of:

- a. The "actual cash value"; or
- b. Our cost to replace the property with property of like kind, quality, age and condition; or
- c. Our cost to repair or our cost to restore the property to the condition it was in just before the loss

2. All items under Property We Cover – Dwelling Protection and buildings on the "residence premises" under Other Structures Protection. We will pay our cost to repair or our cost to replace the damaged property with similar construction and for the same use on the premises shown in the Declarations, subject to the following:

- a. When our cost to repair or replace the damaged property is less than \$5,000 we will pay you the full replacement cost amount without deduction for depreciation.
- b. When our cost to repair or our cost to replace the damaged property is greater than \$5,000, and until actual repair or replacement is completed, we will pay only the "actual cash value", not to

exceed our cost to repair or our cost to replace the damaged part of the property.

- (1) To receive any additional payments on a replacement cost basis, you must complete the actual repair or replacement of the damaged part of the property within one year after the date of loss, unless during this period you request in writing that this time limit be extended for an additional 180 days, and notify us within 30 days after the work has been completed.
- (2) When repair or replacement is actually completed, we will pay the covered additional amount you actually and necessarily spend to repair or replace the damaged part of the property, or our cost to repair or replace the damaged part of the property, whichever is less.

**3. Home Protector Coverage.**

You agree:

- a. To insure your buildings under Property We Cover – Dwelling Protection and Other Structures Protection, on the "residence premises", for the full replacement cost at the time this policy is issued; and
- b. To accept any increase in coverage that results from the application of the Adjustment to Building Cost provision if it is deemed necessary by us. You must pay for any added premium; and

**c. To tell us within 90 days of the start of any additions or other physical changes to buildings on the "residence premises" which increases the value by the greater of:**

- (1) \$25,000; or
- (2) 5% of the current Dwelling Protection amount of insurance.

You must pay any resulting premium.

3. Home Protector Coverage

c. To tell us within 90 days of the start of any additions or other physical changes to buildings on the "residence premises" which increases the value by the greater of:

If you comply with these requirements and if as a result of a covered loss, you have exhausted the amount of insurance:

If you comply with these requirements and if as a result of a covered loss, you have exhausted the amount of insurance:

- a. Applying to buildings covered under Property We Cover – Dwelling Protection or Other Structures Protection; or
- b. Provided under ADDITIONAL COVERAGES, Debris Removal; or
- c. Provided under ADDITIONAL COVERAGES, Building Ordinance or Law;

then, we will pay up to an additional 25% of the amount of insurance applying to the damaged building. The most we will pay for a, b, or c, either singly or in any combination is 25% of the amount actually and necessarily spent to repair or replace the damaged building, whichever is less.

then, we will pay up to an additional 25% of the amount of insurance applying to the damaged building. The most we will pay for a, b, or c, either singly or in any combination is 25% of the amount actually and necessarily spent to repair or replace the damaged building, whichever is less.

- 4. Loss Settlement – Personal Property. We will settle losses to covered property at full replacement cost without deduction for depreciation, subject to the following:

REPLACEMENT COST COVERAGE DEFINED

Replacement Cost means the cost, at the time of loss, of a new item identical to the one damaged, destroyed or stolen. If an identical item is no longer manufactured or cannot be obtained, replacement cost will be the cost of a new item which is:

- a. Similar to the insured article, and
- b. Of like quality and usefulness.

PROPERTY COVERED

- a. Personal property covered in Property We Cover – Personal Property Protection, except personal property stated in Property Not Eligible below;
- b. If covered in this policy; awnings, carpeting, and household appliances, whether or not attached to buildings.

PROPERTY NOT ELIGIBLE

Replacement cost coverage does not apply to:

- a. Items of rarity or antiquity that cannot be replaced;
- b. Articles whose age or history contributes substantially to their value. These include, but are not limited to, memorabilia, souvenirs and collectors items;
- c. Motorized golf carts and their equipment and accessories;
- d. Articles not maintained in good or workable condition;
- e. Property that is either obsolete or useless to the "Insured" at the time of loss;
- f. Property that you do not intend to repair, replace, or restore.

LOSS SETTLEMENT

- a. For property that is eligible for replacement cost coverage it is our option to:
  - (1) Replace, or pay you our cost to replace the property with new property of like kind and quality without deduction for depreciation; or
  - (2) Pay you the cost to repair or restore the property to the condition it was in just before the loss; or
  - (3) Pay you the necessary amount actually spent to repair or replace the damaged property.
- b. We will pay no more than "actual cash value" until repair or replacement of the damaged property is completed, unless the entire loss is less than \$2,500

The stated limit of liability in the policy for the dwelling was \$489,000.00. If the 25% multiplier is allowed, the available limit would increase to \$611,250.00 ( $\$489,000.00 \times 1.25$ ).



**BALTIMORE COUNTY POLICE DEPARTMENT**  
Incident Supplement Report

"Integrity...Fairness...Service"

INCIDENT NUMBER 161820143	
Report Type Incident Supplement Report	Page 2 of 2
Date / Time Occurred 6/30/2016 02:06 to 6/30/2016 02:06	Date / Time Reported 6/30/2016 02:06

Narrative Information

I have reviewed the UCR code of NON CRIMINAL and agree with the NON CRIMINAL disposition.

On 7/1/16, [REDACTED] contact via phone, [REDACTED] contracting. [REDACTED] advised that he was aware of the fire at the [REDACTED] home. When asked who was working there on 6/29/16, [REDACTED] advised that his brother, [REDACTED] was. When questioned about what material was being used on the gazebo, [REDACTED] said he was unsure and referred all questions to his brother.

[REDACTED] subsequently, spoke with [REDACTED] on 7/1/16. According to [REDACTED] he was the person working at the [REDACTED] home on 6/29/16 and he stained the gazebo. According to [REDACTED] he had completed the renovation work in the kitchen and the [REDACTED] had requested that the gazebo be stained. On 6/29/16, he used a product named IPE oil to complete the project. During the application of the oil, he used a total of five rags to wipe up runs. When asked what he did with the rags after he was done with them, [REDACTED] stated that he placed them all in a plastic bag and left them near his supplies which were stored just to the exterior of the kitchen. Upon further conversation, [REDACTED] confirmed what the [REDACTED] had already stated, that he stored his paints and solvents on a table that was just outside the kitchen sliding glass door.

[REDACTED] conducted research on the product called IPE Oil and found that it will spontaneously combust. One website, <https://www.deckwise.com/ipe-oil-label-warning.html> even stated that rags used in the application of the product will catch fire or self-combust. This warning was also repeated on the following website; <https://www.ipeoil.com>.

Based upon these findings, it is Det. Scally's opinion that this fire was caused by the rags used to stain the deck spontaneously combusting after they were used to wick up IPE oil. Once the rags caught fire, the fire spread to the house and the other paints / solvents stored nearby.

Based upon these findings, it is Det. Scally opinion that this fire was caused by the rags used to stain the deck spontaneously combusting after they were used to wick up IPE oil. Once the rags caught fire, the fire spread to the house and the other paints/solvents stored nearby.

No further action to be taken by this agency at this time pending the development of new information.

From: Randy Goodman

Sent: Thursday, July 14, 2016 08:05 AM

To:

[REDACTED]

Subject:

[REDACTED]

[REDACTED] - This will confirm that we agreed this morning to settle the loss of use (additional living expense) component of this claim for 83,872.27. Please advise when we can expect to receive the payment. Thank you for your efforts in resolving this component of the claim.

Best Regards –

Randy

From: [REDACTED]  
Sent: Tuesday, December 27, 2016 12:56 PM  
To: Randy Goodman <[RGoodman@gggco.com](mailto:RGoodman@gggco.com)>  
Subject: [REDACTED] Home Protector

Hi Randy,

It was good seeing you last week, and I hope you're having a great holiday with your family. I tried reaching you by phone today but was unable to. I left a message with your assistant.

I received word back regarding the application of Home Protector additional coverage on the [REDACTED] loss. The [REDACTED] new property will serve as an appropriate replacement, and given the value of the structure, there is no issue dollar-wise.

Where we unfortunately do run in to an issue however, is on the ALE end. The agreement that we reached for 12 months of ALE exposure was predicated on the understanding that the [REDACTED] would be rebuilding their home, and that this process would exceed the 12 month limit stipulated by the policy. Under these circumstances, and in the interest of making things easy for the [REDACTED] [REDACTED] agreed to pay 12 months up front, when usually we would pay ALE in 6 month increments. I did speak with you regarding this settlement, and you did indicate on several occasions that the [REDACTED] would be rebuilding.

Per the closing documents you submitted to me, it is evident that the [REDACTED] actual ALE exposure was limited to a brief period, for which they were fully compensated. As a condition of settling the Home Protector portion of the loss, [REDACTED] is requesting an adjustment equal to the second six month portion of the ALE payout, or \$38,070. This would bring the HP settlement to \$84,180, and all dwelling exposures would be closed at that time.

From: Randy Goodman  
Sent: Thursday, January 05, 2017 11:08 AM  
To: [REDACTED]  
Subject: [REDACTED] Home Protector  
[REDACTED]

Thank you for the holiday wishes. I hope you and your family enjoyed a wonderful holiday season.

Your insured is pleased to be advised that [REDACTED] agrees The [REDACTED] new property will serve as an appropriate replacement and that there is no issue dollar wise.

It is unfortunate that [REDACTED] opines that there is an issue on the Additional Living Expense (ALE) end. You are correct that an agreement was reached on the ALE claim – specifically it was confirmed via email on July 14, 2016. The email stated:

*[REDACTED] This will confirm that we agreed this morning to settle the loss of use (additional living expense) component of this claim for 83,872.27. Please advise when we can expect to receive the payment. Thank you for your efforts in resolving this component of the claim. Best Regards – Randy”*

The confirming email accurately reflected the agreement. We engaged in conversations regarding a “compromise” walk away specific to the ALE coverage in part because [REDACTED] and its consultant suggested homes to rent that the Insured did not feel comparable to the home they lived in before the fire. Reaching a compromise settlement was a manner to settle the ALE and avoid having [REDACTED] and its insured agree on a suitable home that the [REDACTED] could or would rent.

This fire occurred on June 30, 2016. If you recall [REDACTED] wanted its insured to consider making a commitment for the rebuild to a [REDACTED] preferred vendor, Meyers Construction. We told you at that time that the [REDACTED] would not make any commitment and decision as to who they might hire to rebuild until such time as they know the amount it would cost to rebuild and the amount of funds they would receive from [REDACTED] for the rebuilding. Since they would not make the commitment to hire Meyers Construction you asked Meyers to not move forward to produce an estimate. Making such a commitment to any builder before knowing the costs associated with such efforts would not have been financially responsible by the [REDACTED]

Therefore, when we settled the ALE claim on July 14<sup>th</sup>, just two weeks after the loss, the [REDACTED] were not prepared to make any decisions regarding rebuilding. What I said to you at that time was that the insured would rebuild or replace the damaged property.

We further note that the check issued in payment of the ALE claim, in the amount of \$83,872.26, stated “Nature of Payment: Payment under Additional Living Expense coverage for loss of use. First & final payment”. A copy of that check, which was issued the date of the referenced agreement, July 14, 2016, is attached.

The insured fully relied on this understanding when making future financial decisions as to the purchase of the replacement property. The funds available to them under the [REDACTED] policy for rebuilding or replacement efforts were insufficient to effect the necessary repairs, though shortly before the loss [REDACTED] assured them that there was no need to raise the limits of insurance when Mrs. [REDACTED] called [REDACTED] to advise of the recent renovation that was undertaken at the insured location. Had [REDACTED] properly advised the insured on the limit of liability matter its insured would have had ample funds to repair or replace the dwelling.

We further note that in its duty to adjust claims under the covenant of good faith and fair dealing it is generally inappropriate and unreasonable for an insurer to try to use one component of coverage to effect settlement and payment on another distinct coverage part.

While this email is not meant to be all inclusive, we respectfully and strongly advise that your insured does not believe there should be any condition attached to settlement of the Home Protector portion of the loss, and rejects your request for an adjustment of \$38,070.00. They expect [REDACTED] to issue the \$122,250.00 for dwelling plus the \$6112.50 for the debris removal.

Receipt of those payments by your insured would complete the dwelling component exposures.

We look forward to your timely response.

Best Regards –  
Randy Goodman, SPPA

Ref: [REDACTED]

18 DOL: 06/30/2016, MD

We value your communication and are committed to keeping your information secure and confidential.

To ensure delivery: Reply only from this field.

To ensure privacy: Refrain from sending

The policy states there is coverage to pay the reasonable expense as you noted. An expense is not an expense until it is actually incurred. Until actually incurred, it is merely an expectancy or anticipated expense, and not an actual expense.

On 2/22/17 I sent a request for the receipt for the personal property debris removal.

The policy states there is coverage to pay the reasonable expense as you noted. An expense is not an expense until it is actually incurred. Until actually incurred, it is merely an expectancy or anticipated expense, and not an actual expense.

Please submit the receipts for the personal property debris removal for consideration.

Thank you,

From: Randy Goodman [<mailto:RGoodman@gggco.com>]

Sent: Monday, March 13, 2017 12:52 PM

To: [REDACTED]

Subject: EXTERNAL: RE: \*DO NOT CHANGE SU

[REDACTED]

[REDACTED] -

First – we do not agree that the expense needs to be incurred for it to be recoverable under the clear terms of the policy. The word “incurred” does not appear in the Debris Removal provisions of the policy – which are evidenced in my below email to you of February 17, 2017.

Thank you for your emails of February 22<sup>nd</sup> and February 28<sup>th</sup>. I am responding now as I was on vacation at the time of those communications.

First – we do not agree that the expense needs to be incurred for it to be recoverable under the clear terms of the policy. The word “incurred” does not appear in the Debris Removal provisions of the policy – which are evidenced in my below email to you of February 17, 2017.

[REDACTED] in the past has agreed Debris Removal expense does not have to be incurred to be recoverable. [REDACTED] demonstrated that agreement previously on this loss when they included Debris Removal payment of 5% of stated limits, \$24,450.00, when issuing payment of the stated limits on the dwelling. A copy of the confirming email from [REDACTED], and a copy of the issued check, is attached.

If you continue to maintain the insured must incur the expense, despite policy provisions contrary to that position, and in deference to [REDACTED] application of the Debris Removal provision on the Dwelling coverage, we advise that the insured is preparing to sell the property and will be “incurring” the Debris Removal expense by way of a substantial reduction in the sale price of the property, because of Debris Removal.

We ask that [REDACTED] reconsider this issue and promptly issue payment of \$18,337.50 for Debris Removal.

Thank you and Best Regards -

Randy Goodman, SPPA

From: [REDACTED]

Sent: Friday, March 17, 2017 8:35 AM

To: Randy Goodman <[RGoodman@gggco.com](mailto:RGoodman@gggco.com)>

Subject: RE: \*DO NOT CHANGE SUBJECT FIELD\* Confidential: [REDACTED]

[REDACTED] # 317 10 22 L/R # 18 DOL: 06/30/2016, MD

[REDACTED] has reconsidered your request for a payment under the excess debris removal personal property coverage.

It is not a customary claims practice for [REDACTED] to issue a payment on debris removal that is not an incurred expense under the personal property coverage.

An expense is not an expense until it is actually incurred. Until actually incurred, it is merely an expectancy or anticipated expense, and not an actual expense.

[REDACTED] respectfully requests you submit documentation showing any incurred expenses to support your claim request of \$18,337.50. Please ensure the documentation details the incurred expense is for personal property debris removal and not for structural.

Thank you,

From: Randy Goodman [<mailto:RGoodman@gggco.com>]

Sent: Wednesday, March 29, 2017 3:20 PM

To: [REDACTED]

Subject: EXTERNAL: RE: \*DO NOT CHANGE SUBJECT FIELD\* Confidential: [REDACTED]  
[REDACTED] DOL: 06/30/2016, MD

[REDACTED]—

This email will be responsive to your recent communications to me and to [REDACTED] insured regarding Debris Removal for personal property and [REDACTED] contention that the expense must be incurred to be recoverable under the terms of the policy written by [REDACTED] and issued to this insured.

[REDACTED] is simply wrong in its position that the expense must be incurred to be recoverable under the terms of the policy. The Debris Removal provisions of the [REDACTED] policy does not state that the expense is only recoverable if incurred – in fact it doesn't have the word incurred appear anywhere in the Debris Removal provision. As previously provided below is the exacting language of the [REDACTED] policy.

## Debris Removal

We will pay your reasonable expense for the removal of:

Debris of covered property if loss to the damaged property is covered under Section I – LOSSES WE COVER; or

Ash, dust or particles from a volcanic eruption that has caused direct loss to a building or property contained in a building.

This expense is included in the amount of insurance that applies to the damaged property. When the amount payable for the actual damage to the property plus the expense for debris removal exceeds the amount of insurance for the damaged property, an additional 5% of that amount of insurance will be available to cover debris removal expense.

██████ of course could have written a policy that mandated the Debris Removal Expense be incurred as a prerequisite to recovery under the policy. For example purposes we provide the following policy, one of many that are issued and that does in fact mandate that the Debris Removal Expense be incurred as a prerequisite to recovery under the policy (emphasis in bold print added):

DEBRIS REMOVAL "We" will pay the reasonable expenses **incurred** by "you" for the removal of debris of insured property as a result of an insured peril. If the amount payable for loss, including expenses for removal of debris, is greater than the Amount of Insurance applicable to the lost or damaged property, then an additional 5% of the COVERAGE A or COVERAGE C limit as indicated on the Declarations will be available to cover "your" debris removal expenses. For the purposes of this ADDITIONAL COVERAGE, the amount of COVERAGE A or COVERAGE C will not be increased as a result of the application of the GUARANTEED REPLACEMENT COST.

The only reasonable and accurate conclusion that can be reached when contrasting the two respective policy Debris Removal provisions above is that the expense is only recoverable if incurred under the language of the policy that is not ██████ form, and is recoverable under the ██████ form that does not contain an "incurred" mandate. Certainly ██████ could have written a policy, such as the one example we provided, that would have required the expense be incurred, but elected not to do so. ██████ cannot now "add" language that it did not include when drafting and issuing the policy.

Though we are confident we are correct on this issue, we are providing the attached letter from Delbert Adams Construction Group, Inc. that confirms there is a \$25,250.00 reduction in the purchase price of the insured property specific to the removal of the personal property at the premises. The letter clearly represents an incurred cost, as the [REDACTED] would receive a higher price for the home if not for the expense of removing the personal property.

For reasons outlined above we again ask [REDACTED] reconsider their position and issue the \$18,337.50 clearly owed to its insured for Debris Removal of personal property.

Thank you and Best Regards -

Randy Goodman, SPPA

# Litigation Followed...

- › First, the homeowners filed a lawsuit in state court.
  - The claims against contractor alleged:
    - › Negligence
    - › Loss of Consortium
    - › Gross Negligence

URGENT!! READ COMPLETE INSTRUCTIONS BEFORE USING

**DANGER:**

Rags, steel wool, or waste soaked with this product may spontaneously catch fire if improperly discarded. Immediately after use, place rags, steel wool or waste in a sealed water-filled metal container.

URGENT!! READ COMPLETE INSTRUCTIONS BEFORE USING

### Drying Time

Temperature, wood and humidity all effect drying time. Allow 24 hours in most applications.

### Approximate Coverage per Gallon\*

Smooth Wood: 200-300 sq ft / gallon

Rough Wood: 150-250 sq ft / gallon

\*Coverage on dense hardwoods

replace such quantity of Ipe Oil™ Hardwood Deck Finish as is proven to be defective as per [www.IpeOil.com/warranty](http://www.IpeOil.com/warranty).

Seller and manufacturer shall not be liable for loss or damage connected with the use and/or handling of this product. User should determine suitability of this product for the intended use before applying it. User assumes all risk and liability in connection therewith.

**WARNING:** Do not leave rags in a pile, they will self-combust or catch fire. Rags, brushes, rollers, steel wool or waste soaked with Ipe Oil™ Hardwood Deck Finish may also spontaneously catch fire if improperly discarded. Immediately after each use, place waste materials in a sealed, water-filled metal container. Dispose of empty cans or unused portion in accordance with local, state, and federal regulations.

**DeckWise®, The Ipe Clip® Fastener Company, LLC • 2111 58th Ave. Etc. Inc.**  
**Phone: 941-896-9851 • Email: [info@DeckWise.com](mailto:info@DeckWise.com) • Web: [www.deckwise.com](http://www.deckwise.com)**

medical associa  
immediately with  
medical attention

NOTICE: Repro  
associated with  
occupational  
solvent with  
and severe  
Intentional  
consequences  
contain no

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# Litigation Followed...

- Also, claims brought against first-party insurer based on it advising homeowner/insureds that limits were sufficient to cover property in event of total loss. Claims included:
  - › Negligence
  - › Negligent Misrepresentation

# Litigation Followed...

- › Months later, the first-party insurer filed a subrogation against the contractor in federal court.
- › Also, back in state court, the first-party insurer filed a counterclaim against the homeowners arising out of the ALE settlement (discussed above).
  - › Breach of Contract
  - › Unjust Enrichment
  - › Negligent Misrepresentation
  - › Specific Performance (demanding written assignment of subrogation rights)

- (4) When this policy is cancelled, the premium for the period from the date of cancellation to the expiration date will be refunded pro rata.
  - (5) If the return premium is not refunded with the notice of cancellation or when this policy is returned to us, we will refund it within a reasonable time after the date cancellation takes effect.
5. **Nonrenewal.** We may elect not to renew this policy. We may do so by letting you know in writing 30 days before policy termination. This nonrenewal notice may be delivered to you, mailed to you by postal mail at your mailing address shown in the Declarations or provided to you electronically if we have your consent and agreement on file to receive documents electronically.

Proof of mailing, whether by postal mail or by electronic media or communication channel, will be sufficient proof of notice. Electronic notice will be provided upon placing it on our website pursuant to an electronic transaction agreement, or upon directing it to an electronic mailbox or voice channel that you designate for the purpose of receiving mail.

6. **Subrogation.** Any "insured" may waive in writing before a loss all rights of recovery against any person. If not waived, we may require an assignment of rights of recovery for a loss to the extent that payment is made by us.

If an assignment is sought, an "insured" must:

- a. Sign and deliver all related papers;
- b. Cooperate with us in a reasonable manner; and
- c. Do nothing after a loss to prejudice such rights.

7. **Spouse Access.** The "member" and we agree that the "member" and resident spouse are customers and applicants for purposes of state and federal privacy and insurance laws. The resident spouse will have access to the same information available to the "member" and may conduct the same transactions as the "member" including making coverage changes, signing regulatory forms, terminating the policy, and selecting delivery preferences for policy documents.

The "member" may notify us that he/she no longer wants the resident spouse to have access or transaction authority on his/her policy, and we will not permit the resident spouse to access policy information or conduct transactions on this policy.

8. **Assignment.** Assignment of this policy will not be valid unless we give our written consent.
9. **Death.** If any person named in the Declarations or the spouse, if a resident of the same household, dies:
- a. We insure the legal representative of the deceased but only with respect to the premises and property of the deceased covered under the policy at the time of death;
  - b. For the purpose of this condition, "insured" includes:
    - (1) Any member of your household who is an "insured" at the time of your death, but only while a resident of the "residence premises"; and
    - (2) With respect to your property, the person having proper temporary custody of the property until appointment and qualification of a legal representative.



February 15, 2017

VIA E-MAIL

**Paul R. Bartolacci**  
Direct Phone 215-665-2001  
Direct Fax 215-701-2001  
pbartolacci@cozen.com

Brian S. Goodman  
Kramon & Graham, P.A.  
One South Street  
Suite 2600  
Baltimore, MD 21202

Re: [REDACTED]

Dear Mr. Goodman:

I understand the first party property adjustment is now finalized. Pursuant to Paragraph 6 found within that portion of the [REDACTED] policy identified as "Sections I and II - Conditions", enclosed please find an Assignment and Subrogation Receipt to be executed by your clients. [REDACTED] has exercised its right to require an assignment of the rights of recovery for the June 30, 2016 loss to the extent of the payments totaling \$1,095,417.71 made by [REDACTED] to its insureds.

Please return the signed document to me at your earliest convenience.

Very truly yours,

COZEN O'CONNOR

By: Paul R. Bartolacci

PRB:pak  
Enclosure

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### ASSIGNMENT AND SUBROGATION RECEIPT

Received from [REDACTED] (the "Company") the sum of One Million Ninety Five Thousand Four Hundred and Seventeen Dollars and Seventy One Cents (\$1,095,417.71) in payment of certain claims and demands of [REDACTED] [REDACTED] (the "Insureds"), against the Company under the policy of insurance identified as Policy Number [REDACTED], arising from or in connection with any loss or damage by reason of the fire, which loss and damage arose or occurred on or about [REDACTED] at [REDACTED].

In consideration of the payments described above, but only to the extent of those payments received from the Company, the Insureds hereby assign, transfer and set over to the Company any and all claims and/or legal title to all causes of action of whatsoever kind and nature which the Insureds now have, or may hereafter have, to recover against any third party as the result of said occurrence and loss above described. Further, the Insureds agree that the Company may enforce its subrogation rights in such manner as shall be necessary or appropriate for the use and benefit of the Company as subrogee of the Insureds, that the Insureds shall provide reasonable cooperation with the Company, and shall furnish such papers, information or evidence as shall be within the Insureds' possession or control for the purpose of enforcing such subrogation claim, demand or cause of action.

This Assignment and Subrogation Receipt is not intended to be a waiver, release or discharge of any claims of the Insureds or the Company against each other or any third party, for losses, damages or expenses arising from the June [REDACTED] fire.

The Insureds covenant that no release or settlement of any such claim, demand or cause of action has been made in favor of any third party and that no such settlement will be made nor release given by the Insureds without the consent of the Company.

# Subrogation- Generally

- › Can be equitable, contractual or statutory right
- › If the insured is not fully reimbursed for its losses, who gets the first dollar of recovery from the third-party tortfeasor?
- › How this question is answered varies state by state

# Subrogation- The “Made Whole” Doctrine

- › Equitable doctrine but some states have codified
- › Also known as the “Full Compensation” rule
- › The insurer does not acquire a subrogation right until after its insured has been fully compensated
- › Some states permit parties to contract around this doctrine
  - State vary as to what type of language a party must use to do this

# Subrogation- The “Made Whole” Doctrine

- › Adopted in majority of jurisdictions:
  - Alabama, Arkansas, Colorado, Connecticut, District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin
- › Is a nuanced issue so review the case law in your particular state

# Subrogation in Maryland

- › Maryland rejected the Made Whole doctrine in *Stancil v. Erie Ins. Co.*, 740 A.2d 46 (Md. App. 1999)
  - Stancil’s home was destroyed when a vehicle collided with his house and burst into flames
  - His homeowner’s insurer paid policy limits but Stancil was underinsured
  - The at-fault driver’s insurer tendered its policy limit to Stancil but Erie expressed its intention to claim those sums under its subrogation right
  - Stancil sought declaratory relief to determine order of subrogation priority

# Subrogation in Maryland

- › The Court of Special Appeals emphasized that subrogation is “subject to principles of equity”
- › The court relied on the fact that Stancil “decided on the limit and chose one that was less than the real value of his property”
- › Under this circumstance, the court rejected the Made Whole doctrine as Stancil’s failure to adequately insure his property should not create a responsibility on the insurer

# Subrogation in Maryland

- › *Stancil v. Erie* is the only Maryland case to address the Made Whole doctrine
  - › May have been able to challenge application of the Made Whole doctrine in our case on equitable grounds given that the insured was not underinsured by choice but because of the bad advice from its insurer
- Also – we felt it did not apply due to carrier choosing a separate path – separate cause of action in federal court.

# Subrogation- Procedural Issue

- › In our case, there were two separate actions filed against the negligent contractor:
  1. By homeowners in state court seeking damages for personal injury and to recover for their uninsured property damage
  2. By the first-party carrier in federal court asserting subrogation rights
    - This action was filed several months after the state court action
  
- This created a dispute as to who is entitled to the first money recovery against the contractor

# Legal Issues in State Court Actions

- › Homeowner claim against its insurer for negligence:
  - Homeowner called insurer weeks before fire to inquire about policy limit being too low.
  - Alleged that insurer breach duty of care by failing to:
    - › Advise homeowner as to sufficient and proper insurance coverage limits for the Home;
    - › Exercise skill and care in its dealings with the homeowners;
    - › Properly advise as to the proper levels of coverage for the homeowners' home and personal property;
    - › Properly evaluate the homeowners' insurance needs and to make appropriate recommendations concerning insurance coverages;
    - › Issue a homeowners policy that would fully compensate the homeowners for their potential lost real and personal property.
    - › Was homeowner restricted to breach of contract action only?

# Legal Issues in State Court Actions

- › Homeowner claim against its insurer for negligent misrepresentation:
  - Based on phone call where agent made statements about adequacy of limits of the homeowner policy.

# Legal Issues in State Court Actions

- › Contractor sought dismissal of gross negligence claim and/or claim for punitive damages.
  - Court denied motion as to gross negligence.
  - Granted as to punitives.

# Legal Issues in State Court Actions

- › Homeowner filed MTD/MSJ counterclaim. Argued that:
  - No duty to volunteer information where insurer did not inquire about future plans and failed to put homeowners on notice of any purported duty to disclose future plans.
  - No Maryland cases on point.
  - Cited *Norris v. Nationwide Mutual Fire Insurance Co.*, 728 S.W.2d 335 (Tenn. Ct. App. 1986) with similar facts pertaining to ALE settlement.
    - › Court held that by making the settlement without requiring documentation, the insurer **waived** reliance on the policy provision.

# Legal Issues in State Court Actions

– Insurer waived.

- › Under Maryland law, in the context of other types of first-party coverage, it is firmly established that an insurer, by its own acts, can waive the policyholder's compliance with requirements of the policy. *Taubman v. Allied Fire Ins. Co. of Utica*, 160 F.2d 157, 162 (4th Cir. 1947).

# Legal Issues in State Court Actions

- No need for plaintiffs to enter a separate subrogation agreement.
  - › Insurer's subro rights triggered by policy once insurer indemnifies the insured for loss.
  - › Why is insurer still demanding it if it filed separate subro action in fed court without it?

# Legal Issues in State Court Actions

– Court ruled that:

- › Insurer did not waive because policy required that insured “cooperate with insurer in investigation of the claim.”
  - Genuine dispute as to whether insureds cooperated.
- › Denied dismissal/summary judgment on negligent misrepresentation claims and breach of contract.
- › Granted as to unjust enrichment and specific performance.

## › Mediation – Judge Carol Smith

- Ordered by the court.
- All parties present
- 10 hours
- Huge dispute as to first money entitlement
- Reached the initial Delta after 10 hours

## › Experts

- Public adjuster
- Real estate appraiser
- Contractor
- Fire experts – causation (shared with first party carrier)

› Thank you.

› Any Questions