

## Insurance Company Subrogation

### **ORIGINAL MESSAGE** (posted to the VOMA Listserve June 22, 2004)

Scenario: A group of teens vandalize a public facility or a school causing thousands of dollars of damage. We conduct a mediation or 2 and the agreement includes restitution, divided by the teens, to pay back the deductible as well as other appropriate restorative activities. Teens complete the agreement. Case successfully closed! ...Right? Well, not quite. A year later the insurance company of the facility/school then sues the teens' parents to recover the amount they paid out to the school. Has this happened to your center? Is there anything we can do? In retrospect? In the future? (Amy Dowell, Community Justice & Mediation Center, Bloomington, IN)

### **RESPONSES:**

I think the only way to deal with this issue to any certainty is to bring the insurance companies to the table and/or get a release from them at the time of the mediation. You should provide the families with notice that the insurance companies have the right to bring that suit and it is a risk they face no matter what they do re the mediation. I have not seen insurance companies do this very often, but if the amount of the payout is big enough then it makes bringing the suit financially viable. (Bruce A. Kittle, Youth Development & Restorative Justice Programs, Cedar Rapids, Iowa)

You are dealing with a right the insurance company calls "subrogation." In other words, they stand in the place of their insured to collect all damages in full. The school is happy because all their losses were covered, but the insurance carrier has been out some money. Most insurance policies contain a subrogation clause stating that the insurance company can step into the insured's shoes to pursue liability fully. The insured (the school) therefore doesn't have the authority to call it even for the insurance company. We routinely tell offenders and their parents that the insurance company may do this and that the court will cooperate in releasing information so the insurance company can sue them. The only way to completely resolve a restitution agreement is to a) have the insurance company involved in the mediation, b) have the insurance company waive their subrogation rights in writing, or c) make the parties aware that the right of subrogation exists and might be used. (Kathleen Bird, RESPECT victim-offender mediation program, Kansas City, MO)

Twice it happened here with our school district. To avoid that, the school district's Risk Manager does not submit a claim for the damage. We have had this occur with vehicles as well. The insurance company has come back on the kids' parent for restitution. That problem was taken care of by the kids either paying only the deductible OR the victim not filing a claim. (Leslie Young, Loveland, CO)

Although there may be many reasons to question the workings of insurance companies, I don't think that suing offenders' parents for what the company paid an insured is one of them. Although this is not particularly restorative and may create a heavy burden on the families involved, it would seem to be the insurance company's right to do this. When we do high loss mediations that focus on the deductible, I suggest to the participants that some insurance companies may sue parents and kids later, despite what is agreed upon in mediation. (Warren Oster, VOMP, Clackamas County Juvenile Department, Oregon City, Oregon)

Insurance company laws vary from state to state but this is not unusual according to my experience. Sometimes in cases where the settlement is this large, attorneys have advised clients not to participate in VORP because once they start paying restitution then insurance companies can come in and do just as you've stated. In some instances, victims even contact the insurance company and let them know that the offenders have gone through court, are paying restitution, and how to go after them. I recently did a case where the victim did that and the insurance company decided not to pursue the offenders because it was "only \$2,500" but they certainly had that right. My understanding (at least in the past) is that in some cases insurance can claim restitution even before a victim can collect it from the offender. Hopefully with victim's rights that has changed but I'm sure it depends on the state. (Lorraine Stutzman Amstutz, MCC Office on Crime and Justice, Akron, PA 17501)

First, let me say that I am really, truly, no fan of insurance companies. However... .. if the company paid claims for the losses ... and if the company wasn't a party to the mediation... or even if it was a party to the mediation and it didn't accept and sign off on the mediated agreement... then the insurance company has a legal right to sue to recover what it paid on the claim. If the state has a law making parents financially liable for the offenses of their children, then the parents are sue-able for the claim.

This is a familiar scenario in many VOM programs - it comes up often with damage to cars and homes, too. When an insurance company has paid for losses, it's a good idea for the VOM program to get the company to the mediation table, if at all possible. If the company won't come, mediate (and reach an agreement), the program needs to make sure the offenders, the parents and the victims understand that NOTHING agreed to between the victims and offenders at the mediation table will affect the legal rights of the insurance company.

At many juvenile VOM meetings, with the insurance adjusters at the table, I've seen the adjusters feel so moved by the V-O reconciliation and mediation process that they have volunteered to write off their claim against the parents, asking only that their insureds receive restitution for their deductibles. After several such mediations, the insurance companies made large donations to

our county's VORP. It was great PR! Also, sometimes, with a good presentation of what the VOM program is and does, some insurance companies have agreed in advance to accept whatever outcome is reached at the mediation table - sometimes giving the victims the authority to mediate on behalf of the company's interests. At many mediations, the victims, the offenders' parents and even the offenders have said that restitution should be made to the insurance company, as well as the victim.

It is important to remember that this issue isn't just about the insurance company's legal rights. The financial harm caused by the crime was NOT just the deductible paid by the victim, but all of the financial losses caused by the crime. The offenders are not being accountable for the whole impact of their actions when they mediate restitution only for the victim's out-of-pocket losses.

It makes for a thoughtful discussion to consider whether an insurance company is really a victim of the crime, when in fact, it has been paid a premium that it calculated and requested, in exchange for the obligation to bear such losses, if and when they occur. Insurance companies are in the business of collecting premiums and bearing losses (paying benefits). So some would argue that when an insurance company pays for crime losses, it is merely completing a transaction in the ordinary course of its business, rather than being a victim of the crime. Others would argue that all of the company's policyholders are victims of the crime, because those losses will be passed onto them in the calculation of their premiums.

But whatever point of view fits for you, there is no doubt that VOM programs must grapple with these issues and fashion policies that fit with the values they wish to promote in their community, as well as addressing the legal and financial implications, and perhaps most importantly, the implications for offenders taking meaningful accountability for their offenses.

(Marty Price, J.D., Director, Victim-Offender Reconciliation Program Information and Resource Center)

The first comment that comes to mind is that the deductible was insufficient restitution. As the insurers are in a sense now the victims paying out under their policy (although they are contractually bound to do so) may be you should now mediate the insurer's claim since the amount they seek is part of the loss caused by the teens. It would be more just for the teens to pay the whole loss they caused. (Ken in Newfoundland.)

In Pennsylvania the law says that the line of succession for restitution is 1) victim 2) victim compensation program 3) other government agencies and 4) insurance companies. Insurance companies can be listed as victims if they file a claim with the court. If they do not file a claim then the insurance company can sue the youth and parents in civil court, but the most they can receive is \$1,000 per incident. When working with youths and parents, we only deal with out-of-pocket expenses; i.e. whatever the insurance does not cover. (Jon Singer, LAVORP, Pennsylvania)

No direct experience of this, fortunately, though I believe some other European countries have. But it seems to me that this is unacceptable, and could be tackled on two levels:

1. Approach the insurance companies as responsible citizens and explain that a constructive approach is more likely to lead to understanding of why the offence was committed and ways of preventing similar happenings again. In many cases the offenders or their parents wouldn't be able to pay more than a fraction anyway.

2. The legal/ethical approach: the insurance cos. are trying to have their cake and eat it. They made a contract that in return for the premiums, they would pay out if certain things happened. They did happen, the insurance should pay - period. Otherwise the insured party should demand their premiums back, because the insurance company had taken money for a risk which it was not running.

Of course I'm not a lawyer, and I haven't seen the small print of these particular contracts (Martin Wright, Ireland)

I am a former judge and lawyer...now actively practicing and teaching in the restorative justice field. The problem that you have encountered is that the insurance company was/is a stakeholder as a victim of the crime... and needs to be included in the negotiations of how to create a restorative response to the crime. I believe that Mr. Wright's view on the ability of an insurance company to recoup its money is just wrong...many companies hold a subrogation interest as part of the insurance contract. What that means is that if the company pays out a claim, it has the right to attempt to recoup the amounts it has paid from the tortfeasor (the wrongdoer). When juveniles are involved, some states hold the parents financially responsible for all or part of damages caused by their children. This situation is very common...car accidents, medical malpractice claims, other types of negligence, etc. You will not be able to simply approach an executive in the insurance company and tell them that as a policy they should not try to collect on these cases. At this point, the best thing that could be done is to have the parents request that the case go into mediation to see if they can negotiate some kind of settlement with the insurance company. The insurance company cannot be held to abide by any agreement when it was not part of that agreement. (Janine Geske, Distinguished Professor of Law, Milwaukee, Wisconsin)

Dear All - I challenge (as did Martin) the concept of automatically considering the insurance company as a victim. Harm is done to individuals and sentient beings. Corporations by definition are not beings but legal entities designed to protect individuals from both liability and personal harm. The phrase "corporate veil" refers to the protections that individuals accrue as a result of the corporation being established as an independent entity. Boards of directors are given immunity, as are employees. Families

do not have this same legal protection - arms length indemnity against personal/private loss.

As Martin pointed out, insurance companies assess their risk and establish premiums that cover both the costs of that risk - which includes payment of losses on legitimate claims - plus a profit. Schools are predictably places where adolescents make bad decisions, act impulsively, and yes - commit harm through negligence and deliberate action. The insurance premiums paid by schools already cover these obviously predictable actions.

To suggest that the insurance company should then also recover directly from the family of the juvenile offender suggests that "double dipping" suddenly became okay. The insurance company is not likely to return the premiums paid by the school if they recover costs. But they don't operate on an individual payment/individual recover process anyway. They deal in volume and probabilities - always. That is what risk assessment, actuarial tables, multiple hundreds of clients that spread the risk - and premiums that ensure profit is all about. Double profit is not a right or a compact between people in civil society. If it does not happen - it is not a harm experienced.

Insurance companies do have a contract and compact with those they directly insure. Had the school directly committed arson or deliberately destroyed its own property for the purpose of collecting insurance, the insurance company rightly has a violation of the compact and contract. They are free to not pay the claim and/or to recover the payment from the violating party. This compact and contract does not occur between the insurance company and the students and their families.

Insurance companies have chosen to exclude by contract certain risks by what they cover. Parents and families do not have this same right. Insurers have attempted to exclude damage from floods (acts of god), damage caused by persons with history of property damage/domestic violence, disease transmitted by people who knew they had the disease and other cases where the moral and civil rights of victims have been harmed. They have done so because they could not make a profit on these matters or considered the risk too great. People do not have the right to insurance (through the private sector) they are not guaranteed protection. Nor have they under any circumstances agreed to spend their personal/private resources to guarantee a profit (or double profit) for insurance companies who voluntarily in a competitive market choose to insure schools where the risks are obvious, predictable, and anticipated!

The insurance company did not experience personal losses or harm by any of its employees, its property or any violation of the contract/policy that covered the school. They are not suffering from dislocation, fear, or violation of any compact regarding personal safety. The school did not violate the policy or commit fraud in its claim for payment. Where is the harm?

Juveniles are not given legal rights - to drive, drink, enter into contracts, or marry until they are a certain age. On what basis have we determined that they can bind their families to extraordinary personal/private loss by admitting mistakes in judgment, accidents, or deliberate action that caused harm?

Restorative Justice attempts to encourage people to acknowledge responsibility and to attempt to make amends for the harm done. We make a grievous mistake if we attempt to institute practices that ensure double profit to corporations at the cost of truth and financial survival of individual families. The specific family we are aware of was advised by their lawyer to encourage their child to not acknowledge knowledge of the accidental damage he witnessed a friend cause because it would expose the family to enormous personal/private financial risk if the insurance company filed a suit against them. Where is justice, peace, and accountability in this situation?

We need to ensure that juvenile mediation sessions are confidential and that the admission of responsibility in a mediation process is not the admission of guilt in a court case or insurance claim. We need to indemnify families against the private losses they are exposed to because of the behavior of their children - just like corporations. Perhaps then we could require them to assume responsibility to expect (require) their children to acknowledge responsibility for personal actions and to do what they can to personally make amends.

We cannot make a social compact that every child has a right to health care or education. It would be impossible to think we would agree that as a society we should have laws where every family has the right to a profit - enough money to feed, clothe, and educate their children (in at least middle class style) plus take a vacation and have a right to make a claim against any corporation who required payment from them that put a dent in that profit. It should be impossible that we think that we should have such a law for private/profit corporations.

However, I would welcome (as Dale suggests) the inclusion of the business community as stakeholders in the moral/ethical development of our youth - and welcome their participation in mediation processes that have this goal as the outcome (not the profit of the insurance companies) of the process.

(Barbara Raye, St Paul, MN)

I'm no fan of insurance companies, but the plain truth is that they provide a service by managing risk. We pay premiums to cover expected losses. When the insurance company collects on subrogated claims they reduce the total losses experienced to keep our insurance premiums in line. As much as we hate subrogation, it's part of the plan to manage losses. If the insurance companies did not recover loss from tortfeasors then all their customers would pay for it in the form of higher premiums. To say that the insurance company should refund premiums (double-dipping) betrays a lack of understanding of why and how the insurance industry exists. We need to understand the circumstances of all involved, not just those with whom we are sympathetic. While I agree that making a place at the table for insurance subrogators is often not desirable or even necessary, it is a violation of trust not to inform participants of the possibility of subrogation. They should be fully informed before making a decision to proceed to agreement amongst themselves without checking into the subrogation matter. We are undermining the credibility of our programs if we lead people to believe that they have made an agreement on the "whole matter" when there are loose ends.  
Kathleen Bird

Barbara is right, on a philosophical level. Once one wanders into the territory of law things change. Insurance companies contract with their clients to pay losses, but in return are granted the right of subrogation. This means that they stand in the place of their insured when seeking recompense from the responsible party. Under the law of many states the parents of a minor are responsible for the torts of the minor. Fortunately, standard homeowner's liability insurance commonly covers these torts. However, when a minor whose parents are without insurance commits a tort, the parents are often liable. The victim's insurance company can stand in the victim's place and demand restitution. Whether this is how things ought to be is open to debate. If states had no-fault insurance where the insured's company paid for their own insured's losses without regard to fault we would be in a very different place. The legal system at present works only on the basis of fault, with the guilty party owing either the victim or the victim's insurance company restitution.

This is why our mediators are trained to go into insurance issues with both victim and offender. We don't collect money for insurance companies, but neither do we want to set our offenders up for liability without their knowledge. (Duane Ruth-Heffelbower, VORP Administrator, Fresno, CA)

Companies often have contractual and legislative right to take such action. And absolutely - to not inform people of the legal right of subrogation is a violation of our obligation to them as we encourage mediation. People must be aware of their rights and the rights of others in all cases.

But there is a very big difference between corporations and individuals and the exposure/risk they can choose to take and the consequences they endure. That is my point. Making a profit while managing risk is the purpose of insurance companies. They are not a nonprofit or government service aimed at ensuring a community value. If they could not make excess money over expenditures they would get out of the business - as they have done in several situations and in several states whose legislation was not to their satisfaction. That makes it harder for me to see them in a "victim" role. Stakeholder role yes - victims no.

We are seeing record profits and massive wealth and asset growth by health care insurers - and no drop in premiums. It is naive to think that subrogation recovery success reduces premiums. It reduces loss/pay out, but the risk of the event continues to be the same. Our premiums are based on risk - not subrogation recovery. Now, if we were stockholders, the recovery may impact our per share earnings since it affects the bottom line. But, I encourage us to not apply public or nonprofit logic to the business of profit. It just works differently. (Barbara)

Let me just add one thing to Kenneth's comments below, particularly about the mindset that "oh, no one was hurt; insurance will cover it." I don't perceive the insurance companies as "real victims," it is actually the insurance-buying public and the actual victim filing the claim whose rates may be affected, and that may include the offender as well. It's the same point we make about shoplifting from big companies: it's not the corporation that is "victimized" -- it's the buyers and the store personnel. (Phyllis Lawrence, National Association for Community Mediation)

I think I share approach with Duane and Dale.

In most of Europe it takes much to put liability on parents for damage done by their children. Children are regarded as independent agents causing the loss. Parents are only liable for their children's damages if their actions or clear lack of actions cause damage (Bonus Pater Familias). Statistically it is very rare that parents are sued for reimbursement.

Whenever a victim reveals that insurance companies cover damages, or if the mediator surfaces that fact, the insurance company will be invited to the mediation in order to avoid empty chairs. On the other hand the victim is free not to collect coverage from the insurance company, and then the insurance company is not needed in the process.

It may be regarded a malpractice on part of the mediator if the issue of insurance coverage is left out of the mediation when it is likely that insurance coverage is the typical situation.

In Europe any companies and organizations are regarded equal with individuals. They are part of the community with equal

rights and obligations. It is not odd in this context to examine the emotions, shame, guilt, inhibition, hopes and visions in companies or organizations. They are normally there which matters. (Hans Boserup, Denmark)