

## New York Preserves Subrogation Rights

Lian Skaf

*The Subrogation Strategist*

8.11.23

The insurer's right of subrogation is equitable in nature, even if not based in contract. However, since the insurer steps into the shoes of its insured and is limited to the rights of its insured, an integral part of the investigation process is determining what rights the insured has. Whether or not the insured can settle with the tortfeasor and that whether the settlement would also apply to the subrogated carrier is a question the Supreme Court of New York, a trial court, recently addressed.

In *Utica First Ins. Co. v. Homeport I LLC, et al.*, No. 150448/2022, 2023 N.Y. Misc. LEXIS 3087 (N.Y. Sup. Ct.), the plaintiff insurance carrier's insured, SI Waterfront Management Inc. (SI Waterfront), owned and operated a restaurant called Wynwood at 24 Navy Pier Court in Staten Island, New York. The owner of the property was Homeport I LLC (Homeport). Significant construction work pertaining to plumbing and draining lines at the property was done by Ironstate Holdings, LLC (Ironstate), the plumbing portion of which was conducted by subcontractor Claire Construction Corp. (Claire). As a result of the construction work, on June 8, 2021, SI Waterfront allegedly sustained property damage from flooding.

Utica First Insurance Company (Utica First) began making payments to SI Waterfront for the loss with an advance of \$50,000 on July 21, 2021. It made several more payments to the insured, with the last two coming on March 31, 2022. On September 20, 2021, SI Waterfront allegedly entered into a settlement with Homeport.

Utica First filed suit on January 12, 2022, against numerous defendants, including Homeport, Ironstate and Claire. Claire filed a pre-answer motion for summary judgment/motion to dismiss based, in part, on its contention that the plaintiff could not recover from Homeport due to the settlement and, thus, also could not recover from Homeport's subcontractor, Claire.

The plaintiff opposed the motion on several grounds, including that both it and Homeport's insurers were not parties to the settlement. The plaintiff also noted that it placed Homeport on notice of its intent to subrogate on June 24, 2021, well before the settlement.

The court ultimately dismissed Claire's motion. The court noted that the sworn proof of loss by the insured that accompanied the initial advance stated that the insured could not release subrogation rights. Additionally, the court focused on the fact that the plaintiff carrier sent a notice letter with specific information regarding the potential claims and damage to both Homeport and Ironstate.

Still, although the court noted the importance of the notice letter sent by the plaintiff, it also said that this was not a determinative factor in its holding for the plaintiff. Instead, it held that the plaintiff had an equitable right of subrogation that "applies even if the tortfeasor does not have direct knowledge of an insurer's right to subrogation but possesses information which would reasonably put the tortfeasor on notice of the insurer's right."

This case is important because it reinforces the subrogation rights of the carrier, even in the face of a rogue settlement by its insured and a tortfeasor. Although the court found this right to be independent of a specific notice requirement, it still stated that the adverse party had to have information that would reasonably lead the settling party to be on notice of potential subrogation rights. The easiest way to ensure this exists is to send out a notice letter. Thus, getting notice letters out early and including as much information as possible is key. Furthermore, since the court looked at when a payment was made as the starting point for the assumption of subrogation rights, encouraging carriers to make advances and/or early payments when a claim is clearly covered can also be helpful.

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only and you are urged to consult a lawyer concerning your own situation and legal questions.