

Commercial Insurance Update

Topics Affecting Buyers of Commercial Insurance

MSP C 12/2007 – “Waivers of Subrogation”

December, 2007

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Waivers of Subrogation

What They Are, How They Work, and What You Need to Know

By Jeffrey W. Cavnignac, CPCU, ARM, RPLU, CRIS

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Dictionary.com defines subrogation as:

1. To put into the place of another;
2. Substitute for another;
3. Civil law “...to substitute [one person] for another with reference to a claim or right.”

The best way to explain how subrogation works in the context of insurance is with an example. Let’s assume that General Partners LLC is building a commercial shopping center. One of its subcontractors, Plumbing Corp, is doing some welding at the job site, and through its negligence, a fire starts in the building and the building is destroyed.

Because General Partners has a builder’s risk policy (a first party property policy that covers damage to property under construction) with ABC Insurance Company, the damage is covered, and ABC will pay the claim. However, the damage was caused by Plumbing Corp, and General Partners has a legal right to recover against Plumbing Corp. Since General Partners has been paid by ABC Insurance Company, General Partners’ right of recovery (subrogation) passes to ABC Insurance Company, which can pursue Plumbing Corp for payments made to General Partners. In other words, once General Partners LLC has been made whole, its rights of recovery against Plumbing Corp are subrogated to ABC Insurance Company.

The phrase “waiver of subrogation” means that the right to subrogate has been waived. Waivers of

subrogation are commonly required in contractual agreements. They are specifically addressed in most insurance policies. There is some confusion, however, because every policy treats subrogation differently.

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Some allow waivers, others specifically do not, and certain policies are unclear.

Even though an insurance company's right to subrogate already exists under the law, most insurance policies contain specific provisions dealing with subrogation. The subrogation provisions do not change the insurance company's legal rights. They are intended to remind the insured what he/she can and cannot do relative to these rights.

I will address the main coverages that are usually affected by subrogation, but this is not an all-inclusive list. Recognize that, in general, I'll be discussing standard insurance industry forms. Any manuscripted forms should be specifically reviewed.

Commercial General Liability Insurance

The Insurance Services Office (ISO) Commercial General Liability Form (CG 00 01) includes a provision pertaining specifically to subrogation. Condition 8 of this form reads as follows:

8. *Transfer of Rights of Recovery Against Others to Us.*

If the insured has rights to recover all or part of any payment we have made under this coverage part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us to enforce them.

This provision implies that the insured can waive rights of subrogation if it is done in writing before a loss although case law does not support this 100%. In general, this is how the provision is interpreted.

Nevertheless, to remove all doubt, ISO has made available an endorsement entitled "Waiver of Transfer of Rights of Recovery Against Others to Us" (CG 24 04). This endorsement expressly eliminates the insurance companies' rights to subrogate against those entities listed in the schedule. Although this endorsement simply restates what the policy actually grants, it does serve a purpose. It documents the fact that the insurance company is aware of the contractual agreement between the insured and the person named in the schedule and also serves as evidence to the individual named in the schedule that rights have been specifically waived.

2008 FOCUS Seminars

Cavignac & Associates' FOCUS Room
Bank of America Plaza
450 B Street, 18th Floor, San Diego, CA

- Disaster Recovery Program: Are YOU Prepared?
Thursday, January 10, 2008 — 8:00 AM - 10:30 AM
- Post Accident Response Training
All Loss Types
Friday, January 18, 2008 — 9:00 AM - 11:00 AM

All training sessions available to our clients
Reserve early — seating is limited!

For more information about upcoming seminars:

- Visit our Web site at <http://www.cavignac.com/home.html>
- Contact Darcee Nichols at dnichols@cavignac.com or 619-744-0596

NOTE: Due to the high demand for our seminars and the limited space available, we regret that we are **unable to provide refunds or credits with less than 72 hours advance notice** of cancellation.

Commercial Auto Insurance

The standard ISO Business Auto Coverage Form (CA 00 01) has a very similar subrogation provision to that provided in the Commercial General Liability policy. The ISO Commercial Auto subrogation provision read as follows:

8. *Transfer of Rights of Recovery Against Others to Us.*

If any person or organization to, or for whom we make payment under this coverage form, has rights to recover damages from another, those rights are transferred to us. That person or organization must do everything necessary to secure our rights and must do nothing after "accident" or "loss" to impair them.

It is important to note that this provision pertains to both liability and physical damage. An insured can waive the insurance company's rights if it is done before a loss (see above). Interestingly, there is no standard endorsement available for automobile coverage similar to the CG 24 04, which is available under a general liability policy. Perhaps this confirms the

fact that no such endorsement is necessary since the policy form already allows the waiver.

Professional Liability Insurance

There is no standard professional liability form – professional liability policies are all written on a non-standard basis. About half of these policies specifically prohibit waiving an insurance company’s rights either before or after a loss. This can be extremely problematic for design professionals. It is not uncommon to see a contractual requirement that the design professional waive rights of subrogation on all the policies affected by a contract.

Design professionals need to check their policies to see if they are allowed to waive subrogation rights. Even if they are, I generally recommend that rights of subrogation *not* be waived under a professional liability policy. A professional liability policy is typically written with a substantial deductible. In the event of claims in which design professionals pay their deductibles, their insurance companies’ ability to subrogate against the other party might end up with the design professionals’ deductibles being reimbursed.

Commercial Property and Inland Marine Insurance

Although most property forms are similar to commercial general liability and auto liability coverages with regards to waivers of subrogation, there are some differences.

Some manuscripted forms, particularly inland marine policies, may specifically deny the insured the right to waive subrogation. Still other forms go further than general liability and auto coverages. The ISO Commercial Property Conditions Form, for example, expressly grants the right to waive subrogation by the insured.

I. Transfer of Recovery Rights

If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent

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of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you may waive your rights against another party in writing.

1. *Prior to a loss to your Covered Property or Covered Income.*
2. *After a loss to your Covered Property or Covered Income only if, at the time of loss, that party is one of the following:*
 - a. *Someone insured by this insurance;*
 - b. *A business firm:*
 - (1) *Owned or controlled by you; or*
 - (2) *That owns or controls you; or*
 - c. *Your tenant.*

This will not restrict your insurance.

Although this clause includes the standard warning about impairing the insurance company’s rights after loss, it does provide exceptions to this requirement which allow the insured to waive subrogation rights after a loss under the following circumstances:

- *When the other party is also an insured under the policy*
- *When the other party is the parent or subsidiary of the name insured*
- *When the other party is the named insured’s tenant*

The first two exceptions are not really a big deal. In the first case, in general an insurance company can’t subrogate against its own insured, and in the

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second case it would be rare that both entities were not named on the policy.

The third case, however, pertaining to the named insured's tenant, is significant. If the tenant caused damage to the named insured/landlord's property, the insurance company would have the right to subrogate against the tenant. In order to maintain a good relationship with the tenant, the named insured/landlord may choose to waive their rights, and the property policy specifically allows them to do this after a loss.

It should be pointed out that most standard industrial leases and office leases contain what is known as a "mutual waiver of subrogation." Basically, if the landlord causes damage to the tenant's property which is insured under the tenant's policy, or the tenant causes damage to the landlord's property which is covered by the landlord's policy, both parties agree to waive their rights against the other. The mutual waiver of subrogation, in our opinion, is an excellent provision and should be included in all premises leases. To the extent insurance coverage applies, it eliminates the possibility of litigation after a loss.

Workers Compensation Insurance

Unlike standard general liability, automobile and property policies, the California workers compensation policy does not allow an insured to waive the insurance company's right to subrogate. Section G of Part I reads (see column to right):

Recovery from Others.

We have your rights, and the rights of persons entitled to the benefits of this insurance, to recover our payments from anyone liable for the injury. You will do everything necessary to protect those rights for us and to help us enforce them.

Even though insureds cannot unilaterally waive their insurance companies' rights, they can have their policies endorsed to allow it. Generally speaking, an insurance company will charge a premium of 2-5% of the applicable premium for a specific job to provide this endorsement. Some companies will also provide a "Blanket Waiver of Subrogation." This would pertain to any projects upon which the insured is required to waive subrogation. The charge is usually around 2%, but it is based on the entire policy premium.

Best Practices

It is important to know whether or not you can waive rights of subrogation, and under which policies you can do this. In addition, you should understand under what circumstances that it may or may not make sense to waive subrogation. ✂

Disclaimer: This article is written from an insurance perspective and is meant to be used for informational purposes only. It is not the intent of this article to provide legal advice, or advice for any specific fact, situation or circumstance. Contact legal counsel for specific advice.



Mandatory: Earned Income Tax Credit (EITC) Notice to Employees

Effective January 1, 2008, all employers are required to notify all of their employees of the federal Earned Income Tax Credit (EITC).

Assembly Bill 650, Chapter 606 (Lieu and Jones) requires any employer who is subject to, and is required to provide unemployment insurance, to employees to notify all employees that they may be eligible for the EITC. Employers shall give notification to employees within one week before or after the Wage and Tax Statement (Form W-2) or Miscellaneous Income (Form 1099) is given. Employers may provide the EITC notification with or at the same time as the Form W-2 or Form 1099 is given to employees. This new law also requires the employer to process the IRS Form W-5 for advance payments of the EITC, if requested by the employee.

You must provide notification to your employees by either handing it directly to your employee or mailing it to your employee's last known address. **POSTING OF THIS INFORMATION ON AN EMPLOYEE BULLETIN BOARD WILL NOT SATISFY THE NOTIFICATION REQUIREMENT.**

The notification shall include instructions on how to obtain any notices available from the Internal Revenue Service for this purpose, including, but not limited to, the IRS Notice 797 and Form W-5, or any successor notice or form, or any notice created by you, as long as it contains substantially the same language as the sample notice in the following link: <http://www.edd.ca.gov/EarnedIncomeTaxCredit.pdf> ✂



Five 2008 New Year Resolutions for Human Resource Managers

By Sandra W. Rugg, SPHR
Director of Human Resources

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Next year” is just a week away! Here are five important activities that will get 2008 off to a great start!

1. Update all of the required notices in your Orientation and Termination folders:

Orientation Folder

- I-9 – Employment Eligibility Verification (Rev. 06/05/07) <http://www.uscis.gov/files/form/i-9.pdf>
- W-4 Form – Employee Withholding (2008) <http://www.irs.gov/pub/irs-pdf/fw4.pdf>
- DE-4 – CA Employee Withholding (2007) <http://www.edd.ca.gov/taxrep/de4.pdf>
- DE 2515 – State Disability brochure (Rev.55 (12-07)(INTERNET) <http://www.edd.ca.gov/direp/de2515.pdf>
- DE 2511 – Paid Family Leave brochure (Rev.4 (1-07) <http://www.edd.ca.gov/direp/de2511.pdf>
- DFEH 185 – Sexual Harassment brochure (11/07) <http://www.dfeh.ca.gov/publications/publications.aspx?showPub=15>
- Workers Compensation Notice brochure <http://www.dir.ca.gov/dwc/NoticePoster.pdf>
- Employee Predesignation of Personal Physician for WC claims http://www.dir.ca.gov/dwc/FORMS/DWCForm_9783.pdf
- Employee Predesignation of Chiropractor or Personal Acupuncturist http://www.dir.ca.gov/dwc/FORMS/DWCForm_9783_1.pdf
- Employee Notification Re: Medical Provider Network http://www.dir.ca.gov/dwc/MPN/MPN_SampleInitialWrittenEmployeeNotificationLetter.pdf

Termination Folder

- DE 2320 – Rev. 54 (11 06) (INTERNET) <http://www.edd.ca.gov/uirep/de2320.pdf>

- HIPP Notice – Health Insurance Premium Payment Program <http://www.dhs.ca.gov/mcs/psd/TPL/PDFs/cobraeng.pdf>
 - Notice of Change in Relationship (customize for your company) http://www.cavnac.com/pdfs/Chg_Rel_Ntc_2008.pdf
2. Post the required updated 2008 Employment Law Posters and your 2008 Holiday Schedule. <http://www.calchamber.com/Store/Products/PLE2008>
 3. Have all employees review your Sexual Harassment Prevention policy and sign an Acknowledgment and Agreement that they will adhere to the company policy prohibiting harassment, retaliation or discrimination.
 4. Review and update your Employee Handbook.
 5. Attend an Employment Law Update program to ensure your knowledge related to changes in the law for 2008 is current, and to become knowledgeable about areas of California Employment Law that pose the largest risk for your company. Two excellent programs are available in January:
 - a. The California Chamber of Commerce is holding a Labor Law Update program in San Diego on January 11, 2008. <http://www.calchamber.com/Store/Products/LS1>
 - b. The San Diego Chapter of the Society for Human Resource Management is holding its annual Law Day Conference at the Marriott Mission Valley from 7:30 am to 3:00 pm on January 16. The flyer is on our Web site. http://www.cavnac.com/pdfs/Law_Day_2008.pdf

If you have questions, would like more information, or need samples of the above-referenced documents, please contact me at srugg@cavnac.com or by phone at 619-744-0569. ✨



Healthy Portion Sizes

Courtesy of Employee Benefits Department

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Did you know that in the 1980s, a typical bagel had 140 calories and a 3-inch diameter? These days, a bagel averages 6 inches – and a whopping 350 calories! With 64-ounce fountain drinks and “mega packs” of snack foods readily available, massive restaurant entrees, and the ability to “upsized” fast food for pennies more, it is easy to get confused about proper portion size.

What is a Portion?

A “portion” can be thought of as the amount of a specific food an individual eats for a meal or snack. Many factors affect food portions, such as the individual’s age, gender, activity level, appetite, and where/when the food is obtained and eaten.

What is the Difference Between Portions and Servings?

A portion is the amount of food you **choose** to eat. There is no “standard” portion size and no single “right” or “wrong” portion size. A serving is a standard amount (issued by the USDA) used to help give advice about how much to eat, or to identify how many calories and nutrients are in a particular food. This is the information located on the nutritional label of a food product.

For example:

You eat a sandwich with 2 slices of bread.

- The USDA’s Food Guide Pyramid serving slice for bread is 1 slice (www.mypyramid.gov)
- Your portion is 2 slices, which equals 2 servings

Determining Healthy Portion Sizes

For a general idea of the amount of food you should be consuming, use the following recommendations.

- A serving of meat is about 2 or 3 ounces – about the size of a deck of cards, or the palm of your hand.
- One serving of grains is equal to one slice of bread, one ounce of cereal, or half a cup of pasta or rice.
- A serving of fruit or vegetables is equal to one piece of fresh fruit or vegetable, half a cup of chopped, or $\frac{3}{4}$ cup of either juice. In general, however, it’s not as necessary to be vigilant about vegetable and fruit intake, as any amount is healthy – just be aware of the sugar content in fruit.

The key to any meal is to have three-fourths of your plate covered with vegetables, and one-fourth with meat or pasta.

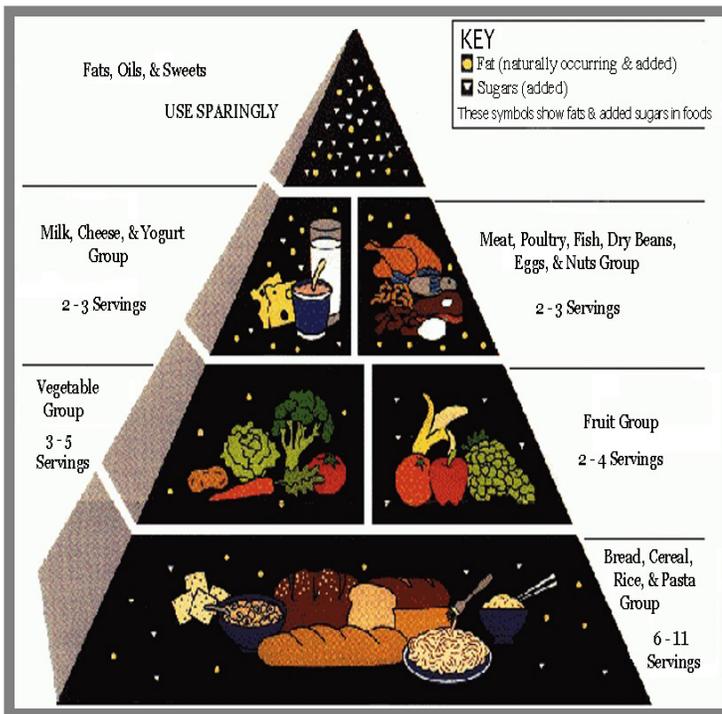
Assuming a 10-inch dinner plate, the following photos show proper portion sizes:



Break Down Your Meal

It might be easier to figure out how much you are consuming if you actually stop and mentally dissect how much you are about to eat. For example, on the following page is how you would break down a spaghetti dinner.

Portions (continued on page 7)



According to the above, that **one meal** satisfied the recommended servings of meat for the **day**, and possibly even grains as well. When taking into account other meals, snacks, and beverages consumed throughout the day, it is easy to see why so many Americans end up overeating.

It's important to follow the Food Guide Pyramid for guidelines on how many servings to consume each day (see chart to left). Your portions do not have to match the standard serving size – they can be smaller or larger. However, the amount you eat throughout the day should match the **total** amount of food that is recommended.

Tips for Choosing Sensible Portions

When Eating Out

- Choose a “small” or “medium” portion, or if at dinner, see if you can have the “kids” or “lunch” portion.
- If the main dish portions are larger than you want, order an appetizer or side dish instead, or split the main entrée with a friend.
- Never force yourself to keep eating. When you are full, stop. Take the rest home and enjoy it as a meal the next day.
- Stay away from “all-you-can-eat” buffets.

At Home

- Every so often, measure out the typical portion of foods you eat often, using standard measuring cups. This will help you estimate the portion size – and you'll likely be surprised to find out exactly how much you are eating.
- Use a smaller plate for your meal. People tend to eat more out of habit when it's from a bigger plate.
- Put sensible portions on your plate at the beginning of the meal, and don't go back for seconds. Chances are, if you sit back and let your meal digest, you will find you are satisfied in about 10-15 minutes. ✨

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Portions (continued from page 6)

Spaghetti Noodles

- Your portion: 2 cups
 - Serving (according to Food Guide Pyramid): ½ cup
- Number of pasta servings: 4

Tomato Sauce -

- Your portion: 1 cup
 - Serving: ½ cup
- Number of sauce servings: 2

Meatballs -

- Your portion: 6 ounces
 - Serving: 2-3 ounces
- Number of meatball servings: 2-3

Don't forget to calculate any appetizers, drinks, or side dishes you consume with your meal as well; for example:

Garlic Bread -

- Your portion: 2 slices
 - Serving: 1 slice
- Number of bread servings: 2

Soft Drink -

- Your portion: 24 ounces
 - Serving: 12 ounces
- Number of beverage servings: 2



Community Bulletin Board

"Neighbors helping neighbors in San Diego"



Celebrating Heroes in Our Community

Please join over 800 corporate and community leaders from all over San Diego County on May 9, 2008 to celebrate the heroes in our community who make life better for seniors who otherwise might be forgotten.

This is Senior Community Centers' annual fundraising event to raise support for the programs and services that provide meals, housing and health services to thousands of elderly men and women living in poverty in San Diego.

Visit our Web site at www.servingseniors.org or call (619) 235-6572 / Extension. 305 to learn more about the impact your participation could have on this population. ✨



"Feline Festivus" a Success!

The San Diego Humane Society's **Feline Festivus** event on the weekend of December 11-12, 2008 found new homes for 54 animals including 25 adult cats, 17 kittens, five dogs, three puppies, and four small animals.

However, many cats are still waiting for families of their own. Shelters countywide are faced with an abundance of cats, and many facilities are nearing capacity. Please visit the Society's Web page at

http://www.sdhumane.org/site/PageServer?pagename=ter_Adoptathon

to watch the progress as the Society strives to reach its goal: **To find homes for 100 of its adoptable cats by the end of 2007!**

To help find homes for all these fabulous felines, the Society is offering incentives:

- First time adopters who adopt a cat at the standard adoption fee of \$100 can adopt an second cat with the Buddy Fee waived.
- Adopters who took a cat home from the Society at any time during 2007 also qualify for the fee waived through the end of the year. ✨



Monarch School's

2008 "Diamond in the Rough" Gala

- Mark your calendar for January 19, 2008
- Reserve your seat **NOW!**



Not all kids are given the same opportunities. Monarch School provides accredited education to homeless and at-risk kids while caring for basic needs such as health care, food, clothing and personal hygiene. Your help can make a difference!

Monarch School is the sole beneficiary of the 2008 "Diamond in the Rough" Gala at the Manchester Grand Hyatt. The incomparable **Natalie Cole** is the headliner!

To make reservations, donate auction items, or for sponsorship information, please contact Paula Kelly at (619) 685-8242, Extension 227, or visit Monarch School's Web site at www.monarchschoools.org. ✨