

OVER PROMISE, UNDER DELIVER: PITFALLS OF A HIGH VOLUME PRACTICE

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Low dollar uninsured motorist cases are synonymous with a high volume subrogation practice. To many, this area of subrogation practice is often considered the least desirable and least profitable of all subrogation areas. For those seeking to break into the subrogation craft, the barriers to entry are low, given that it is very inexpensive to file a typical auto subrogation case and in the vast majority of these files there will be no need for depositions, experts and the other traditional expenses of litigation. Given these low barriers to entry, an insurance carrier must be highly selective when referring cases in volume to a law firm.

Recently, my firm took over the caseload from an attorney who could no longer manage a high volume subrogation practice and was also hired as a consulting expert in a malpractice suit filed against a high volume law firm that failed to adequately manage its subrogation cases. In both instances, the lawyers involved made errors that resulted in blown statutes, lost recovery and horrible returns. In the malpractice case, a large insurance carrier sent some 4,000 files to a firm before the lawyers' deficiencies were exposed. Before entrusting a large number of cases to a law firm that promises to deliver great results, consider the following practice pointers developed after more than twenty years in a high volume practice.

1. Ask the law firm how it will allocate its resources to your subrogation cases. There is absolutely nothing wrong with a law firm that offers both collection and litigation services. Trouble starts, however, when the law firm is taking an insurance company's subrogation files and intends to devote most of its resources to the collection side, leaving little or minimal effort to the litigation side. When a law firm emphasizes collection over litigation, it creates a number of difficulties that are cost-drivers. For instance, it has been our experience that uninsured motorists are more transient than insured motorists. The longer the amount of time spent in the collection phase, the more likely that the claimant will move. If the claimant moves during the collection phase, the costs associated with location services and multiple service attempts during the litigation phase are driven up. Additionally, if subrogation is not the bread-and-butter of the firm's practice, an insurance company should evaluate whether its referrals will receive top priority.

Practice Tip: One indicator that a law firm will devote most of the firm's resources to the collection side is indicated by the number of lawyers employed by the firm. Likewise, if only one attorney of many is accepting subrogation referrals that is a good indication that subrogation is not a firm-wide priority.

Solution: Establish a realistic structure for collection efforts. Given the sheer numbers of uninsured motorist cases, it is almost impossible for an insurance professional to oversee the collection efforts of outside vendors on a case-by-case basis. Therefore, establishing a framework from the time that the relationship is formed with the outside vendor is mission critical. For example, if a claimant has not responded to calls or demand letters or has responded in a combative manner, it makes little, if any, sense to continue such collection efforts over an extended period of time. Instead, the framework that is established between the outside vendors and the insurance company should clearly stipulate that if after an agreed upon time, if the claimant breaks promises to pay or fails to respond, collection efforts should be terminated and litigation efforts commenced immediately.

2. Require reporting on a monthly basis. It is impossible to manage a high volume practice without technology. If a law firm is soliciting high volume subrogation referrals but is unable to generate reports with the technology in use at the firm, an insurance company should be wary of the firm's abilities to meet the insurance company's high volume subrogation needs. Clearly, technology magnifies efficiency and reduces costs which translates to greater productivity. Therefore, it is incumbent on anyone attempting to manage a high volume business to have the best technology available.

Practice Tip: Paperless files are not a good fit for a high volume litigation firm during the pre-judgment phase. In the malpractice example described in the beginning of this article, the law firm failed to retain copies of pleadings and other documents. If a law firm does not have the capacity to store a physical copy of an active file that has not been reduced to judgment, this is a red flag to an insurance professional. From the insurance company's perspective, it would be incredibly costly and time intensive to recreate physical files so that these matters could be transferred to another law firm if an insurance company were to become dissatisfied with the service provided by the current law firm.

Solution: Ask the law firm to provide you with information in a useful format. Without adequate technology, a firm cannot realistically manage a high volume of referrals or produce meaningful reports. Assuming such technology exists, a monthly report could identify active cases, provide the current status on files, state the date the case was reduced to judgment and much more. These are examples of only a few nuggets of information that should be extracted and provided in a report. Of course, such reporting is client-driven and the insurance company, as the client, should never forget that the law is still a service-driven industry and demand top service from the law firm.

3. Request expense-to-recovery ratios and other scorecard indicators of the firm's past performance. One of the greatest myths of uninsured motorist subrogation is that it is not cost-effective to pursue these cases in litigation. A law firm should be eager to share objective data that demonstrates a proven track record of recovery success. It is helpful for an insurance company evaluating a law firm's performance to know how much the firm recovers, on a average, for every case referred as well as what the cost-to-recovery ratios have been.

Practice Tip: Past performance indicators are demonstrative of a firm's overall attitude towards subrogation cases. If a law firm treats low dollar subrogation cases as bottom-of-the-barrel cases, typically, the firm's efforts will be commensurate of this attitude.

Solution: Insist that your law firm provide scorecard indicators of performance. It is also important that insurance professionals and law firms survey each other so that areas for improvement can be readily identified. A law firm that does not have the technology to extrapolate such data or an interest in evaluating its own past performance may not be a good fit for a high volume of referrals.

4. Encourage your high volume law firm provider to develop different strategies. The costs associated with uninsured motorists are a substantial and growing problem throughout the nation. As the number of uninsured motorists grows, the cost to insurers and their customers must necessarily increase to compensate for the losses caused by this group. A law firm serving the high volume subrogation needs of insurance companies is on the front line and is uniquely situated to propose strategic efforts that encompass both traditional debt collection and litigation methods.

Practice Tip: A popular approach to the uninsured motorist case is to negotiate an installment contract with the claimant to make small, monthly payments to repay the subrogation damages. While common in this industry, this approach is very short-sighted. If the debtor defaults, a breach of contract suit must be filed and the insurance company would necessarily incur the costs for filing suit, service and location services. As a practical matter, filing a "friendly" suit when the claimant first expresses an interest in repaying the debt is optimal. While the filing fee is being incurred, an agreed judgment will eliminate the need for service of process and location services in the event of a default in payments. A judgment also places some finality on the claim which is a benefit to an insurance company that closes files when a judgment is entered. Lastly, for states with Safety Responsibility Laws, a judgment may extend the duration of the drivers license suspension which will lead to increased recovery.

There is no secret that in the numbers driven insurance industry, the success of a subrogation unit will rest on how many dollars the unit has recovered for the company and at what cost to the company. It is important for insurance professionals to select the service providers for their high volume matters with care. Likewise, it is important that law firms that maintain both collection and litigation practices recognize limitations and exploit strengths. An insurance company referring a large volume of cases should recognize the pitfalls in order to maximize recovery results.

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