

## Subrogation key fact sheet

### What are subrogated rights?

- Where an insurer has paid out an insurance claim under any type of indemnity insurance policy, the right of subrogation allows the insurer to "step into the shoes" of the policyholder, and to use the policyholder's name to bring proceedings against a third party who was responsible for causing the losses which were paid out by the insurer under the policy and also any uninsured losses.
- Pursuant to the principles of subrogation, an insurer is also entitled to recover from the policyholder any sums the policyholder may have secured themselves from a third party as compensation or ex-gratia payments so long as such payments were made to the policyholder with the intention of reducing or extinguishing the loss against which the policyholder seeks indemnity from the insurer. For example, furlough payments received by policyholder under the COVID-19 furlough scheme.
- It is common for an insurance policy to set out an insurer's right of subrogation. The insurer usually pays for the legal costs of pursuing a subrogated recovery action. The insurer does not necessarily need the policyholder's consent to enforce the subrogation rights, although it is of course preferable to have the policyholder's cooperation from a practical perspective as the policyholder will have the relevant documents and information needed to pursue the third party.

### Practical Considerations

- Check the limitation period, pursuant to the [Limitation Act 1980 \(the 1980 Act\)](#), in respect of bringing recovery proceedings against a third party. In essence, consider how long do insurers have to pursue a recovery action against the third party before the claim becomes time barred pursuant to the 1980 Act. Consider whether a standstill agreement needs to be agreed with the third party to delay bringing court proceedings or whether a protective claim form needs to be issued in the court to protect the subrogated claim.
- Check the financial viability of the third party and/or whether it is backed by insurance which will respond to provide coverage to the third party and ultimately pay the subrogated claim. [The Third Parties \(Rights Against Insurers\) Act 2010 \(the 2010 Act\)](#) allows a subrogation action to be pursued directly against the insurer of an insolvent third party. The 2010 Act recognises that a claimant will potentially lack information as to the insolvent third party's insurance arrangements. As such, pursuant to section 11 and Schedule 1 of the 2010 Act, a claimant is entitled to request certain information about the insurance arrangements from either the insolvency practitioner of the insolvent third party and/or its legal representatives.
- Is there a large uninsured loss suffered by the policyholder? If so, these losses need to be claimed under the subrogation action and in such circumstances, the insurer and the policyholder should enter into a subrogation apportionment agreement at the outset of a recovery action. Such an apportionment agreement should specify how the recovery sums will be distributed upon any settlement being agreed with the third party. In the absence of such an agreement, the "pay up and recover down model" as laid down in the case of *Napier and Ettrick (Lord) v R F Kershaw Ltd and Others [1993] 1 All ER 385* would apply which will result in the policyholder recovering its uninsured losses first, followed by the insurer recovering its outlay, with any funds remaining going towards the policyholder's excess. If the settlement sum is not sufficient, the insurer could be out of pocket if a large uninsured loss is claimed.