손해사정연구 제7권 제1호 2015. 02

재물보험사고 타보험조항 처리에 따른 실무상 문제점 고찰

(The Study on the Problem Caused by Dealing Other Insurance Clause in Property Insurance Agreement)

신재명*
Jaemyoung, Shin

<국문초록>

1996년 5월경 손해보험사에서 협약을 맺어 임대인과 임차인 또는 원청자와 하청자가 동일 목적물에 대하여 각각 보험을 가입하고 이들의 보험가입금액의 합계액이 보험가액을 초과할 경우는 「중복보험처리」하고, 임대인(또는 원청자)의 보험자는 임차인(또는 하청자)에 대한 대위권 행사를 포기하기로 하였으나, 손해보험사간 협약은 강제화된 법률규정이 아니며, 약관에 '대위권행사를 포기하겠다'는 취지의 조항을 삽입하여 놓지도 않았기 때문에 협약을 지키지 않는 보험사들이 점차 늘어났고, 현재는 협약을 무시하고 해당 보험자의 편리에 따라 대위권을 행사하는 등 현재 실무상 많은 혼란이 야기되고 있는 실정이다(예컨대 임차인이 건물 화재에 대해 전부보험을 가입해 두었는데 이와 별개로 임대인 또한 건물에 대하여 화재보험을 가입한 상태에서, 임차인의 과실에 의한 사고가 발생하면, 약관상 타보험조항에 따라 해당 보험금을 지급한 임대인측 보험사가 임차인에게 보험자 대위권을 행사하게 되고, 이런 임대인측 보험사의 법률행위 때문에 피구상자가 되어버린 임차인은 전부보험을 가입했음에도 불구하고 구상금을 변제하여야할 처지에 놓이게 되는 모순이 발생하게 된다).

이에, 임차인 보험사의 독립책임액을 벗어나는 금액에 대하여는 임대인측 보

* 손해사정사, 국민대 법무대학원 손해사정전공

험사가 대위권을 행사하도록 하는 것이 합리적이며, 따라서 약관상 타보험조항 처리 시 보험금의 지급순서를 정해 '중복계약'이라 하더라도 피구상자의 지위에 있는 자의 보험사에서 독립책임액 만큼 먼저 지급하고 나머지 부족금액은 보험자대위권 행사자가 지급키로 하며, 그 지급금액에 대하여 피구상자에게 대위권을 행사하도록 하는 약관의 개정이 필요하다.

※ 국문 주제어 : 보험자대위권, 타보험조항, 중복계약, 비례분담, 1차위험담보, 2차위험담보, 대위권 포기

Ⅰ. Introduction

Properties are, due to their nature, often insured in several different products under same purpose. In that case, concerning the purpose of the insurance, various financial interests are established on the insureds, and according to the rule of profit prohibition, other insurance clause from the insurance policy condition is employed to make several insurers divide the payment of claims under two different methods of payment sharing[1].

However, examining current insurers' handling of other insurance clause in practice, contradiction occurs. Suppose a lessee was insured on a full insurance against fire accidents while the lessor was discretely insured under the same kind of insurance, and the former caused an accident; in this case, according to other insurance clause of the terms, insurer of the lessor who have paid the relevant amount of coverage will exercise the subrogation right onto the lessee.

So, because of the legal action of the lessor's insurer, lessee gets to face the necessity of reimbursing the recourse amount even though he/she has a full insurance contract. Based on the problem analysis of this case, reasonable solutions were considered on the following; and in conclusion, the author's view will be stated on what is desirable to protect the rights and interests of insurance consumers.

Ⅱ. Insurance Payment Methods in Other Insurance Clause

In practice, it is common to discover several insurance contracts valid for a same insurance purpose.

1) 김학선, 「손해사정이론」, 한백출판사, 2003. pp.109 and below.

For example, an owner insured his own building against fire, and a lessee also got a contract of fire insurance on the rented space he occupies; or, while an owner of a structure bought an insurance policy, and leases it out to a lessee when the latter also insures the structure, etc.

If there exists overlapping contracts like the cases mentioned, property insurance agreement specifies two ways of dividing the insurance payment[2].

1. Principle of average clause in property insurance agreement

Pro rata condition of average method from the agreement is divided into two ways: proportional division of the amount insured[3] and that of the amount of independent liability[4]. Content of the term is as follows.

Standardized Agreement of Fire Insurance.[5]

Article 23 (Calculation of the paid claims)

② If there exists other contracts – including fraternal contract, which means a contract signed up on all sorts of mutual benefit association – concerning same contracting purpose and same accidents, and if the total amount of amount insured is larger than the insurable value, calculation of the paid claims will comply the following. In this case, if insurance coverage claim was resigned on one person who is insured, it does not influence the decision of the other insured's paid claims.

1) If the calculation method of other contract is the same as that of this policy:

---

2) However, on the special agreement on lessee's liability of fire insurance, it may be designated to calculate the insurance payment only by the proportional division method of the independent amount of liability.

3) It is the calculation method on item 1 of clause 2 from article 23 from the standardized agreement on fire insurance.

4) It is the calculation method on item 2 of clause 2 from article 23 from the standardized agreement on fire insurance.

5) standardized agreement on fire insurance<amendment 2011.1.19.>.

$$\text{Amount of loss} \times \frac{\text{amount insured of this contract}}{\text{total amount of amount insured respectively calculated, assuming that there exists no other contract}}$$

2) If the calculation method of other contract is different from that of this policy:

$$\text{Amount of loss} \times \frac{\text{insurance coverage of this contract}}{\text{total amount of insurance coverage respectively calculated assuming that there exist no other contract}}$$

2. Other insurance clause in liability of compensation agreement

Special agreement on Lessee's liability.[6)]

Article 4 (Calculation of claims paid)

① (Omitted)

② In case a contractor or an insured executed a fire insurance contract on the object leased which is the purpose of liability, if the total amount insured of the fire insurance and amount of the liability insurance exceeds the insurable value, it complies the clause 1 of article 20(Apportionment of coverage) on general agreement [General Liability Cover Clause].

..

(Middle part omitted)

..

Article 20 (Apportionment of coverage)

① If there is another contract covering the same risk covered by this one, including fraternal insurances, and the total of the indemnification

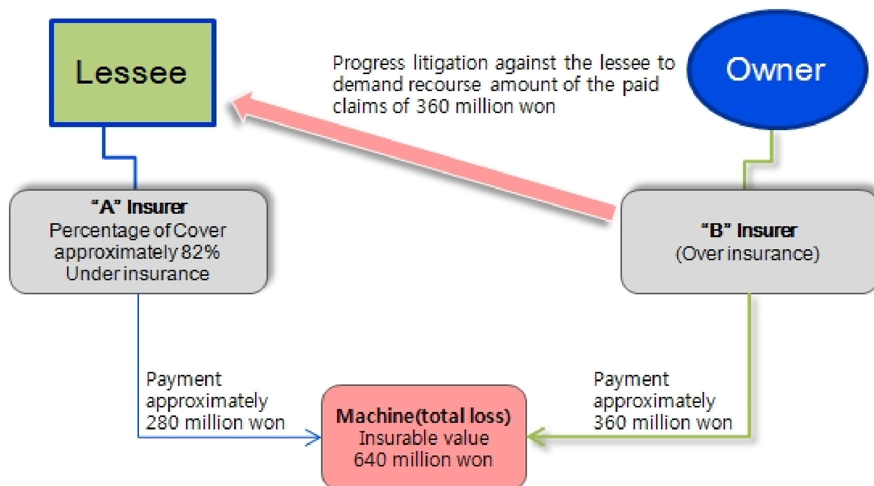
6) Samsung Fire Insurance Anyhome comprehensive insurance policy.

amount separately calculated – assuming that each contract regards there is no other contract - exceeds the damage, the company will compensate the damage in accordance with the previous total of the indemnification(the total of the indemnification amount separately calculated). This applies equally to the case of this contract and the other one even if both were being mandatory insurances.

Ⅲ. In-practice Handling of Other Insurance Clause and Problem Analysis through Litigation Cases of Recourse Amount Claim

1. case 1: Both the lessee and the owner are insured against fire, and calculation method of paid claims are both the same.

[Figure 1] Both the lessee and the owner are insured against fire, and calculation method of paid claims are both the same.



<Table 1> Each insurer's paid claims, assuming that the lessee and the

owner are respectively insured

(Unit: Won)

Division	Insurer	Percentage of cover	Amount Insured	Insurable value	Damage	Paid Claims
Lessee	Insurer A	82%	53,000	64,000	64,000	**53,000**
Owner	Insurer B	Over insurance	69,000			**64,000**
Total			122,000	64,000	64,000	**117,000**

<Table 2> Each insurer's paid claims calculated according to the principle of average clause on the agreement

(Unit: Won)

Division	Insurer	Percentage of cover	Amount Insured	Insurable value	Damage	Paid Claims
Lessee	Insurer A	82%	53,000	64,000	64,000	**27,803**
Owner	Insurer B	Over insurance	69,000			**36,197**
Total			122,000	64,000	64,000	**64,000**

<Table 3>Each insurer's allocation calculated according to the proportional division of the amount insured

(Unit: Won)

Allocation of the amount insured according to the principle of average	Insurer A	$64,000 \times \frac{53,000}{(53,000+69,000)} = 27,803$
	Insurer B	$64,000 \times \frac{69,000}{(53,000+69,000)} = 36,197$
	Total	64,000

In the case 1 above, if the lessee is solely insured and the owner is not, insurer A would have paid the amount of independent liability 530 million won[7] to the owner, and 110million won which is a shortfall from the

7) Total amount insured will be paid since it is a total loss.

amount of damage 640million won and the paid 530million can be directly reimbursed to the owner by the lessee him/herself.

However, insurer A will pay not 530 million but 278.03 million won because the case is handled with principle of average on the ground that the owner also has an insurance. As a result, insurer A saves the coverage amount of 251.97 million won.

Whereas, the insurer B will exercise subrogation right[8] after paying the allocation of 361.97 million won, the lessee who is claimed for compensation will be facing the situation of being claimed for a recourse amount of 361.97 million won and not 110 million, even though he/she has paid the premium applicable to 530 million won and have been paid 278.03 million won.

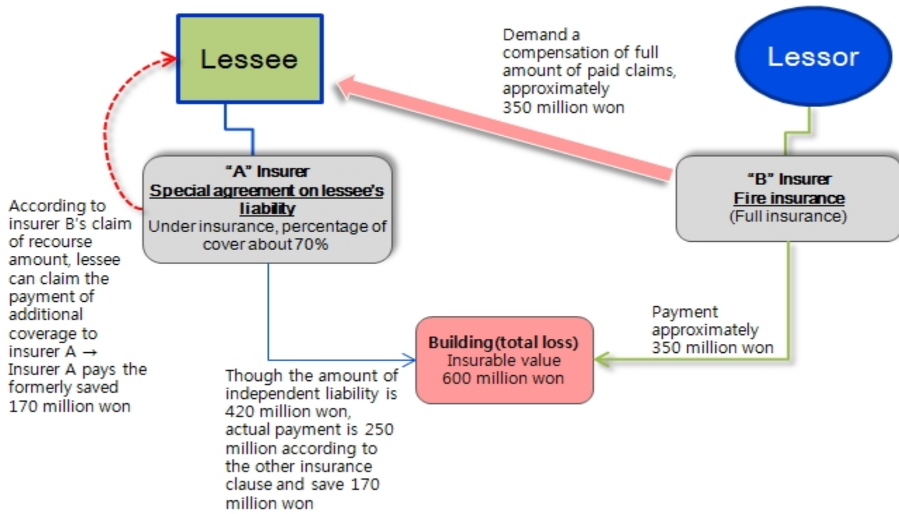
In this situation, if the lessee makes a request to the insurer A to pay the additional 251.97 million won which was underpaid, but the insurer A will deny the request under the principle of average clause on the agreement. Situation of this kind causes a dispute in reality.

In other words, the lessee would have been paid 530 million won if he/she was insured alone, but the insurance status of the owner - which has no regard for lessee's will - gets to infringe on his/her insurance benefit.

2. case 2: Lessee is insured on a special agreement on lessee's liability and owner has a fire insurance.

[Figure 2]-Lessee is insured on a special agreement on lessee's liability and owner has a fire insurance.

8) Under article 681 of commercial law – subrogation on purpose of insurance
In case all the purpose of insurance has lapsed, insurer who has paid the total amount insured will acquire the right of the insured under the purpose. But if part of the insured amount is put onto the insurance, the right to be acquired by insurer will be decided at the rate of the amount insured to the insurable value.



<Table 4> Each insurer's paid claims according to the other insurance clause on the special agreement on lessee's liability

(Unit: Won)

Division	Insurer	Percentage of cover	Amount insured	Insurable value	Damage	Paid Claims
Lessee	Insurer A	70%	42,000	60,000	60,000	**24,706**
Lessor	Insurer B	Full insurance	60,000			**35,294**
Total			102,000	60,000	60,000	60,000

<Table 5> Each insurer's calculated allocation

(Unit: Won)

Allocation calculated	Insurer A's amount of independent liability	42,000
	Insurer B's amount of independent liability	60,000
	Paid amount of Insurer A	$60,000 \times \frac{42,000}{(42,000+60,000)} = 24,706$
	Paid amount of Insurer B	$60,000 \times \frac{60,000}{(42,000+60,000)} = 35,294$
	Total	60,000

On Special agreement on lessee's liability, if the lessor is insured then the insurable interest of each is different so it will not be considered as an overlapping insurance, other insurance clause is inserted into the agreement so as to share the insurance and the coverage with the lessor's insurer under the limit of insurable value by the rule of profit prohibition.

Like the case 2 from above, special agreement on lessee's liability calculates each insurer's paid claims by proportional division of the amount of independent liability, insurer A of the lessee's side divides the share with the lessor's insurer and pays 247.06 million won, saving the coverage amount of 172.94 million and not paying the 420 million won that would have been the paid claims if the lessee was the sole insured.

Separately, insurer B will pay the allocation of 352.94 million won which is set by the agreement to the owner and exercise the subrogation right of the total amount to the lessee.

However, it is stated in the article 1 from special agreement on lessee's liability[9] that'it indemnifies insured's loss by charging a legal liability to a person who has a just right to the real estate,' and insurer B's demand for reimbursement is legally proper, thus the lessee bears again a legal liability because of insurer B's claiming for recourse amount and accordingly claim the coverage on insurer A again based upon article 1 from the agreement, which leads the insurer A to pay the rest of the damages of 172 million 940 thousand won. This situation falls into a so-called contradiction of the policy.

To solve these kinds of problem between the insurers by limiting the range

9) Samsung Fire Insurance Anyhome comprehensive insurance policy p.40 article 1(indemnifiable loss).

If a contingent accident happens to the rented property – one that the insured rented and which is written on the insurance policy, and if a part of a building is rented, it only means to that part – the company will charge the legal liability to the person who has the just right to the property and will indemnify the loss occurred to the insured according to this special agreement.

of the exertion of subrogation, around May 1996, property insurers made an arrangement that if lessor and lessee – or main contractor and subcontractor – are insured respectively on the same object and if the total of these insurances' amount insured exceeds the insurable value, it should be treated as overlapping insurances, and the lessor/main contractor's insurer should agree to a waiver of subrogation right on the lessee/subcontractor[10).

However, aforementioned arrangement between property insurers is not enacted by law and furthermore there is no article inserted in the policy stating with the intent of a waiver of subrogation right, insurers who infringe it gradually increased and in current work practices, there are a lot of confusions caused by this: there existed a case that an insurer, when in position of lessee's, saved the paid claims by standing on the side of paying the allotted share under the arrangement and giving up the subrogation right; but when in lessor's stance, they completely ignored the arrangement and exercised subrogation right to claim the recourse amount for the total amount of paid coverage.

Ⅳ. Improvement Measures

It is not logical for the lessor's insurer to agree to a waiver of all the subrogation right when the lessee is under-insured as the content of the aforementioned arrangement.

If the lessor's insurer gives up all the subrogation right even though the lessee is extremely under-insured, the latter gets to be totally indemnified through the former's insurance and also to evade paying the recourse amount. It is unfavorable for the lessor's insurer to be limited in exercising

10) Noticed result from the heads of loss adjust department conference First Fire & Marine Insurance Co., Ltd., issue No.2-024, May 4, 1996.

the just legal action in this way.

Therefore, it is reasonable to put the subrogation right to the lessor's insurer for the amount that exceeds the amount of independent liability of the lessee's, and it is advisable that when dealing with other insurance clause, the payment order should be determined so that even if the contract is overlapping, the insurer of the person who is in the status of being claimed for the recourse amount – corresponding to the lessee in the case above – should first pay the amount of independent liability, and the rest of the amount should be paid by the subrogation right user - corresponding to the lessor's insurer in the case above – and then exercise the subrogation about the paid amount to the lessee above.

It is fine for the insurer of the person claimed for compensation – who is the lessee from above – to pay the whole amount of independent liability because it was receiving the premium as an intact single insurance without considering an overlapping one. Besides, it is unconvincing that the lessee's insurer makes benefit from the diminished payment by sharing the coverage with the owner's insurer only because the owner was insured on inadvertent reason, when the whole amount applicable to a single insurance was already paid.

Eventually, amendment of agreement using the excess clause[11) – which compensates only the excess of the loss when there is a loss left to be compensated even after the limit of liability is exhausted - is needed under the way of one insurer on the side of the person claimed for compensation taking the form of primary insurance and the other with the subrogation right adopting that of excess insurance[12)].

11) 박진우, 「건설공사보험의 이해」, 신아출판사, 2011.p.79.
12) Mark S.Dorfman, David A. Cather, Introduction to Risk Management and Insurance, 10th edition, 2012. p.181

Following is the revision proposal.

1. Revision of Fire Insurance Agreement

Fire Insurance Agreement Article 23 (Calculation of the paid claims)

1) If the calculation method of other contract is the same as that of this policy:

$$\text{Amount of loss} \times \frac{\text{amount insured of this contract}}{\text{total amount of amount insured respectively calculated, assuming that there exists no other contract}}$$

2) If the calculation method of other contract is different from that of this policy:

$$\text{Amount of loss} \times \frac{\text{insurance coverage of this contract}}{\text{total amount of insurance coverage respectively calculated assuming that there exist no other contract}}$$

3) In case other insurances – including fraternal contracts and mandatory insurances – are able to exercise subrogation to the contractor/insured of this insurance according to article 682 of commercial law, calculated amount will be preferentially paid by our insurance assuming that no other insurance exists, notwithstanding the regulation item 1/item 2 of clause 2 from article 23 from above(primary insurance)

4) In case there exist other insurances, and subrogation right to the contractor/insured of the other insurances can be exercised under the article 682 of the commercial law, amount calculated under assumption that there is no other contract on the exceeding amount that can be covered from other insurance policy when our insurance is not insured.

2. Amendment proposal of special agreement on lessee’s liability

Article 20 (Apportionment of coverage)

1) If there is another contract covering the same risk covered by this one(including fraternal insurances) and the total amount of the indemnification amount separately calculated – assuming that each contract regards there is no other contract - exceeds the damage, the company will compensate the damage in accordance with the previous total of the indemnification(the total amount of the indemnification amount separately calculated). This applies equally to the case of this contract and the other one both being mandatory insurances.

2) In case other insurances – including fraternal contracts and mandatory insurances – are able to exercise subrogation to the contractor/insured of this insurance according to article 682 of commercial law, calculated amount will be preferentially paid by our insurance assuming that no other insurance exists(primary insurance).

3) In case there exist other insurances, and subrogation right to the contractor/insured of the other insurances can be exercised under the article 682 of the commercial law, amount calculated under assumption that there is no other contract on the exceeding amount that can be covered from other insurance policy when our insurance is not insured.

Ⅴ. Conclusion

As above, if it is possible to exercise subrogation right, making the insurer of the person who is demanded for compensation to pay whole amount of independent liability and to keep the payment obligation of the insurer, will

protect expected profit of the lessee - who have earnestly paid throughout insurance period the premium fixed according to the sum insured - from being harmed.

Furthermore, if insurances are overlapping, it is strongly recommended that the insurer on the side of exercising subrogation right should exert it according to commercial law within the limit of paid claims, not making one of the insurers relinquish subrogation like the arrangement of property-casualty insurer in the past. In this way, just benefit of the law will not be violated.

To sum up, pertinent insurer pays the just amount of coverage corresponding to the premium paid by the person claimed for compensation – the lessee in the case above – and the rest of the loss will be secondarily compensated by the other party – the lessor from the case above – so that it achieves the transfer of the loss which is an effect of overlapping insurance and at the same time realize the rule of profit prohibition. If there is an amount paid by the opponent's insurer for the rest of the loss because the lessee's single insurance policy is not a full insurance, this should be naturally reimbursed to the owner by the lessee himself, and the insurer of the owner – lessor from the case above – should act the subrogation right so that the insurer too can exercise the proper legal right.

Thus, through speedy amendment of the agreement and change of the awareness of property insurance companies, current occurrence of unnecessary conflicts between insurers and insurance consumers should be prevented and to lead the protection of insurance consumers.

〈References〉

김학선, 「손해사정이론」, 한백출판사, 2003.
박진우, 「건설공사보험의 이해」, 신아출판사, 2011.
양승규, 「보험법」, 삼지원, 2002.
Dorfman, M.S. & Cather, D.A. Introduction to risk management and insurance, 10th ed, 2012.

Abstract

Examining current insurers' handling of other insurance clause in practice, contradiction occurs. Suppose a lessee was insured on a full insurance against fire accidents while the lessor was discretely insured under the same kind of insurance, and the former caused an accident; in this case, according to other insurance clause of the terms, insurer of the lessor who have paid the relevant amount of coverage will exercise the subrogation right onto the lessee.

So, because of the legal action of the lessor's insurer, lessee gets to face the necessity of reimbursing the recourse amount even though he/she has a full insurance contract.

To solve these kinds of problem between the insurers by limiting the range of the exertion of subrogation, around May 1996, property insurers made an arrangement that if lessor and lessee – or main contractor and subcontractor – are insured respectively on the same object and if the total of these insurances' amount insured exceeds the insurable value, it should be treated as overlapping insurances, and the lessor/main contractor's insurer should agree to a waiver of subrogation right on the lessee/subcontractor.

However, aforementioned arrangement between property insurers is not enacted by law and furthermore there is no article inserted in the policy stating with the intent of a waiver of subrogation right, insurers who infringe it gradually increased and in current work practices, there are a lot of confusions caused by this: there existed a case that an insurer, when in position of lessee's, saved the paid claims by standing on the side of paying the allotted share under the arrangement and giving up the subrogation right; but when in lessor's stance, they completely ignored the arrangement and exercised subrogation right to claim the recourse amount for the total amount

of paid coverage.

Therefore, it is reasonable to put the subrogation right to the lessor's insurer for the amount that exceeds the amount of independent liability of the lessee's, and it is advisable that when dealing with other insurance clause, the payment order should be determined so that even if the contract is overlapping, the insurer of the person who is in the status of being claimed for the recourse amount should first pay the amount of independent liability, and the rest of the amount should be paid by the subrogation right user and then exercise the subrogation about the paid amount to the lessee above.

※ Key words : Subrogation Right of the Insurer, Other Insurance Clause, Overlapping Contract, Principle of Average, Primary Insurance, Excess Insurance, Waiver of Subrogation