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DON'T ADD INSULT TO INJURY: TIPS FOR SUCCESSFULLY PURSUING INSURANCE CLAIMS

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DON'T ADD INSULT TO INJURY:
TIPS FOR SUCCESSFULLY PURSUING INSURANCE CLAIMS

by Finley Harckham[1]

Municipalities, like other policyholders, rely upon their insurance coverage to mitigate the impact of natural disasters, fires, personal injuries and other property and casualty losses. However, often times securing the coverage they paid for is not as simple as just notifying the insurer of a loss or a claim. Particularly for large claims, municipalities need the assistance of counsel to develop a plan for pursuing recovery and then to be proactive and vigilant in their dealings with the insurance company. Fortunately, following a few basic tips can prevent the insurance recovery process from adding insult to injury.

1. Counsel Should Evaluate Coverage For Any Important Claim.

Large and complex insurance claims almost inevitably involve issues of contract interpretation and other matters for which the policyholder requires legal expertise.

A coverage opinion from counsel should be obtained whenever an insurance company asserts, or it appears from the policy, that coverage is not or may not be provided for an important claim. The application of insurance policy provisions to a particular claim is often unclear, and the meanings of numerous standard form clauses have been interpreted differently by the courts of different states. Therefore, determining which state's law applies and researching applicable case law can be

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important to a coverage analysis. Moreover, whether an exclusion applies to a claim may depend upon a determination of the proximate cause of a loss, injury or damage - legal issues best addressed by counsel. Risk managers often look to their brokers to opine on coverage. However, while brokers often have a productive role to play in the handling of the claim, they generally are not trained in insurance policy interpretation.

Counsel should be part of the policyholder's team for pursuing any claim involving coverage issues or the possibility of coverage litigation or arbitration. A municipality may find itself at a distinct disadvantage when pursuing a coverage claim unless it assembles a team with the necessary skills to match those available to the insurance company. Typically, the insurance company has a large claim department with specialists in handling particular types of claims who have access to coverage counsel, accountants, engineers and every other type of expertise that may bear upon coverage for a loss. Many municipalities have similar expertise residing in various departments, which should be brought together to prepare and pursue the claim. Also, outside expertise may be needed, such as outside accounting and loss adjusting expertise for loss calculation and negotiating with the insurer's loss adjuster. If a claim is particularly large or complex, it may be advisable to retain outside counsel to evaluate coverage and provide advice as the claims handling process develops. This is particularly advisable when the insurance company has raised exclusions as a possible basis for a denial of coverage or has asserted other policy-based defenses to payment.

The assistance of counsel is often needed to obtain a clear understanding of the insurance company's coverage position because so-called reservation of rights letters often provide no meaningful information. Those letters typically lack any

meaningful statement of facts relating to the claim and simply quote various insurance policy provisions as providing possible grounds for a denial, without explaining why they may be applicable. They also typically conclude with a blanket statement that the insurance company reserves all of its rights to deny coverage on any ground whatsoever. This type of letter is a self-serving effort to satisfy the insurance company's obligation to promptly articulate the grounds upon which coverage may be denied, but it is deliberately vague in order not to limit its options. Policyholders need a clear and specific statement of any possible grounds for denial so they can provide additional information and assess their coverage. Counsel are often best equipped to demand meaningful coverage positions from insurance companies.

2. Be Proactive in Presenting the Claim.

The most frequently voiced excuse of insurance company adjusters for not promptly handling a claim is that they have not been provided sufficient information from the policyholder. To mitigate this problem, provide the insurance adjuster with all relevant information about your loss without waiting to be asked. Also, do not wait until all of the information about all elements of the loss can be presented in a neat package. Provide information as it becomes available.

3. Give the Insurer a Reasonable Deadline For Resolving the Claim.

Under the best of circumstances, major insurance claims tend to be resolved only when the policyholder pushes them to resolution. When competing for attention with countless other insureds after a catastrophe, it is imperative that the policyholder make clear at the outset of the adjustment process that it will cooperate fully and provide information promptly, but that the claim must be settled by a date

certain. Pick a realistic date and stick to it, if need be threatening to file formal proofs of loss or to assert claims of bad faith claims handling.

4. Comply With All Insurance Policy Requirements.

Most insurance policies impose a number of requirements upon the policyholder, including timely notice and deadlines for the filing of proofs of claim and the commencement of coverage lawsuits. The failure to comply with these requirements might result in a forfeiture of coverage. So, be sure to comply with these requirements or obtain the written agreement of the insurance company to adjourn deadlines. Also, most liability insurance policies require insurer consent to any settlement of a covered claim. That consent cannot be unreasonably withheld, but it is important to give the insurer an opportunity to evaluate a proposed settlement before it is signed.

5. Assemble a Team of Experts to Prepare and Negotiate the Claim.

When evaluating and negotiating claims, insurance companies call upon the expertise of forensic accountants, coverage lawyers and insurance adjusters to protect their interests. Municipalities may find themselves at a distinct disadvantage if they match the insurers only with in-house resources that are not well versed in the intricacies of coverage analysis and claim quantification (particularly business interruption computation). For large claims, policyholders should consider the services of forensic accountants, loss adjusters with expertise in policy analysis, property loss and claim preparation and, if necessary, coverage counsel.

6. Demand Partial Payments on Property Losses.

Often, property insurers will make a "good faith" partial payment and then pay little or nothing more until a final negotiation over all of the open issues. This allows the insurer to hold onto funds that should be paid out for undisputed portions of the claim and increases its leverage for later negotiations. Counter this strategy by forcing the insurance company to commit to a position on coverage and to pay the amounts due under its own analysis of the claim. Start by demanding a coverage determination. Typically, insurers issue vague reservations of rights letters that quote numerous policy provisions without explaining how those clauses apply to the claim. Such a letter is intended to protect the insurance company from a waiver of defenses, but does not fulfill its obligation to provide a timely coverage determination. Respond to the reservation of rights with a demand for a detailed and specific coverage determination, reminding the insurer that its failure to do so may constitute bad faith.

Also, demand payment of the undisputed amount of each element of the claim. For example, a dispute over the period of restoration for business interruption coverage should not delay payment for property loss. If the insurance company will not agree to make partial payments, submit partial proofs of loss, which will trigger the deadlines for payment under most states' unfair claims handling statutes.

7. Document Everything That Happens – and Does Not Happen – With the Claim.

The resolution of claims, particularly catastrophe claims, can be slow-tracked by a high turnover among insurance adjusters or just a lack of attention by claims personnel. Policyholders should not only be persistent in their demands for attention, they should also create a written record of everything that happens with

respect to the handling of the claims, including their responsiveness to requests for information and the insurers' delays and lack of responsiveness. The chronology should be presented to the insurer in writing on an ongoing basis to deter dilatory conduct and to make a record for a possible bad faith claim later on.

8. Appraisal or Litigation.

If a property or time element claim cannot be resolved through negotiation, you may have a choice of proceeding either to appraisal or litigation. Appraisal is a form of arbitration provided for under many insurance policies that either party can demand to resolve disputes over the amount of the loss. It can be a quick and inexpensive way to quantify the claim. However, appraisal is not required, and may not be appropriate, when there are coverage issues to be resolved. For example, if the parties disagree over the amount of a business interruption loss because of a dispute over whether market conditions after the hurricane should be considered when calculating damages, the policyholder would be entitled to have that coverage issue decided in court. Appraisers, who typically are in the building trades, generally are not qualified to address such issues. Also, bad faith claims fall outside the scope of an appraisal clause and will have much greater value if placed before a jury. So, the policyholder must carefully consider its options and not necessarily feel compelled to agree to an appraisal simply because the amount of damages is one issue in dispute.

9. Choice Of Law And Forum Selection.

Insurance policies are interpreted under state law, and with respect to a surprising wide range of issues, standard form provisions are given different meanings from state to state. That creates a powerful incentive for both sides in a coverage dispute to forum shop and to race to the courthouse of a preferred venue at the first

indication that a claim will not be resolved amicably. Therefore, policyholder counsel must focus on choice of laws and choice of forum before a dispute arises over a claim and prepare to file suit quickly in the forum that best suits the client's interests.

A policyholder may assume that as the aggrieved party it has the sole discretion to initiate a coverage action and therefore to select the forum. Likewise, a municipality may assume that any dispute will be resolved under the law of its home state. However, insurance companies frequently bring preemptive declaratory judgment actions in the forum that best serves their strategic objectives. When this happens, a policyholder may file a competing suit in another jurisdiction and argue that as the aggrieved party it is the "natural plaintiff" and therefore its choice of forum should be given priority. When deciding which of two competing actions should go forward, courts consider a number of factors, but many give significant weight to which case was commenced first. Therefore, the policy-holder must consider the possibility that if a coverage claim is not resolved amicably, it may find itself in a race to the courthouse against its insurance companies.

Conclusion

The key to getting insurance claims satisfactorily resolved within a reasonable period of time is for policyholders to take control of the process and to demonstrate a resolve to secure the coverage they paid for. This requires hard work, but it will pay handsome dividends.