

# MICHIGAN LAWYERS WEEKLY

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## Reading is the start to avoiding pitfalls of fire claims

By Michael H. Fabian, Esq.,

The retention of an attorney experienced in handling property damage claims can be the difference between whether a claim is paid or denied, or whether the policyholder receives the full benefits to which he is entitled or something significantly less.

Contrary to popular belief, and the images promoted by the insurance industry, it is the duty of the homeowner or business owner, not the insurance company, to make sure all damage claims are properly documented and valued and all insurance policy conditions are met.

All too often, policyholders fail to meet their contractual obligations following a loss, resulting in a denial of all policy benefits or a claim settlement for a sum far less than what the policyholder would otherwise be entitled to receive.

Unfortunately, many policyholders incorrectly believe that the insurance company will document the claim for them and voluntarily pay all benefits owed without the policyholder affirmatively doing much more than reporting the loss. It is the role of the property insurance attorney to protect the rights of the policyholder and to take the necessary actions to achieve a fair and prompt resolution of the claim.

So what should an attorney do to protect the rights of the policyholder and to make sure a fair claim settlement is reached?

What are some of the “traps for the unwary” that attorneys should watch out for? What should an attorney know and do when

representing a policyholder in a property damage claim?

In this day and age, when most insurance companies have adopted their own customized insurance forms, the most basic answer is, the attorney must read and understand the particular policy of insurance involved in the claim. He must make sure that every required step in the claim process has been satisfied, and that the claim has been professionally prepared and properly submitted for each area of coverage available under the subject policy of insurance.

When the cause of a fire loss is a potential liability issue, the insured's attorney, whenever possible, should arrange for a cause and origin investigation and make sure the insurance company's investigation has met the investigative standards of NFPA 921, *Guide for Fire and Explosion Investigations*, published by the National Fire Protection Association.

### Fire scene investigation

If the attorney has been retained prior to the insurance company determining the cause of loss, or for any reason the cause of the loss appears to be a potential liability issue, he should advise the policyholder that a qualified fire origin and cause investigator should be retained as soon as possible, before there are substantial changes to the fire scene.

The attorney should engage a fire investigator who has sufficient education, training and experience in fire science, who will perform the investigation in accordance with the standards established in the NFPA 921 and other appropriate standards, so that the expert will survive a “Daubert” challenge.

Once an expert is retained, the attorney must make sure that the fire scene is properly secured so that evidence is not lost, altered or destroyed. Also, all potential interested parties should be identified, and then notified in writing, that a fire investigation will take place before any investigation occurs; it will result in the

alteration of the scene so that the interested party is provided an opportunity to timely investigate the scene.

NFPA 921 defines interested parties as “any person, entity, or organization, including their representatives, with statutory obligations or whose legal rights or interest may be affected by the investigation of a specific incident.” Failure to give an interested party timely notice can result in claims of spoliation of evidence and may lead to a court prohibiting introduction of evidence concerning the investigation, the barring of various claims which the client may otherwise be entitled to, sanctions by the court,

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or even potential liability to a third party who has suffered damages as a result of the destruction of evidence.

Sometimes during a scene investigation, the identity of other interested parties may be discovered. If this occurs, the scene inspection should be suspended pending notification to the new parties and the opportunity for those parties to also investigate the scene. Arrangements should then be made to document and secure the scene until the investigation can be continued with all interested parties who desire to participate in attendance.

The attorney should consult with his fire investigation experts to make sure that all potential evidence is properly preserved, that the scene has been thoroughly documented, and that all reasonable causes for the fire have been considered and documented, including alternative causes that the expert considered and eliminated. This is necessary to not only support the opinions of the expert, but also to survive later attacks on the thoroughness and impartiality of the investigation and minimize claims of spoliation of evidence in the event interested parties are identified after the scene has been processed.

#### **The insured's duties following a loss**

Attorneys must make sure that their clients cooperate with insurance companies during the insurer's investigation of a claim. If a policyholder has willfully failed to cooperate with an insurer in its claim investigation, under Michigan law the claim may be barred.

Therefore, under most circumstances, the attorney must generally resist the temptation to "object" to what might seem to be exhaustive and irrelevant document requests by the insurer. He should not refuse to have the client produce documents or submit to exhaustive sworn statements, because to do so would risk a claim denial based on the attorney's advice, and resulting malpractice liability exposure of the attorney.

The first thing that the attorney must do when handling a property damage claim is, if not already done by the client, make sure that prompt notice of the loss has been given to the insurer. This should be in

writing and given as soon as possible, as it will allow the insurer to make a timely investigation into the cause of the loss and to evaluate the damages.

The attorney should then make sure the policyholder has taken appropriate steps to protect the property from further loss and to mitigate the damages. The policy of insurance requires the insured to take reasonable steps to prevent further property damage, such as boarding and securing damaged buildings or removing water that may result in mold. The expenses incurred in protecting the property from further damage are covered by the insurance policy and so detailed records of those expenses should be maintained.

It is the contractual obligation of the policyholder, not the insurer, to submit detailed inventories and prepare estimates of the destroyed, damaged, or lost property. The inventories and estimates should include both the actual cash value and replacement cost of each item claimed. In significant claims, it is advisable for the attorney to engage the services of licensed public adjusters to professionally evaluate and inventory the damaged property and to meet with the insurance company's adjusters in an attempt to reach an agreement on the amount of loss.

The policy of insurance also generally requires the policyholder to exhibit the damaged property to the insurer and to avoid discarding any damaged property prior to the insurer having been given the opportunity to view and evaluate the damage. The attorney must make sure that notice has been given to the insurance company prior to disposing of any property or otherwise altering the scene. Premature disposal of property can lead to claims of spoliation of evidence and a possible denial of part or all of a claim.

Attorneys must be careful that policyholders meet all requirements in submitting a claim in a timely fashion. Within 30 days of notice of a claim, an insurer is required under MCL 500.2006 to advise a policyholder what materials constitute a satisfactory proof of loss. If a proof of loss is timely requested by an insurer, the failure to submit a signed and

sworn proof of loss within the time period specified by the insurer may result in the claim being barred.

The insurer may require the policyholder to submit to an examination under oath (EUO), which, in reality, is a pre-suit deposition. Because there is no case law holding that the rules of evidence and court rules apply to EUOs, and the contractual obligation to "cooperate" in the investigation remains in force, there is little opportunity for the attorney to object to questions that may seem irrelevant to the claim or personally intrusive to the policyholder.

In light of this, instructing a client not to answer questions can be particularly risky to the practitioner. The best way for an attorney to protect a client at an EUO is to spend many hours preparing the client for the exhaustive testimony, just as if the attorney was preparing the client for trial, since the answers by the insured at the EUO are going to form the basis of whether the claim is paid, and if liability is denied, the basis of the claim denial.

EUO testimony may also be the basis upon which a jury may ultimately render a verdict after trial. In short, the importance of properly preparing a client for an EUO cannot be overstated.

Policyholders need experienced property insurance attorneys to protect their rights, to make sure all policy conditions have been met, to see that a proper claim investigation has been conducted and to ensure that a claim is submitted for the policyholder for the full amount of the benefits owed.

The failure of a policyholder to retain an attorney who understands this and protects the rights of the insured can lead to disastrous results, from receiving only a portion of the benefits that should have been paid to a total denial of all benefits.



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