

## Duties After Loss Analysis

Authority: IRMI

In the event of a loss to covered property, the insurer is not bound to provide coverage if the insured fails to comply with the following eight duties and this failure is prejudicial or harmful to the insurer. These listed duties must be performed either by the named insured, his representative, or another insured seeking coverage.

The insured's first duty is to provide prompt notice to the insurer or its agent. Overall, the courts view prompt notice as being timely notice, or the soonest a reasonable person, given the circumstances, should provide notice. If John and Mary Smith suffer a hailstorm loss and they turn in a loss notice 1 month later, this would normally *not* be seen as prejudicial to the insurer. The insurer should still be able to properly investigate the claim, view the damage, and talk to witnesses. However, if John and Mary turn in the claim 2 years after the fact, this could be viewed as prejudicial to the insurer's case. Other weather events could have happened in the meantime, witness accounts of the storm may not be as clear, and normal wear and tear would have occurred as well. The insurer *may* be able to successfully deny the claim based on the prejudicial position this delay puts the insurer in. Note, however, that all circumstances in each case have to be reviewed on an individual basis.

The insured's second duty is to notify the police in the event of a theft. This allows the police an opportunity to apprehend the criminal(s) and recover the goods, thus reducing the insured's loss. It also forces the insured to make a definitive accounting of the goods stolen; this accurate and timely information can assist the insurer in adjusting the loss. It can also reduce the moral hazard of an insured fabricating or exaggerating a loss.

For example, assume John Smith has his computer, TV, and jewelry stolen; however, he fails to contact the police. He contacts his insurer 15 months after the loss. His failure to report the loss to the police, along with the delay in contacting the insurer, certainly prejudices the insurer's investigative efforts. As a result, the claim may be denied.

The insured's third duty is to notify the credit card or electronic fund transfer (EFT) card company in the event of a loss as covered under the credit card, electronic

fund transfer card, forgery, and counterfeit money additional coverage for the property section.

The sooner the insured contacts the company about a loss, the better the chance that the loss can be mitigated. If the insured's credit cards are stolen, it is his responsibility to contact the credit card company promptly. The company can then immediately cancel the card, thus reducing fraudulent charges. If the insured has credit cards issued from more than one credit card company, he is required to contact each of these firms. This condition is similar to conditions relating to the protection of property from further harm after a loss has occurred.

The insured's fourth duty is to protect his property from further damage. If repairs to the damaged property are necessary, the named insured must make reasonable and necessary repairs to protect this property. In addition, the named insured must keep detailed and accurate records of repair expenses. The rationale for this condition is to mitigate damage to property.

An example will illustrate this particular duty. John and Mary Smith's home is hit by a tornado, which tears off part of their roof. Quick action is needed in order to reduce further damage. As long as they are able-bodied and the roof is not too steep or wet, it is expected that the Smiths will cover the roof with a tarp or make a similar temporary repair to prevent the home from suffering further damage. If they are unable to do this, it is expected that they will make a good faith effort to immediately contact a contractor to perform this task as soon as possible. If a burglar breaks into their home and the burglar demolishes the front door, it is expected that John and Mary will repair or replace the door as soon as possible. The insurer would then reimburse them for these types of reasonable repairs. Note that the insured is *not* expected to take extraordinary or dangerous steps to protect the property; only what is reasonable is expected.

The insured is also expected to keep accurate and detailed records of repair expenses, which will assist the insurer in the claims handling process. If the insured completely fails to do this, these expenses *may* not be reimbursed.

The insured's fifth duty is to cooperate with the insurer in the investigation of the claim. To illustrate: assume Mary Smith suffers a large fire loss and she consistently fails to show up for meetings with the adjuster and does not return his phone calls. These types of actions can seriously impede and prejudice the insurer's claim handling and add to its expenses. If Mary's actions are particularly egregious, the insurer is justified in denying this claim. The overall goal of this condition is to

enhance the insurer's ability to provide equitable, timely, and cost-effective claims handling.

The insured's sixth duty is to prepare an inventory of damaged personal property, which details the quantity, description, actual cash value, and amount of the loss. When the insured performs this task, the adjuster can more easily handle the claim. The adjuster should assist the insured as much as possible in this endeavor; the adjuster's experience will facilitate this process. This will also improve the chances that the claim is not overinflated, thus reducing the moral hazard.

In addition, the insured is required to attach all bills, receipts, and related documents that justify the inventory's information. The attachment of all bills and receipts will also smooth the claims-handling process. This will assist the adjuster in verifying that the loss was not fraudulent in the first place and was not overinflated either. In addition, this can assist the insured as far as income tax filing purposes are concerned.

This condition is related to the one calling for cooperation in settling the claim. If the named insured does not provide this type of information to the adjuster after repeated requests, the adjuster's job is much more difficult. This can, in extreme cases, be a justified cause for the denial of the claim, particularly if the named insured's failure to follow these conditions prejudices the insurer's claim handling process.

The insured's seventh duty is to (1) show the damaged property to the insurer, (2) give the insurer any applicable records or documents it requests and allow the insurer to make copies of this material, and (3) submit to an examination under oath, while not in the presence of another insured, and sign any forms relating to this process.

The insurer must request these duties in a reasonable manner. The term "reasonable" is often a contentious one in court cases. In one case, the court declared, "it is extremely difficult to state what lawyers mean when they speak of 'reasonableness.' In part the expression refers to ordinary ideas of natural law or natural justice, in part to logical thought, working upon the basis of the rules of law" (John Salmond, *Jurisprudence* 183 n. (u) (Glanville L. Williams ed., 10<sup>th</sup>ed. 1947)).

To illustrate a situation that might be deemed 'unreasonable': assume the insurer repeatedly asks the insured for the same information, such as records or documents, and this information is provided each time by the insured. However,

the first few adjusters assigned to the case leave the insurer's employ. The insurer keeps losing this material and asks the insured repeatedly for the same information. These repeated requests could be considered unreasonable to the insured.

The insured is also required to provide the insurer with records and documents. These will help the insurer to ascertain the true owner of the property. If the value of these items seems out of line with the value of the home, the insurer may request verification of income. For instance, suppose that John Smith lives in a \$50,000 home but submits records and proof of a theft loss of a \$20,000 stereo and TV system. The adjuster would naturally become suspicious and would want more details such as a sales receipt of the purchase. If the adjuster still has questions concerning this, he might ask for a record of earnings, such as a W-2 form.

In addition, the insured is expected to submit to an examination under oath, while not in the presence of another insured, and sign any forms relating to this process. This is an effective tool for the adjuster and the insurer's attorney in verifying the veracity of the insured's account. These are often performed separately for the various insureds that may be involved, to see if conflicting testimony arises. If it is proven that the insured perjured himself, the grounds for denial are substantively enhanced.

The insured's eighth and final duty is to send to the insurer his signed, sworn proof of loss, within 60 days after the insurer requests it. A "proof of loss" is "an insured's formal statement of loss required by an insurance company before it will determine whether the policy covers the loss" (*Black's Law Dictionary*, 7<sup>th</sup>ed.). The insurer usually provides the insured with the form. In some states, the insurer is required to provide the specific form. In other states, no particular form is required, as long as all necessary information is included.

The proof of loss should include the following eight pieces of information, and most proof of loss statements ask for all eight of these.

First, the time and cause of the loss is essential in allowing the adjuster to determine if the loss occurred during the policy period and if the peril itself is covered.

Second, the interest for any applicable insured and any other party involved with this property and all liens on the property should be listed. It is vital that the insurer ascertain exactly who has an insurable interest. This also includes mortgagee(s) for real property and lien holder(s) for personal property. If these questions become too complicated and indeterminable, the insurer can make the overall payment to

the court in order for the court to make the final determination of the payments to the various parties.

Third, other insurance that might pertain to the loss should be documented in the proof of loss. The other insurance clauses of any applicable policies should be analyzed closely. It is important that the insured not be overindemnified, which can greatly expand the moral and morale hazards.

Fourth, changes in the title or occupancy of the property during the term of the policy need to be specified. If Mary Smith sells her house and ownership passes on July 1, and she turns in a claim for a loss on this same house occurring on July 2, coverage would be denied based on these facts. She did not have an insurable interest in the house on July 2.

Fifth, specifications of damaged buildings and detailed repair estimates are also necessary for the proof of loss. For example, Mary Smith might turn in this information and the adjuster could see immediately that these figures are beyond the limits of coverage. The coverage limits provision would need to be explained to Mary.

Sixth, a detailed inventory of damaged personal property described in the sixth duty-after-a-loss will be necessary. With the insured completing this inventory, the adjuster can more easily handle the claim. The adjuster should assist the insured in this endeavor and his experience and expertise will help the insured. This will also improve the chances that the claim will not be overinflated.

Seventh, receipts for additional living expenses incurred and records that support the fair rental value loss will be necessary. This will allow the adjuster to ascertain if these additional expenses are reasonable and not inflated. For example, assume Mary Smith lives in a 1,400 square foot home and it is almost completely decimated by a fire. She rents an expensive condominium that has 2,500 square feet and the rent is double her house payment. The adjuster would likely reduce the amount of extra expenses in this case, as her lifestyle is enhanced in this temporary residence.

Eighth, evidence or affidavit that supports a claim under the credit card, electronic fund transfer (EFT) card, forgery, and counterfeit money additional coverage in the property section, which states the cause and the amount of the loss, is required as well. This allows the adjuster to accurately gauge the veracity of this type of claim.

Authority: FC&S

An addition to condition B. Duties after Loss in the 2000 forms is the introductory language making it clear that the insurer considers it has no obligation to provide coverage if a failure to comply with any of the conditions prejudices the insurer's position. For example, an insured may decide not to report a theft loss to the police, thus not allowing the insurer a chance to recover the stolen property. Or, instead of putting up a tarp after a windstorm takes off part of the roof, an insured waits until after further damage occurs.

The 1991 homeowners forms required "you" -- the named insured or spouse -- to fulfill the conditions. Obviously, there might be times when this was not feasible. The language in the 2000 forms recognizes this by allowing the named insured, spouse, their representative, or another insured seeking coverage to fulfill the conditions.

There are eight subsections in this condition, with subdivisions within several of these. The condition lists in detail all the things the insured must do following a loss in order to obtain payment from the insurer for that loss. These requirements are, for the most part, a more readable version of lines 90-122 of the New York standard fire policy, upon which many of the current homeowners forms have their base.

An insured must give prompt notice of loss to the insurer *or its agent* (the New York standard fire policy said "immediate written notice to this Company"). In event of a theft, an insured must notify the police; in event of a credit card, fund transfer card or access device loss the company issuing the card must be notified.

An insured is required to make reasonable and necessary repairs to protect the property, and to keep accurate records of the repair expenses. Although not stated, the costs of protecting and making necessary repairs to protect the property are covered in addition to the direct property loss -- but only to the extent that the entire loss does not exceed the limit of liability. However, an insured cannot assume the costs will be covered. For example, following a landslide that dumps significant soil against his home, an insured hires a contractor to remove and

restore the premises. But, since loss resulting from "landslide" is excluded, the restoration and repair costs are not covered.

An addition in the 2000 forms is the requirement to cooperate with the insurer in the investigation of any claim. This reinforces the language prefacing the duties, which states that an insurer may deny a claim if an insured does not cooperate with the insurer.

For loss involving personal property, an insured must prepare an inventory of the damaged personal property. This inventory must show the quantity, description, actual cash value, and amount of loss. All bills, receipts, and related documents justifying the inventory figures must be attached.

As often as the insurer reasonably may require, the insured must show the damaged property, provide the insurer with requested records and documents and permit the insurer to make copies, and submit to examination under oath while not in the presence of any other insured and sign it. The requirement that an insured must submit to questions *without any other insured being present* was inserted into item 7.c. via the 1987 supplemental provisions endorsement HO-350 and was carried over into successive editions. This language revision resulted from the outcome of a Missouri appeals court case, *USF&G v. Hill*, 710 S.W.2d 171 (1986), wherein the court decided that without an express policy provision, an insurer could not require an insured to submit to questioning away from other insureds.

The policy provision requiring examination under oath has been regularly upheld by the courts. The provision appears to have been most regularly invoked when the insurer has some reason to question the legitimacy of a claim. In one case, *Americo Mello v. Hingham Mutual Fire Insurance Company*, 656 N.E.2d 1247 (Massachusetts 1995), the insured declined to submit to an examination under oath, citing privilege against self-incrimination. (He was later charged with arson.) The failure to submit, however, is not always an absolute bar to recovery. In the case of *Sheri Yeo v. State Farm Insurance Company*, 555 N.W.2d 893 (Michigan 1996), the court of appeals held that the plaintiff's refusal had been predicated on the fact that she had already given a complete statement to the adjuster, and thought that was sufficient. The court said that if she agreed to submit to the examination under oath at some other time, the insurer could proceed with a determination as to coverage and continue the claims process. The insurer's investigation had not been prejudiced by the insured's one refusal.

However, sometimes the question of what is "reasonable" arises. There are no guidelines. Generally, examinations are held in an attorney's office and so mutually agreeable times should be arranged.

The requirement to provide the insurer with records has likewise been upheld by the courts. In the case of *Robert DiFrancisco v. Chubb Insurance Company*, 662 A.2d 1027 (New Jersey 1995), the court held that the insured must produce records, including tax returns, from a sole proprietorship. The insurer maintained that the income received from the business could not support the existence of the items claimed stolen in a burglary. The superior court upheld the insurer. Likewise, the court in the case of *Bonnie Dlugosz v. Exchange Mutual Insurance Company*, 176 A.D.2d 1011 (New York 1991) held that the insurer's request for income tax records was valid, and the insured could not withhold the records and still expect the claim to be paid.

The homeowners policies have required a sworn "proof of loss" since the 1982 edition. In the homeowners 76 program, the requirement was for a sworn "statement of loss." The difference is that a statement of loss requirement fails to indicate that the insured must submit proof -- and not merely a sworn statement -- to support the claim.

Earlier homeowners forms required that proof of loss be submitted by the insured within 60 days *after the loss*, "unless such time is extended in writing" by the insurer. The revised language is obviously a more practicable requirement, eliminating the detail of obtaining written permission from the insurer for delay in submitting the proof of loss whenever settlement agreement is not reached within the required time.

The proof of loss must include facts about the loss such as cause, any mortgages or other liens on property, any other insurance, etc. Although most people do not keep receipts for personal property for anything other than "big ticket" items under warranty, it is important that receipts be maintained for any claim under additional living expense, and for any claim made under the additional coverage for credit card or electronic fund transfer.