



# LEGAL CORNER

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## What To Do In The Event Of An Insurance Claim... Potential Pitfalls To Avoid

(Part II)

**Editor's Note:** Part I of this article, which appeared in the April, 2010 issue, dealt with insurance claims coverage in which contractors were able to achieve substantial recoveries from their insurers after initial rejections. Part II will set forth what should be done in order to minimize the potential defenses and obstacles that the carrier may try and assert.

These articles were prepared by my colleagues, Eric Eisenberg and Erin McNamara Boucher. Eric, for the past 19 years, has litigated and tried complex construction and insurance coverage cases. Eric and Erin have successfully handled many contractors' claims against insurers which have ranged in size from tens of thousands to millions of dollars.

**W**hen an accident occurs, it is critical for contractors to present claims to insurance carriers in a manner that minimizes potential defenses as much as possible. Companies should be careful to avoid the following potential pitfalls when making a claim:

### 1. Provide the insurers with prompt notice of a claim.

Because the consequences of not promptly notifying your providers can be significant, it is typically better to "over notify" carriers than to "under notify" them. Therefore, in the event of an accident, a company should notify its builder's risk and general liability carriers, the owner's carriers, the owner's subcontractors' carriers, and the design providers' errors and omissions carriers. While some carriers may say that their policies do not cover the incident, it is better to "over-notify" than to fail to notify a carrier whose policy may end up covering the accident or occurrence.

It is often necessary to take emergency action to respond to claims and to repair contract work in order to progress on a job. Whenever possible, risk managers,

agents, or contractors' attorneys should notify carriers that such emergency actions are required or have taken place. Even if the notice is short, and the insurer only has a small window of opportunity to inspect the damage before emergency actions or repairs are undertaken, short notice is preferable to no notice at all.

### 2. Designate a spokesperson or contact person.

It is important to immediately involve counsel or to designate particular individuals within the company who will interact with insurance carriers and their adjusters regarding claims. Unless an agreement explicitly says otherwise, everything that an insured says or sends to an insurance company is "on the record". Because insurance companies often determine whether coverage applies to a given incident by applying facts to particular words used in the policy, choosing one's words carefully when dealing with insurers is important.

It is possible that one may encounter difficulties in recovering an insured claim because field personnel used particular words in describing activities in their ordinary

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course of work, while insurance companies use different language to describe the events covered by an insurance policy. For example, the distinction between a cessation of work under a builder's risk insurance policy and a "delay" claim against an owner pursuant to a construction contract is subtle. Yet the choice of words used in correspondence with an insurer can have an effect upon a claim made under a builder's risk insurance policy.

### 3. Do not speculate.

Another problem that insureds encounter is "speculation". Insureds should cooperate with insurers and all requests by insurers for information, job records, photographs, and the like should be fairly and promptly responded to, preferably with the assistance of counsel. Speculation should, however, be avoided. In this regard, one is best advised—in the words of the old *Dragnet* TV show—to confine communications with insurers to "just the facts".

### 4. Contemporaneously track your costs and expenses.

Whenever an insured makes a claim against an insurance company, there will come a time (in the course of negotiation or litigation) when the insured will be required to prove the costs or expenses it has incurred in connection with its loss on the insured claim. The better the records

of costs and expenses incurred, the more likely it is for the insured to recover on the claim and the greater the amount of the likely recovery.

When possible, new tracking numbers should be established in an insured's accounting system in order to segregate the costs arising out of an occurrence or accident. Man hours, equipment and materials, as well as subcontractor expenses, used or incurred to repair damages or to mitigate the effects of a loss or accident should be tracked on an ongoing basis. If work, or portions of it, is stopped as a result of the accident or occurrence, such event should also be tracked on an ongoing basis. When one receives a "cessation of work" or "business interruption" claim, both field and home office costs should be captured using costs codes, job reports and, in connection with home office expenses, an "Eichlaey calculation" supported by contemporaneously gathered data.

### 5. Submit timely proofs of loss.

Proofs of loss should be submitted to insurers as soon as possible after an accident or occurrence. Many policies have timeframes during which submissions of proofs or loss are required and one should adhere to such deadlines. Even if there is no timeframe specified in a policy, or if a policy indicates that proof of loss should be submitted "as soon as practicable" or words to that effect, timely proofs of loss are generally advisable. Partial or preliminary proofs of loss can, if necessary, be submitted. An insured should attempt to generate a "final" proof of loss as quickly as possible, and if necessary, it should submit supplementary or amended proofs of loss to capture additional costs or expenses incurred.

### 6. File a lawsuit/arbitration demand before any statute of limitations expires.

Many insurance policies contain a contractual limitations of actions period under which a civil action or arbitration claim must be filed against an insurer within a specified period of time. Because some of these limitations of actions periods can expire in one or two years, it is important to keep these timeframes in mind and to consult

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with counsel well in advance of such a deadline if a claim is not promptly adjusted by an insurer. The fact that an insurer continues to discuss a claim as the filing deadline approaches does not mean that the limitation period has been extended or that the carrier has waived the deadline. Instead, the insurer may wait for the deadline to pass and then argue that your claim is foreclosed.

### **7. Preserve damaged property until instructed by the insurer to do otherwise.**

Many construction insurance policies contain a provision obligating the insured contractor, regardless of liability, to "preserve property" from further damage after a loss or damage to the contract work has occurred. The insured contractor's obligation is mirrored by the insurer's liability to repay the contractor for costs incurred in the course of mitigating further damage to the contract work. Thus, the contractor may recover its reasonable and verifiable costs incurred to preserve damaged property. The contract clause creating these obligations is generally known as a "sue and labor" clause.

### **8. Preserve evidence.**

An insured contractor must take reasonable steps to preserve evidence and to give insurers an opportunity to examine the evidence and physical conditions before they

are disturbed. If an insured contractor fails to do so, the insurer may use the alteration or destruction of evidence as a defense to paying the contractor's claim.

### **9. Make no voluntary payments.**

Under almost all policies, insureds are prohibited from voluntarily making payments on account of a claim. Therefore, when faced with a claim by an owner or third-party, it is prudent for a contractor to consult with counsel and to give its insurers an opportunity to handle the claim on its behalf before making any arrangement or accommodation with the claimant.

### **The Bottom Line:**

***In order to minimize your company's losses from unanticipated accidents and events, and to maximize your company's insurance recoveries, you should obtain expert advice and pay careful attention to detail. Involving experience counsel as soon as a loss or accident occurs is likely the single most important thing that you can do to ensure that your company receives all of the financial protection to which it is entitled. ■***



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