MEALEY'S™ LITIGATION REPORT
Insurance Bad Faith

Square Pegs In Round Holes: When The Adjustment Process Meets The Evidence Code

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Commentary

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If given the chance, most property adjusters would skip the aspect of their job involving litigation. Avoiding lawyers, depositions, and, of course, trials would alleviate much stress. Unfortunately, dealing with lawyers and litigation is an unavoidable job hazard for most adjusters.

Document The Undamaged

You have been there before. A condominium association reported a claim several years back following a storm. You inspected the property and followed a property manager around while they pointed out damage to a few buildings. You took pictures of what they showed you and estimated the damages. The carrier then submitted payment. The claim file was closed. Several years and many hundreds of claims pass until you receive a letter, likely from a public adjuster or attorney, stating that this particular condominium association would like to "reopen" their claim as you "failed" to pay for several million dollars worth of damages at the property.

You think to yourself, "*But they only claimed damages to two buildings. The storm did not even hit this area that hard. Their claim was under the deductible, but I managed to give them some money to satisfy them".* You re-visit the property, and observe much wear and tear and lack of maintenance but no additional covered storm damages. The public adjuster insists, however, the claim is for an additional $5 million. You retain outside coverage counsel to take an Examination Under Oath.

Of course, this is not to say that all "reopened" or "supplemental" claims are invalid. Mistakes can be made, but the percentage of "supplemental" claims that end up in litigation exceeds the percentage of other claims. Conflicts more likely arise when a carrier does not hear from its insured for years until receiving an unfavorably toned letter requesting millions and typically demanding appraisal at the same time.

There are many ways to protect yourself against meritless supplemental claims. One method is by emphasizing photographs. Ideally, the adjuster has taken photographs of the entire property right after the storm, regardless of what the insured originally reported as damaged. This enables an attorney to present the jury with a visual representation of exactly what the property looked like following the storm. You can show the buildings that the insured reported as damaged as well as everything else the adjuster saw. Usually, there is good reason why the insured did not report the majority of the buildings as damaged the first time around.

Photographing everything at the property, including what is not damaged, is a great habit. It enables you, as an adjuster, to protect against future meritless

supplemental claims. When a public adjuster submits a large "supplemental" estimate complete with photographic documentation, you can "impeach" the estimate by showing the same undamaged area in a photograph taken after the loss. Should the disputed claim not get resolved, these photographs provide the carrier with excellent evidence at trial.

In a trial last year, we focused on photographs early and often. The risk was a sprawling campus-like property of over 150 residential buildings. A hurricane hit the property and did cause damage. The carrier paid a substantial amount of money on the claim but ceased making payments when the insured alleged that every building at the property required a roof replacement due to storm damage for a total of more than $18 million. The insurer's adjusters and experts provided thousands of photographs that were used effectively within our opening statement, case-in-chief, and closing argument. Through direct testimony, our experts took the jury on a virtual tour of the property, showing that at least 75% of the buildings had no visible hurricane damage. The jurors could see it for themselves, relying upon nothing other than their own eyes. The experts also detailed the many non-storm related issues on the roofs that likely lead to roof leaks such as ponding, blistering, construction defects, and even "poodling," a term named after the poodle because the remnants of the roof resemble white dog hairs. The photos showed "lakes" on top of roofs due to improper drainage related to any storm. As we reminded the jury during closing (quoting opposing counsel), "A picture is worth a thousand words." In this case, it was worth $18 million.

Accounting for Hearsay

The most common disconnects between adjusters and attorneys are caused by the evidence code. A trial attorney works with the evidence code nearly every day. When finding a key piece of information, one of the first questions an attorney asks is whether that information is admissible evidence at trial. *Can the document or statement be authenticated? Who has sufficient knowledge of the document to enter it into evidence? Is the information hearsay? Is there an applicable exception to allow the hearsay into evidence?* Understandably, an adjuster does not usually entertain these considerations during the investigation and adjustment of an insurance claim. However, if every adjuster is aware of a few legal basics, the carrier's case at trial can certainly benefit.

The purpose of the Rules of Evidence, generally, is to promote fairness, eliminate unnecessary expense and delay, and to create a system where the truth can be ascertained.[1] The evidence code ensures that only certain evidence is considered by the jury or finder of fact. One type of evidence that is heavily restricted from a jury is hearsay. "Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[2] Basically, the hearsay system controls the admissibility of statements made "out-of-court" in a trial before a jury.[3] Controlling hearsay maximizes the reliability of testimony submitted to the jury by ensuring the statements in question are subject to cross-examination and made under oath.[4]

The case of *State Farm Fire & Cas. Co. v. de la Maza*[5] offers a simple example of excluded hearsay. The insured sued its insurer for breach of contract, and the insurer's defense centered on its insured's lack of cooperation with the claim investigation. One aspect of the insurer's case was the presentation of its own attorney's telephone conversations inquiring certain individuals about the insured's whereabouts. The only party to these conversations that testified was the attorney (and his secretary) that made the telephone calls. The court allowed the insurer's attorney to testify about what he said to the absent witnesses but would not allow the attorney to discuss what was said back to him. That evidence was hearsay excluded under the rule. The attorney was attempting to prove that the insured eluded the insurer's claim investigation by stating what other people, who were not testifying at trial, said about the insured. What the attorney said the individuals said was not testimony stated under oath and not subject to cross-examination. It was inadmissible hearsay.

Similarly, the case of *Linn v. Fossum*[6] provides instruction applying the hearsay rules to expert testimony. There, an expert witness testified that she consulted with numerous other colleagues who all agreed with the opinion she was offering to the jury. The Florida Supreme Court held that this testimony was impermissible hearsay. Under the evidence code, an expert is not allowed to testify on direct examination that he

or she relies upon consultations with other experts in reaching his or her ultimate conclusions. Such testimony is a "conduit" that improperly allows hearsay evidence to be portrayed to the jury without these "other experts" being subject to cross-examination. This, unfortunately, is done during an investigation of an insurance claim all the time.

For instance, how do you price out the cost to replace a damaged roof? Typically, an adjuster or its estimator will call three or four local contractors or vendors and ask what the "per square" pricing is for the particular roof system. Those quotes are averaged, and the insured is paid accordingly. But, what happens when that claim is reopened several years down the road? The adjuster knows he called several reputable companies but sometimes cannot remember the person he spoke to or even the price quotes. The pricing information received from these unnamed roofing contractors is hearsay, and not only will what these contractors and vendors say be inadmissible but the estimate itself will be inadmissible. Therefore, if you ever base an estimate of damages upon a particular piece of information, such as roof pricing from a contractor, it is good practice to have that contractor or vendor quote their roof pricing on paper and personally sign the quote. Then, if necessary, you could subpoena that contractor or vendor to testify at trial.

Another example relates to quotes during site inspections. We recently had another large condominium loss where our adjuster recalled that a unit owner told him that his unit was not damaged by the storm in question but had leaked for many years. When asked which unit owner said this, our adjuster reviewed his hand-written notes only to find that it was "Bob from Building 2." Without a last name, we consulted the most recent unit owner listings received from the insured. There were seven "Bob's" that lived in Building 2. While the quote from "Bob from Building 2" was great information, it was inadmissible hearsay because we could not track down "Bob."

Handpicking Experts for Litigation

The importance of experts is common knowledge in the insurance industry. Obviously, carriers rely upon their experts to properly evaluate losses far before a claim ever reaches litigation. This expert evaluation, along with a potential assist from legal counsel, usually dictates whether coverage is granted on a particular loss. There are many considerations that come into play when choosing an expert. Intelligence. Experience. Attention to detail. Previous claims with the expert. Possibly their billing rates. But there is another variable that you should probably consider–how will this expert present to judge and jury?

What experience does your potential expert have in providing sworn testimony? What is his or her comfort level in providing a videotaped deposition or persuading a live jury? Will they, regardless of expertise, convey their opinions in a fashion the average jury can understand? These are all aspects that should be considered, especially if you believe early on that a particular claim may have to be litigated.

Things can go very wrong if an expert is uncomfortable in front of judge and jury. Last year, we had another two week jury trial, and the warning signs were fairly obvious from the beginning in relation to our causation expert, a structural engineer. At first, we had trouble getting in touch with him. We only needed basic information such as when he would arrive in town, but even this information was difficult to come by. Our plan was to work with him at night during trial and during the weekend. He did eventually arrive towards the end of the first week. After exchanging pleasantries, his very first question was telling. "When are we going to talk? I need to get home." I explained that he would not be going home very soon as we needed at least a few days to prepare him in between conducting the trial during the morning and afternoon hours. This did not sit well with him. Plus there was another problem. "I'm staying the weekend? But, I didn't bring any clothes with me." The insurer's expert arrived in Florida for trial with only one casual change of clothes.

Over the next several days, there were a handful of interactions where the insurer's expert expressed his desire to go home. However, whenever we would return from trial for the day, we would always find him working away in our "war room" at the hotel. He worked rather diligently. He would also have several great questions awaiting us when we arrived. When he even bought a new suit to testify in court, it seemed he had overcome his nerves. He hadn't.

The day of his trial testimony arrived. We had agreed the previous night that he would show up at court at 9 a.m. the next morning. He would be our second

witness of the day. I remember looking to the back of the courtroom after finishing the direct examination of the first witness. The expert was not there. No big deal. He could be outside. When re-direct ended, it was my turn to call our causation expert. I announced his name and went outside to get him. He was nowhere to be found. He did eventually arrive to the courthouse, but it was about an hour later. We managed to cover for his absence by reading other deposition transcripts into the record.

When he actually arrived, he was covered in perspiration. He offered an explanation that he got lost. He arrived at the courthouse on time, but could not remember which courtroom we were in. He forgot his phone at the hotel, so he went back to the hotel in an effort to pinpoint which room we were in. This process took several hours. Obviously this nice and otherwise competent expert was simply not comfortable with the litigation or trial process. Actually, to our surprise, he did quite well on the stand, although when done, he almost ran out of the courtroom.

This story is not told simply to rehash this poor man's traumatic experience. The point is that adjusters should be aware that there are some experts available for hire that simply have no comfort level testifying, and their discomfort could negatively affect your litigation. You should consider an expert's experience in providing sworn testimony when hiring a consultant to assess a loss. Conversely, if you lack confidence in your previously hired consultants when litigation begins, you should consider hiring a different group of experts who are more comfortable and confident to actually communicate their opinions.

Document Productions - Proving the Negative

A key portion of any insurance claim investigation is the documentation produced by the insured. Typically, the carrier will ask for a wide range of information including property history, maintenance records, an inventory of the damage, a list of persons with knowledge of the loss, expert reports, and other documents. The insured will usually respond in one of two ways, either to simply send responsive documents or by inviting the insurer's representatives to inspect the documentation at a particular location. Either way, the insurer should immediately confirm the exact contents of the document production in a manner that can be proven in court. Should there ever be a disagreement regarding the contents of an insured's document production, the insurer will be able to prove exactly what the insured produced and when they produced it. Or more importantly, the insurer can conversely prove what the insured *did not* produce, an important element of an insurer's affirmative defense that the insured failed to cooperate with its investigation of the claim.

The system that best confirms the contents of an insured's document production involves the use of "Bates-labels" and letter writing. However, you must be forewarned- this system can be quite tedious and sometimes expensive depending on the size and complexity of a given loss. Let's take the average document production and illustrate how to confirm the exact contents of the production. After sending out a document request, the insured's counsel responds by sending a computer flash drive containing several thousand pages, all allegedly responsive to the request. Your next step is to print out all of these documents and place "Bates-labels" on each page. Therefore, if the insured's production consists of 3,500 pages, the first page will read on the lower right corner, for example, "INSURED-000001" and the last page will be "INSURED-003500." You then write the insured a letter enclosing each of these 3,500 pages and ask for the insured to verify, in writing, that the 3,500 pages consist of everything they previously produced to you on the flash drive. Similarly, you could have the insured perform this same confirmation at an Examination Under Oath. For that to occur, you, as the insurer's representative, need to bring those 3,500 pages to the Examination Under Oath and ask the insured to confirm that those pages are everything that was produced. An insured's refusal to verify the contents of its own document production could be a breach of the cooperation clause.

This system becomes more burdensome when the insured does not send responsive documents but invites the insurer's representatives to inspect documents on site. Usually, the insured will point to a room with many filing cabinets with the general instruction that if responsive documents exist to the requests, those documents are contained somewhere in that room. It is then your job to filter through the filing cabinets and potentially identify the relevant documents. Many times, the insurer's representative will flag the documents he or she finds relevant and only has those

documents copied. However, the only way to actually confirm each and every document that the insured made available in cases like this is to have the entire room of documents copied and "Bates-labeled" pursuant to the system discussed above. Otherwise, when you come across a key, important document for the first time several years into litigation, there is nothing to stop the insured from claiming that document was in the room of filing cabinets but you simply failed to see it or copy it.

You should undertake a cost/benefit analysis as to whether to employ this verification system. If your claim is for a minimal amount of dollars, it may make little sense to use. However, if facing a high exposure and several complex coverage issues, it is highly recommended that an insurer's adjusters or representatives confirm the receipt of every document from the insured.

Conclusion

The above are merely some suggestions that can make litigating a disputed claim smoother and easier. A cost/benefit analysis should be applied to whether many of these ideas should be used for a particular claim. At the very least, you and your attorney should discuss these issues immediately upon receipt of any lawsuit. After all, you don't want to receive a bill from a nervous expert after trial that includes an expense for a new suit.

Endnotes

1. Fed. R. Evid. 102.
2. Fed. R. Evid. 801(c).
3. *See* GLEN WEISSENBERGER & JAMES J. DUANE, WEISSENBERGER'S FEDERAL EVIDENCE § 801.1 (6th ed. 2009).
4. *Id.*
5. 328 So. 2d 547 (Fla. 1st DCA 1976).
6. 946 So. 2d 1032 (Fla. 2006). ■

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