

## **When Catastrophe Comes Calling & Ten Insurance Claim Do's & Don'ts**

### **I. The Catastrophic Claim**

It seems that Southern California is the land of natural disaster. Between fire, flood, earthquake and the occasional stray hurricane, we get more than our share of Mother Nature's wrath.

Since our region is also one of the most highly populated and developed portions of the world, every disaster brings either the threat, or the reality, of catastrophic loss. Most recently, we watched in horror as more than 2500 homes belonging to our friends and neighbors vaporized in storms.

Ah, but at least there's insurance covering the homes you probably thought, as CNN droned on about fire lines and our brave firefighting crews. Well, that can be true, and it can false.

The fact is, whenever there is catastrophe, insurance problems rear their ugly head. Some of the problems are structural in the marketplace, such as limited replacement coverage or properties that through poor underwriting practice have little or no insurance. Some of the problems come from unfair adjusting practices – a carrier that would rather fight than pay its fair share, a catastrophic claims team that is unprepared for the realities on the ground in Southern California and tries to treat our special situation in the same manner it handled that tornado in Kansas last fall or the blizzard in Ohio last winter.

As practitioners, our clients look to us as being experts on how to find their way through the insurance maze during what might well be the worst period of their own natural lives. In a catastrophe such as the recent firestorms, your client might not even know who their insurance company is. The policies and all other important documents may well be cold ash by the time your client knocks on your door asking for help.

There isn't any boilerplate formula for advising insureds about how they might find their way through the insurance maze following a catastrophe. There are, however, some situations that seem to come up time and time again.

This article covers many of the common problems you and your client might face, as well as a brief primer on some of the most common defenses to coverage and bad faith claims you might encounter. At the end, I've included a list of ten insurance claims. Do's and Don'ts you might find helpful.

In any event, the best place to start is at the beginning. So far as an insurance claim is concerned, the beginning and the end is always the policy.

### **II. The Policy as Beginning and End**

It's amazing how often we make the simple mistake of forgetting that insurance really begins with a written contract. Yes, it is true it is a special contract, where in exchange for premium dollars an insurer takes on a quasi-fiduciary role towards its insureds, etc. But, still, somewhere in all those duties, obligations, conditions, coverages, covered and excluded perils there is a written contract.

The first thing that needs to be done in advising on a catastrophic insurance claim is to get a copy of every policy that might possibly provide coverage for the damaged property and read them all from front to back.

Every property policy will have a declarations page that is specific to the insured property, followed by various policy forms, endorsements, riders and attachments. The declarations page should identify each

and every form, endorsement, rider and attachment that makes up the complete policy, usually using a policy form number and sometimes, a date.

Compare the policy forms the carrier delivered to your insured against the declarations page to make sure everything matches. Without going into great detail, a basic principle is that the insurer is bound by whatever contract it delivers to the insured and sometimes you will find that the insurer's policy services people delivered better coverage than the insurer's own records reflect.

First thing, make sure you have every policy that applies to the property and then read them. It doesn't have to be a thorough review at the very beginning. But know what you have.

If your client doesn't have the policy forms because they were lost, destroyed or are otherwise unavailable, you'll have to get policy reconstructions from the carrier. Requests can be made to your client's agent or broker or directly to the carrier's policy services department. If your client doesn't remember who their carrier was, you'll need to do a little detective work. Start with the insured's checking account, most people pay for their insurance by check and a review of banking records might well lead you to every carrier that might provide coverage for the damaged property.

### **III. Agent Negligence**

One issue that frequently arises following a catastrophic loss is that the damaged property was not adequately insured in the first place. Where an agent or broker provided your insured with professional advice on the appropriate coverage or bound coverage based upon their own professional expertise, there may be a claim for professional negligence. See, e.g., *Free v. Republic Ins. Co.* (1992) 8 Cal.App.4th 1726, 11 Cal.Rptr.2d 296.

Not every underinsurance problem is attributable to a broker or agent. In the past, some carriers have systematically reduced coverage for various risks for their own underwriting reasons, and not adequately disclosed what they were doing. Under such circumstances, liability for the underinsurance may lie with the carrier.

Of course, brokers and agents are different flavors of insurance salespeople and each has a different role in the insurance system and different duties and obligations towards insureds. Still, the point remains. If the damaged property was not adequately insured in the first place and your client relied on a professional for insurance advice, investigate.

### **IV. Prudential LMI, *Spray Gould* – Ask Not for Whom the Statute Tolls**

Property insurance contracts generally have their own statute of limitations built in and the period in which to file suit to enforce the contract is almost always less than the period that applies to a plain vanilla written contract.

When you perform your initial policy review, look for the contractual statute of limitations. If one does not appear, check an insurance practice guide for clues about any special period that might apply to any given coverage.

The general rule is that the limitations period begins running once the loss occurs, is tolled during the claims investigation and then runs again when the investigation is complete. See, *Prudential LMI Commercial Ins. v. Superior Court* (1990) 51 Cal.3d 674, 274 Cal.Rptr. 387.

California insurance regulations require a carrier to advise its insureds about applicable time periods affecting the claim, including the time in which suit may be brought. If the carrier does not make such a disclosure, then it may be equitably estopped from raising the statute of limitations as a defense. See, *Spray, Gould & Bowers v. Associated International Ins. Co.* (1999) 71 Cal.App.4th 1260, 84 Cal.Rptr.2d 552. Other misbehavior by a carrier may also create an estoppel where suit is filed after what would normally be the limitations period. See, e.g., *Vu v. Prudential Prop. & Cas. Ins. Co.* (2001) 26 Cal.4th 1142, 113 Cal.Rptr.2d 70.

However, beware of varying limitations periods. When in doubt, calendar the earliest possible date and file before it as a protective measure, or try to arrange a tolling agreement with the carrier.

## **V. Efficient Proximate Cause**

When wildfire causes loss of ground cover followed by pouring rains resulting in mudslides that destroy a home, how do we determine the cause of the loss for insurance purposes?

In California, the analysis is to look for the efficient proximate cause of the loss.

The general rule is that where there are two or more causes of loss, what we call "concurrent causation," the peril that set the chain of causation in motion is the cause of loss for insurance purposes. So, following the hypothetical above, where wildfire is a covered peril there is coverage under the policy, even if earth movement (mudslides) are excluded. *Howell v. State Farm Fire & Cas.* (1990) 218 Cal.App.3d 1446, 267 Cal.Rptr. 708.

This is always an important area where there are catastrophic losses as carriers will typically seize on an excluded peril in denying coverage while ignoring a covered peril. It is important to perform this analysis early on and advise the carrier of your coverage reasoning so that there is no question that the insurance company is on notice.

Ignoring California law in making a claims decision is bad faith conduct justifying punitive damages. See, e.g., *Hughes v. Blue Cross of N. Cal.* (1989) 215 Cal.App.3d 832, 263 Cal.Rptr. 850.

The key cases are *Sabella v. Wisler* (1963) 59 Cal. 2d 21, 27 Cal. Rptr. 689; *Garvey v. State Farm Fire & Cas. Ins. Co.* (1989) 48 Cal. 3d 395, 257 Cal. Rptr. 292; *Palub v. Hartford Underwriters Ins. Co.* (2001) 92 Cal. App. 4th 645, 112 Cal. Rptr. 2d 270.

## **VI. Genuine Dispute Doctrine versus the Manufactured Dispute Argument**

I was talking shop with an expert recently when he made an interesting comment.

"You know," he said, "I've noticed that in the past couple of years, the carriers are putting a lot more pressure on experts to reach a certain result in their reports."

"Genuine dispute doctrine," I said.

"Excuse me?" he replied.

The genuine dispute doctrine springs from a series of decisions that originated in the Ninth Circuit and then spread to the California Court of Appeal. Put simply, the doctrine says that where a carrier relies in good faith on expert opinion in reaching a claims decision it cannot be held liable for bad faith.

In my opinion, the doctrine is leading to a steady corruption of the claims process. Sometimes jurists agree with me. Sometimes they don't.

The best discussion of what is not covered by genuine dispute is found in *Amadeo v. Principal Mut. Life Ins. Co.* (9th Cir. 2002) 290 F.3d 1152. Also see, *Hubka v. The Paul Revere Life Ins. Co.* (S.D.Cal. 2002) 215 F.Supp.2d 1089.

However, when analyzing a potential bad faith claim, genuine dispute must be considered at the outset and measures taken so that when the inevitable summary adjudication motion on bad faith and punitive damages arise, claims handling misconduct (including expert misconduct) is readily apparent from the evidence.

Read *Chateau Chamberay Homeowners Ass'n v. Associated International Ins. Co.* (2001) 90 Cal.App.4th 335, 108 Cal.Rptr.2d 776.

### **VII. Advice of Counsel as a Defense is Only as Good as the Advice of Counsel**

Carriers will also attempt to insulate themselves from bad faith a punitive damages by utilizing attorneys during the claims process and then raising advice of counsel as a defense to bad faith. See, *State Farm Mut. Auto. Ins. Co. v. Superior Court* (1991) 228 Cal.App.3d 721, 279 Cal.Rptr. 116.

#### **To rely on the advice of counsel as a defense, a carrier must**

(1) act in good faith reliance upon the advice of counsel, (2) not be so knowledgeable as to the legal standard as to know the advice was erroneous, (3) have made a full disclosure of all relevant facts to counsel, and (4) be willing to reconsider and act accordingly when shown its counsel's advice was erroneous. There are various responses to the advice of counsel defense, such as that the insurer did not rely on the advice or the advice was patently unsound.

However, this is a tricky area. If it pops up in a case of yours, do the research and consult with experienced counsel. Come to think of it, that's good advice all around.

### **VIII. Punitive Damages after Campbell**

Last year, the U.S. Supreme Court announced that due process acts as a limit on punitive damages in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. \_\_\_\_ (2003). The California Court of Appeal quickly followed up by finding that, in a duty to defend scenario, the upward limit seems to be a multiple of four times special damages. *Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 135 Cal.Rptr.2d 736.

Defense counsel will privately observe that they are already seeing their corporate clients making business decisions based on the economics of a four time multiple punitive damage potential. The notion is, since the consequence can be measured, some tortious conduct can be profitable using a strict cost-benefit analysis.

Trusting to human nature (as did our founding fathers) I believe that ultimately, human greed will trigger some horrendous event that will convince even the conservative minds at the high court that some unpredictability in civil punitive awards is a good thing in a free society.

Soapboxes aside, the reality is that some bad faith actions that were economically viable prior to Campbell are no longer worth pursuing on a contingent fee basis. Analyze your case accordingly. What you once handled as a contingent matter may now only make sense on an hourly retainer.

### **IX. Ten Do's and Don'ts For Making A Claim.**

All the law of bad faith is well and fine, but if the underlying claim is mishandled by the insured, no amount of skillful lawyering can cure the damage.

As with anything else, there is no fixed formula for handling an insurance claim. Even so, over the years I've developed a short list of do's and don'ts that are basis for every claim. [Download a copy](#) and feel free to share it with your clients:

#### **Some Simple Rules in Making an Insurance Claim**

Insureds who have a claim should keep ten simple rules in mind as they pursue benefits due them under their insurance contract:

#### **DO:**

1. Report your loss as soon as possible. Don't procrastinate with an insurance claim. On the other hand, you should not be making needless claims, because the carriers keep track of what you claim and too many claims can affect your ability to obtain insurance in the future. Use your best judgment, but make your decision as quickly as possible.
2. Document your loss as thoroughly as possible in writing. The insurance company keeps an extensive claim file. You should have one too. Get a manila folder or a binder and collect receipts, notes, photographs – everything having to do with the claim – in one place. Try to keep it organized, but it's more important to keep it than anything else.
3. Keep a written diary of all communications and contacts during your claim. The insurance company adjuster is supposed to keep a diary of every communication he or she has with you but very often will only record the communications that are helpful to them. You need to keep your own diary of every contact you have with the company. A diary looks like this: <<diary graphic>> You should also confirm all important oral communications in writing. It is amazing how this one simple practice can solve so many problems during the course of a claim.
4. Take photographs of your loss where possible. Don't be cheap with the film, either. This is especially important with property losses such as fire, earthquake or automobile accident. Make sure you document visible evidence of your loss. Your adjuster may not get around to taking photographs until a significant amount of time has passed, and if the visible evidence of your damage has disappeared (such as when a flood scene is cleaned) the carrier will use that lack of evidence against you.
5. Be truthful and accurate about your loss. Don't overstate your claim, but don't understate it either. Insurance adjusters are much like investigators and they are trained to be suspicious. You need to be candid with your carrier. At the same time, you need to take care that you can support your claim with accurate information. Don't assume that a carrier will accept your estimates of value, quantity or whatever without question. That seldom happens in all but the smallest claims. Be ready to defend your estimate.
6. Be polite but firm with claims personnel. Claims adjusters are people too. They have a job to do and you should attempt to treat them with all due courtesy. Now, it is true, there may come a time when the

adjuster will be difficult if not rude, especially when pressed for additional payment. Avoid being drawn into a battle with the adjuster. Keep your head, commit important communications to writing and be polite but firm. If the dispute erupts into litigation, everything you say or do is subject to scrutiny and criticism and you want a clear record that the insurance company is the wrongdoer, not you.

#### **DON'T:**

7. Do not misstate facts. Once again, adjusters are trained to be suspicious. You should report your loss like a news reporter reports a story. Just the facts, ma'am.

8. Do not intentionally overstate the value of your loss. We call this "overreaching" in the legal profession and it is an excellent way to get into trouble on your claim. Remember, claims professions adjust claims day in and day out. They have probably seen claims similar to yours dozens if not hundreds of times and have a notion about the value of your loss is likely to be.

9. Do not engage in any act that might be considered fraudulent. Fraud is a intentional act calculated to mislead. Don't do that during your claim. A carrier's favorite defense is to yell "fraud!" even where there is none. So don't give the insurance company any ammunition. Also, insurance fraud is not only grounds to deny a claim, but it is a criminal offense as well. During your claim, honesty is always the best policy.

10. Do not be intimidated into settling your claim for less than its reasonable value. Insurance adjusters are trained negotiators. They are trained to attempt to settle a claim within a range of value. The first offer you hear is most often the number at the low end of the adjuster's range and you will only find out what the top offer is by negotiating. Don't be intimidated. Present your evidence. Insist on a thorough, fair, objective investigation and evaluation of your claim, which is the standard the law requires. If you believe that you don't have the skill to negotiate successfully, consider getting some help in settling.

#### **X. Conclusion**

Catastrophic losses mean real human catastrophe. When a potential client approaches you with their insurance problem, always keep the import of their loss in mind as you work through their case.

Defense counsel will tell you that never in recent history has insurance law so favored insurance companies.

So be a vigilant, educated advocate. You are on the right side of the fight and you will prevail, so long as you pick the right case and pay attention to the road signs through the insurance maze.

© Bill Daniels Law Offices

**Bill Daniels** regularly publishes a variety of articles and videos to keep you abreast of legal developments and case law that affect our society.

#### **For more and related information:**

#### **ARTICLES:**

- [Coping with California Firestorm Claims.](#)  
Major losses due to fire in California require a careful approach.

- [Five Fatal Bad Faith Mistakes and How To Avoid Them](#)  
The law right now is probably as favorable for carriers as it's been in several generations
- [Discovery and Depositions in the Bad Faith Case.](#)  
Bad faith basics.

## VIDEOS:

### Documents

This video covers "Request for Production". Preparing your documents for any case is important. This video covers 7 important tips to gathering documents in a lawsuit. ([more...](#))

**Bill Daniels | Law Offices has a reputation for winning milestone cases.** Our successful track record proves it, with Bill Daniels involved with multiple significant verdicts and settlements in the tens and even hundreds of millions of dollars. When facing a tough opponent, you need an equally aggressive advocate on your side willing to do battle for you! **Attorneys turn to Bill Daniels | Law Offices to help with the best possible resolution to their problem cases.**

[Contact us today](#) for a free consultation on the merits of your case. When you are facing a tough opponent, put the passion and expertise of Bill Daniels | Law Offices on your side.

**William A. Daniels** is a Trial Attorney with BILL DANIELS \ LAW OFFICES, APC, in Encino, CA. His practice focuses on employment, serious personal injury and class actions. A graduate of Loyola Law School of Los Angeles, he is a member of the Consumer Attorney Association of Los Angeles Board of governors and a founding member of the Civil Justice Program and the 21<sup>st</sup> Century Trial School at Loyola. For several consecutive years he has been named a "Super Lawyer" Los Angeles Magazine in Southern California.

He can be reached at: [William.Daniels@BillDanielsLaw.com](mailto:William.Daniels@BillDanielsLaw.com); [www.BillDanielsLaw.com](http://www.BillDanielsLaw.com)