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10 Tips For Getting Claims Paid

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ANDERSON KILL

Insurance is a strange business. The less promised product insurance companies deliver, and the more slowly they deliver it, the more money they make. The "product" in question is not insurance policies, but payouts on claims.

An insurance company's goal is to obtain the largest premium for the least amount of risk. An insurance company profits primarily by investing those premiums for a return. Ergo, the longer it holds onto the premiums and avoids paying claims, the more profits it will earn. The two primary metrics are the loss ratio – the ratio of premiums to claims payouts – and the "float" – the time lag between collecting premiums and paying claims. That time is money for the insurance company.

For a policyholder, the key to getting around these disincentives to claims payment is understanding the economics of insurance. Reinsurance is key. If there is adequate reinsurance for a claim, the insurance company may be more amenable to payment. By helping the insurance company facilitate its reinsurance claim, you will better your position to maximize coverage for your loss.

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The ten steps below are designed to help you minimize the insurance company's resistance to claims payment. Together, they constitute a blend of pressure to keep the claim moving and support for the insurance company's own quest for reinsurance payment, which in turn will facilitate a claim payment to the policyholder.

1. Give Notice Early, Broadly And Often

Some first-party insurance policies require the policyholder to give notice of a claim within a fixed period, sometimes as short as a week. Therefore, when a claim arises, give notice as soon as possible under as many insurance policies as may be applicable. Supplement that notice as you develop more information about the claim.

Risk managers sometimes fear giving notice, as they believe it may impact renewal. The loss should be identified anyway in the renewal application to prevent a misrepresentation/concealment defense. Also, consider that giving notice as soon as possible will allow your insurance company to give notice to its reinsurer as soon as possible, and thus facilitate claims payment.

Remember that providing a notice of occurrence is not a demand for payment and so it should not impact the insurance company's loss ratio. A notice of occurrence also allows the insurance company to conduct an investigation of the loss. If the insurance company has the opportunity to promptly investigate a loss, it can avoid prejudice. Later, you can decide whether and when to make a demand for payment.

Although almost all states require that insurance companies that seek to deny coverage on grounds that the policyholder failed to provide timely notice must demonstrate prejudice (or that the failure to give notice was a material breach), it remains prudent to give notice early, broadly and often. This minimizes the chance that late notice will become a defense to coverage. That will minimize the trouble and expense the policyholder has to bear to get its claim paid.

2. Assemble The Right Team

Your team should include people familiar with your loss and with your insurance coverage. In addition to people from risk management, consider who else might be needed to assist the risk manager: accounting firms, forensic accountants, actuaries, loss adjusters, insurance brokers, engineers, environmental consultants, insurance archaeologists, and maybe even policyholder coverage counsel.

3. Gather All Information And Document Everything

Think about what kind of information you can use to support your claim. Err on the side of providing more documentation than you think is necessary or even reasonable. This will help your insurance company, which may be trying to satisfy the information demands of its own reinsurance company. If the requests for information are unreasonable, write to your insurance company and ask what it really needs to confirm coverage.

Now (before you have to handle a loss) is a very good time to gather and inventory all of your company's insurance policies. Index them. Your insurance broker may help. Having this done before you have to handle the loss will make providing quick and broad notice easier.

After a loss occurs, gather every scrap

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of information pertaining to it. Notify all company departments that have documents that may be pertinent to the loss to preserve those documents. Suspend document destruction procedures applicable to those documents. Scan them. If hard copies of company records have to be destroyed, have someone review the documents before destruction so they can certify that no pertinent records were destroyed. The duty to cooperate means keeping and turning over pertinent documents and doing so as soon as possible. Again, prejudice rules generally apply, but doing it right may help eliminate the argument.

Document all communications with your insurance company, including all requests for information, all conversations, everything the insurance company does pertaining to the claim, and everything you do. Always have the last word – even if it is to say that you disagree. If the claim is denied, you will need this written record as evidence.

4. Avoid Open-Ended Standstill Agreements

Your insurance company may say it needs time to investigate the loss and wants a standstill agreement to preserve everyone's legal position. Avoid these if possible. You give up leverage to force your insurance company to conduct a timely investigation.

If you have to enter into a standstill agreement – and they sometimes are necessary to minimize legal costs – set a clearly defined and realistic deadline. Anything further just gives the insurance company additional "float," which Warren Buffet identifies as a key to insurance profits. Do what you can to get your money quickly so that you can invest it and make profits rather than giving an added bonus to Warren Buffet. Don't give your insurance company a license to stall.

5. Quantify The Loss

Identify and document amounts spent on the loss or the liabilities. Include defense costs for liability matters, in-house time for in-house counsel, risk managers and engineers, and any expenses that can be recorded, tallying past, present and future loss amounts. Consider hiring professionals with expertise in identifying all types of losses that might be included. For future losses, consider using a forecaster or actuary. Such losses can then be reduced by a present value discount and included in your negotiations. Try to consider all possible contingencies.

6. Value The Insurance Asset

Look to the policy limits. Are you sure it has aggregates? Examine all potential forms of coverage and all potentially applicable coverage grants within all potentially applicable policies. Don't forget endorsements. Look at the ultimate net and supplemental payments clauses in liability policies and consider what costs your company has incurred that fall within those coverage grants.

On the negative side, consider deductibles and self-insured retentions. Look at potentially applicable exclusions and exceptions to those exclusions. This will help you shape your company's loss.

When valuing how much you may get back to cover your loss, consider the financial viability of your insurance companies. Taking a discount and getting paid now may have value if your insurance company has a clouded financial future.

Analyze your policy and conduct legal research, if necessary. Look at the loss valuation and compare it to all the forms of coverage available. Apply the losses – limits and sub-limits – as best you can to maximize coverage. Consider forum sensitivity. Does it make any difference if your claim is pursued in one jurisdiction or another? Compare state provisions and precedents regarding late notice prejudice, consent to settle exhaustion of underlying coverage, application of the pollution exclusion, or other factors as applicable. Consider which jurisdictions would suit your claim best.

Is there a mandatory arbitration provision in the policy? A choice of law provision? These must be taken into consideration.

7. Set The Target/Demand

Calculate each insurance company's maximum potentially applicable coverage separately. Make demands separately. While you cannot obtain a windfall or double recovery, there is no reason why you should not start out by explaining to each insurance company what its exposure is. Again, note that while you have likely given notice of occurrence by this point, you still can determine when a demand for payment should be made.

8. Negotiate The Claim

What do you want to achieve? Cash now? A payment stream in the future? A coverage-in-place agreement confirming coverage for future events? Take these factors into consideration.

Negotiate with each insurance company separately. Generally, negotiations that bring all insurance companies together at the same time do not result in prompt settlements. The insurance companies typically get together to share theories of defense to coverage. That does not promote a payment of the claim.

Do not press weak claims. Weak coverage claims tend to hurt, not help, claim payment. But do be persistent in the pursuit of claims that should be paid. Write to the insurance company if you have not heard from them.

Try to get the right people to claim settlement discussions. Make sure you have appropriate settlement authority.

Remember to mind your manners. By the time you have gotten to this point in the payment of your claim, you rightfully may be very frustrated and even angry. Try to put that anger aside for purposes of resolution of the claim. It is harder for the insurance company to pay if there is personal animosity.

9. Use Your Broker Wisely

Insurance brokers can assist in the claim process in many important ways. Most major insurance brokers have departments that quantify and present a loss. The broker can be a neutral party in the claim process, if not your advocate.

The broker can arrange for a principal-to-principal settlement meeting, preferably without counsel (although the participants may be prepared by counsel prior to meeting). The broker also can help make sure that the appropriate claim representative is at a settlement meeting.

The fine print here is that many brokers have a commission arrangement with the insurance company with which you are negotiating, so be aware that he or she may not be entirely impartial.

10. Be Careful In Documenting The Settlement

Focus on the scope of the release. Try to limit the release just to the claim being paid. If the insurance company asks for more (tying is an unfair claims practice under the NAIC Model Unfair Claims Practice Rules adopted in almost all states), then make sure you can quantify the value of the additional coverage you are giving up.

Just because you have not yet experienced a certain type of loss does not mean it won't happen. Do not give up anything you have not valued carefully.

Make sure the payment is net of retrospective premium adjustments or any other charge back. The last thing you want is a bill from the insurance company.

Be very careful of indemnification provisions. They easily can eat up the claim payment proceeds you are getting. Limit indemnification provisions by agreeing to a defense but not indemnity for future claims, or cap defense and indemnity obligations at the settlement amount.

Key to the whole process is persistence. Don't give up. And remember that even when the process is at its most adversarial, all the work you put into documenting your claim potentially may help your insurance company with its reinsurer. Make the economics of insurance work for you rather than against you.