
KICK IT UP A NOTCH

When A Lawyer Is Helpful During The Insurance Claim Process

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KICK IT UP AN NOTCH— WHEN A LAWYER IS HELPFUL DURING THE INSURANCE CLAIM PROCESS.

“... there are at least four times in the claim process when you should seriously consider hiring a lawyer. Those times include: (1) an examination under oath; (2) an appraisal; (3) a delay in the investigation and payment of the claim; and (4) when presented with a release.”

Asking a lawyer when it's the best time to hire a lawyer is a lot like asking an alcoholic when it's the best time for a drink. The answer: Anytime. A lawyer can be invaluable in the claims process from the beginning to the end; however, there are at least four times in the claim process when you should seriously consider hiring a lawyer. Those times include: (1) an examination under oath; (2) an appraisal; (3) a delay in the investigation and payment of the claim; and (4) when presented with a release. Of course, a lawyer can be helpful at other times such as when the carrier requests a recorded statement or documents that veer far afield from a legitimate investigation of the loss; but for the most part, a lawyer should always be consulted in the four situations described herein.

Examination Under Oath

Most property insurance policies contain a provision requiring the insured, after a loss, to submit to an examination under oath touching upon all matters material to the adjustment of the loss. An examination under oath is similar to an oral deposition. Generally, it is conducted by an attorney for the insurance company; although an adjuster can conduct the examination. It is a process where a series of questions are asked of the insured, under oath, and his answers are recorded by a court reporter. Thereafter, the insured is required to sign a transcript of the examination. If the insured fails to submit to the examination or fails to sign the transcript; it is a breach of the insurance contract and may operate as a complete defense to the insurer's obligation to pay an otherwise valid claim.

Insurers utilize the examination under oath process for a variety of reasons. Sometimes it is used to investigate policy defenses, such as when there is a fire loss and evidence of arson exists or when there is suspected fraud in the application process. Sometimes it is used to develop subrogation claims against third parties the insurer may chose to pursue after payment of the loss. But, most often it is used to acquire evidence to support a denial or reduced payment for a claim.

Regardless of the reason the insurer chooses to use the examination process, the insured has a right to have an attorney present and, in almost all cases, should take advantage of that right. After all, if the insurance carrier is going to hire a lawyer to take an examination under oath, you had better arm yourself with a lawyer.

A skilled insurance lawyer will review your claim's history; attempt to determine the true motives of the carrier in selecting to conduct the examination; prepare you to give your testimony; and insure that your rights are protected in the examination. Insurance attorneys and adjusters have been known to use verbal and physical intimidation and coercion to gain an advantage in examinations. Often, the mere presence of an attorney will reign in such abusive tactics.

In other cases, after reviewing the claim's history, an attorney may advise you to forego the examination under oath and to immediately file suit against the carrier. Generally, this recommendation is made so you can avoid having to give your testimony twice: once in the examination and once again in a deposition. The more times you provide your testimony, the greater the possibility that inconsistent statements will be given that can be used to attack your creditability. By filing suit prior to the examination, an attorney will try to limit the number of times you will be required to testify regarding the claim. There are some risks with this approach; however, an attorney is in the best position to evaluate these risks in connection with a particular claim.

Appraisal

Another time an insured should seriously consider hiring an attorney is immediately after the insurance carrier requests an appraisal. Like the examination under oath, the appraisal process is a contractual provision designed to protect the insurance company in the claims process. It is designed to resolve one and only one question. That question is: "What is the amount of the loss?"

“The disadvantages of the appraisal process are: (1) its limited use, i.e. the amount of loss only; (2) unpredictable outcomes; and (3) its binding nature with only a limited ability to correct errors.”

Procedurally, the appraisal process begins with a written demand by either the insurer or insured requesting appraisal. Next, each side selects an appraiser that is required to be independent and competent. Thereafter, the appraisers typically select an umpire to resolve any disputes between their respective determinations. After selecting an umpire, the appraisers inspect the loss and prepare their estimates stating the actual cash value for each item. If the appraisers fail to agree, they submit their differences to the umpire. At this point, the umpire is empowered to make a final determination. In most policies, the final determination is required to be itemized and agreed to by any two of the three members the appraisal panel. The award is then filed with the insurance company and becomes binding upon the insured and the insurer.

The disadvantages of the appraisal process are: (1) its limited use, i.e. the amount of loss only; (2) unpredictable outcomes; and (3) its binding nature with only a limited ability to correct errors.

The appraisal process is handicapped by its limited use. The appraisal process can be used only to determine the amount of the loss. It cannot be used to decide questions of coverage or the cause of loss. For example, in connection with a typical homeowner’s policy in a hurricane loss, it is inappropriate for the appraisal process to be utilized to determine if the loss was caused by wind (covered cause of loss) or flood (non-covered cause of loss). An appraisal can only determine the dollar amount of the loss. But despite these limitations, insurers routinely utilize the appraisal process to take advantage of uninformed policyholders to determine coverage or causation and dispose of problem claims.

The appraisal process is also subject to unpredictable outcomes. This chiefly arises from the human element in the process. Appraisers and umpires are required to be independent and competent. They should be impartial and not under the control of the appointing party. They are not to be simply advocates for the person responsible for appointing them. They must be someone who understands insurance issues and has first hand knowledge of construction and replacement costs or can secure this information from reputable sources. Usually

this entails an enormous amount of research to accurately determine: the cost of thoroughly repairing a structure to its pre-claim condition with like kind and quality materials, the cost of complete debris removal costs in the case of fire or major contamination, the cost to repair and replace contents with like kind and quality and in some cases, the cost of additional living expenses if home becomes untenable. Inconsistent and unpredictable outcomes occur when one or more members of the appraisal panel fails to understand the limited use of the appraisal process or is not independent or competent.

Another disadvantage of the appraisal process is that it is binding. As a result, it is virtually impossible to correct errors that occur in the appraisal process. To correct any errors in the appraisal process, you must show that the appraisal award was the result of fraud, accident or mistake or that the appraisers or umpire were not independent or competent. In most cases, if you win this battle you will have to do so at the court of appeals level because trial courts seem to give the same amount of deference to the appraisal award as they give a jury’s verdict.

With all of the disadvantages of the appraisal process, I generally recommend that clients avoid participation in the process. However, if you chose to participate in the process, an attorney can draft an appraisal agreement for you that sets forth procedures to be employed in the process that are consistent with fundamental fairness; investigate the background of all appraisers and umpires to ensure impartiality, competence and compliance with the appraisal process; and advise you on methods to protect the evidence in the event the appraisal award must be challenged.

Delay In Investigation and Payment

You should also consider hiring an attorney when the carrier has violated its duties under the policy and the law in the investigation and payment of your claim. Texas has the Prompt Payment of Claims Statute §542.055 TEX. INS. CODE that provides a detailed timetable by which the carrier must request items, respond to the claim, accept or reject liability for the claim

“Accordingly, as a broad general rule, if your carrier has not accepted, rejected or paid your claim within 60 days after you have submitted all items, statements and forms that the insurer requested, you should consult with an attorney about the need for filing a lawsuit.”

and if accepted, pay the claim. In many property insurance policies, this timetable is also set forth contractually as part of the policy.

An insurer must within 15 days from receipt of written notice of a claim: (1) acknowledge receipt of the claim; (2) commence an investigation of the claim; and (3) request from the policyholder all items, statements, and forms that the insurer reasonably believes, at the time, will be required from the claimant. With certain exceptions, an insurer must notify the policyholder within 15 business days of the receipt of all items, statements and forms reasonably requested whether it will accept or reject the claim. If rejected, the carrier must state the reasons for the rejection. If unable to accept or reject the claim with the time period, the carrier must notify the policyholder within the time period of the reasons that it can not accept or reject the claim and thereafter accept or reject the claim not later than the 45th day after notification of its need for additional time.

Accordingly, as a broad general rule, if your carrier has not accepted, rejected or paid your claim within 60 days after you have submitted all items, statements and forms that the insurer requested, you should consult with an attorney about the need for filing a lawsuit. The statute provides that if the carrier violates the timetable, it must pay the insured the amount of the claim due under the policy, interest on the amount of the claim at the rate of 18% per year and the insured’s reasonable attorney’s fees.

Too often, I have seen policyholders delay involving an attorney in the claims process because they wrongly believe the legal process takes too long or costs too much. Sometimes claims adjusters foster this belief by stating that the insurer will delay payment if an attorney becomes involved or a lawsuit is filed. I have found that the policyholder’s delay in hiring an attorney only works in favor of the insurer. An insurance company merely uses the period of delay to gather evidence to augment its defense of the claim and outlast the insured.

In light of the remedies provided by law, none of the adjuster’s arguments retain validity. A successful policyholder can expect

to recover his reasonable and necessary attorney’s fees and penalty interest in the amount of 18% for the period of delay. Legal representation accelerates rather than impedes settlement.

Release

Finally, consider hiring an attorney anytime you are asked to sign a release. Insurance adjusters notoriously overreach when requesting the insured to execute a release in connection with the settlement of a claim. In fact, it is a violation of the Texas Insurance Code for a carrier to attempt to enforce a full and final release when only a partial payment has been made, unless the release is a compromise settlement of a doubtful and disputed claim. A skilled insurance attorney can review the release to ensure that it is drafted for clarity so that it cannot be construed to release unintended rights, evaluate your settlement in connection with the strength of your claim and preserve your rights with regard to other potential claims or causes of action.

Conclusion

A knowledgeable and skilled insurance attorney can be very helpful to the policyholder at any time during the claims process. However, if you find yourself in the claims process without an attorney, seriously consider hiring an attorney, if the carrier seeks to take your testimony through the examination under oath process, tries to invoke the appraisal provisions in the policy, violates the statutory and contractual timetables governing the investigation and payment of a claim or asks you to release your rights. In these situations, it is important to have an attorney advise you so that mistakes that could irreparably damage your claim are avoided.

ABOUT THE AUTHOR

J. BRANTLEY DURRETT, III

J. Brantley Durrett, III is an attorney that has been representing policyholders in insurance disputes against insurance companies and other wrongdoers since 1989.

His experience is concentrated in complex civil litigation matters with a particular emphasis in representing policyholders in insurance litigation. He has represented homeowners, apartment owners and business owners against their insurance carriers when their contractual and other rights have been abused by unscrupulous insurance adjusters and other scoundrels. He also has significant appellate experience including appeals before the Texas Courts of Appeal and the United States Court of Appeal for the Fifth Circuit. In an appellate capacity, Mr. Durrett has handled insurance cases of first impression in Texas and won reversals of lower court mistakes.

Mr. Durrett has been licensed in Texas since 1989. He has obtained millions of dollars in settlements for his clients. He is a member of numerous professional organizations, including the State Bar of Texas (Sections: Litigation, Insurance, and Commercial and Consumer Law) and the American Association for Justice (Sections: Motor Vehicle Liability, Insurance, Medical Malpractice, Commercial Litigation and Expert Witnesses).

Recently, Mr. Durrett restructured his practice to accept only a limited number of serious cases each year. As a result, he can provide a greater level of personal service for his clients without the distraction of maintaining a heavy case load.

If you think you have wronged by your insurance carrier or its adjusters, contact Mr. Durrett for a FREE, no obligation consultation.

Durrett Law Firm

The **Durrett Law Firm** is dedicated to protecting your interests and handling your case with personal attention, aggressive advocacy, professionalism, and compassion.

We have been successfully representing policyholders against their insurance carriers in Texas for almost 20 years. We understand that sustaining a insured loss can be financially and emotionally devastating. We strive to balance this concern with the unique and rigorous demands of the legal system. We understand that the selection of an attorney is an important decision, and which may have far reaching consequences.



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