

## [The Importance of Complying With Post-Loss Policy Provisions: Four Things You Must Do To Avoid Forfeiting Coverage After A Loss](#)

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Imagine that you arrived at the office one day and learned that someone was asserting a claim for damages against your company, or that one of the company's buildings had been damaged in a storm the night before. Although you undoubtedly have insurance for such events, would you be prepared to pursue the claim with your carrier?

Most insurance policies impose a number of duties that must be complied with before the insurer is required to respond to a claim or make any payments under the policy. Failure to comply with these duties could be costly, potentially resulting in a forfeiture of coverage under the policy.

There are four basic duties that must be satisfied in order to pursue any insurance claim.

### **1. You must provide notice to your insurer as soon as possible.**

An insurance company's duties under a policy are not triggered until it receives notice of a covered event. Most policies, including the standard comprehensive general liability (CGL) policy, require the insured to give notice of any claim brought against the insured or any "occurrence" that could result in a claim. Under most policies, such notice must be given "as soon as practicable," and must include the time, place and circumstances of the event. The purpose of this requirement is to permit the insurer to investigate and gather information about the claim before any evidence is lost or destroyed.

"As soon as practicable" has been interpreted to mean within a reasonable time under the circumstances. Various factors can influence whether the insured's notice was timely under this standard. Among other things, a court will consider the amount of time that passed after the insured became aware of the event and the level of diligence the insured exercised in determining if the claim might fit within one of its policies. As a practical matter, this means that, as soon as you become aware of a potentially covered event, you should give notice to every insurer that might conceivably provide coverage. If you are unsure whether one or more of your policies might apply, it is advisable to seek the opinion of insurance counsel.

Some policies have special notice requirements saying notice must be given within a specific period of time -- say 30 or 60 days. Because of this, it is important to be familiar with your policies and make every effort to give notice within the required period. If you cannot locate one or more policies that you believe might apply to the claim, you should immediately request a copy from your insurer or agent. Late notice will generally not be excused based on the inability to locate a copy of a policy.

Failure to provide timely notice can have serious consequences. First, any litigation costs you incur defending the underlying claim before providing notice will not be reimbursed. Second, your insurer might assert late notice as a defense to coverage, arguing that you violated the terms of the policy.

The treatment of this defense varies widely depending on which state's law applies. Some states hold that notice is a prerequisite to coverage, and that a failure to give timely notice voids coverage under the policy. Most states, however, hold that coverage will be voided only if the insurer shows that the late notice caused it prejudice, such as by undermining its ability to adequately investigate the claim or defend or settle the underlying suit.

To avoid having your claim lost due to late notice, it is advisable to designate someone at your company as the person to whom information about new claims (or occurrences that could give rise to claims) is submitted, and who has the task of ensuring that your insurers and agents are given prompt notice.

## **2. You must provide an accurate and timely proof of loss statement.**

In addition to providing notice, some policies require the insured to submit a sworn proof of loss statement. This requirement is typically found in "first-party" policies, which protect the insured from directly incurred losses, such as theft, property, health, disability and life insurance. The purpose of the proof of loss statement is to provide the insurer with the information it needs to determine if the claim is covered and, if so, in what amount, and to prevent fraud by requiring the insured to swear to the information being submitted.

A proof of loss is generally a two- or three-page form containing blanks for a variety of information requested by the insurer. Though the information differs from insurer to insurer, it typically includes: the time and cause of loss; the interest of the insured and any lien holders of the property; any other insurance which may cover the loss; details of any lost personal property or damaged buildings and accompanying repair estimates and supporting documents; and the specific amounts the insured is requesting in payment.

The time for providing the proof of loss is determined by the language of the policy. Some policies require the statement to be submitted within 60 or 90 days of the date of the loss, while others require submission within 60 or 90 days of the date the insurer requests it. It is therefore important to review your policies to see what requirements they impose.

Missing the deadline for the proof of loss could be fatal to your claim. As with late notice, the insurer might attempt to deny coverage based on untimely proof of loss. The law governing this defense tends to be the same from state to state as the law for late notice. Thus, most states hold that coverage is voided only if the insurer can show that it was prejudiced.

It is critical to be as accurate as possible when completing a proof of loss statement. Because the statement is under oath, an insurer might contend that any error voids coverage under the policy, or – worst yet – amounts to fraud. In most states, however, the insurer must show that the error was both intentional and material in order to result in a loss of coverage.

The proof of loss statement is tied to another important power the insurance company has at its disposal: the examination under oath. If the insurer has doubts or questions about the statements in

the proof of loss, it can require the insured to submit to an examination under oath, during which the sworn proof of loss could be used against the insured. This highlights the importance of being as accurate as possible when completing the proof of loss.

If you are faced with a policy requiring a proof of loss, our attorneys can assist you in completing the statement in order to ensure your claim is processed as quickly and smoothly as possible.

### **3. You must cooperate with your insurer in its investigation and handling of the claim.**

Most insurance policies require the insured to cooperate with the insurance company in the investigation, defense, and handling of any lawsuit or other claim brought against the insured. In general, this means providing the insurer and the attorneys it retains with the information, documents, and access to witnesses they need to defend the suit. The insured's failure to meet this obligation could result in a loss of coverage.

In most cases, your company will have a shared interest in cooperating with its insurer in order to obtain a favorable outcome in the lawsuit. If that interest ever diverges, however, and the insurer demands something that your company does not wish to provide (for example, asking you to turn over documents protected by the attorney-client privilege), you should consult with counsel to decide how to respond. The duty to cooperate is not limitless, and an insurer's request could very well cross the line.

The duty to cooperate can be complicated when the insurer has agreed to defend the insured in the underlying suit but reserved its right to deny coverage for any unfavorable judgment or settlement. In these circumstances, a conflict of interest arises from the fact that the insurer is providing a defense to the insured but simultaneously trying to preserve its own interests. If a policyholder finds itself in this position, it should carefully weigh its duty to cooperate, and may want to seek counsel to review any requests for information. The policyholder will still be required to provide information to defend the underlying suit, but need not provide information the insurer is requesting solely for purposes of supporting a decision to deny coverage.

The duty to cooperate ceases where the insurer, rather than issue a reservation of rights, has denied coverage for the claim, leaving the insured to defend itself in the underlying suit. In those circumstances, the insured is free to take control of its own defense and has no further duty to cooperate with the insurer.

### **4. You must cooperate with your insurer in settling claims.**

Most CGL policies give the insurance company discretion to settle claims or lawsuits against the insured. They state that "no insured will, except at the insured's own cost, voluntarily make a payment, assume any obligation or incur any expense" related to a claim. The purpose of this provision is twofold: it gives the insurer who is footing the bill control over any settlement negotiations, and prevents the insured from entering into a collusive settlement with the claimant. Under this

provision, your company still has the ability to settle without the insurer's consent, but any such settlement will be paid out of the company's own pocket and will not be reimbursed.

When the insurer has denied coverage for the claim, courts hold that the policyholder is permitted to settle the claim without the consent of the insurer. The settlement must still be reasonable, however, taking into account, among other things, the likelihood of the insured losing the case and being found liable to the plaintiff. Most courts hold that the insurer bears the burden of proof to demonstrate the policyholder's settlement was unreasonable.

If you have questions about this or any other insurance issue, please contact Joe Kuiper, chair of the Insurance Practice Group, at 616.752.2481 or [jkuiper@wnj.com](mailto:jkuiper@wnj.com).