

This outline on Claims Management was presented by Kent Pagel to a group of construction suppliers at a meeting held in Las Vegas, NV in 2005.

CLAIMS MANAGEMENT—SOME FUNDAMENTAL CONCEPTS

“You keep on doing what you’ve always done, you’ll keep on getting what you’ve always got.”

Purpose of Claims Management

- Claims management is an essential part of an effective risk management and liability avoidance program.
- Soundly handling claims is second only to an effective loss control program.
- Claims management reduces the direct costs of claims paid either by a company or its insurance company.
- Affects the price of both primary and excess insurance on a go forward basis.

Goal of Claims Management

- Improve results.
- Treat all claims with a sense of urgency.

CLAIMS MANAGEMENT—EVEN BEFORE A CLAIM IS FILED

Do: Each year, when you get copies of your insurance policies, ask your broker(s) to explain what to do to file a claim under each policy.

Note: If possible, craft specific language in your Commercial General Liability Insurance policy requiring your company's consent for your insurance company to settle.

Alternatively: Agree on claims related procedures, e.g., writing in that your company counsel will be selected to serve as the insurance company's counsel in the event a claim covered by insurance is asserted.

Establish: Company procedures that are endorsed by company management.

Consider: A company claims procedures manual.

Consider: Adding an arbitration or mediation provision in your customer contract.

CLAIMS MANAGEMENT—IS THE CLAIM COVERED BY INSURANCE?

Claims Covered by Insurance:

- **Workers' Compensation:** For injuries or occupational diseases sustained by company employees while at work.
- **General Liability:** For claims made against company for damages to the property of others or injury to non-employees.
- **Automobile Liability:** For any damages or claims related to company cars, trucks, or rental cars used for business.
- **Property Insurance:** For loss or damage to company property, either real or personal (i.e., building and contents).
- **Other Insurance:** Crime (employee dishonesty and forgery) and electronic data processing (including media and data).

Claims Not Covered by Insurance:

- Breach of contract and warranty claims.
- Backcharges
- Company wrongful employment practices?

CLAIMS MANAGEMENT—PROCESSING OF A CLAIM

Automobile Insurance Claims:

- Report all claims within 24 hours.
- Use a company developed claims reporting form.
- Report serious accidents (serious personal injury) by telephone to company office as soon as possible.
- If injury is to a company employee performing company business, a workers' compensation report must also be filed.

General Liability Insurance Claims:

- Report all claims within 24 hours.
- Use company developed claims reporting form.
- Report serious accidents (includes serious injury to any person or major damage to the property of others) by telephone to company office as soon as possible.
- If injury is to an employee performing company business, a workers' compensation report must also be filed.
- As soon as the circumstances allow, be sure to take the time to make written notes of all details relevant to the claim.

Property Insurance Claims:

- Any loss or damage to company property should be reported immediately by telephone to the company claims coordinator.
- Company claims coordinator will then report as appropriate to the company insurance broker and insurance company.
- When reporting the following information should be provided: date and time of loss or occurrence; cause of loss—e.g. describe what happened; description of what was damaged or stolen; and estimate amount of loss.
- If loss appears to be the result of a criminal act, notify local law enforcement officials.
- As soon as the circumstances allow, make sure to make written notes of all details relevant to the claim—include names of people who might have knowledge of the claim, take photographs if appropriate, and keep and store all physical evidence related to the claim.

CLAIMS MANAGEMENT—PROCESSING OF A CLAIM

Respond in writing to all threats of litigation.

Control certain losses without legal representation—utilize a simple release form.

Investigate accidents—essential.

Consider a Company Crisis Response Plan.

- Critical to have one in place; not hard to implement.

- Designate a media spokesperson; best that this be someone in senior management not involved with the actual investigation of the incident leading to the crisis.

CLAIMS MANAGEMENT—PROCESSING OF A CLAIM

- Service of lawsuits:
 - United States Marshal.
 - Deputy sheriff or constable.
 - Through Secretary of State via the U.S. Postal Service.

- Time to respond:
 - Time period to respond commences to run upon service.
 - Summons spells out the amount of time to respond.
 - Late response could lead to default judgment. Default judgments are hard to overturn.
 - Complaint or petition will tell you what complaints are being made of your company and the damages the plaintiff seeks from your company.

- Do not defend yourself, even in an arbitration.
 - Too much potential for making technical mistakes.
 - Lack of objectivity...*fool for a client.*

CLAIMS MANAGEMENT—THE “RIGHT” DEFENSE COUNSEL

- Regarding investigations, product warranty claims, design claims and construction defect litigation—Not just an attorney, not a trial attorney and not just a construction attorney—A construction, industry knowledgeable attorney who understands the courtroom.
- One who has worked with your company and has a good working relationship with you.
- Someone who will leave the “lawyer” in the courtroom.
- Essential that lawyer be familiar with construction matters.
- Lawyer must have experience.
- DO NOT: Hire lawyers just because you know them or because you have seen them do a good job in an unrelated field.

CLAIMS MANAGEMENT—DETERMINE IF CLAIM IS COVERED BY ANY INSURANCE POLICY

Incident: Company vehicle related

Insurance: Automobile liability insurance

Incident: Injury to employee

Insurance: Workers' compensation insurance

Otherwise, first place to look when you have been sued is the Commercial General Liability Policy=
Liability Policy = CGL Policy

QUESTION: Fundamentally—what does insurance cover?

ANSWER: The consequences of action not the intending to harm person or property.

EXAMPLE—SCENARIO # 1: Swing bat at mailbox—no coverage for the mailbox. If you strike a person in the head in the process, coverage for striking the person in the head.

EXAMPLE—SCENARIO # 2: Swing bat at head—no coverage for the head. If you swing at leg and hit head, not covered

CLAIMS MANAGEMENT—CLAIM COVERAGE UNDER THE CGL POLICY

- Insuring Agreement--Provides three types of coverages—referred to as Coverage A, Coverage B and Coverage C.
- Coverage A—the most important, sets forth the promise of the insurance company to:
...Pay **sums** that the insured **becomes legally obligated to pay** as damages because of **bodily injury or property damage** covered by the policy...

Sums—means amounts awarded by a court to a claimant.

- Exception--generally does not apply to punitive damages.
- Punitive damages are amounts above and beyond what is held necessary to compensate a claimant for injury or damages.

Becomes legally obligated to pay—determination initially made by the insurance company based on its investigation.

Bodily Injury—fairly self explanatory—bodily injury means bodily injury. (although questions might come up in the instance of emotional distress).

Property Damage—Results from an **Occurrence**—physical injury to property, including the loss of use of that property and can include the loss of use of property that is not physically injured.

- Cost of repair (if it can be repaired);
- Cost to replace (if it cannot be repaired);
- Cost of use or a replacement during the time of repair; and
- The loss of income while the property that is injured cannot be used.
- Gaps in the commercial general liability policy (CGL).
 - Headed for trouble if you don't keep reading beyond the Insuring Agreement.
 - CGL policy structured to start out giving broad coverage then it restricts or carves away coverage through exclusions, limitations, definitions, and conditions.
- Many exclusions apply.

CLAIMS MANAGEMENT—CLAIM COVERAGE UNDER THE CGL POLICY

- What can you do about losses that fall within the liability exclusions?
- Avoidance: This means ceasing the activities that give rise to the risk. This may only be practical on a limited basis.
- Self-insure the risk or retention.
- Transfer the risk.
- But do the techniques of self-insuring and risk transfer apply?

CLAIMS MANAGEMENT—CLAIM COVERAGE UNDER THE CGL POLICY

Notification of Claim/Lawsuit

- Within your Company:
 - Notify the Company claims coordinator and if applicable the Company corporate counsel. Follow their instructions.
 - DO NOT discuss the lawsuit with any persons other than employer and the insurance company.

- Notification of Insurance Company:
 - Follow insurance company procedures as best you can.
 - Place insurance company directly on notice. If you notify your broker ask for confirmation from the insurance company and follow-up.

- Keep a copy of everything you send the insurance company. Copy your broker on all correspondence with your insurance company.

- Memorialize conversations with your broker and the insurance company. On all correspondence with your insurance company—identify the named Insured (your Company), the policy number, the date of loss, and the claim number.

CLAIMS MANAGEMENT—CLAIM COVERAGE UNDER THE CGL POLICY

Insurance Company Duty to Defend.

- Simply stated, insurance company required to pay legal fees and costs (often including expert witness fees) that the insured (your Company) incurs in defending the underlying claim brought by a third party.
- Defense required when the allegations in the underlying claim give rise to a potential insurance coverage under the CGL policy.
- Even if coverage exists for only part of the claim, in most states, the insurance company must provide a defense of the entire action.
- No limit to what the insurance company is obligated to pay.
- Discontinued only when the applicable limit has been used up in the payment of judgments or settlements.
- Exists with respect to a "suit" which means a civil proceeding, such as the filing of a complaint, more commonly known as a lawsuit.
- Also includes arbitration proceedings if the insured is required to submit to such proceedings or if the insurer consents to the proceeding.
- Mediations may be considered a "suit" if the insurance company consents to the mediation.
- A criminal complaint is not a suit.
- Insurance company not able to recover from an insured the cost of defending any claim that was potentially covered by the CGL policy.
- Insurance company not allowed to terminate their obligation to defend by simply offering to pay the applicable limit or paying the limit into a court or to the insured.

Insurance Company Duty to Indemnify.

Simply stated, insurance company required to pay the actual judgment or settlement amount for any covered loss incurred in the underlying claim.

CLAIMS MANAGEMENT—CLAIM COVERAGE UNDER THE CGL POLICY

The Reservation of Rights Letter.

- An indication from the insurance company as to the possibility that there is no bodily injury or property damage or CGL exclusions may apply to eliminate potential coverage
- Insurance company may begin their defense but reserve their right to withdraw from defense as facts are established.
- Issuing reservation of rights letters. Treat seriously any letters received from your insurance company.
- Is there a conflict of interest?
- Insurance company may file suit against its insured to determine obligation to defend—the declaratory judgment action.

Insurance Defense Counsel.

- Insurance companies generally retain defense counsel of their choosing for the policyholder.
- Component Manufacturers may want to consider selecting own counsel in the event of a reservation of rights.
- In any event take a strong and active role!

CLAIMS MANAGEMENT—CLAIM COVERAGE UNDER THE CGL POLICY

Claim Adjusting Process.

- Claims served on an insurance company are assigned to a claims adjuster
- The Claims adjuster—either an employee of the insurance company or works for an outside agency.
- Adjuster investigates the loss—compares the facts of the case to the terms of the insurance policy.
- If the adjuster determines the policy does not cover the loss, the claim is denied.
- If the adjuster determines the loss is covered, the adjuster will negotiate with the insured on a property claim to settle or with the claimant to settle a liability claim.
- In the case of a severe claim, or in the event a lawsuit has been filed, the adjuster will retain a law firm to investigate, defend and/or settle.

CLAIMS MANAGEMENT—CLAIM COVERAGE UNDER THE CGL POLICY

Claim Costs.

- Claim costs are a large percentage of monies expended by insurance companies.
- Oftentimes they become the reason why insurance companies choose to settle otherwise very defensible claims.
- Paid claims on the other hand directly affect premium costs in the future.
- Important to monitor both claims costs/loss adjustment activities of the insurance company to ensure that only legitimate claims are paid.

CLAIMS MANAGEMENT—CLAIM COVERAGE UNDER THE CGL POLICY

Claim Coordination.

- Adjusters perform a critical, highly visible function and are an extremely overworked group of people—taking an interest in claims servicing will frequently result in better service and thus lower claims cost.
- Periodically visit; hold meetings at the insurance company with the administrator in charge of your claims. Discuss:
 - The open claims report;
 - Amounts reserved; and
 - Actions taken by the adjuster, future activity, and potential settlement strategies—especially for the more difficult cases.
- Evaluate the promptness of the insurance company in processing and handling of cases.
- Evaluate the thoroughness of investigations conducted. Are proper investigations being done to determine responsibility, damage possibilities, and the need to involve other parties in the process?
- Evaluate negotiations and settlement tactics.
 - Is your insurance company moving forward toward settlement of those cases that need to be settled?
 - Are they taking a firm stand on those cases that need to be defended?
- The selection of the proper attorney for the case is important for favorable results. Consider using your broker to coordinate with the insurance company for your input on the selection of attorneys on cases involving construction defects, collapses, design responsibilities or serious injuries.
- Use your Broker/Agent effectively—they have the contacts with the insurance company and allows them the ability to establish contact with people who have the authority to move swiftly toward resolution of any problem.

CLAIMS MANAGEMENT—CLAIM COVERAGE UNDER THE CGL POLICY

Claim Reserves.

- Need to constantly evaluate the reserving practices of your insurance company.
- Reserving is not an exact science; however the experience of the insurance company, your broker, your Company claims coordinator, your counsel and WTCA should provide a fairly accurate cost projection for each case.
- Paid claims + Case reserves = Incurred losses.

Paid claims = amounts actually paid (Workers' compensation and liability insurance claims).

Case reserves = an estimation of what will be paid on pending open claims

Incurred losses = the sum paid claims and case reserves.

- Incurred losses figures are given to competing insurers quoting on your insurance account, used to calculate workers compensation experience rating modifiers, and used in calculating premiums under standard retrospective rating plans.
- Premium costs can be controlled by monitoring and negotiating reserves. Estimated case reserves have a substantial effect on premiums and any "over-reserving" by the insurance company will cause undeserved premium increases.
- Reserve rationale is most often not communicated by the insurance company. Seldom do reserves represent the actual value of a case and many adjusters are prone to frequent reserve changes.
- An **initial reserve** should be applied to a case within a few days after the adjuster receives the claim and has had a chance to perform at least a preliminary investigation.
- A **final reserve** should be placed on a claim about 30 days after the adjuster has completed his or her claims investigation; and there may be some reluctance to change as this may be viewed as a management weakness because it indicates a failure to fully grasp the significance of a claim.
- Claim reserves are reported on an **open claim report**, which shows each case and the amount paid and reserved to date. Many insurance companies will provide such a report quarterly and probably monthly for companies of significant size.

CLAIMS MANAGEMENT—CLAIM COVERAGE UNDER THE CGL POLICY.

Maintain Loss Records.

- Important to request (and if necessary, demand) periodic (monthly, quarterly, semiannually or annually) loss reports from WC, auto and general liability insurers.
- Invaluable in terms of analyzing safety and risk control programs, in verifying experience ratings etc.
- Required to obtain quotes from competing insurance companies (or in negotiating a renewal with your current insurance company) and for this last reason, your insurance company may be reluctant to provide.
- In addition to asking for insurance loss data for the current policy year—also ask for updated, currently valued loss reports for each of the past 5 years on an annual basis.
- In other words you will ask your current carrier for loss data on 2003 and for 2004, 2005, 2006, 2007 and 2008. The total dollars may be different for each of these years as open claims are settled with more or less than what was reserved in the original year, e.g. 2003.
- When the market is tight, it is even more important to have up to date loss information—some insurance companies will not be willing to quote your account without up to date information.

CLAIMS MANAGEMENT—CLAIM COVERAGE UNDER THE CGL POLICY

Insurance Company Right to Investigate and Settle.

- Insurance company has the right to investigate any occurrence and settle any claim or suit at its discretion.
- What this means—the insurance company can investigate an occurrence without obligating itself further AND it has full control over defense of the claim and the settlement process
- What's at stake for the insurance company--the entire policy limit and defense costs.
- On the other hand, this gives the insurance company the right to settle even if claims falls within the Company's deductible amount—and Company obligated to reimburse the insurance company.
- The Company needs to monitor at what point policy limits are exhausted. At such time, the insurance company no longer has a duty to defend when policy limits are used up—e.g. when payments have been made to the full extent of the applicable limits of insurance.
- Important to note that the exhaustion of an each occurrence policy limit in one action does not relieve the insurance company to defend a second action arising out of a separate occurrence unless the policy aggregate has also been exhausted.
- Generally quite difficult to negotiate a policy provision requiring insurance companies to consult with you or to obtain your consent before settling. They may agree to consult and not get consent; they may also agree on an informal basis—perhaps even reaching some kind of agreement in a side agreement. More true in larger deductible programs, in which the insurance company has an implied duty to communicate before settling claims since they are essentially settling with the insured's monies.

CLAIMS MANAGEMENT—CLAIM COVERAGE UNDER THE CGL POLICY

What will the Insurance Company Pay?

- First—all expenses that the Insurance Company incurs.
 - attorney fees, private investigator fees and expert witness fees; and
 - bond premiums on bonds up to the amount of the occurrence limit of the policy, for bonds necessary to release attachments of the insured's assets following the trial of a claim covered under the CGL policy.

- Other expenses.
 - the reasonable expenses incurred by the insured at the Insurance Company's request for investigation or defense;
 - court costs assessed against an insured; and
 - interest on a judgment (note the different types of interest to include pre-judgment and post-judgment interest).

CLAIMS MANAGEMENT—CLAIM COVERAGE UNDER THE CGL POLICY.

Ultimate Ways to Keep Your Insurance Company Honest.

- State Insurance Department to the Rescue—e.g. may be able help in the event of a non-renewal.
- The Bad Faith Lawsuit.