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## **Creating a Successful SIU Collaborative Team**

### **I. First Report of Loss/FNOL**

Adequate Training for first notice of loss recipients

The first claim comes through a telephone call to the agent or insurance company or through other various means of communication including emails. The adequate and correct questions to ask may be vital in a first indication or note of a suspicious claim. Adequate training is necessary to hear the claimant's distinctions in voice and other parameters for awareness of the further investigations necessary. Training to obtain sufficient details about the claim facts should be provided so an initial judgment can be made about whether additional investigation is needed to determine whether there are aspects to the claim that might warrant Special Investigation Unit involvement, or whether any "red flags" are raised.

### **II. Claims Department**

The Claims Department should always be aware and wary of information received and compare the same to other information throughout the claim process. The desk adjuster will have certain information including recorded statements and a past history to investigate and analyze plaintiff's present claim as well as those learned from prior reporting of the claimants to compare similar circumstances or similar losses. Thereafter, the satellite adjuster can provide a hands-on view of information, explanations or if additional investigation is needed by the Special Investigations Unit.

### **III. Special Investigations Unit (SIU)**

Once the case is referred to the Special Investigations Unit, information is obtained through certain investigators, including company or independent investigators, through law enforcement, fire marshals and fire investigators, cause and origin experts and others to determine a true cause and analysis of the claim. It can then be

determined by the Special Investigations Unit whether additional information is requested and required, or the claim should be resolved at that point in time.

SIUs have the ability to research information that may not readily be available to the adjusters. This includes a search for prior claim information to see if the claim is part of a pattern of presenting insurance claims, financial information to determine whether there is a potential financial motive for the claim and other verification of information that was provided. For example, if an additional living expense claim is presented, researching the alternative housing location to determine whether the insured has any pre-loss connection to that residence can be done.

If it is determined that more investigation is needed, SIU investigators are skilled in asking detailed questions of insureds, who, under the insurance policy, are obligated to cooperate with the claim investigation. They also can determine what documents to request. Producing requested documents also is an insurance policy condition. This is a phase in the claim process to focus on obtaining documentation and information to support the claim. The goal should be to verify the claim, not to establish that fraud occurred.

Obtaining detailed information is essential. That is why the more detail that is obtained during the initial adjuster statement, the more information the SIU investigator will have for his or her interview.

As information is gathered, it can be determined whether the members of the SIU team should be expanded. Is a cause and origin expert needed? This is a decision that should be made early in the process, before the loss site is compromised to the point that a cause and origin investigation would not be reliable. This includes, for example, fire cause investigation and water damage cause investigation. It might include engineers to evaluate a failure that caused a loss to determine what failure occurred and what caused that failure.

Obtaining numerous photographs every time there is a scene investigation is important so the conditions can be documented, and changes compared. This includes photographs of the claimed damages as well as surrounding, undamaged areas. Experts, or adjusters, should retain, as evidence for future analysis, all property that is suspected to have caused the loss. This includes electrical appliances that may have caused a fire, broken pipe segments or valves that may have caused a water loss, etc. It is hard to prove whether a pipe burst or was manipulated to break without the pipe to analyze. Even if there is not sufficient information at the outset to warrant having testing on these items performed, collect the evidence to it is available to be testing should that later be determined to be necessary. Consult with the appropriate experts as to what property would be useful to collect.

When financial issues are involved, consideration should be given to adding a forensic accountant to the SIU team. Forensic accountants have the training and skill to help determine whether the insured's books and records support financial aspects of the claim, or whether there are inconsistencies that require further investigation.

#### **IV. Attorney Involvement**

If the policyholder either does not cooperate, or through the information provided it is determined that more detailed questioning is needed, consideration should be given as to whether to add an attorney to the SIU team. The attorney's role is to provide legal advice and representation during the claim investigation. It is important that an attorney not become a claim investigator, or there may be a question whether communications with the attorney are protected by the attorney/client privilege. This is especially true if in-house lawyers are used. (See *2,022 Ranch, L.L.C. v. Superior Court*, 113 Cal. App. 4th 1377 (2002), where the court held that information from title insurance company's adjusters, who were licensed lawyers, may not be subject to the attorney client privilege, or attorney work product privilege, if they were performing claims investigations rather than acting as legal advisors.)

Once the claim is presented to the attorney, the attorney gathers the claims information for analysis and prepares to conduct an examination under oath and document production letter to the claimant for the insurance company investigator approval to demand, pursuant to the contract/policy of insurance, that the insured provide additional information including sworn testimony and documents to substantiate his claim. The claimant is required, pursuant to the policy, to submit to an examination under oath and produce the documents otherwise they may be found in non-compliance with the contract and face a denial of the claim.

In some jurisdictions, compliance with the examination under oath policy condition is a condition precedent to coverage when requested. Unless there is compliance, there may be no right to recovery. In other jurisdictions, an insurer may need to establish prejudice before relying on the breach of this policy condition before denying a claim. (See, for example, *Brizuela v. CalFarm Ins. Co.*, 116 Cal. App. 4th 578 (2004).)

Lawyers have the training and experience to effectively cross-examine policyholders both to lock in the story and to expose inconsistencies that may exist. Only lawyers who are experienced in taking examinations under oath should be engaged since there is a significant difference between cross-examination in litigation and during a claim's investigation. Although EUO questioning may be adversarial at times, it must be kept in mind that the goal is to verify the claim, not prove fraud. This creates a delicate balance that could create problems in a subsequent lawsuit if not handled properly.

The lawyer should frequently consult with the SIU investigator regarding what the information that is gathered means in connection with the claim and what additional investigation is warranted.

Once there is a completed investigation, insurance companies can either decide to pay the claim, deny for non-cooperation or deny for the substance of the claim and send a denial letter, or proceed with filing a complaint for declaratory judgment requesting the court find there is no coverage for breach of the contract by claimant. Some states require a preponderance of the evidence burden of proof to establish fraud, and others require a higher clear and convincing evidence standard. It is important to know that jurisdiction's burden of proof standard in determining whether fraud, even if believed to have occurred, can be proved.

In response to any complaint of claimant, the insurance company can file a motion to stay or motion to dismiss for prematurity. However, consideration also should be given as to whether the existence of a lawsuit makes discovery tools such as subpoenas available that otherwise may not be available during a claim investigation.

#### **Louisiana and Mississippi Case Law Pertaining to Examinations Under Oath:**

*Hart v. Mechanics & Traders Ins. Co.*, 46 F. Supp 166, 1942 U.S. Dist.

Holds that attorneys or legal representative of claimant under oath cannot object or ask questions during the examination.

Plaintiff complained that his attorney was not able to ask questions at his examination under oath. The Court held the attorney cannot share in his examination.

Louisiana Courts have consistently held that insureds have a duty to cooperate in the investigation and handling of the claim, including providing documents, items, etc. Such failure to provide the necessary pertinent documents pursuant to the pertinent policy. Both Louisiana State Court jurisprudence under *Lee v. United Fire and Casualty Company*, 607 So. 2d 685:

Plaintiffs filed a first party lawsuit alleging damages. Defendants filed Motions to Dismiss for plaintiff's failure to comply with the contract/policy requirements of providing documents and submitting to an examination under oath. The Court agreed and dismissed plaintiff's lawsuit for plaintiffs' breach of the contractual requirements.

*Brantley v. State Farm Insurance Company*, 865 So. 2d 265:

Plaintiffs filed a first party lawsuit alleging damages. Defendants filed Motions to Dismiss for plaintiff's failure to comply with the contract/policy requirements of providing documents and submitting to an examination under oath. The Court agreed and dismissed plaintiff's lawsuit for plaintiff's breach of the contractual requirements.

Mississippi courts have consistently held that insureds have a duty to cooperate in the investigation and handling of the claim, including providing documents, items, etc. and submitting to an Examination Under Oath. Both Mississippi state court jurisprudence under *Standard Ins. Co. v. Anderson*, 227 Miss. 397, 86 So.2d 298 (Miss. 1956);

After claimants failed to comply with the contractual requirements of the policy, the insurer filed complaints for dilatory judgment requesting an order from the Court there was no coverage because claimants breached the policy provisions. The Court granted the insurer's complaint and denied coverage to claimants.

*Allison v. State Farm Fire & Casualty Co.*, 543 So.2d 661 (Miss. 1989):

Plaintiffs filed a first party lawsuit alleging damages. Defendants filed Motions to Dismiss for plaintiff's failure to comply with the contract/policy requirements of providing documents and submitting to an examination under oath. The Court agreed and dismissed plaintiff's lawsuit for plaintiff's breach of the contractual requirements.

*Saucier V. United States Fidelity and Guaranty Co.*, 765 F.Supp. 334 (S.D. Miss. 1991):

Plaintiffs filed a first party lawsuit alleging damages. Defendants filed Motions to Dismiss for plaintiff's failure to comply with the contract/policy requirements of providing documents and submitting to an examination under oath. The Court agreed and dismissed plaintiff's lawsuit for plaintiff's breach of the contractual requirements.

*U.S. Fidelity and Guarantee Company v. Wigginton*, 964 F. 2d 487 (U.S.C.A. 5<sup>th</sup> Cir. 1992), and others, the courts have denied coverage based upon the insured's failure to cooperate pursuant to the contract of insurance:

After claimants failed to comply with the contractual requirements of the policy, the insurer filed complaints for dilatory judgment requesting an order from the Court there was no coverage because claimants breached

the policy provisions. The Court granted the insurer's complaint and denied coverage to claimants.

**V. Conclusion**

As a claim investigation proceeds, and more information is obtained, it is best to continue to consider whether all expertise needed to fully investigate a claim and evaluate the information gathered are part of the SIU team. Experts should be added as needed in order to be sure that the right people are asking, and able to answer, the right questions so that a correct claim decision can be made.