



2019 Annual Conference

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Dealing with Coverage Defenses In Large Property Loss Claims from Investigation to Trial

- I. The need to consider coverage issues at the start of any large loss property claim.

While coverage issues can arise at any time, most are present at the start of any claim. With a large loss property claim, all investigating claims personnel, adjusters, attorneys and experts must be aware of potential coverage issues that will potentially impact the claim, whether from a first party, defense, or subrogation perspective. The panel will discuss what documents and information must be reviewed and obtained as soon as a claim occurs.

- II. Typical coverage issues encountered in large loss property claims – first party perspective.

- A. Timely reporting

All property insurance policies require timely reporting of a claim. It is incumbent upon the insured to report the loss to its property insurer immediately, as timely reporting is crucial for a proper and thorough investigation, especially when the cause of loss is a result of fire, explosion, or other sudden occurrence. The panel will discuss typical timely reporting requirements of policies, and when prejudice occurs to the insurer as a result of untimely reporting.

- B. Mitigation

Perhaps even before timely reporting, and certainly immediately afterward, mitigation is a key insurance coverage issue in a first party context. The insured has a duty to mitigate its losses. The panel will discuss when failure to properly mitigate losses becomes a coverage issue and discuss typical mitigation scenarios.

C. Documentation of losses

It is extremely important for an insured to document all loss to the property, especially in regard to individual contents. The panel will discuss coverage issues which occur when an insured has little to no documentation of its property damage or of the value of the property.

D. Building Code

Most property insurance policies require adherence to local building codes. The panel will discuss typical building code provisions that come into play and into insurance coverage context with large loss property claims, and when a failure to adhere to those codes can lead to a loss of insurance coverage.

E. Co-Insurance and Deductibles

Another important coverage issue in large loss property claims is co-insurance and application of the deductibles. Most property policies have provisions which require buildings to be insured at or near their present value. If they are not, then the amount paid can be reduced pursuant to the policy provisions. Additionally, there is often an issue as to which, and how, certain deductibles are applied with any large loss property claim.

III. Typical coverage issues encountered in a large loss property claim – subrogation

A. Right of subrogation

With property claims, right of subrogation by the insurance company typically is found in a policy itself. The panel will discuss typical policy language which gives an insurer a right of subrogation to pursue tortfeasors who cause large loss property claims, and various defenses that are raised against a right of subrogation. Additionally, the panel will discuss when it is necessary to obtain a written contractual assignment from the insured to preserve, or enhance, a right of subrogation.

B. Waiver of subrogation and contractual indemnity

Where there is a contract between the insured and a potential third party tortfeasor, it is imperative to review the contract to determine if there is a waiver of subrogation, a contractual right of defense indemnification, or additional insured requirements. The panel will discuss the various policy endorsements which address waivers of subrogation, contractual defense indemnity and additional insured provisions, and the impact on large loss property claims.

C. Arson and intentional acts exclusions

From a subrogation perspective, you must be aware if there is a potential issue with arson or intentional act. Most third party liability policies will exclude damages caused by arson or intentional act, but there are coverage arguments which may make those exclusions inapplicable.

D. Work/Product Exclusions

If there has been a product defect which causes damage both to the product itself, such as a large engine in a vessel, many liability policies include exclusions which will exclude payment for the replacement cost of the product itself but may still cover consequential damages if the damage product caused damage to other property. The panel will discuss the range of these exclusions, and the manner that courts have distinguished between damage to the property itself and consequential damages.

E. Insured's duty to cooperate

The panel will discuss the coverage provisions which are applicable when an insured fails to cooperate with its property insurer in a subrogation action.

IV. Typical coverage issues encountered in large loss property claims, defense perspective.

A. Third party insurance limits, eroding policies and aggregate limits

When defending a large loss property claim, the liability insurance limits are crucial. There is often an issue as to which insurance limit will apply. The panel will also discuss when limits are eroded by defense and litigation cost, and how aggregate limits affect the defense of an individual large loss property claim.

B. Duty to cooperate

An insured also has a duty to cooperate with its liability insurer. The panel will discuss when the duty to cooperate becomes an issue, and how that issue can be addressed.

V. Dealing with coverage issues at the investigation phase

In regard to the type of coverage issues discussed herein, the panel will review what can be done at the investigation phase to preserve or defeat coverage problems, from the prospective of investigating claims representatives and adjusters, experts and attorneys.

VI. Dealing with coverage issues at the litigation phase

Although it is crucial to identify coverage issues in the investigation phase and deal with them, many coverage issues can arise during the litigation phase of a large loss property claim. The panel will discuss the types of coverage issues that typically arise during the litigation phase, and how those coverage issues can affect and disrupt the litigation.