



## The Role of an Insurance Adjuster in Property Insurance Claims

*by*

**Nigel P. Kent**  
Clark Wilson LLP  
tel. 604.643.3135  
npk@cwilson.com

**TABLE OF CONTENTS**

**I. INTRODUCTION ..... 1**

**II. THE LICENSING AND REGULATION OF INSURANCE ADJUSTERS ..... 1**

**III. CASE LAW RESPECTING THE ROLE OF INSURANCE ADJUSTERS ..... 3**

**IV. THE TECHNICAL POLICY REQUIREMENTS FOR HANDLING CLAIMS ..... 5**

**V. THE IMPLIED OBLIGATION OF “GOOD FAITH” ..... 7**

**VI. SUMMARY AND CONCLUSION ..... 9**

## The Role of an Insurance Adjuster in Property Insurance Claims

### I. Introduction

Many would argue that claims and, more specifically, the handling of claims, is where “the rubber meets the road” in the insurance business. It is the “product” that insurance companies ultimately sell, usually accompanied by heartwarming, Norman Rockwell-type advertising that assures piece of mind, “safe harbors”, “good hands”, and the like.

It is hardly surprising that the average consumer believes that, when a loss occurs, all they have to do is report the matter to their insurance company and the latter will then take care of everything. Such consumers might be astounded to learn that insurers have no such obligation.

Property insurance is, of course, a contract. It is invariably evidenced by policy wording spelling out the terms and conditions of coverage in detail. The average insured, regardless of his level of sophistication, rarely reads his insurance policy. Even if he did, such insured would probably not find any claims handling procedure spelled out in terms that he could understand. It invariably falls to the insurance adjuster to explain the process along with the roles, rights and obligations of all involved.

There is much misunderstanding on the part of insureds, insurers and adjusters alike respecting the claims handling process. This paper attempts to explain both the technical and practical requirements and will hopefully be useful to insurers and independent adjusters on that account.

### II. The Licensing and Regulation of Insurance Adjusters

Section 180 of the *Financial Institutions Act*, RSBC 1996, C. 141, requires all insurance adjusters to be licensed and specifically prohibits any person from acting as an adjuster without such a license. The power to license and discipline insurance adjusters is vested by the Act in the Insurance Council of British Columbia. To obtain the license, the Act requires council to first be satisfied that any applicant,

- Has reached the age of majority (19);
- Meets prescribed educational and experience qualifications;
- Is trustworthy, competent and financially reliable;
- Will “carry on business in good faith according to the usual practice of the business of insurance”; and
- Has not been convicted of any offence that would reveal the applicant to be unfit as an insurance adjuster.

The Insurance Council of British Columbia has prescribed both “Rules” and a “Code of Conduct” governing the licensing and regulation of insurance adjusters. The Code of Conduct dictates certain principles and guidelines reflecting “rigorous standards of personal integrity and professional competence”. It includes general standards of trustworthiness, good faith and competence, but also contains a chapter expressly directed towards insurance adjusters. The chapter imposes a “requirement” as follows:

### **“11.2 Requirement**

#### **Duties to Principal**

You must:

- protect your principal’s interests;
- protect your principal’s confidential information;
- disclose all information materials to the loss or claim;
- decline to act where you have an undisclosed conflict of interest or financial interest in a loss or claim; and
- act within the authority and instructions of your principal.

#### **Duties to Insureds**

You must:

- properly identify yourself, your principal and your role as an adjuster;
- adjust claims promptly and fairly;
- protect the insured’s confidential information; and
- fully disclose information material to the insured’s policy coverage, rights and obligations.”

The chapter also contains certain “guidelines” which, among other things include:

- You must take reasonable steps to keep the insured informed of the status of a claim and respond promptly to the insureds communications;
- You must fully and promptly inform insureds of material information regarding policy coverage, limitation periods, claim denials and their rights and obligations in the claims process, as required in the circumstances;
- You must not take advantage of inexperienced or unsophisticated insureds;

- You must not mislead anyone as to your role in adjusting a claim. This includes who is your principal. For example, when acting on behalf of an insurance company, the insured should be aware that you act for the insurer in the claim and that the insured is responsible for the hiring and work of contractors, even if facilitated by you.

While the above directions do not necessarily constitute legal requirements, it is likely a court of law would adopt them as the appropriate standard of conduct to be expected by an insurance adjuster in the context of any errors and omissions litigation. It is also implicit in all of the above that a competent insurance adjuster must,

- Be fully informed about, and understand the coverages under, the policy;
- Be fully conversant with an insured's rights and obligations in the claims process and be able to inform insureds in that regard; and
- Make the insured aware that it is he, not the insurer (or the adjuster), who is responsible for undertaking repairs and for the hiring and payment of contractors.

### **III. Case Law Respecting the Role of Insurance Adjusters**

In *Hoelzler Construction Ltd. v. Seidler*, 2008 BCCA 77, the BC Court of Appeal was called upon to address the role of an insurance adjuster in the context of property insurance. Following fire damage to the insured property, the insurer appointed an independent adjusting company to assist with loss handling. The plaintiff construction company was hired to complete the necessary repairs and reconstruction to the insured's property. Before the work was completed, disputes arose between the contractor and the insureds. The construction company did not complete the work and eventually sued the insured to recover the sum of \$58,000.00 alleged to be the balance owing for the work performed.

The insureds denied ever having contracted with the plaintiff. They took the position that the independent insurance adjuster did not and could not act as their agent in hiring the construction company to do the work. They also counterclaimed for the cost of remedying alleged defects in the work in the sum of \$27,000.

The Court ultimately held that the insured was liable to pay the construction company. In coming to this conclusion, the Court addressed the role of the insurance adjuster as follows:

“As in most cases like this, the adjuster had a dual role. First, it was appointed by the insurer to quantify the loss of the amount payable under the terms of the insurance policy. This policy obliged the insurer to indemnify its insured for losses to the extent they were insured. It obliged the insurer to pay the replacement cost of the lost or damaged property, rather than its actual cash value.

The provisions of both the indemnifying agreement and the replacement cost endorsement make it clear that the insurers' only obligation under the policy was to indemnify the insured for its losses in

effecting the replacement of the damaged property 'with due diligence and dispatch'. The adjuster's duty to the insurer was to see that it did not pay more than the policy required it to pay in accordance with its terms.

The adjuster's second role arose from the insured's acceptance of and reliance upon the assistance provided by the adjuster in arranging for the repairs or replacement. Here, specifications for the necessary repairs were prepared by the adjuster and sent to the owners for their approval. Those specifications were the means of quantifying the insurer's obligation under the policy. However, the specifications were also the basis on which bids were solicited from contractors for effecting the repairs. The defendant owners acquiesced in the adjuster's soliciting bids on their behalf from interested contractors. Indeed, the owners suggested additional contractors to whom the specifications might be sent.

The owners were not obliged to accept any bids submitted on the specifications. Moreover, in restoring their building, they were not limited to the work specified. If the owners were prepared to pay for something beyond the specified work for which the insurer agreed to provide indemnity, they were free to do so. It was the owner's building. They could have it repaired or restored as they saw fit.

Contrary to the defendants' submissions, an analysis of the substance of the relationship between the parties supports the trial judge's conclusion that an agency relationship existed between [the construction company] and [the insured].

As owners of the building, the [insureds] had ultimate control over what work was done and who did it. Given the [insureds'] participation and acquiescence in the process, there was evidence on which the trial judge could find that the defendants impliedly authorized the adjuster to engage a contractor to effect repairs on their behalf. This authorization could only have come from the owner of the insured building. There was no legal foundation for the insurer to authorize [the adjuster] to contract with the plaintiff, nor did it purport to do so.

The only reasonable inference is that the [insureds] impliedly consented to the adjuster hiring the plaintiff as the contractor engaged to effect the specified work. The insurer could not have made this decision on the owners' behalf without the owners' consent. The insurer's only duty was to pay the indemnity due under the policy."

According to the *Hoelzler Construction Case*, an independent insurance adjuster has two roles, namely:

1. to represent the insurer's interests and to ensure the policy pays only what it is required to pay in accordance with its terms; and
2. a duty to offer and, if accepted, provide the insured with assistance in understanding the process and in arranging for the necessary repairs or replacement.

The other principle that emerges very clearly from the *Hoelzler Construction* case is one that will come as a surprise to most insureds. Contrary to what the advertising might imply, it is not the insurer's responsibility to "look after" the necessary repairs following a loss. Rather, the insurer's only obligation is to provide indemnity for the loss i.e. to reimburse the insured for the cost of repairs or replacement.

#### **IV. The Technical Policy Requirements for Handling Claims**

Even in the modern world of "plain English" policy wording, most property policies contain few, if any, provisions explaining exactly how the claims process is to work. That process is usually buried in the so-called "Statutory Conditions".

Prior to July 1, 2012, the "Fire Insurance" portion of the *Insurance Act*, [SBC 2012] c. 1 contained separate conditions specific to "Fire Policies". Amendments made as of July 1, 2012, however, have standardized the conditions dealing with all types of insurance under the *Insurance Act*, and, as a result, have standardized the processes for dealing with all forms of property damage claims.

The claims process that emerges from a close reading of the "Statutory Conditions" and some of the other sections in the omnibus "General Provisions" (Part 2) of the *Insurance Act* is as follows:

1. The insured must forthwith give notice of any covered loss or damage (SC 6);
2. The insured (not the insurer) must take all reasonable steps to prevent further damage to the property including, if necessary, its removal or protection (SC 9);
3. The insurer then has an "immediate right of access and entry by accredited agents (adjusters) to inspect and appraise the loss or damage;
4. The insured must secure the property and maintain control/possession of the property and is not allowed to "abandon" the property to the insurer without the latter's consent (SC 10);
5. The insurer must furnish the insured with "printed forms on which proof of the loss or claim may be made" (S.27 *Ins. Act*);
6. The insured must deliver to the insurer as soon as practicable that Proof of Loss, verified by a Statutory Declaration "listing the destroyed/damaged property and detailing

- quantity, cost of same, actual cash value of same, and particulars of the amount claimed” (SC 6);
7. The insurer can request, and if it is practicable, the insured must produce, any paperwork it may have relating to the damaged property including invoices, etc. (SC 6);
  8. The loss is payable by the insurer to the insured (or to such other person as the insured directs) within sixty days after submission of the Proof of Loss documents (SC 12);
  9. [Note some property policies bestow upon the insurer the ability to require the insured to submit to examination under oath regarding the loss, and produce documents all at a reasonable place and time designated by them];
  10. Any fraud or wilfully false statement in the Proof of Loss vitiates the entire claim i.e. in such circumstances, the insurer pays nothing even if the fraud relates only to just one component of the loss (SC 7);
  11. Instead of making payment of the claim, the insurer has the option of itself repairing/replacing the damage property by giving written notice to that effect within thirty days after receiving the Proof of Loss and proceeding with such repairs/replacements with all due diligence (SC 13); and
  12. In the event there is a dispute between the insurer and the insured about the value of the property or the amount of the loss, then such dispute must be determined by way of the “appraisal” procedure provided under the *Insurance Act* and the insurer is not obliged to make payment under the policy until that appraisal has been determined (SC 11, S.12 *Ins. Act*).

What is apparent from all of the above is that technically speaking, the insurer is obliged to do very little following a loss. Basically, the only positive requirements imposed by the statute are to:

1. provide forms on which proof of the loss can be made; and
2. make payment (of whatever amount is appropriately due) within sixty days following receipt of such Proof of Loss;

Exactly how much the insurer must pay in respect of any loss is of course governed by the “basis of claim payment” provisions set out in the policy. Generally speaking, with respect to a property loss, the amount payable will either be,

- the cost of repair/replacement (whichever is less) with materials of equivalent kind and quality and without deduction for depreciation (replacement cost); or
- actual cash value (ACV) of the damage, usually determined on the basis of the cost of replacement less an appropriate discount for depreciation having regard to the property’s condition, resale value, and normal life expectancy,



None of these provisions indicate exactly who is to do the repairs and how such repairs/replacements must be made. Technically, it is the insured, not the insurer, who must effect repair or replacement. There is no limitation placed on the insured in the policy wording about what type of contractor he must use or, indeed, any restriction respecting cost or process. The policy says the claim will be paid on the basis of “cost” and does not include qualifiers such as “cheapest” or even in many cases “reasonable”. Any idea (commonly held) said there must be three or four competing quotes from contractors secured and that the contract must be awarded to the lowest quote is actually a complete misconception of what the policy requires.

Of course, most insureds are usually completely ignorant of the required claims process stipulated above and, at the same time, insurers have a perfectly legitimate business interest in trying to control the cost of any given claim as much as they can. Hence, the adjuster appointed by the insurer (whether in-house or independent) to look after the claim, will often play an intermediary role as between insured, insurer, and contractor/suppliers with a view to facilitating repairs and claims processing as efficiently and cost effectively as possible. It is often this function that can confuse the “technical” requirements and roles of the parties specified above. It is this intervention that can lead insureds to believe that it is the insurer’s responsibility (not theirs) to control contractors, deal with deficiencies and generally “get things done”. This is particularly so where the adjuster does not adequately (or accurately) explain the technicalities above, or where formal documents (such as repair contracts, emergency services, authorizations, etc.) are not used or properly executed between the parties.

It will be recalled that “Statutory Condition” 13 provides an insurer with an election to itself restore or replace the damaged property “giving written notice of its intention so to do within 30 days after receipt of the proofs of loss”. The effect of such an election is to convert the insurance contract from an indemnity agreement into a contract to repair. If this occurs, the insured has a cause of action against the insurer for any deficiencies that may result: *Maier v. Lumbermen’s Mutual Casualty Co.* [1932] 2 D.L.R. 593 (SCC). Some cases have held that the intervention of an independent adjuster who effectively hi-jacks the repair process can amount to an election to repair even in the absence of the formal notice contemplated by the Statutory Condition: *Lepin v. Unigard Mutual Insurance Co.* [1976] B.C.J. No. 1044 (SC). The decision highlights the pitfalls of failing to correctly explain and abide by the technical claims procedure contemplated by the policy.

## **V. The Implied Obligation of “Good Faith”**

While the policy itself imposes few obligations on the insurer with respect to the processing of claims, the common law has held, and the Supreme Court of Canada has reaffirmed on several occasions, that the contract of insurance contains an implied obligation that the insurer will deal with claims from its insured in good faith. Breach of this good faith obligation can, in egregious cases, found an award of both punitive damages as well as compensatory damages for mental distress: *Whiten v. Pilot Insurance Co.* 2002 SCC 18, *Fidler v. Sun Life Assurance*, 2006 SCC 30. Indeed, coverage enforcement lawsuits today almost invariably include what has become almost standard form allegations of bad faith claims handling often seeking substantial damages on that account far beyond the actual indemnity provided by the policy.

In most cases where bad faith is found, only moderate awards are made against insurers. In recent cases, however, there appears to be a trend towards more severe awards of punitive and aggravated

damages based on bad faith. This trend was particularly evident in the recent case of *Branco v. American Home Assurance Co.*, 2013 SKQB 98, in which a combined \$4,500,000 in punitive damages and \$450,000 in aggravated damages were awarded against two insurers. The *Branco* case is almost certain to be appealed, and it is possible that the extreme awards will be reduced. Nevertheless, the *Branco* case should serve as a warning to insurers of the severe consequences of acting in bad faith in the claims process.

An insurance policy is, of course, a contract. The contract is between the insured and the insurer. The independent adjuster is not a party to that contract. Hence, as a matter of law, an insured cannot sue the independent adjuster for breach of contract.

However, some courts are prepared to recognize that bad faith handling of insurance claims can be a tort: *Walsh v. Nicholls and CGU Insurance Company*, 2004 NBCA 59. If so, this raises the possibility of extending liability for bad faith beyond the contracting parties and imposing liability on independent adjusters and other employees/agents of the insurer involved in the process (investigators, experts, expert witnesses, lawyers). In one case, *Kogan v. Chubb Insurance*, [2001] O.J. No. 1697, the adjuster was named as a defendant in the case along with the insurer and judgment, including a punitive damage award of \$100,000.00, was granted against both defendants, albeit without any analysis of the legal basis for the adjuster's liability.

In *Fidler v. Sun Life Assurance*, supra, the Supreme Court of Canada held that the "legal standard" of good faith claims handling to which insurers are held was "correctly described" in *702535 Ontario Inc. v. Lloyd's of London*, (2000) 184 D.L.R. (4th) 687 (ON CA). The principles set out in that case, also summarized in the *Kogan* decision, supra, include the following:

- there is a duty to act fairly in investigating and assessing the claim;
- there is a duty to be prompt in handling and assessing the loss and to make payment in a timely fashion;
- the merits of the claim must be assessed in a balanced and reasonable manner;
- there must be an adequate and expeditious evaluation of the claim;
- the insured must be provided with correct information about the claims process and a fair interpretation of the policy wording;
- the insurer must act with reasonable promptness during each step of the claims process; and
- the insurer must not deny coverage or delay payment in order to take advantage of an insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement.

## VI. Summary and Conclusion

Adjusting property loss claims requires expertise, sophistication and finesse. The client (the insurer) expects and demands the adjuster to investigate, evaluate, recommend and supervise all with a view to settling the claim as efficiently and economically as possible. At the same time, the adjuster is called upon to provide empathetic assistance to often distraught insureds who are ignorant of the technical claims process and who frequently have uninformed and unrealistic expectations.

The relationship between an insurer and an independent adjuster is governed by contract. Sometimes these are formal contracts that dictate procedures to be followed, forms to be used, as well as rates of remuneration. Both parties are sophisticated and experienced. Both generally understand the performance expectations of the other and the relationship is usually one of reliance and respect.

The much more difficult challenge for the independent adjuster is managing the communications with, and the expectations of, the insured. Lofty principles of acting “fairly” and “in good faith” must be translated into the everyday practicalities of helping the insured with emergency repairs, finding alternative accommodation, retaining contractors and consultants, and so on. Very few insurers provide adjusters with the written tools to facilitate the process, whether it be a claims brochure, standard authorization or contract forms, or the like. Rather, the adjuster is left to deal with the circumstances as best he can, having regard to his own resources and experience.

A checklist for conduct on the part of an independent adjuster that reflects the correct technical roles, rights and obligations involved in processing a property insurance claim might include the following:

- obtaining, reading and understanding the policy wording (including declaration pages and endorsements) for the particular insured...these are immediately available in today's electronic age;
- providing a copy of the policy to the insured(s) at the outset along with blank Proof of Loss documents;
- providing the insured(s) with a general explanation of the coverages available under the policy i.e. what types of loss/expenses are paid for, how much is payable and when, at the same time ensuring the insured understands that the adjuster is not a lawyer and is not providing legal opinions on coverage;
- ensuring the insured understands that the independent adjuster acts for the insurer and that it is the insured who has primary responsibility for organizing and paying for all contractors, trades and suppliers involved in restoration or repair work, all the while making it clear that the independent adjuster is available to assist with identifying, selecting and possibly supervising experienced vendors;
- having the insured sign written authorization/contract documents reflecting the insured's responsibility for retaining and paying for the work of third parties, especially if facilitated by the independent adjuster;

- explaining the Proof of Loss form and how it is to be completed and submitted, including what the requirements/expectations are in terms of listing each item of destroyed/damaged property, providing details regarding original cost and estimated actual cash value, and requesting any available backup documentary substantiation (assuming production of the paperwork is practicable) e.g. invoices, etc.;
- using “interim” Proof of Loss forms for the purposes of advance payments on account and as “direction to pay” contractors or suppliers as might be required to finance the restoration work;
- explaining the appraisal mechanism available to determine any dispute about valuation or amount of the loss combined with a suitably phrased warning that falsehoods or deliberately exaggerated values in the Proof of Loss will vitiate the entire claim; and
- explaining to the insureds that the policy contains a limitation period of two years from the date of the loss for issuing any lawsuit against the insurer to enforce coverage under the policy and that, while the law regarding applicable limitation periods is somewhat grey, it would be prudent to ensure any such lawsuit is issued within that two year time frame. Amendments to the *Insurance Act* now dictate that the limitation period may not commence until an insurer has provided an insured with notice of the limitation period. For that reason, it is advisable for insurers to notify insureds as soon as possible of the existence of the limitation period (ideally in the same written notice that denies coverage).

The above checklist does not address recommended procedures for avoiding bad faith claims. These procedures, along with a more detailed discussion of bad faith issues generally, can be found in N.P. Kent, “Insurance Bad Faith Litigation: Recent Developments and Interesting Issues Arising from the Supreme Court of Canada Decisions in Whiten and Fidler”, 2007-8, <http://www.cwilson.com/services/18-resource-centre/171-insurance-bad-faith-litigation.html>.

It will readily be seen that many items on the above checklist could be reduced to a standard form brochure or booklet written in plain English and vetted by professionals for accuracy and effectiveness (perhaps lawyers for the former and communication gurus for the latter). The independent adjusting industry, as well as their insurer clients, would benefit from such a resource to the extent that it would assist with uniformity of handling, and possibly more effective management of insureds’ expectations. In the meantime, this paper will hopefully provide some small assistance in understanding the technical and legal issues and avoiding disputes on that account.

**Nigel P. Kent**

The Role of an Insurance Adjuster in Property  
Insurance Claims  
T. 604.643.3135 / [npk@cwilson.com](mailto:npk@cwilson.com)

CW6178473