Flynn-Law Newsletter

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Special Edition

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Napa and Sonoma Ravaged by Fire – Special Disaster Edition – Part 2

As we speak, wildfires are devastating Napa, Sonoma and now Solano counties. My thoughts and prayers go out to everyone affected by the fires, and I am thankful (as I am sure everyone is) for the hard work and dedication of our fire fighters and other first responders.

Once the fires subside and life and property are no longer in imminent danger, affected property owners and business owners will need to turn their focus toward rebuilding and recovering. A big part of this will be insurance. This post is intended to provide an overview of the insurance process.

Notice of Claim, Proof of Loss and Other Obligations of the Insured

The Napa and Sonoma fires have destroyed thousands of properties. This post addresses the obligations of the insured following a loss.

"As soon as possible after a loss, the insured must notify the insurer or the insurance agent of the loss. This is called a 'notice of claim'."

Immediately after a loss occurs, the insured has a duty to mitigate further damage. Stated differently, the insured has an obligation to take steps to prevent further damage to the property. The failure to mitigate further loss is a ground for denying coverage.

As soon as possible after a loss, the insured must notify the insurer or the insurance agent of the loss. This is called a "*notice of claim*." Typically, the policy does not prescribe a specific time-period for providing the notice of claim (e.g., 15 days after the loss). Rather the policies usually require notice "without delay", "immediately" or "promptly" after the loss. The failure to promptly provide notice of claim is not a ground for denying coverage unless the insurer was actually and substantively prejudiced by the late notice. Note, however, that Insurance Code Section 550 provides that in cases of fire insurance, an "unnecessary delay" in providing notice will exonerate the insurer (although courts have found ways around this).

Obligations of the Insured, continued from p.1

After the notice of claim is made, the insurer must commence an investigation of the claim. The insurer is also required to provide receipt of the notice of claim within fifteen days.

After the notice of claim is made, the insured is required to submit a "*proof of loss*." This must generally be submitted "without unnecessary delay" or within a set time period (e.g. 60 days). The proof of loss must include a complete inventory showing in detail the quantities, costs, actual cash value and amount of loss claimed. In addition, the insured must submit a sworn statement providing the time and origin of the loss, the interest of the insured in the lost property, and the actual cash value of each item and amount of loss.

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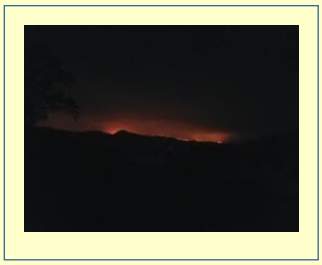
The proof of loss must be made on the best evidence available to the claimant at the time it is submitted. This does not mean you need proof like what you would provide at a trial. Nevertheless, substantial compliance with the proof of loss provisions is required. A proof of loss which fails to provide the basic information and required documentation has been held to be a material breach of the insurance policy and negates the insurers obligation to indemnify for the loss. The insurer is not obligated to indemnify if no proof of loss is filed.



A view of the Atlas Peak fire from eastern Napa County taken Monday morning just hours after the fire first broke out.

The insurer may object to a proof of loss on the basis of incomplete descriptions or omissions. If so, the claimant has a reasonable time to provide a supplemental response. Any defects not objected to by the insurer are waived. The insurer may not object to a proof of loss based on issues of credibility.

The insurer will sometime prepare its own proof of loss based on the information provided to it by the claimant. They will then send this to the claimant asking them to sign it. Unless you believe the insurer is so generous that it is trying to maximize your recovery, instead of minimizing their own exposure, do not sign the insurer-provided proof of loss.

You have the right to submit your own estimates. In the event your estimates are higher than the insurers, the insurer must either: (i) pay the higher amount, (ii) provide the claimant with the name of a person or entity who agrees to perform such repairs at the insurer's cost estimate, or (iii) make written adjustments to the claimant's estimates and provide a copy of such adjustments to the claimant.

Obligations of the Insured, continued from p. 2

Throughout the process, the insured has a duty to cooperate with the insurer. The insurer is entitled to review your books, records and other documents. It is entitled to talk to you and your employees and others with knowledge of the loss. Upon demand, you are also required to submit to an examination under oath (similar to a deposition). There are reasonable limits to what the insurer can and cannot demand (e.g., they must have some relevance), but typically, the insured is advised to cooperate to the extent possible.

The failure to cooperate with the insurer will void coverage if the insurer can establish it was substantially prejudiced by the failure to cooperate. In any event, the insurer's duty to pay is suspended until such time as the claimant adequately cooperates.

Smoke inundates the valley on Tuesday morning, about 36 hours after the start of the Atlas Peak fire. The area was subject to a mandatory evacuation just hours later.

The claimant has the right to see all claim related documents. Upon demand, the insurer must provide, within 15 days, all bids and estimates, appraisals, third party findings, all reports and drawings and all valuation and loss adjustment calculations.

Almost all policies have statutes of limitation saying when a lawsuit must be filed against the insurer. Homeowners' policies generally have a two-year statue of limitations; other property insurance policies often have a one year statue of limitation. The limitations period typically runs from the date of loss. The limitations period is tolled (i.e. suspended) during the time period from when the notice of claim is made and when the insurer unequivocally denies coverage.

The exact same scene shot one week before the start of the fire.

In the event there is a dispute as to the valuation of the property (as opposed to the existence of coverage or another policy related dispute), both the insurer and insured have the right to commence an appraisal process to determine the amount of loss.

Obligations of the Insurer under the Fair Claims Settlement Practices Regulations

This post addresses the obligations of insurers under California's Fair Claims Settlement Practices regulations (the "Regulations").

The Regulations prohibit an insurer from doing a number of things, including: (i) discriminating on the basis of sex, race, religion, property location and additional factors, (ii) failing to notify a claimant of the benefits under a policy, the coverage under a policy and applicable time limits for acting, (iii) requiring the claimant to submit a notice of claim or proof of loss within a specific time (unless the policy itself contains

Fair Settlement Practices, continued from p. 3

such a time limit), (iv) making a partial payment accompanied by language releasing the insurer (unless the policy limits have been paid or the parties have entered into a mutual settlement of the claim), and (v) requiring the claimant to submit to a lie detector test.

The Regulations also provide specific notice requirements and time periods for acting. For example:

- The insurer must acknowledge receipt of a notice of claim within 15 days of receipt;
- The insurer must respond to any correspondence from the claimant within 15 days (if the correspondence seeks a response);
- The insurer must commence investigation of the claim within 15 days after receiving the notice of claim.
- The insurer must accept or reject a claim no later than 40 days after the claimant submits a proof of loss (although the insurer may extend this time period by giving written notice every 30 days);
- The insurer must tender payment of the undisputed portion of a settlement payment within 30 days.

The Regulations impose additional substantive requirements on insurers. An insurer is prohibited from making an "unreasonably low" settlement offer. The insurer is prohibited from requiring the claimant to use a particular person or entity to perform the repairs (although they may make recommendations).

If the insured submits a higher repair estimate than the estimate prepared by the insurer, the insurer must either: (i) pay the higher amount, (ii) provide the claimant with the name of a person or entity who agrees to perform such repairs at the insurer's cost estimate, or (iii) make written adjustments to the claimant's estimates and provide a copy of such adjustments to the claimant.

The insurer is also required to notify the claimant of the benefits under the policy, the coverage under the policy and any applicable time limits for action. The failure to do so is a prohibited act under the Regulations.

With respect to actual cash value policies (as opposed to replacement cost policies), the carrier has the burden of justifying any depreciation in an itemized and explicit manner. This must be explained to the claimant. The cost of labor is not included in any depreciation deduction.

If a claim is denied or rejected, either in full or in part, the insurer is required to, amongst other things, provide a factual and legal basis for the denial, including citations to applicable statutes and/or the policy language itself.

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