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Want to Reduce Litigation Expenses? Win in Court

August 27, 2014 by Jason Wolf (/author/jason-wolf/)

No one enjoys paying litigation defense costs. Unfortunately, it comes with the territory. As a carrier grows, it becomes an increasingly deep-pocketed target for plaintiff attorneys.

There are myriad ways to trim the fat from your legal department, yet the smartest way to reduce litigation expenses is often overlooked: win in court.

Executive Summary

The smartest way for insurers to reduce litigation expenses is often overlooked: win in court. Attorney Jason Wolf recommends implementing a companywide strategy of strong claims handling and collaboration between adjusters, underwriters and legal.

This sounds obvious, but the method of winning in court is less obvious. You don't need to hire the biggest and baddest trial lawyer in town or spend oodles of money on paying defense lawyers.

The way to prevail is to ensure you implement a companywide strategy so that when a lawsuit is filed, the claim has been handled in a manner that places defense counsel in a prime position to win. As a defense attorney who represents insurers, I often delve into discovery in a lawsuit and find out that a front-end claims handler did something to make defending my clients untenable, forcing me to recommend settlement.

For instance, when the laws change in a state, the carrier's legal department should analyze the case law and offer instruction for the claims department on how to adjust claims from day one to use the new laws to their advantage. When the claims and legal departments are working together, there is a much better chance of winning.

The more you win, the more you will be able to reduce lawsuits overall once the plaintiffs' bar recognizes that you are not as vulnerable as other companies.

Generally speaking, the best way to improve your outcomes is to train the claims department to think like a lawyer.

Strategize, Strategize, Strategize

If you have seen a spike in a certain type of claim and are wondering how to address it, that is the perfect time to strategize among claims, legal and underwriting.

In Florida, one of the recent scourges is the rise in "AOB claims" and "AOB lawsuits," which are clogging up the dockets statewide. The scheme goes as follows: Water mitigation companies have linked up with public adjusters and their representatives so that any time an insured has a water loss claim, the PA "recommends" the water mitigation contractor to perform extraction services. The water extraction company has the insured execute an assignment of benefits document so that all benefits are to be paid directly to the contractor.

The problem is that these claims are often denied due to long-term water damage.

While it's true that the insured had a supply-line leak or a pipe burst, these claims often share common traits, such as worn-out cast iron piping that deteriorated, thereby causing the leak as well as existing water stains throughout the property.

Naturally, these claims are denied. So, what does the water extraction company do? It sues the carrier for payment.

Carriers are aggressively challenging these lawsuits in court (including with several cases pending at the appellate court level that may create legal precedent soon) and are also lobbying the state legislature for changes in the law.

Insurers can form the first line of defense.

First, generate a legal opinion from your underwriting and claims counsel to interpret the anti-assignment clauses in your policies.

Second, at the management level, consider how your denial will appear to a jury of lay persons. Remember that insurance companies almost never come across as the "good guy" to a jury, so you need to have an ironclad case.

Your field adjusters know what an old water stain looks like, so they deny claims for existing water damage. But are you denying claims based upon the (obvious) appearance of old stains while acknowledging that the insured had some type of "water event" and used a water mitigation company?

In this scenario, at trial, your defense attorney will display blown-up pictures of the old damage and argue that the water leak caused no new damage. But the plaintiff's attorney will offer testimony from the water mitigation contractor who says that he performed several thousand dollars of mitigation work.

There may have been existing damage, but can you prove it in court? If not, educate your field staff on the best way to handle these types of claims.

Teach Field Adjusters to Consider Ambiguity

Adjusters have no room for ambiguity. They make determinations such as whether damage predated a loss or whether a policy clearly states that a loss is not covered.

Lawyers, on the other hand, thrive on creating ambiguity, believing that language is open to interpretation—e.g., claiming that the policy language doesn't mean this; it means that.

Courts generally construe any ambiguities in favor of coverage (as opposed to denial). The front-end adjuster may be flabbergasted to learn policy language he considered to be crystal clear is actually ambiguous in the eyes of the court.

For instance, ask 100 people on the street to define the word "you," and most people will figure it out. However, the definition of the word "you" can be ambiguous in the insurance policy when it addresses who is, and is not, a named insured. We see these issues when definitions in the policy do not seem to fit the circumstances, such as a case in which "you" is defined as "you or any family members" but the insured is a corporation, not an individual.

Let's say a family member of a corporate employee was driving a corporate vehicle and got into an accident. An uninsured motorist sought coverage from the policy. Does this fit the definition of "family member"?

Savvy lawyers can come up with different rationales on both sides of the issue. The point is that you need to get your legal department involved in training field staff to consider the ambiguities.

On a more rudimentary level, consider the phrase "sudden and accidental." Adjusters learn what this means at claims school. A lay person knows what it means. You may deny a claim because seepage occurred over time, not suddenly. That type of analysis, however, does not take into account the ambiguities in the phrase.

On the first day that the water, or pollution, or gas, started seeping into the insured risk, it was "sudden." On the ensuing days, it was not necessarily sudden. This type of overall ambiguity—and whether your position will hold up in court—should be taken into account by the field adjusters and legal department working in tandem throughout the adjusting process.

Consider the Emotional Aspects of the Claim

A claims adjuster assessing damage at an insured property after a catastrophe will not be swayed by emotions. That doesn't mean the adjuster fails to comprehend the enormity of the emotional devastation; we can all grasp what it means to lose the home that's been in our family for generations. Still, the adjuster's job is to write an objective estimate and move the claim process to conclusion as quickly as possible.

When there is a catastrophe and everyone thinks they have a claim—from those whose homes are demolished to those who lost a few roof shingles—field adjusters may deny a lot of claims, especially the more specious ones made months after the storm. People can be emotional, even those with seemingly minimal damage. The adjuster's job is not to let emotions get in the way.

The job of the plaintiff's attorney, however, is to appeal to the emotions of the jury. The best attorneys tell stories, weave narratives and twist jurors' emotions from one extreme to another.

This does not mean the carrier must provide coverage merely because the insured makes a sympathetic plaintiff. But it does mean that you need to think through the emotional aspects involved before making a final decision.

Again, this doesn't compel you to pay more money, but if you understand that certain scenarios are likely to lead to lawsuits—and strategize on how to approach this element—you can let emotions be a micro-component of your overall formula in evaluating the claims.

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