IAs and Conflicts of Interest

Stop Them Before They Start

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A phone call brings a new assignment: a large fire destroyed several local businesses in a strip mall. While initial reports suggested the fire was still under investigation, witnesses noted that they first saw fire from the grocery store, the anchor tenant, and it spread to the neighboring book store and salon. While the fire department contained the blaze to those three stores, the remaining businesses sustained varying degrees of smoke and water damage. Those stores, though fortunate to escape the direct physical damage, would remain closed while the fire was investigated and the damages repaired.

This is how the morning started for Wayne, a general adjuster for a national independent adjuster (IA) firm. Shortly after taking the assignment, Wayne received the ACORD first notice of loss (FNOL) form and the insurance policy for the grocery store, a national chain. The property coverage for this loss came through a manuscript policy where four separate carriers had taken on a percentage of the risk. One carrier had assumed half the risk and was designated as the lead, while the remaining carriers had divided up the remaining risk by varying amounts.

As Wayne began documenting and preserving the scene, another carrier approached him about acting as an IA for the book store's property claim. As Wayne pondered whether he could serve as the independent adjuster for this claim, the fire investigator he retained uncovered information regarding the cause of the fire. Investigators placed the origin close to a hot water heater, and the grocery store manager admitted that, prior to the fire, there were discarded cardboard boxes stacked up against the heater near the burner. However, the fire investigator also confirmed there was a sprinkler system in this area that could have put out the fire, but that it had been shut off by a painter working inside the store.

In this scenario, the IA has a host of issues he needs to identify and address promptly to ensure that he serves his client, or potential clients, properly. He must not only recognize that

his client's insured may have potential liability for causing the fire, but also that his client may have a viable right of subrogation.

This scenario creates multiple separate conflicts of interest that must be addressed. First, the liability carrier for the grocery store should be notified of the loss, if it has not been already. Second, it is likely that the property carriers subscribing to the risk may wish to explore subrogation more closely; however, to do so will invariably highlight the grocery store's negligence. Moreover, Wayne must determine whether he can act as the IA for the book store's carrier if there is a good chance the book store and the grocery store could ultimately be adverse to each other in future legal proceedings. What can Wayne do to protect his client and his client's insured's interest?

Privileged Reporting

At the outset, an IA must recognize that all of his activities may be fully discoverable by many different parties if the matter ultimately ends up in litigation. Often, the IA's work product is not protected under the attorney-client communication or work product privileges.

In fact, the discoverability of the adjuster's reports or communications will be analyzed differently depending on who is requesting the information, when, and why. For example, a substantive report prepared by the IA, analyzing both first-party property coverage and liability issues after the adjuster has spoken with the insured, will likely be discoverable in a subrogation action if a third party makes such a request. A judge will ultimately decide whether the full report or a redacted report that omits the adjuster's liability analysis will suffice. This same information may also be fully discoverable if the affected insured requests this information in a later coverage action.

However, if the loss ultimately ends up as a liability claim, then many times the adjuster's report will be fully protected from disclosure by the work product protections if you can establish that it was made in anticipation of litigation. Moreover, some states recognize an insured-insurer privilege, but that protection is only for liability claims against an insured.

Therefore, while the IA has an obligation to its client to gather factual information, the adjuster should not analyze the legal impact of those facts, which could later be discoverable, unless the clients make a specific request to do so.

Navigating Conflicts of Interest

In large, multi-party losses where a potential conflict of interest exists, it is critical that the IA reacts quickly to protect the interests of both the policyholder and the carrier, even if doing

so limits or prevents an IA's ability to work for additional clients stemming from the same occurrence.

While the adjuster may not have a fiduciary duty to the policyholder, the insurer that retained him does. Therefore, the adjuster needs to keep its client—the insurer—informed of all developments as they occur. If the decisions that an IA makes regarding these potential conflicts of interest negatively impact the insured, then the insurance company client may be exposed to additional liability and even potential bad faith, depending on the state.

This does not mean that an IA can never accept multiple assignments from multiple carriers involved in one occurrence. In many instances, a little leg work will reveal that the potential conflicts of interest are not conflicts at all. Whatever the adjuster decides, obtaining consent from the insurers, even though not required, is the best and safest practice.

When an IA faces the prospect of working for multiple carriers that insure multiple parties on the same loss, the adjuster should initially evaluate if there is any real conflict of interest.

First, the relationship between the parties affected by large losses often started well before the loss occurred, and are often contractual in nature. In many instances, these entities recognized the possible losses and created contractual provisions regarding potential liabilities. For example, the legal relationship between tenants and landlord, as well as tenants and other tenants, will be governed by leases or other documents signed prior to the loss.

When an independent adjuster is first tasked with any multi-party loss, such as that involving landlord-tenant, condominium, warehouse or shipping losses, the IA should request contracts and other documents between the affected parties to appropriately document the file. At that point, the adjuster will also have the opportunity to examine possible conflicts of interest.

For example, in residential and commercial leases, the IA should look for subrogation waivers, limitations of liability and hold harmless agreements. Often, a lease will contain these provisions, but they will only cover the relationship between the landlord and the tenant. It is important to recognize whether the scope of these provisions, if present, covers the relationship between just the landlord and tenants or extends to tenant-tenant relationships as well.

In any multi-party loss where the relationship between the parties is not covered by a written document, or if the parties' agreement does not contain a limitation of liability, waiver of

subrogation, or hold harmless provision, then an IA is wise to decline any invitation to work for more than one party.

In multi-party losses where the potential liability between the parties is covered, the adjuster should still obtain consent from each client in the order he was retained before working for multiple carriers.

However, it must be noted that some states will not allow these provisions to be enforced, particularly if there is an underlying public policy consideration at play. Wisconsin has a statute that prohibits enforcing any provision in a lease where a tenant or landlord is relieved of legal liability for damages caused by that party's own negligence. Therefore, while the IA may not be expected to perform a legal analysis of these documents, any discussion that the adjuster has with his client about a potential conflict of interest should also cover whether someone has performed a legal analysis of them.

Multiple Insurers, One Insured

Losses assigned to an IA by way of a subscription policy are a slightly different animal, as conflicts of interest relate most often to the wishes of the individual carriers and potentially the insured as well.

Thankfully, many subscription policies provide some guidance to the adjuster as to who ultimately decides coverage, expert retention, or other claim-related issues. To the extent that the adjuster becomes involved, it can become an issue of merely keeping the respective clients content. This situation is driven more by the personalities of the parties involved than legal concerns.

However, many of these subscription policies are generated for large corporations and garner huge premiums for the carriers involved. Often, these policies dictate which IA firm will be used for all losses, and the insured has some say regarding who will adjust *its* losses. Therefore, the IA has some interest as well in keeping the insured happy.

That said, the IA must recognize that the insured is not his client and that his fiduciary duty is to the carriers only. Often, the adjuster will be tempted to push the boundaries in these situations and provide guidance to the insured regarding coverage questions. The IA might also want to review issues outside the scope of the claim. The adjuster would be wise to avoid these temptations, however, as they may constitute a violation of the IA's fiduciary obligation to the client and could also make the adjuster akin to a public adjuster, depending on the state where the loss took place.

Lastly, IA firms also face these same issues when they have two separate adjusters who are independently retained to work on the same loss for different carriers insuring different insureds. Adjusting firms are wise to follow the same set of rules set forth above, but there may be some leeway, as the conflict of interest is less direct.

It is nearly unheard of that two attorneys from the same firm would work for different clients affected by the same loss unless their interests are perfectly aligned. However, there have been court decisions scattered throughout the country where experts from the same firm were allowed to testify for parties adverse to each other. In those cases, the courts were most concerned with the experts' ability to protect against the improper sharing of information. In this regard, it is likely that an adjuster would be treated more like an expert than an attorney, but the ultimate decision on any conflict issue rests with a judge and will be analyzed on a case-by-case basis. If the judge rules that there is a conflict that was not appropriately handled, then the consequences can be drastic and will likely include barring the IA and others tainted by the IA's improper sharing of information. Therefore, taking on such an assignment without performing the appropriate due diligence and obtaining the necessary client approval is a risky proposition not worth taking.

Where does all of this leave Wayne? As it turns out, he was able to obtain copies of the leases between the landlord and the tenants. The leases held harmless provisions between the landlord and all tenants. So, at the end of the day, all carriers involved agreed that Wayne could handle multiple assignments without conflict. Well, sort of. The painter's liability carrier has denied liability. Wayne has avoided discussing subrogation issues in his client reports other than to say that counsel has been retained and will report directly on those issues. The end result? Conflicts are avoided for a job well done.