

6 Tips For Responding To Notices Of Catastrophic Loss

Law360, New York (April 17, 2012, 12:46 PM ET) -- When significant property damage and attendant business losses occur by fire, explosion, flooding or other catastrophe, injured parties and their insurers often notify potentially liable third parties, including service providers and product manufacturers, of their potential liability for the loss and invite the third parties to participate in future inspections or evidentiary testing.

Proper handling of these notice of loss and inspection letters by the defense can facilitate a more accurate assessment of the risk, avoid future litigation and set the stage for a successful defense if litigation ensues.

1. Act Quickly to Learn as Much Background Information as Possible from the Noticing Party

Since a \$50,000 loss will be approached differently than a \$1 million loss, ask for a ballpark figure on the size of the loss. Also, request complete information about the product or service alleged to have caused the loss.

For a product, ask for the product's model number or name, serial number, manufacture date, and sale or installation date. For a service, ask for detailed information concerning the type of service that was provided and the dates of service.

Specifically ask for a list of retained evidence, including any and all component parts of the product, and obtain an accounting for any evidence that is no longer available. Learn whether the parties previously inspected or tested the evidence.

If so, who attended the prior inspections or tests, what has been done, and what are the preliminary findings? Sign-in sheets should have been used, so ask for a copy.

If photographs have been taken of the accident scene or the evidence, particularly the product, ask for duplicates so they can be immediately reviewed by in-house technical personnel and outside consulting experts.

2. Obtain Information About the Proposed Inspection or Test and Follow-Up

Request specific information about the proposed inspection or testing: Who is invited and what is his or her connection to the claim?

Ask for a copy of the protocol that the claimant's expert should have prepared outlining the steps to be followed at the inspection or test. The content of the proposed protocol may influence whom you will have attend the inspection, e.g., an in-house technician, a chemist, a metallurgist, an electrical or mechanical engineer or a cause-and-origin expert.

Both in-house contacts and retained experts should review the draft protocol and note any areas of disagreement about what will be done. Most experts involved in litigation routinely draft and evaluate protocols and have specific ideas about what should and should not be done and the proper sequence that should be followed.

Vital information can be captured — or lost — depending on the sequence of steps taken during a destructive inspection or test. Conferring with a consulting expert and other participants about the protocol ahead of time can lead to more complete and accurate results and can save valuable time that would be wasted if objections are first raised at the inspection or test.

An agreed protocol also helps participants determine the tools and equipment they need to bring and how much time is required to complete the inspection or test.

3. Conduct an Initial Independent Investigation of the Incident or Claim

Some independent investigation and research should be completed before the noticed inspection or test. A search for news articles or reports about the incident as well as applicable fire or police department reports may provide valuable information, including witness statements, the amount of the damage and potentially responsible parties.

A Freedom of Information Act request to obtain public records may also be warranted.

Briefly review applicable state law, standards or codes to access the framework within which the claim is being made and to uncover legal precedent that may either bar future litigation against your client or make it more or less viable.

Equipped with information about the specific product or service at issue, you should confer with your client to identify applicable product manuals and technical information and any and all contracts or records related to the service provided. Instructions and warnings in product manuals and service-contract provisions often limit potential liability and, depending on the applicable state law, may bar an action for damages.

At least some of the information gained should be shared with your consulting expert before the inspection or testing to help the expert evaluate the claim.

4. Be Aware of Spoliation and Chain-of-Custody Issues

The evidence must be handled properly to avoid future spoliation and chain-of-custody issues. Assess who is scheduled to attend the inspection or test, since potentially liable parties may need to be notified and invited to avoid a future spoliation claim.

Evidence should not be altered, changed or destroyed unless all potentially liable parties are notified and all participating parties are in agreement, and be sure any modification of the evidence is properly documented. Retained experts for the participating parties will often work together to ensure the evidence is properly identified and dismantled without unnecessary alteration.

If evidence will be transported to an outside laboratory or testing location, the parties should agree on how that is to be accomplished without compromising the nature of the evidence or the chain of custody. The point is both to assess the evidence and preserve it for possible future use in litigation.

5. Use an Experienced and Knowledgeable Expert

Do your homework. An expert may appear well-qualified on paper or over the telephone but may not be convincing or believable at deposition or trial. If you have not worked with a particular expert before, find someone who has and get his or her input. Think long and hard about whom you will have attend the inspection or test, as she often will be the linchpin to your defense.

6. Work Toward a Defined Goal

Although it may be difficult in today's economic climate to justify incurring legal and expert expenses before a lawsuit is filed, acting proactively on the front end of a notice of claim while carefully targeting expenses is often money well spent.

The preferred result, of course, is to avoid litigation; a beneficial byproduct is knowledge that can be used as leverage to resolve a claim or defend a lawsuit that cannot be avoided. Either way, it is a win-win situation, both for the client and counsel.

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