

## **Chapter 8 Liability**

### **Liability Concepts**

Homeowners' policies have two sections: Section I and Section II. Section II contains a homeowners' policy's liability coverage. To help familiarize you with liability in general, we'll cover some basic concepts regarding liability insurance.

### **Insuring Agreement**

A liability policy basically agrees to pay on behalf of the insured "all sums the insured becomes legally obligated to pay as damages." This is stated in the insuring agreement.

### **Limits**

Liability policies have three ways in which limits are applied. With a **single** limit, the amount is the maximum liability of the insurer for any one accident or occurrence. A single limit could also be applied to all people hurt in one occurrence, and another single limit for all property damage incurred.

A **split limit** provides two numbers. For bodily injury, one limit will apply to the each person injured in one occurrence, and another limit will apply to the claims of all people injured in one occurrence.

An **aggregate** limit is the limit that applies to the entire policy as a whole, no matter how many people are involved in an occurrence.

### **Legalities**

#### **Legal Liability**

An insurer will pay out under a liability policy if it has been determined that the insured is legally liable. The term "legal liability" refers to the rule that if one injures another due to negligence, the one who caused the injury, must provide reparations to the one injured.

There does not need to be a lawsuit to determine whether or not someone is legally liable. Most liability claims are settled by adjusters who follow the guidelines established by the policy and thoroughly investigate a claim. The most important factor that affects liability claims is whether or not the person considered liable is also considered an insured under the policy.

#### **Torts**

Torts are not defined by law. In fact, "new" torts are created all the time. A tort is a civil wrong that does not arise from a contract for which money damages may exist. There are some widely-recognized types of tort, such as an intentional tort (premeditated) and a negligent tort (failure to exercise care). A strict liability is a liability without fault, sort of like pleading "no contest." It's not guilty or innocent – it's just liable.

Unintentional, or negligent, torts represent the vast majority of all cases brought for personal injury or property damage.

#### **Law**

There are two types of "law" considered in liability insurance – common law and statute law. Common law refers to a body of principles and rules that are based in usage or custom, but not actually codified as "law." Statute laws are laws that have been legislated or created by the state or federal authorities. In many cases, common law is the same as statute law, but any time there is a conflict or contradiction, statute law is applied.

### **Damages**

Liability policies pay "damages," which is an insurance term for "money." There are two types of damages: compensatory and punitive.

#### **Compensatory Damages**

This type of damage can be further classified into two sub-categories: special and general. Special

compensatory damages are those for actual economic loss, such as medical expenses or loss of earnings. General compensatory damages are not as tangible and involve things like pain and suffering and inconvenience. Both types of compensatory damages are reasonably common for tort actions. General compensatory damages are difficult to obtain in a contract action.

### **Punitive Damages**

Punitive damages may be awarded in addition to compensatory damages. Punitive damages are exacted more to punish the defendant than they are to make the plaintiff whole again. Punitive damages are meant to dissuade the defendant from behaving in a way as to cause a liability claim again. Punitive damages may be awarded in a tort action, but are pretty much nonexistent in contract actions.

### **Defenses**

Once the claimant has issued his or her complaint and proves all the elements of negligence, the defendant may return with one of two defenses: assumption of risk and comparative negligence.

#### **Assumption of Risk**

An injured person who knowingly exposed himself or herself to risk is said to have assumed the risk of the injury. Even if the person was injured by no fault of his or her own, if he or she put themselves in that position, it is not the defendant's responsibility.

Let's say Mark has a dog that is kept in a pen in his back yard. The fences in the pen are very high and there is a lock on the gate, keeping the dog inside. If a neighbor finds his or her way into the pen and is subsequently bitten by the dog, it is clear that the plaintiff assumed the risk of being bitten by Mark's dog when he or she decided to climb into the dog's pen. It's not Mark's fault.

#### **Comparative Negligence**

In this defense, the defendant asserts that the plaintiff somehow contributed to the injury. If this is proven, the plaintiff's claim will be reduced by the amount for which he or she was negligent or contributed to the injury. A plaintiff who is found to be 25% negligent for his own injury would receive damages that are reduced by 25%.

In this instance, the defendant could cross-claim the plaintiff and recover an amount based on the reduced degree of negligence.

An adjuster must understand how to determine levels of negligence, especially when dealing with claims that involve comparative negligence defenses

### **Liability - Coverage E: Personal Liability**

Coverage E and Coverage F are found in Section II of a Homeowners' Policy. Section II of the homeowners' policy provides liability coverage in the event of a claim or lawsuit being brought against an insured by a third party. Coverage includes both bodily injury and property damage caused by an occurrence to which the policy applies.

#### **Duty to Indemnify**

An insurer's Duty to Indemnify is an important principle that is part of the basis of liability insurance. Under this clause, the insurer owes the insured a fiduciary duty to indemnify against liability for bodily injury and property damage. This duty is somewhat narrow and ONLY applicable when the insured is liable on the basis of conduct that falls within the scope of the policy's coverage.

If a claim or suit is brought against an insured for damages because of bodily injury or property damage, the insurer will pay up to the limit of liability for damages an insured is legally liable for.

#### **Duty to Defend**

The insurer's Duty to Defend is another important principle of liability insurance. Any doubts regarding the insurer's duty to defend under the policy must be resolved in favor of the insured. If an insurer refuses to defend a claim, it exposes itself to possible punitive damage penalties. The determination of whether a defense must be provided is based on the allegations made in the complaint and the terms of the policy. If there are multiple counts in the complaint, the insurer

must defend the insured until any and all counts that fall under the scope of the policy have been settled.

If a claim or suit is brought against an insured for damages because of bodily injury or property damage, the insurer will provide legal defense, choose the legal counsel and pay the expenses, even if the suit is false or fraudulent. The insurer may also investigate and settle a claim as it sees fit. This is what an insured is paying for in liability coverage.

The insurer's Duty to Defend expires when the limit of liability has been exhausted by payment of a judgment or settlement. This does not, however, completely release the insurer from responsibility.

## **Coverage F: Medical Payments to Others**

Coverage F is the other part of Section II's liability coverage. This coverage pays for medical payments to third parties that are incurred or deemed medically necessary within three years from the date of an occurrence causing bodily injury. This is basic accident coverage, since negligence does not need to be established for coverage to apply.

In insurance terms, "medical expenses" are the reasonable charges for these items:

- Medical services
- Surgical services
- X-rays
- Dental services
- Ambulance services
- Hospital services
- Professional nursing services
- Prosthetic devices
- Funeral services

The insured and other people who live in the insured dwelling are not eligible for this coverage. Residence employees, such as a nanny, are covered.

Coverage F applies to the following:

- A person on the insured location with the insured's permission.
- A person off the insured location, if the bodily injury.
- Arises out of a condition on the insured location or adjoining ways.
- Is caused by the activities of the insured.
- Is caused by a residence employee in the course of his/her employment by an insured.
- Is caused by an animal owned by or in the care of an insured.

## **Homeowner Claims**

### **What Constitutes a Homeowners' Loss?**

There are four factors necessary in order for a loss to be covered by insurance. They are these:

#### **Losses Must be Accidental**

The reason for this is that insurance policies insures against "risks." Therefore, losses must be accidental. If a loss is certain to occur, there is no risk involved. Losses resulting from deterioration are sometimes thought to be the result of a certainty. After all, everything wears out sooner or later. For this reason, should a loss be caused by deterioration, it would not be covered by your insurance.

**Losses Caused by Extraneous Factor**

This means an external cause of damage, such as wind damaging the patio furnishings. Should a loss be caused by an inherent physical condition, the loss would not be covered.

**Losses Caused by Deliberate Action on the Part of the Policy Owner**

Any action on your part that causes a loss to any insured property is not covered. You cannot deliberately destroy property that is insured and expect the carrier to pay for it.

**Losses Must Involve Legal, Covered Property**

Illegal items and contraband are not covered by insurance. If you had an illegal whiskey still in your home and it was damaged by a covered peril, that loss would not be covered. It should be noted that one of the elements of a valid claim is that you must actually sustain a loss. It's not enough to have property by insurance and to have that property damaged or destroyed by a covered peril. It is also necessary that you have a financial and insurable interest in the damaged property in order for a loss to be sustained. The insured must have some degree of ownership in the property in order to have an insurable interest in it.

**Filing a Homeowners' Claim**

When a claim needs to be filed, the following must be kept in mind:

- A policyholder normally has a strong and favorable position where claims are concerned.
- As a rule, the courts usually resolve questions on claims in favor of the policyholder.
- The overall effect of court decisions has been to broaden the coverage of homeowners' policies.
- Although companies differ in their approach to claims, most work to give good service to their customer.
- Some companies engage in questionable practices, and it is prudent to watch out for activities that might not be proper.
- Consequential losses are not covered by homeowners' policies.
- Negotiation is not necessarily a win/lose proposition. Both parties can come out feeling like winners.

**Replacement Costs Coverage**

In approximately 80% of all claims, less than 10% of the property insured is affected by loss. Therefore, it could be said that you are buying insurance to only cover 10% of the property in question and coverage will be adequate 80% of the time.

All homeowners' policies contain a replacement cost provision that requires you to purchase an amount equal to 80% of the replacement cost of the dwelling. The purpose of this requirement is to make the determination of insurance rates simple, and allowing premiums to be based on a fixed cost per \$100.00 worth of insurance.

Calculating replacement cost for the purpose of buying insurance is somewhat different than estimating the cost of buying a new home. There are two reasons why one needs to accurately determine the replacement cost of their home. First, to be certain that the coverage is adequate and that it complies with the replacement cost requirement. Second, the policyowner wants to be secure in the fact that they are not being sold an excessive amount of insurance and the higher premiums that go along with it.

It must be realized that when a company considers attaching a penalty to a claim due to insufficient coverage, the homeowners' policy stipulates that payment is to be based on replacement cost less the appropriate penalty or the actual cash value of the repairs, whichever is greater. Because of the method used to calculate, the actual cash value of the repairs and the

negotiable nature of this issue, it may be best to submit your claim based on the actual cash value of the repairs involved.

When claims are paid under the replacement cost coverage, the company is able to figure its obligation three ways and choose the one that works best for them. These three choices are as follows:

### **Policy Limits**

The most the company ever will pay is the amount of insurance that applies to the property covered.

### **Cost of Replacement**

This would be based on the cost of an equivalent building at the same location.

### **On the Actual Amount Spent in Completing Repairs**

Replacement cost can be defined as the cost to replace damaged property with:

- Like kind and quality
- Similar in basic style
- Similar in basic quality
- Similar in basic function

Remember, the policy provides coverage for replacement costs, not reproduction costs.

Reproduction cost is defined as the cost for replacing property exactly as it was, down to the last detail.

There is one interesting loophole in replacement cost coverage: The repair work done to the building NEED NOT BE based on replacing identical property at the same location. Believe it or not, in some states, reconstructing property at any location, including a different city or state, will qualify as a replacement cost claim.

Therefore, when studying the replacement cost coverage, keep the following in mind:

- Replacement cost coverage applies only to buildings and not all property covered under the policy.
- It is important to be aware of what property is not covered under replacement cost coverage.
- Of all provisions of a homeowners' policy, replacement cost is the most important.
- Let the homeowner take an active role in determining what they feel or know to be the replacement cost of their home.
- Be certain to know how this provision works and how penalties are attached to claims.
- The claim payment based on actual cash value is usually better than a claim payment that involves a penalty when the property involved is not properly insured.
- Since there are alternatives for the payment of replacement cost claims try and negotiate the method that works best.
- "What constitutes replacement" can be very critical in filing a replacement cost claim.
- Understanding the meaning of "betterment" is important to the process of filing a claim, and this can be used to your benefit.

## **Claims on Dwellings and Personal Property**

### **Claims on Dwelling**

When an insured has experienced a loss and wishes to file a claim for a damaged dwelling or

other structure, he or she must be prepared for an involved and complicated process. There are four important steps to filing a claim on a dwelling, as follows:

### **Determining Coverages**

You need to first determine what is and is not covered by your policy. If there is a difference between the cost to repair and the amount of the claim, it could mean out of pocket expenses to you. In other words, should coverage be lacking in certain areas, it may be necessary to take measures throughout the adjustment process to cover shortages by having money left over to pay for items that are not covered.

It is important to know that most claims representatives (adjusters) do not identify the parts of a loss that are not covered in the areas where betterment applies.

### **Determining the Scope of Repairs**

This is the insurance company's description of work that will be included in repair estimates. It can also be referred to as:

- Scope of damage
- Description of work
- Job description

The claims representative will prepare most scope of repairs. The policyowner should clearly tell the claims representative that they wish to go over the work to be considered in the scope of repairs before they are prepared. Often, there are questionable aspects in the scope of repairs. Say, for example, the adjuster feels the bedroom was not damaged enough by smoke to warrant painting it or that the soiled carpet can be cleaned rather than replaced. Since an adjuster works for the insurance company, he or she may try to get the policy owner to accept alterations that will lower the cost of the repair.

### **Determining the Cost to Repair**

Now we need to convert the scope of repairs into an "Agreed cost to repair." You need to know that as a policyholder your position here is very weak. There are these two reasons for this:

- 1) Most companies use an estimate to establish a cost to repair. The company representative could obtain a bid from a familiar contact and get a low estimate.
- 2) The company always retains the right to repair the property. If they use this option, the chances of handling the claim creatively in order to avoid absorbing any shortfalls are ruined.

### **Determining the Amount to Repair**

This part is relatively easy. The appropriate deductibles are subtracted from the cost to repair. Since the deductible will always apply, it must be considered. Parts of the loss that are not covered will be subtracted from the cost to repair. When all these figures are agreed upon, including the cost to repair, the actual cash value amount of claim, and the pending replacement cost claim, you will sign the papers, collect the payment in full and concentrate on repairing your damage.

An insured should keep the following in mind when compiling a claim on a dwelling:

- Always consider variations on reconstruction.
- Profit and overhead allowances are part of the cost to repair and should be part of the claim payment.
- Although building code requirements are a factor, a creative approach can keep them from being a problem.
- Assertiveness on your part in dealing with contractors is usually the key to a positive outcome.
- The construction contract must include all the work you want done in the estimate.
- You can negotiate favorable financial terms with a contractor for payment assignments.

-Most contractors resist using them, but penalty clauses can help avoid delays in construction.

## **Claims on Personal Property**

A personal property claim is very similar to a dwelling claim. Personal property includes things like your clothing, jewelry and other such belongings. First, follow the same four steps described earlier, which are these:

- Determine coverage
- Determine the scope of loss
- Determine the replacement cost
- Determine the amount of the claim

**1. Determine what personal property is covered.** Review the exclusions in the policy that specifically refer to personal property. Find out if what your loss is covered and what the limit is on that coverage.

**2. Establish the scope of the loss.** This means that you determine which property is going to be included in the claim. Always complete an inventory on your own. Do not leave this to the insurance company representative. Often, you may find it difficult to determine if damaged items can be cleaned rather than replaced. As a rule, if the company agrees to clean it and this is unsuccessful, the property will be replaced.

**3. Establish the replacement cost of the property.** This will involve a substantial amount of work, but it needs to do this with every item. Getting replacement cost prices from discount or lower priced stores is not always the best solution. Next to each item that you want replaced should be a record showing the price reference.

**4. The final step is the actual cash value of the claim.** This is necessary in most cases as the replacement cost coverage on personal property usually requires replacement of the property involved before the difference between the actual cash value and the replacement cost is collectable. This means that the policy owner will probably have to purchase that new chair before the company will pay the full amount of that chair.

When filing a claim for personal property, keep the following in mind:

- Compiling a personal property claim is similar to compiling a building claim.
- Depreciation is highly relevant to personal property claims and is based on the ratio between the life expectancy and the age of the item.
- A well-presented claim will make for a quick settlement. A good format in presenting the claim is important.
- Another important aspect is documentation. The policy owner has both rights and obligations in this area.
- Loss by mysterious disappearance and conversion are not covered under many homeowners' policies.
- An inventory of the personal property will enable the filing a complete claim in the event of a severe loss. Consider photographs or videotaping.