



## An Insured's Post-Loss Duty to Cooperate in Property Insurance Policies

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### Introduction

Most property insurance policies, such as homeowners, dwelling fires, or commercial property policies, contain many duties and obligations called “conditions” that an insured must first comply with before he or she may 1) recover under the policy; or 2) sue an insurer for a breach of the insurance policy.<sup>1</sup>

To learn about these conditions, an insured must first read his or her entire policy, not only the declaration page. Generally, policies may have varying conditions regarding the insured's duties after a loss, but most contain some universal post-loss duties that primarily intend to benefit both the insurer, who needs information from the insured to protect its own interest; and the insured, who needs a claim to be handled expeditiously and appropriately. In examining the insured's post-loss duty to cooperate, there is a focus on allowing the insurer to timely investigate the loss, and on protecting further damage to the insured property.

This post-loss duty to cooperate is especially important because *willful* noncooperation of the insured is a valid defense under a policy of noncompulsory insurance, like a homeowners or commercial property policy.<sup>2</sup> But generally, noncooperation of the insured is not a valid defense to an insured's liability to a third party under a compulsory insurance policy, like a no-fault auto or liquor-liability policy.

### An insured's duties after a property loss

After a loss, an insured must cooperate with the insurer during the investigation of the claim, and comply with the remaining policy's conditions, or risk forfeiture of any available coverage under the policy. Generally, an insured must do the following:<sup>3</sup>

- a. Provide prompt notice of the loss to the insurer or the insurer's agent;
- b. Protect the insured property from further damage;
- c. Provide a timely sworn statement in proof of loss; and
- d. Appear for an examination under oath.

*An insured must provide prompt notice of the loss to the insurer or the insurer's agent.*

Providing prompt notice permits the insurer to a) timely investigate and gather information about the claim before any evidence is lost or destroyed; and 2) protect the insurer from any potential fraudulent, excessive, or invalid claims.<sup>4</sup>

Unlike other types of policies, like pollution or directors and officers liability policies, which require insureds to provide written notice within a specific period of time or number of days, like 7, 30, or 60 days, most property insurance policies require that insurers are notified promptly, as soon as reasonable, as soon as practicable, or some other similar language.

This distinction is significant because Michigan courts have interpreted policy provisions requiring notice to be provided promptly, as soon as reasonable, or as soon as practicable, to mean within a reasonable period of time, depending on the facts and circumstances of the loss.<sup>5</sup> In reviewing those facts and circumstances, a court may consider these factors:

1. When did the insured first discover or learn of the loss;
2. The amount of time that passed after the insured learned of the loss;
3. The level of diligence the insured exercised in determining if the claim might fit within one of its policies; and
4. The level of the insured's sophistication.

Under the ISO homeowner's policy form,<sup>6</sup> late notice doesn't justify denial of an insured's claim unless the late notice is prejudicial to the insurer. The relevant language is:

#### **Duties After Loss**

In case of a loss to covered property, we have no duty to provide coverage if the failure to comply with the following duties is *prejudicial* to us.

Similarly, in policies that require “prompt,” “as soon as possible,” or other similar notice provisions, under Michigan law, an insurer must prove *actual prejudice* by late notice before it can escape liability under a property insurance policy.<sup>7</sup> Generally, whether a late notice had prejudiced an insurer is a question of fact for the jury.<sup>8</sup>

***An insured must protect the insured property from further damage***

Under the ISO property insurance forms, after a loss, an insured has a contractual duty to take all reasonable steps to mitigate his or her damages by protecting the insured property from further damage. An insured must also keep a record of any expenses incurred for emergency and temporary repairs. When mitigating the damages, an insured must only act as a reasonable prudent person; in other words, an insured need not take extraordinary efforts or steps that could create an undue burden on him or her. Whether an insured reasonably mitigated the damages usually depends on the loss's facts and circumstances.

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**Under the ISO homeowner's policy form, late notice doesn't justify denial of an insured's claim unless the late notice is prejudicial to the insurer.**

When complying with the duty to mitigate the damages after a loss, an insured must act promptly and must not wait on the insurer's determination of the claim or receiving payment from the insurer. Therefore, an insured must reasonably mitigate the damages even if this means incurring out-of-pocket expenses. Generally, an insured won't be permitted to recover for any additional damages that could have been avoided if he or she was able to mitigate his or her damages.

Likewise, under Michigan law, an insured must exercise reasonable care to minimize his or her damages.<sup>9</sup> But the insurer has the burden to prove that the insured failed to mitigate the damages, and an insurer can only reduce the insured's recovery when it shows that the insured has failed to employ every reasonable effort to mitigate damages.<sup>10</sup>

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***An insured must provide a sworn statement in proof of loss***

Within 30 days of receiving a notice of claim, a property insurer must inform its insured of what information or documents must be submitted to constitute a satisfactory proof of loss.<sup>11</sup> Usually, an insurer will request that the insured submit a "sworn statement in proof of loss" (SSPOL). The SSPOL provides the insurer with the information it needs to

determine if the claim is covered and, if so, in what amount, and to prevent fraud by requiring the insured to swear to the truthfulness of the information being submitted.

When responding to the insurer's request, an insured must timely submit a SSPOL or risk forfeiture of any potential benefits under the policy.<sup>12</sup> But an insurer may not rely on the insured's failure to submit a document titled SSPOL when an insured substantially complies with the purpose of the SSPOL.<sup>13</sup>

For example, when an insurer receives the functional equivalent of the information included in a SSPOL such as receiving immediate notice of the claim, fully investigating the claim, and examining the insured under oath, the insured is held to have complied with the policy's conditions, and the insurer may not deny a claim for failure to timely submit a SSPOL.<sup>14</sup>

An insured must also review the policy's post-loss conditions to determine when the SSPOL is due. Some policies require an insured to submit a SSPOL within 60 days after the date of loss, while others require an insured to submit a SSPOL within 60 days after the insurer's request.

If an insured cannot timely submit a SSPOL, he or she should attempt to obtain a written extension from the insurer; and if the insurer refuses to approve such extension, the insured should then try to diligently submit any available information within the required time period, and then supplement the SSPOL once additional information becomes available.

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***An insured must appear for an Examination Under Oath***

The SSPOL usually goes hand-in-hand with another important post-loss condition known as the examination under oath (EUO). Usually, if the insurer has doubts or questions about the facts and circumstances surrounding the loss, the SSPOL, or the insured's financial condition, it may require the insured to submit to an EUO, during which the

SSPOL could be used against the insured. This highlights the importance of providing an accurate and truthful SSPOL to the insurer.

An EUO is a process in which an insured verbally answers the insurer's questions under oath and provide numerous other documents. Although an adjuster may complete an EUO, it is usually conducted by an attorney on the insurer's behalf, in the presence of a court reporter typing down everything being said, and is usually completed in the presence of the claim's adjuster or an investigator from the insurer's special investigation unit. Therefore, when responding to an insurer's request for an Examination Under Oath, an insured shouldn't proceed with the Examination Under Oath alone, and should consider retaining a property insurance attorney to assist with the process.

Depending on whether the loss is residential or commercial, the information or documents requested might be very exhaustive and lengthy, which sometimes will prompt insureds to express their frustration with the process, including feeling it is intrusive or overbroad. Nonetheless, an insured must cooperate and submit to an EUO because failure to submit to an EUO suspends the insurer's duty to provide coverage or payment for the insured's loss until the EUO is completed.<sup>15</sup>

When an insured *willfully* refuses to submit to an EUO, his or her subsequent suit against the insurer must be dismissed with prejudice.<sup>16</sup> Willful noncompliance is more than an insured's failure to attend the EUO due to a scheduling conflict. Michigan courts define willful noncompliance as the insured's "failure or refusal to submit to an [EUO] or otherwise cooperate with an insurer in regard to contractual provisions allowing the insurer to investigate the claim *that is part of a deliberate effort to withhold material information or a pattern of noncooperation with the insurer.*"<sup>17</sup> The insured has the burden to show that he or she has not deliberately withheld *material* information.

### Some insurers attempt to expand the scope of the duty to cooperate

Although an insured owes the insurer a post-loss duty to cooperate, this duty is not limitless, and it mustn't create an undue burden on the insured, especially when an insurer requests information that an insured doesn't have and can't obtain, or when a non-insured, third-party witness refuses to speak with the insurer.

In recent years, some insurers have frequently attempted to expand the scope of the duty to cooperate, and have requested insureds to provide additional information or documentation, although there is no explicit authority in the policy for requesting these additional documents or information.

For example, a cell-phone forensic download is now a part of most fire-insurance claims. Although a request for cellphone data might be relevant if it is limited to a day or two before and after the loss, some insurers have attempted to extract all of the information available on a cell-phone since the insured bought it, going back several years; or downloading private irrelevant information, like a photo of the insured's significant other or the insured's children.

Similarly, some insurers have requested information from an insured's social-media accounts, while others have become much more aggressive, requesting the insured's usernames and passwords to these social-media accounts.

Likewise, some insurers have required an insured to produce friends, neighbors, or other non-insured third parties for a statement under oath, and have wrongfully denied the insured's claim when those non-insured third parties refuse or fail to respond to the insurer's request for a statement under oath. It behooves insurers to know that the post-loss duty to cooperate is only a duty of an insured, as defined under the policy. Third parties, which aren't an insured as defined under the policy, need not cooperate with the insurer, and an insured's claim shouldn't be denied for a third-party failure to cooperate with the insurer.

### Conclusion

After a property loss, an insured must cooperate with the insurer by 1) providing prompt notice of the loss to the insurer or the insurer's agent; 2) protecting the insured property from further damage; 3) providing a timely sworn statement in proof of loss; and 4) appearing for an examination under oath. An insured who doesn't comply with these duties may be barred from recovering under the policy, and generally can't sue an insurer for a breach of the insurance policy until he or she first complies with the policy's terms and conditions. ■

### About the Author

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### Endnotes

- 1 This article discusses the Insurance Services Office, Inc (ISO) policy forms. Some insurers may use their own policy forms, which may include different or additional post-loss duties or conditions.

- 2 See *Action Auto Stores v United Capital Ins Co*, 845 F Supp 417, 422 (WD Mich 1993).
  - 3 The ISO policy forms contain additional post-loss duties. For example, an insured must notify the police in case of loss by theft and exhibit the damaged property.
  - 4 *Wendel v Swanberg*, 384 Mich 468; 185 NW2d 348 (1971).
  - 5 *Motor State Ins Co v Benton*, 35 Mich App 287; 192 NW2d 385 (1971).
  - 6 ISO is an advisory organization providing statistical, actuarial, underwriting, and claims information and analytics; compliance and fraud identification tools; policy language; and other related risk management services to the property and casualty insurance industry.
  - 7 *Burgess v American Fid Fire Ins Co*, 107 Mich App 265; 310 NW2d 23 (1981).
  - 8 *Id.*; *Wendel* at 470; *Koski v Allstate Ins Co*, 456 Mich 439, 444; 572 NW2d 636 (1998).
  - 9 *Klanseck v Anderson Sales & Services, Inc*, 426 Mich 78, 91; 393 NW2d 356 (1986); see also *Lawrence v Will Darrab & Assoc, Inc*, 445 Mich 1, 15; 516 NW2d 43 (1994).
  - 10 *Dep't of Civil Rights v Horizon Tube Fabricating, Inc*, 148 Mich App 633, 637; 385 NW2d 685 (1986).
  - 11 MCL 500.2006(4).
  - 12 *Fenton v Nat'l Fire Ins Co*, 235 Mich 147; 209 NW 42 (1926).
  - 13 *Dellar v Frankenmuth Mut Ins Co*, 173 Mich App 138; 433 NW2d 380 (1988).
  - 14 *Id.*
  - 15 *Yeo v State Farm Ins Co*, 219 Mich App 254; 555 NW2d 893 (1996); *Vertex Int'l Mgt, LLC v State Farm Fire & Cas Co*, \_\_\_ F Supp 2d \_\_\_; 2011 U S Dist LEXIS 156544 (ED Mich, June 29, 2011); *Bowlers' Alley, Inc v Cincinnati Ins Co*, 108 F Supp 3d 543 (ED Mich, 2015).
  - 16 *Id.*
  - 17 *Allen v Mich Basic Prop Ins Co*, 249 Mich App 66, 73; 640 NW2d 903 (2001) (Emphasis added).
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