CURIE

Employee vs. Independent Contractor

by Jim Casey

What's inside

There is a growing trend in today's workplace of hiring contractors rather than employees to perform necessary services. This trend is a result of a number of factors, including greater flexibility, reduced overall costs, and often a greater specialization that contractors bring to a project. The distinction between the two is somewhat difficult to determine but can have wide reaching implications.

An employee has certain rights on termination that generally are not available to contractors. Additionally, an employer is under statutory obligations regarding withholdings and remissions for income tax, workers' compensation and employment insurance. As well, employees have certain entitlements under the employment standards legislation, such as overtime pay, minimum wage and paid vacation, which are not available to contractors.

Problems arise when independent contractors are providing services, but here are some aspects of the relationship that suggest or resemble a traditional employer/employee relationship.

The courts have used various tests to determine whether one is an employee or an independent contractor. The tests examine all aspects of the relationship with an emphasis on determining if the 'employee' is carrying on his or her activities on his or her own behalf and not merely for a supervisor.

The "integration test" or the "economic dependency test", for example, looks at the integration of the worker into the employer's business and asks: "is that worker economically dependent on the company?" or "are the worker's activities an essential component of the business?" If the answer to either is "yes", then the worker will likely be considered a 'dependent contractor' or an employee.

No one aspect of the relationship is determinative. For example, there could be one or more characteristics under the employee category and the individual could still be found to be an independent contractor or vice versa. Each case will depend on its individual facts.

It is generally, advisable that a contract be entered into in order to help distinguish independent contractors from regular employees.■

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The Adjustment Process

by Stewart Roberts

PROPERTY CLAIMS

Property claims or losses are, in insurance parlance, "first party" claims as Property Insurance is a two-party contract between an Insurer and an Insured. The latter, in making a claim against the policy is simply invoking the Insuring Agreement, whereby the Insurer makes specific promises to indemnify the Insured against loss to described property by described perils. The response of the Insurer to notice of a claim is routinely to assign an adjuster. An "independent" adjuster whose services are hired by the Insurer. CURIE uses only "independent" adjusters. The basic task of the adjuster is to act as an agent of the Insurer, charged with the responsibility of assessing the loss in terms of its value and policy coverage. In practice, however, the Property Adjuster does much more and should be seen as a source of valuable assistance to the Insured institution.

Adjuster assistance can be especially helpful to the Insured in that the Adjuster is familiar with construction companies who understand fire restoration work and other specialist contractors whose services may be required for cleanup operations, etc. In short, all of those services necessary to getting back in business with a minimum of disruption. The most useful attribute the Adjuster brings to the scene is experience. What can be a stressful, once in a lifetime experience for the employees of the Insured charged with dealing with the matter, is the "stock-in-trade" and working environment of the Adjuster. Remember also, that while the Adjuster is the agent of the Insurer, the relationship with the Insured should be characterized as constructive and co-operative. In the Selection and assignment of Adjusters, CURIE endeavors to ensure that it is represented by well-trained, competent people who will meet expected standards.

The above is no more than a "broad brush" picture of what is to be expected when a loss occurs and the Insurer responds to its contractual obligation under the policy. However, as mentioned earlier, Property Insurance is a two-party contract which imposes obligations on both parties. Many of these obligations are detailed in Section VIII, Policy Conditions, and especially, the Statutory Conditions ("statutory" because they are embodied in the Provincial Insurance Acts and are uniform in all provinces, with the exception of Quebec). Sections 6, 9, 10 and 11 set out what is required by the Insured. Rather than recite these conditions verbatim, this commentary will simply highlight and explain the more important sections.

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Condition 6 "Requirements After Loss":
Essential here is the requirement that the Insured give notice of loss to the Insurer "forthwith". That this be done in writing should not preclude a telephone call as first and immediate notice. The Adjuster can be expected to assist the Insured with compliance of the remaining requirements under this section.

Condition 9 "Salvage":
This condition requires the Insured to "take all reasonable steps to prevent further damage" and to protect the insured property, including if necessary, its removal. Subsection (2) provides that "the Insurer shall contribute pro rata towards any reasonable and proper expenses in connection with steps taken by the Insured….according to the

respective interests of the parties". This condition should be read in conjunction with Condition 9. *Don't wait for the Adjuster to arrive on the scene before starting to act on these requirements.*

Condition 10, "Entry, Control, Abandonment":
This condition is especially important in that it gives the Insurer "immediate right of access and entry" to the property. Also linked with Statutory Condition 10 is Policy Condition 8.11, "Subrogation", which expands upon the statutory right of subrogation provided by Provincial Insurance Acts. Subrogation can be of particular interest to CURIE Subscribers with large deductibles. Provided that the insured loss exceeds the deductible, the Insurer is empowered to conduct the recovery proceedings against the party at fault for the complete loss (including any uninsured portions).

In addition to the investigation process necessary to determining whether a third-party is responsible for the loss and that a right of recovery exists, another situation may require the Property Adjuster to become involved with more than a "first-party" contractual function. This arises when a loss occurs to property "for which the Insured has assumed responsibility" **(4.2)** The operative words "assumed responsibility" may mean that the Property Adjuster will have to investigate the circumstances in the context of a bailee's exposure. In given circumstances, the policy may operate like a liability contract and defend the insured against a claim brought by the owner of such property.

A typical, and most common example, is the case in which notice to the Insurer has been delayed. Delay can result in a bodily injury claim being more costly to settle for a variety of reasons (or a combination of all of them).

BUSINESS INTERRUPTION
While the Adjuster is familiar with Business Interruption Insurance and may be of assistance to the Insured in formulating the claim, the responsibility for calculating and substantiating the claim remains that of the Insured. However, assistance is available in that Condition 8.3, "Professional Fees", provides coverage for the cost of accountant's fees. Your Adjuster and/or CURIE Claims Manager will be pleased to give you the names of accountants with experience in this specialized field.

LIABILITY CLAIMS
The characteristics of liability claims have little in common with property claims, which (excepting relatively infrequent coverage issues) are not subject to significant variables. The property loss adjustment process is little more than a form of audit to determine the amount of the Insurer's obligation to the Insured. However, the third-party factor amounts to a "wild card". To CURIE subscribers, most third-party claims represent bodily injuries. Claimants come from all walks and stations of life and their injuries may range from bruises to mortal. The liability of the Insured towards the third-party can range from zero to one hundred percent. The random quality of these variables is beyond the control of risk management or claims administration. The ultimate cost of individual claims is however, subject to yet another variable – the quality of risk management and claims adjustment skills applied in response to them. A typical, and most common example, is the case in which notice to the Insurer has been delayed. Delay can result in a bodily injury claim being more costly to settle for a variety of reasons (or a combination of all of them). Victims of accidents, often aggrieved, in addition to being injured, are unlikely to feel well disposed towards the party perceived as responsible for the accident, when that party seemingly ignores their misfortune. This scenario alone, probably accounts for far more claimants retaining lawyers than those who see the prospect of litigation as a winning lottery ticket. Since the duty of the lawyer is to seek the maximum possible damages for his or her client, the die is then cast for a total claims cost which may be a multiple of the figure which prompt reporting and intelligent claims handling would have achieved.

ERRORS AND OMISSIONS
E&O claims tend to manifest themselves in the form of a legal demand or litigation and involve substantial or complex matters. In most cases, the matter is referred directly to counsel for the appropriate response.

Because of the potential complexity of E&O claims and the coverage issues which they may pose, it is doubly important that they are reported promptly to CURIE. Equally important in this context are the references in Condition 8.4 (a) and (b) to "Other Notice of Claim First Received" (see Definition 6.6). This expands significantly on the duty to notify CURIE by including the awareness of the Insured of "any circumstances which could reasonably be expected to give rise to a claim…..".

DUTIES OF THE INSURED LIABILITY
Liability insurance policies are not subject to provincially legislated Statutory Conditions, but the conditions which form part of the CURIE contracts, carry equal weight in the duties they impose upon the Insured Subscriber, when an - "occurrence……happens which may give rise to a claim". The most important policy conditions touching on claims are as follows:

Condition V – Deductible:
Sometimes overlook, the second paragraph of this condition sets out "CURIE's right to investigate, negotiate……,irrespective of the application of any deductible amount." In other words, the Insured Subscriber is required to report claims which may be seen as falling below the deductible threshold. However, the condition does not preclude CURIE authorizing the Insured Subscriber to settle a claim on its own behalf, within the deductible.

Condition VIII – (8.4) – Notice of Accident, Occurrence, Error, Omission or Malpractice Claim or Suit: The operative language here is contained in sub-section (a), which requires that notice of an occurrence, etc., which may give rise to a claim shall be given to CURIE – "as soon as practicable, after….knowledge thereof gained by the insurance official of the Named Insured", plus sub-section (b) which requires that all written claims or suits, etc., be forwarded immediately to CURIE.

Condition 8.5 - Investigation and Settlement of Claims: This condition gives CURIE the right to deal with claims as it deems expedient.

Condition 8.6 – Assistance and Co-operation of the Insured: This condition sets out the obligation of the institution to provide for the attendance of witnesses, etc. and to attend hearings and trials. It should be read in conjunction with Condition II – Additional Insuring Agreement 2.5 – Expenses Incurred at Reciprocal's Request, which provides for the Insured to be reimbursed – "for all reasonable expenses incurred at CURIE's request, including actual loss of earnings".

THE LIABILITY ADJUSTMENT PROCESS
CURIE's response to notice of an occurrence involving bodily injury or property damage will normally be to assign an Adjuster to work with the Insured Subscriber. As in the case of property losses, the first issue is that of coverage. In the absence of problems, the adjustment process should proceed with the basic objective of bringing the matter to a conclusion, which is economical from the standpoint of the Insurer, and equitable in the context of applicable law.

Additional Insuring Agreement 2.1 – Defence – Settlement, is invariably responded to first, with priority being given to making personal contact with the accident victim. Several objectives dictate the priority. These include obtaining the victim's account of the occurrence (wherever possible, in the form of a signed statement); securing a signed

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authorization for medical reports to be supplied to the Adjuster' and providing the victim with tangible evidence that the circumstances of the occurrence and their personal situation of the claimant is receiving "hands-on" attention. From then on, the Adjuster's investigation will be directed to assessing the liability situation, securing the necessary evidence, including the signed statement of witnesses, plus an initial valuation of the injury in the context of contemporary court awards.

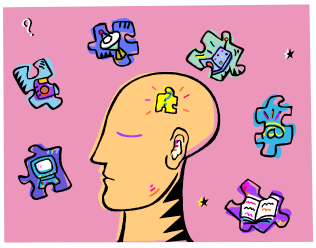
Where no liability appears to exist, the combination of an intelligently based denial, backed by supporting evidence, is often sufficient to enable the Adjusters to close the file. Occasionally, as a precautionary measure against the possibility of a change of heart by the claimant, CURIE may elect to take a release for some nominal figure. More commonly, the heavy onus imposed by such statutes as Occupier's Liability Acts, together with a legal system which tends to favour plaintiffs, means that liability is frequently difficult to discharge completely. However, in most cases, liability is not clear cut; some degree of contributory negligence by the claimant may exist. This factor usually enables the Adjuster to negotiate a mutually agreeable settlement which also, realistically represents an economical solution for CURIE. Many claims are settled in this fashion without the claimant feeling it necessary to seek legal representation. In those cases where the claimant is represented by a lawyer, most are resolved without the necessity of CURIE retaining counsel. This is because the enormous cost (to both sides) of going to trial, and the unpredictability of the result, means that an out of court compromise is usually the more attractive solution.

Where no liability appears to exist, the combination of an intelligently based denial, backed by supporting evidence, is often sufficient to enable the Adjusters to close the file.

In cases of a serious or complex claim, CURIE may elect to retain counsel, immediately. This is a "judgement call" and may be prompted by the sense that litigation is inevitable and it will be benefit of counsel's involvement in the investigation process from the outset. Another important reason to retain defence counsel immediately, is to acquire "privilege" with respect to documentation, such as statements etc., created from that time onwards. Under the rules of court procedure operating in most provinces, the adversarial parties are required to produce all documents relating to the occurrence. Generally speaking, however, documents prepared after the retention of counsel and which can be identified as being produced at the request of counsel, are considered "privileged" and not exposed to the scrutiny of opposing counsel. This is another reason for the importance of prompt reporting of occurrences – especially those involving serious bodily injury or death.

In all cases, whether the claim involves Property or Liability Insurance, the CURIE Subscriber should not feel isolated from CURIE. Should any questions, whatever, arise, please call Stewart Roberts, Claims Manager.■

Brain Teaser:



Here is a math formulation which amazes me that it works. TRY IT!!

- Take your house number and double it
- Add 5
- Multiply by ½ of 100
- Add your age
- Add the number of days in a year
- Subtract 615
- The last number will be a combination of your address and your age. **AMAZING**, isn't it!!

Claims, those dreaded claims!!

While many of you reading this newsletter have a wealth of insurance background, I am sure that there are also quite a few who are relatively new to the field and therefore, lack a clear understanding of the claims process. I would like to use this opportunity to familiarize you with what happens to a liability claim from the time it is reported until the time it is eventually resolved.

Thanks to your efficiency, I usually receive notice of a claim within a day or two of its occurrence. Depending upon the nature and severity of the matter, an adjuster will be appointed to investigate the loss and report back to me with his or her findings. As the information is gathered, reserves are set up to reflect the severity and potential liability of the claim. Simply put, reserves are monies put aside by an insurer (or reciprocal) to pay for its potential liabilities.

If, after gathering all the information, liability seems likely against the University, negotiations towards settlement will take place. In the event that negotiations are unsuccessful, the legal process will now begin.

I would like to point out CURIE's philosophy on claims settlement. While it is normal practice for traditional insurers to make settlements of frivolous or "nuisance" lawsuits, it is our mandate to resist such claims. In matters where there is clearly no liability against the University (or its employees) CURIE will refuse to enter into negotiations and will provide a complete defense. We do not want to be seen as an easy target or as someone who will shy away from lawsuits simply due to public pressure or the high cost of defense.

A lawsuit is typically begun by a plaintiff's lawyer issuing a Statement of Claim (in some provinces this may be preceded by a Writ). This document will state the names of all those bringing the action (the plaintiffs) and all of those that are being sued (the defendants). It is typical for lawyers to use a "shotgun" approach in naming defendants. They will name anybody even remotely involved, hoping to attach liability to at least one of the parties. Generally speaking the claim sets forth the amount of damages that the plaintiff is requesting and the material facts relied upon by the plaintiff to substantiate the claim. The amounts that are usually claimed for in a Statement of Claim rarely represent the actual value of a plaintiff's claim and are most always grossly inflated.

When a Statement of Claim is served, there is a designated time limit (20 days in most provinces) in which a response known as a Statement of Defense, must be filed. It is for this reason that it is imperative for you to advise me within 24 hours of the receipt of such a document so that I may either appoint defense counsel or contact the plaintiff's lawyer to arrange for an extension of time in which to have our defense entered.

In response to the Statement of Claim, the Statement of Defense will refute all allegations of negligence and will contain our version of the material facts which support our defense of the claim.

This article was written for CURIE in 1989 by C.M. Hendler, Claims Manager

Once these documents have been exchanged, the lawyers will arrange for Examinations for Discovery to take place. In the procedure both sides have an opportunity to examine each other under oath. Testimony given at Discoveries may be entered as evidence at trial.

Now that both sides have seen the strengths and weaknesses of the other side, negotiations resume in a more serious tone. If the two sides still cannot agree, the next stage is often the Pre-Trial Conference.

At a Pre-Trial, both lawyers present a legal brief to a judge. The judge will then sit down with the two lawyers and advise them of his or her assessment. The judge's assessment is not binding but it does serve to heavily influence the "warring factions".■

Don't Underestimate Winter

An unprepared and/or unprotected facility will quickly fall victim to low temperatures, snow and freezing rain. Cold weather losses can be prevented or minimized by a proper maintenance plan in conjunction with an emergency plan. Your plans should address known or expected trouble areas. Listed below are just a few commonly identified problem areas that should be addressed by building maintenance personnel as part of an on-going loss prevention:

Buildings

- Every year snow and ice accumulations lead to the collapse of building roofs which lead to extensive damage. Snow watches can be organized to monitor depths so that removal of unsafe accumulations can be performed.
- Drains and eaves should be checked for clearance to prevent ponding when thawing takes place during warm spells or when spring arrives.
- Proper maintenance of building structures can lead to a prevention of heat loss through doors, windows, vents and insulation.
- Internal temperatures of buildings should be maintained at acceptable levels to protect contents from exposure to extreme coldness.

Equipment

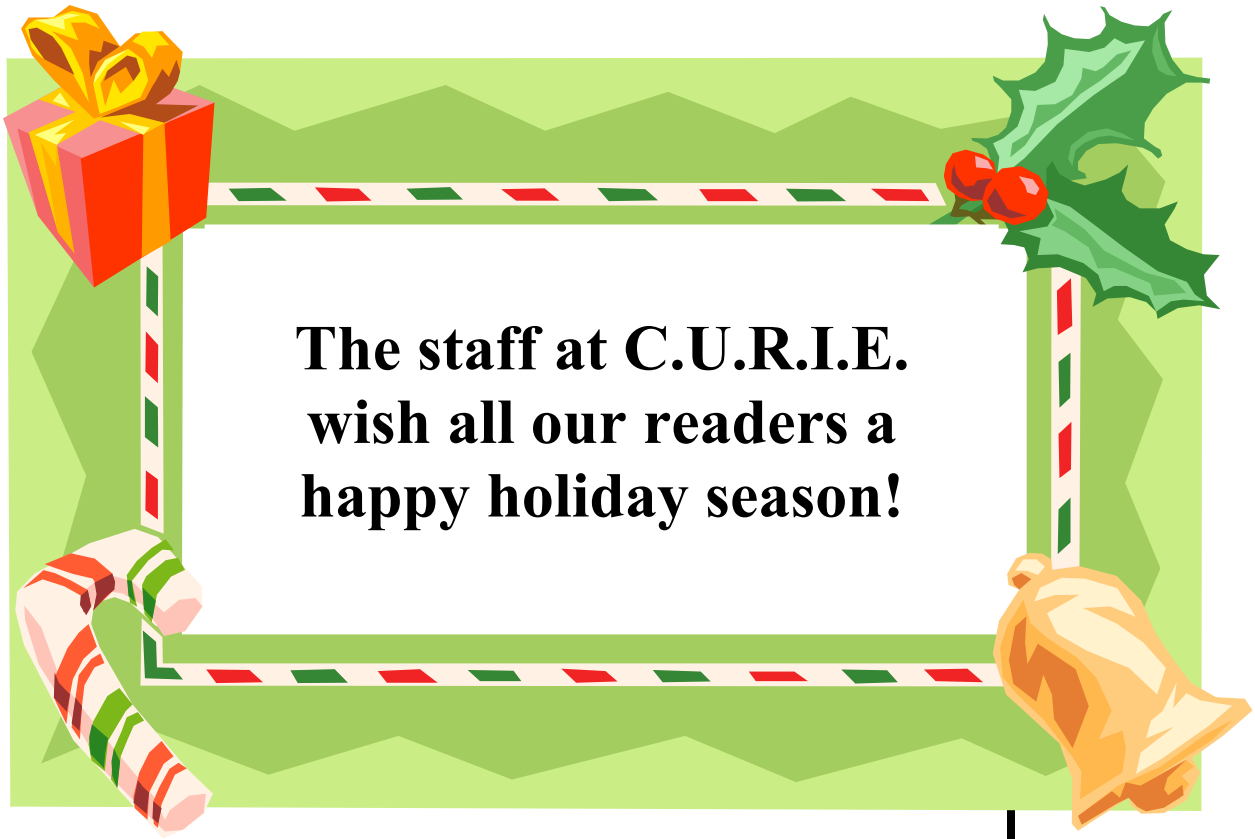
- Be sure that heating equipment has been satisfactorily serviced and is capable of maintaining a minimum of 45 degrees F internal temperature.
- Be sure fire protection equipment and systems have been prepared for winter and establish emergency procedures for frozen piping.

External

- Ensure that clear access to buildings for emergency crews are always maintained.
- Identify the location of fire hydrants and ensure that they remain accessible at all times.

Remember, you pay now or you pay later.■

This article was written for CURIE in 1990 by Pat Cruickshank.



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