

In the media — April 24, 2000

Insurance Companies Should Not Compromise Impartiality of Judicial Process to Save Money

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Los Angeles Daily Journal

Our civil justice system has come under attack on many fronts--from the usurpation of our right to a trial by jury by banks, insurance companies and HMOs that foist mandatory arbitration upon us to the corporate financing of judges' campaigns that stack the courts against the average citizen seeking redress.

Insurance companies and their lobbyists have been at the forefront of this attack--spending millions to weaken consumer protection laws and persuade the public that lawsuits brought by greedy lawyers need to be scaled back. The insurance lobby has continually misled and often successfully convinced the public and policy makers that if insurers are able to cut back on their litigation costs, any resultant savings will be passed on to consumers in the form of lower insurance premiums. Their arguments seem persuasive in some respects . . . until you find yourself on the wrong side of a dispute such as when you or your loved one is denied necessary health care treatment by an HMO that stonewalls discovery in the arbitration process or you are injured in an auto accident and the at-fault insurance company unfairly denies or low-balls your legitimate claim.

Despite what insurers promise lawmakers and the public, studies have shown that state laws restricting the ability of consumers to seek redress in the courts have not lowered insurance rates in those states any more than rates have been lowered in states that have not passed such limits on recovery. Indeed, insurance companies have instead spent hundreds of millions in premium dollars to lobby against consumer protection laws so they can charge more and pay out less on legitimate claims. The \$50 million insurance industry-backed campaign to overturn, through Propositions 30 and 31, California laws that would have allowed consumers to sue an at-fault driver's insurance company that denied, delayed or low-balled their claims is but the latest blatant example of spending premium dollars to mislead the public.

In addition to attacking important consumer protection laws in the name of saving money, insurance companies are increasingly implementing broad "litigation cost-control" programs internally. In reality, however, it is doubtful, once again, that policyholders ever will see any of the "savings" from these programs passed on to them. More likely, these so-called, cost-cutting efforts serve only one purpose--to boost insurers' bottom line. Further, many of the cost-control methods being implemented by insurance companies are compromising the ethical obligations of both the attorneys who defend policyholders and the court reporters who report depositions while, at the same time, seriously disadvantaging consumer plaintiffs.

As more and more legal decisions are being wrested from their control by insurance companies seeking to keep costs down by directing how cases are litigated, insurance defense attorneys are increasingly finding that their independent judgment and skill as professionals is slipping away, just as occurred with doctors in HMOs. The President of the Michigan Defense Trial Counsel (MDTC) captured the current state of affairs from the perspective of the defense bar as follows:

A core objective of our ethical rules is to protect the lawyer's capacity to exercise independent judgment in the best interests of his client. The potentially conflictual triangular relationship between the doctor, the patient, and the patient's insurer may at times be present in the relationship between the lawyer, the client, and the client's insurer. Once realized, a conflict of interest is an insurmountable professional obstacle precisely because it inevitably affects the exercise of the independent judgment that defines us as professionals. ' It seems that with the increasing domination of the managed services model in the medical field, lawyers need to be especially vigilant and jealous of their professional autonomy. This is why it is essential that members of both sides of the Bar become involved in the political process that will inevitably affect our professional identity as well as our livelihood.

Insurers' attempts to lower litigation costs has also negatively impacted the independence and ethical duty of impartiality required of court reporters who take down deposition testimony. Increasingly, insurers are entering into exclusive, preferential agreements with court reporting agencies that provide insurance counsel with special services not offered to opposing parties in exchange for repeat business. Such services include the expedited delivery of deposition transcripts at reduced or no charge, exclusive searchable witness databases, and free rough draft transcripts, to name a few.

At the same time that insurance companies are lamenting their rising litigation costs, they are spending millions to lobby against laws aimed at preserving the impartiality and fairness of our courts. For example:

- Farmers Insurance Group opposed and helped to stall California legislation (AB1158) and a code of professional conduct proposed by the Court Reporters Board of California that would have simply required the disclosure to opposing counsel of the preferential, exclusive agreements between court reporters and insurers.
- The Insurance Federation of Pennsylvania opposed legislation backed by the Pennsylvania State Bar that would require the equal provision of deposition services, such as simultaneous delivery of transcripts to all parties.
- The "Coalition for Litigation Cost Containment," consisting of American Insurance, Amica Mutual, Beacon Mutual and Metropolitan Life opposed a Rhode Island bill that would prohibit court reporters from entering into long-term, exclusive deals with interested parties. The "Coalition's" position statement provided to legislators clearly misconstrued relevant case law and misrepresented the position of the National Court Reporters Association as favoring such deals, when in fact, that professional organization is working at the state and federal level to ban these insurer practices.

- "The Wisconsin Insurance Alliance" led by American Family opposed a Wisconsin bill that aimed to ban preferential deals between insurers or other interested parties and court reporters, erroneously claiming that the bill "is anti-consumer and will raise the cost of litigation to all parties."

Just as we would not tolerate insurers striking secret, one-sided deals with judges (although industry-employed arbitrators are a step in that direction), we should likewise not tolerate such preferential agreements with those responsible for producing the official record in judicial proceedings in exchange for a false promise of lowered insurance rates. Essentially, we are moving towards a privatized system of justice in which insurers and other corporate interests are able to control the rules and the outcome of litigation. These profit-driven abuses of our civil justice system must be stopped if we are to preserve any semblance of fairness in our courts.

To this end, insurance defense attorneys should follow the example of Montana lawyers who have petitioned their Supreme Court to challenge insurers' litigation cost-control programs as a violation of counsel's ethical duties to the insured. Likewise, California legislators should side with consumers and the public interest in favor of strong measures that ban insurers' preferential deals with court reporters. And, mandatory, pre-dispute arbitration that prevents citizens from seeking their day in court should be banned. While Californians desperately need affordable insurance, we should not be fooled by so-called efforts to cut litigation costs when the savings never get passed on to us. We cannot afford to lose the one avenue where we should expect to be on equal footing with the all-powerful insurance company--the fairness and impartiality of our courts is worth preserving.