

May 9, 2016

Jim Tompkins
Senior Policy Analyst
Washington Office of the Insurance Commissioner
PO Box 40258
Olympia, WA 98504-0258

Via email to OIC Rules Coordinator

RE: CR-102, Matter No. R-2015-06: Notice to Claimants in Third Party Settlements

Dear Mr. Tompkins:

We are writing on behalf of the members of the Property Casualty Insurers Association of America (PCI), the National Association of Mutual Insurance Companies (NAMIC) and the American Insurance Association (AIA) in response to the proposed rule referenced above which would require an insurer to notify a third party claimant when a claim (at or above a to-be-determined value) has been settled and paid by an insurer. Our members collectively write a majority of all P&C policies in Washington State and are concerned this proposed rule may impose an unreasonable burden on insurers who are not responsible for the (likely rare) criminal actions of claimants' attorneys.

Like other criminal acts, failing to forward claims settlement proceeds and/or diverting such proceeds to the personal use of the attorney is clearly a criminal - as well as unethical - act and responsibility for such acts must ultimately rest with the person(s) who committed the crime. The perpetrator should be responsible for full restitution, including interest, for all amounts that were wrongly diverted to the perpetrator's personal use.

Washington, like many other states, has a crime victims' compensation fund to assist victims who qualify (<http://www.lni.wa.gov/ClaimsIns/CrimeVictims/FileCoverage/EligibilityRequirements/Default.asp>) and a victim of a felony or gross misdemeanor appears to be eligible to apply. Additionally, Washington lawyers are obligated to maintain Interest on Lawyers Trust Accounts (IOLTA) accounts. The interest on these accounts is to be available for various charitable purposes. Perhaps these funds could be repurposed to assist victims who have been defrauded by their own lawyers?

It is our understanding that the language under consideration in the proposed rule comes from model language developed by the American Bar Association (ABA) and that at least one high-profile case successfully investigated by the Insurance Commissioner and prosecuted by the state has led to this rule proposal. We would like to offer the following specific concerns about the language of the ABA model:

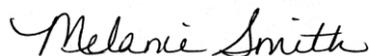
- It is important to recognize that insurers working through a claim from a third party claimant owes a contractual responsibility specifically and exclusively to its own insured. In fact, precedential case law at the state Supreme Court level suggests that an insurance adjuster – an insurance company employee who may prepare legal documents and give advice affecting legal rights to claimants – should be held to the same standard of care required of practicing attorneys.
- It would not be permissible for an insurer's attorney to contact a claimant directly where the claimant is represented by counsel. *Jones v. Allstate* could be interpreted to mean that insurance company employees are similarly restricted. And, on a pragmatic level, how would the insurer know where to send a required settlement notice or be assured they have been provided accurate contact information? Injured parties sue the policyholder of an insurer, not the insurer itself. How would an insurer be able to find or confirm a current address for the party that is suing its policyholder? Would additional verification of notice having been provided be required of the insurer to ensure compliance with the notice provisions (representing yet an additional administrative burden on the insurer)?
- There may be circumstances where binding contractual language or existing case law could prevent contact between an insurer and a third party claimant. We are concerned that other provisions not contemplated in the ABA model to monitor compliance will make this proposed new notice requirement even more onerous and add costs which are ultimately borne by consumers.

Given these concerns, our first recommendation is that the CR-102 in this matter be withdrawn and no new rules be promulgated in this area. As an alternative, we respectfully suggest the OIC work with stakeholders including insurers, the state Attorney General, the courts and the legislature to amend statutes and/or regulations to ensure that violations of the relationship between attorneys and clients are dealt with harshly, and that victims of such criminal acts are fully compensated for their losses. Should the OIC move forward with language substantially similar to the ABA model, we suggest the following changes:

- Language should be added to clarify that the requirements in the first section apply only unless contact with a third party claimant is prohibited or limited under the terms of the applicable insurance policy or by law. Our members would oppose any additional reporting, “proof of disclosure” or other record-keeping requirements added in connection with the adoption of the ABA model as well.
- The dollar threshold for claims falling under these proposed requirements should be set reasonably high – for example, at or above \$250,000 – to avoid excessive imposition of new notice requirements by insurers.
- Language should be added to clarify that nothing in these rules is intended to create a new cause of action that might be brought against an insurer regarding any notice to third party claimants that might be required by these rules. Compliance with these rules should be regulated exclusively by the Office of the Insurance Commissioner, and no private right of action should be created.
- Language should be added to clarify that the Office of the Insurance Commissioner will not take enforcement action against an insurer where the insurer has made reasonable, but unsuccessful, efforts to identify and contact a third party claimant for the purposes of providing the required notice of settlement.
- Any rule requiring insurers to provide additional notice to third party claimants should have a delayed effective date (a minimum of six months is recommended) in order to provide insurers time to prepare notices and establish internal compliance mechanisms.

Thank you for the opportunity to provide comments on this matter. Please contact us if we can provide additional information.

Respectfully,



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