

...news, views and reviews from the Center for Justice & Democracy

CENTER FOR JUSTICE
& DEMOCRACY
NEWS

IN THIS ISSUE: FOCUS ON AUTO INSURANCE

Dear Friend,

The present attack on the civil justice is more serious than it has been in the last 17 years. For the third time in 30 years, the insurance industry is responding to a severe drop in investment income and years of pricing errors by seeking to enrich its already huge profits at the expense of innocent victims.

At the Center for Justice & Democracy, we are working around the clock to help respond to this new insurance crisis. We are being asked to testify before state legislative committees and to brief congressional staff. We are putting out press releases and new studies, sometimes several in a week. And we are bringing on additional staff to start organizing the many coalition groups that must be brought on board this effort, so that we can show lawmakers, the media and the public that attacks on people's fundamental legal rights would have a devastating impact on our nation.

We are dedicated to preserving the civil justice system, and with your help, we can continue to move forward. If you have not already joined CJ&D or shown your support, we encourage you to please help now! Please see membership information on Page 4 of this newsletter. Thanks so much.

Sincerely,

Joanne Doroshow
Executive Director

The Collision Between Consumers and Insurance Companies

Auto insurance is a product like no other. Though mandatory for most Americans who want to drive, it is too expensive for most and entirely unaffordable for many. Because of scant oversight of insurance industry activities, auto insurers can, in an effort to raise profits, impose rate hikes that are so astronomical that they threaten the ability of drivers to obtain coverage.

What is happening in the auto insurance market is not unlike the premium "crisis" that many insurance lines are starting to experience. And

the culprit is not lawsuits or lawyers, but lost investment income and pricing errors by the insurance industry itself. As explained in an April 24, 2002 *Wall Street Journal* article, several factors are behind today's auto insurance rate hikes. "High among them," explained the paper, "The nation's largest auto insurer, State Farm Mutual Automobile Insurance, had been keeping its rates artificially low to gain market share – and many competitors had to follow suit. But after losing billions of dollars last year, State Farm is scrambling to raise premiums.

They're up as much as 7% in California, 9% in Texas and 10% in Florida."

No-Fault Trends

In the 1970s, 19 states enacted some form of auto "no-fault" insurance laws that not only limit benefits but also restrict injured consumers' access to the courts. Currently about one-third of the states have no-fault systems that contain "thresholds," measured either by the seriousness of injury, or death, or a specific monetary amount of medical expenses incurred. If injuries rise above the threshold level,

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California's Foundation for Taxpayer and Consumer Rights – Helping the Poor and Uninsured in America's Most Populous State

By Doug Heller, FTCR's
Senior Consumer Advocate

In the spring of 2000, scandal rocked California's insurance commissioner. It was a winding tale of a politician, Chuck Quackenbush, who would not punish insurance companies that had defrauded policyholders but instead allowed insurers to set up non-profit foundations that were then used to serve Quackenbush's political career. Quackenbush, who received over \$8 million in donations from insurance industry sources during his campaigns and six-year tenure as the state's insurance regulator, resigned

in disgrace in June 2000 and has been living in Hawaii with a state investigation into his conduct still open.

In November 2002, California voters will finally have the opportunity to elect a new commissioner to be the third elected insurance regulator since voters threw out the appointed commissioner system as part of the 1988 ballot initiative, Prop. 103. During the March 2002 primary, a former commissioner, John Garamendi, beat out the Chair of the State Assembly's Insurance Committee, Tom

Calderon, who, unlike all other candidates, had accepted more than \$1.5 million in insurance industry contributions. Calderon's substantial defeat (he placed third among Democrats, although he had the most money for the race) is widely considered attributable to the public's awareness that he had accepted insurance money. California lawmakers are now considering a statutory ban on insurance industry contributions to candidates for insurance commissioner.

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In Pursuit of Justice ...

“Out of necessity, I have developed an expertise in automobile insurance,” says Kathleen O'Donnell of the Marcotte Law Firm in Lowell, Massachusetts. Kathleen, along with Janice Kim, former President of the Consumer Lawyers of Hawaii and head of her own law office in Hawaii, are two of the most prominent, nationally-recognized experts in auto cases that we know. We are proud to count them both among the many supporters of the Center for Justice & Democracy.

We first heard Janice speak on soft tissue injuries at a presentation in Iowa, where her compelling pres-

entation captivated the room. Kathleen, the first woman elected to the Massachusetts Chapter American Board of Trial Advocates, was one of three Association of Trial Lawyers of America members to join Janice in Hawaii in January, 1996 to help fight that state's no-fault automobile insurance proposal. In 1997, Kathleen was the sole ATLA representative sent to Hawaii in 1997 for the same purpose.

Both Janice and Kathleen have been a tremendous resource for CJ&D on auto issues. They have also been extremely generous with their complements. Janice recently told us, “The Center for

Justice & Democracy does wonderful work combating the smoke and mirrors used by big businesses who would severely restrict consumers' rights to seek redress in the courts. They deserve our utmost support.” Her views were echoed by those of Kathleen, who said, “The Center for Justice and Democracy has taken over where Nader's Raiders left off. Its research on behalf of consumers and in defense of the civil justice system is outstanding. If lawyers have to choose one organization to support, it should be CJ&D.”

We so admire Janice Kim and Kathleen O'Donnell – and we're lucky to have their support.

Helping the Poor and Uninsured in California continued...

It is in this volatile atmosphere that the next insurance commissioner faces a series of battles that have already begun. Atop the list will be the issue of rate increases in both personal and commercial lines of insurance. But another crucial challenge facing the commissioner will be the implementation of the state's innovative, but lagging, “lifeline” auto insurance program for impoverished motorists. The pilot program allows low-income drivers with good driving records to buy a low-cost (\$450/year, which is low-cost in Los Angeles), basic liability insurance policy from private insurers. In its first year and a half, 2,400 people have purchased the policy with minimal public information available.

Our organization, the Foundation for Taxpayer and Consumer Rights (FTCR), is currently working with the California state legislature to expand the program's reach and lower the policy's cost.

Of course, we have run into insurance industry opposition to our efforts, just as we had between 1997 and 1999 when we pushed for the program initially. The insurers have always preferred to avoid selling any insurance product to the hundreds of thousands of low-income, uninsured drivers in the state. We have pressed for the program because state law imposes draconian fines for driving without insurance, while doing nothing to make sure affordable policies are available. The industry's response to the “lifeline” program has been to call for a no-fault, first party system for the poor. Californians, however, have consistently rejected no-fault at the ballot box and in the state legislature.

The battle to protect the poor and assist the uninsured has other fronts in California. We are fighting the growing use of credit history (which is often a surrogate for poverty) in rating and underwriting

customers. The insurance industry is also attempting to circumvent a voter-enacted law that bars insurers from surcharging customers simply because they had no prior insurance coverage. Using the oxymoronic phrase, “initial persistency,” insurers seek the right to offer a discount to drivers that have carried insurance with another company for the previous one to three years, meaning that drivers without such previous insurance would have to pay a higher premium. It is nothing less than the “haves” getting premium reductions on the backs of the “have-nots.”

The fight between consumers and their insurance companies, of course, also rages on the other side of the insurance exchange – claims, where we have won some victories recently. California law now ensures that policyholders have expanded access to their claim file, have new rights when they undergo an insurer's “examination under oath,” are not forced into the

slow and expensive appraisal process after a disaster, and must now be informed of their rights under the unfair claims practices law. In addition, there is new sunshine on insurer behavior: a recent change in the law requires the insurance commissioner to place on the department's web site “market conduct examination” reports investigating a company's claim-handling procedures.

After a year in which an energy crisis dominated the news and occupied Californians' consumer concerns, the insurance industry is making a play to regain its spot atop the list of industries most in conflict with its customers. The last commissioner allowed insurers to get away with so much; we'll see if the next insurance commissioner is willing to keep this industry in line.

For more information on the Foundation for Taxpayer and Consumer Rights, visit their web site at www.consumer-watchdog.org.

The Collision Between Consumers and Insurance Companies *continued...*

injured parties may try to recover non-economic damages from reckless drivers, holding them fully accountable through the civil justice system. Thresholds are burdensome obstacles for injured parties trying to recover full compensation.

Moreover, no-fault schemes are inherently more expensive than the traditional tort system, because, under no-fault, both the innocent victim and the motorist who caused an accident are compensated with medical expenses, lost wages and certain other expenses, regardless of who is at fault. No-fault states have the highest average auto insurance premiums in the nation. The problem is not one of demographics, but rather that no-fault insurance has not, and will not, produce savings. In fact, no state has switched from "traditional law" to no-fault since 1976. In the two states that repealed no-fault laws since 1991, premiums dropped while they increased in states retaining no-fault. In Georgia, premiums went down 6% in 1992, the year after it repealed no-fault. In

Connecticut, premiums went down 7% in 1994, the year after it repealed no-fault, according to data from the National Association of Insurance Commissioners.

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Today, insurance companies are backing efforts in the states to make victims' abilities to file no-fault claims more difficult. Ostensibly to cut down fraud, New York auto insurers are supporting Regulation 68, anti-consumer rules promulgated by the state insurance department that not only require all injured New Yorkers to report auto accidents within 30 days and file medical claims within

45 days but also allow insurers to set standards for denial of excuses for missing such extremely short deadlines. This regulation has been strongly opposed not only by the state's consumer advocates and attorneys, but by New York's medical establishment as well. On April 4, 2002, a state appellate court lifted an interim stay and allowed Reg. 68 to go into effect. An appeal challenging the rules' legality has been filed and is scheduled to be heard by an appellate court this coming September.

Auto "choice" no-fault is another widely-criticized development that has been on the table in Congress and several states for a number of years. For more details, *see below*, "A Word About Auto "Choice" No-Fault."

Manuals and Software – Paying Less and Less to Victims

Auto insurance companies have also devised claims policies intended to further minimize payouts and maximize profits. Thirty-four insurers, representing 60% of the personal auto insurance market,

use a computer program called "Colossus," which is essentially a database that produces settlement recommendations based on information provided to it by the claims adjuster. It works like this: insurance adjusters type in data about the accident, injuries and damage, in addition to the age, background and medical history of the claimant, and Colossus spits out a settlement range based on similar accidents nearby whose claims have already been settled. Though purporting to evaluate claims on an objective, case-by-case basis, the system provides artificially low settlement offers that favor auto insurers paying out as little as possible. The fact that injured consumers are prevented from seeing how or on what basis calculations are made makes insurers' use of Colossus all the more troublesome.

Insurance companies use other methods for paying out less to

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A Word About Auto "Choice" No-Fault

A bill has once again been introduced in Congress to enact a no-fault proposal called auto "choice," which in fact gives consumers no choice at all. The "Auto Choice Reform Act of 2001" (H.R. 1704) would force states and motorists to decide between one of two unfair systems – a "pure" type of no-fault or a limited version of "traditional law" auto insurance coverage.

"Pure" no-fault takes away any right to go to court and eliminates

all opportunities for severely injured accident victims and their families to recover any "non-economic" damages (i.e., compensation for intangible injuries like loss of a limb, permanent disability, disfigurement or pain and suffering), no matter how serious or permanent the injury. The alternative, a limited version of "traditional tort law" coverage, forces consumers to pay somewhat higher insurance rates than those choosing no-fault while only having restricted access to the courts

and limited opportunities to hold reckless drivers accountable. The claim of "choice" is both unfair and misleading because the rights of those who "choose" traditional law coverage depend on the "choice" made by other drivers. Full access to the courts under traditional law coverage is guaranteed only if the other driver involved in an accident also has traditional law coverage. However, if the other driver has chosen no-fault, that driver cannot be sued. The traditional law policyholder must collect

from his or her insurance company, with no access to the courts.

Contrary to insurers' claims, "choice" will not result in lower premiums or additional benefits for consumers. In fact, studies show that no-fault states are consistently among the most expensive states in the nation.

In April, Colorado legislators rejected attempts to enact an auto "choice" no-fault system. Congress should do the same.

The Collision Between Consumers and Insurance Companies *continued...*

injured victims. Allstate, for example, has a history of instructing adjusters in its internal claims manual to contact injured policyholders who are not already represented by counsel, portraying themselves as legal representatives for auto accident victims in an attempt to settle cases. In January 2000, a Washington state court ruled that this claims-handling policy amounted to the “unauthorized, negligent practice of law,” a decision currently under review by the state’s supreme court. Similarly, in January 2002, a Pennsylvania appeals court found that Nationwide Mutual Insurance Co.’s claims manual revealed a company philosophy against case-by-case evaluation of claims, an approach serving as evidence that Nationwide had engaged in bad faith with a policyholder.

Some insurers have even rewarded adjusters for shrinking the amount the insurer pays for claims. According to a September 2000 study by the consumer insurance guide, insure.com, Allstate Insurance Company, Farmers Insurance Group and State Farm Mutual Auto “currently have in place or have in the past had in place companywide practices that reward their claims adjusters for reducing expenses and cutting costs, including strategies for cutting the amount the insurer pays for claims.” In sum, it is insurers’ deliberate claims-reduction tactics, not injured victims and their attorneys, which force auto accident victims to file lawsuits for just compensation.

Independent Medical Exams – Corrupt, Not Independent

Before paying bills, insurance companies usually want the opinion of another doctor—their own doctor. It’s a process called “independent medical examination” or as most plaintiffs’ lawyers call it, “defense medical examination.” In fact, these exams are never independent, they are often not examinations and sometimes they are not even conducted by a “medical” professional. They are often done by companies hired specifically and solely to contain insurance company costs.

This was the finding of an extensive 2000 *Dateline NBC* two-part investigation of companies hired by State Farm to conduct medical “paper reviews” of insurance claims. This report became the basis for a multi-state investigation into the use of “paper reviews.”

In one case, a journalist was found to be writing doctors’ opinions, along with a paralegal, a former teacher and a nurse. The company provided them with a computer containing stock paragraphs of medical opinions that were put into medical reports.

Dateline also found that doctors were signing stacks of reports while barely reviewing them. Or even worse, that staff members changed doctors’ reports without the doctor’s knowledge and then forged their signature. As of the report, only four states had either banned or specifically regulated these kinds of paper reviews to ensure doctors had written them.

But while every IME process is not as corrupt as what *Dateline* found, they are all problematic. The insurance companies all choose the doctors and the location of exams. In many cases, doctors fail to perform proper procedures or testing, fail to consult or consider the opinion of treating physicians, fail to review properly a patient’s symptoms or obtain a thorough history of the patient. Negative reports always follow. For the injured victim, all of these problems combine to lead to the wrongful denial of or termination of benefits.

Real Solutions

Lawmakers should take responsible, remedial steps to reign in the power and control the abuses of the auto insurance industry. States need to enact laws and regulations so that public officials making policy decisions and legislative choices have information on payouts, losses, income and reserves to determine the true condition of the insurance industry and how victims are faring under the present system. States must also take a far more active role in controlling insurance rates. At a minimum, departments should be given more authority to approve or reject rate requests, or to advocate the rollback of insurance rates. In addition, underfunded and understaffed insurance departments must receive increased funding for investigators, auditors, actuaries and other professionals to recommend appropriate insurance rates. Moreover, states should also repeal anti-rebate and anti-group laws as well as establish a state consumer advocate, which will lead to lower auto insurance rates.

Repealing no-fault laws will also go a long way to reduce insurance rates.

On the federal level, Congress should repeal the insurance industry’s federal anti-trust exemption, thereby prohibiting auto insurers from acting in concert to raise prices and preventing tying arrangements, market allocation among competitors and monopolization. Increased competition would bring lower prices and would increase the availability of auto insurance for consumers. The federal government should also force auto insurers to disclose certain financial data to insurance buyers that it prepares for insurance sellers.

Without these state and federal reforms, consumers will continue to be victimized by the profit-driven tactics of the auto insurance industry.

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