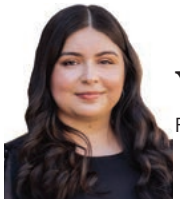

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Dealing with the dark side

SOME PERSPECTIVE FROM AN AUTO-INSURANCE ADJUSTER TURNED PLAINTIFF ATTORNEY

Shortly after I graduated college, I got my first job as an auto-insurance adjuster. After years of working for rental-car companies, non-standard auto insurance carriers, and government entities, I decided to go to law school. Now I am a plaintiff's attorney and I will be sharing with you the lessons I learned as an adjuster, which have forged my approach when dealing with auto-insurance companies.

A dark place

I must make it clear that it is not my intent to vilify insurance companies, but to give you a better understanding of the inner workings of a most formidable adversary. You have heard the joke, right? The "dark side." If I had a penny for every time I've heard that one…but it's true. Auto-insurance land is a dark place, my friend. It is a place deeply rooted in history and doctrine. There is a formula, template, or database for everything. It is a place where all plaintiffs are the same. As advocates for injured plaintiffs, the sooner we accept and understand this doctrinal approach to auto claims handling, the better our results will be.

Insurance Code protects consumers

California has more laws to protect insurance consumers than any other state in the country. The most pertinent of these laws are contained in The Insurance Code and the Code of Regulations. In tandem, these tell auto insurers what they can and cannot do. Knowingly, or unknowingly, many auto-insurance companies routinely break these rules when resolving claims. If we become familiar with the rules, we can then not only hold adjusters accountable when the rules are broken, but also move our clients' claims to speedier and more favorable resolutions.

First, did you know that "upon receiving proof of claim, every insurer . . . shall immediately, but in no event more than forty (40) calendar days, accept or deny the claim, in whole or in part"? (Cal. Code Regs. § 2695.7, subd. (b).) Further, in the likely event the insurer wholly or partially denies your client's claim, they must:

> Do so in writing and shall provide to the claimant a statement listing all bases for such rejection or denial and the factual and legal bases for each reason given for such rejection or denial which is then within the insurer's knowledge. Where an insurer's denial of a first-party claim, in whole or in part, is based on a specific statute, applicable law or policy

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> provision, condition or exclusion, the written denial shall include reference thereto and provide an explanation of the application of the statute, applicable law or provision, condition or exclusion to the claim. Every insurer that denies or rejects a third-party claim, in whole or in part, or disputes liability or damages shall do so in writing.

(Cal. Code Regs. § 2695.7, subd. (b)(1).)

Reflect on the denial letters you have received in the past (whether first-party or third-party). Chances are they have not met the standards set out above. Why is that? One likely reason is that your client's claim falls under one of the "exceptions" to the requirements set out above.

For example, pursuant to California Code of Regulations, section 2695.7, subdivision (b)(2), an insurer is not required to disclose information that could alert a claimant to the fact that the claim is being investigated as a suspected fraudulent claim. Thus, you might get a letter simply stating that, at this time, the carrier is not able to accept or deny the claim. Alternatively, it is also possible that the auto insurance company is alleging it needs more time to investigate the claim. If true, the insurer is still required to specify any additional information it requires to accept or deny the claim and must do so within the "time frame specific in subjection 2695.7 (b)," i.e., forty days.

> Thereafter, the written notice shall be provided every thirty (30) calendar days until a determination is made or notice of legal action is served. If the determination cannot be made until some future event occurs, then the insurer shall comply with this continuing notice requirement by advising the claimant of the situation and providing an estimate as to when the determination can be made.

(Cal. Code Regs. § 2695.7 (c)(1).)

The 30-day letter

In auto-insurance land, they call these notices "30-day letters." Often, they are system generated and thus do not clearly set out the information that is required to accept or deny the claim. Further, amongst adjusters there is a widespread belief that even if you are not actively working a claim towards resolution, it is OK. So long as you are sending out your "30-day letter," it's all good, right? Wrong.

So, what can *you* do stop the "30-day letter" avalanche? Pay attention. Make sure you understand what the adjuster claims to need. Do they claim they are pending the police report? Well, you should order it or pick it up yourself and provide it as soon as possible. Do not wait for the adjuster to obtain it. Are they pending photos of the cars involved in the accident? If you have them, send them immediately. If you do not have them, try to get them. Is the adjuster asking for a recorded statement from your client? Consider providing your client's written statement in lieu of a recorded statement or producing your client for a recorded statement (with you on the line, of course) and limit its scope to cover the facts of the accident only; absolutely no questions about injuries or treatment!

My point is, pay attention to the rules, pay attention to what is said (or not said) in the letters the auto insurance carrier sends, and think outside the box to provide the information necessary to get your client's claim moving.

A fair and objective investigation

Lastly, and most importantly, as to the initial claim investigation, "every insurer shall conduct and diligently pursue a thorough, fair and objective investigation and shall not persist in seeking information not reasonably required for or material to the resolution of a claim dispute." (Cal. Code Regs., § 2695.7, subd. (d).)

So, again, do not ignore the letters and do not lie down and accept the adjusters' reasoning as true. Dispute what you can when it is appropriate to do so. For example, as an adjuster I once handled a four-vehicle auto accident with multiple passengers in each vehicle. The police report was in (it placed the insured at fault), I took a recorded statement of all four drivers (all three claimant drivers placed the insured at fault), but I was taught that I could not accept liability for the accident until I took a recorded statement from all passengers involved.

Today, as a plaintiff's attorney, I would argue that the passenger statements were not reasonably required for a determination of liability, yet as an adjuster I did not receive any pushback from the attorneys involved in the claim. Sure, the passenger statements may have been pertinent to resolving any potential bodily injury claims, but I certainly had sufficient information to resolve the property damage portion of the claim. Had I received any pushback from the attorneys, I would have likely obtained authority from my manager to proceed with property damage payments.

Complain to the Department of Insurance

What else can you do when an adjuster is delaying resolution, or is making a settlement offer that is unreasonably low? (See Cal. Code Regs. § 2695.7 (g) (1-6).) File a complaint. You can file a complaint on your client's behalf on the California Department of Insurance's website where you will be asked to explain the nature of the complaint, provide complaint details, and supporting documentation. However, it is possible that your complaint will be determined to be "unjustified" and therefore the Department of Insurance ("DOI") will not take any action against the auto insurance company. But, let me tell you, there is nothing like a DOI complaint to get a claims manager/adjuster moving. I remember the first (and only) DOI complaint I received; in the end it was determined to be an unjustified complaint, but boy, did I resolve that claim at lightning speed. I wanted it off my desk as soon as possible.

The next time you receive a denial letter, a request for recorded statement, or

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an insultingly low settlement offer, I suggest you reference the California Code of Regulations and/or the California Insurance Code for guidance and recourse.

I also suggest you check the California Department of Insurance for updates on applicable law and regulations, as changes could affect your client's recovery. To illustrate, in my research for this article, I found that as of January 1, 2020 "consumers now have the right to choose a cash payment in lieu of repairing a damaged vehicle under an automobile insurance policy thanks to Assembly Bill 1538. . . [this] new law helps protect low-income drivers, allowing policyholders to collect an insurance claim even if they choose not to repair the vehicle." (California Department of Insurance (2020, January 2). *2020 brings greater protections for insurance consumers as new laws go into effect* [Press Release].)

Auto insurance companies and tort reform: A love story?

I cannot talk about auto-insurance companies without touching on tort reform. After all, for many decades it has been the auto-insurance carrier's greatest weapon, especially at trial. Disclaimer: In comparison to other areas of law (a moment of silence for our brothers and sisters practicing med-mal), personal-injury law has been relatively unscathed. Regardless, we can still see and feel the effects of tort reform. Some relevant remnants being statutes of limitations, alternative dispute resolution, and reduction of damages due to "collateral sources." However, I believe a change is coming. I believe auto-insurance carriers are in for a nasty breakup with this long-time lover.

For all intents and purposes, the tort-reform movement began in the 1970s. It was a movement led by insurance companies and large corporations, the goal of which was to attack the civil-justice system and change rules of law, not through case-by-case adjudication, but through public perceptions and legislation limiting personal injury lawsuits. Those who advocated for tort reform sought to persuade the public that the civil-justice system was corrupt and that its operations had adverse effects on the economy. They created advertisements and lobbying campaigns that supported the notion that the judicial process is biased towards plaintiffs, resulting in high liability insurance premiums. ("*Tort Reform.*" Justia, 21 May 2019, www.justia.com/injury/negligence-theory/tort-reform/.)

In other words, tort reform is about money. If at trial, the jury is "reformed" then they are not with the injured party and will believe that a large jury award will have a sort of trickle-down effect that will somehow raise their own auto insurance premium. This is how a "reformed" jurist will think, regardless of the injuries sustained by the human being in front of them.

Still, if you agree with me that tort reform is about money, then you might also agree there is a change on the horizon. After all, a discussion of tort reform and money is ultimately a discussion of present society. "In this regard, it is important to remember that society is not monolithic. People vary in their values, in how they form opinions, and in the issues they consider important." (F. Patrick Hubbard, The Nature and Impact of the "Tort Reform" Movement (2006).)

So, what is now considered important? I would say… social justice. Although the social climate of the United States of America, and California for that matter, appears divided, I believe that most of society, especially "young" people, carry with them a strong desire for social justice directed at "the man." That is because, in the media, we are constantly bombarded with the idea of "the one percent." This separation of wealth has become increasingly prominent in our lives because of the advent of social media and, as a result, many of us are left with anti-corporate sentiments.

How many times in the past year have you heard the names Jeff Bezos, Mark Zuckerberg, Bill Gates, Kylie Jenner, and Elon Musk? Consider your own reaction when bombarded with their massive wealth and consider whether jurors will feel the same.

Cue entrance and in comes "social inflation"

A round of applause please, for our new BFF. "Social inflation" refers to the alleged rising costs of insurance claims because of societal shifts, plaintiff-friendly legal decisions, and larger jury awards. Many believe that social inflation is a result of a deep anti-corporate sentiment that has been bubbling to the surface since the 2008 financial crisis. Whatever it is, whatever you call it, wherever it came from, it is here to stay. The jury will no longer automatically side with auto-insurance companies. Especially not in a post COVID-19 world where large corporations doubled their profits while people struggled (and continue to) to keep their homes and jobs.

I predict that social inflation will be accelerated by the COVID-19 pandemic. We will see more litigation, a broader definition of liability, and larger jury awards for plaintiffs injured in auto accidents. This change will undoubtedly affect the way auto-insurance carriers interact with their insureds, which brings me to my next point of discussion.

Communicating directly with an insured

Direct communication with an insured before they are represented by counsel is one of the greatest tools we have as advocates for injured plaintiffs. Let us say you have filed a claim with the auto-insurance carrier on behalf of your client. The property damage has been resolved, and your client is done with treatment. You send out a time-limit demand and the adjuster calls you with a low-ball offer.

Instead of going back and forth and negotiating against yourself with the adjuster, you send a letter to the insured. In this letter, you establish their liability, you summarize your client's injuries and provide the total special damages. Then

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you go on to discuss general damages and the pain and suffering your client has endured because of their negligence. Lastly, you implore the insured to contact their carrier. You explain that the auto insurance company has made such a low offer they have breached their duty of good faith owed to them as the policyholder, and as such the carrier is unreasonably exposing them to damages beyond the policy limits. Policy limits, which mind you, they paid for with their hard-earned money.

Compelling? I think so. Further, as discussed above, in a post-COVID-19 world, this type of communication with insureds will become even more effective. Perhaps before it might have been easy for the adjuster to convince the insured that they were not going to pay the policy limits because theirs is a case that needs to go to trial based on principal, to make a point, or to make an example of the plaintiff. However, if we do end up seeing increased litigation, it will not be in the carrier's best interest to withhold the policy. The only way they will avoid drowning in litigation is to pay and close claims. So apply some pressure now — employ this tactic right away!

What if your case is already in litigation? Well, you can still address the defendant through their counsel (see Nick Rowley's "Running with the Bulls: How to Win Top-Dollar Settlements" (Published by Trial Guides - 2018).) Despite fewer trials due to the pandemic, still send that letter. Send that e-mail. It will still be a sobering reminder of what is likely to come.

An invitation

Whether you have been practicing personal-injury law for years and have been dealing with auto-insurance carriers every day, all day, or whether you are new to the game and have limited experience dealing with auto insurance companies, I hope I have raised issues worth your consideration. In our day-to-day, it is easy to dismiss our interactions with auto-insurance companies as routine and generic. Do not do so. History, doctrine, and practice are the auto-insurance carrier's mistakes. Don't make them yours. Continue to think outside the box and forge an approach that works.

Yesenia Sanchez, who started her career as an insurance adjuster, is a litigation attorney exclusively representing consumers in personal injury matters. She is a graduate of Glendale University College of Law, Class of 2020. She is a member of the Consumer Attorney Association of Los Angeles and the Latina Lawyers Bar Association.