Claims Professionals on the Firing Line!

By Kathleen H. Klaus and Harvey R. Heller

As both defense and coverage counsel, we have worked with a host of claims professionals for many carriers and TPAs over the last 30 plus years. We liken our role as being the people at the base of a ladder, fact finding, analyzing and providing a resolution strategy to assist a claims professional in evaluating a particular claim. We receive and seek authorization for experts to assist in our defense. Often times we, like the plaintiff's bar, use an expert more than once depending on the matter at hand.

There are those in the plaintiff's bar, certainly on the GL side, who feel that insurance companies don't pay what they should and are "out to get" the plaintiff. Of course, the defense bar has often felt that plaintiff's experts are likewise "hired guns" who in addition to the suffix M.D., Esq., AIA or whatever should also be given the suffix "MAI" after their name (Made As Instructed!)

While the foregoing has been the stuff of coffee talk and finger pointing, recently the plaintiff's bar has started to get some traction across the country with a new weapon: RICO.

On September 24, 2013, Sixth Circuit Court of Appeals sitting en banc decided that injured workers cannot bring suit under RICO for the wrongful denial of workers compensation benefits. The decision reversed two panel decisions that held injured workers who were denied benefits could seek redress in federal court. *Jackson, et al v. Sedgwick Claims Management Services, et al,* 731 F.3d 556 (6th Cir. 2013). Our firm represents Sedgwick Claims Management Services in the case.

The plaintiffs' theory in *Jackson* was that the self-insured employer, the third-party claims administrator and the doctor who performed an IME conspired to deprive the plaintiffs of workers compensation benefits. The conspiracy consisted of the claims administrator sending certain injured workers to "cut off" doctors posing as independent medical experts. These doctors would issue "predetermined" opinions that the injured worker was fit to return to work. The claims

administrators allegedly ignored contrary medical evidence presented by the plaintiffs' experts and denied or terminated benefits. The plaintiffs sought treble damages under RICO, attorney's fees and a jury trial.

The *Jackson* court found that the plaintiffs had no standing to bring suit under RICO because RICO restricts standing to plaintiffs seeking damages for "injury to business or property" and the plaintiffs in *Jackson* were seeking damages based on their personal injuries. Writing for the 11 – 5 majority, Judge Julia Smith Gibbons held the plaintiffs' losses "are simply a shortcoming in the compensation they believed they were entitled to receive for a personal injury." Plaintiffs must seek redress for that injury in the administrative agency created by the Michigan legislature to adjudicate disputes over workers compensation.

The Sixth Circuit was the first federal appellate court to rule on the issue, but similar cases are pending across the country. A case was filed recently against York Risk Services Group in Arizona on behalf of injured firefighters and Walmart and Claims Management, Inc. recently paid $8 million to settle a RICO class action case brought on behalf of Walmart employees who claimed they were wrongfully denied workers compensation benefits.

These cases are far reaching and can put every claim professional at risk. The plaintiff's bar is likewise exposed because after all "what's good for the goose… !"; but the parallel is not on an equal footing due to collectability issues nor is it an answer to the onslaught that must be vigorously defended. We suggest that perhaps this new onslaught is an outgrowth of a frustration that plaintiff's bar has with tort reform across our country.

If these cases get traction, one can easily envision claims professionals and carriers being dragged into court and staying awhile due to fact questions surrounding the claim handling created by normal file handling. The nightmare of carriers or TPAs hard drives being scraped in discovery for wording that creates a potential exposure will have substantial impact on our industry.

So, we must establish newer and/or better best practices to deal with this situation before this mole hill becomes a mountain! We expect to write more on this in the future, but it's appropriate to start taking prophylactic measures now!

Read the Claims Management Article