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New CFA study says insurer profit increases due to overpricing, cost shifting

A new study by the Consumer Federation of America (CFA) concludes that the property/casualty insurance industry's dramatic increase in profits and surplus in recent years is due, in part, to overcharging customers and shifting costs to consumers and taxpayers.

The report provides extensive data demonstrating that property/casualty companies are paying out lower claims in relation to the premiums they charge consumers than they have in decades. The combined ratio, the relationship of all paid claims and expenses to the premiums that insurers collect, appears to be the lowest on record in 50 years.

"Profits and a solid insurance industry are a good thing, but unjustified profits and excessive capitalization harm consumers," CFA Director of Insurance J. Robert Hunter said. Hunter, who is the author of the study, is an actuary, former state insurance commissioner and former federal insurance administrator.

"We saw record profits in 2004 and 2005 despite significant hurricane activity," Hunter added. "Profits in 2006 rose to unprecedented heights, with pre-tax profits likely to increase to over $30 billion for property/casualty insurers, a jump from the previous record of more than $100 for every man, woman and child in America.

"Meanwhile, the amount that insurers paid in claims and expenses as a percentage of the premium collected in 2006 plummeted to a 50-year low."

Hunter said, "Unfortunately, a major reason why insurers have reported record high profits and low losses in recent years is that they have been methodically overcharging consumers, cutting back on coverage, underpaying claims and getting taxpayers to pick up some of the tab for higher risks."

The insurance industry took issue with the study's findings. A story on the Jan. 8, 2007, broadcast of NPR's "Morning Edition" reported that the industry feels it is not fair to compare payment rates from the 1980s to today's payment rates.

Robert Hartwig, president and chief economist of the Insurance Information Institute, said, "Interest rates were two times as high—and in the early 80s three times as high—as they are today. What this means is insurers could take in premium and invest it at a much higher rate than they can today." Hartwig said that insurers have to charge more to make up the difference, according to the NPR story.

Record high profits/low losses

The CFA study estimates that after-tax returns for the industry for 2006 are $60 billion. Profits for the record years of 2004, 2005 and 2006 are estimated to be $149.2 billion. The loss and loss-adjustment ratio (LAE) for 2006 is estimated to be 68.3 percent, the lowest in the 27 years studied. The years 2003 through 2006 represent four of the six lowest loss and LAE ratios in the last 27 years.

According to the CFA study, statistics indicate that insurers are less efficient in delivering benefits to Americans. "Allstate, for example, appears to be paying much less than half of the premium it collects in benefits to consumers," according to a CFA press release.

CFA notes four tactics that it says insurers have used to shift risk:

- Create sharp limits on coverage and availability. "Anti-concurrent-causes" clauses and insurers' refusal to write new policies in coastal areas are two of the examples cited.
- Sharp increases in homeowner insurance rates. Homeowners near coastal areas have faced rate increases of up to 100 percent on top of large previous increases, according to CFA.
- Programs designed to systematically underpay claims. CFA says programs like "Colossus" and "Claims Outcome Advisor" allow insurers to determine the amount of overall claims' savings they want to achieve before they assess legitimacy of claims.
- Taxpayer subsidies. Insurers and real estate interests were the major business proponents of the Terrorism Risk Insurance Act created by Congress in 2002. The CFA study estimates that to date insurance companies have received a subsidy of about $7 billion because they do not have to pay premiums for the reinsurance provided by the federal government.

Several other national consumer organizations—Americans for Insurance Reform, Center for Economic Justice, Center for Insurance Research, Center for Justice and Democracy, Consumers Union, Foundation for Taxpayer and Consumer Rights and United Policyholders—joined CFA in release of the study.

CFA recommends the following governmental changes: (1) a "dramatically" improved regulatory system to gain control of excessive rates, (2) research into the fairness of insurance rates, (3) the creation of single or multi-state funds to cover all wind risk, (4) congressional authorization for the use of interstate compacts to create multi-state wind pools.

It also recommends that consumers avoid doing business with companies that have a history of anti-consumer behavior, carefully review policies to

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ABA ethics opinion: Lawyers free to examine metadata

Lawyers who receive electronic documents are free to look for and use information hidden in metadata—information imbedded in electronically produced documents—even if an opposing lawyer provided the documents, according to an American Bar Association (ABA) ethics opinion.

The opinion is contrary to the view of some legal ethics authorities who found it ethically impermissible as a matter of honesty for lawyers to search documents they receive from other lawyers for metadata or to use what they find, the ABA Standing Committee on Ethics and Professionalism said.

But the ABA committee said the only provision in the ABA Model Rules of Professional Conduct relevant to the issue merely requires a lawyer to notify the sender when the lawyer receives what the lawyer should reasonably know were inadvertently sent documents. It does not require the recipient to return those documents unread.

The committee also made clear that it was not addressing situations in which documents are obtained through criminal, fraudulent, deceitful or otherwise improper conduct.

The ABA committee noted metadata is ubiquitous in electronic documents and includes such information as the last date and time that a document was saved and by whom, data on when it was accessed, the name of the owner of the computer that created the document, the date and time the document was created, and a record of any changes made to the document or comments written into it.

"Other types of metadata may or may not be as well known and easily understandable ... Moreover, more thorough or extraordinary investigative measures sometimes might permit the retrieval of embedded information that the provider … either did not know existed, or thought was deleted," the

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Getting legislative appropriation for road-hazard tort judgments against state

If you secured a road-hazard tort judgment against the state for a client, the only way to get that judgment paid is through legislative appropriation. This includes consent judgments.

The appropriations process involves several steps, and attorneys who have a client with one of these judgments should start working now to ensure that the Legislature considers that judgment during the 2007 Regular Session, which begins on Monday, April 30.

Plaintiff attorneys should also be aware that it is their sole responsibility to initiate the appropriations process on behalf of the client. They should not rely upon opposing counsel's offer of help with the process.

Any legislator can assist you and your client; however, Art. III Sect. 16 of the Louisiana Constitution specifies that "[a]ll bills for raising revenue or appropriating money shall originate in the House of Representatives, but the Senate may propose or concur in amendments, as in other bills." Your legislative sponsor does not have to be from your or your client's district.

The prefiling deadline for session is Friday, April 20. After that date, legislators may file only a limited number of additional bills.

Copies of the controlling judgments, including date of demand, are all that is needed to draft a bill and advance the process. However, in order for committee consideration of your client's request, these documents are also necessary:

- certified copies of all judgments material in the case, including denial of writs from the Louisiana Supreme Court,
- an original affidavit of finality from the state counsel, and
- a brief explanation of the case.

Documents should be sent to Elise Read, Appropriations Committee Analyst, House of Representatives, P.O. Box 44486, Baton Rouge, LA 70804. Phone: (225) 342-1394. Fax: (225) 342-2451.

Also give copies of the documents to your legislative sponsor.

If you have a case that casts the state for interest or costs, you should also review La. R.S. 13:5112 (Suits against the state or political subdivision; court costs; interest) and provide pertinent documents to Read and your legislative sponsor.

Read advises plaintiff attorneys with road-hazard tort judgments against the state to have their bills drafted now before legislators and House staff are heavily involved with other legislation for the session.

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Verdicts & Settlements

Rear-end wreck; neck, low-back pain; $612,000 jury award

In the early morning, defendant rear-ended plaintiff's pickup truck, which was stopped at a red light. Plaintiff was 58 and had been seeing a chiropractor for neck and lumbar pain for 25 years. In 2001, a neurosurgeon diagnosed plaintiff with a narrowing of the disc space with a vacuum disc phenomena at the L5-S1 level.

Plaintiff refused an ambulance at the scene, but after going to work and bringing his truck for repair, he did visit his chiropractor, reporting the wreck and complaining of neck and back pain.

Plaintiff treated exclusively with the chiropractor for seven months before seeing an orthopedist, whose MRI of plaintiff's neck showed a small disc bulge at C5-6, osteophyte and long-standing degenerative changes. The MRI of plaintiff's low back also revealed a mild disc bulge, osteophyte and long-standing degenerative changes.

Defendant's IME/neurosurgeon and plaintiff's orthopedist testified that there were no objective changes between plaintiff's 2001 lumbar film and his 2004 test. The main issue in the case was credibility of plaintiff, who testified that his pain increased in frequency and intensity after the wreck. Plaintiff's wife also testified that the wreck made plaintiff's pain worse.

In opening statement defense told the jury that the case was one in which they would have to determine whether the plaintiff was a liar. Throughout the trial, defendants focused on a chiropractic visit plaintiff had six days before the wreck. Plaintiff's self-reported pain-level rating at that visit was the same as his pain-level rating the afternoon of the wreck. Defense also argued that plaintiff did not miss work due to pain.

After receiving epidural steroid injections, plaintiff ultimately underwent a lumbar fusion at L5-S1. Orthopedist testified that if the epidural steroid injections were unsuccessful, a fusion would be needed at C5-6. He also opined that based on plaintiff's subjective complaints and patient's history, the wreck caused plaintiff's pain to increase to a point where surgical intervention was offered. Jury awarded plaintiff $612,000.

Burgess v. Troy A. Wade, CTL Distribution, Inc., et al., No. 80,562, 23rd JDC, 12/13/06
Plaintiff's counsel: André Gauthier and Jody Amedee, Gauthier & Amedee, Gonzales
Plaintiff's experts: Dr. Jorge Izasa, orthopedics, Baton Rouge; Phillip Smith, D.C., chiropractics, Gonzales, La.; Dr. Gray Barrow, pain management, Baton Rouge, La.

Child struck by police vehicle; subtle brain damage; $4 million judgment

A police vehicle struck an 8-year-old boy who was crossing the street on his way home from school. The child suffered a closed-head injury and subtle brain damage, which was established through neuropsychological testing by plaintiff's expert.

Defendant alleged a "child-darting" case. Defendant's expert argued the child was mildly retarded prior to the injury and any effects of the head injury were temporary.

Economist projected impaired earning capacity based on potential of earnings and life-care plan allowed for care for eight hours per day.

Stewart v. City of New Orleans, et al., No. 98-01292, CDC, Div. D, 9/18/06.
Plaintiffs' counsel: Robert L. Manard and Paul E. Mayeaux of Manard & Mayeaux, New Orleans, La.
Plaintiffs' experts: Dr. Susan Andrews, neuropsychology, New Orleans; Dr. Cornelius Gorman, life care planning, Galveston, Texas; Shael Wolfson, economics, New Orleans

Wreck; three-level cervical spine fusion, bulging lumbar disc; $653,000 settlement

The driver of a logging trailer, while driving at night, passed up his intended turn and was attempting to back up on the highway and turn around. The logging rig was not fitted with the required retro-reflective tape and it was jack-knifed across plaintiff's lane of travel.

Plaintiff, a 45-year-old man, struck the logging truck and underwent a three-level cervical fusion for injuries sustained in the wreck. He also had an un-operated, bulging lumbar disc.

Case settled for $653,000.

Tippett v. Tedder, et al., No. C20040317, 36th JDC, Beauregard Parish, 12/06
Plaintiff's counsel: Steven Broussard of Broussard & Hart, LLC, Lake Charles
Plaintiff's experts: Dr. Charles Bettinger, economics, Lake Charles; Dr. John Grimes, vocational rehabilitation, Lafayette

Mesothelioma; death; $2.5 million judgment

Decedent, who was exposed to asbestos while working at Exxon refinery operations as an assistant to boilermakers and pipefitters and as a welder from 1945 to 1986, died from mesothelioma in 2005.

Decedent's family filed suit and plaintiffs' counsel maintained that overwhelming evidence showed that the company knew that asbestos could cause cancer but did nothing to protect its workers.

After a five-day trial, judge found for plaintiffs and awarded them $2.5 million. Under the judgment, ExxonMobil is responsible for half of the award. The other half was allocated to previously settled parties. ExxonMobil has appealed the judgment.

Spillman v. Anco Insulations, Inc., et al., No. 536,903, 19th JDC, East Baton Rouge Parish, 11/30/2006
Plaintiffs' counsel: Cameron Waddell and Jody Anderman, LeBlanc & Waddell, LLP, Baton Rouge

Drunk driving wreck; back injury; $2.5 million settlement

A drunk driver struck plaintiff, a New Orleans bus driver, on Mardi Gras day in New Orleans. Defendant driver's alcohol level exceeded twice the legal limit. Plaintiff, a 56-year-old, underwent surgery for a single-level disc.

The insurer denied coverage on the grounds that the driver violated company policy by driving the vehicle without permission of the owner for personal use and while intoxicated.

After several motions for summary judgment were denied, writs were taken to Supreme Court, which also were denied.

Compensatory damages were estimated at a little under $1 million. The case settled for $2.5 million.

Fields v. Callahan, et al., No. 2004-18, CDC, Div. D, 12/20/06
Plaintiff's counsel: Robert L. Manard and Paul E. Mayeaux of Manard & Mayeaux, New Orleans
Plaintiff's experts: Dr. William George, toxicology, New Orleans; Bobby Roberts, vocational evaluation, New Orleans

Failure to diagnose cancer; death; $173,000 settlement

When decedent, a 64-year-old disabled male, sought treatment for a urinary problem, medical tests showed an elevated specific antigen (PSA) level. A biopsy on decedent was normal, and although his PSA continued to rise, he was not properly instructed to return for follow-up treatment.

Decedent was later seen at another state clinic and was given hormone treatment despite the elevated PSA. Subsequently decedent was diagnosed with metastatic prostate cancer and died.

Decedent's widow filed a complaint. Medical review panel convened and did not give an opinion, but agreed to reconvene. Plaintiff submitted a supplemental position paper, after which defendant settled for a total of $173,238.70.

Brunett v. State of Louisiana, et al., No. MRP/03MR345, 12/06
Plaintiff's counsel: Bertha Iturralde Taylor of Bertha Iturralde Taylor, LLC, Baton Rouge; Oscar L. Shoenfelt of Shoenfelt Law Firm, Baton Rouge

Classifieds

National perspective

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After discovering that her ureter was indeed cut, Linn and her husband, Anthony, filed a medical malpractice action against Fossum alleging that he was negligent for failing to diagnose it.

Before trial, the Linns deposed Dr. Dana Weaver-Osterholtz, the defendant's expert witness. Weaver-Osterholtz acknowledged that, in her own practice, she would not follow Fossum's "watch and wait" approach. However, after discussing Fossum's conduct with several other urologists, she believed that he satisfied the prevailing professional standard of care.

The Linns filed a motion to exclude Weaver-Osterholtz's statement that Fossum met the standard of care. They argued that because Weaver-Osterholtz formed her opinion by relying on experts who were not witnesses in the trial, her proposed testimony would serve as a conduit for their inadmissible hearsay opinions. The trial court denied the motion.

After the jury returned a verdict in Fossum's favor, the Linns appealed, claiming that the trial court committed error in permitting Weaver-Osterholtz to testify based on views held by experts not testifying in court.

The Florida Supreme Court agreed with the Linns, reasoning that Weaver-Osterholtz's testimony posed two dangers. First, the court reasoned that citing non-testifying experts can bolster an expert witness's testimony, making the jury believe the expert to be a more reliable source than she actually is.

Second, such testimony replicates the dangers of hearsay in that it permits a party to present the non-testifying expert's view to the jury without affording the opposing party an opportunity to cross-examine. While Weaver-Osterholtz was not excluded from testifying, she could not state that she consulted others.

Two justices dissented because the consultation, to them, was appropriate to determine the standard of care as what is "recognized as acceptable and appropriate by reasonably prudent similar health care providers."

Since determining the applicable standard of care often requires consultation with the health care community, the dissenters believed that, in the interest of full disclosure, it is proper for a testifying expert witness to refer to such consultations.