

Carrier Management

Consider Your Options and Fight Back Against Claims Fraud

August 5, 2014 by Frank S. Goldstein

Fraud is an unfortunate reality in business today, particularly for banking, finance, healthcare and insurance companies. Not just commonplace, it is profitable enough to attract organized crime rings.

Executive Summary

Attorney Frank Goldstein believes that many insurance companies are partially to blame for the rise of fraud because the industry simply is not aggressive enough in the battle against fraudulent activity. Here, he lays out some considerations for insurers that are tired of being labeled “soft touches” and want to make a statement against claims fraud.



Nothing demonstrates that better than law enforcement’s findings when they recently busted a staged-crash organization in Florida. Investigators uncovered evidence that offered revealing insights into just how detail-oriented these insurance fraud perpetrators were.

Among the implications, the ring’s leaders knew which insurance companies were perceived as “soft touches” that were willing to pay claims they knew were fraudulent rather than spend any resources fighting obvious criminal activity.

You can guess which companies bore the brunt of the ring’s fraudulent auto and property insurance claims.

For details of the bust, see National Insurance Crime Bureau, May 21, 2014, “33 Arrested in Staged Accident Scheme” and wptv.com, May 16, 2014, “Insurance Fraud Ring Busted.”

Let me say up front that I believe many insurance companies are partially to blame for the rise of fraud. I don’t mean they are directly involved, but, as a whole, the industry simply is not aggressive enough against fraudulent activity.



I'm not necessarily saying insurance companies should sue to recover every loss due to fraud, though that is one option. Some are very proactive against fraudulent activity and in addressing potential weaknesses in their profession. But most insurers simply do not take a stand against fraud or actively work to prevent it from happening—again and again.

They pay claims knowing they are fraudulent, just to put the issue behind them. Even worse, they do it all the time. By not standing up to fraud they are, in my opinion, inviting it to continue.

That said, as the Old Testament passage (*Ecclesiastes 3*) notes: There is “a time to be silent and a time to speak...a time for war and a time for peace.” Not every case of fraud must be prosecuted to the fullest extent. Insurance companies should be judicious when considering what action to take.

Having an experienced attorney or law firm as part of their team enables companies to be more informed about their options so they can make the best decision for them and their customers.

Insurance companies need an expert who will lay out all their options and take them through the process of identifying their goals, marshaling their resources, confirming all the investigatory evidence, outlining the appropriate course of action and providing a realistic examination of expectations.

You've been working for months—maybe years—on an investigation into a particular case. Your investigators have conducted solid exploration and have uncovered strong information that fraud and deception exists. Are you ready to take the case to court and get recompense?

Not necessarily.

Insurance companies, in particular, must come to grips with a number of challenges and issues before deciding to move forward with the civil recovery process.

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Confirming the Goals



Before all else, a big part of my job as an insurance fraud attorney and litigator includes determining exactly what my client companies really hope to accomplish. Believe me when I say it's not as simple as just asking the question. It often requires as much time and preparation as a witness cross examination because, in many cases, what an insurance company thinks and says it is prepared to do is nowhere near aligned with what they're actually willing to spend in time, talent or treasure to accomplish it.

They're mad and want to set things right. But they usually haven't considered all the options open to them. Bottom line, insurance companies really need a reality check, so that's the first thing a good attorney has to provide.

Ultimately, it boils down to three potential outcomes, or some combination of any or all of the three. Do you want to: (1) just stop the bleeding; (2) make a statement; or (3) recover your losses?

Let's analyze those options to provide a better understanding about what each involves.

Stop the Bleeding

In this scenario, the wronged insurance company alerts perpetrators that fraud has been uncovered and lets them know that it will be going after the fraudsters if they do not immediately stop. This is a more "informal" action and the least expensive approach. The insurance company basically is saying, "We'll forgive your past criminal actions if you don't do it again."

Unfortunately, fraudsters often may agree to stop the activity in Florida, for example, if that's where they're caught, but can move their operation to another state where similar opportunities may still exist.

Your company could be forced to deal with the same fraud again, just in a different location. However, if all you want to do is stop the immediate bleeding as the least expensive option, your attorney can help effect the deal.

Make a Statement

Many times insurance companies make a statement against fraud by involving law enforcement. When they turn over evidence to authorities, that message typically generates media coverage that results in widespread public exposure.

By bringing law enforcement into the equation, you're telling the world your company is not a patsy and is willing to do what it takes to prosecute fraud. It identifies you as being strong against fraud by saying, "Don't mess with us!"

However, be aware that evidence an insurance company sees as "conclusive" may not suffice for law enforcement. As an officer of the court, an attorney can be a valuable tool by helping present your case to authorities, as well as the public, and being able to fill in evidentiary "holes" for law enforcement as they make their case for prosecuting the fraud.

Recover Monetary Losses

Going for civil recovery, or monetary recovery, basically is the reverse of option one; the insurance company does not forgive the previous fraud but wants all fraudulently obtained payments returned—and is pressing the issue in court.

All things being equal, insurance companies naturally prefer to recover the money that was stolen from them. But, at what price?

Prosecuting a case takes money—lots of it in most cases. Going to court may involve additional resources and time, including a re-investigation of the evidence, along with additional research and preparation, as well as the legal team's court time.

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To ensure they have all the facts, companies need an attorney who lives and breathes these cases—one who knows what holes the defense may try to exploit, what strategies and tactics will be most effective, and what motions to anticipate and file. Preferably, it should be an attorney with experience in all three options, who can fully explain the benefits and drawbacks of each.

They also should have an attorney who will support them in the least expensive cases as well as big money ones.

Only after all these cards are on the table is it decision time.

Are You Prepared to Make a Statement?

Given all their options, an insurance company may decide it wants to make a statement. Many attorneys will say, “Okay, let’s go for it.” I say, “Not so fast.”

Wanting to draw the line and take a stand is a good first step. But prior to going into full battle mode, I want to make sure my client understands what lies ahead. Then, if they’re still on board, we can move forward.

Here’s why I think that way.

The client may be prepared to pay attorney’s fees associated with making a statement, but I want to make sure they’re also ready to commit the necessary resources to presenting a winning case—resources that include people and time.

Too often a client has unrealistic expectations, especially regarding the time it takes to piece a case together. They may think that, since investigators have already gathered evidence, the legal team should be able to take the case right to authorities or to trial.

It doesn’t work that way.

The legal team needs to retrace every step of the investigation and do its own probing to ensure your evidence will stand up and that it’s all the evidence. Before having your case tried in court, I’m sure you’d want to know the evidence you have is complete and strong, or if there is additional evidence out there that can strengthen your case. I certainly want those reassurances before I tell a client what their chances of winning might be.

Verifying evidence takes time—and personnel dedicated just to that task. I always recommend clients provide as many of the people and services possible to keep costs in check. If they don’t have the team to commit, or aren’t willing to spend the necessary time, they can always pay the law firm to do it. But clients need to know what the cost will be, and how long it may take, before signing off on the process.

Good attorneys can gauge if clients are truly committed to taking the time and spending the resources necessary to fight a case to the end. If not convinced you’re in it for the long haul, they won’t accept your case.

The evidence also affects the attorney’s decision. It may not be as strong as you think. If an attorney believes he or she has no chance to win the case, they likely will turn you down. In fact, it’s the attorney’s job to tell you if you don’t have the evidence to proceed.

Speaking from experience, I can tell you that’s more the norm than the exception. No one likes to lose. My firm typically turns away more cases than it accepts precisely because our attorneys believe the evidence is lacking or the client isn’t prepared to invest the time and resources it will take to win the case.

But even when clients pass these fraud-action “smell tests,” questions—and decisions—remain.

You Have Cause, But...

Evidence suggests you have viable cause to seek monetary recovery. Now you're left with multiple options. When considering the type of case to file, I always recommend first determining what can be proven.

Primarily, can you prove intent or deception? Or just negligence? That will be a deciding factor in the cause of action a company should pursue and the amount of money that can be potentially recovered.

Do you understand what the burden of proof will be in your case?

Most people may be inclined to reply “beyond reasonable doubt.” They'd be correct if it were a criminal case, but fraud is also prosecuted in civil court. Most civil cases only require a *preponderance of the evidence* (POTE)—meaning the scales of justice must be tipped ever so slightly in your favor, essentially 51 percent. (MSPBWatch.org, July 7, 2012, “What is the ‘clear and convincing evidence’ standard?”)

This is the lowest burden of proof and, typically, the least lucrative, although if one can prove fraud by a preponderance, then punitive damages still can be awarded.

Some causes of action—primarily those in which you can prove the accused intentionally, knowingly or willfully intended to defraud—can result in the award of punitive damages and recovery of attorney's fees. In other words, proving intent offers the largest potential awards. Many others, where only negligence can be proven, may result only in payment of compensatory (or actual) damages.

The highest burden of proof, of course, is beyond reasonable doubt. Outside of criminal trials, it is never a burden of proof standard. Beyond a reasonable doubt requires a very high burden of evidence and can be extremely difficult to prove.

Between the preponderance of the evidence and beyond reasonable doubt standards you'll find clear and convincing evidence (CACE)—meaning you must prove that a crime is substantially more probable to have occurred than not. (Source: law.cornell.edu, “Clear and convincing evidence” definition). Courts and Congress have determined CACE is appropriate, for example, in cases in which the government wants to deport, denaturalize or commit a person, as well as in libel or attorney disbarment actions. Some civil causes of action also require this burden of proof, such as civil RICO cases.

Together with their attorney, insurance companies must decide where their evidence falls: Does it merely meet the POTE standard? Or does CACE exist?

Keep in mind that any case in which you could win attorney's fees works both ways. Lose, and you could be on the hook for your own fees and those of the defendant. That's why, when considering the cause of action to file, it's important to weigh the strength of the defense's case against your own.

Make sure your legal team is prepared to present both sides of the case to you before making a decision to proceed.

Key Points When Deciding a Course of Action

To ensure the greatest prospects for success when deciding if or how to fight fraud in a particular circumstance, I suggest you sit down with an experienced attorney and review your priorities and projected expenses.

- Identify your goals: stop the bleeding, make a statement or recover money.
- Review all required resources—cost, people and time. Are you prepared to allocate or pay for what's necessary?
- Set realistic expectations for the resolution of your case.
- Analyze all the evidence—yours and that of the defense.
- Let the evidence point to the best course of action.
- Factor in your added financial responsibilities should you lose.
- Once you make a commitment, stick to it; no second-guesses.

I doubt we'll ever be able to completely eliminate fraud. It's too profitable and, in some cases, just too easy. However, I do believe that by taking more aggressive action against the rings and individuals responsible for perpetrating fraudulent activities—whenever appropriate—companies can strip away much of the profit and make it more difficult for fraud to succeed.

And that's a win-win for banking, finance, healthcare and insurance companies nationwide, as well as for their customers.