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Current Insurance Industry Trends and Their Impact on the Claims Industry:

Surviving the Law of Unintended Consequences

Legal counsel who have served claims departments for any length of time have seen waves of change and overhaul in claims practices and the insurance industry overall. Nothing, however, occurs in a vacuum. Rarely are there seismic shifts in claims practices or insurer staffing levels without accompanying unintended consequences which, by their very unintended nature, can produce a whole new set of challenges. In this column I address three recent developments in the industry, and how each is already presenting challenges that high-level decision makers may not have anticipated.

Fraud perpetrators study industry news and know which companies have eliminated SIU positions. I primarily provide legal counsel, not business advice. And I do not believe that any CEO undertakes mass layoffs lightly or without careful consideration of the lives at stake. However, we need to understand that SIU counsel and the claims community are not the only ones who have been following the news of recent mass layoffs at some of the largest insurers in the industry. We aren't the only ones on LinkedIn. The organized insurance fraud perpetrators we have dedicated our careers to fighting know quite well which companies are laying off experienced claims investigators, and they have no sympathy for the business case behind these decisions. They have already begun targeting these companies in hopes of capitalizing on temporary gaps in experienced claims staffing, and it is highly probable they have already stolen millions in claims payments.

Long-term profitability is a necessary goal for any insurer, and sometimes achieving that goal requires painful workforce reductions. But companies would be wise to recognize when deciding which roles to eliminate that the perpetrators who are so adept at extracting billions of dollars every year through insurance fraud will give the industry no grace period to right the financial ship. They will double down on their fraud by targeting the vulnerable. They are doing it right now. The best defense against that is the experienced claim investigator, and these are roles that no insurer should eliminate except as an absolute last resort.

Increasingly leaner claims operations present potential bad faith exposure. The trend in the claims industry is to require fewer claims' representatives, sometimes with less-than-optimal levels of training, to handle a larger volume of claims across multiple states. Once again, there can be a strong business case for the necessity of scaling down claims operations in this manner.

However, claims keep coming in at the pre-scale pace, and expecting one claims representative to handle the work of several is a good way to create unhappy customers. One diligent claims professional can only get to so many claims in one day, and we need to remember that claims professionals serve their customers during times of trauma and need after unexpected losses. These are not customer interactions that should be rushed in the interest of complying with the latest internal file handling metrics. No business benefits from unhappy customers, but when those unhappy customers are insurance policy holders who are protected by state insurance department regulations and The Model Unfair Claims Practices Act, the risk of litigation can skyrocket. It is entirely possible to deny even contentious claims, if the facts and the law compel denial, and still avoid drawing lawsuits from unhappy policy holders simply by communicating fully and frequently every step of the way, including adequate explanation of the basis of denial. This requires a serious investment of time and attention. An over-burdened claims professional simply may not have it to spare. Those of us who counsel the industry in matters of coverage and bad faith are already seeing the resulting uptick in breach and bad faith lawsuits against insurers who may not have adequately balanced considerations of business efficiency with considerations of adequate customer service.

Nuclear verdicts are the new reality, often even in suspicious injury claims, and insurers need to understand the juror psychology behind them. The expression "nuclear verdict" has no fixed definition, but we know them when we see them. Generally, a nuclear verdict is a multi-million-dollar verdict that appears to be orders of magnitude larger than what insurers might view as the reasonable value of the claim. Why are they happening with such frequency these days? I have lectured on this issue nationally several times, and it can occupy a full day as a standalone seminar topic. However, it would be fair to attribute them to a pretty understandable tenet of modern juror psychology.

Jurors increasingly are younger, many have jaded view of the system, and they may use their jury service as an opportunity to right what they view as societal wrongs. It is always fashionable to sneer at the

generations behind us as soft, but this view will not help us reach increasingly younger jury pools. And the reality is, jurors who were born in the mid- to late-90's and later have endured at least two significant global recessions, seemingly endless wars for which cost has been no consideration, expensive healthcare, depressed employment opportunities and reduced purchasing power. Little wonder they have a jaded view of things. Meanwhile, the American consumer has never loved insurance companies. And that cool view of the industry can become inflamed each time large insurers report record profits as these more recent generations continue to feel they are struggling.

When these jurors have an opportunity to extract justice from defendant corporations directly, or from insurers implicitly (jurors usually understand that insurers are defending and indemnifying individual defendants), verdicts can skyrocket. This can even occur in injury cases featuring what we consider to be clear evidence of medical fraud. Jurors understand that, at least as long as the trial lasts, they are the government and are charged with dispensing justice with the force of law. Younger jurors can wield that power aggressively. Moreover, a young juror with no experience evaluating suspicious injury claims simply may not be interested in holding suspicious medical care against an injury plaintiff. Rather than dismiss this worldview (and as a proud member of Generation X, I am as guilty as anyone of wanting to do so) we need to understand what gave rise to it, and how to empathize with these younger jurors well enough to reach them with our stories at trial.

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