

FIGHT FIRE WITH FIRE: THE NEED FOR CARRIERS TO BE AFFORDED MORE DUTIES AND PRIVILEGES TO COMBAT THE PANDEMIC OF WORKERS' COMPENSATION INSURANCE FRAUD



I. BRIEF INTRODUCTION

On March 11, 2020, the World Health Organization declared the novel Coronavirus (“COVID-19”)¹ a pandemic.² While there was, and still is, a great deal of uncertainty about the nature of COVID-19, there also was, and still is, a great deal of confusion about the word “pandemic.”³ Countries, world leaders, and public health authorities have yet to concretely agree upon a single definition of “pandemic.”⁴ However, the loosest, most commonly used definition is: “an outbreak of a disease that occurs over a wide geographic area . . . and . . . affects a significant proportion of the population.”⁵

Applying that loose, commonly used definition to an issue plaguing workers’ compensation law, it would not be far-fetched to declare insurance fraud a pandemic, too. Workers’ compensation insurance fraud is an economic disease that runs rampant throughout all fifty United States (“US”)⁶ jurisdictions and affects carriers and every policyholder.

Just like how countries, world leaders, and public health authorities have been advocating for quarantines and vaccines to combat COVID-19,⁷ it is time for courts and legislators to afford carriers more duties and privileges, namely reasonable investigation and unqualified immunity, to combat the pandemic of workers’ compensation insurance fraud. It is time to fight fire with fire.

¹ COVID-19 is the abbreviated name for the novel Coronavirus.

² Kathy Katella, *Our Pandemic Year – A COVID-19 Timeline*, YALE MEDICINE: FAMILY HEALTH (Jan. 8, 2023, 10:19 PM), <https://www.yalemedicine.org/news/covid-timeline>.

³ See Robert H. Shmerling, MD, *Is the COVID-19 pandemic over, or not?*, HARVARD HEALTH PUBLISHING: STAYING HEALTHY (Jan. 8, 2023, 10:14 PM), <https://www.health.harvard.edu/blog/is-the-covid-19-pandemic-over-or-not-202210262839>.

⁴ *Id.*

⁵ *Id.*

⁶ US is the abbreviated name for the United States.

⁷ See *id.*

II. WORKERS' COMPENSATION INSURANCE FRAUD: AN OVERVIEW

Insurance fraud typically occurs when a retail agent or policyholder intentionally misrepresents facts or circumstances to obtain an unlawful gain during the process of buying, using, or selling risk-transfer⁸ products.⁹ Although insurance fraud is not distinctly addressed by the federal government when the act does not involve interstate commerce, it is a white-collar crime in every US state and the District of Columbia.¹⁰ Some common schemes of insurance fraud in the workers' compensation line of business are: overstating injuries or limitations; employees working "under the table"¹¹ while collecting temporary disability benefits; employers misclassifying employees; and medical providers overbilling or billing for services not rendered.¹²

A. TRAJECTORY OF ABUSE

Workers' compensation insurance fraud displays an "emerging, highly disturbing" trajectory of abuse.¹³ For example, the Texas Department of Insurance identified 99,850 workers' compensation insurance claims in 2020 versus 73,628 in 2019,¹⁴ and the California Department of Industrial Relations, Division of Workers' Compensation suspended 178 medical providers as of September 2022.¹⁵

⁸ Risk-transfer is, by definition, insurance. The two words are used interchangeably twice in this article.

⁹ *Insurance Fraud*, NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS: CENTER FOR INSURANCE POLICY AND RESEARCH (Jan. 8, 2023, 10:24 PM), <https://content.naic.org/cipr-topics/insurance-fraud>.

¹⁰ *Id.*

¹¹ Working under the table is another way of saying unreported employment.

¹² Coalition Against Insurance Fraud, *The Impact of Insurance Fraud on the U.S. Economy*, 14 (2022), <https://insurancefraud.org/wp-content/uploads/The-Impact-of-Insurance-Fraud-on-the-U.S.-Economy-Report-2022-8.26.2022.pdf>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Louise Esola, *California comp regulators suspend 178 medical providers in 2022*, BUSINESS INSURANCE: WORKERS COMP (Jan. 8, 2023, 10:44 PM), <https://www.businessinsurance.com/article/20220930/NEWS08/912352818/California-comp-regulators-suspend-178-medical-providers-in-2022>.

In 1980, the Insurance Information Institute (“III”)¹⁶ interviewed adjusters and concluded that fraudulent claims accounted for about ten percent of property-casualty incurred losses and loss adjustment expenses each year.¹⁷ Based on that measure, in 2020, insurance fraud, in general, would have totaled \$38 billion,¹⁸ and workers’ compensation insurance fraud, specifically, would have totaled \$7 billion.¹⁹

This past year, the Coalition Against Insurance Fraud (“CAIF”)²⁰ conducted an updated study.²¹ The results indicated that in 2022, insurance fraud, in general, totaled \$308.6 billion,²² and workers’ compensation insurance fraud, specifically, totaled \$34 billion.²³ The split of the latter was \$9 billion from premium fraud and \$25 billion from claims fraud.²⁴ This means, today, sixteen percent of all workers’ compensation insurance claims are fraudulent,²⁵ which, according to the Federal Bureau of Investigation, costs the average policyholder between \$400 and \$700 in premiums.²⁶

B. MECHANICS

How does workers’ compensation insurance fraud cost the average policyholder between \$400 and \$700 in premiums?²⁷ Well, first, when carriers indemnify fraudulent claims, they incur financial losses, which are passed on to every policyholder in the form of higher premiums.

¹⁶ III is the abbreviated name for the Insurance Information Institute.

¹⁷ Coalition Against Insurance Fraud, *The Impact of Insurance Fraud on the U.S. Economy*, 8 (2022), <https://insurancefraud.org/wp-content/uploads/The-Impact-of-Insurance-Fraud-on-the-U.S.-Economy-Report-2022-8.26.2022.pdf>.

¹⁸ *Id.*

¹⁹ *Id.* at 18.

²⁰ CAIF is the abbreviated name for the Coalition Against Insurance Fraud.

²¹ *Id.* at 2.

²² *Id.* at 37.

²³ *Id.* at 18.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Insurance Fraud*, FEDERAL BUREAU OF INVESTIGATION: STATS & SERVICES (Jan. 8, 2023, 10:39 PM), <https://www.fbi.gov/stats-services/publications/insurance-fraud>.

²⁷ *Id.*

Second, fraudulent claims increase the overall number of claims carriers receive. This leads to higher administrative costs, which are passed on to every policyholder in the form of higher premiums. Finally, fraudulent claims create a perception that a carrier is riskier to insure. This leads to higher reinsurance²⁸ premiums to compensate for the increased risk, which are passed on to every policyholder in the form of higher premiums. Fraudulent workers' compensation insurance claims are also damaging because they cause "humanitarian harm" when medical providers subject patients to unnecessary treatments.²⁹

C. LEGAL OPTIONS

If a carrier suspects workers' compensation insurance fraud, its legal options are limited.³⁰ A carrier can only inform law enforcement agencies of fraudulent claims, withhold payments, and collect evidence for use in court.³¹ Most carriers are required by law to establish Special Investigation Units ("SIUs")³² to help identify fraudulent claims;³³ however, carriers lack the duty of reasonable investigation, contrary to the name.³⁴ Said duty rests with insurance fraud bureaus and public attorneys.³⁵ Nevertheless, to successfully bring a workers' compensation insurance fraud case to trial, SIUs must provide prosecutors with information about the parties involved.³⁶

²⁸ Reinsurance is insurance for insurance companies.

²⁹ Coalition Against Insurance Fraud, *The Impact of Insurance Fraud on the U.S. Economy*, 2 (2022), <https://insurancefraud.org/wp-content/uploads/The-Impact-of-Insurance-Fraud-on-the-U.S.-Economy-Report-2022-8.26.2022.pdf>.

³⁰ *Background on: Insurance Fraud*, INSURANCE INFORMATION INSTITUTE: CRIME + FRAUD (Jan. 8, 2023, 10:34 PM), <https://www.iii.org/article/background-on-insurance-fraud>.

³¹ *Id.*

³² SIUs is the abbreviated name for Special Investigation Units.

³³ *Id.*

³⁴ *Maxwell v. AIG Domestic Claims, Inc.*, 460 Mass. 91 (2011).

³⁵ *Id.*

³⁶ *Background on: Insurance Fraud*, INSURANCE INFORMATION INSTITUTE: CRIME + FRAUD (Jan. 8, 2023, 10:34 PM), <https://www.iii.org/article/background-on-insurance-fraud>.

Not only are SIUs critical, but they actually work, too.³⁷ Some studies have indicated that SIUs recover \$10 for every \$1 spent in an investigation.³⁸

Moreover, immunity laws, which tend to be qualified, allow carriers to report information at a low threshold without fear of criminal or civil prosecution.³⁹ Consequently, the success of the battle against workers' compensation insurance fraud depends on the level of priority assigned by state legislators, regulators, and law enforcement agencies.⁴⁰ As of now, forty-two states and the District of Columbia have created insurance fraud bureaus, which are funded through direct assessments levied against licensed carriers or through other agencies and general funds,⁴¹ to investigate such illegal risk-transferring activities.⁴²

Carriers are, arguably, the least-involved stakeholder in the fight against workers' compensation insurance fraud.⁴³ This does not make sense because, first, the most effective means of rooting out workers' compensation insurance fraud are data-driven technologies such as predictive modeling,⁴⁴ link analysis,⁴⁵ and artificial intelligence,⁴⁶ for example.⁴⁷ In 2019, about forty percent of carriers said that their technology budgets would be larger moving forward, year-after-year, with predictive modeling and link analysis being the top programs considered for

³⁷ See E. J. Pankau & F. E. Krzeszowski, *Putting a Claim on Insurance Fraud*, 37 SECURITY MANAGEMENT 91-94 (1993).

³⁸ *Id.*

³⁹ *Background on: Insurance Fraud*, INSURANCE INFORMATION INSTITUTE: CRIME + FRAUD (Jan. 8, 2023, 10:34 PM), <https://www.iii.org/article/background-on-insurance-fraud>.

⁴⁰ *Id.*

⁴¹ *State Insurance Fraud Bureaus*, FIRE SCIENCE INVESTIGATIONS: INSURANCE (Jan. 8, 2023, 10:54 PM), <https://www.fsiohio.com/state-insurance-fraud-bureaus/>.

⁴² *Background on: Insurance Fraud*, INSURANCE INFORMATION INSTITUTE: CRIME + FRAUD (Jan. 8, 2023, 10:34 PM), <https://www.iii.org/article/background-on-insurance-fraud>.

⁴³ *See id.*

⁴⁴ Predictive modeling is an analytic process that uses data mined from a variety of sources to create a statistical model of future behavior.

⁴⁵ Link analysis, sometimes called “graph visualization” or “network visualization,” is the process of visually presenting networks of connected entities as nodes and links.

⁴⁶ Artificial intelligence is technology that mimics human intelligence to perform tasks. It can also iteratively improve itself based on the information it collects.

⁴⁷ *Id.*

investment.⁴⁸ Second, carriers have a direct, financial interest in fraudulent transactions⁴⁹ and are subject to strict regulations to protect against the results this very issue creates.⁵⁰

Two of the main purposes of insurance regulations are: (1) to ensure that consumers are charged fair and reasonable insurance prices; and (2) to ensure that consumers are protected against carriers that fail to operate in ways that are legal and fair.⁵¹ Since carriers pool their risks, and those risk pools evenly share all losses,⁵² \$34 billion of fraudulent workers' compensation insurance claims are passed on to every policyholder.⁵³ If carriers must protect consumers from unfair and unreasonable insurance prices, why are courts and legislators handcuffing them? Why are courts holding that carriers may report fraudulent claims but may not reasonably investigate them? Why are legislators passing immunity laws that are qualified, not unqualified, thereby putting a ceiling on the low threshold for carriers to report fraudulent claims?

D. CALL TO ACTION

Believe it or not, carriers and the public are fighting the same fight here. Workers' compensation insurance fraud affects carriers' profitability and, as previously mentioned, costs the average policyholder between \$400 and \$700 in premiums.⁵⁴ There is a dire need for courts and legislators to see this as a public policy issue and take a hardline, pro-carrier approach to combating the pandemic of workers' compensation insurance fraud. Carriers should be afforded the duty of

⁴⁸ *Id.*

⁴⁹ *Maxwell*, 460 Mass. at 104.

⁵⁰ See *Market Conduct Regulation*, NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS: CENTER FOR INSURANCE POLICY AND RESEARCH (Jan. 8, 2023, 10:29 PM), <https://content.naic.org/cipr-topics/market-conduct-regulation>.

⁵¹ *Id.*

⁵² Annie Sisk, *What Is Risk Pooling in Insurance?*, BIZFLUENT (Jan. 8, 2023, 10:49 PM), <https://bizfluent.com/about-6521384-risk-pooling-insurance-.html>.

⁵³ See *id.*

⁵⁴ *Insurance Fraud*, FEDERAL BUREAU OF INVESTIGATION: STATS & SERVICES (Jan. 8, 2023, 10:39 PM), <https://www.fbi.gov/stats-services/publications/insurance-fraud>.

reasonable investigation, given their resources and anti-fraud technologies, and immunity laws should be modified and expanded, so that carriers have unqualified, not qualified, immunity.

III. CRITIQUE OF A LEADING MASSACHUSETTS CASE

MAXWELL V. AIG DOMESTIC CLAIMS, INC., 460 MASS. 91 (2011)

Jesse Maxwell, a workers' compensation insurance claimant, filed suit against AIG Domestic Claims, Inc. ("AIGDC")⁵⁵ after AIGDC referred his claim to the Insurance Fraud Bureau ("IFB"),⁵⁶ communicated with investigators and prosecutors regarding his activity and claim, and, allegedly, used criminal processes to gain leverage against him.⁵⁷ Maxwell raised an abuse of process theory, while AIGDC argued, unsuccessfully, that it had immunity under 1996 Mass. Acts 427, § 13(i).⁵⁸ The court held for Maxwell because Massachusetts's insurance fraud reporting statute did not envision that, following a report to the IFB, AIGDC would assume an active role in his prosecution.⁵⁹

1996 Mass. Acts 427, § 13 mandates that carriers promptly, within thirty days, refer transactions to the IFB when they "merely have reason to believe that insurance fraud may have occurred" and ensures that carriers have immunity from liability, which minimizes hesitation and maximizes reporting.⁶⁰ Furthermore, 1996 Mass. Acts 427, § 13 specifically locates the duty of reasonable investigation with the IFB and public attorneys, not carriers.⁶¹ In fact, the court believed that an inferred duty of reasonable investigation would either encourage carriers to delay

⁵⁵ AIGDC is the abbreviated name for AIG Domestic Claims, Inc.

⁵⁶ IFB the abbreviated name for the Insurance Fraud Bureau. The IFB is a private entity authorized by special act of the Massachusetts Legislature to combat insurance fraud in the workers' compensation and automobile insurance systems by investigating charges of such fraud and referring suspected violations for criminal prosecution.

⁵⁷ *Maxwell*, 460 Mass. at 92.

⁵⁸ *Id.*

⁵⁹ *Id.* at 106.

⁶⁰ *Id.* at 102.

⁶¹ *Id.* at 103.

reports to the IFB or completely deter carriers from filing reports to the IFB in the absence of rock-solid evidence.⁶²

Using dicta, the court stated that the public would not benefit from the imposition of an additional layer of scrutiny between a carrier's mere reason to believe that an insurance transaction may be fraudulent and its report to the IFB.⁶³ The court also went so far as to state that the public might be harmed if carriers enjoyed a larger role in the investigatory process because, unlike the IFB, an Attorney General, or a District Attorney, carriers have a direct, financial interest in demonstrating a transaction to be fraudulent, and this interest might reduce objectivity and lead to over-zealous and oppressive efforts to root out fraud when none actually exists.⁶⁴

In its opinion, the court was clearly trying to keep carriers at a healthy remove from prosecutorial pursuits.⁶⁵ While prosecutors should be left to do the prosecuting, it is utterly incomprehensible why the court stripped carriers from possessing the duty of reasonable investigation. The costs of workers' compensation insurance fraud burden both carriers and policyholders, so everyone would benefit from carriers reasonably investigating fraudulent claims if it resulted in carriers identifying more fraudulent claims and not indemnifying those claimants. Plus, even if carriers reasonably investigated fraudulent claims, it would not rid people like Maxwell of notice, hearing, and review.⁶⁶ Joint investigatory efforts between carriers (private entities), the IFB (a private, quasi-judicial entity), and prosecutors (public attorneys) would, by definition, still entail notice, hearing, and review, and the proceedings would not be subject to public inspection beyond information requests from law enforcement agencies.⁶⁷

⁶² *Id.*

⁶³ *Id.* at 104.

⁶⁴ *Id.*

⁶⁵ *Id.* at 106.

⁶⁶ *Fremont Comp. Ins. Co. v. Superior Court*, 44 Cal. App. 4th 867, 876 (1996).

⁶⁷ *Id.*

The current process of rooting out workers' compensation insurance fraud is not working. Insurance fraud bureaus and public attorneys need all the help they can get. If carriers were parties to this type of litigation, investigations would be enhanced with the additions of their staffed SIUs and anti-fraud technologies. Upon filing a report to the IFB, carriers should be able to do more than just respond to IFB requests for information; courts and legislators should not handcuff them to halt all discretionary duties. Forcing carriers to halt all discretionary duties is a waste of resources and, ultimately, a severe detriment to the public.

In all likelihood though, the public would not see forcing carriers to halt all discretionary duties as a detriment. Instead, the public would probably hesitate to afford carriers more duties. Society tends to view the relationship between a policyholder and carrier like David versus Goliath.⁶⁸ So, if carriers were now able to reasonably investigate fraudulent claims, society would, assumingly, view that relationship like David versus Goliath and Goliath's twin brother – another Philistine giant.

The million-dollar question remains: do we risk a small percentage of claimants not receiving workers' compensation benefits to control premium costs for every policyholder throughout all fifty US jurisdictions? Speaking in utils, the most good for the most people would come from carriers reasonably investigating fraudulent claims. This is a value judgment that will deter future unscrupulous criminals from filing fraudulent claims and benefit carriers and every policyholder.

⁶⁸ A biblical tale from 1 Samuel 17 that involves a brave, yet average, sheep herder (David) battling, and defeating, a nine-foot-tall Philistine giant (Goliath).

IV. COMMENT ON A LEADING CALIFORNIA CASE

FREMONT COMP. INS. CO. V. SUPERIOR COURT, 44 CAL. APP. 4TH 867 (1996)

In February 1992, two carriers reported Dr. Gopinath to the California Department of Insurance and Los Angeles District Attorney's Office for billing both of them for a single incident and changing the date on two reports to show two different injuries.⁶⁹ Dr. Gopinath was arrested and tried but later acquitted.⁷⁰ The arrest was obviously not good for Dr. Gopinath's practice, so his complaint accused the two carriers of instigating "an aggressive campaign" to destroy his medical career.⁷¹

Section 1877.5 of California's Insurance Code provides carriers with qualified immunity to furnish information to the State's insurance fraud bureau or a local district attorney's office.⁷² Essentially, carriers are immune from "any civil liability in a cause or action of any kind" if they act "in good faith, without malice, and reasonably believe that the action taken was warranted by the then known facts, obtained by reasonable efforts."⁷³ The complaint in question, however, alleged that the two carriers acted with malice.⁷⁴

Comparatively, Section 47 of California's Civil Code gives everybody, including carriers, the right to report crimes to the police, local prosecutor, or appropriate regulatory agency, even if the report is made in bad faith.⁷⁵ The absolute privilege of unqualified immunity in Section 47 represents a value judgment that facilitating the "utmost freedom of communication between citizens [and carriers] and public authorities, whose responsibility is to investigate and remedy wrongdoing[s]," is more important than the "occasional harm that might befall a defamed

⁶⁹ *Fremont*, 44 Cal. App. 4th at 871.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 871-72.

⁷³ *Id.* at 872.

⁷⁴ *Id.*

⁷⁵ *Id.* at 875.

individual.”⁷⁶ In layman’s terms, it is acceptable to risk a small percentage of claimants being harmed or defamed, vigorously investigated, and potentially denied from receiving workers’ compensation benefits if carriers are allowed to have unbridled discretion to report workers’ compensation insurance fraud in an attempt to control premium costs for every policyholder throughout all fifty US jurisdictions.⁷⁷

The Court of Appeals held that Section 47 extends immunity for false reports of workers’ compensation insurance fraud.⁷⁸ If Section 47 provides immunity for false reports of rape or employee theft, then it necessarily follows that it also provides immunity for false reports of workers’ compensation insurance fraud.⁷⁹ Section 47 applies, if anything, all the more so to workers’ compensation insurance fraud than other localized crimes because carriers and every policyholder indirectly suffer the consequences.⁸⁰

Simply put, the Court of Appeals was spot-on with its decision. Unlike the *Maxwell* court, the presiding judge who wrote this opinion from a utilitarianism perspective correctly articulated that it would be ridiculous for legislators to seek to curtail workers’ compensation insurance fraud but then, in the process, create major disincentives for carriers to report fraudulent claims, since the sheer number of stakeholders this issue affects is far greater than rape or employee theft, for example.⁸¹ To encourage carriers to report fraudulent claims by enacting qualified immunity laws is pointless because it permits aggrieved claimants to then turn around and sue carriers for executing a task they are legally mandated to do.

⁷⁶ *Id.* at 876-77.

⁷⁷ *See id.*

⁷⁸ *Id.* at 877.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 875.

The *Maxwell* court handcuffed carriers in Massachusetts by holding that they may not reasonably investigate fraudulent claims, so as to supposedly “protect the public,”⁸² while the *Fremont* court crystalized California’s immunity laws, so as to afford carriers more privileges and actually protect the public.⁸³ The former got it wrong, and the latter got it right.

V. BRIEF CONCLUSION

The purpose of this article is to call for courts and legislators to afford carriers more duties and privileges, namely reasonable investigation and unqualified immunity, to combat the pandemic of workers’ compensation insurance fraud. Carriers should not be forced to be two-to-three steps away from taking adverse action against unscrupulous criminals; rather, carriers should be heavily involved in investigating workers’ compensation insurance fraud. Although it is not the sole remedy, it is a step in the right direction. Anything less would be unfair to carriers and, more importantly, the public.

In finality, unless some drastic change is made, workers’ compensation insurance fraud will continue to get worse each year (see chart below) and leave innocent policyholders suffering:



FIGURE A⁸⁴

Once more, and with great emphasis, it is time to fight fire with fire.

⁸² *Maxwell v. AIG Domestic Claims, Inc.*, 460 Mass. 91 (2011).

⁸³ *Fremont Comp. Ins. Co. v. Superior Court*, 44 Cal. App. 4th 867 (1996).

⁸⁴ Sara Routhier & Joel Ohman, *Most Common Car Insurance Repair Scams and What You Can Do To Avoid Being a Victim*, AUTOINSURESAVINGS: VEHICLE MAINTENANCE TIPS (Jan. 8, 2023, 10:59 PM), <https://www.autoinsuresavings.org/common-car-insurance-repair-scams/>.