

## Gone too far?

Industry lawyers cry foul, say bills penalize insurers

**By Carol Lundberg**

No-Fault Insurance

A package of 12 bills, intended to bring balance to the relationship between insurance companies and their customers, will either kill off insurance corporations, or will be the stake through the heart of the most generous no-fault insurance system in the country depending on whom you ask.

"What these bills do is to level the playing field between insurers and the insured," said David E. Christensen of Southfield-based no-fault law firm Gursten, Koltonow, Gursten, Christensen & Raitt PC.

The bills provide a criminal provision for insurance executives whose companies operate in bad faith with customers. They provide for fines up to \$1 million for insurance companies that fail to deal fairly with customers.

"The threat of having to pay damages for cheating people would be the most threatening to the insurance industry," Christensen said. "If they had a penalty for cutting people off without any basis, it would stop. It would stop overnight."

But Troy attorney James L. Borin of Garan Luow Miller P.C., said that the insurance companies are simply not behaving as badly as some bill supporters would have the public believe.

He acknowledges that he works in a sharply focused practice area: only litigation, exclusively on the insurer's side, and almost exclusively in no-fault cases.

"The bills just don't reflect the reality that I see in these cases," he said. "There is an assumption that insurers aren't paying their claims, and that's not true. From my perspective, the vast majority of no-fault claims are paid timely and appropriately by the insurance company."

Borin added that insurance companies need to be sure that claims are legitimate in order to keep rates at a reasonable level.

He worries that if punitive laws are enacted, insurance companies will leave Michigan, or that no-fault coverage, which he says is more generous in Michigan than anywhere else in the country, could be compromised.

### Wearing them down

The state of the industry, as it is now, is that some insurance companies refuse to pay legitimate claims, and will stall for as long as possible, said Michael H. Fabian, of Farmington Hills-based Fabian, Sklar & King, which works exclusively on fire and explosion cases. He said that no-fault insurance is generally more consumer-friendly than the property and casualty cases he works on in Michigan.

The reason insurers stall and deny payments is that they hope to wear down claimants, who may take less than they're entitled to, out of desperation. And at the very least, the insurance company is able to hold onto cash a little longer by delaying payment.

"It's like if you rob a bank. If you get away with it, you keep the money," Fabian said. "If you get caught, all you have to do is give back the money you stole, and maybe a little interest and nothing else. There are no consequences for robbing the bank."

Christensen said he sees that happen all the time.

He recalled a recent case in which an insurance company stopped paying the bills to care for his client's care after she'd sustained a brain injury. The insurer paid for a year and half, and then suddenly stopped paying, he said.

So the woman sued, and won.

"The jury awarded every penny we asked for, plus interest, and in that case the judge awarded lawyer fees. That was in August. So we sent them September's bills. And they never paid," Christensen said.

So he filed a second lawsuit to collect. And he won, but the insurer didn't pay.

It took a third lawsuit to get the company to pay.

"This was the largest insurer in the world, and paying a small attorney fee is nothing to them," Christensen said. "The way this system works is, no-fault cases are litigated until just before trial, and 99 percent of the time the insurance company pays right before trial. But you don't get to collect penalties if it doesn't go to trial; 95 times out of 100, they don't pay penalties, and they know that.

"They just hold their money for a couple of years and then pay what they were supposed to pay, but it's two years late," he added. "So people have lost their homes and their credit is almost always ruined."

So when asked if a \$1 million penalty is too stiff, Christensen said no.

"When you've seen what I've seen and what people have gone through, you'd never think it's excessive. It's a weapon, and it's a potential big stick," he said.

### Who really benefits?

The bills, Fabian said, would remedy those problems.

However, the bills have been heavily criticized by the insurance industry, said State Rep. Barb Byrum (D-Onondaga), who chairs the insurance committee.



The House standing committee on insurance met three times last month to discuss the bills, yet Byrum has been criticized for not seeking enough input from the industry, she said. The bills have garnered broad support in the House, she said, but she doesn't expect the more conservative Senate to be so receptive to them.

"I hope that the Senate sees [the package of bills] for what it is. It's consumer protection," Byrum said. "But we've heard these bills called the 'No-fault lawyer stimulus bills,' and the insurers are lining up in opposition, so we know that we're on to something."

Christensen takes issue with the notion that he, or any of his colleagues in no-fault firms stand to gain if the bills pass.

"Basically, these laws would mean that we get paid to do work we've been doing for free. As lawyers, we handle these cases because our clients have nowhere else to turn," he said. "We're just trying to get their bills paid, and don't even make a fee on that."

He'd rather be able to refer out the bad-faith complaints and focus just on the no-fault cases.

And if the bills pass, allowing clients and their attorneys to collect on such cases, Christensen will be able to do that.

"We'll love not having to handle these kinds of cases anymore," he said. "As it is, we do an immense amount of unpaid bill collection on behalf of our clients."

Pete Kuhnmuensch, executive director of Insurance Institute of Michigan, admits that the insurance industry should talk seriously about increasing fines for insurers who violate the current laws. He said the range of fines -- \$500 to \$5,000 -- is not sufficient. But the bills go too far in penalizing insurers.

"This standard of bad faith puts the insurer at risk, and could increase the costs for everyone," he said.

Michigan's auto insurance rates are higher than in other states, but that's because Michigan is one of only 12 no-fault states.

"That's an unfair comparison. In tort states, you have to sue to collect. Our no-fault system is really the best in the country because you can efficiently and quickly be paid on your claim," he said. "People forget that no-fault is a balance between immediate first-party benefits against the limitations on tort actions."

Steven B. Galbraith, of Detroit based insurance defense firm Galbraith, Gordon & Penzien PC, said the bills go too far to penalize the insurer while protecting the insured.

"What does it say in these bills about when a carrier can recover damages? Nothing. The only time a carrier can recover is if the claim is fraudulent or if it's so excessive as to have no reasonable foundation," he said. "No carrier has ever prevailed using that standard."

As it is now, plaintiffs can recover 12 percent interest on delayed claims, and can recover attorney fees at trial.

"It's not fair to say that plaintiffs have no recourse," Galbraith said.

Still, he does acknowledge that the state's conservative courts and

legislature have perhaps meant the pendulum has swung a little too far toward the side favorable to insurance companies.

"But these bills go screaming right by the center, way too far over to the other side," Galbraith said. "What I'd like to see is that the pendulum would rest in the middle."

*If you would like to comment on this story, please contact Carol Lundberg at (248) 865-3105 or [carol.lundberg@mi.lawyersweekly.com](mailto:carol.lundberg@mi.lawyersweekly.com).*

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## Insurance-related bills pending in the State House of Representatives

HB 4244: Remedies for failure to timely pay benefits; expand to include attorney fee under certain circumstances.

HB 4846: Increase penalties for engaging in unfair or deceptive acts or practices.

HB 5144: Provide for whistleblower protection to insurance employees reporting violations of unfair practices in insurance law.

HB 5145: Impose penalty of second or subsequent violation, when there is a breach of obligation to deal in good faith by certain insurers.

HB 5146: Create a presumption that when there is a violation of unfair and prohibited trade practices act by certain insurers, the that violation was in bad faith, and create remedies.

HB 5147: Provide for penalties for certain individuals who knowingly create, foster, or encourage an environment that leads to systemic wrongful denial of claims.

HB 5148: Implement criminal procedure and sentencing guidelines for knowingly creating, fostering, or encouraging an environment that leads to systemic wrongful denial of claims.

HB 5149: Create an insurance whistleblower protection fund.

HB 5150: Provide a private citizen cause of action for unfair trade practices.

HB 5151: Requirement of notification to credit reporting agencies when insurers fail to pay timely benefits.

HB 4844: Provide general amendments for duty to deal fairly.

HB 5020: Provide for a requirement for certain insurers to deal fairly and in good faith with individuals claiming benefits.