

**Publications - Insurance Fraud - Recovery**

**INSURANCE FRAUD - RECOVERY  
OF DAMAGES FROM  
INSURANCE FRAUD PERPETRATORS**

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**INSURANCE FRAUD - RECOVERY OF DAMAGES FROM  
INSURANCE FRAUD PERPETRATORS**

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**Presented to:**

**CHUBB GROUP OF INSURANCE COMPANIES**

**200 St. Paul Place, 23<sup>rd</sup> Floor**

**Baltimore, Maryland**

**By:**

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## **TABLE OF CONTENTS**

### **INTRODUCTION**

### **I. CIVIL LITIGATION**

- A. The Deterrence Factor
- B. The Collection Factor - The Recovery

## **II. LEGAL REMEDIES PROVIDED FOR UNDER THE LAW**

- A. Unjust Enrichment
- B. Conversion
- C. Replevin
- D. Detinue
- E. Misrepresentation
- F. Constructive Fraud
- G. Negligent Misrepresentation
- H. Civil Conspiracy
- I. Declaratory Judgment
- J. Indemnification

## **III. METHODOLOGY: A BRIEF SYNOPSIS OF RECOMMENDED PROCEDURE IN EFFECTUATING A CIVIL REMEDY**

- A. Affidavit of Loss
- B. Deposition of the Claimant
- C. Proof of Loss
- D. Assignment of Rights
- E. Indemnity Agreement
- F. Promissory Note/Confessed Judgment Note
- G. Securing the Promissory Note: Financing and Security Agreement for Payback

H. Consent Judgment

I. The Rico Statute - An Effective Civil Remedy

**IV. CIVIL LITIGATION VIS-A-VIS CRIMINAL PROSECUTION:  
LIABILITY CONSIDERATIONS - A CAVEAT FOR THE UNWARY**

V. CONCLUSION

VI. LIST OF ATTACHMENTS

**INTRODUCTION**

The past decade has seen a significant increase on the parts of both Federal and State Government in legislating efforts to combat insurance fraud. Maryland is no exception. The Maryland Insurance Fraud statute enacted over a decade ago required insurers to take affirmative action with respect to reporting insurance fraud and required insurers to promulgate, implement and maintain an anti-fraud plan on December 31, 1991. The writer authored a critique of the then newly enacted statute which was published in the "In Brief," a publication of the Governor's Executive Advisory Council. A copy of the article is set forth in the beginning of this publication. Subsequently, the Maryland legislature amended the statute attempting to cure a number of statutory deficiencies and established a limited form of immunity. The immunity provided in the current statute is immunity for "good faith" compliance in reporting suspected insurance fraud to law enforcement and the Maryland Insurance Commission, but does not provide insurer to insurer immunity nor immunity for reporting suspected insurance fraud to the NAIC or NICB.

It is submitted that additional legislation is necessary to provide immunity for an insurer, its employees and producer when acting without malice, fraudulent intent, or bad faith and should further extend the immunity for communications to other insurers, the NAIC or NICB.

While considerable progress has been made in uncovering insurance fraud during the past decade, too little attention has been given to the effort of recovering damages from Insurance Fraud Perpetrators. While a number of states have commenced legal action for such recovery, it was not until 1995 that Maryland did so. Notwithstanding the effort on the part of State Insurance Fraud Bureaus to initial civil actions against fraud perpetrators, the lack of staffing and administrative priorities remain formidable handicaps to effective collection efforts.

Therefore, this publication, which is an updated version of the original publication on this topic dating back to June 16, 1992, is presented in the hopes that it may serve as an assistance to the Insurance Industry in establishing an Agenda to Recover Damages from Insurance Fraud Perpetrators.

Insurance fraud is a recognized national problem which not only adversely affects the insurance industry, but also directly affects the entire nation, inclusive of the insurance consumer. It has been estimated that, in 1991 alone, insurance fraud has cost property/casualty insurance consumers more than Seventeen Million Dollars (\$17,000,000.00).<sup>[1]</sup>

One recognized method of combating insurance fraud is for the insurance carrier, which has been defrauded, to avail itself of the legal remedies available to it in order to effectuate a recovery against insurance fraud perpetrators. Recovery of damages from insurance perpetrators can be accomplished by means of:

- 1)The institution of civil litigation to recover damages from insurance fraud perpetrator(s); and
- 2)Seeking restitution in those cases resulting in successful criminal prosecution.

## **CIVIL LITIGATION**

The first issue for determination for the insurance carrier to make in its attempt to seek a recovery from the insurance fraud perpetrator is the feasibility of the institution of civil litigation to recover damages from insurance fraud perpetrators. This, of necessity, must take into consideration not only successful litigation, but also the successful collection of the judgment award.

## **THE DETERRENCE FACTOR**

Irrespective of the success in preventing insurance fraud accomplished by the anti-fraud methods of the insurance carrier, inclusive of the mandatory reporting requirements which have been legislatively enacted in a number of states, deterrence is a necessary ingredient of all anti-fraud efforts. While maximum deterrence flows from criminal prosecution, criminal prosecution frequently does not occur in insurance fraud cases, as prosecutorial discretion (the prosecutorial prerogative) often prevents criminal prosecution of insurance fraud cases. Failure of the appropriate authority to prosecute may result from the limited resources of the prosecution, the prosecutorial prerogative or the case load of violent crimes and/or drug and drug-related crimes such as drug trafficking which are considered to have of a higher priority than "white collar" or "insurance fraud" cases.

In many instances law enforcement agencies are not set up or man-powered sufficiently so as to effectively deal with the problem of insurance fraud. In many instances, while civil litigation cannot be cost justified, such litigation has a definite deterrence value.

### **THE COLLECTION FACTOR - THE RECOVERY**

In other instances where the likelihood of recovery from a financially solvent fraud perpetrator is very real, civil litigation should be pursued aggressively. Once the decision is made to seek a recovery through civil remedies, an arsenal of weapons is at the disposal of the defrauded carrier. Successful collection, however, depends not only on the skillful completion of the insurance fraud investigation but also the identification of the appropriate civil remedy the utilization of proper collection methodology and the location of the assets from which to collect the civil judgment once it has been obtained.

### **LEGAL REMEDIES PROVIDED FOR UNDER THE LAW**

In cases where the insurance carrier discovers that there has been fraud on the part of the claimant in a case where payment has already been made to the claimant, the law provides for a large number of remedies which include the following:

#### **UNJUST ENRICHMENT**

Unjust enrichment is a general legal theory which holds that one person should not be permitted unjustly to enrich himself at the expense of another through fraud, misrepresentation or another act of wrongdoing. Unjust Enrichment is a fundamental principle of restitution and is the prerequisite of most legal actions to recover monies wrongfully paid to an individual. Where an individual unjustly retains benefits which were acquired wrongfully such as monies obtained through a fraudulent insurance claim it is against the fundamental principles of justice, equity and good conscience to allow such an individual to retain those benefits which in justice and equity belong to another, and the court will grant relief on that basis.

#### **CONVERSION**

Conversion is essentially the civil law name for theft, or an intentional act by which a Defendant interferes with the Plaintiff's property in such a serious manner as to warrant the Defendant to pay or repay its full value in damages. Examples of the way that a Defendant can interfere with a Plaintiff's property interests include wrongful acquisition by theft, embezzlement, fraud, misrepresentation, misuse and other acts which may be encountered with respect to a fraudulent insurance claim and which

deprive a Plaintiff of the use of its property. The name of the action by which the wronged party recovers the value of its wrongfully taken goods is Trover. It is an important aspect of an action for Trover that the Plaintiff need not prove the intent of the Defendant to wrongfully acquire the property of the Plaintiff, rather the Plaintiff must merely demonstrate that the Defendant committed an intentional act which deprived the Plaintiff of its property. Thus, care, good faith, lack of knowledge or “good intentions” are not adequate defenses to such an action by the Defendant.

### **REPLEVIN**

Replevin is one of the oldest remedies recognized by our system of common law. Such an action is appropriate in most cases involving the unlawful taking of property. Replevin is a proceeding by which the owner of property, which has been wrongfully taken by another, seeks to recover possession of the specific property which has been taken. Simply stated, replevin is a proceeding to regain possession of specific property which was wrongfully taken from another and it serves to transfer title to the property from the Defendant to the Plaintiff.

### **DETINUE**

Detinue is another common law action for recovery of specific personal property which has been unlawfully retained or its value. A Detinue action also includes the right to recover damages caused by the loss or deprivation of the property such as interest or lost income, which distinguishes it from the action for Replevin, discussed above. In an action for replevin, possession of the property is immediately shifted from the Defendant to the Plaintiff at the outset of the action, with bond or other security posted to secure the value of the property. In a Detinue action, possession of the property shifts only after the final judgment of the court.

### **MISREPRESENTATION**

The tort of fraud or deceit provides a remedy for one intentionally deceived by another’s representations about the existence or absence of material facts when, upon justifiably relying on the representations, the victim incurs damages. The cause of action is ancient. It originated in England during the 1200’s.<sup>[2]</sup>

Fraud itself is a generic term which embraces intentional misrepresentation and concealment. Fraud can be a powerful tool to disregard and/or vitiate every transaction and all contracts. Therefore, if the insured is found to have committed fraud, the insurance contract is void. The allegations required to properly plead the cause of action known as intentional misrepresentation or deceit are as follows:

- 1)The Defendant asserted a false representation of a material fact to the Plaintiff;
- 2)The Defendant knew that the representation was false or the representation was made with such reckless disregard for the truth that knowledge of the falsity of the statement can be imputed to the Defendant;
- 3)The Defendant made the false representation for the purpose of defrauding the Plaintiff;
- 4)The Plaintiff relied with justification upon the misrepresentation and
- 5)The Plaintiff suffered damages as a direct result of the reliance upon the misrepresentation.<sup>[3]</sup>

### **CONSTRUCTIVE FRAUD**

Constructive fraud is a breach of duty, legal or equitable, which the law declares fraudulent. The breach is considered fraudulent because it tends to deceive others, violates public or private confidence, or injures public interests. Constructive fraud does not require the culpable party to have an actual dishonest purpose or an intent to deceive. Where constructive fraud is found to have existed, a viable remedy is for the insured to declare the contract of insurance null and void. The elements of constructive fraud which must be pleaded include the following:

- 1)the existence of a legal or equitable duty, usually arising out of a relationship where trust and confidence exist, i.e., a fiduciary relationship or confidential relationship;
- 2)a breach of that duty by;
- 3)conduct which deceives or violates the confidence or injures the public interest<sup>[4]</sup>

The measure of damages is also an important consideration when instituting suit for fraud. In appropriate cases, punitive damages are recoverable provided Plaintiff is awarded compensatory damages. Punitive damages may not be recovered without alleging or proving actual malice. Actual malice exists if the conduct complained of was performed without legal justification or excuse and was influenced or motivated by hatred, spite or with intent to deliberately injure the Plaintiff.

Concealment or deceit, sometimes referred to as “non-disclosure” is that branch of misrepresentation which involves concealment of material facts with intent to deceive. The elements of this tort are as follows:

- 1) duty to disclose;
- 2) failure to disclose the material facts;
- 3) with the intent to deceive, i.e., Defendant knows Plaintiff would act in a different manner had he known of the existence of the undisclosed facts;
- 4) Plaintiff acts in justifiable reliance on the concealment; and
- 5) Plaintiff suffers damages as a result of the concealment.

In the absence of a duty to disclose, failure to disclose an important fact in contract negotiations may not give rise to liability for concealment or non-disclosure. Under the same circumstances, however, Plaintiff may be entitled to rescind the contract if the concealed fact is basic. The measure of damages for concealment or non-disclosure is the same as with the other aspects of misrepresentation.

### **NEGLIGENT MISREPRESENTATION**

The tort of misrepresentation provides a remedy for one acting in reliance on a false representation by another whose conduct in, rendering the representation, was **“culpably careless,”** but not **“deliberately fraudulent”**. Moreover, if a party to a transaction is under a duty to speak, non-disclosure or concealment may also constitute negligent misrepresentation. To recover damages for negligent misrepresentation, it must be shown that:

- 1) the Defendant made a false misrepresentation of a present or past material fact;
- 2) the Defendant, owing the Plaintiff a duty of care, was negligent in making such false statements or representation;
- 3) the Defendant made the statement and/or representation intending that the Plaintiff would act in reliance on it;
- 4) the Defendant knew the Plaintiff probably rely on the statement and/or representation, which if false would cause injury or loss of the Plaintiff;
- 5) the Plaintiff relied on the statement and/or representation;
- 6) the Plaintiff’s reliance was justified; and
- 7) the Plaintiff suffered damages as a result of his reliance on the statement and/or negligent misrepresentation made by the Defendant.<sup>[5]</sup>

## **CIVIL CONSPIRACY**

Civil conspiracy is a general legal theory which holds that parties entering into an agreement whereby the object of the agreement is either an unlawful act or a lawful act to be accomplished by unlawful means will be subject to civil prosecution. It is necessary to show that a Defendant has knowledge of an illegal enterprise and that he performed one or more overt acts in furtherance of the conspiracy.

The elements of an action for civil conspiracy are as follows:

- 1) a confederation of two or more persons by agreement or understanding;
- 2) some unlawful or tortious act done in the furtherance of the conspiracy or use of unlawful or tortious means to accomplish an act not in itself illegal; and
- 3) actual legal damage resulting to the Plaintiff.<sup>[6]</sup>

## **DECLARATORY JUDGMENT**

The declaratory judgment act provides an opportunity to any person including corporations or partnerships, to settle and to obtain relief from uncertainty and insecurity with respect to rights, status and other legal relations. Thereby, various courts have jurisdiction to construe written contracts, inclusive of insurance agreements and contracts and declare the respective rights of the parties under the contract. Parties therefore may seek determination of a question of construction or validity arising not only out of a contract insurance, but also under all types of contracts, deeds, wills, trusts, land patent statutes, ordinances, administrative rules, and/or regulations and to obtain a declaration of rights, status or legal relations thereunder. A Complaint for Declaratory Relief must allege that one has an interest under the contract, deed, will, trust, etc. or that one's rights are affected by a statute, and that there exists a justiciable issue or controversy relating to a question, construction or validity of the instrument or statute. The justiciable issue must present more than a mere difference of opinion, and there must be more than a mere prayer for declaratory relief in the Complaint.

## **INDEMNIFICATION**

The right of indemnity as a variable remedy for the wrongful act of another party or to protect the insurer against litigation arising out of any misrepresentations made by the assured, may arise as a result of either an express contract or an implied contract. To recover under an expressed contract of indemnity, the Plaintiff must show that:

1)there was an agreement by one party to indemnify the other party (there must have been mutual assent to the terms of the indemnity by the making of an offer by one party and by the acceptance thereof by the other party, and it must be supported by a sufficient consideration); and

2)the occurrence which was indemnified against happened (where the indemnity is against liability, indemnity must show that the liability has become fixed and established; where the indemnity is against loss or damage, the indemnitee must state that he has made payment or suffered loss or damage).

The right of indemnity may also arise from an implied contract under which the primary or principle wrongdoer is obliged to respond for all or part of the damages which the original Plaintiff has asserted against the original Defendant. To recover under and implied contract or indemnity, the indemnitee must show that:

1)the liability was imposed on him for the injuries of the Plaintiff; and

2)the Plaintiff's injuries were the result of the wrongful act of the third party.

### **METHODOLOGY: A BRIEF SYNOPSIS OF RECOMMENDED**

### **PROCEDURE IN EFFECTUATING A CIVIL REMEDY**

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### **AFFIDAVIT OF LOSS**

After all of the pertinent underlying facts have been investigated by the insurance carrier, it is important to preserve the evidence as to the factual basis for the loss and amount of damages claimed. This can be accomplished by having the person or persons who performed an appraisal and/or the persons who actually performed the work to prepare an affidavit of property damage. Furthermore, as in Maryland, the affidavit must be signed under the penalties of perjury and that the assertions were made upon their personal knowledge. Finally, it should precisely state the underlying facts associated with the losses claimed as well as the amount of damages sustained.

### **DEPOSITION OF THE CLAIMANT**

In a first claim involving an assured policy holder making a fraudulent claim against the carrier under coverage afforded by an insurance policy, an effective means of documenting fraud or fraudulent claims is to take the deposition of the claimant. Said deposition is sworn testimony of the deponent made under oath. Most insurance policies require the insured to cooperate with the insurer with regard to the claim. Therefore it is important to pinpoint the nature of the fraudulent claim and establish the fraudulent aspect of the claim through deposition testimony. It is recommended that insurance defense counsel familiar with property loss and subrogation claim(s) be consulted and provided with all relevant information. The deposition of the claimant can be taken in the presence of the insurance adjuster. This will serve the purpose of affording the carrier the opportunity to observe the demeanor of the deponent and in making a determination of the existence of fraud vel non.

### **PROOF OF LOSS**

For each case, it is suggested that Proof of Loss Statement, under oath, be submitted to the claimant with a provision attesting to the validity of the claimant's damages and losses. This proof of loss should be notarized and any and all salient facts regarding the nature of the claim set forth accordingly. The Proof of Loss Statement should be a condition precedent to the insurer paying the loss. Sanctions in the form of an indemnification agreement should the claim be proven as fraudulent may be inserted in the proof of loss statement in the event the claim is not valid. The sanctions can be in the form of a refund, promise to pay, or in some instances, and indemnification agreement. The Proof of Loss Statement should set forth, in effect, the carrier is relying on the claimant's statements with regard to the validity of the claim(s) made by the insured and in the event that the claimant has made a false claim then the provisions which provide for sanctions in the form of indemnification are applicable.

### **ASSIGNMENT OF RIGHTS**

In appropriate cases, it is suggested that the insurer obtain an assignment of rights under which the assured transfers any and all rights that the insured may have against third parties inclusive of all civil remedies against the perpetrators of fraud to the insurer, so that the insured can be pursue the parties who are liable through subrogation. Such an agreement should contain language clearly setting forth that the insurer has the right to pursue the responsible parties on behalf of the insured for the loss or damage. Furthermore, that the insurer is able to act as their agent and attorney in fact and that they are entitled to the proceeds paid out minus the deductible paid by the assured. In the event of third party fraud a subrogation suit may be maintained by the insurer premised in fraud against the fraudulent third party.

### **INDEMNITY AGREEMENT**

In relevant situations, it is advantageous for the insurer to enter into an indemnity agreement with the assured to protect the insurer against any and all litigation born out of any misrepresentations made by the assured. Use of an indemnity agreement serves as another means of protecting the insurer against potential fraudulent claims and ramifications therefrom.

### **PROMISSORY NOTE/CONFESSED JUDGMENT NOTE**

In certain situations, it becomes necessary for the insurer to protect its rights in the event that the liable party wishes to reimburse the insurer for any damages sustained. In this event it is paramount that the insurer protect its interests by entering into an agreement in writing and executed with the requisite formalities. One recommended method is the execution of a promissory note under which the fraudulent perpetrator agrees to make payment(s) to the insurer of the damages sustained as a result of the perpetrators of fraud. The obligations of a promissory note can be strengthened by including within the agreement a confessed judgment clause which essentially states that if the responsible party breaches the agreement by failing to make agreed upon payment(s), that any attorney of record can appear on behalf of the responsible party and confess judgment in favor of the holders of the promissory note. Simply stated, this agreement obviates the necessity of having a trial, and the insurer merely petitions the Court to enforce the confessed judgment.

### **SECURING THE PROMISSORY NOTE: FINANCING AND SECURITY AGREEMENT FOR PAYBACK:**

Another alternative to the insurer to protect its rights is to enter into a security agreement between the insurer and the responsible party. Under the security agreement, the responsible party essentially secures the amount owed with collateral, which allows the insurer a secured interest in the collateral in the event the damages are not paid off. In such cases the UCC requires the execution of a financing statement which must be filed in the court of appropriate jurisdiction. The purpose of the financing statements is to give notice to creditors and potential creditors of the existence of the lien created by the security agreement.

### **CONSENT JUDGMENT**

Finally, another alternative to secure the insurer's rights and interest is a consent judgment. Essentially, a consent judgment is a document between the insurer and the responsible party under which the responsible party admits liability. Although a consent judgment is certainly one of the best ways to protect the interest of the insured, they are often difficult to procure in that the responsible party is essentially giving up all of his rights and admitting to the liability and damages and waiving his

right to trial. However, in a fraud case where the fraud perpetrator is willing to do so, a consent judgment is always recommended.

### **THE RICO STATUTE - AN EFFECTIVE CIVIL REMEDY**

Although commonly overlooked, the RICO Statute is an effective civil remedy which may be used to combat insurance fraud. Targeting the fraud activities of professional and utilizing the potential of RICO remedies through an aggressive policy of RICO actions against financially accountable individuals and organizations not only would act as an effective deterrent to fraudulent conduct on the part of fraud perpetrators but also assures, to the fullest extent possible under the full measure of RICO remedies, the collection of a successful judgment against a Defendant who has committed insurance fraud and is found

to have violated the RICO Statute.

Under the RICO Statutes entrepreneurial fraud enterprises and their principals are subject to draconian punishments. Additionally, RICO offers special remedies not affordable under common law recoveries including (1) interim relief to halt criminal operations without awaiting trial; (2) forfeiture of assets employed in perpetrating crimes and (3) civil treble damages.<sup>[7]</sup>

With regard to insurance fraud, RICO civil remedies have remained virtually unnoticed by the insurance industry, and may in fact, be the single most valuable too available to insurers in this area. RICO has three (3) primary possibilities for effective use by insurers. The first is reduced losses from claims with either a false basis or falsely inflated amount. The second is to reduce losses from payment of legitimate fidelity bond and casualty claims where the insured has been a victim of dishonesty. The third is to reduce internal losses from dishonesty of insurance industry employees including embezzlement, computer frauds and other schemes resulting in theft of one type or another.<sup>[8]</sup>

The most alluring portion of RICO in reference to insurance fraud is the treble damages provision in Section 1964(c). Additionally, a most useful application of RICO for insurers is in the area of recovering losses from false claims. Where a person submits a false claim to an insurer, there are inevitable mailings and usually long distance phone transmissions in the course of processing the claim. These acts can serve as the predicate or required acts necessary to support a civil RICO claim.

Another potential use of civil RICO by insurers is to recover losses from internal theft by employees and agents. Within the insurance industry, employee and agent thefts

are seldom solo performances. Quite often the perpetrators are in collusion with other employees or agents or some outsiders.

In conclusion, although civil RICO claims involving insurance fraud are in their infancy, there are indications that RICO may very well become an indispensable tool in fighting insurance fraud.

## **CIVIL LITIGATION VIS-A-VIS CRIMINAL PROSECUTION:**

### **LIABILITY CONSIDERATION - A CAVEAT FOR THE UNWARY**

While every agenda to prevent insurance fraud should include criminal prosecution of insurance fraud perpetrators as well as civil litigation as effective modalities of dealing with insurance fraud perpetrators, the insurance carrier should always keep separate and distinct its insurance fraud reporting activities and cooperation in criminal prosecutions from its activities in connection with its civil litigation efforts to effectuate a recovery from the insurance fraud perpetrator(s). This is especially true in any case which involves criminal prosecution prior to such time as the insurance fraud perpetrator has been convicted of a criminal offense.<sup>[9]</sup>

Most states have enacted legislation in the form of “black mail” or “extortion” statutes which, simply stated, proscribe as criminal conduct the act of sending a letter or verbally threatening to accuse any person of a crime or to falsely accuse a person of disreputable conduct which accusations, if true, would expose such person to criminal prosecution or bring said person into contempt or disrepute with an intent to extort or gain any money, goods, chattels or other valuable thing.”<sup>[10]</sup>

It therefore is axiomatic that an insurance carrier either individually or through counsel scrupulously avoid making a demand upon a suspected fraud perpetrator threatening criminal prosecution in the event restitution is not made by the fraud perpetrator.

An additional problem is created in those states which have enacted mandatory reporting requirements on the part of the insurance industry.<sup>[11]</sup> In such instances, substantial risks of liability for malicious prosecution, defamation and negligent misrepresentation may attend good faith but unsuccessful criminal prosecution of the insurance fraud perpetrators.

As a consequence of the liability factors to which the well-meaning but violating insurer is exposed, it is essential in establishing an agenda to deal with insurance fraud that the course of civil litigation be kept separate and distinct from the course of criminal prosecution<sup>[12]</sup> and that although both causes are indispensable to a

successful agenda, they must at all times be kept on parallel course - each separated from the other but aggressively pursued.

## **CONCLUSION**

Once an insurance anti-fraud agenda has been established and is properly implemented by the insurance carrier by the effective use of the methodology and civil remedies available, the fundamental dual purpose of the anti-fraud effort may be realized, i.e. (1) presenting a deterrence to criminal fraud perpetrators and (2) effectuating a recovery from insurance fraud perpetrators. Recovery of damages under the anti-fraud agenda can be successfully accomplished by means of:

- 1)the institution of civil litigation to recover damages from insurance fraud perpetrators;
- 2)seeking restitution in those cases resulting in successful criminal prosecutions.

## **LIST OF ATTACHMENTS**

- 1.The Maryland Insurance Fraud Statute - *In Brief* Volume 2, No. 5 Summer 1992  
Article by Jeffrey R. Schmieler
- 2.Statement of Claim in Replevin
- 3.Detinue
- 4.Injunction
- 5.Proof of Loss Statement
- 6.Subrogation Receipt/Assignment
- 7.Indemnity Agreement
- 8.Promissory Note
- 9.Confessed Judgment Note
10. Confessed Judgment Rule
11. Consent Judgment

12. Financing Statement
13. Security Agreement
14. Security Agreement (Chattel Mortgage)
15. Consent Judgment Rule
16. Consent Judgment form
17. Attachment Before Judgment Law
18. Attachment Before Judgment Rule
19. Attachment on Original Process Form
20. Request for Writ of Attachment Before Judgment
21. Fraud - Corporate Misrepresentation
22. Blackmail/Extortion Statutes
23. Firm Prospectus

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<sup>[1]</sup> Fighting the Hidden Crime: A National Agenda to Combat Insurance Fraud. According to this publication, approximately ten percent (10%) of claims dollar(s) paid out are attributed to fraud.

<sup>[2]</sup> Actions for intentional misrepresentation have traditionally been termed fraud when instituted in law courts, and termed deceit when instituted in the “equity” courts. However, the elements for each were identical.

<sup>[3]</sup> The Plaintiff must prove each of the elements of fraud by clear and convincing evidence. This burden of proof is more strict than the traditional burden of proof is more strict than the traditional burden of proof in civil cases that being more probable than not, or greater weight of the evidence. The critical element of this tort is the intent to deceive, i.e., “scienter.” Materiality and justifiable reliance are indispensable elements as well.

<sup>[4]</sup> A party is liable to another if he breaches a legal or equitable duty owed to that other party and the breach is fraudulent because it tends to deceive others, violates public or private confidence or injure public interests. The guilty party does not have an actual dishonest purpose or an intent to deceive. Clear and convincing proof is required to prove constructive fraud.

<sup>[5]</sup> Negligent misrepresentation must be distinguished from the tort intentional misrepresentation or deceit. The tort of intentional misrepresentation or deceit involves the intent to deceive by the Defendant. In the tort of negligent misrepresentation, “scienter” by the Defendant [intent to deceive] is not present. With the development of the tort of negligent misrepresentation in its application to commercial transactions, courts have engaged in discussion about when parties owe a duty of care to another. This issue becomes more focused when courts review arms length negotiations and a claim that during such negotiations, one party misrepresented to the other. It is important to note that the misrepresentations must be more than casual expressions of opinion or a causal response made in that the latter expressions may not stand on the same plan as the deliberate certificate intended to sway conduct and the Plaintiff must be entitled “justified” to rely on them.

<sup>[6]</sup> A conspiracy standing alone, is not actionable. To prove the commission of an unlawful act in a civil conspiracy action; however it is not necessary to show that the act was criminal in nature. An unlawful act, as employed in a civil conspiracy context, connotes a tort, breach of contract or other actionable wrongs. Because of the difficulty in proving a conspiracy by direct evidence, a conspiracy may be proved by circumstantial evidence. Accordingly, a conspiracy may be shown by inferences drawn from the nature of the acts complained of, the individual and collective interests of the alleged conspirators, the situation and relation of the parties, their motives and all the surrounding circumstances proceeding and attending the culmination of the common design. In an action for the tort of conspiracy, the damages recoverable are those which proximately result from wrongful conduct. However, there will be no recoverable damages where damages cannot be recovered on an account of the alleged tortious act itself. Punitive damages may also be recoverable in an action for civil conspiracy.

<sup>[7]</sup> RICO is usually invoked in connection with other, more traditional claims such as fraud. The language of the RICO Statute, 18 U.S.C.L. 1900 et seq. defines actionable “racketeering activity” as any act or threat involving among other things, mail fraud, wire fraud and interference with interstate commerce. Since most fraudulent insurance claims will be submitted through documents sent through the U.S. mail and/or promulgated by use of the telephone, the fraud involved in the typical

fraudulent insurance claim will qualify as “racketeering activity” under the RICO definitions.

The statute also requires Plaintiffs to show a “pattern of racketeering activity” defined as at least two (2) acts of racketeering activity, one of which occurred after the effective date of the act.

Finally, the Plaintiff must demonstrate the existence of and “enterprise,” which includes any individual, partnership, corporation or other legal entity.

<sup>[8]</sup> It should be noted that to date, private parties civil RICO suits have been limited and little case law has been generated as to its use. In addition, some view RICO as an act reserved specifically for organized crime. Therefore, although RICO certainly appears to be a valuable tool for the future of insurance fraud claims, its effectiveness has yet to be thoroughly tested and its use and value is still not fully determined.

<sup>[9]</sup> The preferable time to seek restitution in a criminal case is after a criminal correction and prior to and at the time of criminal sentencing.

<sup>[10]</sup> An exemplar of such a statute is attached hereto as Attachment #22.

<sup>[11]</sup> The problem is even exacerbated in states such as Maryland which has enacted such a statute but which has not enacted an immunity provision for good faith compliance with the mandatory reporting statute.

<sup>[12]</sup> Although restitution is an effective means of recovery from convicted insurance fraud perpetrators the remedy of criminal restitution should be vigorously pursued only after the criminal correction and preferably at the time of sentencing.

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