

Beware!

Arson & Fraud Reporting
and
Immunity Statutes
are **NOT** all the Same

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INSURANCE FRAUDS PREVENTION ACT CIC § 1871 *et seq.*

- "the business of insurance involves many transactions which have potential for abuse and illegal activities...."
- (and see Cal. Penal Code § 550)

INSURANCE FRAUDS PREVENTION ACT CIC § 1871 *et seq.*

Legislative Goals (of the Act):

- more **effectively investigate and discover insurance frauds,**
- **halt fraudulent activities, and**
- **assist and receive assistance from federal, state, local, and administrative law enforcement agencies** in prosecution of persons who are parties in insurance frauds."

INSURANCE FRAUDS PREVENTION ACT CIC § 1871 *et seq.*

- Created the **Bureau of Fraudulent Claims** (CIC § 1872)
- Mandated filing various kinds of **Suspected Fraudulent Claim Reports**

What are you supposed to report? And, to whom?

- DOI Bureau Of Fraudulent Claims Report (e-FD1, CIC § 1872.4)
- Motor Vehicle Ins. Fraud (CIC § 1874 *et seq.*)
- Arson Fire Report (CIC § 1875.2)
- Worker's Comp Fraud (CIC § 1877.3)
- Mandatory? – or – Permissive?

Permissive and Mandatory Info Sharing

- CIC § 791.13
- To Authorized Governmental Agencies
(CIC § 1873 *et seq.*)
- Mandatory? – or – Permissive?

Arson / Fraud Reporting & Immunity Statutes

- Do you know whether, or when, you are required to file a Fraud Report?
 - Does that answer change, depending on what type of claim you are working?
- Do you know who you must report to, and/or who you are permitted to share information with?
- What do you provide, what do you say, and what do you not provide and/or say?
- Do you have “immunity” for filing a Fraud Report?
 - Are all the Immunity Statutes the same?

T – E – C – I...

TRIGGER?

Is the reporting duty **MANDATORY** or **PERMISSIVE**?

ENTITY?

CONTENT?

IMMUNITY?

DOI BUREAU OF
FRAUDULENT CLAIMS REPORT (eFD-1)
(CIC § 1872.4)

T RIGGER?

- “Any company licensed to write insurance in this state that believes that **a fraudulent claim *is being made*** shall,
- within 60 days ***after determination*** by the insurer that the claim appears to be a fraudulent claim. . . .”

eFD-1 TRIGGER?

-
- INSURERS STRESS AND RELY ON...
 - when an insurer “believes that a fraudulent claim is being made”
 - “after determination by the insurer that the claim appears to be a fraudulent claim”

eFD-1 T RIGGER?

-
- INSUREDS STRESS AND RELY ON...
 - report shall be made “within 60 days after determination by the insurer that the claim appears to be a fraudulent claim” and
 - when the company “believes that a fraudulent claim is being made”

DANGER ZONE!!

eFD-1 TRIGGER

- CIC § 1872.4 - **EXCEPTIONS**
- “The insurer’s initial investigation indicated a potentially fraudulent claim **but further investigation revealed that it was not fraudulent**” (CIC § 1872.4(b)(1).)
- “The insurer and the claimant have reached agreement as to the amount of the claim **and the insurer does not have reasonable grounds to believe that claim to be fraudulent**” (CIC § 1872.4(b)(1).)

DANGER ZONE!!

eFD-1 T RIGGER

- **EXPECT THE COURTS TO ...**
- NOT be consistent
- unclear, dangerously ambiguous statute – leads to:
- **INCONSISTENT APPLICATION & UNCERTAINTY...**

eFD-1 C ONTENT? / I MMUNITY?

STAND BY...!

Motor Vehicle Ins. Fraud **T** RIGGER?

(CIC § 1874 *et seq.*)

- “When an insurer knows **or** reasonably believes it knows...
- “the identity of a person whom it has reason to believe committed a criminal or fraudulent act relating to...
- “a motor vehicle theft or motor vehicle insurance claim...
- (CIC § 1874.2(b)(1))
- “THEN ...”

Motor Vehicle Ins. Fraud ENTITY?

Mandatory? – or – Permissive?

- “THEN ...
- the insurer... SHALL NOTIFY...”
 - Local police department
 - Sheriff’s office
 - CHP
 - Or district attorney’s office
- AND, MAY NOTIFY
 - And other “authorized governmental agency...”
- (CIC § 1874.2(b)(1))

Motor Vehicle Ins. Fraud ENTITY?

Mandatory? – or – Permissive?

- AND...
- “UPON WRITTEN REQUEST” from “an authorized governmental agency”
 - NOT the same list of agencies to whom the mandatory 1874.2(b)(1) Report must be made.
 - CHP, CDI, DOJ, DMV, local police or sheriff department, a “law enforcement agency of the federal government”, any District Attorney, and any “licensing agency governed by the Business & Professions Code or the Chiropractic Initiative Act”
- the insurer... “SHALL RELEASE all relevant information deemed important to the authorized governmental agency”
- (CIC § 1874.2(a))

Motor Vehicle THEFT or SALVAGE TOTALS

T RIGGER / E NTITY? (CIC § 1874.6)

- “Every insurer SHALL report covered private passenger automobiles involved in theft and salvage total losses... to the National Automobile Theft Bureau or a similar central organization ... approved by the commissioner...”

Motor Vehicle Ins. Fraud Reports

Do they REPLACE the 1872.4 e-FD1?

- If I file one or more of these Motor Vehicle Insurance Fraud Reports, do I still have to file an 1872.4 e-FD1?
- “Nothing in this section shall relieve an insurer of its obligations under Section 1872.4.”
- (CIC § 1874.2(b)(2))

Motor Vehicle Ins. Fraud Reports

C ONTENT? / I MMUNITY?

STAND BY...!

ARSON FIRE REPORT – T RIGGER?

(CIC § 1875.2)

- “If any insurer *has reason to suspect* that a fire loss was caused by incendiary means,
- Trigger: “reason to suspect” vs. “after determination”

ARSON FIRE REPORT – T RIGGER?

(CIC § 1875.2)

- Do you have to have evidence supporting the conclusion that YOUR INSURED was responsible for the fire (before you have a duty to report)?
- Do you have to suspect that YOUR INSURED was responsible for the fire (before you have a duty to report)?
- **T** rigger: “reason to suspect a fire loss was caused by incendiary means”

ARSON FIRE REPORT – ENTITY?

(CIC § 1875.2)

- *the insurer shall furnish an authorized agency with all relevant information acquired during its investigation of the fire loss **and cooperate** in an investigation by an authorized agency...."*
 - State Fire Marshall, Director of CalFire, Chief of any Fire Dept. or Fire Protection District, the Attorney General, any District Attorney, any peace officer, CDI, and any federal agency (CIC § 1875(a).)

ARSON FIRE REPORT

C ONTENT? / I MMUNITY?

STAND BY...!

Worker's Comp Fraud – T RIGGER?

(CIC § 1877.3)

- “When an insurer ... knows or reasonably believes it knows the identity of a person or entity whom it has reason to believe committed a fraudulent act relating to a workers' compensation insurance claim ..., then...”

Worker's Comp Fraud – T RIGGER Parsed

- “When an insurer ...

- 1a) knows or
- 1b) reasonably believes it knows

- 2) the identity of a person or entity whom it has reason to believe committed a fraudulent act relating to a workers' compensation insurance claim ..., **OR**,

- 3) has knowledge of such a fraudulent act that is reasonably believed not to have been reported to an authorized governmental...”

Worker's Comp Fraud – ENTITY?

- ***Mandatory vs Permissive?***

- “then ... the insurer **shall notify** ...
 - the local district attorney's office **and**
 - the Fraud Division of the Department of Insurance”
- “and **may notify** any other authorized governmental agency of that suspected fraud...”
- (CIC § 1877.3(b)(1))

Worker's Comp Fraud – ENTITY?

Mandatory Upon Request

- AND...
- “UPON WRITTEN REQUEST” from “an authorized governmental agency”
 - NOT the same list of agencies to whom the mandatory 1877.3(b)(1) Report must be made.
 - any District Attorney, CHP, CDI, DOJ, DMV, local police or sheriff department, a “law enforcement agency of the federal government”, and any “licensing agency governed by the Business & Professions Code or the Chiropractic Initiative Act”
- the insurer... “SHALL RELEASE all relevant information deemed important to the authorized governmental agency”
- (CIC § 1877.3(a))

Worker's Comp Fraud

C ONTENT? / I MMUNITY?

STAND BY...!

Permissive and Mandatory Info Sharing

- CIC § 791.13
- To Authorized Governmental Agencies
(CIC § 1873 *et seq.*)

CIC § 791.13

- Generally insurers are prohibited from disclosing “personal or privileged information ... about an individual collected or received in connection with an insurance transaction...”
- **UNLESS THE DISCLOSURE FALLS WITHIN ONE OF SEVERAL ENUMERATED EXCEPTIONS**

CIC § 791.13

- Distinctions made based on **who the disclosure is to:**
 - Insurance Institution (CIC §§ 791.13 & 791.02(k).)
 - Insurance Agent (CIC §§ 791.13 & 791.02(c).)
 - Insurance Support Organization (CIC § 791.13 & 791.02(l).)
 - Insurance Regulatory Authority
 - Law Enforcement
 - Other (Including Valid Subpoena)

CIC § 791.13(c)– Disclosures IF to an Insurance Institution, Agent, Or Support Organization... (ENTITY)

- Can provide IF REASONABLY NECESSARY TO DETECT OR TO PREVENT (TRIGGER)
 - Criminal activity
 - Fraud
 - Material misrepresentation
 - Material nondisclosure
 - In connection with insurance transactions (CIC 791.13(c)(1))
- OR - IF REASONABLY NECESSARY for either the disclosing or receiving insurance entity (Alternate TRIGGER)
 - “To perform its function in connection with an insurance transaction involving the individual” (CIC 791.13(c)(2))

CIC § 791.13(b)(2)(B)– Disclosures IF to a non-insurance entity ... (E)NTITY

TRIGGER:

- Can provide IF REASONABLY NECESSARY “to enable such person to provide information to the disclosing [Insurance Entity]...”
- FOR THE PURPOSE OF DETECTING OR PREVENTING:
 - Criminal activity
 - Fraud
 - Material misrepresentation
 - Material nondisclosure
 - In connection with insurance transactions

CIC § 791.13(e) & (f) & (h)

Disclosures OK IF ... (E)NTITY

- To an Insurance Regulatory Authority
- To a Law Enforcement or other Governmental Authority pursuant to law
- In response to a facially valid... Subpoena
- NOTE: These categories ARE NOT LIMITED by a “for the purpose of...” clause

CIC § 791.13 – Disclosures

C ONTENT? / I MMUNITY?

STAND BY...!

More Mandatory Info Sharing (re “any specific insurance fraud”)

- Requests by: Authorized Governmental Agencies (CIC § 1873 *et seq.*)
 - Upon written request, the insurer “**shall release**”
 - “all relevant information deemed important to the Authorized Governmental Agency...” (CIC § 1873(a))

More Mandatory Info Sharing (re “any specific insurance fraud”)

- “Authorized Agency” for CIC § 1873(a) purposes includes:
 - CDI, CHP, DMV, DOJ
 - Police and Sheriff
 - District Attorney
 - Other Law Enforcement(for the full list, see CIC § 1873.3)

More Mandatory Info Sharing (re Suspected Arson)

- Requests by: Authorized Governmental Agencies **re suspected Arson** (CIC § 1875.1)
 - An authorized agency may, when there is evidence or suspicion **that the crime of arson has been committed**, request any insurer to release all information in its possession that the authorized agency determines to be relevant to the crime. The insurer **shall release**... material relating to the investigation of the loss...and any other relevant evidence”

More Mandatory Info Sharing (re Suspected Arson)

- “Authorized Agency” for purposes of **CIC § 1875.1** includes:
 - CDF / State Fire Marshall
 - Chief of any Fire Department
 - Chief of any Fire Protection Dist.
 - Attorney General
 - Any District Attorney
 - Any Peace Officer
 - DOI
 - Any Federal Agency
 - CIC § 1875

More Mandatory Info Sharing (re Worker's Comp Fraud)

- **“Upon written request to an insurer... by an authorized governmental agency, an insurer... SHALL release ... all relevant information ... relating to any specific workers' compensation insurance fraud investigation.”** (CIC § 1877.3)

More Mandatory Info Sharing (re Worker's Comp Fraud)

- “Authorized Agency” for purposes of **CIC § 1877.3** includes:
 - any District Attorney
 - CHP, CDI, DOJ, DMV
 - local police or sheriff department
 - a “law enforcement agency of the federal government”
 - and any “licensing agency governed by the Business & Professions Code or the Chiropractic Initiative Act”
 - CIC § 1877.1

IMMUNITY?

The Immunity Statutes

- Do you have “immunity” for filing these various Reports – or responding to the authorities’ requests / demands for information?
 - If so, how much?
 - Is it the same for all these reporting and compliance statutes?

Immunity for your eFD-1?

- such confidential reports "shall not be subject to public inspection" and
- "shall not be subject to subpoena or subpoena *duces tecum*". (CIC §1872.3)
- the filing of such confidential reports shall not subject insurers to civil liability, provided no malice is involved (at least theoretically....)
(CIC §§ 1872.5 and CCC § 47)

Immunity for your eFD-1?

- BUT... **plaintiff's counsel** will:
 - Argue they are not trying to hold the insurer liable “for filing the report...” ..., but that instead they are “only” proffering the **evidence to show the company's state of mind, and unreasonable conduct**, in the “bad faith” case
 - Proffer such reports as **evidence of a “determination”** by the company, as of filing the eFD-1, **that the claim “is” fraudulent**.
 - Argue that the report is evidence that **company had made up its mind** by that point, and all further action on the file was to develop proof to support such a defense (rather than a continuing objective search for the truth).

DANGER! Impact of the CIC § 1872.4 EXCEPTIONS on your **I**mmunity

- Expect plaintiff's counsel to argue those eFD-1 TRIGGER EXCEPTIONS - - Remember the exceptions? You don't have to report IF:
 - “The insurer’s initial investigation indicated a potentially fraudulent claim *but further investigation revealed that it was not fraudulent*” (CIC § 1872.4(b)(1).)
 - “The insurer and the claimant have reached agreement as to the amount of the claim *and the insurer does not have reasonable grounds to believe that claim to be fraudulent*” (CIC § 1872.4(b)(1).)
- They will argue that **there's no point to including these exceptions** in the statute **if the “TRIGGER” was mere “belief” or “suspicion”**...

Immunity Statutes

Vehicle Claim

- “In the absence of fraud or malice, no insurer ..., shall be subject to **any civil liability in a cause of action of any kind** for releasing or receiving any information pursuant to Section ...1874.2.”
(CIC § 1874.4 and CCC § 47)

I mmunity Statutes

Vehicle Claim

- BUT again... You expect plaintiff's counsel to:
 - Proffer such reports as **evidence the company “knew”**, as of filing the Report, **that the insured had “committed a criminal or fraudulent act”**.
 - Argue that the report is evidence that **company had made up its mind** by that point, and all further action on the file was to develop proof to support such a defense (rather than a continuing objective search for the truth).
 - Argue they are not trying to hold the insurer liable “for releasing or receiving any information...” ..., but that instead they are “only” proffering the **evidence to show the company's state of mind, and unreasonable conduct**, in the “bad faith” case

Immunity Statutes

Arson Report

- “In the absence of fraud or malice,
no insurer ... who (a) furnishes information whether oral or written, pursuant to this article, or (b) assists in any investigation conducted by an authorized agency, **shall be liable for damages in a civil action.**”
(CIC § 1875.4 and CCC § 47)

I mmunity Statutes

Arson Report

- IF the Reporting is managed properly, this one should give reasonable comfort and protection....
- Just need **“reason to suspect”** – that **fire was ARSON...**
- NOTHING re **“who”**....

I mmunity Statutes

Workers Comp

- “**No insurer** ... who (a) furnishes or receives information ... or (b) assists in any investigation of a suspected violation ... **shall be subject to any civil liability** ... where the insurer ... acts in good faith, without malice, and reasonably believes that the action taken was warranted by the then known facts, obtained by reasonable efforts.”
- (CIC § 1877.5 and CCC § 47)

I mmunity Statutes

Workers Comp

- BUT again... You can reasonably expect insured's / plaintiff's counsel to:
 - Argue that the report is evidence that **company had made up its mind** by that point, and all further action on the file was to develop proof to support such a defense (rather than a continuing objective search for the truth).
 - Argue they are not trying to hold the insurer liable "for releasing or receiving any information..." ..., but that instead they are "only" proffering the **evidence to show the company's state of mind, and unreasonable conduct**, in the "bad faith" case

Immunity Statutes

for CIC 791.13

- “No cause of action in the nature of defamation, invasion of privacy or negligence shall arise against any person for disclosing personal or privileged information in accordance with this chapter...; provided, however, this section shall provide no immunity for disclosing or furnishing false information with malice or willful intent to injure any person.”
- (CIC § 791.21 and **CCC § 47**)

Immunity Statutes for CIC 1873 requests

- “In the absence of fraud or malice, no insurer ... shall be subject to **any civil liability *for libel, slander, or any other relevant cause of action*** by virtue of releasing or receiving any information pursuant to Section 1873 or 1873.1.”
- (CIC § 1873.2 and CCC § 47)

Reporting / Info Sharing

CONTENT - **DANGER ZONE!!**

- Attorney-Client Privilege
- Several practical issues re file review / redaction / privilege pull
- If you don't protect it, you **LOSE IT!!!**

C CONTENT

GUARD AGAINST the DANGERS

- “Echo” the statutory reporting **T**RIGGER language
- Apply your facts to that reporting **T**RIGGER
 - i.e. industry recognized Red Flags
 - Make clear you are responding to a mandatory reporting requirement...
- **TIMING IS IMPORTANT**
 - (Assess: Risks vs. Benefits)

CONTENT – *If reporting* *before a claim decision has been made:*

- Emphasize **goal** is to reach **fair, reasonable, and appropriate resolution** of the claim
- **Consistent with policy and law**
- Make clear **investigation continuing**
- **No conclusions yet** reached
- Emphasize **intent to objectively collect** and
- **Thoroughly and fairly evaluate**
- **All** relevant evidence

CONTENT – How do you GUARD AGAINST the DANGERS?

- Carefully draft an **artful cover letter**:
 - Expressly reference and state your **reliance on the mandating statute** and relevant **immunity statutes**
 - **OBJECTIVE FACTS, NEUTRALLY PRESENTED**
 - Avoid overly broad, generalized conclusions
 - Include inculpatory AND exculpatory evidence?
- Appoint the **right person to sign** the report

You should now understand "T – E – C – I" ...!

TRIGGER?

Is the reporting duty **MANDATORY** or
PERMISSIVE?

ENTITY?

CONTENT?

IMMUNITY?

Want a copy of this presentation?

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