ILLINOIS
Association of
DEFENSE TRIAL
COUNSEL

December 19, 2019

Peter L. Rotskoff
Attorney Registration and Disciplinary Commission
of the Supreme Court of Illinois
One Prudential Plaza
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Dear Mr. Rotskoff,

Introduction

Thank you for the opportunity to participate and discuss the proposed insurance payee notification rule. The Illinois Association of Defense Trial Counsel ("IDC") commends the ARDC Trust Account Regulation Committee for thoroughly researching the issue and proactively pursuing this fraud prevention measure. IDC has similarly reviewed and considered this proposal and offers the following thoughts.

IDC believes that all parties are best protected when litigants are treated fairly by the courts, by their opponent and by their own attorney. When settlements are paid to attorneys who then fail to turn over the appropriate amounts of the settlements to their clients, the whole justice system is damaged. Therefore, IDC agrees that it is important to take steps to prevent this from occurring. IDC also notes that the overwhelming majority of attorneys representing claimants are zealous advocates for their clients and treat them with the utmost good faith. This rule is aimed at the small minority who fail to meet these standards.

However, IDC is concerned that if the proposal is adopted as written, with no modifications, it could create unacceptable risk for insurers and for insurers' attorneys, for the reasons discussed below. Therefore, IDC will support the proposal if is modified to address the following concerns:

1. While recognizing that the rule may be necessary, IDC agrees that direct communications between insurers or their attorneys and a represented plaintiff should be kept to a minimum and should be designed in a manner to avoid disrupting the plaintiff's attorney client relationship. Additionally, since a requirement that insurers or attorneys retained by insurers have direct contact with the plaintiff, without first getting the permission of the plaintiff's attorney, the rule must make it clear that such communications will not be considered a violation of the Illinois Rules of Professional Responsibility. Thus, the rule must make it clear that the communication can come either from the insurer or counsel retained by the insurer. We would also recommend that the Illinois Supreme Court consider amending the Rules of Professional Responsibility to make it clear that communications required by this new rule will not be considered to violate the rule preventing communication directly from counsel for one party to a represented party.

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The proposed rule states that the "insurer or its representative" shall provide notice to the claimant. In practice, defense attorneys commonly deliver settlement checks. The ARDC Trust Account Regulation Committee concludes that Rule 4.2 of the Illinois Rules of Professional Conduct would permit this contact as one "authorized by law." Yet, we remain concerned that the phrase "authorized by law" may not be sufficiently clear in the context of a payee notification rule enacted by the Illinois Department of Insurance.

If the rule is enacted by the legislature as a statute, then the Rule 4.2 "authorized by law" requirement should be satisfied. Still, IDC would suggest that the proposed rule language be changed to use the phrase "insurer or its attorney, an attorney retained to represent its insured, or other representative" in order to avoid any potential misunderstanding of the term "other representative."

If the payee notification rule is enacted as an administrative rule by the Illinois Department of Insurance, then a question may arise as to whether the insurance administrative rule authorizes attorneys, including outside counsel, to have direct contact with represented parties. The phrase "law" includes a "civil or penal statute, supreme court rule, administrative rule of regulation or tenet of professional code." *Fellhauer v. City of Geneva*, 142 Ill. 2d 495, 506 (1991) citing *People v. Weber*, 133 Ill. App. 3d 686, 690-91 (5th Dist. 1985). However, the power to supervise and administer attorneys rests with the judiciary. *People ex rel. Baricevic v. Wharton*, 136 Ill. 2d 423, 432-33 (1990) (citations omitted). IDC submits that a rule promulgated by the Illinois Supreme Court would be the best instrument to authorize direct contact between counsel and a represented party for the purpose of complying with payee notification rules.

IDC also has concerns that this rule may lead claimants to directly respond to an insurer or defense attorney, which could constitute an unauthorized communication with persons represented by counsel. See Ill. R. Prof'l Conduct R. 4.2 cmt. 3 (eff. July 1, 2013) ("The Rule applies even though the represented person initiates or consents to the communication."). In Massachusetts and Virginia, payee notification rules specifically allow insurers to tell claimants to contact their own attorney with questions about the notification. A similar modification here would provide valuable guidance and help maintain the confidence of the claimant's own attorney-client relationship with claimant's counsel.

To further address these concerns, IDC suggests that the ARDC recommend an addition to Rule 4.2 of the Illinois Rules of Professional Conduct to clarify that communications authorized by law include those authorized under payee notification rules. This modification would provide several benefits and reduce the potential for a different ruling by Illinois courts and federal courts interpreting Rule 4.2.

2. Insurers and their representatives will normally not have direct and current information concerning the plaintiff's contact information. Therefore, for this rule to work, at the time a judgement or settlement is entered, the plaintiff's attorney must be required to provide the plaintiff's contact information to the insurer or the insurers' representatives, and the rule must be clear that an insurer and its representatives may rely on the information received from the Plaintiff's counsel or pursuant to the settlement of judgment documents. Notably, several jurisdictions provide a specific procedure for payee notification. For example, Connecticut, Delaware, Maryland, Massachusetts, Nevada, and New Jersey all provide for notice to be mailed to the last known address of the claimant. In Virginia, notice can be sent to a physical address or emailed to an address provided by the claimant. The IDC suggests specific guidance as to how notice should be provided by the insurer or representative.

3. The rule should make it clear that it is not creating a private right of action for the plaintiff if the insurer either fails to provide notice of the settlement to the plaintiff, or if, for some reason, the notice does not actually reach the plaintiff. Moreover, it should be clear that the rule is not establishing a standard of care for insurers or imposing any duty on insurers to claimants, so that a failure to provide such notice is a breach of the standard of care that could lead to a negligence action. In cases where an attorney does not fairly distribute the proceeds of a settlement or judgment, the claimant's attorney is at fault, not the insurer which paid the settlement.

4. The rule should also specify exactly what the insurer or its agent should state in the letter. It would be advisable for the ARDC or the Department of Insurance to provide sample letter(s) that would be considered to conform with the rule, including language that notice per this rule is not meant to constitute legal advice.

5. Based upon the overview provided, Client Protection Program payouts predominantly relate to personal injury and workers' compensation claims, not property damage claims. Unless additional data indicates that property damage claims represent a significant portion of settlement conversion claims, IDC proposes that the rule be expressly limited to injury claims. This modification would prevent any confusion that might arise as to whether casualty claims made by a natural person include dissimilar claims such as property damage subrogation claims involving an insured's deductible.

6. The Georgia and Virginia rules expressly provide that the payee notification rule does not operate to invalidate the settlement. This provision makes it clear that payee notification is not a condition precedent of the settlement agreement, and IDC recommends similar language in the proposed payee notification rule.

Suggested Modifications to the Proposed Rule

In addition to the statutory change and the suggested change to the Illinois Rules of Professional Conduct discussed above, IDC proposes the following language for an Illinois insurer payee notification rule:

A) Upon the payment of $2,000 or more in settlement or satisfaction of any third-party liability ~~or casualty~~ personal injury claim or workers' compensation claim, the insurer, ~~or its~~ directly or through its attorney, an attorney it has retained to represent its insured, or other representative shall provide written notice to the claimant where: (1) the claimant is a natural person, and (2) the payment is delivered to the claimant's lawyer or other representative. Notice to the claimant shall be made at the same time payment is made and may be provided through regular mail to the address of the claimant provided by the claimant's attorney at the time of settlement or judgment. Notice may also include a statement that the insured may not be entitled to receive the full amount of the payment, and that the claimant should contact the claimant's attorney to obtain further information.

B) This Rule shall not create a cause of action for any person or entity, other than the Illinois Department of Insurance, against the insurer, its attorney, an attorney it retained to represent its insured, or other representative based upon the failure to serve notice as required by this rule or the defective service of notice; nor shall this rule establish a defense for any party to any cause of action based upon the failure of the insurer or its representative to serve notice as required by this rule or the defective service of notice. Further, failure to provide notice in accordance with subsection (1) shall not invalidate or in any way affect the settlement for which the payment was made by the insurer. Nothing in this rule is intended to create a duty on the part of the insurer toward the claimant.

Additional Discussion

Without responding in full to ITLA's November 4, 2019, correspondence, the IDC is compelled to briefly address certain inflammatory, incorrect statements. It is troubling that when asked to comment on fraud perpetrated by claimant's attorneys, ITLA fails to propose any solution and inexplicably insists that insurers advocate against justice. Illinois insurers and their attorneys operate in a regulated environment. The Illinois Supreme Court, Illinois Department of Insurance, and numerous other public entities and private organizations, including insurers and defense attorneys, work to provide Illinois claimants with a fair, efficient system to resolve disputed claims.

Conclusion

The IDC agrees that the purpose of the payee notification rule would protect claimants and promote confidence in the legal profession through fraud prevention. The proposed rule, with the statutory and rule modifications discussed above, is consistent with the ARDC's mission and purpose, as well as the IDC core value of promoting and supporting the highest ethical standards within the legal profession. The IDC thanks the ARDC for the opportunity to offer comments in support of this proposal, which appropriately aims to prevent fraud in the legal profession.

Very truly yours,

William K. McVisk

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President
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