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## Insurance Claims Fraud Problems and Remedies

Robert W. Emerson

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# Insurance Claims Fraud Problems and Remedies

ROBERT W. EMERSON\*

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*"Down went the owners - greedy men whom hope of gain allured:  
Oh, dry the starting tear, for they were heavily insured."*

*W. S. Gilbert, The 'Bab' Ballads, "Etiquette" (1871).*

## I. INTRODUCTION

Both legal experts and lay people share a common understanding of the concept of fraud.<sup>1</sup> Presumably, they agree that law should

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1. This article uses the term "fraud" much the same way lay persons and lawyers use it. See, e.g., WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 490 (1988) (defining fraud as the "intentional perversion of truth in order to induce another to part with something of value or to surrender a legal right"); FLA. STAT. ch. 817.234(1)(A)(1) (1991) (defining a fraudulent insurance claim as involving "intent to injure, defraud, or deceive" an insurer with a statement that contains "false, incomplete, or misleading information concerning any fact or thing

serve to prevent, curtail, compensate for, or punish fraud. The creation of the law via statutes and judicial opinions, as well as its implementation through lawsuits and criminal prosecutions, is intended to advance these goals. An essential premise in the law of fraud is that people who commit fraud willfully violate well-established legal and moral values. Fraud is more than just a typical civil wrong,<sup>2</sup> such as a breach of contract or the tort of negligence, because it involves intentional, dishonest behavior<sup>3</sup> and often is also a crime. Therefore, civil fraud law goes beyond determining liability and providing restitution to wrongfully injured parties; it ventures into issues more typically found in criminal law: deterrence and punishment. As with other types of intentional torts, the tortfeasor who commits fraud must disgorge ill-gotten gains or otherwise restore the *status quo ante*. Moreover, the misconduct should lead, whenever appropriate, to an award of exemplary (punitive) damages in addition to the compensatory award.

However, such an understanding of the law of fraud, and of its goals, finds little expression in practice. This is particularly true for areas like insurance claims fraud, where theory is not nearly as controversial as the practical concerns of prevention and detection. Indeed, case law and statutory reform could serve to reduce incentives for insurance claims fraud, increase the chances to detect it, and strengthen the level of punishment. However, the players in the system — the insurers' counsel, defense attorneys, plaintiffs' lawyers, claims personnel, Department of Insurance fraud investigators, and insurance fraud prosecutors<sup>4</sup> — could still hinder progress.

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material to [a] claim"); MO. ANN. STAT. § 375.991(1) (Vernon Supp. 1991) (defining a fraudulent insurance act as "knowingly and with intent to defraud present[ing to] an insurer . . . any written statement as part of, or in support of, . . . a claim for payment or other benefit pursuant to an insurance policy . . . which [the presenting party] knows to contain materially false information"); N.J. REV. STAT. § 17:33A-4(a)(1) (1985) (defining an insurance fraud violation as presenting "any written or oral statement as part of, or in support of or opposition to, a claim for payment or other benefit pursuant to an insurance policy, knowing that the statement contains any false or misleading information concerning any fact or thing material to the claim").

Both at law and in lay terms the definition of fraud encompasses broad concepts such as deceit, trickery, and cheating. See BLACK'S LAW DICTIONARY 594 (5th ed. 1979); 6 OXFORD ENGLISH DICTIONARY 152 (2d ed. 1989); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 762 (2d ed. 1987); WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 555 (2d ed. 1984). Fraud is thus not a technical term, but a basic concept generally understood by most people.

2. See BLACK'S LAW DICTIONARY 27 ("Actionable fraud"), 223 ("Civil fraud"), 594-95 ("Fraud") (5th ed. 1979).

3. See *id.* at 594 (stating that fraud is "[a]n intentional perversion of the truth").

4. All these players have been surveyed, and their responses have been incorporated into this article. For discussion of *public* attitudes—the views of insurance consumers—see

This article discusses one type of fraudulent activity: automobile insurance claims fraud.<sup>5</sup> It grows out of a study performed at the University of Florida's Insurance Research Center. While the study specifically focused on the state of Florida, its findings and conclusions are applicable to auto insurance fraud nationwide, and even to insurance fraud generally.<sup>6</sup>

The article first discusses types of automobile insurance fraud and relevant statutes and cases. It shows that claimants have strong economic incentives to pad their auto insurance claims or even to file completely fictitious claims. Inflation of damages, we see, may at times be an accepted negotiating tactic, particularly with respect to uninsured motorist and bodily injury liability. Yet, these exaggera-

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FLORIDA INS. RESEARCH CENTER, UNIVERSITY OF FLORIDA, AUTOMOBILE INSURANCE FRAUD STUDY 72-111 (1991) [hereinafter AUTO INS. FRAUD STUDY]. Complete copies of the study, including a closed-claims analysis, the public poll, and appendices containing the surveys and complete tabulations of responses, are on file with the author and the Insurance Research Center, College of Business Administration, University of Florida, Gainesville, Florida.

5. The California legislature declared as follows in 1989 Cal. Stat., c. 1119, § 3 (codified at CAL. INS. CODE § 1871(b) (West Supp. 1991) (emphasis added)):

[I]nsurance fraud is a particular problem for automobile policyholders; fraudulent activities account for 15 to 20 percent of all auto insurance payments. *Automobile insurance fraud is the biggest and fastest growing segment of insurance fraud and contributes substantially to the high cost of automobile insurance with particular significance in urban areas.*

See *infra* notes 24-25, 29-30 and accompanying text.

While this article focuses on fraud by claimants, the author recognizes that insurers are not blameless; they, too, can cheat. Insurers may defraud their policyholders in any number of ways, such as materially altering the risk of the firm after the contract has been formed and purposely delaying or denying altogether the payment of legitimate claims. However, competitive markets and vigilant regulation discourage systematic actions of this type. For recent examples of fraud within insurance companies, see Jon E. Crosby, *Insider Frauds*, FLA. UNDERWRITER, Apr. 1990, at 10; Laura Mazzuca, *License to Steal*, BUS. INS., Jan. 2, 1989, AGENT/BROKER TOPICS, at 34A; Douglas McLeod, *Former Insurer Exec Faces New Indictment for Fraud*, BUS. INS., May 4, 1987, AGENT/BROKER TOPICS, at 2; Phil Zinkewicz, *In Search of a Better Mousetrap: Insurance Fraud*, 1 INS. REV. 36 (Feb. 1989); *Dept. of Insurance: Gallagher Fines Nine Insurance Companies \$30,000*, BUS. WIRE, May 18, 1989, available in LEXIS, Nexis Library, Wire file; see also *infra* note 45.

6. All forms of insurance create moral hazards between insureds and their insurers. Insureds have an incentive to minimize their premium and to maximize the benefits received per premium dollar spent. Insurance, in short, tends (1) to attract purchasers who have reason to know they are more vulnerable to an insured risk than the general population (adverse selection), and (2) to reduce the insureds' incentives to behave honestly and to take precautions against covered risks (moral hazard). See LEWIS E. DAVIDS, *DICTIONARY OF INSURANCE* 17-18, 304 (7th rev. ed. 1990) (defining "adverse selection" and "moral hazard"). Therefore, insurers establish underwriting procedures, design their contracts, and adjust claims in such a manner as to protect themselves against policyholder dishonesty. For a more comprehensive examination of this subject, see CAROL ANNE HEIMER, *REACTIVE RISK AND RATIONAL ACTION: MANAGING MORAL HAZARD IN INSURANCE CONTRACTS* (1985); NEIL A. DOHERTY, *CORPORATE RISK MANAGEMENT: A FINANCIAL EXPOSITION* 20 (1985).

tions may constitute misrepresentations,<sup>7</sup> and they often escape the attention of claims personnel. In other words, the economic disincentives to commit fraud, such as the risk of getting caught, are usually small.

The article next reviews countermeasures against fraud, including both state and private enforcement efforts. It shows that fraud is inadequately detected, insufficiently reported, lackadaisically prosecuted, and lightly punished.<sup>8</sup> While economic crime specialists zealously pursue prosecution, such expertise remains rare and white-collar crime prosecutorial units are few in number. Most prosecutors lack the experience, knowledge, or interest to prosecute cases of insurance fraud aggressively. When there are convictions, effective alternative sentencing must be available, given the practical restrictions of overcrowded jails.

Lastly, the article analyzes survey responses from claims personnel, defense attorneys, plaintiffs' attorneys, insurers' in-house counsel, prosecutors, and governmental investigators of fraud. As one might expect, claims personnel and plaintiffs' attorneys often oppose each other systematically, not just on individual cases. The survey responses, however, point to some surprising areas of agreement. Common interests of these two key groups in the insurance process could be a basis for budgetary, legislative, and educational reforms designed to combat automobile insurance fraud.

## II. PURPOSE, METHODOLOGY AND DATA SOURCES

The purpose of polling claims personnel, defense attorneys, plaintiffs' attorneys, fraud investigators, prosecutors, and insurers' in-house counsel was to develop information about these groups' estimates and attitudes on claims fraud and potentially related issues.<sup>9</sup> It makes sense to study automobile insurance fraud by ascertaining the

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7. If an exaggeration is a statement of fact rather than an opinion as to value, it may constitute a fraudulent act. *See, e.g.*, BLACK'S LAW DICTIONARY 594 (5th ed. 1979) (defining fraud as "[a] false representation of a matter of fact").

8. Even if erroneous, a perception of laxity on the part of the insurance industry can encourage would-be defrauders to engage in misrepresentation. *See infra* Appendix, Table 12 (showing that almost one-third of respondents with an opinion wrote that fraud cases go unreported because the insurers believe the government does not pursue these cases. Furthermore, almost one-eighth of the respondents wrote that the government lacks the resources required to pursue insurance fraud cases).

9. All of the questionnaires were to be returned by the respondents directly to the Florida Insurance Research Center, University of Florida. The questionnaires gave the respondents the option to furnish their names and telephone numbers, but assured them complete confidentiality. The names and numbers were requested in case the research center needed to contact the participants.

actions, attitudes and perceptions of these practitioners, because improvement of fraud law must come in the form of prevention, detection, and punishment, not in reformulation of longstanding legal principles.<sup>10</sup>

The surveys were designed in close consultation with several experts in automobile insurance matters, including representatives from each of the groups surveyed. In addition to multiple choice responses, the surveys asked for and received written comments and open-ended responses. The author interviewed numerous key participants in the fight against insurance fraud, most notably investigators and prosecutors.

The claims personnel survey was sent to the approximately 160 insurance companies licensed to provide auto insurance in Florida. Each insurer was asked to randomly select twenty percent of its claims adjusting work force to complete the survey. Four hundred of Florida's 4,623 licensed insurance company adjusters returned questionnaires.<sup>11</sup>

In order to survey attorneys with experience in auto insurance claims, the author obtained current mailing lists from two groups: the Florida Defense Bar, and the Academy of Florida Trial Lawyers. The defense bar list contained approximately 800 names, and each person received a survey. The Academy list contained about four times as many names, which were randomly sampled so that an equal number of plaintiffs' attorneys and defense attorneys would receive the surveys. Two hundred thirty-four defense attorneys and 177 plaintiffs' attorneys completed and returned the survey.<sup>12</sup>

These surveys, as well as those of in-house counsel,<sup>13</sup> prosecutors,<sup>14</sup> and investigators,<sup>15</sup> were completed from late April to late July 1990. Each survey expressly guaranteed confidentiality to the respon-

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10. As previously stated, there is less controversy regarding the theory of fraud law than there is concerning the law's application. *See supra* text accompanying note 4.

11. Telephone Interviews with John Derby & Don Powers, Florida Department of Insurance, Bureau of Agent and Agency Licensing (Nov. 14, 1990) (figure of 4,623 adjusters is as of July 31, 1990). The 400 represent 8.7% of Florida's adjusters. The response by exactly 400 adjusters means that with at least 95% probability their collective responses to each question coincide with the views of the total population of adjusters, subject to a margin of error of less than 5%.

12. For statistical purposes, we can assert the following with at least 95% probability: The collective responses to each question asked of the defense lawyer sample coincide with the views of the total defense lawyer population, with a margin of error of less than 6%; the collective responses to each question asked of the plaintiffs' lawyer sample coincide with the views of the total plaintiffs' lawyer population, with a margin of error of less than 7%.

13. AUTO INS. FRAUD STUDY, *supra* note 4, at 119-20.

14. *Id.* at 120.

15. *Id.*

dents. Also, each survey instructed the individual respondent to mail the completed survey directly to the University of Florida's Insurance Research Center. These safeguards enabled the respondents to answer independently and without pressure from their employers, clients, or governmental superiors.

### III. THE LEGAL ENVIRONMENT OF AUTOMOBILE INSURANCE FRAUD

#### A. *The Problem in General: Condoning Attitudes, Fraudulent Acts, Poor Responses, and Miscreant Professionals*

A significant part of the general public distrusts and dislikes the insurance industry.<sup>16</sup> Many consumers believe that they benefit from their policies only if and when they collect on an insurance claim.<sup>17</sup> Perhaps as a result, they may consider it acceptable to inflate legitimate claims and even to file for fictitious losses.<sup>18</sup> From their view-

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16. For example, in a random telephone survey of 614 Florida households in February 1990 by the University of Florida's Bureau of Economic and Business Research, 23% of the respondents believed that insurance companies are dishonest, make alarmingly high profits, or fit both categories. (A complete description and analysis of that public survey is found in AUTO INS. FRAUD STUDY, *supra* note 4, at 72-111.) Insurance officials concede that they have a "very, very poor" public image and that people view insurers as "big fat cats." Michael Allen, *More Car Owners Are Scheming to Cheat Insurance Companies as Economy Falters*, WALL ST. J., Oct. 10, 1990, at B1 (quoting American Insurance Association Vice-President Janet Bachman).

In their *individual* dealings with insurers and adjusters, however, the public may generally be quite satisfied. Wallace R. Hanson, *Claims Adjusters Take Unwarranted Abuse*, NAT'L UNDERWRITER, PROP. & CASUALTY/EMPLOYEE BENEFITS ED., Oct. 2, 1989, at 24 (citing a Consumer Reports survey in which 221,000 readers who had filed auto insurance claims within the last three years responded; approximately 60% stated that they were "completely satisfied" with the way their claim was handled, and about another 30% were either "very satisfied" or "fairly well satisfied"; only 10% chose one of the negative answers — "somewhat dissatisfied," "very dissatisfied," or "completely dissatisfied"). A much smaller, but perhaps more representative, sample of the American people (i.e., a group not limited to Consumer Reports readers) consisted of 1,448 persons age 18 and over, chosen randomly. That poll found 74% satisfied with how their insurer handled a recent *home* insurance claim. *Id.*

17. Allen, *supra* note 16 (noting that in 1981 and 1989 polls, 20% and 25% of the respondents, respectively, agreed that, "[i]t's all right to increase the amount of your insurance claim . . . to make up for the insurance premiums you paid when you had no claims"). The real value of insurance policies lies in their shifting of risk from the insured to the insurer; that value does not depend on actual losses or pay-outs.

18. See also AUTO INS. FRAUD STUDY, *supra* note 4, at 72-111. Fourteen percent of the respondents openly stated that policyholders deserve the money they collect through false claims. About 24% excused such fraud on the grounds that policyholders need the money. Eighty-five percent of the respondents would defraud an insurance company for \$500 or more absent any risk of getting caught. *Id.* at 82-83. The actions condoned by large numbers of the surveyed consumers include exaggerating medical expenses to increase one's settlement for pain and suffering (37%), inflating the repair bill estimates (38%), concealing traffic tickets and accidents on insurance applications in order to lower the premiums (37%), pretending that the insured automobile was stolen (17%), and staging accidents (15%). *Id.* at 99 (table) &

point, such fraud only cuts into insurers' excessive profits.<sup>19</sup> They ignore, however, the real problem: Because premium increases partly incorporate fraud costs, insurance fraud hurts all policyholders, not just insurers. Also, the possibility of fraud causes distrust between insurer and insured and thus may poison the claims process even when both sides try to be fair. Finally, the impact of insurance fraud extends beyond a business' or consumer's "bottom line." Although thought of as a non-violent, economic crime, insurance fraud can lead to, or be part of, unlawful *violent* activities.<sup>20</sup>

The permissive public attitude may beget or reflect fraudulent activities.<sup>21</sup> According to many insurance industry representatives, fraud has become quite common among insurance claimants<sup>22</sup> and professionals in related activities.<sup>23</sup> Studies seem to confirm the hypothesis: Fraud is rampant.<sup>24</sup> Nevertheless, many insurance com-

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79-93 (analyzing how respondents' estimates of fraud correspond to their own attitudes on the subject).

19. See *supra* note 16.

20. Jon E. Crosby, *Insurance Fraud—More Than an Economic Crime*, FLA. UNDERWRITER, June 1990, at 32, 36; see also *Fraudulent Auto Accidents Viewed as a Thriving Racket*, N.Y. TIMES, Nov. 29, 1985, at B25 (a participant in staged car accident insurance fraud schemes quit "when he realized that innocent people were being [physically] injured").

21. It also undergirds public attempts to reduce overall insurance rates, such as California's Proposition 103 (codified at CAL. INS. CODE § 1861.01 -.16 (West Supp. 1991)). See *Calfarm Ins. Co. v. Deukmejian*, 771 P.2d 1247 (Cal. 1989); see also *Guaranty Nat'l Ins. Co. v. Gates*, 916 F.2d 508 (9th Cir. 1990) (comparing a Nevada insurance rate rollback statute with the California scheme). For a thoughtful analysis of expansive liability concepts and their relationship to insurance problems such as lessened availability, affordability, and scope of coverage, see George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987).

22. Robert G. Knowles, *Florida Nets \$500 Million Fraud Ring*, NAT'L UNDERWRITER, PROP. & CASUALTY/EMPLOYEE BENEFITS ED., Jan. 15, 1990, at 1; Mazzuca, *supra* note 5; Paul E. Tracy & James A. Fox, *A Field Experiment on Insurance Fraud in Auto Body Repair*, 27 CRIM. 589 (Aug. 1989).

A large portion of the public also seems to believe false claims are very common. ALL-INDUSTRY RESEARCH ADVISORY COUNCIL, PUBLIC ATTITUDE MONITOR 19 (1989) (in a public survey, 42% of the respondents stated that false claims in auto insurance are very common; this percentage was higher than for any other type of insurance).

23. E.g., auto mechanics, medical specialists, attorneys, adjusters, or other professionals assisting with claims. See *United States v. Jacob*, 502 F. Supp. 1221 (D. Md. 1980) (lawyer, doctor, and insurance adjuster ran a fraud scheme); *State v. Dawson*, 290 So. 2d 79 (Fla. 3d DCA 1974) (attorney faced criminal charges for representing clients in auto fraud cases against insurance companies); Ann G. Clarke, *The War Insurers Must Win*, 87 BEST'S REVIEW, PROP. & CASUALTY/EMPLOYEE BENEFITS ED. 51 (June 1986).

24. In Florida, fraud accounts for approximately 13.6% of *all* automobile insurance claims payments. AUTO INS. FRAUD STUDY, *supra* note 4, at 25 & 69. In Massachusetts, estimates have come in the same range — 13% to 20% of the annual \$1.5 billion in car insurance claims. Marie Gendron, *Insurance Fraud Bureau Lauded by Pols, Activists*, BOSTON HERALD, Sept. 27, 1989, at 29. The national figure has been estimated to be 10% to 15% of all auto insurance claims dollars. Allen, *supra* note 16 (citing Insurance Information Institute figures). The United States Chamber of Commerce has estimated that 10% of *all* insurance



panies hesitate to investigate, refer for prosecution, or take other countermeasures against fraud.<sup>25</sup> This reluctance may be due to a social aversion against prosecuting white collar crimes.<sup>26</sup> Furthermore, insurers have been able to pass along the cost of claims fraud to consumers in the form of higher premiums.<sup>27</sup>

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claims contain some fraud. Robert E. Hoyt, *The Effect of Insurance Fraud on the Economic System*, 8 J. INS. REG. 304, 305 (1990). Of the different types of insurance, fraud seems to affect automobile insurance the most. *Id.* at 310 & n.2 (noting that the three most frequently reported types of fraud in New Jersey each involve automobile insurance, and that a startling 27% of all claims investigated by a national anti-fraud organization, the Insurance Crime Prevention Institute, involve just one particular scheme—staged automobile accidents).

Experts have estimated fraud involving various types of automobile insurance coverage. An independent report prepared for the Automobile Insurers Bureau of Massachusetts, HERBERT I. WEISBERG & RICHARD A. DERRIG, *BODILY INJURY LIABILITY CLAIMS IN MASSACHUSETTS: AN INITIAL REPORT ON THE AIB BASELINE STUDY 6-7* (January 19, 1990), examined 426 bodily injury claims in Massachusetts arising from accidents occurring between July 1, 1985 and June 30, 1986. (The authors began with 597 files, and then excluded 123 PIP subrogation payment claims, as well as 48 claims from the city of Lawrence, Massachusetts, due to widespread suspicion that the city was "host to an extensive fraud operation."). The study found that 47 claims (11% of the total sample) contained one or more of five fraud elements: duplicate claims for a single injury, bills submitted for treatment not rendered, non-existent or pre-existing condition unrelated to the accident, deliberate misrepresentation of lost wages, or other material misrepresentations. *Id.* at 18. Altogether, 31.7% of the claims were cited for fraud (apparent fraud exclusively (2.6%), apparent "build-up" exclusively (20.7%), or both (8.5%)). *Id.* at 19. "Build-up" was defined as "an attempt on the part of the claimant and/or health care provider to inflate the damages for which compensation is being demanded." *Id.*; see also *infra* note 29 (concerning a 1990 closed claims study determining that 13.6% of claims payments by Florida private passenger auto insurers were on fraudulent claims).

Some recent auto insurance studies have focused on repairs and theft. Tracy & Fox, *supra* note 22, at 601, concluded that the average repair estimate, when covered by insurance, was 32.5% higher than for noncovered repairs. A Massachusetts task force estimated that fraud was involved in 25% of all reported car thefts. Susan E. Ghezzi, *A Private Network of Social Control: Insurance Investigation Units*, 30 SOC. PROB. 521 (1983) (citing GOVERNOR'S TASK FORCE ON AUTOMOBILE THEFT, *AUTO THEFT IN MASSACHUSETTS - AN EXECUTIVE RESPONSE* (Boston: Gov't Printing Office 1980)). A more current, nationwide estimate is that 15% of all auto theft claims are fraudulent. Philip J. Crepeau, *Photo Inspection Helps Deter Auto Fraud*, NAT'L UNDERWRITER, PROP. & CASUALTY/EMPLOYEE BENEFITS ED., Sept. 18, 1989, at 18; Peter Van Aartrijk, *Insurance Fraud Outlined*, NAT'L UNDERWRITER, PROP. & CASUALTY/EMPLOYEE BENEFITS ED., Feb. 29, 1988, at 4 (noting that in 1986 nearly 70,000 motor vehicles were stolen in Florida alone); see also Barbara Campbell, *Fraud Sting Brings Charges Against 170*, UPI REGIONAL NEWS - MICHIGAN, July 21, 1986 (reporting insurance industry estimates that about 30% of reported auto thefts nationwide are fraudulent).

25. See, e.g., Guy E. Burnette, *Defending Against Insurance Fraud*, THE BRIEF - A.B.A. SEC. TORT & INS. PRAC. 43 (Summer 1989); K.M. Chrysler, *How Auto-Insurance Thieves Pick Your Pocket*, U.S. NEWS & WORLD REPORT, Feb. 23, 1981, at 42; Clarke, *supra* note 23, at 60; Telephone Interview with Jed George, Manager of Special Investigations Unit, Region III, Government Employees Ins. Co. (GEICO) (May 18, 1992); Telephone Interview with Aaron Mazen, Director, Insurance Fraud Bureau, New York Department of Insurance, and Treasurer/Past President of the International Association of Insurance Fraud Agencies (May 18, 1992).

26. Tracy & Fox, *supra* note 22, at 589-90.

27. Clarke, *supra* note 23, at 51, 56; *Fraudulent Auto Accidents Viewed as a Thriving*

If various estimates of the cost of fraud<sup>28</sup> are accurate, fraudulent claims substantially increase the insurer's cost of doing business.<sup>29</sup> Knowledgeable claimants — that is, people who have filed more than one insurance claim — tend to have less scruples than do novices

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*Racket*, *supra* note 20. Premium increases do not lead to a correspondingly large drop in demand for policies or in types or amounts of coverage. The demand for automobile insurance seems to maintain price *inelasticity*, especially because most states require some form of automobile insurance. Hoyt, *supra* note 24, at 308.

28. Chrysler, *supra* note 25 (1981 estimate that auto insurance fraud annually costs insurers, and ultimately policyholders, \$3 billion—as much as one-third of car insurance premiums); Clarke, *supra* note 23 (1986 insurance industry estimates that \$3.5 billion paid annually in the United States covers fraudulent or partially fraudulent claims—approximately 15% of all paid claims); Jon E. Crosby, *We Need to Change Attitudes*, FLORIDA UNDERWRITER, Mar. 1990, at 16 (estimating that annual, nationwide insurance fraud costs amount to 15 to 33 cents of every premium dollar and between \$50 billion and \$100 billion *in toto*, counting the cost of adjusting, investigating, litigating and paying fraudulent claims); Vicki Quade, *Insurance Fraud: Bogus Car Claims Stir Action*, 69 A.B.A.J. 1205 (1983) (estimating that stemming fraud could lower insurance premiums by at least 8%, and noting that insurer sources estimate that 10% of all car claims are fraudulent); Robin Yocum & Catherine Candisky, *Insurance Scams Cost Consumers Billions*, COLUMBUS DISPATCH, Dec. 18, 1988, at 1A (graph showing that 25% of comprehensive auto insurance is spent on fraud); Zinkewicz, *supra* note 5 (remarking that speakers at a meeting of the International Association of Insurance Fraud Agencies and the National Association of Insurance Commissioners “pointed out that insurance fraud, ranging from mundane cases of padded claims to sophisticated incidents of organized criminal activities, costs the insurance industry about \$16 billion a year”); *White Collar Justice*, 19 CRIM. L. REP. (BNA) 3 (April 14, 1976) (estimating the annual cost of insurance fraud to be \$1.5 billion to insurers and \$0.5 billion to policyholder victims); *see also* Catherine Candisky & Robin Yocum, *Insurance Companies Wage War on Fraudulent Claims*, COLUMBUS DISPATCH, Dec. 19, 1988, at 1A (estimating that total insurance fraud costs to insurers are at least \$66 billion a year); Crepeau, *supra* note 24, at 20 (citing 1987 FBI data placing car theft costs at over \$6 billion annually); Michael Goldsmith & Todd Maynes, *The Undermining of Civil RICO*, 2 CRIM. JUSTICE 6, 9 (Spring 1987) (stating, “[i]nsurance fraud costs \$11 billion”); *Fraud Costs Consumers \$15 Billion Annually*, NAT’L UNDERWRITER, PROP. & CASUALTY/EMPLOYEE BENEFITS ED. (Feb. 29, 1988), at 37; *supra* note 24 (discussing studies attempting to estimate the frequency of various types of auto insurance fraud); *infra* note 29 (concerning a 1990 closed claims study determining that fraudulent claims amounted to 13.6% of all claims payments by Florida private passenger auto insurers thus leading to estimated annual fraud costs exceeding \$364 million in Florida alone).

29. The Florida Insurance Research Center at the University of Florida conducted a study of 1,709 randomly selected automobile insurance claims files which included a total of 3,016 coverages; all of these claims were closed during the period from March 29 to May 30, 1990. AUTO INS. FRAUD STUDY, *supra* note 4, at 33-34, 39-40. Twenty-five insurers, representing nearly 65% of the private auto insurance policies written in Florida, participated. *Id.* at 30-31. Analysis determined that an estimated 13.6% of claims payments by Florida private passenger auto insurers were on fraudulent claims. *Id.* at 8-9, 68-69. (As one might imagine, the estimates were much lower for property damage claims than for matters involving personal injuries. *Id.* at 40 & 46.)

Applying the above percentages to the total number of auto insurance claims in Florida in 1989 yields an estimate that fraudulently-obtained claims payments for that one year totaled \$364 million. *Id.* at 69. Of course, the economic impact of auto insurance fraud in Florida is much greater than \$364 million because this amount does not include the costs of application fraud, loss adjustment expenses, insurer fraud investigation units, and state government expenses related to fraud. *Id.* at 70.

about filing for inflated amounts to "cover their deductible" or to make an easy profit. They may rationalize their misconduct with the conclusion that "insurance companies make so much money, anyway."<sup>30</sup> Insurance fraud sets a vicious cycle in motion: insurance companies continue to increase premiums for the entire pool of insureds in order to cover the higher losses, while some consumers file for additional uncovered amounts to make up for the higher premiums charged.<sup>31</sup>

Compounding the problem is the involvement, in *some* claims, of unscrupulous professionals. The seemingly easy money from insurance fraud occasionally may tempt medical, legal, or other experts assisting with insurance claims.<sup>32</sup> Unprincipled doctors, chiropractors, attorneys, and insurance adjusters may help claimants and policyholders to build and file falsified claims.

When involved in fraudulent activities, doctors and adjusters pose acute problems because of their specialized knowledge and because documents provided by them are freely used to evaluate claims. Physicians, lawyers, and insurance adjusters have been caught in both large and small-scale fraudulent operations.<sup>33</sup> Their

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30. See *supra* note 16; see also INS. INFO. INST., INSURANCE PULSE (4th Quarter 1989) (copy on file with the author) (73% of the public states that the belief insurance companies are very wealthy is a somewhat important or very important reason people may cheat on insurance claims). The chief of Ohio's insurance fraud division, Marsha Hartley, stated that many people view the insurer "as a big company picking on the little guy" when it investigates claims. Yocum & Candisky, *supra* note 28, at 2A. This "tough image" simply may add to the perception that insurers are "big companies with deep pockets." Candisky & Yocum, *supra* note 28. Hartley says, "[p]eople pay those premiums for years and years. They look at this as a way to recover some of that money." Yocum & Candisky, *supra* note 28, at 2A.

Perhaps the better results for knowledgeable claimants are not an indication of "better" (harder to detect) fraud schemes, but of greater insurance company negotiating leverage over inexperienced claimants. The insurance industry may educate its consumers quite poorly about coverage, rate-setting, and claims practices because of "a feeling . . . that ignorant clients are easier to 'deal' with." Hoyt, *supra* note 24, at 306.

31. Clarke, *supra* note 23, at 56; Crepeau, *supra* note 24, at 18; *Fraudulent Auto Accidents Viewed as Thriving Racket*, *supra* note 20. For a state-by-state table indicating average automobile insurance premiums for each of the years 1984 through 1988, see A.M. BEST Co., *Best's Insurance Management Reports*, Feb. 9, 1990 (indicating that the national average for automobile insurance premiums has increased much faster than the overall inflation rate).

32. Of course, this assertion is not intended to impugn the many medical and legal professionals who are involved in *legitimate* insurance claims. An attorney may perform vital services as a claimant's counsellor and advocate, and doctors often play a crucial role in the claims process via diagnosis and treatment of auto accident injuries.

33. See *United States v. Jacob*, 502 F. Supp. 1221 (D. Md. 1980); *Pearce v. United States Fidelity and Guaranty Co.*, 476 So. 2d 750 (Fla. 4th DCA 1985); *State v. Dawson*, 290 So.2d 79 (Fla. 1st DCA 1974); Catherine Candisky & Robin Yocum, *Scams Take Ingenuity But Usually Follow Patterns*, THE COLUMBUS DISPATCH, Dec. 19, 1988, at 3B (describing "doctor/lawyer conspiracies"; according to the Insurance Crime Prevention Institute, many accident victims do not know of collusion between the doctor and the lawyer); Don J.

schemes include assisting claimants in padding valid claims and creating entirely fictitious claims.<sup>34</sup> These bogus claims may exist solely on paper or may involve other members of the fraud ring who act as the claimants. While investigators must be careful in gathering the evidence,<sup>35</sup> developing the charges,<sup>36</sup> and prosecuting the defend-

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DeBenedictis, *The Alliance: Did a Network of Small Southern California Law Firms Conspire to Defraud Insurance Companies to the Tune of \$200 Million?*, 75 A.B.A.J. 59 (Dec. 1989) [hereinafter DeBenedictis, *The Alliance*]; Don J. DeBenedictis, *\$2 Million Civil RICO Suit Brought Against Accident Fraud Operation*, L.A. DAILY J., Mar. 2, 1984, at 16 [hereinafter DeBenedictis, *Accident Fraud Operation*]; Knowles, *supra* note 22; Mazzuca, *supra* note 5; Mark Thompson, *RICO Suit Against Lawyers, Doctors Allowed*, L.A. DAILY J., April 22, 1986, at B1; *Chicago Attorney Sentenced to Five Years in Prison*, 17 ICPI REPORT 2 (4th Issue 1990); *Doctor and Legal Assistant Charged in California with \$11G Fraud Attempt*, 17 ICPI REPORT 14 (3d Issue 1990); *Final Sentencings in White-Collar Fraud Ring*, 17 ICPI REPORT 4 (4th Issue 1990); *Florida Fraud Mill Shut Down, Chiropractor and Attorney Wife Arrested*, 17 ICPI REPORT 2 (3d Issue 1990); *From Coast to Coast, Staged Accident Rings Continue to Proliferate*, 18 ICPI REPORT 1 (1st Issue 1991); *Indictment Names New Jersey Law Firm and Osteopathic Office in Racketeering Scheme*, 18 ICPI REPORT 4 (1st Issue 1991); *Insurance Adjuster and Wife Sentenced for Auto Accident-Related Medical Fraud*, 17 ICPI REPORT 9 (4th Issue 1990); *Insurance Adjuster Indicted for \$91G Insider Theft Scheme*, 17 ICPI REPORT 4 (4th Issue 1990); *Nine Indicted in Memphis for \$108G Staged Auto Accident Schemes: Second Wave in Long-term Investigation*, 17 ICPI REPORT 3 (2d Issue 1990); *Personal Injury Attorneys and Five Others Indicted in \$9 Million Racketeering Scheme*, 17 ICPI REPORT 1 (2d Issue 1990); *Staged Auto Accident Defrauder Sentenced to One Year: \$84,605 Restitution Ordered*, 18 ICPI REPORT 3 (1st Issue 1991).

34. INSURANCE CRIME PREVENTION INSTITUTE, 1989-1990 ANNUAL DIRECTOR'S REPORT 29-30, 32-34 (1990); *Chicago Attorney Sentenced to Five Years in Prison*, *supra* note 33; *Doctor and Legal Assistant Charged in California with \$11G Fraud Attempt*, *supra* note 33; *Final Sentencings in White-Collar Fraud Ring*, *supra* note 33; *Florida Fraud Mill Shut Down, Chiropractor and Attorney Wife Arrested*, *supra* note 33.

35. See *United States v. Jacob*, 502 F. Supp. 1221 (D. Md. 1980) (defendant attorney, charged with filing a false income tax return, was allegedly part of an automobile insurance fraud ring with a doctor and claims adjusters that was designed to obtain wrongly inflated personal injury settlements; the court ordered suppression of evidence seized during search of lawyer's office because search warrant was too indefinite about the crimes for which evidence was sought); *State v. Dawson*, 290 So. 2d 79 (Fla. 1st DCA 1974) (all charges dismissed against attorney charged with grand larceny for making fraudulent representations in the car accident claims of his clients, because documents had been produced in violation of lawyer's privilege against self-incrimination under the U.S. Constitution and FLA. STAT. ch. 914.04 (1971)).

36. *Cox v. State*, 443 So. 2d 1013 (Fla. 5th DCA 1983). Cox allegedly telephoned two agents for his insurer and reported the theft of a trailer that he knew had not been stolen. He subsequently withdrew the claim, and the insurer made no payments to Cox or anyone else. Cox was charged with making a false report of a crime and with violating the false insurance claims statute. At the urging of Cox's lawyer, the trial judge instructed the jury on the crime of attempt as well as the false insurance claims criminal statute and the jury convicted Cox of "attempted false and fraudulent insurance claim." *Id.* at 1014.

The District Court of Appeal reversed the false insurance claims conviction. It noted that the applicable statute already encompasses attempts. Thus there could be no separate crime of attempting to violate the false insurance claims statute. *Id.* at 1015. The attempt conviction was overturned and the case remanded for a new trial on the false insurance claim charge.

ants,<sup>37</sup> recent cases throughout the nation show that auto insurance fraud rings can be detected and destroyed, and that the members can be convicted and sent to prison.<sup>38</sup> Clearly, the numbers are significant; although only a presumably small percentage of professionals abuse the insurance system, it does not necessarily follow that — when insurance fraud does occur — the involvement of professionals is rare.<sup>39</sup>

### B. *Categorizing the Scam: Three Main Types of Fraud Against Insurers*

Fraud occurs in all areas of automobile insurance, particularly through falsified insurance applications, legitimate but fraudulently inflated claims, and phony claims.<sup>40</sup> Experts assume that claims fraud

37. See, e.g., *Glassman v. State*, 377 So. 2d 208 (Fla. 3d DCA 1979) (physician tried for grand larceny for alleged participation in an insurance fraud scheme involving staged car accident and feigned injuries; conviction reversed and case remanded for new trial because prosecutor made improper arguments, including unprofessional language and several remarks that strongly implied defendant had committed a whole series of crimes for which he was not on trial).

38. See, e.g., Paul Duggan, *Long String of Swindles Alleged at Maryland Sentencing*, WASH. POST, Sept. 2, 1988, at C1 (stating that a group of swindlers repeatedly faked accidents and collected claims payments of about \$200,000 in five months; ringleader sentenced to seven years in prison); Knowles, *supra* note 22 (reporting that 32 criminal charges were brought against nine individuals and three corporations; that both doctors and lawyers were arrested; that a 16-month investigation netted evidence of a \$500 million insurance fraud ring in South Florida); *Personal Injury Attorneys and Five Others Indicted in \$9 Million Racketeering Scheme*, *supra* note 33; *Staged Auto Accident Ring Sentenced in Baltimore: \$147,854 Restitution Ordered*, 17 ICPI Report 12 (2d Issue 1990) (three of four members of the ring sentenced to prison; full restitution and lengthy probation also ordered); see also UNITED SERVICES AUTOMOBILE ASSOCIATION (USAA), SPECIAL REPORT ON COST CONTAINMENT 7 (1990) (noting that the National Automobile Theft Bureau and the Insurance Crime Prevention Institute, working in concert with state and local authorities, have been able to track down and break up numerous fraud rings throughout the country).

39. INSURANCE CRIME PREVENTION INSTITUTE, *supra* note 34, at 18 (stating that 173 of 613 persons charged with crimes stemming from ICPI investigations in the year ending June 30, 1990, were licensed professionals; these professionals were implicated in 58 different ICPI investigations involving over \$66 million). The ICPI notes that the percentage of cases it prosecuted in federal courts has risen dramatically from 24.3% in 1987 to 57.3% in 1990. *Id.* This increase bespeaks the increasing complexity, costs, organized nature, and interstate character of much insurance fraud. *Id.*

40. All areas of the insurance industry are affected by fraud. See, e.g., Ollie L. Blan Jr. & J. Mark Hart, *Fraud in Insurance Contract Litigation - A Defense Viewpoint*, 16 CUMB. L. REV. 447 (1986); Michael Bradford, *Fraud Not Chronic, But Still Costly*, 21 BUS. INS. 3, Sept. 26, 1987; Alan P. Crawford, *In the Industry's Corner*, 49 INS. REV. 44 (Sept. 1988); DeBenedictis, *The Alliance*, *supra* note 33; Zinkewicz, *supra* note 5.

For a discussion of fraud outside the auto insurance field, see Andrew B. Doppelt, *Who You Gonna Call? Fraudbusters!*, 33 SECURITY MGMT. 163 (Sept. 1989) (outlining the use of outside financial fraud investigators); Paul Marcus, *White Collar Crime: A Legal Overview*, 52 U. CIN. L. REV. 378 (1983) (discussing prosecution of fraud); John Panneton, *Federalizing Fires: The Evolving Federal Response to Arson Related Crimes*, 23 AM. CRIM. L. REV. 151

costs the industry much more than does application fraud.<sup>41</sup> Therefore, this article focuses primarily on claims. Moreover, while some insurers and insurance agents have engaged in fraud or other misconduct,<sup>42</sup> this article concerns only fraud by claimants or by those acting on claimants' behalf.<sup>43</sup>

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(1985); Ellen S. Podgor, *Tax Fraud -Mail Fraud: Synonymous, Cumulative or Diverse?*, 57 U. CIN. L. REV. 903 (1989); *Fraud Commission's Finding Supported in AICPA Testimony*, 164 J. ACCOUNTANCY 84 (Sept. 1987); John W. Poulous, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295 (1986); Note, *Prime-Rate Fraud Under RICO*, 72 GEO. L.J. 1885 (1984); *Project; White-Collar Crime: Survey of Law - 1982 Update*, 20 AM. CRIM. L. REV. 291 (1982); R. Glenn Bauer, *A Short History of Maritime Fraud*, 12 TUL. MAR. L.J. 11 (Fall 1987); Christie Harlan, *Ex-Owner of Sunbelt Savings of Texas Is Indicted on Thrift Fraud Charges*, WALL ST. J., July 12, 1990, at A2; Scot J. Paltrow, *Jury Finds Mulheren Guilty of Conspiracy, Market Manipulation*, L.A. TIMES, July 11, 1990, at D1 (securities fraud); Andy Paztor & Rick Wartzman, *Off the Hook: Hughes Aircraft Chief Is Implicated Belatedly in Defense-Secret Case*, WALL ST. J., July 6, 1990, at A1 (defense procurement fraud); John R. Wilke, *Open Sesame: In the Arcane Culture of Computer Hackers, Few Doors Stay Closed*, WALL ST. J., Aug. 22, 1990, at A1 (computer fraud). For white collar crime in general, estimates have placed the annual cost between \$40 billion and \$200 billion. See Georgette Bennett, *The Future of White-Collar Crime*, NAT. L.J., Mar. 23, 1987, at 15. This article, however, concentrates solely on automobile insurance fraud.

41. Clarke, *supra* note 23, at 51; *Fraudulent Auto Accidents Viewed as a Thriving Racket*, *supra* note 20.

42. See *supra* note 5. Such actions include: (1) alteration of documents (see, e.g., *Martinez v. Standard Guar. Ins. Co.*, No. CL 87-4877 A1 (Cir. Ct. of 15th Jud. Cir., Palm Beach County, Fla., Second Amended Complaint, filed July 7, 1989) (alleging that the insurer caused or procured the alteration of an independent medical examination report and used that altered report to deny further personal injury protection benefits, in violation of Florida statutes as well as of the law of fraud); (2) for supposedly impartial physical examinations, knowing use of doctors who routinely diagnose the claimant as malingering or otherwise "side" with the insurer (Letters to Robert W. Emerson from plaintiffs' attorneys John T. Kennedy (May 18, 1990) & Michael A. Viscomi (May 22, 1990)); (3) acceptance of premiums despite having reason to investigate whether the policyholder gave accurate information, but, when a claim is made, investigating and perhaps denying all or part of the claim because of such inaccuracies in the policy application (see *infra* note 76); (4) stealing or mispending premium dollars (see, e.g., Zinkewicz, *supra* note 5). See also Letters to Robert W. Emerson from plaintiffs' attorneys Richard B. Davis, Jr. (June 14, 1990) (alleging that claims adjusters are paranoid, that too many policies are wrongfully cancelled, that the insurance industry is "misdealing" with members of the public and trying to "starve out" the insureds, that insurers "nit pick every claim" and "rather frequently take advantage of the claims of the elderly, the poor, and the infirm," that insurers often waste much time and money defending a case until just before trial—when they offer a long overdue settlement); Karen A. Gievers (June 4, 1990) (stating that insurers "do a woefully inadequate job" in teaching their agents and customers about the civil justice system, constitutional rights, general and special damages, the civil responsibility of parties at fault to compensate victims of negligence, and duties owed to first and third parties); John T. Kennedy (May 18, 1990) (contending that insurers routinely engage in unfair claims practices, particularly denial of personal injury protection benefits); Michael A. Viscomi (May 22, 1990) (contending that certain insurance companies, most of them located in Miami, "do everything they can to deny and in some cases simply ignore" legitimate claims, especially denying no-fault benefits).

43. For a list of state laws against insurers' unfair claims settlement practices, see 2 JOHN C. MCCARTHY, *RECOVERY OF DAMAGES FOR BAD FAITH* 753-56 (5th ed. 1990).

1. FRAUD IN INSURANCE APPLICATIONS<sup>44</sup>

Some insurance customers try to lower their premiums by falsifying their insurance applications.<sup>45</sup> They fail to list all drivers,<sup>46</sup> omit previous accidents and tickets,<sup>47</sup> or otherwise avoid full and truthful disclosure of information requested by the insurer.<sup>48</sup> In some states, the insurer must keep the policy in force after discovery of the misrepresentation unless the misrepresentation materially increased the risk of loss covered by the policy.<sup>49</sup> The insurer may, however, adjust the premium to reflect the actual risk involved.<sup>50</sup>

*Klopp v. Keystone Ins. Co.*<sup>51</sup> is a representative case in which the Pennsylvania Superior Court strictly interpreted a statute on policy cancellation. The insurer issued a binder, then attempted to rescind the policy after an accident occurred one day later and it discovered that the insured had provided incorrect answers on the application.<sup>52</sup> Despite the insured's misstatements, the insurer had to cover the accident.<sup>53</sup>

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44. Third-party problems caused by insurance application fraud are outside the scope of this article. For a discussion of this issue, see Barbara J. Call, *Third-Party Problems With Falsified Insurance Applications*, 25 TORT & INS. L.J. 671 (1989).

45. See, e.g., *Jackson v. American Motorists Ins. Co.*, 388 So. 2d 584 (Fla. 5th DCA 1980); see also Robert J. Brennan & Jane M. Hanson, *Misrepresentation in the Application as the Basis for Rescission of a Property Insurance Policy*, 21 TORT & INS. L.J. 451 (1985).

46. See, e.g., *Darby v. Safeco Ins. Co.*, 533 So. 2d 37 (La. Ct. App. 1988).

47. See, e.g., *Haugseth v. Cotton States Mut. Ins. Co.*, 386 S.E.2d 725 (Ga. Ct. App. 1989); *Benton v. Shelter Mut. Ins. Co.*, 550 So. 2d 832 (La. Ct. App. 1989).

48. In Pennsylvania, for instance, these actions could be a misdemeanor under 40 PA. CONS. STAT. § 474(a) (1971); see also *infra* note 70 (listing additional state criminal laws). Such actions also might furnish the insurer with grounds for cancelling the policy. See, e.g., FLA. STAT. ch. 627.728 (1991).

49. See, e.g., TENN. CODE ANN. § 56-7-103 (1989) (alternatively, to rescind, the insurer must show an actual intent of the client to deceive); WIS. STAT. ANN. § 631.11(2) (West 1980) (stating that unless the insurer relied on a material misrepresentation or unless the fact misrepresented contributed to the insured's loss, the insurer cannot avoid its obligations under an insurance policy).

50. See, e.g., CAL. INS. CODE §§ 447-49 (West 1972 & Supp. 1992); FLA. STAT. ch. 627.409(1) (1989); MASS. GEN. L. ch. 175, § 186 (1987); N.Y. INS. LAW §§ 3105-06 (McKinney 1985).

51. 549 A.2d 221 (Pa. Super. Ct. 1988), *allocatur granted*, 559 A.2d 38 (Pa. 1989).

52. 549 A.2d at 222.

53. *Id.* at 223 & n.1. The insurer could, however, cancel the remainder of the policy. *Id.* at 223; see also *Ohio Farmers Ins. Co. v. Michigan Mut. Ins. Co.*, 445 N.W.2d 228 (Mich. Ct. App. 1989) (holding that auto insurer cannot rescind and limit its liability to an innocent third party injured in an accident with the insured's car, even though the insurer might otherwise have the right to rescind as a result of the insured's misrepresentations about the owner and principal driver of the car); *Allstate Ins. Co. v. Boggs*, 271 N.E.2d 855 (Ohio 1971) (finding that insurer can cancel policy only prospectively if application misrepresentations are material; once a covered incident occurs, the insurer cannot use the insured's misrepresentations to avoid liability).

In some states, the insurer may void the policy once it learns of the misrepresentation.<sup>54</sup> In others, the insurer may void only the additional exposure not originally considered as a result of misrepresentation.<sup>55</sup> Of course, if the insurer would not have issued the policy but for the insured's false statements in the application, grounds exist for declaring the policy void *ab initio*.<sup>56</sup>

When state legislation permits insurers to cancel policies because of material misrepresentations<sup>57</sup> or fraudulent misstatements in the application, courts sometimes do not tolerate insurer-fashioned alternatives to cancellation. In the Florida case of *Jackson v. American*

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54. 12A JOHN A. APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE §§ 7276, 7291-7305 (1981); WILLIAM F. YOUNG & ERIC M. HOLMES, CASES AND MATERIALS ON THE LAW OF INSURANCE 150-154 (2d ed. 1985); *see, e.g.*, *Benton v. Shelter Mutual Ins. Co.*, 550 So. 2d 832 (La. Ct. App. 1989) (affirming trial court's decision that insured's knowing misrepresentations of her driving record were material to insurer's decision to issue a policy and that these misrepresentations, discovered after an accident for which the insured made a claim, rendered her coverage void); *United Security Ins. Co. v. Commissioner of Ins.*, 348 N.W.2d 34 (Mich. Ct. App. 1984) (denying claim by insured who made misrepresentation, with no-fault binder rescinded *ab initio*); *Nationwide Mut. Ins. Co. v. Conley*, 194 S.E.2d 170 (W. Va. 1972) (finding policy void *ab initio* due to insured's misrepresentations on application).

55. 12A APPLEMAN & APPLEMAN, *supra* note 54, § 7294 (concluding that insured's misrepresentation does not void policy if there is no connection between loss and matters misrepresented); *see, e.g.*, IOWA CODE ANN. § 515.101 (West 1988); UTAH CODE ANN. § 31A-21-105(2) (1991). This rule is most likely to be found in claims involving life insurance or disability insurance. Several states expressly require that insurers must show a causal connection between the facts misrepresented in an application and the subsequent loss in order to deny recovery. *See, e.g.*, KAN. STAT. ANN. § 40-418 (1986); MO. ANN. STAT. § 376.580 (Vernon 1991); R.I. GEN. LAWS § 27-4-10 (1989) (specifically providing that whether a misstatement contributed to the loss "shall be a question for the jury"). *But see* *Southern Farm Bureau Life Ins. Co. v. Cowger*, 748 S.W.2d 332 (Ark. 1988) (overturning prior holding that required a showing of causation between misrepresentation and loss). The *Cowger* court noted a policy dilemma—better treatment of dishonest applicants than honest ones—when proof of causation is necessary.

[R]egardless of a misrepresentation which causes the insurer to undertake a risk, [the insurer's] liability will occur unless the loss is related to the fact misrepresented. This places the policy applicant in the position of being able to gamble that he or she will not sustain a loss caused by the existence of the fact misrepresented. The misrepresentation may or may not have an effect. The party defrauding the insurance company may or may not be rewarded. On the other hand, the honest applicant who has the same facts to reveal will be denied coverage because of telling the truth.

*Id.* at 335.

56. *McAllister v. AVEMCO Ins. Co.*, 528 A.2d 758 (Vt. 1987) (interpreting VT. STAT. ANN. tit. 8, § 4205 (1984)); *see also* ALASKA STAT. § 21.42.110 (1991) (similar provision).

57. Cancellations may occur regardless of whether the misrepresentation was intentional; the key factor is *materiality*. 12A APPLEMAN & APPLEMAN, *supra* note 54, §§ 7293, 7294; *see, e.g.*, GA. CODE ANN. § 33-24-7(b) (1990); TEX. INS. CODE ANN. § 21.16 (West 1981) (by statute, materiality is "a question of fact to be determined by the court or jury trying the case").



*Motorists Ins. Co.*,<sup>58</sup> the insured misrepresented on her application that she drove two miles to work, rather than the actual ten-mile distance.<sup>59</sup> The increased distance led to a higher risk of accident and entitled the insurer to a higher premium.<sup>60</sup> Because the insured did not respond to a premium increase notice from the insurer,<sup>61</sup> the insurer reduced the term of coverage from one year to 289 days.<sup>62</sup> A claim arose after 289 days but before the expiration of the one-year term.<sup>63</sup> The court held that the insurer could not deny coverage and that it should have cancelled the policy once it learned of the fraudulent misstatement on the application.<sup>64</sup> In light of the "statutorily mandated fashion" for treating this problem,<sup>65</sup> the court found that no alternative existed.<sup>66</sup>

Some statutes delineate how an insured's misrepresentations affect the validity of a policy.<sup>67</sup> In *Motors Ins. Co. v. Woodcock*,<sup>68</sup> the Third District Court of Appeals of Florida considered a Florida statute governing insureds' warranties and misrepresentations to the insurer.<sup>69</sup> The court held that the statute gave insurers "a viable defense even in the absence of effective cancellation."<sup>70</sup> After discov-

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58. 388 So. 2d 584 (Fla. 5th DCA 1980).

59. *Id.*

60. *Id.*

61. The insured contended that she never received any notice. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 585.

65. FLA. STAT. ch. 627.728 (1991).

66. *Id.*; see also *Alexander Underwriters Gen. Agency, Inc. v. Lovett*, 339 S.E.2d 368 (Ga. Ct. App. 1985) (holding that insurer's purported cancellation of policy failed because unearned premium was not returned within the statutory 15-day period after cancellation notice was sent to the insured; the court upheld a summary judgment for the insured, awarding liability coverage on an accident occurring subsequent to the attempted cancellation).

The *Jackson* court evidently meant to encourage insurers to promptly investigate and respond to application inaccuracies. *Accord* *Haugseth v. Cotton States Mut. Ins. Co.*, 386 S.E.2d 725 (Ga. Ct. App. 1989) (after discovering that the insured misrepresented her driving record, the insurer attempted to cancel her policy while retaining the premium earned to date. The insurer subsequently denied the insured's claim for the loss of her stolen automobile on the grounds that the misrepresentation voided the policy. The appellate court overturned a summary judgment for the insurer because the insurer's method of and delay in cancelling the policy may have estopped the insurer from voiding the policy).

67. See, e.g., ALA. CODE § 27-14-7 (1986) (defining effects of representations and misrepresentations); FLA. STAT. chs. 627.409(1) & 627.728(5) (1991) (concerning respectively, warranties/misrepresentations and the presumptive notice received by insured).

68. 394 So. 2d 488 (Fla. 3d DCA 1981).

69. FLA. STAT. ch. 627.409(1) (1991).

70. 394 So. 2d at 488 (citing *Sauvageot v. Hanover Ins. Co.*, 308 So. 2d 583 (Fla. 3d DCA 1975)). The statute reads as follows:

[In the application or negotiations for the insurance policy, m]isrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy . . . unless:

ering alleged omissions or misrepresentations about the insured's driving record, the insurer in *Motors* offered to continue the insured's policy upon payment of a higher premium.<sup>71</sup> The insured refused to pay this additional premium and, after the theft and destruction of the car, filed a claim. The court found no reliance by the insured upon the insurer's offer to continue coverage at a higher premium. Only reliance by the insured on the insurer's offer could have estopped the insurer from asserting its statutory right to contest the policy's validity.<sup>72</sup>

In sum, insurers generally have a right to cancel fraudulently procured policies.<sup>73</sup> Once an insured party is involved in an accident, however, third parties may have valid claims. At that point, a policy cancellation affects only the insured and not the innocent third party whose rights to be made whole have already vested.<sup>74</sup> The policy of protecting innocent third persons may thus bar an insurer from voiding fraudulently obtained coverage.<sup>75</sup> Compulsory policies often provide, for example, a minimum amount of liability coverage to be retained. The clear lesson for insurers therefore is: Thoroughly check the application *before* issuing the policy. In some cases, the insurer's right to void a policy may not apply retrospectively—at least not for parties other than the one who actually made the misrepresentations

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- (a) They are fraudulent;
  - (b) They are material either to the acceptance of the risk or to the hazard assumed by the insurer; or
  - (c) The insurer in good faith would either not have issued the policy . . . , would not have issued it at the same premium rate . . . [or] in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy . . . or otherwise.

FLA. STAT. ch. 627.409(1) (1991). Some states with criminal laws specifically prohibiting false statements in insurance applications include: Alaska (ALASKA STAT. §§ 21.36.360(o) & (q)(7) (1984) (misdemeanor)); Florida (FLA. STAT. chs. 626.9541(k)(2) & 817.236 (1991)); Georgia (GA. CODE ANN. § 33-1-9 (1991 & Supp. 1992)); Indiana (IND. CODE 27-8-3-21 (1986)); Montana (MONT. CODE ANN. § 33-18-401(1) (1991) (misdemeanor)); New Mexico (N.M. STAT. ANN. §§ 59A-16-23(A)(1) & (B) (1988) (felony)); Pennsylvania (40 PA. CONS. STAT. § 474(a) (1971) (misdemeanor)); S.D. CODIFIED LAWS ANN. § 58-33-37 (1990) (misdemeanor)); Vermont (VT. STAT. ANN. tit. 8, § 4205 (1984)).

71. *Motors Ins. Co. v. Woodcock*, 394 So. 2d 485, 487 (Fla. 3d DCA 1981).

72. *Id.* at 489 (citing a waiver case, *Mutual of Omaha Ins. Co. v. Eakins*, 337 So. 2d 418 (Fla. 2d DCA 1976)).

73. Edward M. Miller, *Current Issues in Insurance Policy Litigation*, 68 MICH. B.J. 46, 48 (1989) (stating that, "[i]n the absence of a provable waiver by the insurer, or estoppel to assert it, fraud will vitiate coverage").

74. 12A GEORGE G. COUCH, *CYCLOPEDIA OF INSURANCE LAW* § 45:903 (2d ed. 1981); see also *supra* note 53.

75. *Id.* § 45:906.

in the application. In fact, by the time a claim arises, a court may even bar an insurer's attempt to deny coverage for the misrepresenting person.<sup>76</sup>

## 2. FRAUDULENTLY INFLATED CLAIMS

### a. Settlement Practices, Claimant Motivations, and Group Norms

Inflated claims probably are much more frequent than outright phony claims.<sup>77</sup> Insurers may pay exaggerated claims simply because the time and money spent to deny a padded claim exceeds that of simply paying the inflated claim.<sup>78</sup> As one commentator put it:

[W]hen adjusters are faced with piles of claims on their desks and are pressured to settle them, they tend to separate the clearly fraudulent claims from the less obvious ones. Lacking adequate resources to investigate, they pay many claims from the less obvious that are questionable. Once payment is made, the claim becomes legitimate and is "lost forever."<sup>79</sup>

Insureds pad claims for a variety of reasons. Some pad valid claims to get compensation for non-covered portions of the loss, to "recover" past premiums paid, or just to make a profit.<sup>80</sup> Others pad their claims to meet the damages prerequisite for filing a tort suit; the

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76. This situation could arise when the insured who made the misrepresentation points to insurer misconduct in the form of *ex post facto* underwriting. The claim is that the insurer issues policies and accepts premiums when it knows, or should know, that the applicant is ineligible for coverage; if the insured files a claim, his "fraud" in obtaining the policy—his misrepresentation—is exposed and the insurer then denies the claim. Miller, *supra* note 73, at 48. Miller notes that insurers can detect misrepresentations by consulting the Cleveland (Regional) Index Bureau, a compilation of all injury claims data, and, for property damages, the Property Loss Register. *Id.* Access to such information may serve to estop insurers from claiming reliance on falsehoods found in insurance applications. *Id.* at 48-49. See *State Farm Ins. Co. v. Kurylowicz*, 242 N.W.2d 530 (Mich. Ct. App. 1976) (requiring the insurer to investigate applicants promptly—holding that deferring investigation until an insured files a claim violates public policy); Miller, *supra* note 73, at 48.

77. WEISBERG & DERRIG, *supra* note 24, at 18-19; Clarke, *supra* note 23. Obviously, claim negotiation tactics may involve some "puffing" of the dollar amount of damages. Claims personnel and, at a somewhat higher rate, defense and plaintiffs' attorneys usually agree that exaggerations about value are an acceptable tactic when used by claimants or their attorneys during settlement negotiations on bodily injury or uninsured motorist liability. AUTO INS. FRAUD STUDY, *supra* note 4, app. C at 7, 18, 22, 29, 33, app. D at 7, 19 (Attorney Survey, Question 18a & Claims Personnel Survey, Question 15a). *Accord id.* app. F at 12, 25, 29 (Insurers' Counsel Survey, Question 22a). Misstatements of fact, though, are strongly condemned by all groups. *Id.* (Attorney Survey, Questions 19a-d; Claims Personnel Survey, Questions 16a-d). *Accord id.* app. F at 12-13, 25, 29 (Insurers' Counsel Survey, Questions 23a-d).

78. Clarke, *supra* note 23.

79. *Id.*

80. Tracy & Fox, *supra* note 22, at 590; AUTO INS. FRAUD STUDY, *supra* note 4, at 98.

typical no-fault state<sup>81</sup> permits claimants to escape no-fault and bring a tort action only if their damages exceed a certain minimum.<sup>82</sup>

Defense attorneys, insurers' general counsel, and claims personnel believe that the presence of a claimant's attorney in a case greatly increases the likelihood that bodily injury, uninsured motorist,<sup>83</sup> personal injury protection,<sup>84</sup> and medical payments claims will be inflated.<sup>85</sup> Curiously, while a large majority of each group—claims personnel, defense attorneys, and plaintiffs' counsel—considers insur-

81. See *infra* note 84.

82. As noted by no-fault experts Jeffrey O'Connell and Robert H. Joost, the effect of such a rule may be to encourage inflation of claims. O'Connell & Joost, *Giving Motorists a Choice Between Fault and No-Fault Insurance*, 72 VA. L. REV. 61, 70 & n.28 (1986).

83. Every state has a financial responsibility law meant to require all drivers to obtain at least a minimum amount of liability insurance. JAMES L. ATHEARN, ET AL., *RISK & INSURANCE* 434 (6th ed. 1989). Nonetheless, nationally approximately 10% of all vehicles are uninsured. A.M. BEST CO., *Best's Insurance Management Reports*, May 14, 1990.

84. About half of the states have no-fault laws. ARK. CODE ANN. §§ 23-89-202 to 23-89-208 (Michie 1987 & Supp. 1991); COLO. REV. STAT. ANN. §§ 10-4-701 to -723 (West 1990 & Supp. 1991); CONN. GEN. STAT. ANN. §§ 38-319 to 38-350 (West 1987 & Supp. 1991); DEL. CODE ANN. tit. 21, § 2118 (1985 & Supp. 1990); D.C. CODE ANN. §§ 35-2101 to 35-2114 (1988 & Supp. 1991); FLA. STAT. chs. 627.730-.7405 (1991); HAW. REV. STAT. §§ 431:10C-101 to 431:10C-121 (1985 & Supp. 1991); KAN. STAT. ANN. §§ 40-3101 to 40-3121 (1986 & Supp. 1990); KY. REV. STAT. ANN. §§ 304.39-.010 to 304.39-.340 (Michie/Bobbs-Merrill 1990); MD. ANN. CODE of 1957 art. 48A, §§ 538-547A (1991); MASS. GEN. L. ch. 90, §§ 34A, 34D, 34M, 34N & 34O (1989 & Supp. 1991) and ch. 175, § 113A-D (1987 & Supp. 1991); MICH. COMP. LAWS §§ 500.3101-.3179 (1983 & Supp. 1990); MINN. STAT. ANN. §§ 65B.41 to 65B.71 (West 1986 & Supp. 1992); N.H. REV. STAT. ANN. § 264.16 (1982 & Supp. 1991); N.J. STAT. ANN. §§ 39:6A-1 to 39:6A-35 (West 1990); N.Y. INS. LAW §§ 5101-5108 (McKinney 1985 & Supp. 1992); N.D. CENT. CODE §§ 26.1-41-01 to 26.1-41-19 (1989 & Supp. 1990); OR. REV. STAT. §§ 742.520-.542 (1989 & Supp. 1990); 75 PA. CONS. STAT. ANN. §§ 1711-1724 (Purdon 1990); S.D. CODIFIED LAWS ANN. §§ 58-23-6 to -8 (1990); TEX. INS. CODE ANN. §§ 5.06-.12 (West 1981 & Supp. 1992); UTAH CODE ANN. §§ 31A-22-306 to 31A-22-309 (1991 & Supp. 1991); VA. CODE ANN. § 38.2-2202 (Michie 1990); WIS. STAT. ANN. § 632.32(4)(b) (West 1980). Of these states, Florida, Michigan, New Jersey, New York, and Pennsylvania use verbal thresholds; Colorado, Connecticut, Hawaii, Kansas, Kentucky, Massachusetts, Minnesota, North Dakota, and Utah use monetary thresholds; and Arkansas, Delaware, the District of Columbia, Maryland, New Hampshire, Oregon, South Dakota, Texas, Virginia, and Wisconsin have no real limitation on tort rights. See INSURANCE INFORMATION INSTITUTE, *THE FACT BOOK: 1992 PROPERTY/CASUALTY INSURANCE FACTS* 101-102 (1992).

In Florida, the no-fault statute requires an expert medical opinion of permanent injury to support damage claims. FLA. STAT. ch. 627.737 (1991). A United States Department of Transportation study concluded that this "verbal threshold" in the Florida statute significantly contributed to a slowdown in the increase of automobile insurance premiums. OFFICE OF THE SECRETARY OF TRANSP., U.S. DEP'T OF TRANSP., *COMPENSATING AUTO ACCIDENT VICTIMS: A FOLLOW-UP REPORT ON NO-FAULT AUTO INSURANCE EXPERIENCES* 28 (May, 1985); accord Telephone Interview with Jed George, *supra* note 25.

85. AUTO INS. FRAUD STUDY, *supra* note 4, app. C at 4, 6, 17-18, 22 (Attorney Survey—answers of defense attorneys—Questions 6, 7, 15, 16); *id.*, app. F at 5, 7, 23-24, 29 (Insurers' Counsel Survey, Questions 7, 8, 16, 17); *id.*, app. D. at 4, 6, 18-19, 22-23 (Claims Personnel Survey, Questions 3, 4, 12, 13). On the whole, plaintiffs' attorneys disagree. *Id.*, app. C at 4, 6, 28-29, 33 (Attorney Survey—answers of plaintiffs' attorneys—Questions 6, 7, 15, 16). See

ers' understating of values an unacceptable negotiating tactic with respect to collision, property damage, comprehensive, personal injury protection and medical payments matters,<sup>86</sup> the defense and plaintiffs' bar is somewhat *less likely* to condemn such understatements.<sup>87</sup> In fact, the lawyers tend to support such behavior for uninsured motorist and bodily injury liability negotiations while most claims personnel do not.<sup>88</sup> In uninsured motorist or bodily injury cases, which entail more judgmental and subjective quantification of damages, attorneys thus seem more willing than claims personnel to accept exaggerations or understatements from either side.<sup>89</sup> Evidently, attorneys more readily distinguish between factual misstatements and negotiating ploys based on opinion rather than alleged facts.

### b. Inflating of Property Damage and Personal Injuries

Claimants may fraudulently inflate auto property damage. For example, a claimant obtains several estimates of the damage to her car. She then uses the highest estimate to file for reimbursement from the insurance company, while actually having repairs performed at

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*infra* Appendix, Tables 1 & 2 (uninsured motorist or bodily injury inflation of damages depend upon whether plaintiffs have an attorney).

Plaintiffs' lawyers believe that the opposite behavior, insurers' deflating of damages, occurs quite frequently, especially in uninsured motorist or bodily injury liability cases; claims personnel believe that it is rare. The defense attorneys' collective opinion lies in between, except for personal injury protection and medical payments matters (in which defense and plaintiffs' attorneys have similar opinions). AUTO INS. FRAUD STUDY, *supra* note 4, app. C at 5-6, 17-18, 22, 28-29, 33, app. D at 4-6, 18-19, 22-23 (Attorney Survey, Questions 8, 11, 14 & 17; Claims Personnel Survey, Questions 5, 8, 11 & 14). Typically, the views of insurers' counsel resemble those of the claims personnel and rank between the average claims person's response and the average defense attorney's opinion. *Id.*, app. F at 5-7, 23-24, 29 (Insurers' Counsel Survey, Questions 9, 12, 15 & 18); see *infra* Appendix, Tables 3 & 4 (plaintiffs' attorney inflation of personal injury protection or medical payments damages, and insurers' deflation of those damages) and Tables 5 & 6 (insurer deflation of uninsured motorist or bodily injury damages and of collision and/or property damages, respectively).

86. AUTO INS. FRAUD STUDY, *supra* note 4, app. C at 8, 19, 22, 30, 33; app. D at 8, 19, 23 (Attorney Survey, Questions 20b-d; Claims Personnel Survey, Questions 17b-d); see *infra* Appendix, Tables 7-9.

87. AUTO INS. FRAUD STUDY, *supra* note 4, app. C at 8, 19, 22, 30, 33; app. D at 8, 19, 23 (Attorney Survey, Questions 20b-d; Claims Personnel Survey, Questions 17b-d); see *infra* Appendix, Tables 7-9.

88. AUTO INS. FRAUD STUDY, *supra* note 4, app. C at 8, 19, 22, 30, 33; app. D at 8, 19, 23 (Attorney Survey, Question 20a; Claims Personnel Survey, Question 17a); see *infra* Appendix, Table 10. Perhaps claims personnel fear allegations of bad faith or of other claims of unfair practices so much that they believe even a give-and-take negotiating process could later be used as evidence of the insurer's "wrongful" behavior. See *infra* Part IV.B (Concerns About Bad Faith).

89. See *supra* note 77; AUTO INS. FRAUD STUDY, *supra* note 4; app. C at 7-8, 18-19, 22, 29-30, 33; app. D at 7-8, 19, 23 (Attorney Survey, Questions 18a & 20a; Claims Personnel Survey, Questions 15a & 17a); *infra* Appendix, Tables 10 & 11.

the shop that wrote the lowest estimate.<sup>90</sup> Also, unscrupulous body shops sometimes write the estimate a little higher to "help" the dishonest claimant.<sup>91</sup> Perhaps the claimant justifies this behavior by arguing that she only collects the extra money to compensate for her deductible.<sup>92</sup>

Claimants may also pad claims for medical bills by attempting to collect for treatment of injuries not caused by the accident. They include bills for routine checkups<sup>93</sup> with the bills for treatment of a covered injury. Insurers also contend that sometimes insureds obtain medical treatment to increase "specials"<sup>94</sup> rather than for medical reasons.<sup>95</sup>

Adjusters can counter inflated claims by carefully reviewing all bills and estimates. Consultation with medical experts or others hav-

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90. There have been legislative proposals to prevent such incidents. For instance, a Florida bill expressly permitted insurers to encourage their insureds to use an insurer-approved repair facility and to have insurers pay the facility directly. 1982 Fla. Laws 243 (unenacted ch. 627.7289). Permitting the insured to decide how and whom to pay is more meaningful if the insured selects options at the start of the policy, rather than after an occurrence. This would permit insurers to pass along cost savings, in the form of lower premiums, to those insureds choosing the less costly form of repairs reimbursement.

91. They may also charge substantially more for repairs covered by insurance than for noncovered repairs. Tracy & Fox, *supra* note 22.

92. See *supra* notes 16-19 and accompanying text about public attitudes toward insurers and insurance claims fraud. An industry study conducted in the mid-1980s indicated that "most people think it is okay to pad their claim to cover a deductible." Hanson, *supra* note 16 (a survey by the All-Industry Research Advisory Council (AIRAC) found that 31% of the public agreed that it is "all right to increase the amount of your claim to make up for a deductible"); accord AIRAC, PUBLIC ATTITUDE MONITOR 12 (1991) (about one-third of those surveyed in 1981, 1983, and 1989 seemed to agree that it was "all right to increase the amount of your insurance claim by a small amount [in order] to make up for the deductible . . ."). Of course, the deductible is calculated into the amount charged for the premium; for lower or no deductibles, a higher premium customarily is charged, unless proscribed by law.

93. Routine checkups create medical expenses that auto insurance is not intended to cover.

94. The term "specials" or "special damages" is commonly used in the insurance industry to describe medical bills, lost wages, and other specific economic losses. DAVIDS, *supra* note 6, at 427 (defining special damages as "[t]hose which are the natural, but not the necessary consequences of the act complained. Actual loss as distinguished from presumed loss"). It is often a base from which settlements are negotiated—e.g., a payment of "three times specials." ATHEARN, ET AL., *supra* note 83; H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT 108-11 (rev. 2d ed. 1980) (discussing various multipliers applied to special damages — the average seems to be settlements for about three times these amounts).

95. See WEISBERG & DERRIG, *supra* note 24, at 18-19 (finding extensive "build-up"—claimants and health care providers trying to inflate damages for which they seek compensation). When asked why certain automobile insurance fraud cases are not sent by insurers to the Florida Insurance Fraud Division, nine claims persons specifically blamed collusion between plaintiffs' lawyers and health care providers, which presumably makes fraud difficult to detect, let alone prove. AUTO INS. FRAUD STUDY, *supra* note 4, app. D at 24 (Claims Personnel Survey, Question 22); *infra* Appendix, Table 12; see also O'Connell & Joost, *supra* note 82, at 70-71.

ing special knowledge is necessary at times. For instance, insurers often use staff appraisers as well as independent appraisal firms specializing in insurance work to evaluate automobile damages.<sup>96</sup> No appraiser, however, can keep insureds from cheating by failing to repair the car after payment and then claiming the same damage on subsequent claims.<sup>97</sup>

c. Fighting in Court the Fraudulent Inflation of Claims

Attempts to inflate claims are not consistently prosecuted because claimants, if challenged, often back down and claim the appropriate amount.<sup>98</sup> Prosecutors do, however, pursue some gross cases of claim inflation. Florida brought criminal charges for claim inflation in *State v. Book*.<sup>99</sup> The insured, Book, purchased a Mercedes for \$44,000. Three weeks later it was stolen. Book estimated the car's value in his initial telephone claim at \$57,000, in an affidavit filed with the insurer at \$50,000, and in an invoice Book had the auto company send to the insurer at \$53,000. Book received an insurance settlement greater than the amount he paid for the car, but the inconsistencies in his statements ultimately led to an indictment for the uttering of a false document, grand theft, and three counts of filing a fraudulent insurance claim.<sup>100</sup> A Florida appellate court reversed the trial judge's order dismissing all of the charges and held that the insured made material misrepresentations about the purchase price "obviously . . . believ[ing] that an inflated purchase price would enable him

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96. Insurers believe that these efforts are well worth their cost because they reduce or eliminate the necessity to rely on inflated body shop estimates. The claimant may still find someone to repair the car for less, but at least the insurer paid only the estimated market value of the repairs.

97. See Crepeau, *supra* note 24, at 40 (noting that the defrauder may obtain insurance for a substandard or previously damaged vehicle, or declare a collision or vandalism which actually occurred before this particular policy began; both schemes are designed to make the insurer believe the car was insured in good condition, and thus to assure higher pay-outs on a claim). Perhaps only re-inspection by the appraiser and an eye for old damage can prevent double payment for the same damage. *But see infra* note 119 (concerning automobile inspection requirements for new insurance policies).

98. *But see Cox v. State*, 443 So. 2d 1013 (Fla. 5th DCA 1983). Cox allegedly falsely reported to his insurer the theft of a trailer and then withdrew the claim. The insurer made no payments, but Cox was still charged with crimes and convicted. This case is further discussed at note 36, *supra*.

When asked why insurers might not refer fraud cases to the state insurance fraud division, only one claims adjuster wrote that claimants, if confronted, usually back off from fraudulent claims, thus rendering referral unnecessary. AUTO INS. FRAUD STUDY, *supra* note 4, app. D at 24 (Claims Personnel Survey, Question 22) (255 of 400 respondents furnished an answer to this open-ended question); *infra* Appendix Table 12.

99. 523 So. 2d 636 (Fla. 3d DCA 1988).

100. *Id.* at 637. The three counts for insurance claims crimes, FLA. STAT. ch. 817.234(1)(b) (1991), were based on the actions producing the three different figures submitted to the insurer.

to secure a more desirable settlement.”<sup>101</sup> The court refused to recognize the insurer’s failure to include the statutorily required warning about the felonious nature of false claims<sup>102</sup> as a valid defense to insurance claims crimes.<sup>103</sup>

*Book* notwithstanding, fraud can be exceedingly difficult to prove in a criminal or civil court. The burden of proof, even in civil cases, is much greater than a preponderance of evidence.<sup>104</sup> Moreover, doubts tend to be resolved in favor of the accused defrauder. Even with apparently baseless claims, the claimant generally has the right to a jury trial, especially if the dispute concerns physical injuries.<sup>105</sup>

In *Francois v. Harris*,<sup>106</sup> the trial court dismissed a personal injury suit.<sup>107</sup> Francois supposedly felt pain in his knee and back immediately after the accident, but failed to seek medical care until at

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101. 523 So. 2d at 638.

102. The provision is as follows:

All claims forms shall contain a statement in a form approved by the Department of Insurance that clearly states in substance the following: “Any person who knowingly and with intent to injure, defraud, or deceive any insurance company files a statement of claim containing any false, incomplete, or misleading information is guilty of a felony of the third degree.

FLA. STAT. ch. 817.234(1)(b) (1991).

103. 523 So. 2d at 639.

104. 9 WIGMORE, EVIDENCE § 2498, at 424 (Chadbourn rev. 1981) (stating, “a stricter standard, in some such phrases as ‘clear and convincing proof,’ is commonly applied to measure the necessary persuasion for a charge of fraud”); Geoffrey C. Hazard, Jr. & Cameron Beard, *A Lawyer’s Privilege Against Self-Incrimination in Professional Disciplinary Proceedings*, 96 YALE L.J. 1060, 1061 & n.3 (1987) (in civil cases, fraud must be established by clear and convincing evidence, not just by a preponderance of evidence); see, e.g., *American State Ins. Co. v. Ehrlich*, 701 P.2d 676, 679 (Kan. 1985) (alleged fraud in obtaining an automobile insurance policy; misrepresentation about marital status). In ordinary civil matters, the preponderance of evidence standard applies. 9 WIGMORE, *supra* at 419.

105. These matters involve difficult damages issues beyond the usual calculation of fair market value for property damages and the wading through of bills which need to be reimbursed, etc. For instance, in *Burkett v. Parker*, 410 So. 2d 947 (Fla. 1st DCA 1982) the trial court had granted the defendant a summary judgment after the treating physician testified that there was *no* permanent injury, the applicable no-fault “threshold” requirement. The appellate court promptly vacated the judgment because the physician, understandably unwilling to rule out completely certain future medical developments, also had stated that permanency “could be possible.”

Even insurance company representatives distinguish between “puffing” or other exaggeration with respect to uninsured motorist or bodily injury claims, as opposed to other types of claims tied more directly to the reimbursement of specific bills. *Supra* note 77; AUTO INS. FRAUD STUDY, *supra* note 4, app. D at 7, 19 (Claims Personnel Survey, Question 15a). The insurers themselves also appear to be more inclined to deflate damages in personal injury matters. Plaintiffs’ attorneys contend that such insurer gamesmanship is most common in uninsured motorist or bodily injury cases. *Supra* note 85.

106. 366 So. 2d 851 (Fla. 3d DCA 1979).

107. This suit only concerned damages; defendants had already conceded liability. *Id.*



least three days later, after being advised to do so by an attorney.<sup>108</sup> Francois' answers to interrogatories pointed to far more serious and long-lasting injuries than did his testimony at trial three months later.<sup>109</sup> He testified at trial to a successful chiropractic treatment and no physical complaints since December 1976.<sup>110</sup> The answers to the interrogatories on November 30, 1977, stated that he continued to suffer from recurrent backaches which interfered with his work. The answers also included a final report from the chiropractor asserting that Francois had a "5% permanent partial disability."<sup>111</sup> His claim furthermore contained inconsistencies regarding lost earnings.<sup>112</sup>

The appellate court reversed the dismissal and remanded the case for a new trial, concluding that "[i]n all but the most extreme cases, our system entrusts juries with the ultimate decisions as to whether claimed injuries are genuine or not. Our experience has demonstrated that juries deserve this trust and that they are well able to discern the truth and to render judgment accordingly."<sup>113</sup> This aversion to pre-jury dismissals on matters of fraud is widespread in state courts. Judges traditionally do not want to bypass juries on such a basic area of factual interpretation. They are skeptical of summary judgments, directed verdicts, and reversals of jury verdicts.<sup>114</sup>

### 3. FALSE CLAIMS

Probably the most costly type of fraud is the false claim,<sup>115</sup> usually filed by the insured alone. Other possible participants in this type of fraud are "professional claimants" or dishonest medical, legal, or other specialists who, absent fraud, ordinarily play legitimate roles in

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108. 366 So. 2d at 851, 852 n.4. The attorney's "runner" had given Francois a ride home after the accident. *Id.*

109. 366 So. 2d 851. Francois evidently contended that he did not prepare or even read the interrogatories he swore to and signed. *Id.* at 852 n.4.

110. *Id.* at 851. The trial was in February, 1978.

111. *Id.* at 851-52.

112. *Id.* at 852 n.2.

113. *Id.* at 852. The court cited *Young v. Curgil*, 358 So. 2d 58, 59-60 (Fla. 3d DCA 1978) for the proposition that facts which support a conclusion that the plaintiff has feigned his injuries must reach a level constituting "outrageous misuse of the system of justice" to justify a dismissal. Cf. *Horjales v. Loeb*, 291 So. 2d 92 (Fla. 3d DCA 1974) (plaintiff admitted changing prior sworn testimony so that he could recover against an insured defendant; his case was dismissed).

114. For an example of a judicial determination that a jury was unreasonable, see *Darby v. Safeco Ins. Co. of America*, 533 So. 2d 37 (La. Ct. App. 1988) (reversing a jury's determination that non-disclosed member of household was covered under auto insurance policy).

115. See Laura Mazzuca, *States Track Insurance Fraud as the Crime is on the Rise*, BUS. INS., Jan. 2, 1988, AGENT/BROKER TOPICS, at 34D.

the insurance claims process.<sup>116</sup>

Policyholders who successfully padded previous claims and those who felt they did not receive proper compensation for a prior claim may file totally fictitious claims. Occasionally, people take out policies for the sole purpose of filing false claims at a future date.<sup>117</sup> For example, after sustaining an uninsured loss, some claimants purchase insurance and then file a claim.<sup>118</sup> This method of fraud is common with previously wrecked and stolen cars.<sup>119</sup>

Claimants also may defraud insurers by filing a claim for damage or theft that has not occurred or for a car that does not exist.<sup>120</sup> Some owners file false theft claims for automobiles with severe engine trouble in order to collect insurance proceeds.<sup>121</sup> Also, some insureds who have difficulty making their car loan payments "solve" the problem via automobile theft.<sup>122</sup> While eventual discovery of the fraud

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116. See John F. Berry, *3 Frisco Executives Indicted for Auto Insurance Fraud*, WASH. POST, May 5, 1978, at F1; DeBenedictis, *The Alliance*, *supra* note 33; DeBenedictis, *Accident Fraud Operation*, *supra* note 33; *Fraudulent Auto Accidents Viewed as a Thriving Racket*, *supra* note 20; Knowles, *supra* note 22; McLeod, *supra* note 5; Thompson, *supra* note 33. Note that collusion between health care providers and plaintiffs' attorneys was rarely suggested as a reason why insurers fail to report automobile insurance fraud to the fraud division. AUTO INS. FRAUD STUDY, *supra* note 4, app. D at 24 (Claims Personnel Survey, Question 22) (only nine responses out of 255 who wrote answers); see *infra* Appendix, Table 12.

117. See, e.g., Duggan, *supra* note 38 (discussing how an itinerant group of swindlers took out multiple insurance policies in order to fake accidents and otherwise collect on false claims); Insurance, UPI, Aug. 14, 1985, available in LEXIS, Nexis Library, UPI file (describing how a man purchased auto insurance in fifteen states in order to make false claims, then filed and collected claims totalling as much as \$400,000 on just one car).

118. Crepeau, *supra* note 24; *Illinois Man Sentenced for \$8G Auto Fraud Scheme*, 17 ICPI REPORT 3 (4th Issue 1990); Tracy & Fox, *supra* note 22.

119. Crepeau, *supra* note 24, at 40. The best means to deter this type of fraud is to require that the agent writing the policy initially inspect the automobile. Some insurers, such as Government Employees Insurance Company (GEICO), make such inspections a standard procedure in the application process. Telephone Interview with Jed George, *supra* note 25. Most insurers, however, do not follow such a procedure; consequently, a few state legislatures recently have intervened by enacting laws requiring such inspections. See, e.g., California Assembly Bill No. 3469 (approved by Governor, September 10, 1990, and filed with secretary of state, September 13, 1990), 1990 Cal. Stat., c. 736 (codified at CAL. INS. CODE §§ 400-405 (West Supp. 1992)); 1990 Florida Act, Senate Bill 2670, codified at FLA. STAT. § 627.744 (1991) (eff. Oct. 1, 1990); MASS. GEN. L. ch. 175, § 113S (1989); MASS. REGS. CODE tit. 211, § 94 (1989). New York enacted the model statute in 1977. Crepeau, *supra* note 24. N.Y. COMP. CODES R. & REGS. tit. 11, § 67 (Regulation No. 79) (1977) implemented the statute.

120. CLINTON TERRY & CHARLES KREBS, AUTO THEFT AND AUTO RELATED CRIMES IN SOUTH FLORIDA (DADE, BROWARD, AND PALM BEACH COUNTIES) (report prepared for the South Florida Alliance to Combat Theft in Our Neighborhood Council - ACTION) 48; see Crepeau, *supra* note 24, at 40; see also *supra* note 119.

121. TERRY & KREBS, *supra* note 120, at 15, 47. Such owners simply may abandon the vehicle or hand it over to thieves. See Allen, *supra* note 16, at B25; Crepeau, *supra* note 24, at 40.

122. Allen, *supra* note 16, at B8; TERRY & KREBS, *supra* note 120, at 15, 47. These automobiles often are sold for parts or sold intact on the black market. TERRY & KREBS,

may lead to civil or criminal punishment,<sup>123</sup> detection is difficult.<sup>124</sup> The economic effects of false claims extend beyond the insurers and their honest policyholders to innocent lienholders, such as banks, which may find that their interest is not protected by the insured's policy in cases of conversion by the insured.<sup>125</sup>

Other fraudulent claims come from so-called professional claimants.<sup>126</sup> Such claimants not only make false product liability or other general liability claims,<sup>127</sup> but they also ply their trade in the auto insurance field. Their *modus operandi* is to claim accidents in which the insured was suddenly "cut off" so that she rear ended the claimant,<sup>128</sup> accidents in which a phantom vehicle supposedly forced the

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*supra* note 120, at 3, 11, 13; *see also* *United States v. Giannetta*, 711 F. Supp. 1144 (D. Me. 1989) (detailing a probationer's auto insurance fraud scheme involving stolen and "stripped" cars). Another tactic is "car dunking" — placing a car at the bottom of a lake or other body of water and then claiming it to be stolen. Allen, *supra* note 16, at B1, B8.

123. *See In re Forfeiture of One 1971 Mercedes Benz Automobile*, 495 So. 2d 226 (Fla. 4th DCA 1986), where the court affirmed the trial court's findings that Starla Rose arranged to have her car stolen in order to make a fraudulent insurance claim. At the very least, the court found Rose falsely claimed the car was stolen *after* the police recovered it. *Id.* at 227 (Anstead, J., dissenting in part). Rose's Mercedes Benz was forfeited to the state under Florida Statutes, chs. 932.701-.704 (1986) because it had been "employed as an instrumentality in the commission of, or in aiding or abetting in the commission of a felony." *Id.* *See also* James R. Campbell, *Fraud Sting Brings Charges Against 170*, July 21, 1986, UPI available in LEXIS, Nexis Library, Wire file (detailing how the nation's largest undercover insurance fraud operation as of 1986 led to criminal charges against 170 persons for fraudulent claims of auto theft exceeding \$100 million); *Insurance Fraud Arrests*, UPI, Oct. 11, 1983, available in LEXIS, Nexis Library, UPI File (noting the arrest of five persons "for reporting their vehicles stolen and filing insurance claims when they actually had abandoned the cars").

124. Crepeau, *supra* note 24.

125. *See Progressive Am. Ins. Co. v. Florida Bank at Daytona Beach*, 452 So. 2d 42 (Fla. 5th DCA 1984) (finding that lienholder was not covered when the insured converted the car because insurance policy plainly excluded coverage for an insured's acts of conversion, and because policy provided no special coverage for lienholders). *But see* *Ohio Farmers Ins. Co. v. Michigan Mutual Ins. Co.*, 445 N.W.2d 228 (Mich. Ct. App. 1989) (concerning third party personal injury claims, finding that insurer was estopped from asserting policy rescission because of insured's application misrepresentations; insurer had to pay up to coverage limits obtained under insured's policy); *supra* notes 74-76 and accompanying text.

126. Professional claimants, either by themselves or in a "band" ("ring"), make their living by filing and collecting on fraudulent insurance claims. *See United States v. Panza*, 750 F.2d 1141 (2d Cir. 1984); Chrysler, *supra* note 25; Duggan, *supra* note 38; *F.B.I. Charges 170 in Car Insurance Fraud*, N.Y. Times, July 23, 1986, at A16; *Fraudulent Auto Accidents Viewed as a Thriving Racket*, *supra* note 20; *Insurance Fraud Arrests*, *supra* note 123; *Seven Arrested For Fraud*, UPI, May 9, 1982, available in LEXIS, Nexis Library, UPI File.

127. Professional claimants may pretend, for example, that they consumed a soft drink which turned out to have a mouse in it. *See, e.g.*, Candisky & Yocum, *supra* note 33 (describing a number of insurance scams, including the one above); *see also* *Fraud Suspect Denies Charges*, Gainesville Sun, March 30, 1991, at B4 (reporting scheme to defraud insurers in a series of phony slip-and-fall cases); *New Hampshire Man Finds Insurance Industry Not Tooth Fairy*, 17 ICPI Report 10 (4th Issue 1990).

128. *See, e.g.*, *Two Cleveland Men Indicted for \$22G Caused Accident Fraud Scheme*, 17 ICPI Report 12 (2d Issue 1990).

claimant's vehicle off a road and thus injured the driver as well as numerous passengers,<sup>129</sup> events causing severe injuries but only slight damage to the car, and incidents involving pedestrian injuries that did not incapacitate the claimant.<sup>130</sup> Another scam is the staged automobile collision, which involves a conspiracy to file false insurance claims by a number of persons who planned and executed the "accident."<sup>131</sup>

Challenging the professional claimant is difficult. Usually, the parties can point to real physical injuries or to damage to the vehicle, but the damages were sustained under fabricated or non-covered circumstances and typically are grossly exaggerated. Services such as the Regional Index Bureau<sup>132</sup> help insurance companies track injury claims. The bureau provides reporting companies with information on a claimant's prior claims and injuries. The bureau even describes similar claims filed under another name, on the assumption that the same claimant may adopt an alias. By comparing its information with the information held by such clearinghouses, the insurance company can avoid paying for an injury another insurer already covered and also can learn of previously existing conditions. Knowledge of such conditions helps adjusters to determine what injuries, if any, genuinely arose from a covered accident.<sup>133</sup>

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129. *Staged Auto Accident Ring Sentenced in Baltimore: \$147,854 Restitution Ordered*, *supra* note 38.

130. *See supra* citations in note 126; *see also* Candisky & Yocum, *supra* note 33 (describing various automobile accident schemes); Van Aartrijk, *supra* note 24 (outlining various auto insurance fraud scams).

131. *See, e.g.,* Fernandez v. State, 370 So. 2d 818 (Fla. 3d DCA 1979) (upholding defrauder's conviction for participation in staged accident conspiracy); Allen, *supra* note 16, at B8 (stating that rate of reported, staged auto accidents in California has risen 38% annually from 1986 through 1989); Herb Jaffe, *Staged Car Accidents Top List of Schemes*, NEWARK STAR LEDGER, March 18, 1986, at 1; *Caused Crashes Send Two to Prison*, 17 ICPI Report 12 (4th Issue 1990); *Eighteen Members of Organized Fraud Ring Indicted in Texas*, 18 ICPI Report 9 (1st Issue 1991); *Four Oklahomans Charged in Alleged \$38G Fake Accident Scheme*, 17 ICPI Report 10 (4th Issue 1990); *From Coast to Coast, Staged Accident Rings Continue to Proliferate*, *supra* note 33; *Insurance Agent and Second Man Sentenced for Staged Auto Accident Scheme: \$175,000 Restitution Ordered*, 17 ICPI Report 15 (3d Issue 1990); *Nationwide Staged Auto Accident Ring Collides with Law in Denver: Multi-State Investigation Pursues 30*, 17 ICPI Report 16 (3d Issue 1990); *Staged Auto Accident Defrauder Sentenced to One Year: \$84,605 Restitution Ordered*, *supra* note 33; *Staged Auto Accident Ring Convicted in Chicago*, 17 ICPI Report 1 (4th Issue 1990); *Staged Auto Accident Ring Sentenced in Baltimore: \$147,854 Restitution Ordered*, *supra* note 38; *31 Indicted for Roles in Staged Auto Accident Ring: Orange County's Largest Insurance Scam*, 17 ICPI Report 16 (3d Issue 1990); *37 Indicted in Chicago - "Operation Crystal Ball"*, 17 ICPI Report 15 (3d Issue 1990); *Three Oregon Men Indicted for \$115,000 Rip-Off*, 17 ICPI Report 12 (4th Issue 1990); *Two Cleveland Men Indicted for \$22G Caused Accident Fraud Scheme*, *supra* note 128.

132. The Regional Index Bureau is a service to which many insurance companies subscribe.

133. Other helpful, national sources of information and investigative skills include the National Automobile Theft Bureau (NATB) in Washington, D.C.; the Insurance Crime

#### IV. COUNTERMEASURES AGAINST FRAUD

##### A. *Private and Legislative Responses to Automobile Insurance Fraud*

Would-be profiteers find many avenues to commit insurance fraud. Some fraud schemes become huge,<sup>134</sup> while others involve only the relatively small amount to cover a deductible. In response, most insurers actively search for fraud,<sup>135</sup> and some states pursue and prosecute even the "petty" insurance defrauder.<sup>136</sup>

The insurance industry has organized to fight fraud by establishing groups such as the Insurance Crime Prevention Institute (ICPI), the National Automobile Theft Bureau (NATB), and in-house "special investigation units" (SIUs).<sup>137</sup> Several states established governmental departments to investigate and assist in the prosecution of insurance fraud.<sup>138</sup> Other states still need to create insurance fraud

Prevention Institute (ICPI) in Westport, Connecticut; and the Insurance Information Institute in New York City. See *supra* note 76 (about *ex post facto* underwriting and the Cleveland Index Bureau as well as the Property Loss Register). While some state governments also have their own databases, the need for both private and governmental improvements remains. Hoyt, *supra* note 24, at 313.

134. DeBenedictis, *The Alliance*, *supra* note 33; *F.B.I. Charges 170 In Car Insurance Fraud*, *supra* note 126; *Personal Injury Attorneys and Five Others Indicted in \$9 Million Racketeering Scheme*, *supra* note 33; *Seven Arrested For Fraud*, *supra* note 126; see *Bulletin*, 17 ICPI 11 (2d Issue 1990) (reporting the indictments of 31 individuals in a California staged vehicular accident ring and the indictments of 37 persons in Chicago as part of a continuing multi-agency investigation of auto accident schemes); Campbell, *supra* note 24; DeBenedictis, *Accident Fraud Operation*, *supra* note 33; Knowles, *supra* note 22; *31 Indicted for Roles in Staged Auto Accident Ring: Orange County's Largest Insurance Scam*, *supra* note 131; *37 Indicted in Chicago—"Operation Crystal Ball"*, *supra* note 131.

135. At the very least, insurers show an interest in deterring frauds that rise to a certain threshold level of loss.

136. In New York, for instance, a first party claimant was convicted of grand larceny after he filed a fallacious claim to receive less than \$1,400 (after allowing for the deductible). *People v. Ferone*, 526 N.Y.S.2d 973 (N.Y. App. Div. 1988); see also, e.g., *Cajun Auto Fraud Probe Heats Up With Indictment of Eight*, 17 ICPI Report 3 (4th Issue 1990) (noting the indictment of four persons for receiving \$1,875 via a staged auto accident scheme). Without an initial report by the insurer, of course, states cannot pursue most fraud because they simply do not know about it. Approximately 15% of the responding claims personnel wrote that small fraud cases are not referred to governmental investigative authorities. AUTO INS. FRAUD STUDY, *supra* note 4, app. D at 24; see *infra* Appendix, Table 12.

137. See *supra* note 133. One commentator notes that, although SIUs "are charged primarily with investigating suspicious claims, they are beginning to devote more resources to educating claims personnel." Hoyt, *supra* note 24, at 314.

138. Mazzuca, *supra* note 115. The states include: Alaska (ALASKA STAT. § 21.06.080(c) (1991) (giving the insurance department broad powers to investigate any alleged violations, such as claims fraud) & § 21.36.390(c) (1991) (stating that the insurance department's director "shall investigate facts . . . and shall refer . . . to the appropriate prosecutor" insurance law violations, which include claims fraud)); California (CAL. INS. CODE §§ 1872-1872.9 (West 1992) (created in 1978)); Florida (FLA. STAT. ch. 626.989 (1991) (created in 1976)); Georgia (GA. CODE ANN. § 33-2-3 (1992) — providing the state insurance commissioner with broad

bureaus.<sup>139</sup> State officials and insurers hope that such units will focus public attention on prevention, detection, and prosecution of fraud, and thus deter this type of white collar crime.<sup>140</sup>

Increasing frustration among insurers and investigators has prompted them to seek stronger civil and criminal measures against

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powers to create departments — a Fraud Unit, within the Insurance Commission's Enforcement Division, was created in 1991, modelled after Florida's Fraud Division — Telephone Interview with David Wilson, Fraud Investigator, Georgia Insurance Commissioner (May 22, 1992)); Idaho (IDAHO CODE §§ 41-250 & 41-252 (1991) (created in 1980, now a two-person claims fraud bureau within the Department of Insurance — Telephone Interview with Ralph Krom, Investigator, Idaho Department of Insurance) (May 18, 1992)); Nevada (NEV. REV. STAT. §§ 679B.154-.155 (1991) (established in 1983)); New Jersey (N.J. STAT. ANN. § 17:33A-8 (1985 & Supp. 1991) (created in 1983)); New York (N.Y. INS. LAW §§ 401-402 (McKinney 1985) (created in 1981)); North Carolina (N.C. GEN. STAT. § 58-2-160 (1991) (in essence, granted investigative powers in 1945, but with insufficient manpower to pursue much claims fraud—Telephone Interview with Eben Wallace, Chief Investigator, Investigations Division, North Carolina Department of Insurance (May 19, 1992)); Ohio (established in 1985; created in a budget item; no special enabling statute—Telephone Interview with John M. Dillon, Chief, Fraud Division, Ohio Dept of Insurance (May 18, 1992)); Pennsylvania (part of the Enforcement Bureau at the Pennsylvania Insurance Department, but claims fraud is not an emphasized area—Telephone Interview with David Tressler, Investigator, Pennsylvania Department of Insurance (May 18, 1992)); and Texas (TEX. INS. CODE art. 1.10D (West 1992) (created in 1991). Ontario, Canada also has such a bureau (Telephone Interview with Olivia Bertie, Investigations and Compliance Branch, Ontario Insurance Commission (May 19, 1992)). See also Clarke, *supra* note 23, at 52 & 56; Mazzuca, *supra* note 115. Only three states—California, Florida, and New York—have granted arrest powers to their insurance fraud investigators. They are the most aggressive states in pursuing insurance claims fraud (Telephone Interview with Aaron Mazen, *supra* note 25), although New Jersey fraud division personnel argue that their approach—stiff civil penalties—is actually more effective. See *infra* notes 227-231 and accompanying text.

Some states without separate fraud units let their insurance departments investigate alleged fraudulent claims. See, e.g., MO. REV. STAT. §§ 375.991 -.994 (Supp. 1991); Telephone Interview with Aaron Mazen, *supra* note 25 (referring to other states, such as Delaware, which sometimes informally investigate claims fraud). In several states such as North Carolina, Pennsylvania, and, to a lesser extent, Ohio, the emphasis remains on investigating fraud by insurance agents, with very few resources devoted to investigation of fraud by claimants. *Id.*; accord Telephone Interview with Eben Wallace, *supra*.

139. See, e.g., *Easy to Suspect, Hard to Prove*, BOSTON HERALD, Feb. 26, 1990, at 22 (arguing that a Massachusetts fraud bureau would be instrumental in eliminating false claims); *Those Phony Injury Claims*, BOSTON HERALD, Feb. 6, 1990, at 8 (disputing whether the estimated \$400 million in savings to be produced by a proposed, industry-funded fraud bureau would be passed on to consumers). Massachusetts now has an insurance fraud bureau. This bureau, though, is privately funded and operated by Massachusetts insurers. There is no requirement that insurers report to it, no proven track record of working with government to obtain convictions, and no power to subpoena witnesses or documents. MASS. GEN. L. ch. 266, § 111B (1992) (effective in 1991); telephone interview with James L. Bryant, Massachusetts Assistant Attorney General (May 21, 1992).

140. At times the mere presence of a private or state anti-fraud unit seems to prevent fraud. Zinkewicz, *supra* note 5 (referring to one insurer's practice of sending claimants a form letter that states "as a matter of policy" the claim is submitted to the SIU; some 80% of such claims are dropped).

those who commit automobile insurance fraud.<sup>141</sup> Courts and legislatures have rejected procedural shortcuts, such as polygraph tests in lieu of thorough investigations.<sup>142</sup> Yet, that rejection does not undercut the clear trend toward vigorous and successful pursuit of insurance claim miscreants and would-be defrauders. Prosecutors often use the federal Mail Fraud statute to reach such claimants.<sup>143</sup> In

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141. Burnette, *supra* note 25, at 43 (arguing that insurers finally "have begun to realize that fraudulent claims can be aggressively and successfully defended"); Candisky & Yocum, *supra* note 28 (quoting an insurer's chief fraud investigator, who said, "enough is enough" about the practice of paying rather than investigating small, suspect car claims); Crepeau, *supra* note 24; DeBenedictis, *The Alliance*, *supra* note 33; Fielkow & Eisenberg, *Civil RICO: The Insurers Fight Back*, 21 TORT & INS. L.J. 1-29 (1985); Ghezzi, *supra* note 24; Kress, *Insurers as RICO Plaintiffs: A Civil Remedy for Fraud*, 16 THE BRIEF - A.B.A. SEC. TORT & INS. PRAC. 33 (Fall 1986); Thompson, *supra* note 33.

The Insurance Crime Prevention Institute is the leading anti-fraud organization in the industry and counts just about every major insurer as a member. It states the following to be its purpose: "to join with every property and casualty insurer in a partnership to combat fraud, reduce its costs, and protect honest policyholders with the most concerted anti-fraud effort possible." 18 ICPI Report 2 (1st Issue 1991).

Some, though, dispute the insurance industry's oft-stated readiness to confront fraud. Of the claims personnel in Florida who responded to an open-ended question seeking the reasons why insurers might not report automobile insurance fraud to that state's insurance fraud division, over one-third said that insurers lack the internal resources—primarily money, personnel, and time—properly to identify fraud, report it to the authorities, and otherwise treat it. AUTO INS. FRAUD STUDY, *supra* note 4, app. D at 24 (93 of the 255 with responses); see *infra* Appendix, Table 12. Another twenty respondents, nearly 8% of those who expressed an opinion, blamed adjuster apathy. *Id.* That opinion is especially interesting because most of the respondents (60%) were themselves claims adjusters, and the rest presumably all had claims adjusting experience as managers/supervisors. AUTO INS. FRAUD STUDY, *supra* note 4, app. D at 4, 18, 22.

Others also doubt that the government really has committed itself to fighting automobile insurance fraud. Claims personnel frequently suggested the following reasons why insurers do not refer fraud matters to governmental fraud investigators: (1) failure of the fraud division to prosecute (29.41% of those responding); (2) inadequate legislation for the successful prosecution and punishment of insurance fraud (13.73%); (3) lack of governmental resources for successful investigation and prosecution of insurance fraud (11.76%); (4) inadequate punishment of persons committing insurance fraud (7.84%); (5) a court system bias toward the insureds, even those who defraud insurers (6.27%). *Id.*, app. D at 24; see *infra* Appendix, Table 12.

142. *E.g.*, in *Elder v. Coronet Ins. Co.*, 558 N.E.2d 1312 (Ill. App. 1990), the court held that insurer Coronet's exclusive reliance on the results of a polygraph test in denying the insured's automobile theft claim violates public policy and may constitute an actionable offense under the state Consumer Fraud and Deceptive Business Practices Act. Likewise, the Illinois Director of Insurance promulgated a rule barring an insurer from even "requesting" a polygraph examination. 13 Ill. Reg. 1204, 1217 (eff. Jan. 11, 1989) (expanding ILL. ANN. CODE tit. 50, § 919.60(d) (1989) to forbid insurers not just from *requiring* that insureds take polygraph tests, but to outlaw insurers' non-mandatory *requests* for polygraphs). The rule was upheld in court. See *Coronet Ins. Co. v. Washburn*, 558 N.E.2d 1307 (Ill. App. 1990).

143. 18 U.S.C. § 1341 (1988) (forbidding the use of United States Postal Service "to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises"); see, e.g., *Nine Indicted in Memphis for \$108G Staged Auto Accident Schemes: Second Wave in Long-term Investigation*, *supra* note 33; *Staged Auto Accident Ring Sentenced*

addition, authorities have prosecuted large fraud rings under the federal Racketeer Influenced and Corrupt Organizations statute (RICO),<sup>144</sup> and insurers have proceeded as plaintiffs in civil RICO cases.<sup>145</sup> Members of large-scale insurance fraud operations frequently are involved in other illegal activities as well.<sup>146</sup>

Numerous states specifically consider insurance claims fraud a crime.<sup>147</sup> Some statutes specifically provide that an insurer can

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in *Baltimore: \$147,854 Restitution Ordered*, *supra* note 38; *Two Cleveland Men Indicted for \$22G Caused Accident Fraud Scheme*, *supra* note 128.

144. 18 U.S.C. §§ 1961-68 (1988). Prohibited activities are outlined in 18 U.S.C. § 1962 (1988), and the criminal penalties and prosecution provision is at 18 U.S.C. § 1963 (1988). See *Russello v. United States*, 464 U.S. 16 (1983) (affirming unanimously a RICO conviction arising from arson and a 18 U.S.C. § 1963(a) order to pay \$340,043.09 in fines—the amount of ill-gotten insurance proceeds); *United States v. Turkette*, 452 U.S. 576 (1981) (landmark decision holding that RICO is not limited to the criminal infiltration of legitimate enterprises but also covers organizations whose actions are exclusively criminal; defendant, the leader of a 13-person criminal ring of drug traffickers, arsonists, bribers, and insurance defrauders, was convicted for, *inter alia*, insurance claims fraud); *United States v. Panza*, 750 F.2d 1141 (2d Cir. 1984) (affirming six defendants' RICO convictions for a scheme to defraud automobile insurance companies with false property damage claims); Knowles, *supra* note 22; *Personal Injury Attorneys and Five Others Indicted in \$9 Million Racketeering Scheme*, *supra* note 33; *Three Oregon Men Indicted for \$115,000 Rip-Off*, *supra* note 131.

About half of the states have their own RICO statutes, generally providing both criminal and civil sanctions. See Note, *Concurrent Jurisdiction Over Civil RICO Claims*, 73 CORNELL L. REV. 1047, 1075-76 n.226 (1988) (listing the states with "little RICO" statutes). Moreover, civil suits under the federal RICO law may be brought in either federal or state court. Tafflin v. Levitt, 493 U.S. 455 (1990) (unanimous decision).

145. See, e.g., Burnette, *supra* note 25, at 47-48; DeBenedictis, *The Alliance*, *supra* note 33; Fielkow & Eisenberg, *supra* note 141; Kress, *supra* note 141; Larry E. Parrish, *RICO Civil Remedies: An Untapped Resource for Insurers*, 49 INS. COUNSEL J. 337 (1982); Thompson, *supra* note 33; Howard Veisz & Marvin Wexler, *Civil RICO: A Weapon Against Fraud*, 86 BEST'S REVIEW, PROP. & CASUALTY ED. 22, Apr. 1986; Zinkewicz, *supra* note 5 (citing law professor G. Robert Blakey's speech to the effect that RICO civil actions are the most valuable means of fighting insurance fraud). A private cause of action under RICO is set forth in 18 U.S.C. § 1964(c) (1988).

Proposals to reduce the scope of civil actions under RICO have been supported by the insurance industry but opposed by the National Association of Insurance Commissioners. Steven Brostoff, *Civil RICO Suit Limits to be Debated in Congress*, NAT'L UNDERWRITER, PROP. & CASUALTY, Mar. 6, 1989, at 2. Moreover, RICO has limits. For example, a court held that a conspiracy by adjusters, appraisers, auto dealers, body shop operators, an insurance company employee, and various claimants did not constitute a RICO civil conspiracy because the insurer adduced no evidence that the defendants' joint, criminal enterprise made the defrauded insurer's damages more than if the same actions had been done separately. *Fireman's Fund Ins. Co. v. Plaza Oldsmobile, Ltd.*, 600 F. Supp. 1452 (E.D.N.Y. 1985).

146. See *United States v. Panza*, 750 F.2d 1141 (2d Cir. 1984); *Fireman's Fund Ins. Co. v. Plaza Oldsmobile, Ltd.*, 600 F. Supp. 1452 (E.D. N.Y. 1985); *United States v. Jacob*, 502 F. Supp. 1221 (D. Md. 1980); *Eighteen Members of Organized Fraud Ring Indicted in Texas*, *supra* note 131. Certainly, smaller fraud operations may also involve other crimes. See, e.g., *United States v. Giannetta*, 711 F. Supp. 1144 (D. Me. 1989) (probationer involved both in auto insurance fraud concerning stolen cars and in the sale of illegal drugs).

147. ALASKA STAT. §§ 21.36.360(b)(2)-(3) & 21.36.360(q) (1991); CAL. INS. CODE § 1871.1 (West Supp. 1992); CONN. GEN. ANN. STAT. § 53A-215 (1985 & Supp. 1992); DEL.



recover damages, including attorney fees and investigative costs, from claimants convicted of insurance fraud.<sup>148</sup> Moreover, a criminal conviction may estop the insured from relitigating the fraud issue in a subsequent civil suit.<sup>149</sup>

Relatively few states have enacted statutes specifically governing the investigation and prosecution of insurance fraud.<sup>150</sup> These laws establish governmental departments to handle the investigation of suspected insurance fraud. The departments typically work hand in hand with prosecutors to develop criminal cases. States with such insurance fraud divisions generally require the insurance adjuster and insurance company to report suspected fraud to the division.<sup>151</sup> Yet,

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CODE ANN. tit. 11, § 913 (1987 & Supp. 1990); FLA. STAT. ch. 817.234 (1991); GA. CODE ANN. § 33-1-9 (1991 & Supp. 1992); IDAHO CODE § 41-1325 (1991); ILL. REV. STAT. ch. 73, para. 1101 (1965 & Supp. 1992); MASS. GEN. LAWS ANN. ch. 266, § 111A-111B (West Supp. 1990); MONT. CODE ANN. § 33-18-401 (1987 & Supp. 1990) (both application and claims fraud); N.M. STAT. ANN. § 59A-16-23 (Michie 1988) (both application and claims fraud); N.Y. PENAL LAW §§ 176.00-30 (McKinney 1988); N.C. GEN. STAT. § 58-2-161 (1990); N.D. CENT. CODE §§ 26.1-01-10 & 26.1-02-24.1 (1989); OHIO REV. CODE ANN. §§ 2921.13(a)(10), 2921.13(D)(3) (1990 Supp.); OKLA. STAT. ANN. tit. 21, § 1662 (West 1983); 40 PA. CONS. STAT. § 474 (1971) (both application and claims fraud); R.I. GEN. LAWS § 11-18-1.1 (Supp. 1991); S.C. CODE ANN. § 38-55-170 (Law. Co-op. Supp. 1991); S.D. CODIFIED LAWS ANN. § 58-33-37 (1990) (both application and claims fraud); TENN. CODE ANN. § 39-14-133 (1991) (theft); UTAH CODE ANN. § 76-6-521 (1990) (theft); WIS. STAT. ANN. § 943.395 (West 1982). All of the above statutes cover claims fraud, while most do not mention fraud on applications. A New York court specifically found that the state's criminal provision, N.Y. PENAL LAW § 176.05 (McKinney 1988), only applies to fraud on commercial insurance applications, not to personal policies. See *People v. Ferone*, 526 N.Y.S. 2d 973 (1988); see also *supra* notes 48 & 70 and accompanying text (discussing criminal law for fraud on applications).

148. See, e.g., FLA. STAT. ch. 817.234(5) (1991).

149. See, e.g., *Morin v. Aetna Casualty & Sur. Co.*, 478 A.2d 964 (R.I. 1984). But see *Fisher v. Wainwright*, 584 F.2d 691 (5th Cir. 1978) (holding an insured's *nolo contendere* plea to insurance fraud crimes inadmissible against the insured in a civil case).

150. See *supra* note 138 and accompanying text. One of the first states to enact such laws was Florida. The initial Florida statute, 1976 Fla. Laws 266 (effective Oct. 1, 1976), created the forerunner to the Division of Insurance Fraud and specifically provided that fraudulent insurance claims constitute a third degree felony. These laws are now found at FLA. STAT. ch. 626.989 (1991) and FLA. STAT. ch. 817.234 (1991), respectively. There have been numerous amendments. See, e.g., 1977 Fla. Laws 468; 1978 Fla. Laws 258; 1979 Fla. Laws 81; 1979 Laws 400; 1982 Laws 243; 1983 Laws 288; 1987 Laws 334; 1989 Laws 42; see also AUTO INS. FRAUD STUDY, *supra* note 4, at 146 n.102 (furnishing history of the Florida Division of Insurance Fraud). In general, however, none of the states has had a sustained, legislative focus on the problem of insurance claims fraud. Telephone Interview with Aaron Mazen, *supra* note 25. Insurance law reforms instead have centered on other issues such as medical malpractice, rate structuring, no-fault insurance, and bad faith.

151. States with such requirements are: Alaska (ALASKA STAT. § 21.36.390(a) (1984)); California (CAL. INS. CODE § 1872.4 (West 1991)); Florida (FLA. STAT. ch. 626.989(6) (1991)); Georgia (GA. CODE ANN. § 33-1-16(f) (1991)); Idaho (IDAHO CODE § 41-250 (1991)); Illinois (ILL. ANN. STAT. ch. 73, para. 767.24(c) (1991) (concerning motor vehicle insurance)); Massachusetts (MASS. GEN. L. ch. 266, § 111B(f) (1992) (reporting to a *privately operated* investigation bureau about suspected auto insurance fraud)); Minnesota (MINN. STAT. § 65B.81 subd. 2 (1992) (concerning motor vehicle theft fraud)); Missouri (MO. ANN. STAT.

the level of compliance is unclear.<sup>152</sup> A number of claims personnel acknowledge that they, or at least adjusters generally, lack familiarity with the requirements and procedures for reporting fraud to the authorities.<sup>153</sup> The new "get tough" attitude has increased the number of prosecuted fraud cases, but still has not solved the problem. Small claims fraud often remains unnoticed or unreported<sup>154</sup> because of the overall cost of pursuing such fraud<sup>155</sup> or, at times, because of adjuster apathy.<sup>156</sup> The problem of too few personnel, too little time, and not enough money also contributes to a failure in detection.<sup>157</sup>

Many insurance companies have implemented in-house training

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§ 375.992 (Vernon 1991)); New Jersey (N.J. STAT. ANN. § 17:33A-9(a) (1985)); New York (N.Y. INS. LAW § 405 (McKinney 1985)); North Carolina (N.C. GEN. STAT. § 58-2-163 (1990)); and Texas (TEX. INS. CODE ANN. § 21.78(2)(b) (West 1992) (concerning automobile insurance fraud only)). See also Clarke, *supra* note 23, at 52 & 56; Mazzuca, *supra* note 115.

152. In fact, neither the Florida Fraud Division nor prosecutors have ever proceeded against agents, insurers, or others for failing to report under FLA. STAT. ch. 626.989(6) (1991). Telephone Interview with Jon E. Crosby, then Director, Division of Insurance Fraud, Florida Department of Insurance (Apr. 24, 1991) [hereinafter "Crosby Interview"]; Telephone Interview with Frank Doolittle, Director, Division of Insurance Fraud, Florida Department of Insurance (May 18, 1992) [hereinafter "Doolittle Interview"]. Indeed, no such alleged failure has even been investigated. Crosby Interview; Doolittle Interview. According to Mr. Crosby, no statutes or regulations provide a penalty for a ch. 626.989(6) failure to report except for the administrative and misdemeanor sanctions generally provided under FLA. STAT. ch. 624.15 (1991).

The founder and former President of the International Association of Insurance Fraud Agencies is unaware of any proceeding ever, *anywhere*, against a nonreporting insurer. Telephone Interview with Aaron Mazen, Director of the New York Insurance Fraud Bureau, *supra* note 25. New Jersey's fraud division, however, is starting to conduct random audits of auto insurers to ascertain whether they actually report suspected fraud; punishment of the nonreporting entities may prove necessary. Telephone Interviews with Richard Koch, Chief, New Jersey Insurance Fraud Division (Jan. 30 & May 20, 1991; May 19, 1992); see *infra* note 229 (relating to New Jersey anti-fraud legislation in 1990, as well as to prospective regulations thereunder).

153. AUTO INS. FRAUD STUDY, *supra* note 4, app. D, at 24 (24 out of 255 respondents, 9.41%); see *infra* Appendix, Table 12. In addition, four claims personnel—1.57%—said that adjusters' "lack of knowledge" leads to a failure to report. *Id.* Perhaps claims personnel working for insurers with SIUs need not be familiar with the state reporting requirements, so long as they inform their SIUs of all cases of suspected fraud. Presumably, the SIU experts know of the need to report to the pertinent authorities. Nonetheless, it is disquieting that some claims personnel would not even know of such a fundamental state requirement.

154. AUTO INS. FRAUD STUDY, *supra* note 4, app. D at 24 (38—14.9%—of 255 responses). The responses assume that the fraud has been or, but for apathy, easily could have been discovered. Over one-third of claims personnel stated that insufficient insurer resources cause the failure to report fraud cases to the state insurance fraud division. AUTO INS. FRAUD STUDY, *supra* note 4, app. D at 24 (93—36.47%—of 255 responses); *supra* note 141.

155. *Id.*, app. D at 24 (40—15.69%—of 255 responses).

156. *Id.* (20—7.84%—of 255 responses); *supra* note 141.

157. For a complete summary of responses, see *infra* Appendix, Table 12.

programs to teach adjusters how to spot fraud.<sup>158</sup> Organizations such as the Insurance Crime Prevention Institute run industry-wide seminars. Adjusters learn how to identify the indicators of fraud<sup>159</sup> as well as how to react to fraud. Some companies' Special Investigative Units (SIUs) take over the investigation of claims once an adjuster suspects fraud.<sup>160</sup> Many insurer's SIUs, however, only handle claims exceeding a certain amount.<sup>161</sup> That practice necessarily overlooks an unknown, perhaps substantial, number of small fraudulent claims, but it presumably serves as some deterrent to more egregious attempts at fraud.

In addition to requiring adjusters to report suspected fraud,<sup>162</sup> many states also encourage adjusters and insurance companies to notify the proper authorities by statutorily protecting them from an accused's defamation claim or other civil actions.<sup>163</sup> In *Pearce v.*

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158. See Ghezzi, *supra* note 24, at 521.

159. ICPI publishes a list of 93 indicators of auto insurance claims fraud which many companies give to their adjusters to use as reference when handling claims. See AUTO INS. FRAUD STUDY, *supra* note 4, at 49-50, app. A at 10-15.

160. See ALL-INDUSTRY RESEARCH ADVISORY COUNCIL (SPECIAL INVESTIGATIVE UNIT), SURVEYS ON INSURANCE COMPANY USE OF SIUs FOR FRAUD INVESTIGATION (1984); see also Ghezzi, *supra* note 24, at 524-527. Of course, because cases go to the adjusters' superiors, this specialization means that claims personnel may know little about the law or actual practices.

161. The names of these insurers cannot be disclosed because would-be defrauders could use knowledge of such confidential, informal thresholds to target particular insurance companies and to structure their claims so as to avoid investigation. Telephone Interviews with claims supervisors, regional officials, and other officials of insurance companies (June 22, 1990; Sept. 13, 1990, and Oct. 11, 1990). See, e.g., Ross, *supra* note 94, at 132 & n.24 (noting that insurers will not give "official approval" to a policy of paying nuisance value for claims below a certain threshold "for the convincing reason that such a policy, once known, would perhaps be likely to stimulate both routine litigation and the presentation of unmeritorious claims").

162. See *supra* notes 151-153 and accompanying text.

163. The state statutes are as follows (general immunity for reporting all types of suspected insurance fraud, not just automobile insurance claims fraud, unless otherwise stated): ALASKA STAT. §§ 21.36.365, 21.36.390(2) (1991); ARIZ. REV. STAT. ANN. § 20-2119 (1990); CAL. INS. CODE §§ 1872.5, 1873.2, 1874.4 (West 1992); COLO. REV. STAT. § 10-1-127 (1991); DEL. CODE ANN. tit. 18, § 533 (1989); FLA. STAT. § 626.989(4)(c) (1991); GA. CODE ANN. §§ 33-1-16(d)(3) & 33-39-22 (1992); IDAHO CODE § 41-271(5) (1991); ILL. REV. STAT. ch. 73, para. 767.24(h) & 1102(4) (1991); IND. CODE ANN. § 27-1-3-22(b) (Burns Supp. 1990); KAN. STAT. ANN. § 40-2,119 (1986); KY. REV. STAT. ANN. § 304.1-190 (Baldwin 1988); LA. REV. STAT. ANN. § 22:1218 (West 1991); ME. REV. STAT. ANN. tit. 24, § 2183 (1964); MASS. GEN. L. ch. 266, § 111B(j) (1992); MINN. STAT. § 65B.81 subd. 5 (1992) (concerning only fraud about automobile theft); MO. ANN. STAT. § 375.993(2) (Vernon 1991); MONT. CODE ANN. § 33-19-408 (1991); NEB. REV. STAT. §§ 44-3,133, 44-3,141 (1990); NEV. REV. STAT. § 679B.157 (1991); N.J. STAT. ANN. §§ 17:33A-9(b), 17:23-19 (1985 & Supp. 1991); N.Y. INS. LAW § 406 (McKinney 1985); N.C. GEN. STAT. § 58-2-160 (1991); N.D. CENT. CODE § 26.1-02-24.2 (1989); OHIO REV. CODE ANN. §§ 3937.42(E) & 3999.31 (1989); OR. REV. STAT. § 746.685 (1989); 40 PA. CONS. STAT. § 474.1 (1989); S.C. CODE ANN. § 38-77-1130(e) (Law. Co-op. 1976) (covering only automobile insurance fraud); TEX. INS. CODE ANN. §§ 1.10D(6), 1.40(b-

*United States Fidelity & Guar. Co.*,<sup>164</sup> a former adjuster for U.S.F. & G. filed a malicious prosecution action against the insurer after he was acquitted of criminal charges stemming from U.S.F. & G.'s payment of fraudulent auto insurance claims. The Fourth District Court of Appeal of Florida interpreted a Florida statute as granting broad immunity to the insurer and its employees when they report suspected fraud to the state division in charge of investigating suspected insurance fraud. The court barred Pearce's suit,<sup>165</sup> noting that the immunity statute shielded "specific persons" who perform required reporting tasks from libel or *other* civil actions.<sup>166</sup> In particular, the court wrote:

We read this to mean any and all civil causes of action based upon conduct under the statutory section. . . . It is unsound to say that

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d) & 21.78(4) (West 1992); VA. CODE ANN. §§ 38.2-229(A), 38.2-618 (Michie 1950); WASH. REV. CODE § 48.01.190 (Supp. 1991). These statutes generally resemble the model immunity statute suggested by the National Association of Insurance Commissioners (NAIC). That model statute broadly defines a "fraudulent insurance act" and then provides, in part, as follows:

A. No person when acting without malice, fraudulent intent or bad faith, shall be subject to liability by virtue of his filing reports, or furnishing, orally or in writing, other information concerning suspected, anticipated or completed fraudulent insurance acts, when such reports are provided to or received from: (1) Law enforcement officials, their agents and employees; or (2) The National Association of Insurance Commissioners, the state Department of Insurance, a federal or state governmental agency or bureau established to detect and prevent fraudulent insurance acts, as well as any other organization established for the same purpose, and their agents, employees or designees.

B. No person or entity identified in Subsection A or any of their employees or agents when performing their authorized activities including the publication or dissemination of any related bulletin or reports, without malice, fraudulent intent or bad faith, shall be subject to civil liability for libel, slander, or any other relevant tort, and no civil cause of action of any nature shall exist against such persons.

MODEL IMMUNITY ACT § 2 (1990).

164. 476 So. 2d 750 (Fla. 4th DCA 1985).

165. *Id.* FLA. STAT. ch. 626.989(4)(c) (1991) states:

In the absence of fraud or bad faith, a person is not subject to civil liability for libel, slander, or any other relevant tort by virtue of filing reports, without malice, or furnishing other information, without malice, required by this section or required by the department or division under the authority granted in this section, and no civil cause of action of any nature shall arise against such person:

1. For any information relating to suspected fraudulent insurance acts furnished to or received from law enforcement officials, their agents, or employees;
2. For any information relating to suspected fraudulent insurance acts furnished to or received from other persons subject to the provisions of this chapter; or
3. For any such information furnished in reports to the department, division, or the [NAIC].

166. 476 So. 2d at 752-53.

only reports on the Division-prescribed form and subsequent provision of information are immune from civil prosecution, but that information less formally communicated leaves an insurer or its employees open to suit. . . . Nor is it reasonable to suppose that it was the legislature's purpose to permit possible fraudulent claims to go unpunished unless the Division created a form for reporting suspected fraud and the insurer or its employee used that form to make a report.<sup>167</sup>

### B. *Concerns About Bad Faith*

While immunity from civil actions should encourage the reporting of fraud, adjusters often have countervailing concerns. The delay of payment on a valid claim because the adjuster suspects fraud can expose both the company and the adjuster to bad faith lawsuits. A Florida statute corresponding to other states' bad faith case law,<sup>168</sup> reads as follows:

Any person may bring a civil action against an insurer when such person is damaged . . . [b]y the commission of any of the following acts by the insurer: 1. Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his interests . . . . [A] person pursuing a remedy under this section need not prove that such act was committed or performed with such frequency as to indicate a general business practice.<sup>169</sup>

Adjusters thus worry about bad faith actions by insureds when-

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167. *Id.* at 753.

168. A bad faith cause of action in third party cases "has received almost unanimous acceptance throughout the United States." STEPHEN S. ASHLEY, *BAD FAITH ACTIONS: LIABILITY AND DAMAGES* § 2:22 (1990). The third party bringing such a suit may be an injured driver or passenger to whom an insured owes bodily injury liability. This injured third party has legally enforceable rights under the insurance contract; after obtaining a judgment for his injuries, he becomes a third-party beneficiary of the contract between the tortfeasor and that person's liability insurer. See *Cardenas v. Miami-Dade Yellow Cab Co.*, 538 So. 2d 491, 495 (Fla. 3d DCA), *review dismissed*, 549 So. 2d 1013 (Fla. 1989); see also, e.g., *Jefferson v. Allstate Ins. Co.*, 673 F. Supp. 1401 (D. S.C. 1987); *Jones v. Continental Ins. Co.*, 716 F. Supp. 1456 (S.D. Fla. 1989); *Liberty Mut. Ins. Co. v. Parkinson*, 487 N.E.2d 162 (Ind. Ct. App. 1985); *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165 (Tex. 1987).

Thirty-five jurisdictions also recognize a cause of action for bad faith in first-party cases, where the insured himself sues the insurance company. ASHLEY, *supra*.

These bad faith claims are not to be confused with the situations targeted by the unfair claims settlement practices statutes. For a list of the types of misconduct usually barred by such statutes, see MCCARTHY, *supra* note 43, at 526-30. For a complete list of the state laws against unfair claims settlement practices and against unfair and deceptive acts generally, and for state statutes specifically providing for the recovery of attorney's fees, damages or interest in suits against insurers, see *id.* at 753-60.

169. FLA. STAT. ch. 624.155(1)(b) (1991).

ever they delay the settlement of claims. Almost half of the claims personnel participating in the study stated that fear of "bad faith" actions influences their payment of questionable personal injury claims, medical bills, uninsured motorist claims, or bodily injury costs in a relatively large number (over twenty percent) of such questionable claims.<sup>170</sup> Defense attorneys are even more likely to believe that "bad faith" fears influence insurers' decisions whether to pay questionable claims.<sup>171</sup>

This concern about bad faith suits thus weighs against reporting possible fraud.<sup>172</sup> Indeed, fear of such lawsuits occasionally may lead insurers to pay some meritless claims.<sup>173</sup> Not only may "bad faith" worries forestall reporting of suspected automobile insurance fraud to state investigators,<sup>174</sup> but also fears that the insurer will receive bad publicity or be sued for defamation discourage claims personnel from reporting fraud.<sup>175</sup> Of course, bad faith actions are not an immediate threat to most insurers; underlying questions of coverage, liability, amount, and other claims issues must be thoroughly resolved before a claimant acquires the right to sue for bad faith.<sup>176</sup> Moreover, the

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170. AUTO INS. FRAUD STUDY, *supra* note 4, app. D at 9, 20, 23 (Claims Personnel Survey, Questions 20a & 20d); *see infra* Appendix, Tables 13-14.

171. AUTO INS. FRAUD STUDY, *supra* note 4, app. C at 8-9, 19, 22 (Attorney Survey—answers of defense attorneys, Questions 23a-d). Plaintiffs' lawyers find it improbable that fear of bad faith factors in the insurers' decisions to pay questionable claims. *Id.* at 8-9, 30, 33 (Attorney Survey—answers of plaintiffs' attorneys, Questions 23a-d); *see infra* Appendix, Tables 13-14.

172. *See supra* notes 151-153 and accompanying text about statutory requirements that insurers report suspected fraud. The "cost-effectiveness" rationale against reporting suspected fraud (AUTO INS. FRAUD STUDY, *supra* note 4, app. D at 24; *supra* notes 141 & 154 and accompanying text), and the "fear of bad faith" rationale (AUTO INS. FRAUD STUDY, *supra* note 4, app. D at 24; *supra* notes 168-71 and accompanying text), are joined by a fear of libel and of bad publicity (AUTO INS. FRAUD STUDY, *supra* note 4, app. D at 24; *infra* note 175), which could hurt sales of insurance policies. *See* Candisky & Yocum, *supra* note 28; Yocum & Candisky, *supra* note 28; *see also infra* Appendix, Table 12.

173. Hoyt, *supra* note 24, at 312 n.3 (citing Barry Zalma, *An Invitation to Fraud*, BEST'S REV., PROP./CASUALTY ED. 80-83 (Sept. 1987)).

174. AUTO INS. FRAUD STUDY, *supra* note 4, app. D at 24 (38—14.9%—of the 255 that responded); *see infra* Appendix, Table 12.

175. AUTO INS. FRAUD STUDY, *supra* note 4, app. D at 24 (16—6.27%—bad publicity; 17—6.67%—libel or other defamation). The latter concern is surprising inasmuch as the insurer should be protected from such suits by FLA. STAT. ch. 626.989(4)(c) (1991). *See supra* notes 163-167 and accompanying text.

176. *See Romano v. American Cas. Co. of Reading, Pa.*, 834 F.2d 968 (11th Cir. 1987) (applying Florida law) (holding that bad faith action for failure to settle an auto accident claim would not ripen until completion of the underlying action's appellate process, even though there had been a final judgment in excess of policy limits against the insured); *Colonial Penn. Ins. Co. v. Mayor*, 538 So. 2d 100 (Fla. 3d DCA 1989) (ruling that insured's uninsured motorist claim must first be resolved before she could bring a bad faith action against her insurer).

insurers' fears are generally exaggerated. The claimant's own bad faith — his attempted fraud — effectively shields the insurer from the claimant's claim of bad faith.<sup>177</sup> Indeed, no reasonable investigation of what ultimately is determined to be a wholly legitimate claim should expose the insurer to bad faith liability.<sup>178</sup> Neither mistakes nor reasonable delays constitute bad faith, and the law permits a sincere and prompt effort to substantiate questionable claims.<sup>179</sup> Nevertheless, studies indicate that some insurers have overreacted to the threat of bad faith litigation.<sup>180</sup>

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177. *California Casualty Gen. Ins. Co. v. Superior Court*, 218 Cal. Rptr. 817, 822-23 (Cal. Ct. App. 1985). One article comments on this principle as follows:

[T]he equities shift noticeably in favor of the insurer who, in response to a fraudulent claim, marshals its considerable resources to investigate and adjust a claim made by the insured purely for the purpose of exploiting his/her/its rights under the policy. Such facts certainly justify an award of compensatory—and perhaps punitive—damages against the insured. This logic applies *a fortiori* in the case where the insured, in addition to presenting a fraudulent claim (or knowingly presenting a meritless claim), sues the insurer for compensatory and punitive damages when the claim is denied. In this case, the insurer has not only incurred the expense of investigating and adjusting the claim, but has suffered the added exposure and expense of defending the frivolous bad-faith action. Here, the insured's abuse of the bad-faith "lever" may well constitute a malicious breach of its duty of good faith sufficient to form the basis for a punitive damages award in favor of the insurer.

Patrick E. Shipstead & Scott S. Thomas, *Comparative and Reverse Bad Faith: Insured's Breach of Implied Covenant of Good Faith and Fair Dealing as Affirmative Defense or Counterclaim*, 23 TORT & INS. L.J. 215, 226 (1987). See generally Stephen S. Ashley, *The Effect of the Insured's Misconduct on the Insurer's Liability for Bad Faith*, 2 BAD FAITH L. REP. 153 (1986); John F. Dobbyn, *Is Good Faith in Insurance Contracts a Two-Way Street?*, 62 N.D. L. REV. 355 (1986).

178. Douglas G. Hauser, John P. Ashworth & Marc D. Francis, *Comparative Bad Faith: The Two-Way Street Opens for Travel*, 23 IDAHO L. REV. 367, 372 & n.39 (1987). Of course, legislatures could help by providing specific time periods to respond to claims, including bad faith allegations. Insurers would be free from liability when acting within this "safety time zone."

179. Ashley, *supra* note 168, at § 5:04 (noting that "mere erroneous denial of benefits under an insurance policy does not vest the insured with a cause of action for bad faith"); see, e.g., *Harrison v. Benefit Trust Life Ins. Co.*, 656 F. Supp. 304 (N.D. Miss. 1987) (holding that honest mistake in execution of an otherwise adequate investigation is not bad faith); see also *Sharpe v. Employers Mut. Casualty Co.*, 808 F.2d 1110 (5th Cir. 1987); *Othman v. Globe Indem. Co.*, 759 F.2d 1458, 1465 (9th Cir. 1985) (finding insurer was *not* acting in bad faith when it denied a claim because the insured refused to furnish documents or otherwise cooperate); ASHLEY, *supra* note 168, at 5:06 (stating the common sense proposition that insurers are not obliged to pay claims the instant they are presented, that insurers may take the time necessary to determine whether claims are meritorious).

180. Hoyt, *supra* note 24, at 312-13 (citing a Jury Verdict Research, Inc. conclusion that insurers often settle questionable claims for a much greater amount than warranted by the probability of a claimant's success); see also Philip J. Hermann, *Lawyer Urges Insurers to Contest Bad Claims*, NAT'L UNDERWRITER, PROP. & CASUALTY/EMPLOYEE BENEFITS ED. 400 (Sept. 19, 1986). Officials at some insurers proclaim that they refuse to allow the threat of bad faith actions to deter them from investigating claims and withholding payment until

While insurers' fears of bad faith suits are not well-grounded in law, they may still be reasonable as *practical concerns* about the time and expense of responding to bad faith allegations. Although bad faith claims are difficult to prove, claimants can easily assert them. Responding to "bad faith" allegations may entail excessive administrative costs. Settling some questionable claims rather than bothering with bad faith litigation may thus save money.<sup>181</sup> This subject requires further study as to: (1) the nature and scope of the insurer's administrative costs of contending with bad faith issues; and (2) possible legislative or in-house (insurer) reforms to reduce such costs.<sup>182</sup>

### C. Civil Suits

Insurers can bring civil RICO actions against insureds who make fraudulent claims.<sup>183</sup> In response to bad faith allegations by the insured, they may also file counterclaims for "reverse" bad faith<sup>184</sup> or for breach of contract. Insurers can further seek Rule 11 sanctions in federal court<sup>185</sup> or comparable penalties under state rules of civil procedure against both the insured *and* the insured's attorney.<sup>186</sup> If a court finds the insurance claimant's case to have been frivolous or

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satisfied of a claim's legitimacy. Interviews with Gerald Attis, Divisional Superintendent, State Farm Ins. Co., in Orlando, Florida (June 27, 1990) and by telephone (May 18, 1992) (contending that State Farm has no concerns over bad faith when it investigates suspected fraud).

181. Generally, the mere threat of litigation may deter parties from socially beneficial choices or innovations. PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 158-61 (1988). For insurers, the decision may be to pay frivolous claims rather than to advance society's long-term interest in having insurers pay only legitimate claims.

182. One possible reform looks as follows: Upon allegation of bad faith, insurers could file a report with the state insurance department and request an initial assessment of the case. The department's early feedback would inform the insurer whether a fraud defense appears to have sufficient merit to avoid a bad faith judgment. Of course, these reports would need updating as more information becomes available.

183. *Supra* notes 144-145 and accompanying text.

184. *Supra* note 177 and accompanying text.

185. FED. R. CIV. P. 11. See Burnette, *supra* note 25, at 43-44 (describing the potential use of Rule 11 as a countermeasure against insurance fraud); Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 234-35 (1988) (finding that from 1983 through 1987 there were 47 published cases involving a Rule 11 motion against a personal injury plaintiff, with 28 resulting in a Rule 11 sanction or warning). The overwhelming majority of sanction motions are against *plaintiffs'* lawyers, and they are granted more frequently (approximately 60%) than those against defense counsel (approximately 50%). *Id.* Note that Professor Vairo's study did not consider unpublished decisions, which far outnumber published holdings. See Melissa L. Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383, 388 n.25 (1990) (noting that about two-thirds of Rule 11 decisions in the Third Circuit in 1987 were unpublished).

186. See, e.g., MD. R. P. 1-341 (awarding costs, including attorney fees, for actions brought, maintained, or defended in bad faith or without substantial justification).



malicious, it may even order the claimant to reimburse the insurer for attorney's fees.<sup>187</sup> In cases where claimants assert fraudulently inflated or entirely false claims in court, insurers can also use offers of judgment to obtain some reimbursement of costs, perhaps even attorney fees, if an eventual verdict effectively endorses what the insurer offered rather than what the claimant sought.<sup>188</sup> As an alternative to waiting indefinitely for insureds to pursue denied claims in court, the insurer can seize the initiative by refusing to pay apparently fraudulent claims and then seeking a declaratory judgment that the insurer has no liability.<sup>189</sup>

For the study, insurers' counsel were asked a series of questions about the decision making process for lawsuits brought by insurers against alleged insurance defrauders. After all, these attorneys effectively control whether most suits are filed. Their collective conclusions were as follows:

1. They were somewhat more likely than not to consider the financial cost a significant factor against filing suit.<sup>190</sup> The time and aggravation of litigation, as well as pretrial discovery expenses, usually were considered only minor negative factors against suing alleged defrauders.<sup>191</sup> The wide latitude of discovery was seen as even less of a deterrent against a lawsuit.<sup>192</sup>
2. The difficulty of detecting fraud is the most important reason

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187. See, e.g., COLO. REV. STAT. ANN. § 13-17-102 (West 1989) (general statute applicable in any type of civil action); FLA. STAT. ch. 57.105 (1991) (general statute applicable in any type of civil action); GA. CODE ANN. § 13-6-11 (Supp. 1991) (about contracts generally); TENN. CODE ANN. § 56-7-106 (1989) (statute specifically concerning insurance policy claims).

188. FED. R. CIV. P. 68. Many states have such rules as well. See, e.g., COLO. REV. STAT. ANN. § 13-17-202 (West Supp. 1991); FLA. STAT. ch. 45.061 (1991). Some states even have a rule directed specifically at tort cases usually covered by insurance. See, e.g., FLA. STAT. ch. 768.79 (1991).

189. That course of action relies on the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1988). States also permit such actions.

Courts, however, have dismissed declaratory judgment actions filed by insurers who denied a claim. See, e.g., *Casualty Indem. Exch. v. High Croft Enterprises, Inc.*, 714 F. Supp. 1190 (S.D. Fla. 1989) (dismissing insurer's declaratory judgment action as mere "procedural fencing"—an attempt to accomplish a "backdoor" removal from state to federal court); *State Farm Fire & Casualty Co. v. Taylor*, 118 F.R.D. 426 (M.D.N.C. 1988) (dismissing insurer's action, filed three days before denial of claim was sent to client, as tactical device whose use in these circumstances would promote disorderly race to the courthouse and discourage "prelitigation" settlement of disputes).

190. AUTO INS. FRAUD STUDY, *supra* note 4, app. F at 8, 24, 29 (Insurers' Counsel Survey, Question 19a).

191. *Id.* (Insurers' Counsel Survey, Questions 19b-c). Note, though, that a sizeable minority, over 40% of responding counsel, found these factors to be a significant hindrance.

192. *Id.*, app. F at 9, 24, 29 (Insurers' Counsel Survey, Question 19d) (about two-thirds of the respondents considered it as having either little or no effect).

not to file a suit.<sup>193</sup> Judgment-proof insureds<sup>194</sup> and the potential for "bad faith" or similar awards are additional, very important factors against seeking the help of courts.<sup>195</sup> The uncertainty of jury verdicts also weighs heavily against filing suit.<sup>196</sup> The insurer's desire to maintain good public relations and the presumed anti-insurer bias of most jurors are considered less significant.<sup>197</sup>

These answers may explain why all groups, including plaintiffs' attorneys, tend to agree that the insurer's ability to countersue rarely affects the insurer's decision for or against paying a claim.<sup>198</sup> They also show that a potential action against the would-be defrauder for *his* bad faith toward the insurer does not play a significant role.<sup>199</sup> In

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193. *Id.*, app. F at 11, 24, 29 (Insurers' Counsel Survey, Question 19j) (38 of 43 respondents considered it, at the very least, a significant factor. Most stated that it translates into a direct, substantial cut in the number of insurer lawsuits against insureds). When asked for comments about insurer lawsuits, more (four) comments were directed solely at this point than any other factor. (Fourteen of the 45 respondents wrote comments.) *Id.*, app. F at 11, 30 (Insurers' Counsel Survey, Question 19k).

194. *Id.*, app. F at 10, 24, 29 (Insurers' Counsel Survey, Question 19h) (fifty-five percent stated that judgment-proof status substantially cuts the number of insurer lawsuits; about 27% said the reduction is at least one-half; only one out of four respondents considered judgment-proof status as only a minor factor inhibiting insurer lawsuits).

195. *Id.*, app. F at 9, 24, 29 (Insurers' Counsel Survey, Question 19e) (thirty-four of 43 respondents found the potential for "bad faith" actions a significant factor against insurers' filing suits). When asked for additional comments about insurer lawsuits, two respondents again mentioned the concern about "bad faith" litigation as "overwhelming consideration" against filing a lawsuit. *Id.*, app. F at 11, 30 (Insurers' Counsel Survey, Question 19k) (fourteen of the 45 respondents wrote comments). Another respondent wrote that the elimination of punitive damages against insurers would lead to the litigation of many more suspected fraud cases, and another opined that large plaintiff's attorney fees awarded in some cases tend to dissuade insurers from fighting questionable personal injury protection cases. *Id.*

196. *Id.*, app. F at 9, 24, 29 (Insurers' Counsel Survey, Question 19f) (twenty-one of 43 respondents considered it a significant factor, with ten others concluding that it was very significant). When asked for additional comments about insurer lawsuits, two wrote about the unpredictability of juries. *Id.*, app. F at 11, 30 (Insurers' Counsel Survey, Question 19k) (fourteen of the 45 respondents wrote something).

197. *Id.*, app. F at 10, 24, 29 (Insurers' Counsel Survey, Questions 19g & 19i). These factors were each considered slightly less important than the overall financial costs. *Id.*, app. F at 8, 24, 29 (Insurers' Counsel Survey, Question 19a); *supra* note 190 and accompanying text. A majority of the respondents, however, still viewed each of these three factors—money, public relations, and juror bias—as a significant inhibitor of insurer lawsuits. *Id.*, app. F at 8, 10, 24, 29 (Insurers' Counsel Survey, Questions 19a, 19g & 19i).

198. *Id.*, app. C at 9, 19, 22, 30, 33, app. D at 10, 20, 23, app. F at 12, 25, 29 (Attorney Survey, Question 24; Claims Personnel Survey, Question 21; Insurers' Counsel Survey, Question 21).

199. Ashley, *supra* note 168, § 6:14 (stating, "one should not expect . . . that courts will apply the rules of bad faith mechanically and necessarily hold an insured liable for bad faith if it engages in conduct that would give rise to a cause of action for bad faith if engaged in by an insurer"). See, e.g., *Insurance Corp. of N. Am. v. Moore*, 783 F.2d 1326 (9th Cir. 1986) (holding that the insurer may not recover attorneys' fees after a showing of insured's bad

conclusion, civil countersuits are ineffective weapons for insurers combatting fraud. We shall next consider whether criminal counter-measures fare better.

#### D. *State Investigation and Prosecution*

In recent years, many states have created insurance fraud units, and existing units have grown tremendously.<sup>200</sup> For example, one of the most sophisticated state offices for insurance fraud investigation, the Florida Division of Insurance Fraud, has grown substantially in terms of number of investigators,<sup>201</sup> field offices,<sup>202</sup> and cases.<sup>203</sup> The Division is increasingly targeting small-dollar cases,<sup>204</sup> which many insurers fail to investigate privately because of supposed cost-inefficiency. The Division's former director confirmed that his office "necessarily prioritize[s] matters involving large dollar amounts, multiple offenders, repeat offenders, and multiple victims"; however, he said, the Division refuses to overlook lesser violations or otherwise allow insureds who make fraudulent claims to believe that by stealing fewer dollars "they can slip through the cracks" and avoid prosecution.<sup>205</sup> The Division thus investigates most case referrals presenting any evidence of fraud.<sup>206</sup> Moreover, because Florida law specifically requires only the submission of a false claim (rather than payment on it) to establish a third-degree felony,<sup>207</sup> the Division will not drop an inves-

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faith). *But see* *Handel v. United States Fidelity & Guar. Co.*, 237 Cal. Rptr. 667 (Cal. Ct. App. 1987) (suggesting that the insurer might have a bad faith cause of action against an insured who tries to commit insurance fraud; the court, however, overturned a jury verdict granting an insurer substantial compensatory and punitive damages on its counterclaim alleging the insured's bad faith); *Habiheh v. West Am. Ins. Co.*, No. 144,606 (Riverside County Super. Ct., Cal., 1985) (finding for insurer on "reverse bad faith" cross-complaint against insured for about \$75,000), described in Shipstead & Thomas, *supra* note 177, at 225 n.71.

200. *Supra* notes 138, 150-151 and accompanying text.

201. AUTO INS. FRAUD STUDY, *supra* note 4, at 155-56 n.137.

202. *Id.* at 156 n.138.

203. *Id.* at 156 n.139.

204. Mazzuca, *supra* note 115.

205. Jon E. Crosby, *Insurance Fraud - Focusing Our Resources*, FLORIDA UNDERWRITER, May 1990, at 14, 46.

206. *Id.* Perhaps the greatest dichotomy between Fraud Division practices as pronounced by the director and as viewed by claims personnel appeared when almost 30% of the claims experts explaining why cases are not referred to the Division opined that the Division does not adequately pursue matters referred to it. AUTO INS. FRAUD STUDY, *supra* note 4, app. D at 24 (75 of 255 responses); *infra* Appendix, Table 12.

207. FLA. STAT. § 817.234(1) (1991). *See* *Cox v. State*, 443 So. 2d 1013 (Fla. 4th DCA 1983), discussed *supra* notes 36 & 98; *see also* CAL. INS. CODE § 1871.1 (West Supp. 1992) (stating that it is a crime to knowingly present fraudulent claims; there is no requirement for payment to have been made); IDAHO CODE § 41-1325 (1991) (presentation of the false claim constitutes a crucial element of the crime; payment does not).

tigation simply because the claimant withdraws a claim.<sup>208</sup>

Still, Florida and other states have only qualified success in fighting insurance fraud. During the past decade, Florida has made substantial progress in detecting and prosecuting insurance crimes.<sup>209</sup> But judged by present estimates of actual fraud, rather than by past prosecutions, the picture remains bleak. Insurance fraud arrests and convictions occur in only an insignificant percentage of the presumed instances of automobile insurance fraud.<sup>210</sup>

The most frequently stated reason for states' failure to pursue suspected insurance fraud cases is lack of sufficient evidence. Insurance personnel most often mention this same problem as a reason for not reporting suspected fraud to the government to begin with;<sup>211</sup> governmental investigators<sup>212</sup> and prosecutors<sup>213</sup> alike name it more frequently than any other reason when justifying lack of prosecution. Indeed, the ICPI finds that only one in eight referrals has sufficient evidence to merit prosecutorial review.<sup>214</sup> The government ends up bringing charges in about seventy to seventy-five percent of the cases ICPI recommends for prosecution.<sup>215</sup>

Few prosecutors have much experience handling automobile insurance fraud cases.<sup>216</sup> In many of Florida's twenty judicial cir-

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208. Robin Yocum & Catherine Candisky, *Ohio Laws Hinder Fight Against Fraud*, COLUMBUS DISPATCH, Dec. 20, 1988, at 1A, 2A (quoting Jon E. Crosby, then director of Florida's Division of Insurance Fraud). Cf. note 98 and accompanying text. The distinction between failed and successful attempts to obtain claim payments may still be crucial in other jurisdictions' investigative and prosecutorial decisions. For instance, Ohio has no law against mere attempts, Yocum & Candisky, *supra*, and the New Jersey fraud division focuses on obtaining civil damage awards, *infra* notes 227-31 and accompanying text. Obviously, given limited public resources, it makes some sense to focus on "successful" fraud rather than attempted fraud cases in which the damages are most likely comparatively small.

209. For a brief account of Florida's improvements, see AUTO INS. FRAUD STUDY, *supra* note 4, at 157-58.

210. *Id.* at 158. Florida Fraud Division opinions about why an insurer might not refer fraud cases are found *id.* at 159.

211. *Id.*, app. D at 24 (106—41.57%—of the 255 responses); see *infra* Appendix, Table 12.

212. AUTO INS. FRAUD STUDY, *supra* note 4, app. E at 4, 16 (Fraud Division Survey, Question 6). For the investigators' perceptions of problems at the prosecutorial level, see *id.* at 160.

213. *Id.* at 163 & n.178.

214. INSURANCE CRIME PREVENTION INST., *supra* note 34, at 16 (figures from July 1, 1987, to June 30, 1990).

215. *Id.* at 17 (figures from July 1, 1987, to June 30, 1990).

216. Telephone Interview with Chet Zerlin, Deputy Chief, Economic Crimes Unit, Dade County, Florida, State's Attorney Office (May 19, 1992) [hereinafter Zerlin Interview]; Telephone Interviews with Kent Neil, Chief of Economic Crimes Unit, 17th Judicial Circuit, Broward County, Florida, State's Attorney Office (Feb. 16 & 27, 1990; May 19, 1992) [hereinafter Neil Interviews]; Telephone Interview with Carole Rice, Assistant State's Attorney, 5th Judicial Circuit - Ocala, Florida (Feb. 20, 1991) [hereinafter Rice Interview]. For instance, none of the prosecutors responding to the survey had spent more than 20 percent

cuits, for example, no prosecutor has had any auto claims fraud cases.<sup>217</sup> Only a few circuits, in large metropolitan areas, have several prosecutors experienced in auto insurance fraud. Presumably, this problem exists in most states.<sup>218</sup>

Prosecutorial disinterest exacerbates the problem of inexperience. As one prosecutor put it:

Most Assistant State Attorneys either aren't interested in prosecuting white collar cases or just *not* knowledgeable [sic] enough to file said charges. So if an investigator has trouble finding someone to file his case, he would be reluctant to [send it on for prosecution]. It depends on the Judicial Circuit.<sup>219</sup>

Prosecutors find that time constraints, budget and personnel shortages, poor case preparation by law enforcement or fraud division investigators, and poorly drafted fraud laws and sentencing guidelines create other stumbling blocks.<sup>220</sup> Prosecutors acknowledge that they prefer the prosecution of "street crimes" to white collar crimes; they may not understand "paper" crimes, and do not have the time to learn.<sup>221</sup> In offices with well-established economic crime units, however, prosecutors rarely drop charges.<sup>222</sup>

Most prosecutors and insurance fraud investigators agree that jail time is the most appropriate punishment for insurance fraud criminals who are "repeat" offenders, followed by restitution, fines, probation, and community service.<sup>223</sup> Most states' insurance fraud laws provide prison terms, albeit relatively short ones. In many states, however, prosecutors have great difficulty securing a prison

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of his or her time on automobile insurance claims fraud; most had handled no more than a total of nine such cases in recent years. AUTO INS. FRAUD STUDY, *supra* note 4, app. G at 3, 12, 15 (Prosecutor Survey, Questions 4-5).

217. Neil Interviews, *supra* note 216; Rice interview, *supra* note 216.

218. Telephone Interviews with Richard Koch, *supra* note 152.

219. AUTO INS. FRAUD STUDY, *supra* note 4, app. G at 4, 16 (Prosecutor Survey, Question 7). Noting the difficulty in getting prosecutors to respond to insurance fraud, Notre Dame Law professor G. Robert Blakey put it as follows: "If I go to a prosecutor to ask him to pursue an action, often the response is 'Listen, I've got a drug problem in my state—rapes, robberies, murders. You want me to spend time on a case where somebody cheated an insurance company? Isn't that what insurance companies are for?'" Zinkewicz, *supra* note 5.

Speaking more generally about law enforcement officers, a respondent wrote, "[n]ot one . . . in fifty [is] aware of what constitutes insurance fraud and of the congruent issues." AUTO INS. FRAUD STUDY, *supra* note 4, app. E at 11, 19 (Fraud Division Survey, Additional Comments at End of Survey).

220. *Id.*, app. G at 4, 16 (Prosecutor Survey, Question 8); Neil Interviews, *supra* note 216; Rice Interview, *supra* note 216; Zerlin Interview, *supra* note 216.

221. Rice Interview, *supra* note 216.

222. Neil and Zerlin Interviews, *supra* note 216.

223. AUTO INS. FRAUD STUDY, *supra* note 4, app. E at 5, 12-13, 15; app. G at 5, 12-13 (Fraud Division Survey, Question 10; Prosecutor Survey, Question 11).

term for *first-time* insurance fraud offenders.<sup>224</sup> Prosecutors find restitution the most important punishment for a first-time offense, with jail time ranked second, followed by probation, fines, and community service.<sup>225</sup> The views of fraud division investigators are similar, except that they place fines and other assessments higher, about equal to jail time in importance.<sup>226</sup>

New Jersey takes a different approach. It mostly relies on administrative penalties focussed on restitution<sup>227</sup> and on civil penalties of \$5,000 or greater.<sup>228</sup> This approach may make more sense than emphasizing *criminal* investigations. It avoids the problems of high burdens of proof and of funneling violators into already-glutted penal systems. New Jersey's approach requires direct cooperation between defrauded insurers and the state, particularly in actions where the latter seeks civil fines and the former pursues compensatory damages such as investigation expenses, costs of suit, attorney fees, and possibly treble damages.<sup>229</sup> Richard Koch, the director of the New Jersey fraud division, emphasized that New Jersey's civil penalty scheme warns would-be defrauders that they can be hit "where it counts": in

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224. One prosecutor wrote, "[i]t requires about 43 third degree felony counts for a defendant with no previous record to score a prison term." *Id.*, app. G at 5, 17 (Prosecutor Survey, Question 9). Fraud Division respondents also wanted sentencing guidelines which would provide some jail time as well as other increases in punishment. *Id.*, app. E at 8, 17 (Fraud Division Survey, Question 8).

225. *Id.*, app. G at 5, 12, 15 (Prosecutor Survey, Question 10).

226. *Id.*, app. E at 5, 12, 15 (Fraud Division Survey, Question 9).

227. N.J. STAT. ANN. §§ 17:33A-2, 17:33A-5 (West 1985 & Supp. 1991).

228. *Id.* at §§ 17:33A-4, 17:33A-5.

229. *Id.* at § 17:33A-7. In 1990, the New Jersey legislature sought to improve cooperation by requiring all automobile insurers to file with the state insurance commissioner "a plan for the prevention of fraudulent insurance applications and claims and for the prevention of automobile theft." N.J. STAT. ANN. § 17:33B-46(a) (West Supp. 1991). Under the New Jersey legislation the commissioner, calling upon the expertise of the state's Division of Insurance Fraud Prevention, has 90 days to approve or disapprove the plan. *Id.* The commissioner can request amendments and, ultimately, can impose a rather severe penalty—a reduction of up to 20% in the automobile physical damage base rates—for insurers that fail to submit a plan, fail to make requested amendments, or fail "to properly implement an approved plan in a reasonable manner and within a reasonable time period." *Id.* at § 17:33B-46(c). Plan implementation is to be monitored by the state's Division of Insurance Fraud Prevention, and each insurer must file an annual report "on its experience in implementing its fraud and theft prevention plan." *Id.* at § 17:33B-46(b). Again, failure to file such reports may result in a 20% reduction of physical damage base rates. *Id.* at § 17:33B-46(c).

State regulations and the individual insurers' plans have been completed and filed, and all insurers must include in their plans a section ensuring compliance with the fraud reporting requirements of New Jersey law. *Id.* at § 17:33A-9(a) (West 1985). Telephone Interviews with Richard Koch, *supra* note 152. The failure to report thus will constitute a failure to implement the plan and will give the state a right to penalize the insurer (20% rollback in physical damage rates). *Id.* The Division is starting to monitor compliance with the reporting requirement through random audits; while the 20% rollback should be sufficient, other penalties also may be provided via future regulations. *Id.*

the pocketbook.<sup>230</sup> Consistently imposed fines and complete restitution sanctions may have a deterrent value and a public education effect lacking in less frequent criminal convictions, suspended jail terms, and probation periods.<sup>231</sup>

## V. CONCLUSION

Insurance fraud is multifaceted. There is no single typical profile of the fraudulent claimant. Fraud is committed by polished professional criminals and ordinary citizens. A single act of fraud may involve millions of dollars or less than one hundred dollars. Increased law enforcement may be the way to deter or catch professional defrauders, but small-time fraud must be stopped by efforts within the insurance industry.<sup>232</sup>

Erroneous statements about damage values or other "soft" representations may qualify as opinion or as mere negotiating ploys, but gross exaggerations may actually amount to unlawful misrepresentations.<sup>233</sup> The fraud resulting from such misrepresentations often escapes the attention of very busy claims personnel.<sup>234</sup>

Even if claims personnel do suspect fraud, they frequently choose not to pursue their hunches.<sup>235</sup> Some insurers, in effect, encourage fraud by failing to file reports with governmental investigators or

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230. *Id.* Of course, New Jersey's use of civil penalties does not preclude criminal prosecutions. See N.J. STAT. ANN. § 17:33A-14 (1985). Realistically, though, the New Jersey scheme means that only the most egregious or repetitive cases are likely to be pursued by prosecutors; the governmental insurance-fraud experts emphasize restitution and civil fines. Telephone Interviews with Richard Koch, *supra* note 152.

231. *Id.* Without dissent, prosecutors supported improving clearinghouse networks, educating the public, raising the qualifications of insurance company fraud investigators, increasing insurer civil actions against defrauders, raising registration requirements for insurance agents, and — most of all — aggressively pursuing criminal remedies. AUTO INS. FRAUD STUDY, *supra* note 4, app. G at 6-8, 10, 13-15 (Prosecutor Survey, Questions 14a, 14d-f, 14i-l & 14s). Governmental investigators essentially backed the same reforms. *Id.* at 161 & n.168. Apart from creating the general benefits of fraud deterrence and detection, such education may help in sensitizing potential future jurors to the extreme costs associated with automobile insurance fraud. Rice Interview, *supra* note 216; AUTO INS. FRAUD STUDY, *supra* note 4, app. G at 8, 17 (Prosecutor Survey, Question 14v).

232. See Ghezzi, *supra* note 24.

233. See *supra* note 7 (on exaggerations as misrepresentation); *supra* note 89 and accompanying text (on exaggerations as negotiation). No-fault thresholds often encourage such exaggerations. See *supra* note 82 and accompanying text.

234. *Supra* note 154 (2d para.). Claims personnel often also believe that the government lacks the resources to conduct an adequate investigation and prosecution. See *infra* Appendix, Table 12 (11.76% of volunteered responses—30 out of 255).

235. The reasons may be, for instance, limits in time or financial resources, adjuster apathy, concerns about a claimant's legal reprisal, and feelings that insurance crimes are not adequately prosecuted or punished. *Id.*

other law enforcement officials.<sup>236</sup> In the end, lax sentencing guidelines and limited enforcement resources send the message that the government neither vigorously prosecutes nor convincingly punishes insurance fraud.

One erroneous perception widespread in the industry is that bad faith laws stymie insurer anti-fraud efforts.<sup>237</sup> Another is the notion that *frequently* governmental investigators improperly screen and inadequately investigate or pursue cases.<sup>238</sup>

On balance, then, the areas with the most subjective quantification of damages — uninsured motorist and bodily injury liability — provide the greatest incentives for fraud.<sup>239</sup> If a claimant is clever, knowledgeable, and not greedy — either in the amount of claimed damages or in the number of claims — he can almost count on committing fraud with impunity. To make matters worse, the incentives for fraud are often created by the insurers themselves: choosing not to pursue suspected fraud, opting not to report matters to governmental authorities. While the defrauders are truly the culpable parties, insurers constitute the front line in the battle against auto insurance fraud. It is clear that insurers could do more to discourage such fraud. Governmental authorities can only buttress and supplement the insurers' effort.

Unfortunately, the public's attitude towards insurance companies hinders insurance fraud prevention. Padding of estimates and altering the facts of otherwise non-covered accidents are not widely regarded as criminal activities.<sup>240</sup> Many policyholders believe they deserve to get something tangible in return for their premium money regardless of the contractual restraints under the policy and at law.<sup>241</sup> Insurance claims personnel thus believe that education can help combat automobile insurance fraud.<sup>242</sup> The idea is that once consumers

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236. See *supra* notes 152-153 and accompanying text.

237. The administrative costs and hassle of responding to bad faith allegations, though, may outweigh this legal conclusion that bad faith actually is quite difficult to prove in court. See *supra* notes 180-182 and accompanying text.

238. See *infra* Appendix, Table 12 (75 of 255 claims personnel respondents volunteered that fraud division investigators fail to pursue cases, and 30 wrote that the division lacks the necessary resources).

239. See, e.g., AUTO INS. FRAUD STUDY, *supra* note 4, at 40, 46 (compared with pay-outs for other types of coverage, the claims payments in those two types of automobile insurance coverage have the highest proportion caused by fraud: about 24% of bodily injury and 43% of uninsured motorist payments, with other coverages ranging from around 6% to 18%).

240. AUTO INS. FRAUD STUDY, *supra* note 4, at 78-79, 94, 98, 101 (survey of public attitudes).

241. *Id.* at 103. Perhaps the claimant's rationalization is that she has paid premiums for years without ever before filing a claim.

242. *Id.*, app. D at 11-12, 20, 23 (Claims Personnel Survey, Questions 23d, 23f, 23g).



see that they actually can save more money if fewer policyholders inflate their claims, fewer fraudulent claims will be filed.<sup>243</sup> Defense and plaintiffs' attorneys, however, are skeptical about the effectiveness of educating the public.<sup>244</sup>

Which measures, then, have the potential to reduce auto insurance fraud? Based on the surveys' findings, as well as on the current status of the law, the following recommendations are proposed:

1. Insurers' concerns over "bad faith" actions today causes the payment of numerous questionable personal injury protection, medical payments, uninsured motorist, and bodily injury claims. Yet, most statutes and case law do not support these concerns. If a plaintiff unfairly threatens a bad faith action, the insurer should respond by filing a counterclaim, submitting a reasonable "offer of judgment," pursuing Rule 11 sanctions, seeking a declaratory judgment, forwarding (if relevant) materials to the appropriate law enforcement authorities, or taking any other appropriate action. Insurers should also use the remedies available under current law to defend against questionable claims. If necessary, they should file counterclaims, properly cancel policies, pursue and report fraud, or take other affirmative steps to combat fraud and discourage future fraudulent acts.

2. Insurers must increase their efforts to settle legitimate claims promptly and fairly. They must avoid precipitous actions in paying or denying claims,<sup>245</sup> and correct mistakes when they occur.

3. Whenever feasible, insurers should rely upon the clearing-

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Attorneys, both for plaintiff and defense, are less sanguine about the usefulness of education on auto insurance fraud and its costs. *Id.*, app. C at 10, 11, 20, 23 (Attorney Survey, Questions 25d, 25f, 25g); see *infra* Appendix, Table 15.

243. Such an outcome may be unlikely. AUTO INS. FRAUD STUDY, *supra* note 4, at 93 (noting that a publicity campaign actually may increase the likelihood of participation in fraud); Interviews with Walter Dartland, Attorney and Executive Director, Citizens' Fraud Prevention and Education Foundation, in Orlando, Florida (Jan. 5, June 27 & Nov. 2, 1990) (noting that past anti-fraud, educational campaigns, such as one in California two decades ago, actually have led to increased insurance fraud).

Another possible deterrent mechanism, as well as a prod to greater public involvement in fighting fraud, would be a "fraud tips hotline." James E. Seymour, *Fraud Not a Closet-Case*, FLA. UNDERWRITER, May 1990, at 14, 47; AUTO INS. FRAUD STUDY, *supra* note 4, app. D at 17, 28 (Claims Personnel Survey, Final Comments) (15 of 135 respondents mentioning an education campaign, a reward system, or a hotline); *id.*, app. C at 14, 36 (Attorney Survey (answers of plaintiffs' attorneys) Question 25u) (four of 67 volunteered responses suggested that the public should be educated and that there should be a fraud hotline). The NATB has such a hotline, but it is only for fraud involving car theft.

244. Indeed, past studies have indicated that informing the public that a large proportion of claims are fraudulent may boost the incidence of fraud. Some consumers interpret such information as signifying that they should also be "getting in on the action," rather than simply paying additional premium dollars for the fraud of others. See *supra* note 243.

245. Both defense and plaintiffs' attorneys mentioned precipitous actions by insurers either in paying or denying claims. AUTO INS. FRAUD STUDY, *supra* note 4, app. C at 27, 37-38.

house networks.<sup>246</sup> They should also take advantage of improvements in prosecutorial knowledge about automobile insurance fraud and about ways to fight it, and should further use arbitration. Because plaintiffs traditionally prefer jury trials, they may need special incentives to agree to arbitration.<sup>247</sup> Tax incentives or other funding mechanisms may encourage better in-house training and may further cooperation between insurers and law enforcement authorities.

4. Governmental bureaus exclusively concerned with the investigation of insurance fraud should be created in all states. States and insurers need to allocate the required investigative and prosecutorial resources. If properly managed, these resources, whether private or public, will pay for themselves in prevention, restitution, and fines.<sup>248</sup> Because experts in the field consider a law enforcement background the most important qualification for fraud investigators,<sup>249</sup> and because investigators have virtually all of the duties of other law enforcement officers, qualified investigators should have arrest powers.<sup>250</sup> Prosecutors need to develop expertise in economic crimes.

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246. Examples of such clearinghouses are: (1) the Index System (or Central Index Bureau) concerns bodily injury claims and is administered by the American Insurance Services Group, Inc., a subsidiary of the American Insurance Association; (2) the Comprehensive Loss Underwriting Exchange (CLUE) features the claims loss experience of over 200 insurers representing more than 44% of the automobile insurance market; (3) a car theft information system run by the NATB.

247. Some states have set up arbitration or mediation schemes in limited areas of coverage. For example, a 1990 Florida statute permits either the insurer or the insurance claimant to require mediation of any auto insurance property damage claim or of a personal injury claim for no more than \$10,000. FLA. STAT. ch. 627.745 (1991). The state also now requires binding arbitration of disputes between the insurer and the insured's health care provider, if that provider agreed to accept assignment of the insured's personal injury protection benefits. *Id.* at ch. 627.736(5).

248. Telephone Interview with Richard Koch, *supra* note 152; *see also* Crosby, *supra* note 28 (noting that criminal sanctions, rather than civil measures, are often the most realistic method of combatting insurance fraud).

249. That seems to be the near-unanimous opinion of both Florida's fraud division workers and of its prosecutors. AUTO INS. FRAUD STUDY, *supra* note 4, at 161 & n.169, app. E at 11, 14 (Fraud Division Survey, Question 14), and app. G at 11 & 14-15 (Prosecutor Survey, Question 15). Claims personnel, insurers' counsel, defense attorneys, and plaintiffs' lawyers all tended to rank law enforcement experience (investigative work) as the most important qualification. *Id.* at 167 & 168 n.202. Only in California, Florida, and New York, though, do the investigators have the same power as other police to make arrests, and only a few additional states grant subpoena authority to the investigative division. Telephone Interview with Aaron Mazen, *supra* note 25; *see, e.g.*, MO. ANN. STAT. § 375.994(1) (Vernon 1991) (granting subpoena powers, but no arrest powers, to department investigators); N.J. STAT. ANN. § 17:33A-10 (1985) (granting only authority to subpoena).

250. Having insurance fraud specialists carry out most insurance fraud arrests enhances the effectiveness of prosecution. During the course of an arrest, persons frequently wish to make statements. If the arresting officers have familiarity with the particulars of the case, and knowledge in that field generally, they will be able to follow up on admissions, to ask further questions, and most importantly, to understand the significance of what the suspect has said or

Those prosecutors with a general aptitude for and an interest in pursuing white-collar criminals should be offered career incentives to pursue what many disparage as dull, non-violent cases.

5. Harsher criminal penalties for fraudulent claimants should be provided for in sentencing guidelines, sought by prosecutors, granted by judges, and administered by the correctional system. A breakdown in any one area exacerbates the problem of fraud; defrauders soon learn that they probably can escape detection and, at the very worst, will suffer little if caught.<sup>251</sup>

6. States without adequate investigative and *criminal justice* resources to combat insurance fraud should opt for a scheme such as New Jersey's, and should focus on complete restitution for the fraudulent payout as well as for investigative expenses, attorney fees, and costs of suit.<sup>252</sup> They should enact a statutory treble damages provision and give authorities the right to impose stiff civil penalties.

7. When insurers report suspected fraud, each case must be acknowledged to the party forwarding the case. A statute or administrative rule should mandate quarterly status reports or other regular updates for the referring party, as well as information about final disposition of the case.<sup>253</sup> Prosecutors need to provide referring fraud

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done. Crosby Interview, *supra* note 152; accord Doolittle Interview, *supra* note 152 (also noting that fraud division arrest powers may speed up the process for detaining suspects and reduce the chances that suspects can successfully flee the jurisdiction).

251. Hoyt, *supra* note 24 (noting that punishment must go beyond the mere return of the fraudulent payout to have cognizable deterrent value).

252. The New Jersey approach is discussed *supra* notes 227-231 and accompanying text. No other state has a similar statutory scheme or civil enforcement emphasis. Telephone Interview with Aaron Mazen, *supra* note 25; Telephone Interviews with Richard Koch, *supra* note 152.

253. Some states have laws requiring or recommending such reports. See, e.g., CAL. INS. CODE § 1872.4(a) (West Supp. 1992) (providing that the fraud bureau will notify the insurer of its findings); IDAHO CODE § 41-271(4) (1991) (stating that the reporting insurer has the right to request and receive relevant, non-privileged information about a fraud division claims investigation); N.J. STAT. ANN. § 17:33A-11 (West 1985) (declaring, "the [insurance] commissioner may, in his discretion, make relevant papers, documents, reports, or evidence available to . . . an insurance company or insurance claimant injured by a violation of this act"); N.Y. INS. LAW § 405(c) (McKinney 1985) (requiring that the superintendent of insurance, "where appropriate," report about violations of the law "to the person who submitted the report of fraudulent activity"). The policy and procedure manual of Florida's Insurance Fraud Division requires that a standard letter acknowledging receipt be sent to the referring insurer. Telephone Interview with Gabriel Mazzeo, Attorney & Assistant Director, Division of Insurance Fraud, Florida Department of Insurance (May 15, 1991); Doolittle Interview, *supra* note 152 (noting that the Division now sends a more personalized acknowledgment letter, geared, *inter alia*, toward the type and *prima facie* merits of a referral, the estimated likelihood of prosecution, and the need, if any, for further information from the insurer).

While the Florida Division, similar to divisions in other states, is protected from subpoena-attempts by people seeking information on pending investigations, insurers are not

offices and individual investigators with the same sort of reporting.<sup>254</sup> Absent such reporting, insurers may conclude that their referrals have been ignored<sup>255</sup> and choose not to refer future cases.

8. Insurers must not countenance "small dollar" fraud. There should be no set cutoff below which insurers pay claims with little question and never call SIUs into action.<sup>256</sup> States must require that insurers take strong measures to deter and detect fraud,<sup>257</sup> and to report suspected fraud to the authorities.<sup>258</sup> States must furthermore grant insurers and their personnel civil immunity for good faith compliance reports to the authorities or to groups such as ICPI or the NATB.<sup>259</sup> Of course, enacting such laws is not, by itself, sufficient. Insurers must change their internal procedures to actually meet this reporting requirement.<sup>260</sup> Insurers must recognize that referring matters to the authorities is a positive business choice involving little legal risk,<sup>261</sup> and that reporting creates a substantial chance of convicting a fraudulent claimant. States should go as far as requiring insurers to set up and effectuate anti-fraud plans.<sup>262</sup> The state, by legislation, regulation, and enforcement, can see to it that insurers and the government work together to prevent and prosecute fraud.

Of course, none of these suggestions individually will guarantee fraud deterrence. In combination, however, they have the potential to

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protected. The Division thus has practical reasons (in addition to confidentiality concerns, *id.*) to withhold certain specific information from insurers in some ongoing cases. Nonetheless, general updates could be provided, if only to let insurers know that the matter has not been forgotten. Upon completion of a case, a final report is supposed to be sent to the insurer. Telephone Interview with Gabriel Mazzeo, *supra*.

254. If the prosecutors do not directly inform insurers about cases, the fraud division or state insurance department should continue to fulfill the reporting obligations to the referring insurer. In California, if the district attorney does not prosecute within 60 days after receiving a Bureau of Fraudulent Claims referral, the district attorney must inform both the bureau and the insurer "as to the reasons for the lack of prosecution regarding the reported violations." CAL. INS. CODE § 1872.4(a) (West Supp. 1992).

255. See *infra* Appendix, Table 12 (showing a large percentage of claims personnel believe that the fraud division fails to pursue referred cases and does not communicate or cooperate with insurers). Even if these perceptions are erroneous, the insurers' future actions — deterrence, investigation, referrals — may be affected by those perceptions.

256. See *supra* note 161 and accompanying text.

257. See *supra* note 229 (on New Jersey's efforts to make insurers fight fraud).

258. See *supra* note 151-153 and accompanying text; *supra* note 229.

259. See *supra* note 163 and accompanying text.

260. See *supra* notes 151-153 and accompanying text. New Jersey has started to counter insurers' inattentiveness or apathy by conducting random audits of insurers' files. Telephone Interviews with Richard Koch, *supra* note 152. The goal is to ensure that insurance companies take these reporting requirements seriously. See *supra* note 229.

261. That statement is true, of course, only for states with a civil immunity statute. See *supra* note 163 and accompanying text.

262. See *supra* note 229 for an example.

remedy the various problems in detecting and fighting insurance claims fraud. The goal is to give insurers the courage and ability to confront suspected fraud,<sup>263</sup> but also to pay quickly, perhaps even generously, when claims are legitimate. Legislators must reform state laws undermining either the planning or execution of reasonable private investigations by insurers or the morale and effectiveness of state investigators and prosecutors. Insurers must report all cases of suspected insurance fraud.<sup>264</sup> In addition to instituting penalties for non-reporting,<sup>265</sup> the legislatures, regulatory agencies, and courts must implement and strengthen rewards<sup>266</sup> for the insurer and its personnel who report suspected fraud.

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263. Confronting suspected fraud is preferable to caving in to a *short-term* solution of paying a smaller amount than fighting fraud would incur.

264. There are *no* significant efforts at the federal level to create a regulatory program to deter, detect, and prosecute insurance claims fraud. Telephone Interview with Thomas Goddard, Counsel for Government & Media Relations, National Association of Insurance Commissioners (May 18, 1992). The only current lobbying "push" is for federal laws against insider fraud by directors, officers, brokers, or agents. *Id.*

For now, the arena for reform remains at the state level. Even well-established national organizations such as ICPI are still "spread too thin" to effectively and comprehensively compensate on a national level for inadequate state investigations and prosecutions. Telephone Interview with Aaron Mazen, *supra* note 25.

265. *Supra* notes 152, 229 (New Jersey's approach).

266. *E.g.*, civil immunity, required follow-up reports back to the insurer, heightened opportunities for complete restitution.

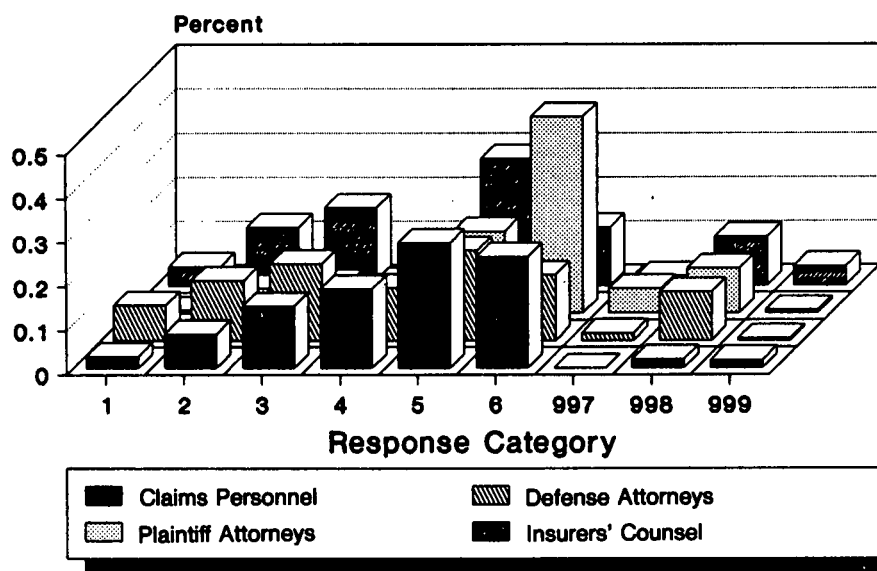
## APPENDIX

TABLE 1

In your opinion, what percentage of claimants who do not have attorneys inflate their damages in cases involving uninsured motorist or bodily injury liability?

	Claims Personnel	Defense Attorney	Plaintiff Attorney	Insurers' Counsel
Category	Percent	Percent	Percent	Percent
1	2.75%	8.12%	0.56%	4.44%
2	7.75%	13.68%	5.65%	13.33%
3	14.00%	17.52%	6.78%	17.78%
4	18.00%	11.97%	7.34%	4.44%
5	28.50%	20.51%	18.64%	38.89%
6	25.25%	14.96%	44.63%	13.33%
997	0.00%	1.71%	5.65%	2.22%
998	2.00%	11.11%	10.17%	11.11%
999	1.75%	0.43%	0.56%	4.44%

GRAPH 1



Legend: 1 = 81 to 100%, 2 = 61 to 80%, 3 = 41 to 60%, 4 = 21 to 40%, 5 = 11 to 20%, 6 = 0 to 10%, 997 = Do not understand question, 998 = No response, 999 = Do not have adequate information to form an opinion.

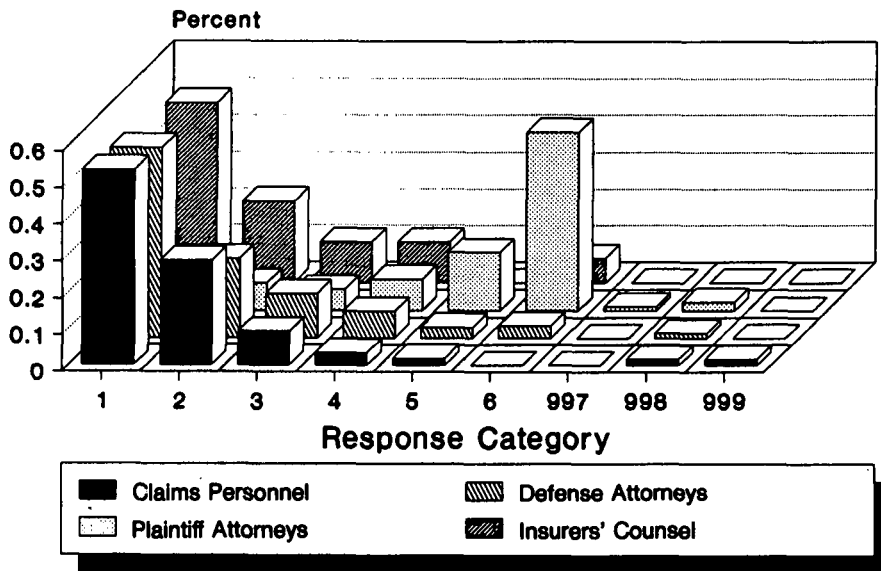
Source: Survey of Claims Personnel question 3, Survey of Private Attorneys question 6, Survey of Insurers' Counsel question 7.

TABLE 2

In your opinion, what percentage of attorneys for claimants inflate the claimants' damages in cases involving uninsured motorist or bodily injury liability?

	Claims Personnel	Defense Attorney	Plaintiff Attorney	Insurers' Counsel
Category	Percent	Percent	Percent	Percent
1	53.25%	51.71%	10.73%	48.89%
2	28.50%	21.37%	7.23%	22.22%
3	9.25%	11.97%	5.65%	11.11%
4	3.50%	7.26%	8.47%	11.11%
5	2.00%	2.99%	15.82%	0.00%
6	0.00%	3.42%	48.59%	6.67%
997	0.00%	0.00%	1.13%	0.00%
998	1.75%	1.28%	2.26%	0.00%
999	1.75%	0.00%	0.00%	0.00%

GRAPH 2



Legend: 1 = 81 to 100%, 2 = 61 to 80%, 3 = 41 to 60%, 4 = 21 to 40%, 5 = 11 to 20%, 6 = 0 to 10%, 997 = Do not understand question, 998 = No response, 999 = Do not have adequate information to form an opinion.

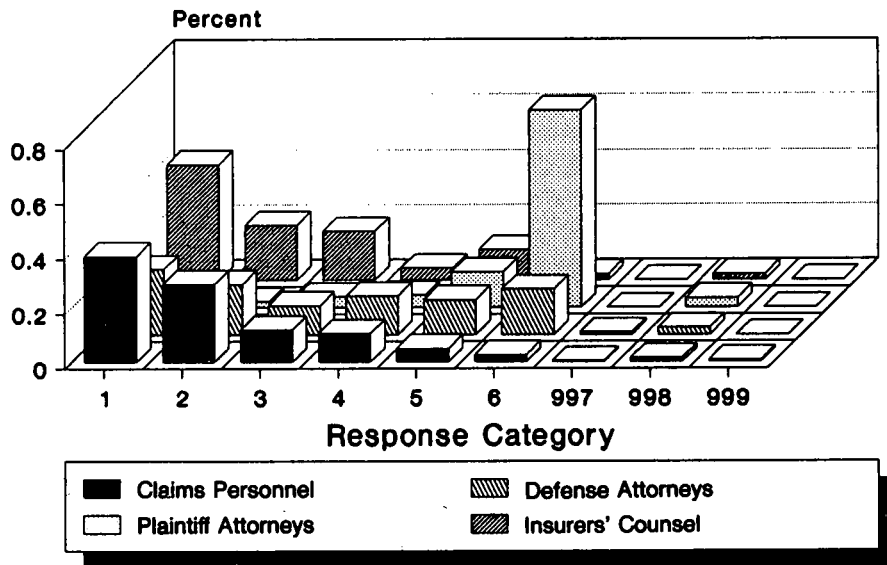
Source: Survey of Claims Personnel question 4, Survey of Private Attorneys question 7, Survey of Insurers' Counsel question 8.

TABLE 3

In your opinion, what percentage of attorneys for claimants inflate the claimants' damages in cases involving personal injury protection and medical payments?

	Claims Personnel	Defense Attorney	Plaintiff Attorney	Insurers' Counsel
Category	Percent	Percent	Percent	Percent
1	38.75%	23.93%	1.13%	42.22%
2	28.50%	18.38%	2.26%	20.00%
3	11.75%	10.68%	3.95%	17.78%
4	10.50%	14.10%	4.52%	4.44%
5	5.00%	12.82%	12.99%	11.11%
6	2.75%	16.67%	71.75%	2.22%
997	0.50%	0.85%	0.00%	0.00%
998	1.50%	2.56%	3.39%	2.22%
999	0.75%	0.00%	0.00%	0.00%

GRAPH 3



Legend: 1 = 81 to 100%, 2 = 61 to 80%, 3 = 41 to 60%, 4 = 21 to 40%, 5 = 11 to 20%, 6 = 0 to 10%, 997 = Do not understand question, 998 = No response, 999 = Do not have adequate information to form an opinion.

Source: Survey of Claims Personnel question 13, Survey of Private Attorneys question 16, Survey of Insurers' Counsel question 17.

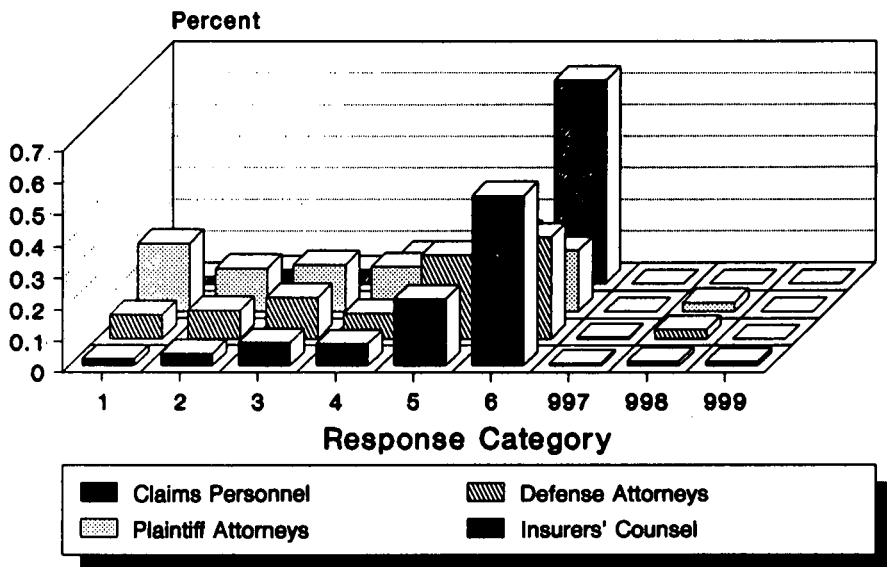


TABLE 4

In your opinion, for cases involving personal injury protection and medical payments, in what percentage of the cases do insurers *deflate* the damages?

	Claims Personnel	Defense Attorney	Plaintiff Attorney	Insurers' Counsel
Category	Percent	Percent	Percent	Percent
1	2.25%	7.69%	21.47%	2.22%
2	4.00%	8.97%	13.56%	4.44%
3	7.50%	13.25%	14.69%	4.44%
4	7.25%	8.12%	14.12%	8.89%
5	21.50%	26.50%	14.12%	15.56%
6	54.00%	32.05%	19.21%	64.44%
997	0.75%	0.43%	0.00%	0.00%
998	1.50%	2.99%	2.82%	0.00%
999	1.25%	0.00%	0.00%	0.00%

GRAPH 4



Legend: 1 = 81 to 100%, 2 = 61 to 80%, 3 = 41 to 60%, 4 = 21 to 40%, 5 = 11 to 20%, 6 = 0 to 10%, 997 = Do not understand question, 998 = No response, 999 = Do not have adequate information to form an opinion.

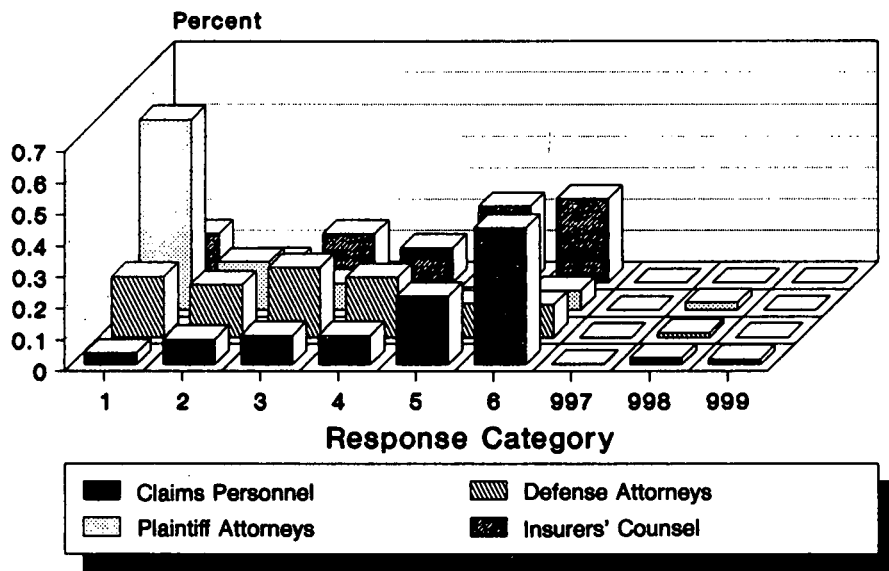
Source: Survey of Claims Personnel question 14, Survey of Private Attorneys question 17, Survey of Insurers' Counsel question 18.

TABLE 5

In your opinion, for cases involving uninsured motorist or bodily injury liability, in what percentage of the cases do insurers *deflate* the damages?

Category	Claims Personnel	Defense Attorney	Plaintiff Attorney	Insurers' Counsel
1	3.75%	19.66%	60.45%	15.56%
2	8.00%	16.67%	15.25%	6.67%
3	9.25%	22.22%	8.47%	15.56%
4	9.25%	19.23%	4.52%	11.11%
5	21.75%	10.68%	2.82%	24.44%
6	43.75%	10.26%	6.21%	26.67%
997	0.25%	0.00%	0.00%	0.00%
998	2.25%	1.28%	2.26%	0.00%
999	1.75%	0.00%	0.00%	0.00%

GRAPH 5



Legend: 1 = 81 to 100%, 2 = 61 to 80%, 3 = 41 to 60%, 4 = 21 to 40%, 5 = 11 to 20%, 6 = 0 to 10%, 997 = Do not understand question, 998 = No response, 999 = Do not have adequate information to form an opinion.

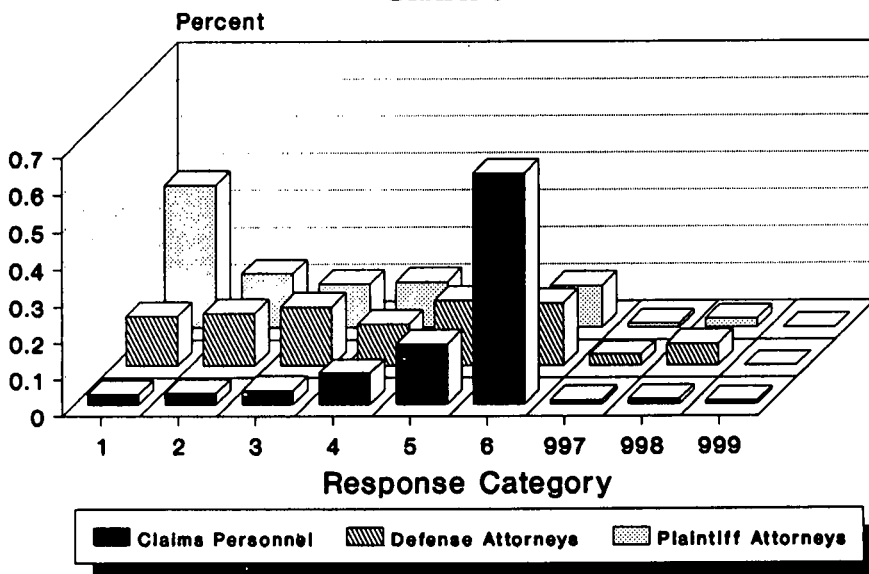
Source: Survey of Claims Personnel question 5, Survey of Private Attorneys question 8, Survey of Insurers' Counsel question 9.

TABLE 6

In your opinion, for cases involving collision and/or property damage, in what percentage of the cases do insurers *deflate* the damages?

Category	Claims Personnel		Defense Attorney		Plaintiff Attorney	
	Number of Responses	Percent	Number of Responses	Percent	Number of Responses	Percent
1	11	2.75%	32	13.68%	68	38.42%
2	12	3.00%	34	14.53%	26	14.69%
3	15	3.75%	38	16.24%	21	11.68%
4	34	8.50%	27	11.54%	22	12.43%
5	66	16.50%	42	17.95%	14	7.91%
6	250	62.50%	40	17.09%	20	11.30%
997	4	1.00%	7	2.99%	2	1.13%
998	5	1.25%	14	5.98%	4	2.26%
999	3	0.75%	0	0.00%	0	0.00%

GRAPH 6



Legend: 1 = 81 to 100%, 2 = 61 to 80%, 3 = 41 to 60%, 4 = 21 to 40%, 5 = 11 to 20%, 6 = 0 to 10%, 997 = Do not understand question, 998 = No response, 999 = Do not have adequate information to form an opinion.

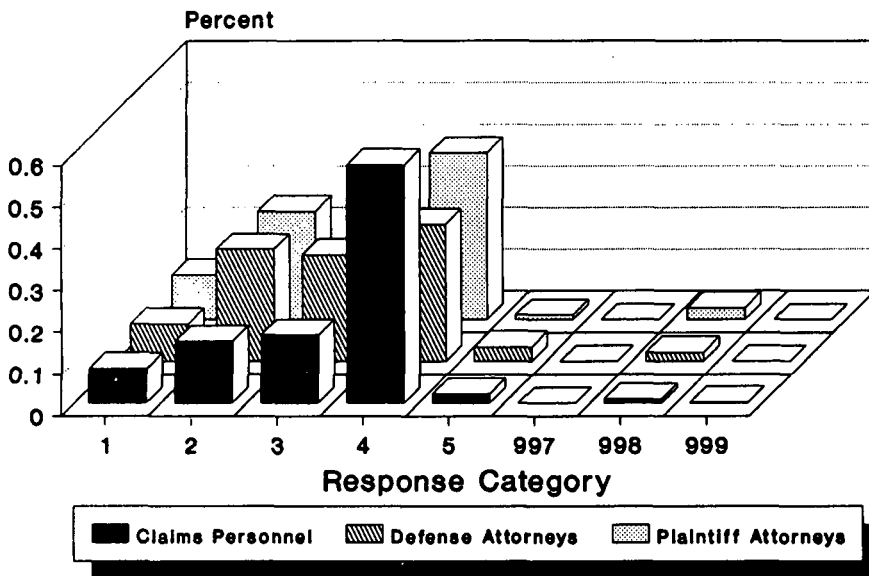
Source: Survey of Claims Personnel question 8, Survey of Private Attorneys question 11.

TABLE 7

Do you agree or disagree with this statement: *Understating of Values*, as opposed to misstatements of fact, are an acceptable negotiating tactic to be used by the insurer with respect to collision and/or property damage?

Category	Claims Personnel		Defense Attorney		Plaintiff Attorney	
	Number of Responses	Percent	Number of Responses	Percent	Number of Responses	Percent
1	33	8.25%	21	8.97%	19	10.73%
2	59	14.75%	63	26.92%	46	25.99%
3	65	16.25%	60	25.64%	34	19.21%
4	229	57.25%	77	32.91%	71	40.11%
5	9	2.25%	8	3.42%	2	1.13%
997	0	0.00%	0	0.00%	0	0.00%
998	4	1.00%	5	2.14%	5	2.82%
999	1	0.25%	0	0.00%	0	0.00%

GRAPH 7



Legend: 1 = Strongly agree, 2 = Somewhat agree, 3 = Somewhat disagree, 4 = Strongly disagree, 5 = Don't know, 997 = Do not understand question, 998 = No response, 999 = Inadequate information to form an opinion.

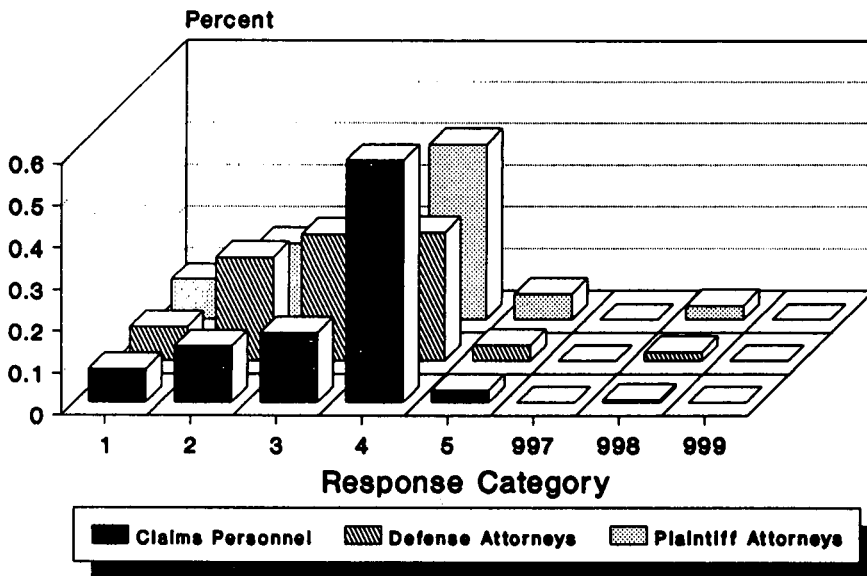
Source: Survey of Claims Personnel question 17b, Survey of Private Attorneys question 20b.

TABLE 8

Do you agree or disagree with this statement: *Understating of Values*, as opposed to misstatements of fact, are an acceptable negotiating tactic to be used by the insurer with respect to comprehensive coverage?

Category	Claims Personnel		Defense Attorney		Plaintiff Attorney	
	Number of Responses	Percent	Number of Responses	Percent	Number of Responses	Percent
1	32	8.00%	19	8.12%	17	9.60%
2	54	13.50%	58	24.79%	32	18.08%
3	67	16.75%	71	30.34%	37	20.90%
4	232	58.00%	72	30.77%	74	41.81%
5	12	3.00%	9	3.85%	11	6.21%
997	0	0.00%	0	0.00%	0	0.00%
998	3	0.75%	5	2.14%	6	3.39%
999	0	0.00%	0	0.00%	0	0.00%

GRAPH 8



Legend: 1 = Strongly agree, 2 = Somewhat agree, 3 = Somewhat disagree, 4 = Strongly disagree, 5 = Don't know, 997 = Do not understand question, 998 = No response, 999 = Inadequate information to form an opinion.

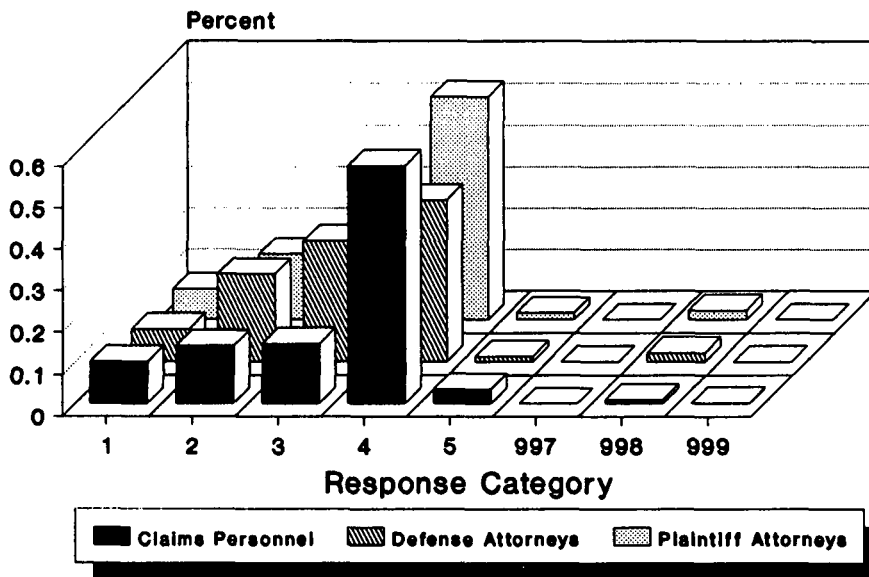
Source: Survey of Claims Personnel question 17c, Survey of Private Attorneys question 20c.

TABLE 9

Do you agree or disagree with this statement: *Understating of Values*, as opposed to misstatements of fact, are an acceptable negotiating tactic to be used by the insurer with respect to personal injury protection and medical payments?

Category	Claims Personnel		Defense Attorney		Plaintiff Attorney	
	Number of Responses	Percent	Number of Responses	Percent	Number of Responses	Percent
1	40	10.00%	18	7.69%	13	7.34%
2	55	13.75%	49	20.94%	28	15.82%
3	57	14.25%	68	29.06%	34	19.21%
4	229	57.25%	91	38.89%	95	53.67%
5	14	3.50%	3	1.28%	3	1.69%
997	0	0.00%	0	0.00%	0	0.00%
998	4	1.00%	5	2.14%	4	2.26%
999	1	0.25%	0	0.00%	0	0.00%

GRAPH 9



Legend: 1 = Strongly agree, 2 = Somewhat agree, 3 = Somewhat disagree, 4 = Strongly disagree, 5 = Don't know, 997 = Do not understand question, 998 = No response, 999 = Inadequate information to form an opinion.

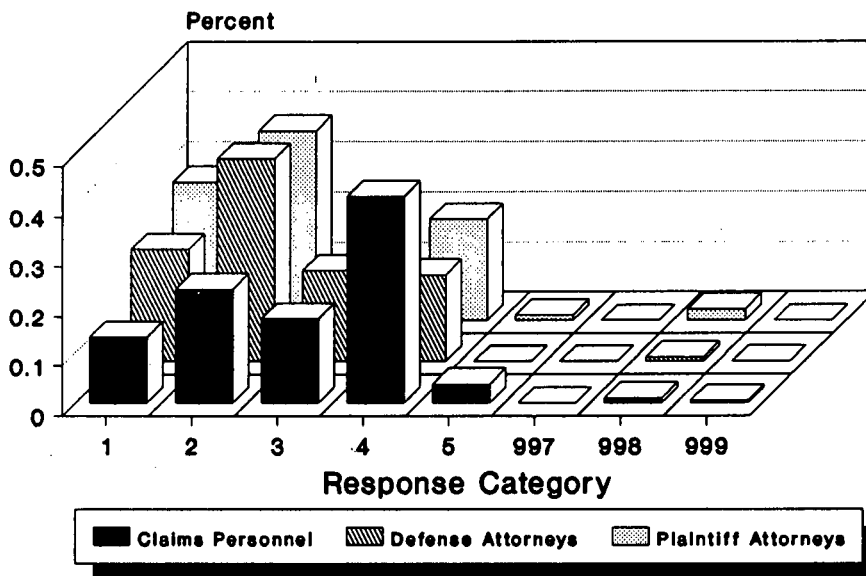
Source: Survey of Claims Personnel question 17d, Survey of Private Attorneys question 20d.

TABLE 10

Do you agree or disagree with this statement: *Understating of Values*, as opposed to misstatements of fact, are an acceptable negotiating tactic to be used by the insurer with respect to uninsured motorist or bodily injury liability?

Category	Claims Personnel		Defense Attorney		Plaintiff Attorney	
	Number of Responses	Percent	Number of Responses	Percent	Number of Responses	Percent
1	53	13.25%	53	22.65%	49	27.68%
2	92	23.00%	95	40.60%	67	37.85%
3	68	17.00%	43	18.38%	19	10.73%
4	166	41.50%	41	17.52%	36	20.34%
5	15	3.75%	0	0.00%	2	1.13%
997	0	0.00%	0	0.00%	0	0.00%
998	4	1.00%	2	0.85%	4	2.26%
999	2	0.50%	0	0.00%	0	0.00%

GRAPH 10



Legend: 1 = Strongly agree, 2 = Somewhat agree, 3 = Somewhat disagree, 4 = Strongly disagree, 5 = Don't know, 997 = Do not understand question, 998 = No response, 999 = Inadequate information to form an opinion.

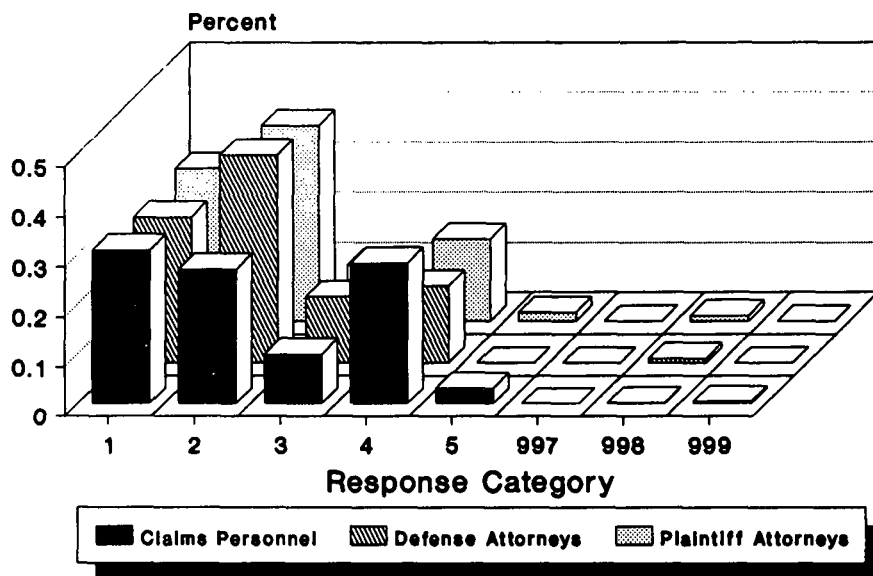
Source: Survey of Claims Personnel question 17a, Survey of Private Attorneys question 20a.

TABLE 11

Do you agree or disagree with this statement: *Exaggerations as to value* are an acceptable negotiating tactic to be used by claimants or their attorneys with respect to uninsured motorist or bodily injury liability?

Category	Claims Personnel		Defense Attorney		Plaintiff Attorney	
	Number of Responses	Percent	Number of Responses	Percent	Number of Responses	Percent
1	123	30.75%	68	29.06%	54	30.51%
2	108	27.00%	97	41.45%	69	38.98%
3	40	10.00%	31	13.25%	20	11.30%
4	113	28.25%	36	15.38%	29	16.38%
5	13	3.25%	0	0.00%	3	1.69%
997	0	0.00%	0	0.00%	0	0.00%
998	1	0.25%	2	0.85%	2	1.13%
999	2	0.50%	0	0.00%	0	0.00%

GRAPH 11



Legend: 1 = Strongly agree, 2 = Somewhat agree, 3 = Somewhat disagree, 4 = Strongly disagree, 5 = Don't know, 997 = Do not understand question, 998 = No response, 999 = Inadequate information to form an opinion.

Source: Survey of Claims Personnel question 15a, Survey of Private Attorneys question 18a.



TABLE 12

Claims Personnel Survey, Question 22. If you believe that insurance fraud cases are not sent by the insurers to the Department of Insurance Fraud Division, in your opinion, what would be the principal reasons? (List the reasons in order of importance beginning with the most important reason.)

255 out of 400 responded

Insufficient evidence for a successful prosecution	106
Lack of insurer resources	93
Lack of pursuit by Insurance Fraud Division	75
Overall costs	40
Ineffectiveness/small dollar amount of the fraud involved	38
Fears of bad faith	38
Inadequate legislation	35
Lack of fraud division resources	30
Lack of familiarity with referral procedures/requirements	24
Adjuster apathy	20
Punishment too weak	20
Lack of communication/cooperation between adjuster and Insurance Fraud Division	19
Fear of libel action	17
Fear of bad publicity	16
Bias of judicial system towards insureds	16
Collusion between lawyer and chiropractor/physician	9
Inadequate media promotion	4
Adjusters' lack of knowledge	4
Unprofessional attorneys	4
Division process takes too long	2
Personal injury protection statute weighted against insurers	2
Attorneys for plaintiff mean we're unable to deal with claimant directly	1
Paperwork	1
Referral eliminates any claims settlement leverage	1
Claimants usually back off if charged with fraud	1
Public education needed	1
Statute of limitations	1
Physicians' peer review do not cooperate	1

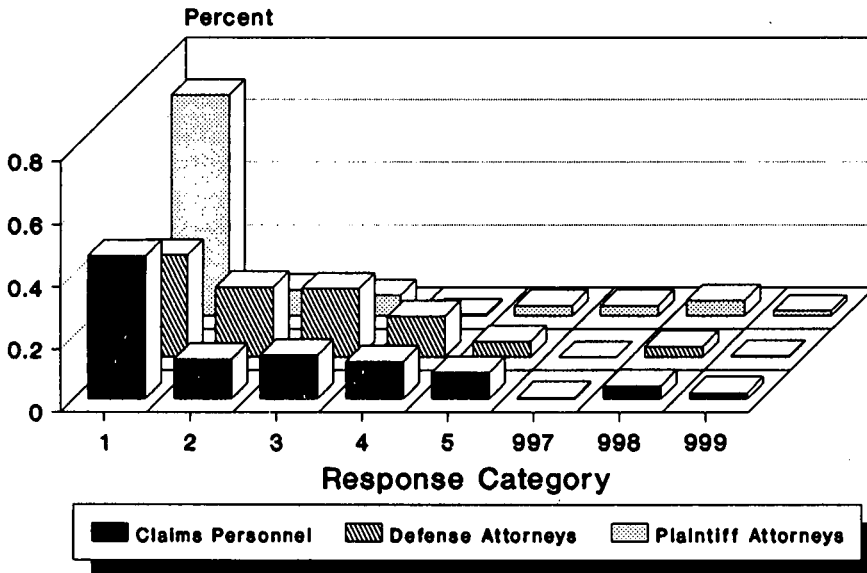
NOTE: On all surveys, the number of responses may exceed the number of respondents because a respondent may furnish multiple answers.

TABLE 13

In cases where fraud is suspected, how often is the allegation of "bad faith" a factor in your (the insurer's) deciding to pay a questionable claim involving uninsured motorist or bodily injury liability?

Category	Claims Personnel		Defense Attorney		Plaintiff Attorney	
	Number of Responses	Percent	Number of Responses	Percent	Number of Responses	Percent
1	184	46.00%	77	32.91%	125	70.62%
2	51	12.75%	53	22.65%	15	8.47%
3	56	14.00%	52	22.22%	12	6.78%
4	48	12.00%	31	13.25%	1	0.56%
5	34	8.50%	12	5.13%	6	3.39%
997	2	0.50%	0	0.00%	6	3.39%
998	17	4.25%	8	3.42%	9	5.08%
999	8	2.00%	1	0.43%	3	1.69%

GRAPH 13



Legend: 1 = 0 to 20%, 2 = 21 to 40%, 3 = 41 to 60%, 4 = 61 to 80%, 5 = 81 to 100%, 997 = Do not understand question, 998 = No response, 999 = Inadequate information to form an opinion.

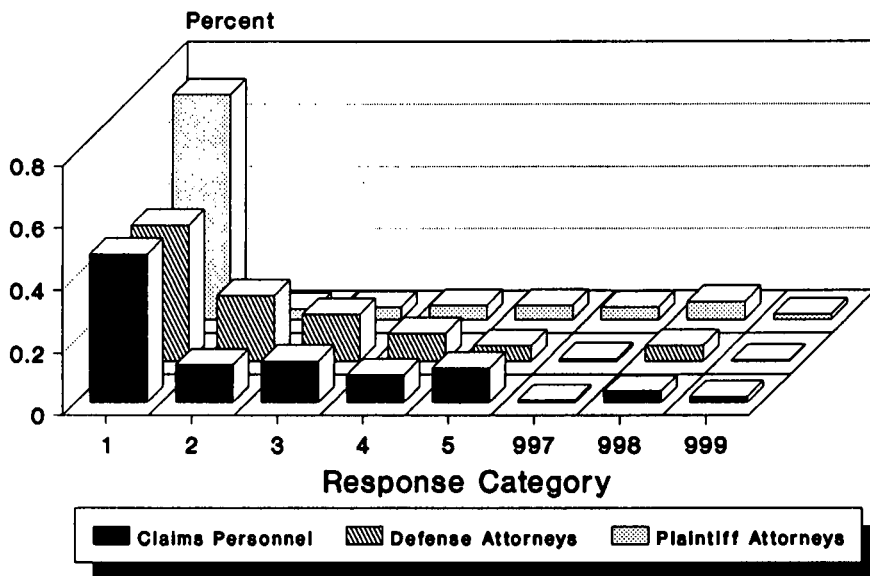
Source: Survey of Claims Personnel question 20a, Survey of Private Attorneys question 23a.

TABLE 14

In cases where fraud is suspected, how often is the allegation of "bad faith" a factor in your (the insurer's) deciding to pay a questionable claim involving personal injury protection and medical payments?

Category	Claims Personnel		Defense Attorney		Plaintiff Attorney	
	Number of Responses	Percent	Number of Responses	Percent	Number of Responses	Percent
1	190	47.50%	102	43.59%	128	72.32%
2	49	12.25%	49	20.94%	6	3.39%
3	54	13.50%	35	14.96%	7	3.95%
4	36	9.00%	21	8.97%	8	4.52%
5	45	11.25%	12	5.13%	8	4.52%
997	3	0.75%	2	0.85%	7	3.95%
998	15	3.75%	12	5.13%	10	5.65%
999	8	2.00%	1	0.43%	3	1.69%

GRAPH 14



Legend: 1 = 0 to 20%, 2 = 21 to 40%, 3 = 41 to 60%, 4 = 61 to 80%, 5 = 81 to 100%, 997 = Do not understand question, 998 = No response, 999 = Inadequate information to form an opinion.

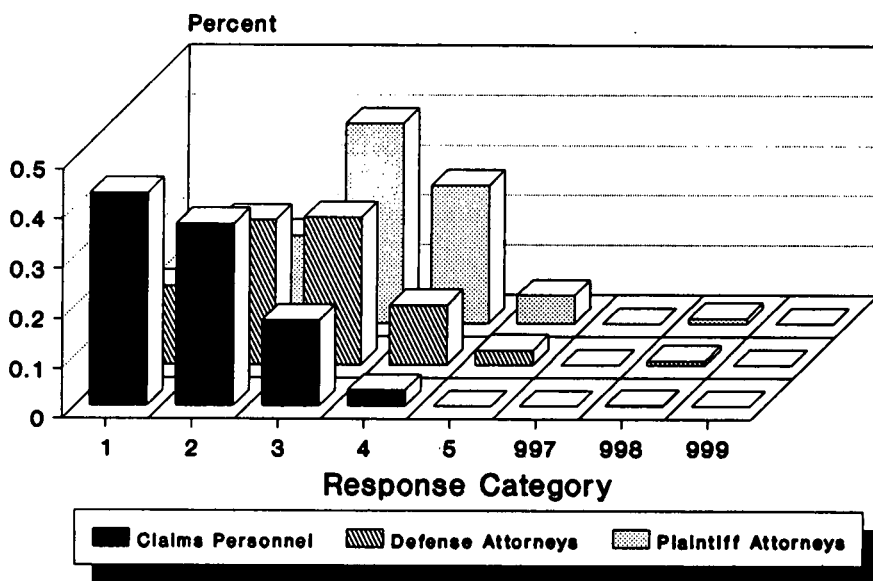
Source: Survey of Claims Personnel question 20d, Survey of Private Attorneys question 23d.

TABLE 15

In your opinion, how effective would educating the public about the dollar cost of fraud be in reducing auto insurance fraud?

Category	Claims Personnel		Defense Attorney		Plaintiff Attorney	
	Number of Responses	Percent	Number of Responses	Percent	Number of Responses	Percent
1	171	42.75%	37	15.81%	14	7.91%
2	146	36.50%	91	38.89%	31	17.51%
3	69	17.25%	69	29.49%	71	40.11%
4	13	3.25%	28	11.97%	49	27.68%
5	0	0.00%	7	2.99%	10	5.65%
997	0	0.00%	0	0.00%	0	0.00%
998	1	0.25%	2	0.85%	2	1.13%
999	0	0.00%	0	0.00%	0	0.00%

GRAPH 15



Legend: 1 = Absolutely necessary, 2 = Very important, 3 = Important, 4 = Not important, 5 = Don't know, 997 = Do not understand question, 998 = No response, 999 = Inadequate information to form an opinion.

Source: Survey of Claims Personnel question 23f, Survey of Private Attorneys question 25f.