

The Insurance Industry “Cries ‘Wolf!’” About Lawyers

Ken Klein

Decades of history has taught us that plaintiff’s lawyers are not the primary reason insurance premiums go up or insurance companies fail. But plaintiff’s lawyers are the shiny object that insurance companies point to as an easy answer to a complex problem. Again.

There is a lot of stress at present on insurance companies. Climate change is increasing the likelihood of large scale, insured losses. Insurer costs are going up faster than insurers can practically (or even actually) raise premiums. The current stock market is not a dependable backstop for insurer profits. Competition among insurers can be fierce. And political pressure on insurers can be fierce as well.

It all is a complex problem, for which there is no easy solution. Not for the first time, right now it may be no fun to be an insurance company.

As in the past, insurance companies are falling back on a familiar refrain—don’t blame us; blame the lawyers: Look at all the attorney ads; look at how plaintiff’s lawyers behave in court; look at the entitlement attitude of millennials. It’s all just too much. And it’s killing insurance.

Well, I’ve looked. And so far, the conclusion seems to be the same as in the past. The insurance industry blaming its woes on lawyers reaches back at least into the 1970s. Sometimes it pauses. But it never stops. And each time there seems to be little there, there. When, for example, during the mid-1980s, the insurance industry cried from the heavens about a lawsuit crisis, the prominent academic, Michael Saks, wrote, “If the lawsuit crisis exists, serious evidence of it should not be too difficult to find. In fact, the more awful the problem, the more plentiful and glaring should be the evidence. I have begun such an inquiry, but so far, the hard evidence has been, to put it mildly, elusive.” And at least so far, just as in the past, the inquiry again largely seems to be coming up empty.

Let's start with the biggest of big pictures. The key piece of evidence for the industry's claim that lawyers are ruining everything is a supposedly rapidly increasing frequency of plaintiffs winning big verdicts in court. The truth of the assertion is debatable. But even if true, what does it stand for?

A big verdict (a jury's decision) stands for very little. What stands for something is a big final *judgment* (all appeals exhausted, and a defendant now has to pay). What a big final judgment stands for is that someone did something wrong. And what frequent big final judgments stand for is that a lot of people are doing something wrong.

The litigation system is acutely aware that it takes little more than a filing fee to start a lawsuit, and that even totally frivolous lawsuits can be expensive to defend. In response to these concerns, there is a cradle to grave procedural architecture to catch and kill frivolous lawsuits. It begins with screening the first filing to see if there is any plausible, evidence-based theory of the case. It ends only when the last court, often an appellate court and sometimes even the Supreme Court, signs off that in retrospect there actually is sufficient evidence to support the plaintiff's recovery (if any). In other words, a case doesn't even get to trial unless there is adequate pre-trial evidence developed to get it there. A case doesn't get to a jury unless there is adequate trial evidence to get it there. And a jury verdict does not become a judgment unless there is sufficient admitted evidence to support what the jury decided.

Is it possible for a frivolous case to slide all the way through? Almost certainly. But if the system works as designed, then very rarely. Do plaintiff's lawyers attempt trial tactics to get a big jury award? Good ones do. But if the system works as designed, then an award achieved by these tactics that is not evidence-based will not become a judgment.

Whether the system is working as designed has been closely studied. So far, there is little evidence it is failing. Are there still unscrupulous, greedy, successful lawyers? Yes, but there also are unscrupulous, greedy, successful insurance companies. Anybody can file a lawsuit. But not anybody can win one. Repetitive plaintiffs' wins tell us more about defendants than they tell us about plaintiffs. Which is why I conclude that while lots of big final judgments probably do *not* describe unscrupulous lawyers repetitively winning frivolous lawsuits, lots of big final judgments probably *do* describe that insurers often are acting poorly.

Which brings us to the nut of the truth about plaintiff's lawyers: these guys are investing their own money. And they are no different than any other investor in anything. A plaintiff's lawyer is not paid by

the hour. They are paid a percentage of what they win. Billboards and television ads aren't cheap. Nor is funding a fight against a well-healed insurance company. If a plaintiff's lawyer is investing their money in cases that are unsupported by evidence, then they won't be a plaintiff's lawyer for long.

Which brings us to the last leg of this apparently very wobbly three-legged stool—that millennials are now old enough to be on juries and millennials are out to get big business. There is lot debatable about this thesis. More than this blog entry can address. I will limit my comments here to the irony of it. Today, the version of “those darn kids” is an accusation hurled by now grizzled baby boomers who run insurance companies. When insurance companies were run by World War II veterans, it was the very same accusation hurled at then young baby boomers. The more things change, the more they stay the same.

A recent article by an investigative reporter for the *Tampa Bay Times* is entitled, “Florida leaders blame insurance crisis on lawsuits, but evidence is thin” (full disclosure: the article quotes me toward the end). The article is discussing the most recent round of litigation reform enacted in Florida to try to relieve financial stress on insurance companies (in response, of course, to calls for it by insurance companies). The article notes, however, that Florida's own most recent report on insurer insolvencies “notes nine ‘factors’ for the 15 companies that went insolvent in the prior five years. ...It does not mention lawsuits or litigation.”

The past tells us what likely will happen next. The reforms likely will not help companies. But the reforms likely will make even merited litigation harder to file and harder to win. Which likely will hurt real people who have suffered true harm. Because, it turns out, lawyers apparently aren't the primary problem.

Many times before insurers have asked for—and gotten—litigation reform or tort reform or damages caps or the like. And yet, premiums keep going up, and coverage keeps getting harder to find. There is little reason to expect a different result this time. Insurers certainly have offered none.

In the end, the insurance industry seems less like the prey of repeated attacks by a fearsome predator, and more like the boy who keeps crying ‘wolf!’