

NO.

COURT OF APPEALS
OF THE STATE OF WASHINGTON

(King County Superior Court Cause No. 99-2-02212-2 SEA)
(Court Of Appeals No. 46005-6-1)

JANET JONES and TERRY JONES,

respondents

v.

ALLSTATE INSURANCE COMPANY
AND JEREMY FRANCE

Petitioners,

and

DAIMLER CHRYSLER CORPORATION
AND ALLIED SIGNAL CORPORATION n/ka/
HONEYWELL, INC.

Defendants.

**BRIEF OF UNITED POLICYHOLDERS AS AMICUS CURIAE IN SUPPORT OF
RESPONDENTS**

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COPY

INTEREST OF AMICUS CURIAE

United Policyholders, is a non-profit corporation dedicated to educating policyholders about their rights and duties under their insurance policies. Specifically, United Policyholders engages in educational activities by promoting greater public understanding of insurance issues and consumer rights. United Policyholders' activities include organizing meetings, distributing written materials, and responding to requests for information from individuals, elected officials, and governmental entities. These activities are limited only to the extent that United Policyholders exists exclusively on donated labor and contributions of services and funds.

Amicus Curiae has a vital interest in seeing that the standard form liability insurance policies sold to countless policyholders are interpreted properly by insurance companies and the courts. As a public interest organization, United Policyholders seeks to assist and to educate the public and the courts on policyholders' insurance rights and their efforts to have them enforced throughout the country.

In doing so, United policyholders, through their attorneys Jean Magladry of Magladry & Weigel and Eugene R. Anderson and William G. Passanante of Anderson Kill & Olick, P.C. request this court affirm the trial court's decision and to find that Allstate Insurance Company engaged in the Unauthorized practice of law.

QUESTIONS PRESENTED

Amicus Curiae United Policyholders hereby adopt and fully incorporate by reference the statement of facts and questions in the brief submitted to this Court by Respondents Janet and Terry Jones.

SUMMARY OF ARGUMENT

In addition to the issues presented by the respondents, the practices of Allstate's claims representatives give rise to an impermissible and unresolvable conflict of interest. Allstate's interests lie with their own bottom line despite the assertions, both implicitly and explicitly, made in their "Quality Assurance Pledge" and "Do I Need An Attorney" letters. Allstate allegedly advises third-party claimants whom it is not representing, and therefore illegally acts as a representative of the claimant. As a result of Allstate's unresolvable conflict and its illegal and unethical practices, Allstate is acting contrary to law, and is engaging in deceptive trade practices that present a danger to the public and undermine their duty as a fiduciary.

DISCUSSION

1. Conflict of Interest

Washington's insurance provisions hold insurance companies to a relatively high standard in their business conduct. Insurance companies are expected to uphold a relationship with the public predicated on trust and good faith.

"The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance" West's revised Code of Washington, title 48. Chpt. 48.01, 48.01.030 Public Interest

* * * * *

"No Person engaged in the business of Insurance shall engage in unfair methods of competition or in unfair or deceptive acts or practices in the conduct of such business" West's Revised Code of Washington Annotated, Title 48, Insurance Chapter 48.30 Unfair Practices and Frauds, 48.30.010

Although the insurance provisions are clear, the Insurance Industry has been able to use methods of claims handling, which in this case are illegal, that circumvent these standards. The primary interests of an insurance company do not lie with the victim of an accident, in which their policyholder may be held responsible. An insurance company seeks to protect their interests, particularly their bottom line, and has no interest or obligation to protect those of the victim. In fact, Allstate evaluates their claims attorneys by how much is paid out and their relative costs of the claim. Attorneys and claims handlers alike are evaluated by the amount of the settlement and the "percent of cases resolved at or below the evaluated amount". (See Exhibit 1: at 600076, 600109, 600121, and at 2/E) These employee evaluation criteria do not require a claims handler to consider the interests of the claimant in a case against their policyholder, and directly influence the manner in which claims are handled by Allstate employees.

Another insurance company, Continental Casualty Insurance Company, has asserted that its duties as a fiduciary to representing the interests of policyholders and themselves:

"It has been held that an insurer who issues a [comprehensive general liability policy] is under a fiduciary duty to look after the interests of the insured as well as its own interests."¹

If any relationship exists between an insurance company and a victim of an accident, in which their policyholder was held responsible, it is adversarial in nature. Because an

insurance company's aim is to minimize the amount paid to claimants asserting claims against its policyholders, it can not legally represent those same claimants. That claimant represents a potential liability to the insurance company and its policyholder, therefore, is an adversary and not a "customer"².

II. Claims Handlers Are Not Lawyers

State Bar Associations have determined that insurance claims handlers are not attorneys and therefore are not authorized to represent the interests of the public. The Pennsylvania Bar Association describes the role of claims adjusters as one limited to responsibilities related to the insurance company's claims handling. The claims handler should not and cannot hold themselves out to the public as a representative of their interests.

"[A claims adjuster is] an agent of the company hired to investigate and evaluate claims being made against the company. He does not hold himself out to the public as competent to represent their interests and, indeed, only deals with the public from a plainly adversary posture"²

By attempting to give the impression that they are representing the interests of the victim, Allstate's claims handlers are improperly holding themselves out to the public as lawyers. One of Allstate's primary objectives, outlined in its claims manual, is to "reduce claimants need for attorney representation". (See Exhibit 1, at 12) Allstate instructs its claims handlers to try to control the interaction with claimants in such a way as to prevent losing the

¹ Continental Casualty Company's Memorandum of Law For Trial at 27, filed Sept. 11, 1990, Continental Cas. Co. v. Great Am. Ins. Co., 711 F. Supp. 1475, 1481 (N.D. Ill. 1989)

² Pennsylvania Bar Association/ Unauthorized Practice of Law Committee Website, <http://pabar.org/upl/typical.shtml> "Typical Problem Areas Involving the Unauthorized Practice of Law" at 9 of 42

case to an attorney, which reflects Allstate's attempts to improperly compete with attorneys for to represent the claimant.

The Washington Supreme Court has stated that an individual who claims to represent the legal interests of a victim, and is not qualified, presents a threat to the public, Washington State Bar Ass'n v. Washington Ass'n of Realtors, 41 Wh.2d 697, 712, 251 P.2d 619 (1952) (Dorworth, J., Concurring):

"When a person holds himself out to the public as competent to exercise legal judgement, he implicitly represents that he has the technical competence to analyze legal problems and the requisite character qualifications to act in a representative capacity. When such representations are made by persons not adequately trained or regulated, the dangers to the public are manifest"

Therefore, it is illegal for claims handlers to practice law because they are not qualified to exercise legal judgement and are not attorneys at law. The Allstate Claims Manual and "Quality Service Pledge" implies that claims representative are qualified to assess an accident and determine eligibility for compensation. This type of analysis requires legal judgement and expertise, judgement and expertise Allstate's claims handlers do not possess. In its Claims Core Processing Revision (CCPR) Claims Manual, Allstate advises their representatives to approach an unrepresented victim of an accident in the following manner:

"To the extent our policyholder is at fault:

-I will help you determine if you are eligible to receive compensation for any injuries you may have suffered.

-I will discuss fair payment for your claim when you feel you are ready" See Exhibit 1, at 16 (M).

Concealed in this approach to claims handling are both the conflict of interest between the claims handler and the victim, as well as, the claims handler's lack of expertise to

advise victims of their legal rights. The facts in the case before this court amplify the detrimental effects that the unauthorized practice of law by insurance claims handlers can have on accident victims. The Allstate claims handler put himself out to the victim as a guide through the process of maximizing the compensation for an accident, when in fact the claims handler jeopardized the majority of compensation that the victim was entitled to.

III. Bad Faith and Deceptive Practices

To the average auto accident victim, the "Quality Service Pledge" and "Do I Need An Attorney" letter might appear comforting at first. Allstate claims personnel are trained to make face-to-face contact with claimants and "establish empathy" to further discourage claimants from hiring attorneys. See Exhibit 1: at 8 (I), 12 (L), 13 (J). The claims handler performance is judged, in part, on the rate of representation. See Exhibit 1: at 12 (L). The fewer claimants who hire a lawyer, the higher the performance rating of the claims handler. This criteria is based on Allstates research, which indicates that, "represented claims settle for 2-3 times more than unrepresented claims". See Exhibit 1: at 3 (O). Reducing the claims representation rate provides beneficial results, but may not be in the interests of the claimant. In presenting this victim with a list of reasons not to hire an attorney, Allstate is attempting to convince victims that they do not need representation.

Allstate's conduct deceives accident victims regarding the true nature of their adversarial relationship with the insurance company. For years the insurance industry has spent large sums on advertisements and slogans which instill a sense of trust and confidence. Allstate Insurance Company's slogan "You are in good hands with Allstate", instills a sense of trust, which gives policyholders and even victims a certain expectation when involved in negotiations

with the insurance company. The Insurance Company is an adversary that is far more experienced than the average accident victim.³ Allstate creates an environment that is deceptive and misleading. Many government organizations have successfully moved against Allstate's claims handling practices, for example:

- In 1999, an Unauthorized Practice of Law Committee in Arkansas found that the company had engaged in the unauthorized practice of law without a license
- In August 1999, Missouri Attorney General Jeremiah Nixon sent an *Assurance of Voluntary Compliance* to Allstate regarding the brochures. Missouri barred the quality service pledge brochure in its present form and has outlined changes that must be made before it can be used in the future.
- In May 1999, South Carolina Department of Insurance issued its Order Adopting Report on Target Examination as to Market Conduct Affairs- In the Matter of Allstate Insurance Company. Allstate agreed to revise the quality service pledge brochure to reflect state law.
- In October 1998, the Connecticut Department of Insurance issued an order forcing Allstate to stop issuing the customer service letters until they were reformulated in accordance with state insurance statutes and the unauthorized practice of law statute.

Various States are taking these actions in order to protect the interests of accident victims in their respective jurisdictions. This case represents an opportunity for the State of Washington to join many other states in protecting accident victims from Allstate's claims handling practices.

³ Both the conflict of interest and the legal experience of the insurance industry are reflected "in the fact that insurance companies spend over \$1 billion annually in litigation battles against policyholders." Miller v. Statefarm, 500 S.E. 2d 310, 1997 W. Va. LEXIS 289, *20 n.10, citing Eugene R. Anderson & Joshua Gold, Recoverability of Corporate Counsel Fees In Insurance Coverage Disputes, 20 Am. J. Tr. Ad. 1, 3,

CONCLUSION

To allow these practices to continue harms the public, and challenges the laws in Washington against the unauthorized practice of law, bad faith and deceptive practices in the insurance industry. United Policyholders concurs with both the King County Superior Court Decision and the respondent's evaluation of the Allstate claims practices, and urges this Court to protect the public from the threat presented by the unauthorized practice of law by insurance claims handlers. For the reasons set forth herein, Amicus Curiae United Policyholders respectfully requests that this Court affirm the order of the trial court.

Respectfully Submitted,



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n.5 (1996). Messrs. Anderson and Gold are partners in the firm of Anderson Kill & Olick PC, counsel for United Policyholders in this case.

EXCERPTS

PROFILE: UNREPRESENTED CLAIM UNIT

Objectives

- To provide customer service and build rapport with claimants through empathetic customer focus of fact gathering and claim processing
- To reduce claimant's need for attorney representation through effective application of structured communication tools and interpersonal skills

Primary activities

- Triage, allocate customer contact to handle face-to-face where appropriate and telephonic/tracking
- Claim investigations and file documentation (coverage, liability, damages)
- Claim negotiation and settlement on non attorney represented claims

Primary performance measures

- Contact time
- Attorney representation rate
- Compliance with procedures
- Settlement results

Individual attributes/skills required

- Technical skills:
 - Computer/Excel/Internet personal skills
 - Active listening SKM
 - Resilient/assessive/feedback of expertise
 - Transfer/handoff of Microsoft file process

Other characteristics

- Customer service orientation
- Empathy, compassion
- Work organization/Follow-up
- Patience
- Persuasion

Implementation tips

- Work hours will vary and will include weekend hours (high-adjustments exist the Member)

INITIAL CLAIMANT CONTACT OUTLINE



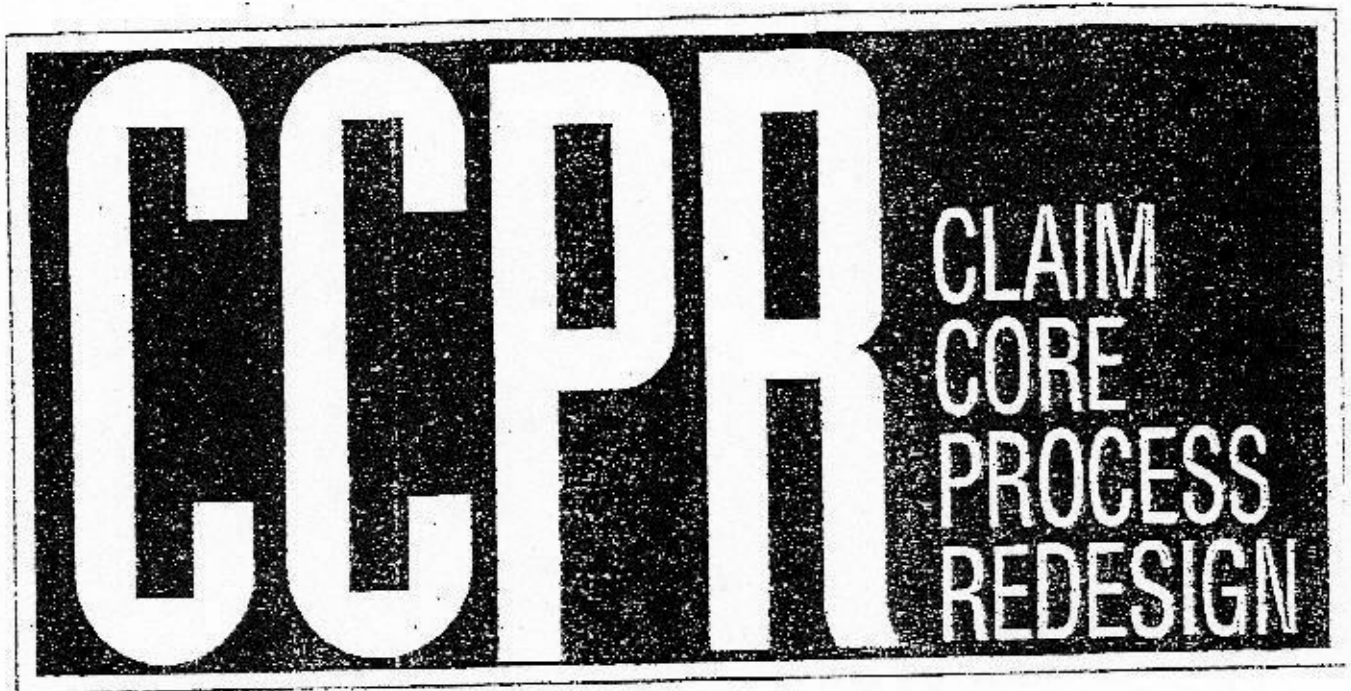
1. Establish empathy and gather injury facts
2. Confirm Customer Service Pledge
3. Gather loss facts
4. Confirm liability decision
5. Discuss payment of medical bills/wage loss
6. Assist in providing for car repairs
7. Assist in arranging for alternate transportation
8. Explain the settlement process and discuss attorney economics
9. Close and follow up

End of

CONFIRM THE CUSTOMER SERVICE PLEDGE



- Full customer friendly explanation of the claim process
- Quick, fair investigation of the facts of the case
- To the extent our policyholder is at fault,
 - I will assist you in providing for the repair of your vehicle and arranging for a rental
 - I will help you determine if you are eligible to receive compensation for any injuries you may have suffered
 - I will discuss fair payment for your claim when you feel you are ready



Implementation Training Manual

LITIGATION MANAGEMENT

PROPERTY OF ALLSTATE INSURANCE
NOT FOR DISTRIBUTION TO ANY THIRD PARTY

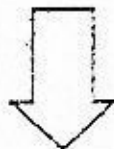
MEASURE FOR ECONOMIC OUTCOMES

Case example	Soft-tissue injury to neck and back	
	Evaluated amount	\$6,000
	Loss payment	\$7,000
	Legal expenses	\$3,000

New measurement

Deviation from the
evaluated amount
plus expenses

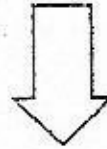
= \$7,000 (loss payment)
- \$6,000 (evaluated amount)
+ \$3,000 (legal expenses)
= \$1,000 (deviation from
evaluated amount)
+ \$3,000 (legal expenses)
= \$4,000 (deviation from
evaluated amount plus legal
expenses)



Measures results
relative to the evaluated
amount of the case

Old measurement

Loss and expenses:
= \$7,000 (loss payment)
+ \$3,000 (legal expenses)
= \$10,000 (total cost)



Measures total
cost to Allstate

RECOMMENDED ATTORNEY PERFORMANCE MEASURES

	Measure	Definition
Results	Performance vs. evaluated amount	Percent of cases closed at or below evaluated amount
	Consistency	Aggregate dollar and percentage deviation from evaluated amount
Productivity	Disposition ratio	Actual resolution method vs. initial resolution method
	Closures	Number of cases closed over number opened Number of cases closed by resolution method
Activities	Litigation plan	Percent of cases with specific plan tailored to the case and agreed to by claims
	Compliance with litigation plan and timeframes	Number or percent of cases where plan and timeframes were complied with
	Communications	Percent of required claim/client contacts on all cases

600109

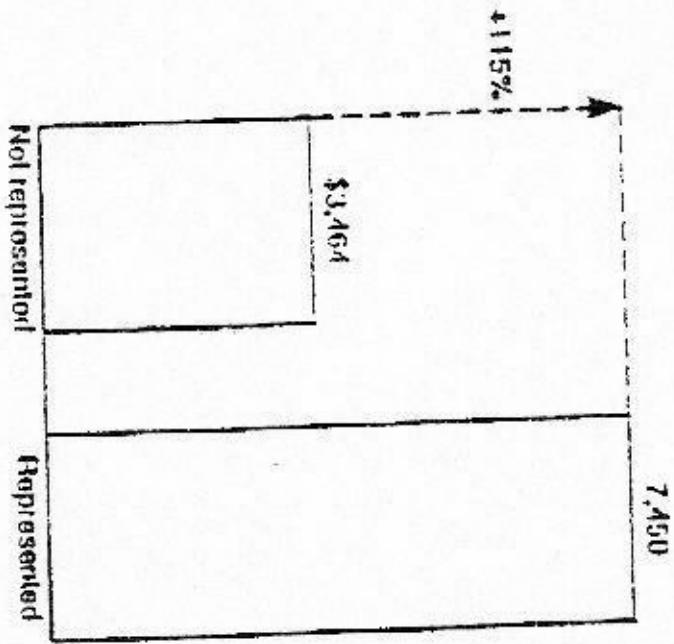
OBJECTIVE MEASURES TO COMPARE STAFF AND RETAINED COUNSEL

**Economic
results**



- Actual expenses
- Average dollar deviation from evaluated amount
- Percent of cases resolved at or below the evaluated amount
- Actual losses
- Disposition rate

BI SOFT-TISSUE CASES \$1,500-15,000
Dollars



**Represented
claims settle for
2-3 times more than
unrepresented
claims**

