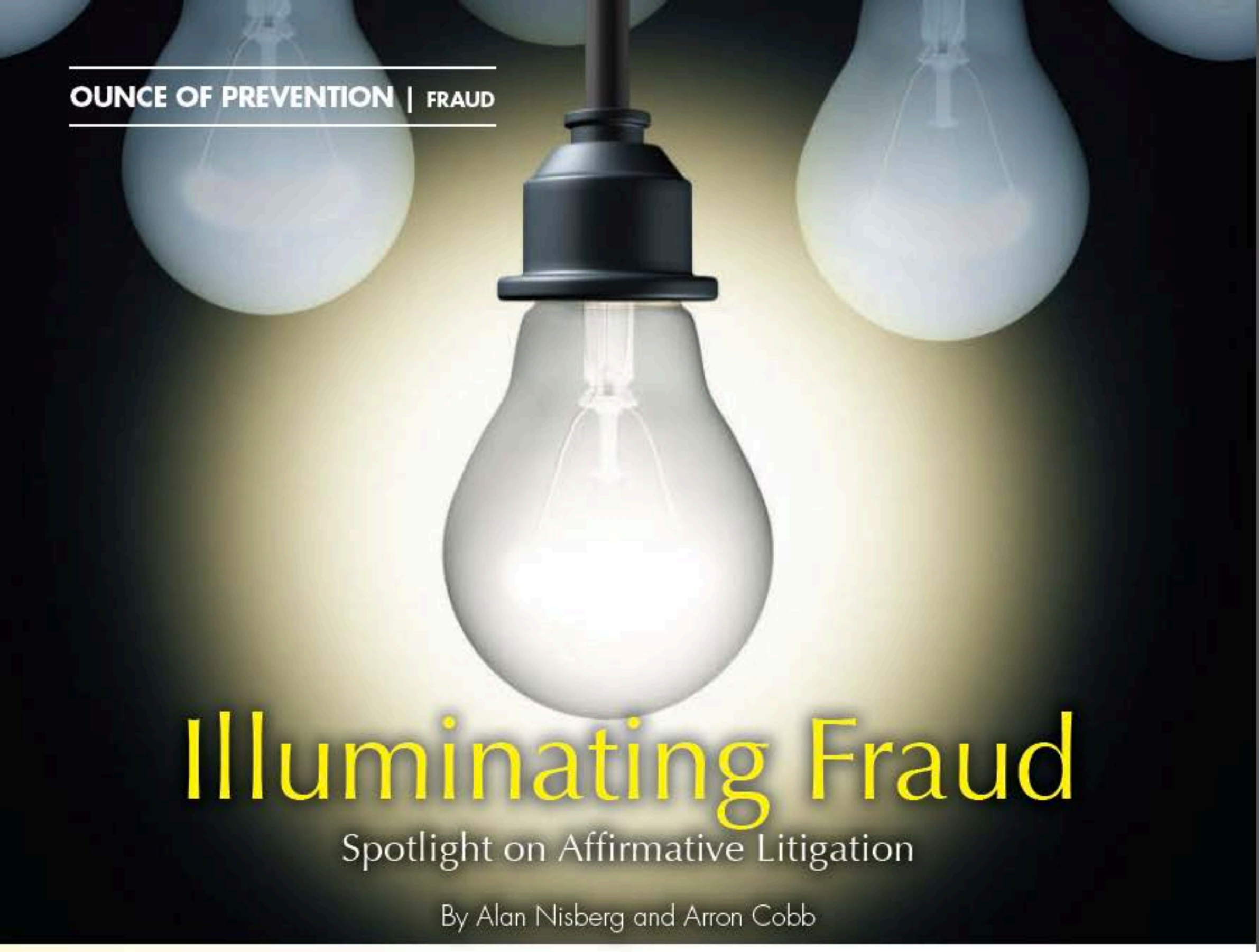

Illuminating Fraud

Spotlight on Affirmative Litigation

By Alan Nisberg and Arron Cobb

Insurance companies are defensive by nature. The very concept of insurance is to indemnify losses, not to prevent them. When it comes to insurance fraud schemes, however, denying claims is not enough to avert the cost of ongoing illicit behavior. Sadly, fraudsters recognize that the insurance industry is generally not particularly effective in stamping out multi-claim fraudulent activity. Insurance fraud today requires insurers to be more proactive.

According to estimates from the U.S. Federal Bureau of Investigation and the Coalition Against Insurance Fraud, insurance fraud has a price tag of more than $100 billion dollars each year –at least $68 billion of that in health insurance fraud and more than $40 billion in other insurance fraud. On the other hand, *fighting* fraud is cost effective. The National Health Care Anti-Fraud Association has estimated that every $2 million invested in addressing healthcare fraud returns $17.3 million in savings.

The insurance industry's response to the fraud epidemic plaguing our nation should be multifaceted, including personnel training for better screening of claims, in-depth investigations, involving law enforcement when appropriate, and a more pro-active approach to civil litigation.

Identification

The first step to combating fraud is to identify it. Insurance fraud comes in many shapes and sizes, ranging from a solo insured's misrepresented claim to an elaborately organized scheme orchestrated by professionals.

In the field of property insurance, insureds often present false sworn statements in proof of their loss. It is also common for public adjusters and contractors to present estimates that inflate the unit price or scope of goods and services. If the estimates have no basis in truth, then seeking payment based on the estimates is fraud. A series of similar false estimates across multiple claims may demonstrate a common scheme to defraud. Although less frequently identified, contractors and engineers also have been known to bill for goods and services not actually rendered.

Healthcare fraud is even more prevalent. It often involves billing for services not rendered, not medically necessary, or unrelated to a covered injury. The scheme may involve staged accidents, unlicensed medical care, illicit self-referrals, and/or patient brokering. Healthcare fraud is especially prevalent in the states that mandate personal injury protection (PIP) insurance, but also affects other kinds of

automobile and health insurance coverages throughout the Unites States.

Recognizing the difference between "one off" fraud (which can be ended by denial and defense) and multi-claim fraud (which often requires a more vigorous approach to avert) is crucial to an insurer's strategic decision-making. The first step is for adjusters to recognize red flags and advise management that a referral to the insurer's special investgation unit ("SIU") should be considered. Claim personnel should be provided in-house training on fraud recognition, access to continuing education seminars, and fraud alerts.

Investigation

The resources available to investigate fraud are numerous. The goal, of course, is to determine:

- Who is involved
- How the fraudulent scheme is being perpetrated
- How best to address the fraudulent activity

Pre-Screening Metrics — SIU should initially pre-screen by focusing on the impact of the suspicious behavior. Analysts should run metrics on the number of claims involved, and quantify historical payments. The high exposure projects will result in the greatest cost savings over time. Look for trends of widespread or high volume misconduct. Calculate the potential fraud exposure and the potential savings.

Identifying the Parties and Interests — Conduct online research to identify business and personal relationships, financial interests and organizational structure that might facilitate illicit conduct. This should include corporate and fictitious name registration, property appraiser data, company websites, news articles, social media and asset searches. Map out the relationships and holdings.

Exploring Misconduct — Evidence of prior misconduct may be helpful. Search court dockets for lawsuits. Review databases regarding loss/claim history (e.g., PILR, CLUE). Reflect on fraud indicators identified by the National Insurance Crime Bureau. Consider a confidential inter-carrier information swap between appropriate SIU personnel. Conduct surveillance. Invoke the insureds' policy duties of cooperation, recorded statements, examinations under oath, medical examinations and records production. Interview witnesses (e.g., current/former employees, ex-spouses, third-party vendors, etc.). Invite confidential informants to discuss what they know, preferably under oath. Conduct pertinent discovery in pending litigation brought against you. If law enforcement initiated a parallel criminal investigation, find out if any part of the investigation or litigation file is available for review. You may also be able to initiate a civil proceeding to obtain pre-suit discovery in certain instances.

Law Enforcement Referral — Insurance fraud is not only actionable civilly, but also criminally. The insurer is the victim. SIU personnel need to be savvy regarding an insurer's legal duty to report fraud and the privileges and immunities that apply to information sharing. If law enforcement successfully prosecutes the action, then the insurer (as victim) has a right to recover criminal restitution. Additionally, a closed criminal investigation file may become public record, providing helpful information to assess the strength of a civil case.

Setting Goals

Once the fraudulent activity is identified, the insurer should advance a strategic plan to countermand it. Often, this planning will be with the assistance of legal counsel. If the fraudulent activity is recurrent in nature, then the plan should account for both remedial measures and prospective problem solving.

First, identify the most effective solution, which may be one or more of the following: avert litigation, deter behavior, recover money damages, obtain injunctive relief, secure a forbearance agreement, establish favorable decisional law, and/or bring about legislative change. To combat continuing fraud, the insurer also needs to set in place an interim protocol to insulate against fraudulently induced indemnification payments. The protocol may include diversion of all future claims to SIU, denial of improper claims, and closer monitoring of the wrongdoer's activities.

Next, evaluate the dispute resolution options:

A Solution *Without* Litigation?

Settlement talks (with or without a mediator) before filing a lawsuit have benefits. You may have an opportunity to obtain restitution and a forbearance agreement without the expense of litigation. A practical business decision that resolves a dispute without litigation averts the distraction of company personnel, the expense of litigation, and keeps a low profile, which may be desirable to one or both parties. Be mindful that strength in negotiations may be improved after litigation is initiated. Of course, this "without litigation" approach would not be attractive if the goal is to make new decisional law or bring about legislative change.

Stay the Course — Defend

If the opposing party already has initiated damages litigation, then a second option is simply to defend. This approach may be appropriate if you have not already paid fraudulently induced sums in the course of claim handling. It also may be an avenue for establishing favorable decisional law (via appeal) or legislative change (if combined with lobbying efforts). However, this "defense only" approach will not result in recovery of money damages, injunctive relief or deterrence. Defending a multitude of individual lawsuits also comes with considerable litigation expense, thinning of resources, and often less favorable or inconsistent results.

Affirmative Litigation – Multiple Claims

The most proactive approach is to initiate litigation against the defrauding party. Greater risk often comes with greater rewards. Initiating an affirmative multi-claim (aggregated) lawsuit not only has the prospect of monetary recovery, but also may result in savings on the overall expenses of litigation (win or lose). This "affirmative litigation" approach also sends a message of confidence, thus improving negotiating strength and increasing the likelihood of a favorable settlement.

Legal Consultation

An experienced trial attorney is an essential partner in the fight against multi-claim fraud. Legal counsel is often retained during an ongoing fraud investigation. Initial impressions from a trial lawyer's perspective will help shape the continuing investigation and strengthen the legal case. Once the investigation matures to the point of possible affirmative litigation, legal counsel should provide a comprehensive legal opinion addressing litigation options. Counsel will need to work closely both with investigators (to become knowledgeable about the factual evidence) and with the decision-makers (to identify the insurer's broader objectives).

In a detailed presentation, the attorney will be expected to summarize the core evidence, describe the insurer's legal and alternative dispute resolution options, comment on the likelihood of success, identify possible consequences of initiating affirmative litigation, and propose an effective and efficient plan to achieve the insurer's goals.

Counsel's legal opinion should:

- Identify the parties (companies, principals, co-conspirators)
- Explain available legal theories
- Select the most favorable legal theories
- Select the most favorable claims upon which to proceed
- Describe the facts in context to the essential elements of each legal theory
- Evaluate the strengths and weakness in the evidence
- Specify whether an expert is needed
- Quantify recoverable damages
- Identify the insurer's exposure to liability for counterclaims
- Recommend self-analysis ("best practices" assessment)
- Assess the likelihood of success
- Propose a litigation plan
- Estimate litigation budget

Benefits of Affirmative Litigation

The insurance industry underutilizes affirmative litigation. Through systematic training, analysis, and planning, aggregated fraud litigation results in significant financial savings. Win or lose, defending a multiplicity of individual lawsuits can be far more expensive than a single affirmative lawsuit. Affirmative litigation is also a powerful way to focus the insurer's resources for greater success through litigation, to enhance the insurer's negotiating strength, and to deter misconduct of others. Being proactive via affirmative fraud litigation will benefit the entire insurance industry and the savings will inure to the benefit of the ultimate consumer — the insureds. LM

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Affirmative Fraud Trial Checklist

Be a persuasive storyteller. Keep the jury focused and interested. Emphasize the most compelling evidence. Systematically place the fraudulent conduct on display.

- ☐ Address jury preconceptions
  - ☐ Jury selection
  - ☐ Opening statement
  - ☐ Presentation of evidence
  - ☐ Closing argument
  - ☐ Judge's jury instructions
- ☐ Start with the story
  - ☐ Who are the perpetrators and co-conspirators
  - ☐ What is the fraud
  - ☐ The fraud triangle: means, motive, opportunity
  - ☐ What is the evidence of each person's involvement
    - ☐ Circumstantial and direct evidence
    - ☐ Overt acts to further a conspiracy
  - ☐ Who is the primary/secondary victim (e.g., insurer-primary/insureds-secondary)
- ☐ Other important evidence
  - ☐ Admissions by the defendants
  - ☐ Inconsistent statements
    - ☐ Internal inconsistencies
    - ☐ Inconsistencies between witnesses
    - ☐ Blaming each other
  - ☐ Spoliation/tampering/fabricating evidence
  - ☐ Defendant's lack of documentation to substantiate defenses
  - ☐ Following the money (involvement of multiple parties)
  - ☐ Assess whether to include/exclude secondary misconduct
  - ☐ Inferences based on Fifth Amendment privilege against self-incrimination
  - ☐ Attacking credibility (e.g., criminal conviction)
  - ☐ Expert opinions (if applicable)
- ☐ Identify and undermine any alternative interpretation of the evidence
- ☐ Bring the story full circle from jury selection to closing argument