

## Unauthorized Practice of Law By Insurance Claims Adjusters

This article will examine the issue of the unauthorized practice of law by insurance claim adjusters. While unauthorized practice of law as a general topic has received wide attention in case law and law review comments, the narrower issue of unauthorized practice by insurance adjusters has received relatively little attention. The cases which have dealt with this problem, while few in number, have adhered to fairly consistent principles. Thus, by an analysis of these cases and the principles developed therein, this article will, it is hoped, shed light on an area of legal ethics of concern to the legal community.

In order to determine when an insurance adjuster is practicing law without authority, one should first examine how insurance adjusters are employed and how an insurance claim adjustment is made. A claims adjuster represents insurance companies in the settlement of claims brought against the company. Claims adjusters generally work in one of several situations: directly for the company, for an adjustment bureau, as self-employed adjusters or as public adjusters.<sup>1</sup> Public adjusters, as well as other independent claims adjusters not employed by or acting on behalf of insurance companies, often work on a percentage of the settlement basis.<sup>2</sup> It is with these adjusters that unauthorized practice questions most frequently arise.

The term adjustment is used in the law of insurance in more than one sense. Frequently it refers simply to the steps leading to an ascertainment of the amount of value or loss, or in the case of non-agreement between the parties, the steps preceding the selection of arbitrators or appraisers. An adjustment has also been defined as the settling and ascertaining of the amount of indemnity which the insured after making all proper allowances, is entitled to receive or the amount of the loss, as settled.<sup>3</sup>

That unauthorized practice of law is "illegal" is clear and

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1. A. Sandri White, *Insurance Claims, Investigating and Adjusting* 3 (1966).

2. *Id.* at 4.

3. 44 Am. Jur. 2d Ins. § 1674 (1982).

needs no citation of support. What is not so clear, however, is what constitutes unauthorized practice. It is helpful in examining this issue to see how courts have defined authorized or "legal" practice of law and who may engage in such practice.

The legislatures of some states have attempted to define the "practice of law" in state statutes. Most of these statutes fail to precisely define "practice of law," leaving this role in the regulation of legal practice to the respective judiciaries. Some of these statutes have been held unconstitutional by state judiciaries, where the statute authorized nonattorneys to engage in the practice of law.<sup>4</sup>

Formulating a concise definition of the phrase "practice of law" has proven to be an onerous task for the courts. The Massachusetts Supreme Court, when faced with the necessity of formulating such a definition stated, "[i]t is practically impossible to frame any comprehensive and satisfactory definition of what constitutes the practice of law, it being necessary to decide each case upon its own particular facts."<sup>5</sup> The Rhode Island Supreme Court has similarly commented that, "[t]he practice of law is difficult to define. Perhaps it does not admit of exact definition,"<sup>6</sup> and that, "[w]hat constitutes the practice of law is extremely difficult, if not unwise, to even attempt to define, and so determination of any issue that presents this question must be left to the facts in each particular case."<sup>7</sup>

Courts' findings have differed on the particular attributes constituting the practice of law. Courts have, however, been consistent in finding that law practice encompasses more than drafting of legal instruments and representing clients in court.<sup>8</sup> An Indiana Appellate Court's definition of "practice of law" has received wide approval:

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4. See generally *Wilkey v. State ex rel. Smith*, 244 Ala. 568, 14 So. 2d 536 (Ala. 1943), *cert. denied*, 320 U.S. 787 (1943); *Professional Dusters, Inc. v. Tandon*, 433 N.E.2d 779 (Ind. 1982).

5. *In re Mfrs. Protective Ass'n*, 295 Mass. 369, 3 N.E.2d 746, 748 (1936).

6. *Rhode Island B. Ass'n v. Automobile Serv. Ass'n*, 55 R.I. 122, —, 179 A. 139, 140 (1935).

7. *Creditor Serv. Corp. v. Cummings*, 96 R.I. 151, 190 A.2d 2, 7 (1937).

8. See *People ex rel. Lawyers Inst. v. Merchants Protective Corp.*, 189 Cal. 531, 209 P. 363, 365 (1922), *Richmond Ass'n v. B. Ass'n*, 167 Va. 327, 189 S.E. 153 (1937); see also *Grand Rapids B. Ass'n v. DeKema*, 290 Mich. 56, 287 N.W. 377 (1939).

As the term is generally understood, the "practice of law" is doing or performing services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contacts, by which legal rights are secured, although such matters may or may not be pending in a court.<sup>9</sup>

The practice of law by persons not duly admitted to the bar of the state in which they are conducting business constitutes unauthorized practice of law.<sup>10</sup> The practice of law is restricted to licensed attorneys who, "practice under rigid ethical restraints imposed by the courts, state legislatures and the bar."<sup>11</sup> The practice of law has been closely guarded by attorneys and organized bar associations. Lawyers have made concerted efforts to prevent other professional and business groups from invading their realm.<sup>12</sup> Bar associations generally maintain that such actions are necessary to protect the dignity of the judicial process and to protect the public from incompetent practitioners.<sup>13</sup> One court, commenting on the purposes underlying the proscription of unauthorized practice of law, stated that:

[W]hen a person holds himself out to the public as competent to exercise legal judgment, 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.<sup>14</sup>

The Pennsylvania Supreme Court, in an unauthorized practice case, stated that "[t]o practice law a person must demonstrate a reasonable mastery of legal skills and principles, be a person of

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9. *Eley v. Miller*, 7 Ind. App. 529, —, 34 N.E. 836, 837-838 (1893).

10. See generally Code of Professional Responsibility, American Bar Ass'n (1969), effective Jan. 1, 1970; Statement of Principles with respect to the Practice of Law, American Bar Ass'n, Dec. 1970.

11. Comment, The Unauthorized Practice of Law by Laymen and Lay Associations, 54 CAL. L. REV. 1331, 1362 (1966) [hereinafter cited as "Unauthorized Practice"]; see generally 48 A.B.A.J. 99, 112, 114 (1962).

12. See generally 48 A.B.A.J. at 112, 114.

13. See Comment, Unauthorized Practice, *supra* note 11.

14. *Dauphin Co. Bar Ass'n v. Mazzacaro*, 465 Pa. 545, —, 351 A.2d 229, 232 (1976).

high moral character and maintain a continuing allegiance to a strict code of professional conduct.”<sup>15</sup> The court noted the pervasiveness of legal consequences in our modern society and how, “legal consequences often weave their way through even casual contemporary interactions.”<sup>16</sup> The court noted further that in some cases lay persons can clearly appreciate “the legal problems and consequences involved in a given situation and the factors which should influence necessary decisions.”<sup>17</sup> In these cases, the court added, “[n]o public interest would be advanced by requiring these lay judgments to be made exclusively by lawyers.”<sup>18</sup> The court, however, distinguished those situations in which a legal judgment is necessary. These include situations in which a proper judgment “requires the abstract understanding of legal principles and a refined skill for their concrete application.”<sup>19</sup> The line between non-regulated lay judgment and legal judgments is very often a thin line at best. The Pennsylvania Court found that this line was discernible nevertheless. The court stated that “[e]ach given case must turn on a careful analysis of the particular judgment involved and the expertise that must be brought to bear on its exercise.”<sup>20</sup>

The insurance claim adjuster plays a vital role in the overall operation of insuring individuals, groups and businesses against risk of loss. The adjuster’s duties can be divided into three main categories. These duties, present in every claim, may be described as investigation, evaluation and adjustment.<sup>21</sup> The investigator must investigate the claim, gather and evaluate the facts and then recommend a settlement.<sup>22</sup>

Insurance adjusters deal with two major categories of claims—“First-Party” claims and “Liability” or “Third-Party” claims.<sup>23</sup> The difference between these may be illustrated by contrasting automobile collision and liability insurance.<sup>24</sup> Collision coverage insures the policyholder against damage to his person or

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15. *Id.* at \_\_\_\_\_, 351 A.2d at 233.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. White, *supra* note 1, at 5, 8.

22. *Id.* at 8.

23. *Id.*

24. *Id.*



property. If collision policy holder X has an accident damaging his car and files against his insurance, he will have a First-Party claim.<sup>25</sup> The damage to his car will be compensated despite any negligence X may have committed in causing the accident.<sup>26</sup> The claims adjuster in this case need only ascertain whether the car driven by X was one insured under X's policy, and if so, the extent of the loss (the damage to the car) suffered by X.<sup>27</sup>

In a Liability or Third-Party claim, however, "the damage is suffered by a person not specifically covered by the insurance policy."<sup>28</sup> "Liability insurance . . . insures the policyholder against the consequences of his negligence."<sup>29</sup> If X is involved in an auto accident with Y and Y files a claim against X's insurance company, Y has a Third-Party claim. In this case, the claims adjuster representing X's insurance company must investigate the accident. He or she must ascertain all of the facts surrounding the accident to enable the insurer to determine which party it believes was at fault. The adjuster's investigation may reveal that one or both or neither person was to blame, or that fault is impossible to determine on the basis of the available information. In a Third-Party claim, the concept of "fault" is important to the outcome of the claim. On the basis of the claim adjuster's investigation and report of facts and circumstances, the attorneys working for X's insurance company will attempt to ascribe "fault." On this basis, X's insurer will decide either to pay or refuse to pay Y's claim.

In the above illustrations, the claims adjuster who investigated each case might have been involved in one of several employment situations. A claims adjuster may act on behalf of an insurance company in adjusting the company's claims. In representing the insurance company, the adjuster may be an employee of the company's claims department; an employee of an independent adjustment bureau acting under agreement with the company; or a self-employed adjuster acting under agreement with the company.<sup>30</sup>

In some cases the claims adjuster may not be acting on behalf of any insurance company. The adjuster may instead be acting as one independent adjuster representing an insured in his or her

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25. *Id.* at 8, 9.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 10.

30. *Id.* at 3.

Third-Party claim against an insurance company. It is in this situation that unauthorized practice cases most often arise.

Courts which have decided unauthorized practice cases involving insurance claim adjusters have espoused fairly consistent holdings as to what constitutes unauthorized practice of law. The cases in this area can basically be broken down into two main groups.<sup>31</sup> The distinction between these two categories is of a factual nature. The first group of cases are those involving claims adjusters who are either employed by or represent an insurance company (or companies).<sup>32</sup> The second group of cases are those which involve claims adjusters who are not employed by and who do not represent an insurance company (or companies).<sup>33</sup>

While the cases may generally be classified under one category or another, the outcome of each case is still highly fact oriented. There are several factual considerations (other than by whom the adjuster is employed) which appear to be relevant in a court's determination as to whether a claims adjuster is practicing law without authority. A fact pattern involving one or more of the following questions may influence the outcome of a case. A court may look to see whether the respective state has a statute licensing or authorizing the adjuster's status; whether there is an applicable statute defining "practice of law" in the state in question; whether the claims adjuster has solicited claims business; whether the claims adjuster works on a contingent fee basis; whether the adjuster has undertaken to represent claimant's interests beyond the value of loss suffered; and whether the claims adjuster represents third-party claimants or encourages them in civil actions against insurance companies. These and other considerations may be outcome determinative in unauthorized practice cases.

In those cases involving claims adjusters employed by or acting on behalf of an insurance company, courts have generally held that activities of a purely investigatory nature do not constitute unauthorized practice of law. Thus, where adjusters have sought only to ascertain the value of the loss to the insured, no unauthorized practice was involved.<sup>34</sup> Courts have, in some limited cases,

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31. See Annot., 29 A.L.R. 4th 1156, 1158.

32. *Id.*

33. *Id.* at 1161.

34. *Wilkey v. State*, 244 Ala. 568, 14 So. 2d 536 (Ala. 1943), cert. denied U.S. 787 (1943); *Liberty Mutual Ins. Co. v. Jones*, 344 Mo. 932, 130 S.W.2d 945 (1939); *State ex rel. Junior Ass'n of Milwaukee Bar v. Rice*, 236 Wis. 38, 294 N.W. 550

allowed adjusters (on behalf of an insurance company) to negotiate and settle small claims, without finding unauthorized practice.<sup>35</sup> Where, however, claims adjusters have ventured beyond the investigation field, courts have often found unauthorized practice of law. Adjusters who have given legal advice to insured clients, made legal recommendations to insurance companies or engaged in activities normally associated with licensed attorneys have been found to have engaged in the unauthorized practice of law.<sup>36</sup>

In *State ex rel. Junior Ass'n of Milwaukee v. Rice*,<sup>37</sup> the Wisconsin Supreme Court found that certain activities of an independent claims adjuster employed by several insurance companies constituted the unauthorized practice of law. The Court interpreted an applicable state statute as authorizing, "lay persons, lay adjusters regularly employed, or lay independent adjusters, or lay independent adjusters employed by an insurance company to adjust losses [and to] ascertain the facts and negotiate settlements or adjustments on behalf of insurance companies."<sup>38</sup> According to the court there was no impropriety in insurance companies authorizing their adjusters to settle small claims generally considered uneconomical to contest without first obtaining approval of the company's counsel.<sup>39</sup>

Regarding the matter of advertising and solicitation the court found nothing improper in claims adjusters' listing their businesses in telephone directories and in insurance papers or journals.<sup>40</sup> With this the court apparently gave implicit approval to "indirect" solicitation by claims adjusters. Arguably, such solicitations should be limited to that directed toward insurance companies and not to insureds with possible third-party claims.

The court found that "the giving of advice, the offering to give advice and the passing upon liability or non-liability under insur-

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(1940).

35. 244 Ala. 568, 14 So. 2d at 547.

36. *American Auto Ass'n v. Merrick*, 73 App. D.C. 151, 117 F.2d 23 (1940); *Meuner v. Bernich*, 170 So. 567 (La. App. 1936); *Fitchette v. Taylor*, 191 Minn. 582, 254 N.W. 910 (1934); *Dauphin County Bar Ass'n v. Mazzacaro*, 465 Pa. 545, 351 A.2d 229 (1976); *Rhode Island Bar Ass'n v. Lesser*, 68 R.I. 14, 26 A.2d 6 (1942).

37. *State ex rel. Junior Ass'n of Milwaukee Bar v. Rice*, 236 Wis. 38, 294 N.W. 550 (1940).

38. *Id.* at —, 294 N.W. at 557.

39. *Id.*

40. *Id.*

ance policies,"<sup>41</sup> by claims adjusters constituted unauthorized practice. The court stated that giving advice to insurance companies or to claimants "as to legal rights is clearly the function of lawyers [and] [r]endering legal advice for compensation . . . is held to be practicing law under all authorities."<sup>42</sup> The court concluded that such activities conducted by laymen claims adjusters constituted unauthorized practice of law by those persons.<sup>43</sup> The court noted, however, that an adjuster could communicate to his employer or to a claimant an opinion obtained from his employer's counsel, but he could not convey such opinion as his own.<sup>44</sup>

In *Wilkey v. State ex rel. Smith*,<sup>45</sup> the Alabama Supreme Court applied a state statutory provision defining "practice of law"<sup>46</sup> to the activities of independent insurance adjusters employed by several insurance companies.<sup>47</sup> The court found certain

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41. *Id.*

42. *Id.*

43. *Id.* at 557. The court found that the following activities involved giving legal advice and prohibited the adjuster from engaging in them: (1) "appearing in a representative capacity before a justice of the peace;" (2) "advising or recommending that an insurance company settle a claim asserted against it for any amount or sums;" (3) "advising or recommending that an insurance company refuse or reject a claim asserted against it;" (4) "advising or recommending to others including insurance companies of their rights or duties towards insurance companies or third persons;" and (5) "advising or recommending that insurance companies have subrogation or contribution claims against other insurance companies."

44. *Id.*

45. 244 Ala. 568, 14 So. 2d 536 (1943), *cert. denied*, 320 U.S. 787 (1943).

46. *Id.* at \_\_\_\_, 14 So. 2d at 544, *see* ALA. CODE tit. 46 § 42 (1940).

47. *Id.* at \_\_\_\_, 14 So. 2d at 542-43; the court stated there appeared to be 3 different types of insurance adjusters, the "claimant adjuster," the "salaried adjuster" and the "independent adjuster."

The court defined the claimant adjuster as, "one who . . . will . . . obtain, secure, enforce or establish a right, claim or demand for an individual against an insurance company. That is, he collects as well as pays . . ." The court noted that, "[t]he authorities are practically unanimous in holding that the method of operation of this type of insurance adjuster constitutes the practice of law."

The salaried adjuster, the court stated, is one "who performs the same type of service as to [independent adjusters], but is a full time employee of one insurance company or of two or more separate companies writing different lines of insurance, but who operate together as a so-called 'group,' all contributing pro rata to his salary."

The court classified the defendants in the instant case as "independent adjusters." The court found that independent adjusters activities differed very little



of these activities constituted practicing law without a license and prohibited the claims adjusters from continuing these practices, "until regularly licensed to practice in accordance with the laws of the state."<sup>48</sup> The statutory provision defining "practice of law" was applicable to the activities of claims adjusters, but only those activities which occurred after a "default, dispute or controversy" had arisen. The court stated that "[b]efore the situation reaches a point where there is a default, dispute or controversy the law . . . provides for adjustments by independent lay adjusters, duly qualified and licensed as such, who may do whatever is necessary to that end not prohibited by [earlier provisions of the statute]."<sup>49</sup> The court added that once a "default, dispute or controversy" has arisen, the lay adjuster must withdraw from the case and allow further adjustment or litigation to be handed by a licensed attorney.<sup>50</sup> The court justified this position as being a means of protecting both the claimant and the insurance carrier. In claims adjustments before any "dispute," etc. has arisen, an insurance adjuster's duties relate to factual inquiries alone, "such as causes of fires and accidents, and the extent of the loss and negotiations and agreements concerning the same."<sup>51</sup> Once, however, a "dispute," etc. has arisen a wide range of legal principles may be involved requiring a lawyer trained in such matters. Consequently, "any sort of controversy or dispute is the statutory line of demarcation,"<sup>52</sup> and a licensed attorney must handle the claim adjustment from that point.

The court found no impropriety in insurance companies authorizing independent lay adjusters to "settle small claims or claims generally regarded as uneconomical to contest, without specific approval by the company's counsel or its local attorney."<sup>53</sup> The court found further that where the adjuster, acting on instructions from the insurance company, negotiated with a claimant for

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from salaried adjusters. The court stated that "the two types differ only in their method of employment and the method of their payment." The salaried adjuster "is hired by one company or a number of companies acting as a group and is paid by the month," while the independent adjuster "is hired by several companies acting independently, and is paid by the hour and the mile."

48. *Id.* at \_\_\_, 14 So. 2d at 538-539.

49. *Id.* at \_\_\_, 14 So. 2d at 546.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at \_\_\_, 14 So. 2d at 547.

an increased amount of settlement after the claimant refused the first offer, did not constitute "practice of law." The court held that while independent claims adjusters may not prepare contracts or agreements settling or compromising a claim, they are prohibited from having claimants execute written releases where the forms have been furnished by the insurance company.<sup>54</sup>

The court found nothing improper in claims adjusters "holding themselves out as being engaged in the business of independent insurance adjuster and listing the business in the classified section of insurance and adjustment journals."<sup>55</sup>

Those activities which the court did find to constitute "practice of law" without authority, were activities normally associated with licensed attorneys. These restricted activities included advising insurance companies or claimants as to liability or non-liability or their rights against other insurance companies, recommending increased settlement amounts and other questions of rights or liability generally involving legal principles.<sup>56</sup>

In *Herman v. Prudence Mutual Casualty Co.*,<sup>57</sup> the plaintiffs, a group of lawyers and their clients, sought injunctive relief against an insurance company, a corporate adjuster and others. The Supreme Court of Illinois found the plaintiffs' allegations as to unauthorized practice of law by the defendants sufficient to sustain a cause of action.<sup>58</sup> The defendants included a claims adjuster and his employer, an insurance claims adjustment bureau, as well as

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54. *Id.*

55. *Id.*

56. *Id.* at 547-548. The court found that the following activities of the defendant independent claims adjusters acting on behalf of insurance companies constituted unauthorized practice of law: (1) ["advising] or recommending that insurance companies have subrogation or contribution claims against other insurance companies or individuals;" (2) "a lay adjuster's expression of his own opinion to a claimant as to the claimants rights under the Workmen's Compensation Act;" (3) "advising or recommending to an insurance company that the company increase the amount offered the claimant . . . [where] . . . the evidence does not show that such recommendation was limited to [the adjusters] estimate of the amount of loss;" (4) advising a claimant that he could not legally enter suit against the insurance company [by whom the adjuster was employed] to recover for the loss of earnings suffered by claimant's wife while caring for claimant after he was injured;" and (5) "appear[ing] before the courts for the purpose of having settlements with minors approved."

57. *Herman v. Prudence Mutual Cas. Co.*, 41 Ill. 2d 468, 244 N.E.2d 809 (1969).

58. *Id.* at \_\_\_\_, 244 N.E.2d at 815.

the insurance company for which the adjustment bureau conducted adjustments.<sup>59</sup> The allegations were to the effect that the defendants, through actions of their claims adjuster had "maliciously, unethically, and illegally conspired to defraud the [plaintiff lawyers] clients by persuading them to prematurely release their claims [against the defendant insurance company] without advice or counsel or opportunity of trial . . ." <sup>60</sup> Specifically, the allegations concerned actions by the claims adjuster employee in fraudulently explaining the extent, nature and legal consequences of a release shown by him to the plaintiff's client, an insured of the company.<sup>61</sup>

The court stated that if the plaintiff proved his allegations upon remand, he would be entitled to injunctive relief against the unauthorized practice of law by the defendant claims adjusters.<sup>62</sup> The court reasoned that, "the state requires minimum levels of education, training and character before granting a license to practice law. Its purpose in doing so is the protection of the public, and the practice of law by those not so licensed is accordingly prohibited."<sup>63</sup> The court added that it had enjoined the unauthorized practice of law in other cases "not primarily for the protection of attorneys generally, but rather for the protection of the public from potential injury resulting from reliance upon laymen for the performance of acts requiring the training, knowledge and responsibility of a licensed attorney."<sup>64</sup>

In *Liberty Mutual Ins. Co. v. Jones*,<sup>65</sup> the Supreme Court of Missouri lifted a lower court's injunction prohibiting lay claims adjusters employed by an insurance company from adjusting and set-

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59. *Id.* at —, 244 N.E.2d at 810-811.

60. *Id.* at —, 244 N.E.2d at 811.

61. *Id.* at 815. The plaintiffs alleged that . . . [the claims adjuster] advised [the lawyer's client] that he [client] should not consult or advise the attorney then representing [him]; that [the claims adjuster] stated he would explain, and that [he] did fraudulently explain, the legal relationship and the nature, extent and consequences of the release, draft and documents shown by him to [client]; that in reliance thereon [client] signed the proffered releases allegedly represented as reimbursement to [client] for automobile repair cost not covered by [client's] insurer . . . and that such releases were in fact complete releases of [the defendant insurance company] and its assured from all liability.

62. *Id.* at —, 244 N.E.2d at 811.

63. *Id.*

64. *Id.*

65. 344 Mo. 932, 130 S.W.2d 945 (1939).

ting third-party claims asserted against the company's policyholders.<sup>66</sup> The court interpreted two state statutes, one defining the "practice of law" and the other restricting such practice to licensed attorneys, as to not prohibit lay claims adjusters from making adjustments. The court stated that claims adjusters are "licensed by the laws of this state to write casualty insurance and they are authorized as a part of that business to adjust and defend claims against the insured covered by their policies."<sup>67</sup> The court found that adjustment of claims by lay claims adjusters employed by insurance companies did not constitute unauthorized practice of law. The court reasoned that to hold such acts done by lay employees, irrespective of the circumstances in which they were done, as unauthorized practice would be, "to convict thousands who draw on slight routine legal knowledge in the daily work in their own limited spheres."<sup>68</sup>

According to the court, investigation and reporting of facts and circumstances surrounding a claim by a lay claims adjuster employed by an insurance company did not constitute unauthorized practice. Moreover, further activities by lay claims adjusters not involving the exercise of judgment on a legal matter were, in the court's view, completely within allowable bounds of activity by lay claims adjusters.<sup>69</sup>

The court drew a distinction between independent claims adjusters employed by insurance companies and those independent adjusters "who held themselves out to the public as being engaged in the business of adjusting, settling and collecting claims for personal injuries."<sup>70</sup> The court cited cases from other jurisdictions<sup>71</sup> supporting a conclusion that many acts of independent adjusters, not acting on behalf of or employed by insurance companies constituted unauthorized practice of law. The Court, however, noted that lay claims adjusters who are employed by insurance compa-

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66. *Id.* at \_\_\_\_\_, 130 S.W.2d at 961.

67. *Id.* at \_\_\_\_\_, 130 S.W.2d at 955.

68. *Id.*

69. *Id.* at \_\_\_\_\_, 130 S.W.2d at 960-61.

70. *Id.* at \_\_\_\_\_, 130 S.W.2d at 960.

71. *Fitchette v. Taylor*, 171 Minn. 582, 254 N.W. 910 (1934); *Meunier v. Bernich*, 170 So. 567 (La. App. 1936). In the latter case the court's decision that acts of independent claims adjusters holding themselves out to the public constituted unauthorized practice of law was made in the face of a statute permitting such business.



nies to adjust claims "work only for their several employers, who hire and retain them with their eyes open. When they deal with claimants it is on an adversary basis, not a representative basis implying a fiduciary duty."<sup>72</sup>

A second commonly litigated fact situation involves those adjusters who are not employed by or do not act on behalf of insurance companies. Adjusters of this type often solicit business and work on a contingent fee basis. Independent adjusters in this group have held themselves out to the public as being engaged in the business of representing claimants in third-party claims against insurers. The courts have often found that activities by these adjusters on behalf of claimants which go beyond investigation and valuation or appraisal of loss constitute unauthorized practice of law.

In *Fitchette v. Taylor*,<sup>73</sup> the Minnesota Supreme Court affirmed a lower court's grant of injunction against the defendant claims adjusting association of which no member was a licensed attorney. The court stated that "[t]he facts make a case of the practice of law by a layman, which is in any view unlawful."<sup>74</sup> The court found unauthorized practice in the activities of employees of the adjusting association who: "Solicited, advertised for and held themselves out, as being engaged in the business of adjusting and settling claims for personal injuries and collecting the claimed damages therefore for a consideration usually a contingent fee of 33-1/3 per cent."<sup>75</sup> The court found that the defendant claim adjusting association engaged in the following activities as part of their services, "to injured persons who were claimants for prospective damages on account of personal injuries."<sup>76</sup> The claims adjusters defined the legal rights of said injured persons and the legality of the said alleged claims and gave them legal advice and counsel both with reference to the question of liability against prospective defendants and the amount of damages.<sup>77</sup>

The court found that the claims adjusters also:

Interviewed witnesses and secured statements relative to the claims they purported to handle in order to enable them to

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72. Liberty Mutual at 960-61.

73. 191 Minn. 582, 254 N.W. 910 (1934).

74. *Id.* at \_\_\_\_\_, 254 N.W. at 911.

75. *Id.*

76. *Id.*

77. *Id.*

give said claimants legal advice and opinion as to the collectibility thereof and in order to enable said defendants [claims adjusters] to discuss, advocate and argue said legal rights and liabilities in the course of presenting said claims and negotiating the settlement thereof.<sup>78</sup>

The court reasoned that “[a]ttorneys, as officers of court exercise a privilege peculiar to themselves and not enjoyed by those outside of the profession. Hence, it is in a very real sense a franchise and property right.”<sup>79</sup> The court concluded that this was enough to show that the plaintiff lawyer and bar association “suing not for themselves alone but for the benefit of all the affected members of their profession, are entitled to injunction to prevent the unlawful intrusion into their office and professional field,”<sup>80</sup> by insurance claims adjusters.

In *Professional Adjusters, Inc. v. Tandon*,<sup>81</sup> the Indiana Supreme Court held that a state statute providing for licensing of certified public adjusters was an unconstitutional violation of the separation of powers clause of the state constitution. The statute was unconstitutional in that it permitted practice of law by layman not required to be admitted to the bar and not subject to disciplinary rules of the Supreme Court.<sup>82</sup>

In this case a certified public adjuster licensed under the statute entered into a written contract with the defendants to prepare an estimate of loss. The plaintiff public adjuster was to be paid on a contingent fee basis depending upon the amount of settlement. The defendants were the insured owners of a mobile home which suffered fire loss. The public adjuster made a determination of loss and expenses suffered by the insureds and submitted a claim to an adjusting agency acting under agreement with the defendants' insurance company. These actions resulted in an offer to settle of a substantially greater amount than the defendants had previously been offered by their insurers.<sup>83</sup> The suit arose when the defendants failed to tender the full amount which the public adjuster

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78. *Id.*

79. *Id.* at \_\_\_\_, 254 N.W. at 912 (citing *Dworken v. House Owners Ass'n*, 38 Ohio App. 265, 176 N.E. 577 (1931)).

80. *Id.* at \_\_\_\_, 254 N.W. at 912.

81. 433 N.E.2d 779 (Ind. 1982).

82. *Id.* at 782.

83. *Id.* at 781.

maintained that he was owed.<sup>84</sup>

The court stated that the unconstitutional statute "proposed to create a public adjuster which represents an insured and receives compensation to act on behalf of that [insured and] to negotiate for and effect the settlement of a claim for loss or damages."<sup>85</sup> The court found that the statute did not "limit the activity and authority of the adjuster to appraise the loss and report back to the client the fair value of the claim so that the client can go forward and settle the claim."<sup>86</sup> Instead, the court observed, this statute "authorizes the adjuster to go forward and to negotiate for and effect that settlement as a direct agent and representative of the insured."<sup>87</sup> This the court found constituted unauthorized practice of law.<sup>88</sup>

In *Meunier v. Bernich*,<sup>89</sup> the Louisiana Court of Appeals reversed a lower court's judgment in favor of an independent lay claims adjuster in his suit upon a contract. This contract was made between the claims adjuster and the defendants, parents of a child whose accidental death had given rise to the contract.

Upon hearing of the child's death, the plaintiff claims adjuster solicited the parents' business. The parties entered into a written contingent fee contract under which the claims adjuster was to investigate the cause of the accident "and to enforce, secure, settle, adjust or compromise whatever claim or claims the [defendants] may have arising from said fatal accident to their minor daughter."<sup>90</sup> If an adjustment was not reached by the claims adjuster, the contract provided the claim was to be submitted to an attorney at law.<sup>91</sup>

The court found unconstitutional a clause in a state statute defining "practice of law" which excepted from its operation, layman's activities conducted "without resort to court proceedings,"<sup>92</sup>

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84. *Id.* at 780-81. The court stated that the precise issue involving the written contract was not before them since the defendants never reached the stage of answering the complaints on the merits, but raised a motion to dismiss under FRCP 12(B)(6).

85. *Id.* at 782.

86. *Id.*

87. *Id.*

88. *Id.* at 786.

89. 170 So. 567 (La. App. 1936).

90. *Id.* at 568.

91. *Id.* at 569-72.

92. *Id.* at 572.

in enforcing, settling, adjusting or compromising defaulted, controverted or disputed accounts. It was upon this clause which the plaintiff claim adjuster relied for authority in conducting his activities. The court stated that the legislature, through this act, had thereby said "that a layman can perform all of the acts which are ordinarily done by a lawyer except that such laymen may not appear as an advocate in court."<sup>93</sup> According to the court, this exception in the statute, "is not only an encroachment upon the inherent judicial power, but it tends to impede and destroy the court's authority over the legal profession."<sup>94</sup> With this observation, the court ruled that this clause enabling laymen to "practice law without authority" was unconstitutional.

In *Dauphin County Bar Ass'n v. Mazzacaro*,<sup>95</sup> the Supreme Court of Pennsylvania affirmed a lower court's injunction upon the activities of a public claims adjuster which constituted unauthorized practice of law. The Pennsylvania Court affirmed the lower court's finding that the adjuster's activities exceeded his authority under the state statute creating and defining the position of public adjuster. The court found that a public adjuster's license did not confer authority on an adjuster "to negotiate settlements on behalf of injured claimants against alleged tortfeasors or their insurers," (i.e., third-party claims).<sup>96</sup>

The court found that the claim adjuster's activities amounted to, "third-party claimant representation,"<sup>97</sup> and constituted unauthorized practice of law. These unauthorized activities included solicitation of claims of injured parties against alleged tortfeasors who are insured, or against their insurers for a contingent fee of any resulting settlement; writing demand letters to parties from whom recovery is sought and attempting to negotiate settlements with alleged tortfeasors.<sup>98</sup> The court noted, in discussing third-party claim representation, the "vital role that legal assessments play in the negotiation process between a victim of an injury and an alleged tortfeasor or his insurer."<sup>99</sup> The court recognized that it

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93. *Id.* at 575.

94. *Id.* at 576.

95. 465 Pa. 545, 351 A.2d 229 (1976).

96. *Id.* at \_\_\_\_\_, 351 A.2d at 232.

97. *Id.* at \_\_\_\_\_, 351 A.2d at 234 (citing J. Appleman and J. Appleman, *Insurance Law & Practice* § 8649 (1968)).

98. *Id.* at \_\_\_\_\_, 351 A.2d at 232.

99. *Id.* at \_\_\_\_\_, 351 A.2d at 233.



was within the authority and abilities of a skilled adjuster to make a valuation of damages. This requires knowledge of purely factual concerns, such as estimation of loss and cost of repair. Laymen claim adjusters, however, did not have authority or the necessary training to assess the "extent to which that valuation should be compromised in settlement negotiations."<sup>100</sup> Negotiation of settlements, the court stated, requires "an understanding of the applicable tort principles . . . a grasp of the rules of evidence, and an ability to evaluate the strengths and weaknesses of the clients case vis-a-vis that of the adversary."<sup>101</sup> This knowledge requires application of abstract principles to concrete facts. Such knowledge is not accessible to the layman, but instead requires the training of a lawyer.<sup>102</sup> The court stated finally that "lay adjusters who undertake to negotiate settlements of the claims of third party claimants must exercise legal judgments in so doing,"<sup>103</sup> and such exercise constitutes unauthorized practice of law.<sup>104</sup>

### *Conclusion*

These cases represent the apparent trend of authority in this area of the law at the present time. Courts have taken a decidedly negative view toward activities of lay claims adjusters involving much more than investigation, valuation and reporting. The courts appear to be somewhat more lenient toward activities conducted by claims adjusters employed by or acting on behalf of insurance companies. In such cases, courts will apparently not find unauthorized practice of law unless the claims adjuster has clearly entered the legal realm by making judgments concerning matters of liability or legal rights. The courts, however, are quick to find unauthorized practice where adjusters act independently not on behalf of insurance companies, by soliciting third-party claims. Courts apparently view such cases as attempts by laymen to impinge upon

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100. *Id.* at \_\_\_\_\_, 351 A.2d at 234.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* The court in footnote 7 distinguished those situations where claims adjusters negotiate settlements with third-party claimants on behalf of insurance companies from situations where claims adjusters negotiate with insurance companies on the behalf of third-party claimants.

the realm of the attorney. This is sacred ground and the courts appear willing to defend it against onslaughts by the uninitiated.

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