

3601 Vincennes Road, Indianapolis, Indiana 46268
Phone: 317.875.5250 | Fax: 317.879.8408

www.namic.org

122 C Street N.W., Suite 540, Washington, D.C. 20001
Phone: 202.628.1558 | Fax: 202.628.1601

July 28, 2015

Washington State Office of Insurance Commissioner
Commissioner Mike Kreidler
PO Box 40255
Olympia, WA 98504-0255

*sent via email to:
rulescoordinator@oic.wa.gov*

**RE: Requiring notice to third party claimants of settlement payments by insurers (R 2015-06)
NAMIC's letter of opposition to proposed regulation**

Dear Commissioner Kreidler:

The National Association of Mutual Insurance Companies (NAMIC) respectfully requests that the Office of the Insurance Commissioner reconsider moving forward with rulemaking on the draft proposed regulation requiring insurers to provide notice to third party claimants (hereinafter "claimant"), who have retained legal counsel, of settlement checks sent by the insurer to the duly authorized legal agent of the claimant.

NAMIC is the largest property/casualty insurance trade association in the country, serving regional and local mutual insurance companies on main streets across America as well as many of the country's largest national insurers.

The 1,300 NAMIC member companies serve more than 135 million auto, home and business policyholders and write more than \$208 billion in annual premiums, accounting for 48 percent of the automobile/homeowners market and 33 percent of the business insurance market. NAMIC has 138 members who write property/casualty in the State of Washington, which represents 48% of the insurance marketplace.

Through our advocacy programs we promote public policy solutions that benefit NAMIC companies and the consumers we serve. Our educational programs enable us to become better leaders in our companies and the insurance industry for the benefit of our policyholders.

NAMIC appreciates the OIC's laudable desire to protect insurance claimants from unethical and criminal behavior of unscrupulous attorneys who abscond with client settlement funds. However, NAMIC believes that the OIC should leave this legal and regulatory matter to the capable hands of the Disciplinary Board of the Washington State Bar Association and the criminal justice system.

On behalf of NAMIC's members, we respectfully submit the following comments for consideration by the OIC *in opposition to Proposed Rule on Insurance Payee Notification*:

- 1) **The vast majority of jurisdictions in the nation have elected *not* to adopt the American Bar Association model on insurance payee settlement notification.**

Thirty-five (35) jurisdictions have elected not to adopt the American Bar Association model on payee notification and have left the issue of policing unethical behavior of a licensed attorney to the state regulatory body authorized and empowered to discipline professional transgressions and breaches of fiduciary duties owed by licensed attorneys to their clients.

There is no evidence to support the contention that the Disciplinary Board of the Washington State Bar Association is incapable of and/or has been ineffective at regulating the attorney-client relationship and protecting consumers from unethical and illegal behavior by unscrupulous attorneys.

From a regulatory authority standpoint, the OIC should not be directly or indirectly involved in regulating the attorney-client relationship, just like the Disciplinary Board of the Washington State Bar Association should not be allowed to encroach upon the OIC's regulatory authority to regulate insurance carriers.

In essence, the draft proposed regulation would interject the OIC into the regulatory purview of another state agency in a manner which the OIC is not specifically authorized by state law to engage in, and which is inconsistent with inter-agency regulatory protocol. NAMIC is concerned that the draft proposed regulation would establish a regulatory precedence of one state regulatory agency imposing new administrative cost and burdens on its regulatory stakeholders in an attempt to address a purported regulatory problem that pertains to professional stakeholders regulated by another state agency. The creation of inter-agency regulatory conflict is neither appropriate nor beneficial to any of the interested stakeholders.

- 2) **The Proposed Rulemaking is entirely unnecessary, because there is no evidence to support the contention that there is a "wide-spread" problem of licensed attorneys failing to provide claimants with notification of their claims settlements and/or stealing client settlements.**

NAMIC is unaware of any evidence to support the conclusion that there is a widespread problem of insurance claimants, who have retained their own legal counsel, not being provided with timely information from their attorney relating to the settlement of their insurance claim and/or attorneys stealing said insurance settlement proceeds. If such a problem actually exists, the OIC and/or the Disciplinary Board of the Washington State Bar Association would be privy to the existence of data supporting the OIC's concern that licensed attorneys are failing to comply with their professional duties to their clients.

Moreover, if there is a widespread problem of licensed attorneys stealing their client's settlements, the Washington State Attorney General would have data evidencing a significant number of criminal cases pertaining to this felonious misconduct.

If there is an actual problem of attorneys violating their licensure duties and/or the criminal code, a solution needs to be crafted that expressly addresses attorney misconduct, rather than imposing new administrative costs and burdens upon insurers or other the civil claims settlement payors.

- 3) **NAMIC is concerned that the proposed payment notification will not actually protect claimants, and/or prevent attorney misconduct and criminal behavior.**

There is no reason to believe that an insurer settlement notification requirement will prevent unscrupulous attorneys from engaging in professional misconduct and/or engaging in criminal behavior. A licensed attorney's duties to timely communicate settlements and their duty to disseminate client settlement funds are controlled by the terms of the attorney-client fee agreement and the attorney code of professional conduct, so insurer notification to the claimant will not alter these contractual and ethical duties. For example, if the attorney-client agreement states that client settlement funds will be disbursed bi-monthly, an insurer's notice to the claimant of the issuance of the settlement check by the insurer to the attorney will not change or speed-up the attorney's timetable for disbursement of the client settlement funds.

Additionally, if an attorney is willing and able to forge his/her client's signature on an insurance settlement check (i.e. engage in criminal conduct), how will this payment notification really help the claimant, who is still at the mercy of his/her attorney to lawfully disburse settlement money and comply with state law?

The mere fact that a claimant receives notice of the settlement from the insurer will not prevent an attorney, who is engaged in criminal conduct, from disregarding his/her client's requests for specific information on the settlement or from stealing the settlement money owed to the claimant. Even if the claimant has timely knowledge that a settlement payment has been issued, it doesn't mean that the client has the ability or legal right to physically force his/her attorney to disburse settlement funds held in the attorney's client trust

account. Moreover, claimants could end up being placed in harm's way by bursting into their attorney's office and demanding payment of the settlement funds. If the claimant's attorney is willing to commit such a serious felony, a claimant should avoid attempting any direct "self-help" personal collections from such a criminal character.

Even if the claimant shows up at their attorney's office with a police officer to try and collect the claimant settlement funds, the attorney need not comply with the claimant's request for prompt disbursement if the requested disbursement by the claimant is earlier than what is stated in the agreed upon attorney-client fee agreement, and if the attorney plans to or has absconded with their client's funds, the police officer won't be able to do anything about it until he/she has in hand a court order/warrant directing law enforcement action on disbursement of funds. All the attorney/criminal has to say to the police officer is that the amount of the client disbursement is in dispute, pursuant to the terms of the fee agreement, which means that it is a legal dispute for the courts to address not a law enforcement issue. Therefore, claimant notification by the insurer will provide the claimant with no practical protection against criminal conduct by the attorney.

If preventing attorney misconduct is the goal of the OIC, enhanced attorney licensure disciplinary sanctions and stricter criminal penalties would be a far more effective deterrent, and would be more likely to influence attorney compliance with their attorney-client relationship code of professional conduct.

4) The proposed regulation would directly and inappropriately interject insurers into the professional relationship between a claimant and his/her legal representative.

Contractually speaking, the attorney-client *contractual* relationship is legally separate and independent of the insurer-claimant *legal* relationship, so insurers should not be required to interfere with or police the claimant's professional relationship with his/her counsel. The claimant is the one who selects his/her legal counsel and is the one who may fire his/her legal counsel, so it is the claimant's responsibility to retain an ethical attorney and control their professional conduct. Insurers should not be required to get involved in this independent contractual relationship, and expose themselves to a tortuous interference with contract claim by the claimant's attorney.

5) The proposed rulemaking will needlessly increase administrative costs for insurers and their policyholders.

Insurance companies strive to be efficient in their insurance cost-containment practices, so that their overhead costs and expenses do not adversely impact the affordability of insurance products for consumers. The proposed payee notification regulation will require insurers to expend financial resources on notification expenses (postage, notice materials, and staffing associated with generating and disseminating notices), administrative costs related to retention and storage of settlement payment notifications, and legal fees associated with insurer claims attorneys (who are the ones typically involved in insurance settlements when a claimant has retained legal counsel) with sending out payment notices to claimants and responding to inquiries made by the claimant after he/she receives a payment notice.

If there is a legitimate concern over whether or not licensed attorneys are providing timely notification of the receipt of settlement checks on pending insurance claims, the claimant's attorneys should be the ones required to bear the cost of notification, not insurers and policyholders.

6) The proposed settlement payment notification is arguably inconsistent with RPC 4.2, Communication with Persons Represented by a Lawyer.

Washington State Court Rules: Rules of Professional Conduct specifically state, "in representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

In essence, the draft proposed regulation would be in conflict with the well-established prohibition against one attorney bypassing a client's legal counsel and communicating directly with a claimant about any aspect of the case in controversy.

If the OIC imposes a regulatory duty on insurers, and in effect, upon the licensed attorneys, who represents the insurance carriers, to communicate directly with a claimant, who has retained legal counsel, it could be arguably exposing insurer's attorneys to disciplinary action by the Washington State Bar Association for violating RPC 4.2.

Additionally, from a public policy standpoint, NAMIC believes that the OIC should not be indirectly modifying the Professional Codes of Conduct for Attorneys or other non-insurance professional licensees, which is exactly what the practical implications of the proposed regulation would have for insurance claims attorneys.

For the aforementioned reasons, NAMIC respectfully requests that the OIC refrain from moving forward with any contemplated rulemaking on payee notification and leave the policing of attorney misconduct to the Disciplinary Board of the Washington State Bar Association.

Thank you for your time and consideration. Please feel free to contact me at 303.907.0587 or at crataj@namic.org, if you would like to discuss NAMIC's written testimony.

Respectfully,



Christian John Rataj, Esq.
NAMIC Senior Director – State Affairs, Western Region