

REGULATORS OR JURIES: WHO CAN BEST PROTECT INSURANCE CONSUMERS?

by

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There is a vast body of literature documenting the rising costs of class action litigation, inequities between large attorney fee awards with minimal compensation for plaintiffs, and the increasing tendency towards litigation in our society. While this debate raises issues that are valid in their own right, it has not yet addressed a fundamental question: *Is a jury properly equipped to make decisions that have vast public policy implications?*

Increasingly, class action jury decisions are nullifying the authority of professional insurance regulators. Frequently, this nullification extends across state lines. In addition, as the pace of class action litigation increases, another critical question presents itself: *Who is protecting insurance consumers?*

Plaintiffs' lawyers claim that they are protecting the consumer from large corporations. While this claim may not be entirely lacking in merit, it ignores two irrefutable factors when it comes to insurance:

1. Each state vests the duty and authority to protect insurance consumers in an elected or appointed insurance regulator.
2. Insurance regulators are better equipped than juries to protect all insurance consumers.

The bottom line is that juries, which have historically done an admirable job of resolving disputes between specific parties, are ill-equipped to make decisions that have broad public policy implications. This LEGAL BACKGROUNDER provides a simplified examination of the roles of juries and regulators and the rules that govern their decision-making processes.

Role of a Jury. Juries were designed and intended to resolve well-defined disputes between specific parties, and generally they function well in that capacity. Evidence of this exists in the fact that today's tort reform proposals focus on correcting specific problems that will return juries to this function. Ideally, a jury will determine whether the defendant's actions were in violation of the law and, if they were, the amount of damages to be awarded.

However, because juries are intended to be fair and impartial, they are poorly equipped to make decisions which have vast public policy consequences. This is particularly true when there is an expert regulator in place who is charged with consumer protection.

Role of a Regulator. Unlike juries, regulators generally have a wide-ranging charge. For example, in Iowa, “[t]he commissioner of insurance shall be the head of the division, and shall have general control, supervision, and direction over all insurance business transacted in the state, and shall enforce all the laws of the state relating to such insurance.” I.A.C. § 505.8 (*see also*, 18 De. C. § 310, which contains similar language). The breadth of this charge is common, and the scope of state insurance laws is likewise broad. Insurance regulators are responsible for a diverse body of public policy concerns, ranging from overseeing the solvency of insurers licensed in their states to protecting consumer interests.

Even this fundamental consideration of the varying purposes of juries and regulators reveals distinctions that prove that jury decisions should not attain the status of broad public policy determinations.

Scope of Jury Decision Making. The trial process begins with the plaintiff filing a complaint that identifies specific issues, explains how it is that the plaintiff is aggrieved, and identifies the parties alleged to be responsible for the conduct in question. The defendant files an answer denying the allegations, and in some instances raises allegations of their own. It is from this narrow basis that the issues in a lawsuit are defined. As the facts in the lawsuit are developed through the discovery process, the parties are generally confined to pursuing evidence that is relevant to the case.¹ For a variety of reasons, not all relevant evidence is presented to the jury:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

FED. RULE OF EVID. 403.

Further, the information received by a jury is subjected to a refining process that continuously narrows the nature and quantity of that information.

Scope of Regulator Decision Making. There are stark distinctions between the jury and regulatory processes. For instance, in the regulatory process, an issue does not necessarily have to start with a formal proceeding. Consider the issue of so-called “toxic mold” in Texas, a matter that has consumed a great deal of Commissioner Jose Montemayor’s time over the last year. Due to increasing mold claims, Farmers Insurance announced that they would stop offering their standard homeowners insurance policy in Texas. *Insurer to Halt Full-coverage Sales: Farmers Cite Water Damage Claims in Moratorium on Home Policies*, DALLAS MORNING NEWS, July 31, 2001. There was no single formal action that brought the Texas Department of Insurance into this issue. Yet, they are involved due to a concern about the availability of adequate insurance coverage since insurers began limiting available coverage due to dramatically increased claims.

Another distinction from the jury process is that Commissioner Montemayor ordered the five largest homeowners insurance carriers in Texas to report their mold-related losses to him by August 31st. *Id.*

¹The federal rules regarding trial procedures and evidence are employed herein as an example of how the jury system works. In that this system applies to all federal courts, and many federal rules are emulated by the states, this choice provides the best example for a national audience. *See* Federal Rule of Civil Procedure (FRCP) 26(b)(1) for general limitations, and Federal Rules of Evidence (FRE) 401, *et. seq.*

Before making a decision, Commissioner Montemayor held four public hearings.²

Finally, consider the absurdity of imposing limitations on a regulator similar to FRE 403, which would exclude, or bar from consideration, some relevant information for fear that it will confuse, mislead or prejudice the regulator. If one is to make a fair and impartial decision between well-defined parties, a Rule 403-type limitation is appropriate. However, when making a decision that will affect a large and diverse group of insurance consumers, barring the consideration of critical information is dangerous.

While the scope of a jury's consideration is confined to the narrow limits of the lawsuit and the judge's determinations of relevance, a regulator generally has the ability to consider all information that he or she deems relevant before making a determination.

Jury's Method of Obtaining Evidence. Juries are passive in that they do not gather information. Rather, they receive information that has been carefully tailored so that it is relevant to a narrow series of facts. Even in jurisdictions where jurors are allowed to ask questions, only the questions that survive review by both parties and the judge are asked. Not only is evidence limited to information that the judge deems admissible, the judge may instruct the jury that they must view certain evidence in a particular light. FED. RULE OF EVID. 105 The court may even require the jury to "...accept as conclusive any fact that is judicially noticed." FED. RULE OF EVID. 201(g) Further, the court gives general instructions to the jury regarding how they should conduct their deliberations. FED. RULE OF CIV. PRO. 51.

Regulator's Method of Obtaining Evidence. Regulators have a much more active role than juries in gathering information before making a public policy decision. Consider that Commissioner Montemayor's efforts did not end with his decision last year. On January 11, 2002, he "appointed a 19-member Advisory Task Force for Mold-Related Claims to develop recommendations on how insurers should respond to claims for water and mold damage." *Mold Task Force Members Appointed*, Jan. 11, 2002 (Press Release issued by the Texas Department of Insurance). This kind of authority is not unique to Texas. For example, the Director of Insurance in Illinois is empowered: "to conduct such examinations, investigations and hearings in addition to those specifically provided for, as may be necessary and proper for the efficient administration of the insurance laws of this State." 215 ILCS § 5/401(c).

In a sense, a regulator's information gathering process is the reverse of that employed in a trial. The regulator begins with a fairly small amount of information and continuously expands it until there is sufficient evidence to make a decision.

Who are Jurors? The answer to this question begins with the receipt of a summons calling people for jury duty. 28 U.S.C. § 1864. Jury summonses are to be sent randomly with the intent that the resulting pool of jurors will reflect a "fair cross section" of the community. 28 U.S.C. § 1861. Basic qualifications for jury service are related to citizenship and a general ability to perform the functions that a juror must perform, such as: the ability to speak and read the English language. 28 U.S.C. § 1865 (*see also* 28 U.S.C. § 1869(h), which sets out the basic elements of the questionnaire that is to be sent with the summons). Once a pool of jurors is summoned, a panel will be assembled for a particular trial. The lawyers for each party may have the opportunity to question the potential jurors, or the judge may perform that function. In either event, each party is allowed what are known as peremptory challenges, 28 U.S.C. § 1870, that may be

²*Montemayor Protects Consumer Choice, Availability of Mold Coverage*, Nov. 28, 2001. (Press Release issued by the Texas Department of Insurance.) (Note: This example is included because it demonstrates the breadth of a regulator's information gathering authority. It is not intended as an endorsement or criticism of Commissioner Montemayor's decisions regarding mold coverage.)

exercised by a party at their discretion. Also, the judge may excuse potential jurors for potential bias or prejudice. *U.S. v. Annigoni*, 96 F3d 1132 (9th Cir. 1996). People who work for, or represent insurers will probably be excused. This is also true of those who purport to represent consumer interests. Thus, experts are generally excluded from the decision-making body.

The objective of the jury selection process is to find a group of randomly chosen citizens who will have open minds when hearing the case. The practical consequence of this is that jurors are unlikely to have specialized knowledge of the issues in question in the case they are hearing.

Who are Regulators? Unlike jurors, regulators are chosen because they have “knowledge of the insurance industry.” IND. CODE § 27-1-1-2 Whether appointed or elected, regulators have the burden of proving that they have specialized expertise that will enable them to perform this critical responsibility in a professional manner.

Conclusion. Such distinctions between the judicial and regulatory mechanisms are the result of the different purposes these systems serve, and these systems serve their own purposes well. However, when the two are mixed, the result can be disastrous for consumers when applied to resolving insurance-related disputes.

The jury system acts like a funnel, continuously narrowing the body of acceptable information until it becomes a fine stream of admissible evidence. The regulatory process begins at a less well defined point and tends to expand the amount of information upon which a regulator relies in making a decision. The jury system is designed to resolve well-defined individual disputes, while the regulatory process should result in broad public policy determinations that balance the interest of a wide variety of people. Juries are to be unbiased and therefore most likely detached from those who are affected by their decisions. Regulators are experts immersed in the system, they interact regularly with insurers, consumers, and other interested parties, and are able to evaluate information without the need for intervention and guidance that a judge provides to a jury.

Because juries are limited to a narrow stream of evidence that is applied to a likewise narrow set of facts in a dispute between well-defined parties, they are poorly positioned to make decisions that have broader public policy determinations. However, as regulators are charged with balancing the interests of all consumers, the solvency of insurers and the health of the entire system, they are particularly well situated to make broad public policy determinations. It is no wonder that when a jury is placed in the position of making public policy, they are likely to do more harm than good.