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## **Illusory Coverage: California's Insurance *Qui Tam***

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The insurance code is a labyrinth that most people have the good sense to avoid. And those who delve into and understand the code often find themselves scratching their heads when they see how the code is applied. A perfect example of this is California's Insurance Code Section 1871. California legislators, noting the success of the federal and California false claims acts, also known as *qui tam* statutes, created a similar provision to root out insurance fraud. But certain twists in the design and case law has caused the code section to miss its mark and create some unintended consequences.

*Qui tam* statutes are schemes designed to reward whistle-blowers for exposing fraud and abuse in government contracts. In traditional *qui tam* actions, a whistle-blower, called a relator, will bring a suit on behalf of the government in order to recover money stolen from the government. Anyone meeting certain requirements could help enforce the law, regardless of whether or not they had something personal to gain from a lawsuit and can receive substantial rewards as a percentage of any monetary recovery. But the relator must first offer the government the opportunity to prosecute the case - an offer often accepted. California Insurance Code Section 1871 includes a whistle-blower provision that purports to root out fraud and abuse in insurance claims and adjusting. This statute borrows its format from *qui tam* statutes, but perverts the use and purpose. Like the traditional *qui tam* provisions, Section 1871 requires relators to first offer their case to the government. In traditional *qui tam* actions, the government is trying to recover its own money. In a Section 1871 action, the government is trying to recover money for insurers. A substantial chunk of the business of insurance includes litigating the rights of the insurer, whether justified or unjustified. And so the government is expected to spend taxpayer resources to protect a group that has traditionally had no problem protecting itself. Fraud against insurers is an issue that bears little resemblance to fraud against the government and should not be treated the same way. Insurers are not public

entities and there is no reason taxpayers should fund or subsidize these large, profit-seeking corporations.

Of course, proponents of this approach can argue that the code may be used to protect insureds, a group that generally does not have the knowledge, resources, or cohesion to protect itself. For instance, when insurers abuse their insureds in a way that is difficult to quantify as damages, it can often only be pursued by the government and not by the aggrieved. The Consumer Legal Remedies Act restricts lawsuits against insurance companies. Thus, the combination of motivating individuals to root out abuse with the government's resources would seemingly provide resources where they are in need. The plain meaning of the statute would appear to support this.

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But the California appellate courts, despite the pleas of the insurance commission and the consumer bar, put a kibosh on that notion. In *State of California ex rel. Nee v. Unumprovident Corp.* (2006) 140 Cal.App.4th 442, and again in *State Ex Rel Metz v. Farmers Group Inc.* (2007) 156 Cal. App. 4th 1063, the courts held that Section 1871 was not intended to protect insureds. The courts looked at other code sections cross-referenced within Section 1871 that list several violations that would create liability under the section. Basing its opinion on the fact that other sections were not intended to protect insureds, the courts held that Section 1871 was similarly not intended for that kind of protection.

Ostensibly, the courts should never have reached that step of statutory interpretation, as a straightforward reading of Section 1871 would suggest that it can be used to protect insureds as well as insurers. But nothing is ever simple in insurance law.

Still, the courts seemed to leave an opening for change by either the insurance commission or the legislature. In *Metz*, the insurance commission submitted an amicus brief supporting *qui tam* plaintiffs in their right to use that section against insurers. In *Unumprovident*, the court rejected the position of the insurance commission for three reasons: the brief was inadmissible hearsay as it relates to the commission's position because it was filed in another matter; the commission's position was not adopted in the form of a long standing interpretation or formal regulation; and the commission's interpretation would "alter or amend" the statute, or "enlarge or impair its scope." The court effectively said that if California wants to allow Section 1871 to protect insureds it would have to either legislate such change, or have the insurance commission pass a formal regulation that would not enlarge or impair the scope of the existing statute.

In any event, this section cries out for change. Either amend the statute to have insurance companies pursue their interests on their own dollar, or amend the statute to protect a group actually in need of protection - insureds. Or, expand the Consumer Legal Remedies Act applicability toward insurers who violate the insurance code. It is the duty of the legislature and the courts to give us law that is consistent and congruous in application and effect.

There is no question that *qui tam* statutes can be effective. In fact, on Jan. 24, the federal government announced that it had recovered over \$2.5 billion in fraudulent medical claims last year through the federal False Claims Act. However, changes to Section 1871 could help to protect those most in need of protection while preserving the constructive use of governmental resources. Using *qui tam* actions to protect consumers has the added benefit of adding government oversight to consumer actions, giving some protection against strike suits, which, like fraud, harms consumers by raising insurance rates. Ultimately, such consumer protection statutes can cure an ill but it may also create pernicious and unintended consequences. Thus, any proposed changes should be constructed in such a way to avoid these side-effects, and to enhance beneficial results. In any event, the state of California needs to move past the status quo of insurance *qui tam* in this state, and move toward a better and more efficient scheme.