

INSURANCE LAW PROJECT: JIM KUHN, ATTY

By Phyllis Frye:

I think he gave you really good matter of facts do's and don'ts on how to protect yourself, how to keep your place to live and how to make sure somebody can't arbitrarily take away. I told him to preach because Keith's come a long way and I've watched him evolve both on his own issues and on my issues. I am very excited he's here.

I've got a word or two to say and then I'm going to introduce Jim. I don't want this record that's going out on tape and going out on writing to misrepresent some facts. We have today and throughout this conference some very dear people, members of our community who have been kind of taking some pretty large doses of criticism. I want to make sure that they understand that we love them, and I want to make sure that they understand that whenever we are criticizing, and a lot of us are criticizing, either individuals, speakers, whatever, the Republican Party, I want them to understand that we are not criticizing Republicans. And we are not criticizing the historical Republican Party.

What we are criticizing is what is going on in America today and what we saw allowed last week at the Republic Convention when a bunch of people took over that convention. I have very many friends in the community and in other communities -- some where at the dinner last night -- who agree with what happened at the Republican National Convention when the Log Cabin Republicans, which is the Gay, Lesbian group, went on the air, on the media, on the news reports, on the Today Show, and others and said "we are Republicans, we're proud of being Republicans, we're not proud of what's going on right now and we are not going to endorse the current ticket."

So, I want to make sure that we are not bashing the Republican Party historically, we are not bashing Republicans historically, but we are extremely upset at what we heard and what was allowed to be said and was not repudiated.

Those two people that are here today I want you to know I also want this on record that one of them was an alternate delegate to the RNC. She went completely out of the closet. If you think when you hear tonight what it was like for me to walk into the bowels of the Houston Police Department to address the Vice Squad Captain in the days when the Cross Dressing Ordinance was illegal in Houston, I would have much preferred that than to go out of the closet as she did into the Republican National Convention as it was made up last week. I admire them both for what they did. They took our

brochures, about 200 of them, and just plastered them everywhere so I think they deserve a round of applause.

Jim Kuhn. Jim Kuhn is going to speak on Insurance Law. Jim was an original director, very first year that the Bar Association of Human Rights was formed. Jim and I have been friends since about 1978. We've marched together. We've been in people's faces. We've said things that people didn't want to hear. He has served on many boards and agencies in our community and currently is the chair of the Gay, Lesbian Switchboard of Houston. The Gay, Lesbian Switchboard of Houston does turn a lot of people onto the Gulf Coast Transgender Community. Jim, I hope that before you leave you encourage them to put transgender into the term, into the name of the switchboard.

I love this man, I truly do. I think you know that I love you. I trust this man and more than any other lawyer, he and I share in problem-solving and when one is out of town or out of pocket we cover each other and protect each other's interest with our clients. Jim has extensive knowledge in the area of Insurance Law. I trust that after today you will be better equipped to stand up to the people who want the premiums but don't want to pay up. Jim.



By Jim Kuhn:

Thank you Phyllis. I have to remember how I came to know Phyllis very well. She was doing an internship while still a law student in the District Attorney's office of Harris County, and I was trying a bar raid case in the County Criminal Court here and that's when we first got to know each other. Phyllis will have to tell you about her experiences sometimes with our Republican District Attorney, when she was there.

We're going to talk today about Insurance Law. What we decided to concentrate on in the discussion group that we've had for the last two days was the remedies that could be applied to existing insurance coverage in the order of the most common kinds of coverage. I will try to explain the coverage as we go along. I am not going to get into great detail about particular Texas Law because it's not relevant to many of you. I will in passing because we do have something here that California has but mostly we're going to talk about what basic reforms need to be made. It would benefit not only the transgenderal community but also the general public in terms of receiving medical care at a price that you can afford.

On the present health care system, there are several remedies for each type of insurance for which you can lobby right now. ERISA, that's Employees Retirement Income Security Act, is the most common form of insurance coverage that you're going to experience

today. It covers employer insurance programs for life, health, and disability. If the employer pays so much as \$1 of the premium, you're under the risk of ERISA statutes. Whether it is labeled that way or not. It's suppose to be labeled. They're suppose to tell you, but I've had several lawsuits where they didn't tell the employee. It is a federal statute. It pre-empts all state laws. You sue in Federal Court.

The only remedy for wrongly withheld benefits is to sue for the amount that has been wrongfully withheld from you and for permissive, not mandatory, attorney's fees. You end up in Federal Court. The Federal Courts here are overwhelmed. They do not like seeing these cases. I've had one judge just look at me and say, "Settle this, I'm not going to try it." Perhaps your best remedy would be to go mediation. The remedy is obvious. Make the attorney's fees mandatory. Otherwise I don't have an incentive to take the case. If you are on disability or seriously ill you're not going to have the money to hire me otherwise.

Also, there ought to be some penalty for the insurance carrier who wrongfully withholds benefits -- some kind of monetary penalty that would be payable to the plaintiff because they have had to wait 2 to 5 years to get the coverage they were suppose to have in the first place.

Many companies are now also going to self insurance programs because they can no longer afford the insurance company's premiums. These are also going to be controlled by the ERISA statute because they are employer funded. The problem we have had is that self-insuring entity for the corporation or something else tend to place caps limits as to what they are going to pay out for certain types of medical illnesses.

The obvious one is AIDS. There's a case out of Houston, the H & H Music Company case. That has been decided by the 5th Circuit which said yes they can place a cap on AIDS coverage. The company in this case put a lifetime cap for AIDS patients of \$5,000. That's all you get. It's on its way to the Supreme Court of the United States now. I cannot see any particular legal reason why it will not be upheld.

The remedy for that is to prevent, by legislation, companies from excluding any named medical condition and to require minimum standards of coverage for the self-insuring companies. Right now they don't have that. They can offer you a totally useless policy if they so choose and you buy into. If you work for them what choice have you got.

Lastly, you have individual policies. Those are getting rather rare and prohibitively expensive. In Texas and California we have the bad faith doctrine which means when you have your benefits wrongfully withheld. You can not only sue for your contract benefits, you can sue them for mental anguish, you can sue them for trebled damages under the Deceptive Trade Practices Act, and you can sue for mandatory attorney's fees. It's a particularly generous compensation against an insurance company who wrongfully withholds your benefits. In Texas it applies to all forms of insurance, not just health, but also to disability, life, automobile casualty loss, you name it. If it's insurance, it's covered. And as I said, it's particularly generous. I know of one other state that has it and it's California. We took it from them in 1987. This is not legislative law. This is law that was imposed by the Supreme Court of Texas, before they appointed more Republicans to it.

Other states, most states in fact, have the same remedies that the Federal ERISA Act does. You sue for the benefits and attorney's fees and that's all you get. The states need to be encouraged, where the attorney's fees are not mandatory, to make them so, and put some kind every penalty on these people.

Otherwise they will sit on your settlement check until it comes to trial, and if you have a terminal disease they'll try to wait until you're dead. Most people, when someone dies, the executor of your estate may not pursue the lawsuit even though they're entitled to. And if your testimony has not been recorded by deposition they can't really pursue the lawsuit successfully. I had a case like that. The gentleman passed away before we could get to trial and his surviving parents did not choose to pursue. I really wanted to hit this company over the head because they made the last year of his life absolute hell.

Specific to transgenderals, in the insurance community you need to be very careful when applying for any kind of insurance -- life, health, disability, primarily -- as to what the definition of pre-existing conditions are. You cannot expect to start the transgenderal process and change insurance coverage in mid stream. You're not going to be allowed to do that, you're going to get hit with a pre-existing condition. You need to read each individual policy. They stand and fall as their own individual contracts. You need to decide what the pre-existing condition is. Usually it is anything for which you have sought medical treatment, even a consultation, prior to applying for this policy.

I saw something on AIDS that came out in an American Express Insurance paper recently. It was the cleverest question I've ever seen. "Have you ever been advised about HIV or AIDS." Well, you can't turn on the TV or radio and see a public service having been advised about HIV or AIDS. It gives them, it's a weasel way to get out of paying your benefits. A nice company might refund your premiums, but that is about all you're going to get out of them.

If you have a pre-existing condition you really have to tell them about it. If you conceal it from them they're going to jerk your coverage the first time you ask for it. And you'll have wasted a lot of time and effort. You're going to end up with the medical bills any way.

As transgenerals you need to lobby to have the entire procedure from initial consultation all the way through SRS defined legislatively. I don't know of any other way to do it as a medically necessary condition. Other than that they're going to throw you out. "All this is cosmetic. This is elective surgery." And most policies don't cover either of the above.

The other reform that would be useful to the entire industry would be to permit insurance companies or require them to make their claims procedures uniform to relieve the health care providers from the bewildering forms and diagnostic evaluations which plague them now. I would guess that it adds 10 to 20 percent to the cost of medical care in this country just to shuffle the papers back and forth between the doctor's office and the insurance company. Most doctors I know have one person that they have hired full-time to do nothing but process claim forms. And each insurance company is different. Not to mention what you can get into with Medicare and Medicaid.

Separately, many policies, particularly health, have a conversion clause in them. If you are fired or you lose your job, you take disability. I'm not talking about COBRA here, we'll get to that in a minute. They will allow you to convert your policy from a group coverage to an individual coverage. So long as you pay the premiums your employer stops. There is a problem with conversion coverage. Usually the coverage you get is dramatically less than what you had before. If you have any kind of pre-existing condition, which means you cannot go to a new group or a new policy, you're going to find that your coverage is not what you thought it was.

I have experienced this personally. I went from a very nice policy to one that does not cover surgery or outpatient medication. My surgical benefits, \$1200, and that's for a triple bypass. And they only pay 80 percent and there's a lower cap.

There needs to be, in this state particularly, because I've seen some policies, conversion policies that are worse than that, where they will pay you up to \$40/day for hospitalization. You can't get in a charity ward for \$40 a day in this town. There needs to be legislation providing for minimum standards on conversion policies below which the insurance company cannot go. Of course, if you do require them to do that they're going to raise the premium. You have to remember they're in this for profit. They have to pay their stockholder's a dividend.

One thing we did come up at the committee, we suggested to Phyllis and other persons who organized this, That is, in the future conference, you need to devote a section to Medicaid, Medicare, and Social Security. It is very relevant to many people here. We did not get into that because that really wasn't our brief. But a lot of people do end up on disability while going through the transition that you're going through, whether it is an emotional disability or a physical one or everybody has a potential problem with AIDS these days and you may very well end up on Medicaid and Social Security. The system actually does vary from region to region. It determines how well you're going to be received when you're applying for the disability and how many Appellate steps they're going to put you through before you finally get it.

While the particular problems of transgenerals and persons with AIDS or HIV are only going to be adequately dealt with in terms of a general insurance, particularly medical insurance reform, the cost of medical care for the corresponding insurance premiums are completely out of control. Adequate medical care paid for by insurance is becoming the prerogative of the rich and those employed by very large corporations or other organizations. The best local coverage I know of is through the University of Texas system, but they have a great deal of power with the insurance industry.

Small businesses are ones that you might not think particularly are small. I once was involved with a furniture chain that has 10 or a dozen stores in this area and they had to drop their insurance coverage. The employer couldn't pay for it, the employees didn't want to because they couldn't afford it. Your talking anywhere from \$300 to \$1,000 a month to cover a wife and kids as well as yourself. That's bigger than your car payment, bigger than your house payment.

The insurance industry was completely surprised of course by AIDS, by the epidemic, just like the general public was. And after 12 years they still have not found a way to cope with hundreds and thousands of men and women in their peak earning years becoming disabled and incurring medical expenses in the hundreds of thousands of dollars. I don't know how they're going to. This screwed up the actuarial tables beyond all relief.

The only solution that I have seen and there was some debate in the committee about this is a national system which guarantees basic medical care to everyone regardless of the income. Such a program was going to be expensive but is rather hard for me to believe that increased taxes would exceed the premiums you're already paying. You have to remember that if you want to object to paying taxes take a look at insurance premiums you're paying now. And if you spread that out on national basis they might even go down. A federal bureaucracy would be created. But now we have hundreds, thousands of insurance companies with their own individual bureaucracies and 51 state regulatory agencies. I doubt that a federal one would be that more difficult or complicated to deal with. They already make different judgments which harass and confuse caregivers, harass and confuse the insureds. You and I can't tell from one state to the next what kind of reception you're going to get.

When you go in on the transgenderal issue to an insurance company, to an insurance state board I don't know what they're going to do from State to State. Many people haven't tried quite frankly. A lot of people seem to pay out of their own pocket which is a same.

The very least they've got to go to uniform plain forms and procedures and definitions around here.

The present system of course does not address preventive medical care any meaningful manner. Medical intervention often comes only in situations which could have been prevented if the patient would have seen a doctor earlier. You don't have to let the flu develop into pneumonia before you go to the hospital but a lot of poor people do just that. They can't go to the doctor and get a flu shot. They end up down in Ben Taub gasping for breath waiting to be admitted to the pneumonia wing of the hospital.

A national health care system would at least eliminate 51 different systems of insurance regulations that we have now. It's sort of an art within each State. Don't ask me what they do in Louisiana. I couldn't begin to tell you of any other State, other

than Texas. It's going to take away some rights as well as confer them. You'll lose the bad faith doctrine at least as it applies to medical insurance if you go to a national system. I can't imagine the national government allowing that kind of liability to be placed on it. But by God, if you're getting the basic coverage and you're guaranteed, I think it's worth the sacrifice.

There are only those remedies available now to the owners of individual policies. It's not going to help you if your part of a group.

The obvious things are in the imposition of national standards of medical care as if there would be priorities established by the government which might very well exclude coverage for medical minorities such as transgenerals. Sexual re-assignment surgery is not likely to be covered in such a system unless you convince the government of the need. It's very likely to refuse elective cosmetic surgery as we've discussed before which the insurance companies use now to try to get out of it. I don't know why the federal government would be any more enlightened unless you convince them of it. The issue is going to be to convince whoever is making the decisions, whether it's the legislators or the administrative body, that at least SRS, the medical procedure is listed.

The task is going to be rather daunting however, it might be rather easier in a national system to identify who those decision makers are opposed to the present system. We are dealing with hundreds of thousands of company and 51 State Government. I'm including the District of Columbia.

The National System is going to have priorities which will only cover basic medical care. The issue is what is and is not covered was going to be a source of political and administrative conflicts and litigation per decade no matter how you do it. We're already in the Courts. You're not going to decrease the amount of litigation involving insurance if you go to a national plan, you're just going to change the forms and the people that you're suing.

And obvious questions, how long do you treat an AIDS person aggressively before stopping care except that which makes a person comfortable. Well that applies to cancer patients and cardiovascular patents as well. When do you stop trying to cure them and make them comfortable and turn them into a death watch. The Oregon plan deals with that somewhat. We have a proposal here in Texas to do something similar and the priorities put certain kinds of surgery and conditions, particularly experimental ones,

down at the bottom of the list. Basically say, we're not going to pay for it.

You got to remember the people who have a lot of money are always going to have better health care than the rest of us. We should be able to try to eliminate inequities and the prioritize the discriminatory priorities within the present system. The right to a healthy life should not depend upon having a healthy income. I'm going to close with that. Thank you.

By Phyllis Frye:

Well Jim that was really terrific and I want to thank you and I want to add a little postscript to what he has just said as he talked about all the jurisdictions and of course those are just within the United States. Then we have Canada. We have those even if that is its own jurisdiction. Other countries have their own setups and it's a very difficult process.

But as I said when I opened up, this problem is the people in the insurance companies want our premiums. They want our money, but they don't like to pay.

I got a call on Tuesday of this week, today is Saturday. A woman from Arizona -- she is post operative transsexual, and she's been for about two years. She had heard about me through the community. She says, I have got a problem. It's an insurance company. And I thought she was going to tell me she had problems on his collecting on her surgery or whatever. She had that a couple of years ago, but she developed recently, within the past month a tumor on her arm, and the insurance company is refusing to pay saying it's SRS related. She said it gets worse. She says, my nephew who is very homophobic, beat me up the other day and broke my nose. And the insurance company is refusing to pay on that because they say it is SRS related. I don't practice law in her State. I gave her someone in an adjoining State. Hopefully they can find her someone because that insurance company needs to be sued.

In general what is going to happen is the best thing she is going to get after she has waited 2, 3, 4, 5 years and sued through the courts to finally get her money is only the money that she was due to begin with. The insurance company is sitting on those checks collecting interest on that income because it hasn't been paid out. It hasn't paid a crying dime to her all that time that she was without that money that she had to reach in her pocket to pay for that broken nose and to pay for that tumor.