

## William Shernoff marks 50 years as father of bad faith insurance law

By Laurinda Keys

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**K**nown as the father of bad faith insurance law, William M. Shernoff, founder of Shernoff Bidart Echeverria LLP, recently marked the 50th anniversary of *Egan v Mutual of Omaha*, when a jury for the first time awarded emotional distress and punitive damages for the way the insurance company handled the claim of a roofer who was disabled in a fall.

The California Supreme Court upheld the verdict, establishing new tort law. *Egan v. Mutual of Omaha Insurance Company*, 24 Cal. 3d 809 (1979).

Shernoff recently spoke to the Daily Journal about the case and his more than 57 years of practice.

**Daily Journal:** 50 years later now, why was that case so significant?

Shernoff: No. 1: It created a new tort of insurance bad faith which gave policyholders rights they didn't have. Before *Egan* the only remedy for insurance consumers was for breach of contract, which was totally inadequate because it didn't provide for any damages for unfair claims practices. And, with the *Egan* decision creating the new tort of insurance bad faith, insurance carriers have to be more careful now because they could be liable for damages over and above the insurance policy benefits, such as emotional distress damages, consequential damages, and even attorneys' fees. But the other aspect is the therapeutic effect it had, be-



William M. Shernoff is often called the "father of bad faith insurance law." | Daily Journal photo

cause *Egan* said you could also get punitive damages. You know punitive damages are a big deterrent to unfair claims practices because if the insurance company knows they could be liable for punitive damages, they're going to be more careful with their claims handling.

**DJ:** And have insurance company practices improved?

Shernoff: The deterrent factor is working. It's not that they've cleaned up their act all together but it's certainly a lot better than it was 50 years ago.

**DJ:** But you must still be getting cases like this.

Shernoff: Yes but as time went on insurance companies still had many problems with their claims practices and there were still many cases out there. For example, the *Egan* case came out with a quote that said insurance companies can be held liable for failure to investigate a claim, and went further and said the insurance company's duty is to investigate a claim, not only with the mindset to deny the claim but to look for evidence that

would support the claim. And if they don't do that, it's bad faith. But still today, most insurance company claims-people can't help themselves; they just look for ways to deny a claim. And they hardly ever look for a way to support a claim. I don't know if the insurance industry will ever totally clean up their act, because it's inbred in their DNA. But there has been some considerable improvement because of the *Egan* case.

**DJ:** Does every state have this as law now?

Shernoff: I think practically all states now have some form of what might be called insurance bad faith. There's some that don't give punitive damages. There's some that limit it to three times the actual damages or 10 times the actual damages. Broadly speaking, I think insurance bad faith is pretty widespread now and it keeps developing as time goes on. It's a living, breathing new tort that is not so new anymore.

**DJ:** What do you see in the future as far as the ways it will be developing?

Shernoff: It's happening in all areas. For example, health insurance now is a big area for insurance bad faith, where before there was no health insurance bad faith. People have health policies and they can't get to see a specialist in time. A lot of times people suffer damages because they don't get to see their doctor in time. By that time the cancer has spread. So this tort keeps expanding into health insurance, medical insurance, and life insurance, for personal injury lawyers, for failure to settle a claim within policy limits. People are still having a great deal of problems in disputes with the wildfires that burned down their houses, all kinds of flooding and water damage and mudslides. We're seeing a lot of people come with problems they're having getting their claims paid.

**DJ:** After Egan, the verdict amounts grew higher and higher. Did that take a while?

Shernoff: It took a little while to build up. In insurance bad faith cases after Egan came down I was exclusively practicing insurance bad faith law and have been for the total 50 years. But other lawyers soon caught on and started bringing cases for insurance bad faith. Nowadays there are quite a few attorneys that are carrying the torch of trying to protect insurance consumers.

**DJ:** Did you encounter difficulties with jurors who were hesitant to give these higher and higher amounts? How did you deal with that?

Shernoff: Everything is difficult

in litigation. Some jurors are thinking about their insurance rates. But in many cases, the jurors have heard a very disturbing story of usually a family that had insurance and got denied and all kinds of bad things happened to them because the insurance company didn't treat them in good faith. So most jurors, once they hear the plaintiff's case, if it's a very compelling story, they want to deter the conduct. How do you deter conduct of a big insurance company that's got billions of dollars in reserves and is worth billions of dollars. You can't really deter them with a very small punitive award. And the jury usually hears the net worth of the insurance company, so they're not going to feel too sorry for them.

**DJ:** In cases where they were able to overcome your arguments, can you give some insight into what happened?

Shernoff: Usually when you lose a case you don't have the facts on your side. Or it could be 100 things that go wrong, including your witnesses didn't come across with the jury. But most of the time that's not the case. I would say that, as far as developing the law of insurance bad faith, I've been blessed with good partners, Michael J. Bidart and Ricardo Echeverria. They have helped develop the insurance bad faith law for the last 40 years that they've been with me. I have to not only thank my partners but other lawyers in California that have helped develop this tort.

**DJ:** In trial, does the behavior of the insurance adjusters come into play, whether they were polite even if they denied the claim?

Shernoff: Yes, if the insurance claims people take the witness stand and they come across as nice, reasonable people that certainly helps the insurance company's case if they don't make jerks of themselves on the stand. But the other thing I would say about that is these people are trained by the executives in the insurance company and they're just carrying out business practices that they were told to. So we make the argument

that what happened in this case is institutional bad faith, which means that this just didn't happen because one adjuster did something wrong. It happened because he was just following orders from higher up. This is corporate policy that you have to deter.

**DJ:** So as time went on, did you find the insurance companies were settling more?

Shernoff: As the case law developed lawyers became aware of the fact they could get damages for an insurance policy holder, including emotional distress, consequential damages, punitive damages. So they started to bring these lawsuits. The law of bad faith is now all over the appellate courts. They know what their exposure is and it's very significant. So another significant effect of the insurance bad faith law is that it incentivizes settlement of the case.

**DJ:** How did it all start?

Shernoff: I had one earlier case for a farmer from Chino who had a disability policy and the insurance company said he couldn't be disabled because he walked from his house to his mailbox. His insurance policy at the time said he had to be house confined. That's illegal now. We took his case to trial and got a verdict. But I didn't realize at the time the impact that these cases would have and I certainly didn't realize a whole new body of law could spring up as a result of these cases.

**DJ:** How did Mr. Egan become your client?

Shernoff: At the time I was working in a law office with Herbert Hafif, a very well known plaintiffs' personal injury lawyer. Mr. Egan was a client of the firm and he had this problem with his disability insurance policy and so I was appointed to try the case in 1974. Then in 1975 I opened my own law firm.

**DJ:** You had another interesting case, of Elmer Norman, with a \$48 claim that ended up with more than \$4 million, with punitives. What made you decide to represent him?

Shernoff: To begin with I was

very hesitant to take the case, as you can imagine. He kept pestering me to keep looking at things. I started to look more closely and I realized they weren't only cutting Elmer Norman out of his benefits under the policy, but this was happening to a whole bunch of other people. It was not just a \$48 claim now. It was widespread fraud affecting a whole bunch of senior citizens.

**DJ:** What is the most significant case of your career, perhaps as important or more than Egan?

Shernoff: I would have to say my involvement and participation in what's called the Holocaust life insurance cases. These are people that died in the Holocaust and had life insurance but never got paid a penny. I took one case and then several others. International institutions and the governments of the United States and Israel got involved. The bottom line was a fund was put together to compensate Holocaust victims for \$5 billion. So the cases were very significant and got a lot of insurance policies paid for hundreds, if not thousands, of people.

**DJ:** What goals do you still want to achieve?

Shernoff: I'm still active practicing law. I like to keep my brain active and I do what I can to keep on developing this area of law or help develop it. I haven't tried a case in several years. I would say it's time for the younger generation. My partners are trying cases and they do a fantastic job. During the early years when all this development was going on I really got a lot of help from Consumer Attorneys of California through their educational programs. They helped with the amicus briefs on the Egan case. There was a lot of organizational help from CAOC and CAALA. They certainly were a part of developing this area of law as well, not only inspiring me but bringing education to all the plaintiffs' lawyers.

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