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THE UNAUTHORIZED PRACTICE OF PUBLIC INSURANCE ADJUSTING

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SINCE APPROXIMATELY 2008, THE PROBLEM of unlicensed individuals and companies performing public adjusting services without being properly licensed as a public insurance adjuster has become pervasive throughout the United States, particularly in times immediately following a catastrophe. This problem, known as the Unauthorized Practice of Public Adjusting (UPPA) presents great risks to innocent, unsuspecting insureds, insurance carriers, state insurance regulators, legislators and properly licensed, ethical members of the public adjusting profession.

In the world of property and casualty insurance, there are three types of adjusters:

- (1) company adjusters, who are employed by a property insurance carrier;



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In the past several years, the public has seen a proliferation of UPPA — contractors, including roofers, plumbers and electricians, and sometimes even professionals like accountants or insurance brokers perform adjusting tasks for which they are not licensed or trained.

- (2) independent adjusters, who also work on behalf of carriers but are not employed by a single carrier; and
- (3) public adjusters, the only adjusters licensed to work on behalf of the insured in a first-party property claim.

Under the applicable statutory and case law, public adjusters are licensed to represent policyholders in the preparation of first-party property claims in 45 of the 50 states, plus the District of Columbia. This is due in no small part to the efforts of the National Association of Insurance Commissioners (NAIC) in the drafting and passage of the NAIC Model Bill #228, passed on October 28, 2005. Of the 45 states plus D.C. that license public adjusters, at least 20 have enacted, in whole or in part, the Model Bill, either as an original statute or to revise a previously existing law. Public adjusting is a licensed profession regulated under the auspices of each state’s insurance department and those who are licensed are the only professionals permitted to prepare first-party property claims for insureds.

The classic definition of a public adjuster can be found in the NAIC Model Bill, and the definition has been codified in numerous states.

a. “Public adjuster” means any person who, for compensation or any other thing of value on behalf of the insured:

1. Acts or aids, solely in relation to first-party claims arising under insurance contracts that insure the real or personal property of the insured, on behalf of an insured in negotiating for, or effecting the settlement of, a claim for loss or damage covered by an insurance contract;
2. Advertises for employment as a public adjuster of insurance claims or solicits business or represents himself or herself to the public as a public adjuster of first-party insurance claims for losses or damages arising out of policies of insurance that insure real or personal property; or
3. Directly or indirectly solicits business, investigates or adjusts losses, or advises an insured about first-party claims for losses or damages arising out of policies of insurance that insure real or personal property for another person engaged in the business of adjusting losses or damages covered by an insurance policy, for the insured.

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POLICYHOLDER PROTECTIONS

Many unsuspecting insureds, who may be vulnerable following a catastrophe, fall for promises of big paydays, deductible reimbursements, no-hassle claim settlements and more without any protection to such insureds by any law or regulation. Since those who engage in UPPA are unlicensed, many state insurance regulators do not have explicit jurisdiction over them, even if the policyholder reports a bad actor and those state insurance departments that do cannot enforce all of the conduct that occurs. The insured is often left holding the bag, without the property being restored.

Much is being done to combat this problem. At least five state insurance departments have issued directives warning consumers and carriers to be wary of this activity. On November 21, 2019, the Rhode Island Superintendent of Insurance issued Bulletin Number 2019-6, noting that the Department of Business Regulation “has become increasingly aware of consumer and industry concerns surrounding the distinction of the role of a public adjuster and the role of a contractor/estimator.”

To help address those concerns, the Bulletin’s purpose is “to both reinforce the applicable statutes and to provide guidance on activities that can only be performed by a licensed public adjuster.” Notably, the Bulletin reminds insurance carriers that negotiating or settling a claim with an unlicensed adjuster is an unfair claims settlement practice under state statute. (RI Gen. Laws § 27-9.1-4.) Rhode Island, in 2017, became the first state to enact such a law.

Additionally, of the 45 states that license public adjusters, 11 specifically prohibit a public adjuster from being a contractor on the same loss claim due to the inherent conflict of interest. Going one step further, 20 of the 45 states that license public adjusters make UPPA a *crime*.

On a nationwide level, the National Conference of Insurance Legislators (NCOIL) has also drafted a model bill and adopted the “Storm Chaser Consumer Protection Act,” which provides in pertinent part as follows:

A contractor shall not perform the reporting, adjusting or negotiating of a claim on behalf of the consumer and shall not receive compensation for the referral to any entity that reports, adjusts or negotiates a claim on behalf of a consumer.

[See NCOIL Storm Chaser Consumer Protection Act, Section 10 L, 2015, enacted July 19, 2015.] Since 2015, this model bill has been enacted in a few states.

In the face of increased enforcement, some contractors are now making an “end run” around UPPA by having an insured sign an “Assignment of Benefits” form allowing the contractor to directly receive the policy payout. Under an AOB, as the practice is known, an insured signs over not just payment, but also contractual rights. Thus, a contractor may abscond with the payout, or the payout may be insufficient in the contractor’s eyes to finish the work. Too often, the insured is left with incomplete work,



no insurance claim money, and no contract rights left to enforce under their own insurance policy. The insured’s only recourse would be a lawsuit against the contractor, which for most individuals is prohibitively expensive. In recognition of these unfair consequences, some states, such as Iowa and Florida, have reported court decisions or statutory law to prevent this practice.

APPLYING CASE LAW

On the whole, the developing case law has uniformly held that unlicensed individuals cannot perform the services of a licensed and regulated public adjuster. In a landmark decision, a federal court in Fort Worth, Texas, found that a roofing contractor violated the UPPA laws and was liable to the insured for the return of the amount of the contract and for damages. [See *Reyelts v. Cross*, 968 F. Supp. 2d 835 (N.D. Tex. 2013), *affirmed on appeal*, 566 F. App’x 316 (5th Cir. 2014)]. There are many similar claims now being litigated as a class action in Texas state court. [See *Key v. Lon Smith & Assocs.*, Tarrant County District Court].

In the latest major UPPA decision, the Supreme Court of Oklahoma held that an insurance company was immune from suit for reporting a licensure applicant’s previous unlicensed actions to the insurance department. [See *Loven v. Church Mutual Insurance Co.*, Case No. 116808 (Okla. Oct. 22, 2019).]

It is important to recognize and prevent UPPA so that insurance carriers and the insured public are not taken advantage of and are only dealing with professionals who are trained and licensed to help insureds consistent with the law in the presentation, negotiation and settlement of a first-party property claim.

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