



IMPORTANT ADVISORY NOTICE!

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Date: January 24, 2018

To: Members and Non-Member Colorado Roofing Contractors

Subject: **Roofing Contractors Must Not Act as Public Adjusters - Check Your Contract Language**

One of the provisions in Senate Bill (SB) 38, which went into effect on June 6, 2012, Colorado Revised Statutes (C.R.S.) § 6-22-105 (3) states:

A roofing contractor soliciting roofing services in this state shall not claim to be or act as a public insurance adjusting claims for losses or damages.

C.R.S. §6-22-105 (3) goes on to state:

Nothing in this article prevents a public insurance adjuster licensed pursuant to section 10-2-417, C.R.S., from acting or holding himself or herself out as a public insurance adjuster. Nothing in this subsection (3) precludes a roofing contractor from discussing, on behalf of the property owner, the scope of repairs with a property and casualty insurer when the roofing contractor has a valid contract with the property owner of the residential property on which the roofing contractor has contracted to perform roofing work.

The Colorado statute, which requires licensing of public adjuster's, C.R.S. §10-2-417(g) states:

A public adjuster shall not participate directly or indirectly in the reconstruction, repair, or restoration of damaged property that is the subject of a claim adjusted by the public adjuster.

Per the above statutes, Colorado law prohibits a roofing contractor, who is seeking to perform roofing services for a residential homeowner, to represent a homeowner in negotiating, adjusting or settling an insurance claim on behalf of the homeowner with the homeowner's insurer. A roofing contractor is not precluded from providing information to the homeowner's insurer regarding the scope of repairs, which would presumably include pricing information. Note, however, that C.R.S. §6.22-105 (3) states that the roofing contractor is to have a valid contract with the property owner of the residential property on which the roofing contractor has contracted to perform roofing work.

At a CRA seminar presented in December 2017 by Stephen Phillips, counsel for the National Roofing Contractors Association and the National Roofing Legal Resource Center, Mr. Phillips reported on two lawsuits in Texas against a prominent Texas residential roofing contractor. The cases pertained to a similar prohibition in Texas against a roofing contractor whose standard residential contract authorized the roofing contractor to pursue the homeowner's claim with the insurance carrier and receive payment from the insurance carrier. In both cases, the roofing contractor was found liable and now the roofing contractor faces potential liability in a class action suit comprised of former customers.

The first case, *Reyelts v. Cross*, was decided by the federal district for the Northern District of Texas in 2013. After a hailstorm in May 2011, Lon Smith Roofing's sales representative met with homeowners (the Reyelts) in June 2011 at their home and executed a contract. The contract included language authorizing the roofing contractor

to pursue the homeowner's best interests with the homeowner's insurance company. The contract was for \$15,951.48, of which \$14,775.48 was to be covered by insurance and \$1,176.00 was for an upgrade to be paid by the homeowner. In this case, Lon Smith Roofing failed to contact the homeowner's insurer, performed roof repairs, billed the homeowner and sought to collect payment from the homeowner.

The Reyelts filed suit, alleging that Lon Smith Roofing had failed to meet the contract terms, which stated that the homeowner authorized the roofing contractor to pursue the homeowner's best interests for all repairs at a price agreeable to the insurance company and the roofing contractor at no additional cost to the homeowner except for the insurance deductible and upgrades. The Reyelts argued that they were not responsible for anything other than the deductible and upgrades as agreed and sought to prohibit any further collection efforts by Lon Smith Roofing. Because the insurance company had not been contacted before completion of the roof work and was therefore unable to evaluate the reported damage, they refused to make payment.

A federal court declared the contract between the Reyelts and Lon Smith Roofing to be illegal in its entirety, void and unenforceable due to the contract language authorizing the roofing company to pursue the homeowner's best interests at a price agreeable to the insurer and the roofing contractor. That provision made the contract illegal, void and unenforceable because it would have the roofing contractor acting as a public adjuster. Texas, like Colorado, requires public adjusters to be licensed and prohibits contractors from acting as public adjusters. The court ruled that the homeowners were not liable for any payment for the roofing work and ordered Lon Smith Roofing to pay them more than \$225,000 in actual damages, mental anguish and attorneys' fees.

After the resolution of this first case, another suit was brought on behalf of residential homeowners against the roofing contractor based on the same contract language. The provision in the roofing contractor's standard contract with homeowners stated:

“This Agreement is for FULL SCOPE OF INSURANCE ESTIMATE AND UPGRADES and is subject to insurance company approval. By signing this agreement homeowner authorized Lon Smith Roofing and Construction (“LSRC”) to pursue homeowners best interest for all repairs, at a price agreeable to the insurance company and LSRC. The final price agreed to between the insurance company and LSRC shall be the final contract price.”

Based upon the above language which was found to be in violation of the prohibition against the unlicensed practice of public adjusting, both the trial court and Court of Appeals of Texas, in a decision issued on August 3, 2017, ruled that the roofing contract was void. In addition to the roofing contractor not being entitled to be paid because of the illegal contract provision, the Texas Court of Appeals approved a class action suit to be pursued against the roofing contractor whenever the contractor's standard contract with the violative language was used and stated that the homeowner's remedy was return of moneys paid to the roofing contractor. The roofing contractor could be required to pay damages to a class of approximately 3000 of the contractor's customers where the contractor's standard contract with the violative language had been used.

Like Texas, Colorado law requires public adjusters to be licensed (involving a written exam and bonding) and prohibits conflicts of interest. Specifically, an adjuster cannot have any financial interest in any aspect of the claim; cannot participate directly or indirectly in any work related to the claim; and cannot refer or direct the insured to anyone that they may have a financial interest in or may receive financial compensation from. Any language included in a contractor's proposal or contract form that authorizes the contractor to negotiate on behalf



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of, or to pursue the interests of the homeowner in an insurance claim is likely to be considered by a court as a violation of Colorado law, just as was the language in the Lon Smith Roofing contract by the Texas courts. Roofing contractors should not include such language in their contracts and must be careful not to act as a public adjuster. A contractor providing information to a homeowner's insurance carrier so that a claim can be properly adjusted is OK; contractors risk liability if they become engaged in negotiating with the insurer on behalf of a homeowner, in representing a homeowner, in adjusting a claim or in reaching a settlement with the insurer.

The CRA has been given copies of several residential roofing contracts used by members and non-member contractors in Colorado. Some of these residential contracts include very similar language (see actual language samples below) to the violative provision in the Lon Smith Roofing cases. If your company uses language similar to any of these, your company may want to consider having an attorney review your proposal/contract for compliance with Colorado law.

“By signing below, Customer agrees to allow XYZ Roofing Company to pursue Customer’s best interest for a roof replacement at a price agreeable to the insurance company and XYZ Roofing Company, with no additional cost to the Customer except for the deductible.”

“By signing this agreement the property owner authorizes XYZ Roofing Company to pursue property owner’s best interests for roof replacement at a “PRICE AGREEABLE” to the insurance company and XYZ Roofing Company with no cost to the property owner except for the insurance deductible. When “PRICE AGREEABLE” is determined, the final contract amount shall be equal to the Insurance Proceeds and Deductible, and the property owner authorizes XYZ Roofing Company to provide labor and material in accordance with this Agreement and the specifications set out herein and on the reverse side hereof to accomplish the roof replacement.”

“By signing below, the “Customer” agrees to allow XYZ Roofing Company to pursue the “Customer’s” best interest for a roof replacement and/or other trade work associated with the claim.”

“By signing below, you acknowledge XYZ Roofing Company as General Contractor and give authorization to negotiate with your insurance company regarding any claims related matter. XYZ Roofing Company agrees to perform the repairs or replacement specified by your insurance company for the final approved replacement cost value (RCV), overhead & profit and supplements only, with no additional cost to you except for your deductible, city code requirements unpaid by your insurance, and any upgrades or additional work authorized by you and XYZ Roofing Company management in writing.”

Just as with construction defects, the knowledge that a class action lawsuit could happen in Colorado is not implausible and we encourage everyone to be mindful of the information provided. We are not offering legal advice; we can only inform our members and roofing contractors in Colorado of what we have learned. The CRA is dedicated to EDUCATING our members, other contractors and consumers regarding SB38 and any/all issues related to the legislation.

Board of Directors
Colorado Roofing Association