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November 6, 2023

Director Larry Deiter
South Dakota Division of Insurance
Chair, Producer Licensing Task Force of (D) Committee
National Association of Insurance Commissioners

Attention: Tim Mullen
mailed to Tmullen@naic.org

RE: Public Insurance Adjuster Licensing Model Act, MO-228-1

Dear Director Deiter:

Please accept this comment letter from the National Association of Public Insurance Adjusters ("NAPIA"), in response to the NAIC request for comment on suggested amendments to the Public Insurance Adjuster Licensing Model Act, MO-228-1. The proposed amendments would be the first changes reflected in the model since its adoption by the NAIC in 2005.

NAPIA sets the gold standard for ethics in the profession of public adjusting. In fact, its ethical requirements were codified into this NAIC model. NAPIA was founded in 1951 to provide in-depth continuing education, advocacy, and networking opportunities for its 700 plus public adjuster members who handle property losses ranging from large complex commercial losses to individual residential losses. Our members hold a unique combination of skills. Their knowledge on insurance laws, coverage, accounting, construction and materials is not only the key to effective representation of homeowners but can make the difference in whether a business is able to collect revenue and continue operations as a going concern. Consumers are entitled to representation. Public adjuster representation requires both a high and broad level of expertise, often with backgrounds in law, accounting, insurance, business, and construction.

Property losses prove to be a difficult time in the lives of claimants, regardless of the setting. For this reason, we are especially concerned with efforts by those who perform or attempt to perform public adjusting without either a license or the knowledge and skill to do so.

Consequently, NAPIA strives to improve consumer protections and the profession by educating others on how consumers are harmed by bad actors. The association participates as a member of the Coalition Against Insurance Fraud, and partners with FEMA, state Attorneys General, state fraud units, United Policyholders, insurers, and others focused on eradicating bad actors from the property claims process.

Our comments are listed below:

Section 3:

- A. A person shall not act hold himself out as a public adjuster or negotiate a contract for public adjusting services in this state unless the person is licensed as a public adjuster in accordance with this Act.

NAPIA supports the above language and further suggests including a reference to the definition of public adjuster so that the reader is reminded from the outset that public adjusters work with and settle first party claims:

- A. A person shall not act or hold himself out as a public adjuster by performing activities described in Section 2. H or by negotiating a contract for public adjusting services in this state unless....

Section 14. Public Adjuster Fees:

The proposed changes to this section clarify that fee caps will no longer be optional upon repeal of Section 14.A with specific caps to limit fees now recommended in Section 14.D. Back in 2005 when the model was originally adopted by the NAIC, most States did not impose fee caps on public adjusters and therefore, insurance regulators had little interest in pursuing fee caps in a model. Since that time, fee caps have been subject to more legislative scrutiny in disaster prone states. Currently there are 14 states that have fee caps for non-catastrophe claims and another seven impose caps on catastrophes only. Today, half the states either impose a fee cap or follow the NAIC reference in the current model that fees charged be reasonable. With that said, since the majority of states do not regulate a specific fee percentage, it is likely a good number of those will continue to have no interest in enacting a fee cap. This is largely due to a lack of population, lack of catastrophic disasters, or both. Regardless of the reason, NAPIA recommends a drafting note be considered with Section 14 to encourage these states to consider language requiring that fees be reasonable.

A. Proposed Drafting Note:

Many states have laws prescribing specific limits on fees charged by public adjusters. Some states have laws containing more general provisions in line with the previous NAIC requirement that fees be reasonable and not an actual fee cap. Still, some states do not impose a fee cap or even prescribe those fees be reasonable. This may be due to many reasons, including a lack of catastrophic disasters. In states where fee caps are not desired, it is recommended that States nevertheless enact laws to require fees charged by public adjusters be reasonable.

Fee caps are challenging discussion for any business subject to them. In the area of public adjusting, commercial public adjusters can better operate under a fee cap, with an important caveat that the fee cap is reasonable. On the other hand, public adjusters who focus on residential losses tend to require higher fees to operate at a baseline. For this reason, it is often the smaller residential customer in need of representation who is hurt most by a fee cap. This is the absolute irony of consumer protection and fee caps. NAPIA historically has taken a neutral position on fee caps for this reason. However, it is clear to us that regulators and legislatures are taking an increased interest in legislating fee caps in certain states and is requested and expected to weigh in. NAPIA will not oppose the proposed fee caps in Section 14. D. while highlighting the above irony in consumer protection.

The changes appear to have inadvertently removed a reference tying catastrophes to governmental declared disasters. NAPIA recommends the following changes to retain the governmental trigger by tying back to the defined term of catastrophic disaster:

There shall be limits on catastrophic fees. No public adjuster shall charge, agree to or accept as compensation or reimbursement any payment, commission, fee or other thing of value equal to or more than ten percent (10%) of any insurance settlement or proceed for any catastrophic **disaster** insurance claim settlement, and no more than fifteen percent (15%) for any **other** insurance claim settlement. No public adjuster shall require, demand or accept any fee, retainer, compensation, deposit, or other thing of value, prior to settlement of a claim.

Section 15. Contract Between Public Adjuster and Insured:

NAPIA supports the addition of provision at 15. H. to reduce consumer confusion between public adjusters and contractors following a property loss. We also suggest including language from Rhode Island law, Section 27-10-1.1 to create an incentive to reduce consumer harm caused by this confusion and fairly balance the needs of the insurer:

H. The public adjuster shall provide the insurer a notification letter, which has been signed by the insured authorizing the public adjuster to represent the insured's interest. The insurer shall verify that any person providing services identified in section 2A of this act is properly licensed as a public adjuster with the Department. Negotiating, or effecting the settlement of a claim for loss or damage covered by an insurance contract with an unlicensed public adjuster acting on behalf of an insured shall be considered an unfair claims settlement practice. Nothing contained in this section shall be construed to preclude an insurer from dealing with any individual or entity that is not required to be licensed as a public adjuster.

NAPIA further supports the addition of language addressing assignment of benefits at 15. L. Assignment of a contract is a common law right observed in contract law where an individual can assign rights, not just payment, to a third party. The problem with assignment in property loss is that once an assignment occurs, the relationship incentivizing a party to continue to perform obligations under the contract is extinguished. Consequently, some state legislatures have placed limits on assignments in property and life insurance. Real estate transfers, mortgages, personal injury rights are other areas where assignments are limited. NAPIA suggests an additional sentence be included to prevent modification of consumer rights in representation or to circumvent verification requirement as follows:

L. Subject to its terms relating to assignability, a property insurance policy, whether heretofore or hereafter issued, under the terms of which the policy and its rights and benefits are assignable, may provide that the rights and benefits under the insurance may only be assigned to a person who has the legal authority to represent the named insured and may explicitly prohibit assignment of rights and benefits to any other person, including a property repair contractor. For purposes of this subsection, having "legal authority to represent the named insured" includes the person named by the insured as having the named insured's power of attorney, the person who is the name insured's licensed public adjuster, or any other comparable person. Property repair contractors or other services providers operating in the State may not subvert the public adjuster licensing requirement of [Insert appropriate reference to state law] through the acquisition of a power of attorney from the named insured. Nothing contained in the property insurance policy shall allow an insurer to exclude a person who has legal authority to represent an insured from providing services within the scope of that authority or when verification indicates the individual is properly licensed.

Section 16. Unlicensed Actors:

NAPIA supports Section 16. We recommend a drafting note be added to clarify inclusion will trigger application of state insurance fraud laws or insert a cross reference the specific state insurance fraud law.

Section 19. Standard of Conduct of Public Adjuster

NAPIA supports the changes to Section 19 C., G., and I., with the following suggested edits to C.

C. A public adjuster shall not represent or infer damage has occurred as a result of any particular event unless inspection of the property has been completed.

Thank you for your time and consideration on this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian S. Goodman". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Brian S. Goodman
General Counsel

Cc: Chris Aldrich
Matthew Blumkin
Jeffrey Gould
Ann Frohman