Response to comments of Dan Jablan, Rocky Mountain
Insurance Information Association regarding HB18-1153
Representative J. Becker/Sen. Coram

- JABLAN: This bill is premature. The Colorado Supreme Court is currently considering a case on appeal that this bill is trying to partially codify. If passed, it would create confusion and statutory conflict with current case law.

  RESPONSE: There is a case currently pending in the Colorado Supreme Court which has complicated, unique facts. Resolution of that case will not resolve the deluge of litigation pending in Colorado courts concerning the qualifications of appraisers or umpires.

  The proposed legislation cannot affect the outcome of the case since the bill cannot have retroactive effect. The proposed legislation is consistent with existing Colorado law, and the nonbinding guidance from DORA. Currently, although DORA Bulletin B-5.26 (10/26/15) recommends that disclosures such as the ones required under the proposed legislation be made, the Bulletin does not have the force of law in Colorado. The Bulletin was drafted in a joint bipartisan fashion overseen by DORA and involving representatives from the insurance industry and representatives of policyholders. Both constituencies favor the precise disclosures that would be required under the proposed legislation, which are adopted from Bulletin B-5.26. The prohibitions expressed in HB18-1153 preventing any appraiser or umpire who has an interest in the outcome of the appraisal from serving in an appraisal codify the nonbinding guidance of the DORA Bulletin in that regard to create a binding, bipartisan standard of disqualification.

- JABLAN: Public adjusters are seeking to insert themselves into contractual relationships between an insurer and our policyholders. Specifically, the public adjusters desire to interject themselves into contract provisions that create conflict in resolving disputes as to the amount of damages in a particular claim.

  RESPONSE: The proposed legislation does not create any role for public adjusters in the appraisal process. They are neither mentioned nor in any fashion benefitted by HB18-1153. Public adjusters are heavily regulated by the State of Colorado and DORA in order to assure a proper role in the claim adjusting process to allow otherwise unrepresented policyholders to be appropriately represented in dealings with experienced insurance adjusters. Indeed, in an abundance of caution and in response to concerns expressed by the insurance industry, the State has only regulated public adjusters. The State does not require licensure of company adjusters or the “independent adjusters” that work only for the insurance industry. The proposed legislation has no disparate impact on either side to the insurance contract.

- JABLAN: The proponents claim this bill will reduce litigation. However, the insurance industry believes the opposite is true. The language is HB 1153 and any proposed

amendment is inconsistent with current case law and introduces new terms and processes that will have to be litigated.

RESPONSE: The majority of the litigation that has occurred in Colorado state and federal courts since 2014 has involved the potential bias of appraisers, and to a lesser extent, umpires. The disclosures by appraisers recommended by DORA Bulletin B-5.26, and mandated by the proposed legislation, will allow an umpire to understand any potential bias each appraiser brings to the process and evaluate how that bias may affect the appraisal process. Since appraisal is intended as a binding alternative to litigation when the parties to an insured loss cannot agree on the amount that should be paid under the policy, both the insurance industry and policyholders are invested in assuring that appraisal appears fair to both sides. The mandate of the proposed legislation that appraisers, and umpires, disclose any interest in the outcome of the appraisal is consistent with the DORA Bulletin, and HB18-1153 takes the additional step of prohibiting participation of an appraiser or umpire with such an interest in the outcome.

Lack of regulated disclosures by appraisers has predictably led to uncertainty in the reliability of appraisal and spawned an exceptional amount of litigation. Much of that litigation fails to advance resolution of the fundamental dispute that led the parties to appraisal, which was disagreement as to the amount of an insured loss. Instead, the litigation focuses on what disclosures should be required. HB18-1153 will resolve that controversy and remove the need to ask the courts to decide something the policy itself leaves vague or wholly unspoken.

Since appraisers inevitably are aligned either with the insurance industry or policyholders, outright disqualification on that basis does not serve the interests of the parties to insurance policies. A limited number of qualified appraisers to which insurers or policyholders may resort exists, and thus the "bias" of consistently working for one side or the other to appraisals alone should not be a disqualifying factor. However, undisclosed bias may frustrate the appraisal process since the other appraiser and the umpire would not be able to anticipate how that undisclosed bias might affect the opinions and arguments of an appraiser. Mandated disclosures of the frequency within the last 3 years of employment of an appraiser by one party or the other to an appraisal as outlined in the proposed legislation will make that relationship clear to both sides and the umpire, and reduce litigation seeking to obtain that information.

Additionally, since the umpire in an appraisal process should be a true neutral in order to resolve disputes in a wholly nonpartisan fashion likely to be regarded as fair by both sides to the appraisal, the DORA Bulletin advises broader disclosures that include relationships beyond the direct parties to the appraisal so either side may withhold consent to a proposed umpire, or a court whose jurisdiction is invoked to appoint an umpire is well able to establish neutrality of proposed umpire candidates.

Once enacted as the law of Colorado, the disclosures required by the proposed legislation should operate exactly as intended and both enhance the confidence in the appraisal process of the parties to the insurance contract and reduce the need to institute litigation to obtain disclosures.

- JABLAN: The bill cherry-picks from a Colorado Division of Insurance bulletin on how appraisal procedures should work and undermines court decisions on impartiality for appraisers and conflicts of interests. The bill is also about more than the impartiality of appraisers and umpires, it also tries to broaden what can be addressed in an appraisal.

  RESPONSE: HB18-1153 adopts the disclosure directions of the DORA Bulletin for appraisers, the differing disclosure recommendations for umpires, and the recommendations that neither appraiser or party to the appraisal process may has *ex parte* contacts with the umpire. State and federal court decisions are not consistent on the issue of disclosures, including whether any disclosures are required at all since insurance policies are uniformly silent in that regard, though all courts addressing the issue acknowledge that the DORA Bulletin B-5.26 is merely advisory. HB18-1153 will make disclosures mandatory for the benefit of all participants in the appraisal process.

  There is no substantive provision in the proposed legislation that affects, in any fashion, what can be addressed in appraisal. Nearly all courts in Colorado agree on what may be addressed in appraisal thus far, however HB18-1153 does not have any language that will alter existing court decisions.

- JABLAN: This bill would expand the appraisal process to more than just determining the damages. It would allow the appraisal process to address coverage questions. We believe coverage should be determined by the insurance contract and the insurance adjuster, not an appraiser.

  RESPONSE: There is no provision in the proposed legislation that affects, in any fashion, what can be addressed in appraisal. Nearly all courts in Colorado agree on what may be addressed in appraisal thus far, however HB18-1153 does not have any language that will alter existing court decisions. No matter of coverage under an insurance policy is affected by this proposed legislation. Coverage issues are purposely avoided by HB18-1153 in order to allow insurers to define in their policies the coverage they are willing to provide, without interference by anything other than market forces. The proposed legislation merely prohibits either party to the insurance policy from directing or controlling the actions of the appraisers selected by them to assure the independence of the result of the appraisal, which will further reduce controversies leading to litigation.

- JABLAN: No other state in the country has provisions like the provisions in HB 1153 or the amendment. If we allow these types of statutory provisions in Colorado, with the number of damaging hail storms, the General Assembly will be creating a new avenue for

litigation on property claims. In contrast, Texas passed legislation in 2017 that will actually decrease hail/storm litigation.

Recent history in Colorado has already demonstrated that current nonbinding regulation by DORA has created an unreasonably active litigation environment. The proposed legislation addresses precisely the issues being litigated in this state, and does so using known bipartisan standards agreed when DORA Bulletin B-5.26 was issued. There is no reason to accept that more litigation will be inspired than is made unnecessary by proposed law. Whether the recent legislation in Texas will actually decrease hail/storm litigation is unknown.

Parenthetically, Mr. Jablan's reference to an "amendment" is confusing. There is no amendment proposed by the sponsors of HB 1153

- JABLAN: The proposed amendment does not take into consideration there are fundamentally different roles for appraisers and umpires. Appraisers must be skilled and knowledgeable about construction and storm damage to be able to determine the actual loss. Umpires must be skilled negotiators and able to resolve disputes. So, while it is critical to determine that no party benefits from inflating the damages in the appraisal (which is currently addressed in most insurance contracts), treating the two roles the same in statute undermines the appraisal process.

RESPONSE: HB18-1153 adopts the disclosure standards suggested by DORA Bulletin B-5.26, which explicitly distinguish the roles of appraisers and umpires. The bipartisan drafting of the DORA Bulletin makes clear that umpires are the appraisal participants that resolve disputes between the appraisers. Because of the need for transparent neutrality for an umpire in fulfilling that role, the bipartisan DORA Bulletin suggests broader disclosures by umpires that include relationships beyond the direct parties to the appraisal so either side may withhold consent to a proposed umpire, or a court whose jurisdiction is invoked to appoint an umpire is well able to establish neutrality of proposed umpire candidates. HB18-1153 enacts those heightened standards for umpires into law.

Questions?

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