

**TO: NAPIA**

**From: Brian Goodman and Ann Frohman**

**Date: January 10, 2023**

**RE: UPDATE: Legal Analysis of Policy Provision Preventing the Use of a Public Adjuster**

### **A. Introduction**

NAPIA became aware in 2021 that some insurance companies were beginning to include in their first-party insurance policies conditions or other restrictions on the insured's ability to retain a public adjuster to assist in adjusting a claim, and this trend has continued through 2022. This has most notably occurred in policies issued in Kentucky, Florida, Louisiana and Arizona, though there may be other states in which this is happening but of which NAPIA is not yet aware.

Notwithstanding this seemingly growing practice, such conditions are against public policy because they both harm the insured by taking away the insured's option, and in most states, right, to obtain the assistance of a public adjuster, and harm public adjusters, who are professionals licensed and authorized by the state to do their work, by making it less likely that insureds will hire them. In fact, the Louisiana Department of Insurance has issued a directive specifically banning these restrictive forms as violating the insureds' right to hire a public adjuster. *See* La. Directive 219 (Jan. 24, 2022) (Exhibit 1).

Furthermore, the use of anti-public adjuster restrictions is anti-competitive conduct in violation of the Sherman Act, as they illegally force insureds to boycott the services of public adjusters, when hiring a public adjuster would otherwise be in the interest of the insured and potentially to the detriment of the insurer.

Insurance regulators should continue to be on the lookout for policy forms containing such provisions and ensure that such provisions not be accepted for use in first-party insurance policies by issuing directives like Louisiana or taking similar measures.

### **B. NAPIA**

The National Association of Public Insurance Adjusters (NAPIA) ([www.NAPIA.com](http://www.NAPIA.com)) was founded in 1951 to professionalize the then small but growing profession of public adjusting. At that time, the Association enacted a Constitution and By Laws and, importantly, a stringent code of ethics which serve as the model for public

adjusting today.<sup>1</sup> For over 60 years since its founding, NAPIA has worked closely with the insurance industry, state insurance departments, state Governors and legislators, Attorneys General, and others to assure that public adjusters, the only professionals specifically licensed and regulated to prepare first-party property claims for a consumer or commercial insured, practice in an ethical and accountable way. We have members in almost every state from Maine to Hawaii, and have been called to testify and work with state governments in obtaining licensing and assuring that public adjusters properly practice their craft. After Hurricane Katrina, NAPIA was most active in Louisiana and Mississippi to aid their legislatures and insurance departments in the drafting and passage of comprehensive public adjusting licensing statutes, as those states previously had none. NAPIA has worked in numerous other states and 46 of the 50 states, plus the District of Columbia, now have comprehensive licensing bills regulating public adjusters.<sup>2</sup>

### **C. NAPIA and the NAIC Model Act**

Public insurance adjusters are the only professionals licensed and regulated by State Insurance Departments to work for and assist an insured who has sustained a first-party property loss.<sup>3</sup> This is due in no small part to the efforts of the National Association of Insurance Commissioners ("NAIC"), with NAPIA's assistance and input, in drafting and passage of the NAIC Model Act, Bill #228, passed on October 28, 2005.

For approximately 3 years, from 2002 to 2005, Brian Goodman, on behalf of NAPIA, worked closely with the NAIC Property and Casualty Subcommittee, co-chaired by Gene Reed from Delaware and Treva Wright Donnell from Kentucky, in drafting and passing this Model Act, whose influence has now become dominant. Of the 46 states plus the District of Columbia that license public adjusters, at least 20 have enacted, in large part, the Model Act, either as an original or new statute, or to revise a previously existing one.<sup>4</sup>

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<sup>1</sup> In fact, the NAIC Model Act for Public Adjusters, discussed in Part C of this white paper, codifies NAPIA's Code of Ethics directly within the statute, which has been followed and enacted in many states.

<sup>2</sup> The only states that do not have comprehensive licensing bills are Alaska, Alabama, Arkansas and South Dakota. In Arkansas, public adjusting is prohibited as it is considered the unauthorized practice of law.

<sup>3</sup> Public adjusters are licensed to handle first-party claims, that is, to act on behalf of an insured in negotiating for, or effecting the settlement of, a claim for loss or damage covered by an insurance contract. *See* NAIC Model Act. Independent adjusters contract with insurers to represent insurers in negotiating claims but are not employed by the insurance company. Adjusters who are employed by an insurer are known as in-house or company adjusters.

<sup>4</sup> Among those states are: Delaware, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Mississippi, New Hampshire, North Carolina, South Carolina, Tennessee, Texas, and Virginia.

Thus, public adjusters are a well-accepted, licensed profession regulated under the auspices of each state's insurance department and those who are licensed are the only professionals specifically licensed to prepare first-party property claims for insureds.<sup>5</sup> Importantly, the Model Act provides that an insured has a right to hire a public adjuster to help the insured meet their obligations under the policy. *See* NAIC Model Act at Section 15F(2).<sup>6</sup>

Against this background, NAPIA is working to safeguard the rights of insureds to obtain the assistance of a public adjuster should they so choose and the rights of public adjusters to continue providing state-sanctioned public adjusting services, from insurers seeking to curtail these rights through policy provisions essentially prohibiting insureds from retaining public adjusters.

#### **D. Example Restrictive Provisions**

NAPIA is aware of various first-party insurance policies that contain anti-public adjuster language either in the policy conditions or as a separate endorsement to coverage. Below are just a few examples.

##### **1. Avalon Risk Management**

Avalon is based in Arizona and appears to be operating as a Managing General Agent. It includes the following language in its program participants contract:

(b) Owner acknowledges, understands, and agrees that its receipt of the Services is contingent upon Owner waiving any right to use a public adjuster. Owner further agrees to use the insurance company adjuster referred to Owner by Avalon; provided, however, that the Construction Consultant shall not act as the adjuster with respect to the Services.

##### **2. Aspen Specialty Insurance Company**

Aspen Specialty Insurance Company issued a commercial property insurance policy to an insured in Kentucky that included in its declarations page, which is titled as “Risk Details,” various “Program Conditions.” One of those conditions stated:

Anyone who hires a public adjuster will be CANCELLED from the program.

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<sup>5</sup> Attorneys at law may also perform that function but are regulated by State bars and separate statutes. Therefore, attorneys are specifically exempted from public adjuster licensing by the NAIC Model Act and most state statutes.

<sup>6</sup> Available at <https://content.naic.org/sites/default/files/inline-files/MDL-228.pdf>.

### **3. Policy issued by Velocity Risk Underwriters in Florida**

Velocity has its home office in Tennessee and has included the following endorsement on a policy issued to a Florida insured.

#### **ANTI-PUBLIC ADJUSTER ENDORSEMENT**

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**  
This endorsement provides the terms of coverage if coverage is selected on the Declarations Page.

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*To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. This endorsement does not change any other provision of the insurance policy to which it is affixed. This endorsement is a part of this insurance policy and takes effect on the effective date of this insurance policy unless another effective date is shown.*

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Words and phrases that appear in *italics* in the remainder of this form have special meaning. Refer to Section I. Definitions of the policy form and / or this endorsement.

It is understood and agreed that a condition of this policy is that the insured shall not hire, engage, retain, contract with, or otherwise utilize the services of a **public** adjuster, whether or not licensed in the state where the property is located or any other jurisdiction to inspect, evaluate, or adjust any loss covered by the policy.

All other terms and conditions, insured coverage and exclusions of this policy remain unchanged, including applicable limits, sublimits and deductibles, and apply in full force and effect to the coverage provided by this policy.

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### **4. Another policy issued in Florida**

#### **ANTI-PUBLIC ADJUSTER ENDORSEMENT**

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

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*To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. This endorsement does not change any other provision of the insurance policy to which it is affixed. This endorsement is a part of this insurance policy and takes effect on the effective date of this insurance policy unless another effective date is shown.*

It is understood and agreed that a condition of this **POLICY** is that the **NAMED INSURED** shall not hire, engage, retain, contract with, or otherwise utilize the services of a public adjuster, whether or not licensed in the state where the property is located or any other jurisdiction to inspect, evaluate, or adjust any loss covered by the **POLICY**.

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

## 5. Lloyd's of London Policy

### ANTI-PUBLIC ADJUSTER ENDORSEMENT

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**  
This endorsement provides the terms of coverage if coverage is selected on the Declarations Page.

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*To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. This endorsement does not change any other provision of the insurance policy to which it is affixed. This endorsement is a part of this insurance policy and takes effect on the effective date of this insurance policy unless another effective date is shown.*

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Words and phrases that appear in *italics* in the remainder of this form have special meaning. Refer to Section I. Definitions of the policy form and / or this endorsement.

It is understood and agreed that a condition of this policy is that the insured shall not hire, engage, retain, contract with, or otherwise utilize the services of a public adjuster, whether or not licensed in the state where the property is located or any other jurisdiction to inspect, evaluate, or adjust any loss covered by the policy.

All other terms and conditions, insured coverage and exclusions of this policy remain unchanged, including applicable limits, sublimits and deductibles, and apply in full force and effect to the coverage provided by this policy.

#### **E. Anti-Public Adjuster Provisions in Insurance Policies are Contrary to the Public Policy and Should be Stricken.**

The public policy of a state is the law of that State, as found in its Constitution, statutes or judicial decisions. *See, e.g., New England Mut. Life Ins. Co. v. Caruso*, 73 N.Y.2d 74, 538 N.Y.S.2d 217, 535 N.E.2d 270 (N.Y. 1989) ("By 'public policy' is meant the law of the State, whether found in the Constitution, statutes or decisions of the courts."); *O'Hara v. Ahlgren, Blumenfeld and Kempster*, 537 N.E.2d 730, 127 Ill.2d 333, 341, 130 Ill. Dec. 401 (Ill. 1989) ("The public policy of this State is reflected in its constitution, its statutes and its judicial decisions."); *Haakinson & Beaty Co. v. Inland Ins. Co.*, 344 N.W.2d 454, 216 Neb. 426, 429 (Neb. 1984) ("where the lawmaking power speaks on a particular subject, over which it has constitutional authority to speak, the public policy in such a case is what the statute provides").

If a contract or contractual provision is contrary to public policy, it is not enforceable. *See, e.g., 159 MP Corp. v. Redbridge Bedford, LLC*, 33 N.Y.3d 353, 128 N.E.3d 128, 104 N.Y.S.3d 1 (N.Y. 2019) ("We have deemed a contractual provision to be unenforceable where the public policy in favor of freedom of contract is overridden by another weighty and countervailing public policy..."); *Trust v. Reliastar Life Ins. Co.*, 60 So.3d 1148, 1150 (Fla. App. 2011) ("as a general rule, contracts that are void as contrary to public policy will not be enforced by the courts and the parties will be left as the court found them"); *Rogers v. Webb*, 558 N.W.2d 155, 156-57 (Iowa 1997) ("Contracts that contravene public policy will not be enforced."); *O'Hara*, 127 Ill.2d at 341 ("courts will not enforce a private agreement which is contrary to public policy").

In the 46 states plus the District of Columbia, the public policy is clear that public adjusting is a valid and legitimate profession and that it provides value to consumers, such that consumers have a right to retain a public adjuster to assist them in resolving a first-party claim if they so choose. Because provisions prohibiting an insured from exercising this right are in conflict with this public policy, they must be stricken and not enforced.

### **1. Anti-Public Adjuster Provisions are Contrary to Law Nationally Establishing the Profession of Public Adjusting.**

Forty-six of the 50 states plus the District of Columbia have passed legislation authorizing public adjusters to assist insureds in the adjustment of first-party claims. *See supra*, Section C. Those 46 states plus the District of Columbia have promulgated legislation setting forth the stringent requirements that one must satisfy to become licensed as a public adjuster, including things like passing an examination, paying assessed fees, and establishing financial responsibility through obtaining a bond or irrevocable letter of credit. *See, e.g.*, Ariz. Rev. Stat. Ann. §20-321.01, Cal. Ins. Code §§ 15006, 15033; Colo. Code Regs. § 10-2-417; Ky. Rev. Stat. § 304.9-430; NC Gen. Stat. § 58-33A.

These states have demonstrated through this legislation that public adjusting is a legitimate profession that provides value to consumers. Anti-Public Adjusting provisions or endorsements discouraging, and in fact preventing, insureds from hiring public adjusters threaten the viability of the public adjusting profession and should thus be stricken and severed from insurance policies. *Cf. Linder v. Insurance Claims Consultants, Inc.*, 348 S.C. 477, 492 (S.C. 2002) (recognizing that “a suitable accommodation may be made to preserve the business of public adjusting” in a case concerning the unauthorized practice of law and that “it is perfectly appropriate for a public adjuster to negotiate with a carrier on behalf of an insured as evidenced by the very definition of a public adjuster in the NAIC Model Act”); *Unauthorized Practice of Law Committee v. Jansen*, 816 S.W.2d 813, 816 (Tex. App. 1991) (discussing appropriate accommodation “that will not eliminate the profession of public insurance adjusting in the State” in a case concerning the unauthorized practice of law); *Larson v. Lesser*, 106 So.2d 188, 192 (Fla. 1958) (“the business of a public adjuster has been recognized as a valid and legitimate occupation by legislative definition”).

### **2. Anti-Public Adjuster Provisions are Contrary to the Law Nationally Giving the Insured the Right to Retain a Public Adjuster.**

Legislation and regulations in many of the 46 states plus the District of Columbia that authorize public adjusters set forth the public adjuster’s duties to the insured, including requirements concerning the contract that must be signed when a public adjuster is engaged. The public adjuster is also required to make certain disclosures

informing the insured of the different types of adjusters that may be involved in the investigation and settlement of the claim and advising the insured of their right, if they so choose, to retain a public adjuster to work on their behalf and assist them in meeting their obligations under the policy. *See, e.g.*, Cal Ins. Code § 15027; Colo. Admin. Code 702-1:1-2-19; Iowa Admin. Code § 191-55.14; Kas. State. Ann. § 40-5514; Ky. Rev. Stat. § 304.9-433; La. Rev. Stat. Tit. 22 § 1704; NC Gen. Stat. § 58-33A-65.

For example, Kentucky Revised Statute § 304.9-433, which follows the Model Act, requires that the public adjuster provide the insured with a disclosure prior to signing any contract, which must state the following:

Property insurance policies obligate the insured to present a claim to his or her insurance company for consideration. Three (3) types of adjusters may be involved in the claim process as follows:

1. "Staff adjuster" means an insurance adjuster who is an employee of an insurance company who represents the interest of the insurance company and who is paid by the insurance company. A staff adjuster shall not charge a fee to the insured;
2. "Independent adjuster" means an insurance adjuster who is hired on a contract basis by an insurance company to represent the insurance company's interest in the settlement of the claims and who is paid by the insurance company. An independent adjuster shall not charge a fee to the insured; and
3. **"Public adjuster" means an insurance adjuster who does not work for any insurance company. A public adjuster works for the insured to assist in the preparation, presentation, and settlement of the claim, and the insured hires a public adjuster by signing a contract agreeing to pay him or her a fee or commission based on a percentage of the settlement or other method of payment.**

**The insured is not required to hire a public adjuster to help the insured meet his or her obligations under the policy, but has the right to hire a public adjuster.** The insured has the right to initiate direct communications with the insured's attorney, the insurer, the insurer's adjuster, the insurer's attorney, and any other person regarding the settlement of the insured's claim. The public adjuster shall not be a representative or employee of the insurer. The salary, fee, commission, or other consideration paid to the public adjuster is the obligation of the insured, not the insurer. (emphasis added)

This statutory scheme thus not only establishes the legitimacy of public adjusting as a profession, but also that insureds have a right to hire a public adjuster to assist in the adjustment of first party claims. Policy provisions prohibiting an insured from retaining a public adjuster are directly in conflict with statutes making it an insured's right to do so and should be stricken.

The Florida Division of Insurance Agent and Agency Services has even promulgated a regulation stating that “No insurer, independent adjuster, or company adjuster shall represent or imply to any claimant . . . that engaging a public adjuster will delay or have other adverse effect upon the settlement of a claim.” Fla. Rule 69B-220.201 (Ethical Requirements). A provision threatening an insured with cancellation of their policy if they hire a public adjuster is certainly a violation of this requirement.

### **3. Anti-Public Adjuster Provisions may violate the Sherman Act.**

If this troubling trend continues to take hold and more insurers adopt Anti-Public Adjuster provisions, such conduct could rise to the level of an anti-trust violation.

Section 1 of the Sherman Act, 15 U.S.C. §1, prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.” The Supreme Court has long recognized that through this provision Congress intended to outlaw unreasonable restraints of trade. See, *e.g.*, *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 342-43, 102 S. Ct. 2466, 2472-73, 73 L.Ed.2d 48 (1982) (citing *United States v. Joint Traffic Assn.*, 171 U.S. 505, 19 S. Ct. 25, 43 L. Ed. 259 (1898)).

Though the McCarran-Ferguson Act provides certain exceptions to insurers from the provisions of the Sherman Act, there is no exception for conduct that constitutes an agreement to or an act of boycott, coercion, or intimidation. See 15 U.S.C. § 1013(b). The generic concept of “boycott” refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 541 (1978). Property insurers use of anti-public adjuster endorsements is a boycott, as it is forcing its insureds to withhold patronage from public adjusters, who insureds may otherwise retain.

In the antitrust context, group boycotts, or concerted refusals to deal, may run afoul of Section 1 of the Sherman Act. See, *e.g.*, *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 625 (1953) and *see F.T.C. v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 422 (1990) (finding that boycott by criminal defense lawyers, who refused to represent indigent clients until government increased compensation for doing so, constituted “a



classic restraint of trade within the meaning of Section 1 of the Sherman Act”).

As it continues to grow, property insurers’ practice of including anti-public adjuster endorsements or provisions in their policies represents a concerted and intentional course of conduct to illegally control and depress first-party property damage repair costs to the detriment of insureds and the substantial profit of property insurers<sup>7</sup>, and also has the effect of harming public adjusters and restraining their ability to perform their statutorily-authorized profession. These forms thus must be outlawed.

## **F. NAPIA’s Response and Action Plan**

Given that policy provisions restricting or prohibiting an insured from hiring a public adjuster to assist in adjusting first-party claims is contrary to public policy and legislation expressly permitting public adjusters to provide this assistance, as well as potential anti-trust violations, any such provisions should not be permitted to appear in first-party insurance policies.<sup>8</sup>

NAPIA would like to send a letter to state insurance commissioners and possibly state attorneys general to warn about this practice that is negatively impacting insureds. NAPIA would advise that States take action to protect their citizens and offer the following suggestions as to how to address this problem:

### **1. Issuing a Directive or Similar Order**

This is the preferred alternative, assuming there is legal authority to support such action, as it would allow a State to direct both admitted and surplus lines insurers doing business within the state to comply with existing statutory and/or regulatory authority that gives insureds the right to retain a public adjuster.

An example of this action is Directive 219, issued by the Louisiana Department of Insurance on January 24, 2022<sup>9</sup>:

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<sup>7</sup> See January 2010 report from the Florida Office of Program Policy Analysis & Government Accountability finding that “cases took longer to reach a settlement but received higher payments when claimants used public adjusters for claims filed in 2008 and 2009.” Available at: <https://www.floridapublicadjuster.com/OPPAGA.pdf>.

<sup>8</sup> We note that these provisions do not appear to be ISO-approved language.

<sup>9</sup> Available at: <https://www.ldi.la.gov/docs/default-source/documents/legaldocs/directives/dir219-cur-anti-publicadjusterc>.

All authorized insurers and surplus lines insurers (collectively insurers) doing business in Louisiana are hereby directed to comply with La. R.S. 22:1704(E)(2), which grants insureds the right to hire a public adjuster to help meet obligations under their insurance policy. Insurers, as defined in La. R.S. 22:46(10), include every person engaged in the business of making contracts of insurance.

It has come to the attention of the Louisiana Department of Insurance that some insurers are attempting to prohibit the use of public adjusters by insureds in their policy provisions by endorsements to their policies. The anti-public adjuster clauses attempt to prohibit insureds from hiring, engaging, retaining, contracting with, or otherwise utilizing the services of a public adjuster. The prohibition contained in these endorsements or any other policy provision directly contravenes La. R.S. 22:1704(E)(2), which grants insureds the right to hire a public adjuster.

You are hereby directed to review all of your policy forms and endorsements to ensure compliance with La. R.S. 22:1704(E)(2).

## **2. Rejecting Forms filed by Admitted Insurers**

At the least, if a State does not choose to, or is unable to, issue a directive like Directive 219, it should closely monitor the content of policy forms filed by admitted insurers with the respective departments of insurance and reject any forms that include anti-public adjuster prohibitions.

States often require that admitted insurers file policy forms either for “prior approval” by the department before they can be used or under the “file and use” doctrine to be used by the insurer under an assumption of approval from the department. The correct filing approach often depends on whether the policy form governs individual property or commercial property. Under the file and use doctrine, which is more common for commercial coverage, forms can be used if the agency does not communicate a rejection or disapproval before a certain amount of time has elapsed. *See, e.g.*, Ky. Rev. Stat. § 304.14-120 (60-day period); Fla. Stat. § 627.410 (30-day period). Still, the agency may later require changes by the insurer if it later determines that the form language violates the law.

The downsides of this approach to confronting the anti-public adjuster provisions, however, are (1) that insurers may incorporate unlawful terms in portions of the policy that are manuscript or otherwise not submitted for approval, and (2) that surplus lines insurers are using such forms and not required to submit them for review, so the anti-public adjuster language would never be subject to scrutiny by the insurance department.