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for defense,
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corporate counsel

June 2022

Litigation Skills

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The Defense Counsel's Playbook



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A Pandemic of Litigation:

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Quackery and Junk Science:

What It Is, Why it Matters, and
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LETTER FROM THE EDITOR

1 Letter From the Editors

Jasmina Basic and Michaela Shea-Gander

LITIGATION SKILLS



4 The Defense Counsel's Playbook

By Stratton Horres and Karen L. Bashor

RAISING THE BAR



9 D.C. Circuit Un-rings Dismissal Bell on Shutdown-Era Class Actions Seeking Tuition Refunds, but Signals Tough Examinations Ahead

By Michelle Liguori

12 A Pandemic of Litigation: Prisons and Covid-19 Class Actions

By Jeffrey S. Warren

INSURANCE LAW



15 Addressing the Problem with Unlicensed Public Adjusters

By Jose Pagan, Esq., and Katelyn Werner, Esq.

LIFE, HEALTH, AND DISABILITY



18 Diagnoses and Deductions

By Madison Pangburn

25 COVID Testing Fee Disputes: Emergency Laws and Private Rights of Action

By Patrick W. Begos

TRUCKING LAW



30 Quackery and Junk Science: What It Is, Why it Matters, and How to Spot It

By Melody C. Kiella, David M. Wilson

EMPLOYMENT AND LABOR LAW



35 Employment Civil Rights Suits: Wrongful Termination and the Constitution

By Andrew D. Holder

By Jose Pagan and
Katelyn Werner

While many public adjusters are compliant with their respective obligations and the Insurance Code in their respective states, others push beyond the pale of the regulatory scheme.

Addressing the Problem With Unlicensed Public Adjusters

Over the past 5-10 years, the insurance industry has experienced a growth in the percentage of residential and commercial property claims in which a public adjuster is involved in the claims process. Given this trend, issues have been identified that are not easily resolved given the present rubric of public adjuster regulation. One of the major concerns is the proliferation of unlicensed persons acting as public adjusters.

While the National Association of Insurance Commissioners (“NAIC”) has promulgated Model Act MO-228-1 to address the regulation and oversight of this segment of the industry, many issues still abound. Even the State of Florida, which has one of the most comprehensive statutory schemes and consumer protection statutes, still sees significant room for improvement in order to control detrimental behavior by abusive and potentially fraudulent actors in this space. Conversely, the State of Colorado, which has largely adopted the Model Act but currently lacks additional regulatory measures beyond the Model Act, has experienced a wave of public adjusters entering the market from other states, including Florida. Without the additional safeguards, however, it is difficult to address some of the more abusive behavior.

While many public adjusters are compliant with their respective obligations and the Insurance Code in their respective states, there are others who push beyond the pale of the regulatory scheme and

in essence “hijack” claims to enrich themselves and their associates at the expense of the consumer (who in many instances may not even be aware of the circumstances relating to the claim). These issues create problems for both the insureds and the industry, which has led to increased scrutiny by the regulators in their respective states.

A Forward Thinking Approach

The State of Florida has taken a more proactive approach to the regulation of public adjusters than other states. Given the number of claims from windstorms and problems experienced by the industry, the Florida Legislature recognized early in the development of the Insurance Code of the potential danger to the public by unscrupulous or fraudulent actors. To wit, the Legislature included an explicit recognition of the potential public harm in the preamble to the adjuster regulation statutes, which includes the following language:

“The Legislature finds that it is necessary for the protection of the public to regulate public insurance adjusters and to prevent the unauthorized practice of law.”
§626.854, Fla. Stat.

In conjunction with the preamble, the Florida Legislature also recognized the dangers of having unlicensed actors representing unknowing insureds to their detriment. Thus, beyond the administrative penalties found in the Florida Insur-

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ance Code, the Florida Legislature enacted criminal penalties to further ensure the protection of the public and proscribed the unlicensed practice of public adjusting as a minimum third-degree felony. The Florida Insurance Code includes the following language:

“In addition to any other remedy imposed pursuant to this code, any person who acts as a resident or nonresident public adjuster or holds himself or herself out to be a public adjuster to adjust claims in this state, without being licensed by the department as a public adjuster and appointed as a public adjuster, commits a felony of the third degree, punishable as pro-

vided in s. 775.082, s. 775.083, or s. 775.084. Each act in violation of this section constitutes a separate offense.” §626. 8738, Fla. Stat.

In contrast, the NAIC Model Act Section 3 provides merely regulatory provisions which require that a person or company acting as a public adjuster be licensed. There is no additional penalty, as with the Florida Insurance Code, and specifically no criminal offense. Thus, there is no significant disincentive for those who would violate the statute to refrain from such activity. To wit, the Model Act includes the following provisions:

“A person shall not act or hold himself out as a public adjuster in this state unless the person is

licensed as a public adjuster in accordance with this Act.” Section 3. (A.)

“A business entity acting as a public adjuster is required to obtain a public adjuster license. Application shall be made using the Uniform Business Entity Application. ...

Section 3. (C.)

So, while states adopting the Model Act provisions would necessarily include a requirement to be licensed, there is no attenuating penalty to deter would-be fraudulent actors against such unlicensed activity without additional legislative action.

Given the nature of the industry in Florida, the Legislature over the years has amended the Florida Insurance Code to proscribe other abuses which have been identified in the marketplace. Some of the additional prohibited abuses include: requiring certain contract terms to be included in public adjuster agreements; limitations on compensation (for both emergency and non-emergency claims); prohibitions against conflicts of interest; additional ethical obligations beyond the general adjuster code of ethics (which apply specifically to public adjusters); a prohibition against securing a Power of Attorney to decide which company will make repairs to the insured’s property; and holding the primary/supervising public adjuster responsible for any statutory violations of others working on the claim. §§626.854, 626.878, 626.8795, Fla. Stats.

Getting Beyond the Basic Model

The NAIC Model Act and regulations promulgated by other states are, however, less specific. This lack of additional legislative specificity has resulted in numerous issues, which may or may not be addressed administratively depending on the nature of the problem. Regardless of whether an administrative remedy applies, the Model Act contains no associated penalties beyond those generally available to the applicable regulating agency (i.e., Department of Insurance or Financial Services) in a given state. For example, when addressing unlicensed activity in Colorado, the Division of Insurance may issue an Emergency Order to Cease and Desist from the unauthorized and unlawful transaction

of the business of insurance in the State of Colorado pursuant to C.R.S. §§ 10-3-904, et seq. Ultimately, this could result in monetary penalties, which may include restitution and the possible imposition of a civil penalty for each violation of that Order.

In more egregious of circumstances, the Colorado Attorney General's Office may seek to file a civil lawsuit for the protection of the public. But while Colorado and other states may impose monetary penalties, suspend or even revoke licenses of associated parties, there are no accompanying criminal penalties under the Model Act even if the most severe administrative action is imposed. For example, under the Model Act, if an adjuster or public adjuster loses his or her license, or in the event an unlicensed person is found to be continuing to act as a public adjuster without a license, there is no additional penalties allowed under the insurance code. The Florida Legislature addressed this issue recently by providing additional language to the administrative provisions of the Insurance Code recognizing that the act of transacting insurance in any capacity requiring a license is a criminal offense. §626.112, Fla. Stat., as amended, which states:

“Any person who knowingly transacts insurance or otherwise engages in insurance activities in this state without a license in violation of this section or who knowingly aids or abets an unlicensed person in transacting insurance or otherwise engaging in insurance activities in this state without a license commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.” § 626.112(10), Fla. Stat.

The Statute in Action

A recent case in Florida shows how the difference between the statutory frameworks can assist in the effort to address the issue. Recently, the Florida Department of Financial Services arrested an individual who was targeting homeowners on properties built by Habitat for Humanity. The unlicensed public adjuster would approach Habitat for Humanity homeowners, offering them free kitchens

and roofs in exchange for executing an Assignment of Benefits (“AOB”). The unlicensed public adjuster allegedly offered to assist these homeowners with hurricane claims, as well as water damage claims or roof claims when, in fact, he was not licensed to do so. Utilizing the police power provided by the Legislature, based on the forward-thinking pronouncement by the Legislature discussed above, the State was able to take affirmative and meaningful action. Reference “*CFO Patronis Announces Arrest of Unlicensed Adjuster in Fraud Scheme Targeting Habitat for Humanity Homeowners*”.

This recent Florida case shows how the Department of Financial Services was able to bring criminal charges, notwithstanding the fact that the person perpetrating the fraud was not licensed. Since the Florida Legislature proactively identified the need to protect the public, the seriousness of such violations and provided the agency the power to file criminal penalties, the State was able to charge the subject with six (6) counts of unlicensed activity (which is a third-degree felony). The subject faces up to five (5) years in jail, and significantly, is no longer able to continue taking advantage of homeowners. Without those measures, however, the problem may have simply continued.

Legislative Tools to Help Address the Problem

Thus, the repercussion to egregious violators under the Florida Insurance Code includes significant penalties that are not part of the Model Act. The Legislature has addressed the issue by providing the agency additional measures to address and remediate the more abusive violations by fraudulent or abusive actors - by providing the imposition of potential criminal sanctions. While the differences between the insurance regulations in Florida and other states which follow the Model Act (such as Colorado) is notable, this is not to say that the Florida statutes themselves are perfect or will always result in the curbing of abusive or fraudulent behavior. They do, nevertheless, provide a significant tool for a state to take action when these types of cases are discovered.

Accordingly, legislatively empowering the regulating agencies with meaningful

provisions to curb such abuses, as well as educating both the industry and regulatory bodies about to the legal requirements and penalties associated with various proscribed activities, will help to reduce the abuses on the industry and lessen the detrimental effects on the insurance-purchasing public in their respective states.



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