

NO. 13-10896

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GERALD REYELTS and BEATRIZ REYELTS,

Plaintiffs-Appellees

v.

CARY JAY CROSS; CARY JAY CROSS, P.C.; LON SMITH & ASSOCIATES,
INC., and A-1 SYSTEMS, Inc., d/b/a LON SMITH ROOFING AND
CONSTRUCTION

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Texas,
Fort Worth Division
No. 4:12-CV-00112

BRIEF OF *AMICUS CURIAE*
NATIONAL ASSOCIATION OF PUBLIC INSURANCE ADJUSTERS
IN SUPPORT OF APPELLEES

Brian S. Goodman
PESSIN KATZ LAW, P.A.
901 Dulaney Valley Road, Suite 400
Towson, Maryland 21204
(410) 938-8800

Steven J. Badger
ZELLE HOFMANN VOELBEL & MASON LLP
901 Main Street, Suite 4000
Dallas, Texas 75202
(214) 742-3000

Attorneys for Amicus Curiae

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June 26, 2012 Tex. Dept. of Ins.
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STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE

The National Association of Public Adjusters (“NAPIA”) is a nationwide trade association of public insurance adjusters organized in 1951 to professionalize the growing profession of public adjusting. NAPIA exists for primary purposes of professional education, certification, legal and legislative representation, scholarship and research, and marketing and promotion of the public insurance adjusting profession. NAPIA assesses its member firms annual membership fees to help further these several goals.

NAPIA’s interest in the outcome of this appeal is a substantial and direct one. For over 60 years, NAPIA has worked closely with the insurance industry, state insurance departments, state governors and legislators, and attorneys general to ensure that public adjusters – the only professionals specifically licensed and regulated to prepare first-party insurance claims on behalf of a consumer or commercial insured – practice their profession in an ethical and accountable way.

One issue in this appeal by Appellants Lon Smith & Associates, Inc. and A-1 Systems, Inc. d/b/a Lon Smith Roofing and Construction (“the Lon Smith Appellants”) is whether the District Court correctly concluded that their conduct violated Section 4102.051(a) of the Texas Insurance Code by contracting to provide unlicensed public adjusting services. That Section provides that “[a] person may not act as a public insurance adjuster in this state or hold himself or

herself out to be a public insurance adjuster in this state unless the person holds a license or certificate issued by the commissioner” TEX. INS. CODE § 4102.051(a). NAPIA firmly believes the District Court’s decision that Lon Smith Appellants violated Section 4102.051 is correct and should be affirmed expressly on that basis.

For reasons explained further below, NAPIA and its public insurance adjuster members have a strong interest in ensuring that statutes like Section 4102.051 are enforced to prevent roofers and other contractors from acting or contracting to act as public insurance adjusters without being licensed as same. Enforcement of statutes like Section 4102.051 prohibiting the unlicensed practice of public adjusting not only protects the licensed public insurance adjuster profession, it protects consumers from financial conflicts of interest when unlicensed and sometimes unscrupulous construction contractors purport to act as intermediaries with the insurance company on behalf of the consumer, just as the Lon Smith Appellants attempted to do in this case.

Undersigned counsel, Brian S. Goodman, has been general counsel to NAPIA since approximately 2000. NAPIA’s board of directors has authorized undersigned counsel to file this *Amicus* Brief in support of the Appellees on behalf of NAPIA. Additionally, undersigned counsel for NAPIA have authored this

Amicus Brief and NAPIA (and no other person or entity) has funded the preparation and submission of this *Amicus* Brief.¹

SUMMARY OF ARGUMENT

The Lon Smith Appellants ignore the language of their roof repair contract with the Appellees Gerald and Beatriz Reyelts (“the Reyelts”), which specifically “authorize[d] Lon Smith Roofing and Construction (“LSRC”) to pursue homeowner[’]s best interest for all repairs, at a price agreeable to the insurance company and LSRC.” ROA.359, 1066. The contract further stated that “[t]he final price agreed to between the insurance company and LSRC shall be the final contract price.” *Id.* In other words, the repair contract gave the roofer full and final authority to negotiate the repair contract price with the insurer without the insured’s knowledge or approval, in violation of Section 4102.051(a)’s prohibition on unlicensed contractors acting as public adjusters on behalf of insureds. The District Court correctly so concluded.

Strong public policy concerns further support enforcing Section 4102.051(a) to prevent such roof repair contracts. The Lon Smith Appellants’ contract gave them the full authority to negotiate directly with the Reyelts’ insurer with respect to the “final contract price” that the insurer would pay Lon Smith Roofing for the hail damage to the Reyelts’ roof. Allowing unlicensed contractors to act as

¹ See F.R.A.P. 29(c)(5).

intermediaries between the insured and an insurer would wreck havoc on the licensed and regulated public insurance adjuster profession and would allow construction contractors to take advantage of insureds – particularly in the face of a catastrophic natural disaster, when they are the most vulnerable – in situations where the contractors’ financial interests obviously conflict with those of the insured.

ARGUMENT

I. This Court Should Affirm The District Court’s Conclusion That The Lon Smith Appellants’ Roof Repair Contract Violated Texas’ Prohibition Of The Unlicensed Practice Of Public Adjusting.

Section 4102.051(a) of the Texas Insurance Code provides that “[a] person may not act as a public insurance adjuster in this state or hold himself or herself out to be a public insurance adjuster in this state unless the person holds a license or certificate issued by the commissioner under Section 4102.053, 4102.054, or 4102.069.” TEX. INS. CODE § 4102.051(a). Section 4102.001(3) defines the term “public insurance adjuster” broadly to include, among others, “a person who, for direct, indirect, or any other compensation[,] acts on behalf of an insured in negotiating for or effecting the settlement of a claim or claims for loss or damage under any policy of insurance covering real or personal property[.]” *Id.* at § 4102.001(3)(A)(i). A contract that violates Section 4102.051 “may be voided at

the option of the insured.” *Id.* at § 4102.207(a). Additionally, Section 4102 contains administrative and criminal penalties. *Id.* at §§ 4102.204-206.

The Reyelts entered into a contract with the Lon Smith Appellants to repair hail damage to their home’s roof for approximately \$15,000 that specifically “authorize[d]” the Lon Smith Appellants “to pursue homeowner[']s best interest for all repairs, at a price agreeable to the insurance company and LSRC.” ROA.359, 1066. That roof repair contract further stated that “[t]he final price agreed to between the insurance company and LSRC shall be the final contract price.” *Id.* Apparently conceding that the terms of their roof repair contract violate Section 4102.051(a)’s prohibition on the unlicensed practice of public adjusting, the Lon Smith Appellants argue that notwithstanding their contractual ability to do so, they in fact did not negotiate on behalf of the Reyelts “a price agreeable to the insurance company” and the Lon Smith Appellants. Lon Smith App. Br. 25-26. Notably, the Lon Smith Appellants admit that “[t]here is no evidence in the record of what the Lon Smith Appellants actually did with the Reyelts’ insurance company.” *Id.* Moreover, the Lon Smith Appellants concede that they made the judicial admission below in their Joint Status Report that “[i]f there had been a dispute about the estimate or cost of the roof replacement, the insurance company and A-1 Systems would have negotiated an agreed upon price.” ROA.179; *see also* Lon Smith App. Br. 25.

The overly technical distinction that the Lon Smith Appellants attempt to draw by contending on appeal that they did not actually “act” as unlicensed public insurance adjusters in violation of Section 4102.051, even through their roof repair contract illegally permitted them to do so, and even though they admittedly “would have” done so had the opportunity arisen, is immaterial to the question of whether they violated Section 4102.51. Section 4102.207 clearly states that “[a]ny *contract for services* regulated by this chapter that is entered into by an insured with a person who is in violation of Section 4102.051 may be voided at the option of the insured.” TEX. INS. CODE § 4102.207(a) (emphasis added). Consistent with that provision, the District Court held that the Lon Smith Appellants’ *contract* with the Reyelts violated Section 4102.51, and thus was void and unenforceable.

Moreover, as the Texas Commissioner of Insurance has recognized, and as common sense dictates, even holding oneself out as a public adjuster without a license to do so is a violation of Section 4102. See Appendix 1 (June 26, 2012 Tex. Dept. of Ins. Commissioner’s Bulletin #B-0017-12) (“A person who advertises, solicits business, or holds himself or herself out to the public as an adjuster of claims for loss or damage under any policy of insurance covering real or personal property is also performing the acts of a public insurance adjuster.”). The Lon Smith Appellants’ argument that one actually has to perform unlicensed public adjusting in order to trigger Section 4102 is therefore contrary to the text of

the statute, as well as the Insurance Commissioner's plain language interpretation of same.

Accordingly, the Lon Smith Appellants' roof repair contract with the Reyelts was void and unenforceable regardless of what the Lon Smith Appellants did or did not do pursuant to that illegal contract.² The District Court correctly so concluded and this Court should affirm that conclusion to discourage other unlicensed contractors from attempting to take advantage of unwitting insureds like the Reyelts.

II. Public Policy Strongly Favors Strict Enforcement Of Laws Like Section 4102.051 Prohibiting Contractors From Engaging In The Unlicensed Practice of Public Adjusting.

Particularly following a catastrophic event like a fire, tornado, hurricane, or hail storm, insured homeowners seeking to rebuild or repair the resulting damage can be quite vulnerable. Victims of such catastrophes often are looking for help from anyone willing to offer it and are unlikely to check the offering party's training or qualifications. It is unfortunately increasingly common for

² The Lon Smith Appellants' additional reliance on a 2008 bulletin from the Texas Insurance Commissioner, *see* Lon Smith App. Br. 25, is similarly misplaced. That bulletin merely states that "Texas Insurance Code Chapter 4102 does not prevent contractors from providing estimates or discussing those estimates or other technical information with an insurer of its adjuster." *Id.* at Appendix 1. Notwithstanding the Lon Smith Appellants' assertion in their brief (for which they offer no citation to the record) that their "dealings with insurance companies on behalf of their customers is [sic] exactly what the Texas Insurance Commissioner said was permissible under Chapter 4102 of the Texas Insurance Code," *id.* at 25, their roof repair contract with the Reyelts does not limit their dealings with the Reyelts' insurer to "providing estimates" or discussing estimates "or other technical information." On the contrary, the Lon Smith Appellants' roof repair contract gives them full and exclusive authority to negotiate a final "price agreeable to the insurance company."

unscrupulous contractors to target these victims in their weakened state by offering to “work with the insurance company” to obtain the highest insurance payment possible to perform the necessary repairs. The inherent conflict of interest in allowing an unlicensed and unregulated contractor performing the repair work to negotiate the final price that the insurance company will pay for its work is insidious and inescapable. Requiring those parties to be licensed insurance adjusters provides insureds a level of protection from these perils that they might not otherwise be able to provide themselves.

Accordingly, 45 of the 50 states, plus the District of Columbia, have enacted comprehensive licensing statutes regulating public insurance adjusters.³ These statutes address directly the problems inherent in allowing contractors or other unlicensed individuals or entities to act as unlicensed public adjusters. For example, in addition to prohibiting unlicensed contractors from practicing public adjusting, Texas law prohibits licensed public adjusters from conflicts of interest and from soliciting insureds during natural disasters, among other things. *See, e.g.*, TEXAS INS. CODE § 4102.151; *id.* at § 4102.158 (prohibiting licensed public adjusters from “engag[ing] in any . . . activities that may reasonably be construed as presenting a conflict of interest”).

³ The five states that do not have such licensing statutes are Alabama, Alaska, Arkansas, South Dakota and Wisconsin.

In the absence of prohibitions against the unlicensed practice of public adjusting, like Section 4102.051, the incentive for contractors to “adjust” the insured’s claim with the insurer and then only to perform the minimum repairs necessary on the insured’s property is simply too great. The Texas Insurance Commissioner herself has recognized this threat to the insured public, and particularly to non-English-speaking insureds:

It has come to the attention of the Texas Department of Insurance that a number of contractors, roofing companies, and other individuals and entities not licensed by the department have been advertising or performing acts that would require them to hold a public insurance adjuster license. Additionally, the department has learned that the tactics used by these unlicensed individuals include visiting neighborhoods and areas of the state where languages other than English are commonly spoken. These unlicensed individuals often prey on unknowing consumers by promising to ‘work’ insurance claims to achieve a higher settlement.

Appendix 1 (June 26, 2012 Tex. Dept. of Ins. Commissioner’s Bulletin #B-0017-12).⁴

Accordingly, the Insurance Commissioner has made clear that the Texas Department of Insurance “takes seriously the harm unlicensed individuals and entities can cause the marketplace when they prey on unsuspecting consumers and in the industry.” *Id.* Consistent with this concern, the Commissioner has vowed to “refer unlicensed persons performing the acts of a public insurance adjuster to the

⁴ Departments of Insurance in several other states, including New Mexico, North Carolina and Oklahoma, have issued similar bulletins. *See* Appendix 2.

Texas Attorney General” and to “pursue all remedies available under the Insurance Code.” *Id.*

The District Court’s conclusion that the Lon Smith Appellants’ roof repair contract with the Reyelts was unenforceable and void is entirely consistent with the Texas Insurance Commissioner’s stated goal of using the remedies available under the Insurance Code to prevent unlicensed contractors like the Lon Smith Appellants from victimizing vulnerable insureds, including elderly insureds like the Reyelts. Consistent with the State of Texas’ clear desire to enforce the Insurance Code’s prohibition of unlicensed insurance adjusting, this Court should affirm the District Court’s legal conclusion.

Not only does the unlicensed practice of public adjusting pose a serious threat to insureds, it poses a threat to insurers and licensed public insurance adjusters as well. With respect to insurers, while some insurers knowingly may negotiate with unlicensed contractors purportedly acting as adjusters, many insurers may do so unknowingly and thus may fall victim to misleading statements by the unlicensed contractors concerning the scope of the repairs or construction, the materials to be used, etc.

With respect to NAPIA members and other properly licensed and regulated public insurance adjusters, the unlicensed practice of public adjusting poses a double threat to the industry. First, the unlicensed contractors unfairly compete

with licensed public adjusters who must, among other things, pass an exam and subject themselves to ongoing state oversight. Additionally, many states require that licensed adjusters complete continuing education courses to maintain their licenses. These laudable licensing requirements ensure that licensed public adjusters adhere to ethical and regulatory standards that unlicensed contractors can and often do ignore with impunity.

Second, the unlicensed practice of public adjusting unfairly portrays insurance adjusters as untrustworthy and as placing their own interests above those of the insureds. This is particularly damaging to NAPIA and its approximately 115 member firms, who consistently strive to promote the licensed public adjusters' standard of ethical and loyal representation of their insured clients.

A licensed public adjuster acts as a true and impartial intermediary between the insured and the insurer to protect the insured's best interests. Allowing contractors to engage in the unlicensed practice of public adjusting creates an inherent and substantial conflict of interest that immediately puts the contractor's best interests ahead of the insured's. Without strict enforcement of deterrent laws like Section 4102.051 prohibiting unlicensed public adjusting, the incentive to take advantage of the insured will only increase.

The District Court's ruling that the Lon Smith Appellants' roof repair contract with the Reyelts violates Section 4102 is an important one that this Court

should expressly affirm. NAPIA is aware of only one other court opinion in the United States to have enforced the laws prohibiting the unauthorized practice of public adjusting. *See Building Permit Consultants, Inc. v. Mazur*, 122 Cal. App. 4th 1400, 1414 (Cal. App. 2d Dist. 2004) (affirming trial court’s decision that company’s unlicensed practice of public insurance adjusting voided its agreement with the insured).

As the court recognized in *Mazur*, requiring public adjusters to be licensed provides “safeguards of accountability, competence, [and] professionalism.” *Id.* at 1413. Moreover, as the Texas Legislature did in enacting in Section 4102,

the [California] Legislature recognized that insureds would often be susceptible to exploitation in the wake of earthquakes, fires, floods, and similar catastrophes and that consumers of public adjusting services needed protection. In addition to price gouging and collusion with contractors, the Public Adjusters Act protects California consumers from a number of other abuses including high-pressure sales tactics, fraud, and incompetence. To ensure accountability and compliance with professional standards already in place for adjusters employed by the insurers, the Legislature included the licensure requirement as a part of the statutory scheme. In light of the consumer protection goals of the statute as a whole, we infer that the licensure requirement was aimed at any firm that might potentially exploit insureds in a vulnerable position by offering to help them through the insurance claim ordeal.

Id. at 1412.

Expressly affirming the District Court’s ruling that the Lon Smith Appellants’ contract with the Reyelts violated Section 4102 of the Texas Insurance Code would constitute an important recognition of the aforementioned harms

caused by the unauthorized practice of public adjusting and would further the Texas Legislature's important goal of protecting the citizens of Texas from these harms. The Texas Legislature has worked to guarantee that homeowners receive the services of a licensed public adjuster who will honestly and competently assist with the insurance claims process. What the Reyelts received instead in this case was precisely what the Texas Legislature has prohibited – a promise to provide public adjusting services from a roofer without the training and supervision necessary to ensure that the promised claims-handling services will be provided honestly and competently.⁵

⁵ Effective September 1, 2013, the Texas Legislature amended provisions of the Texas Insurance Code specifically to exclude roofing contractors from the insurance claims process. Although this legislation was enacted after the conduct at issue in this appeal, it nonetheless underscores the concerns regarding the unlicensed practice of public adjusting in Texas and the legislative intent to protect Texas consumers from such practices. *See* Tex. Ins. Code §§ 4101.251, 4102.163(a)

CONCLUSION

For the reasons set forth above, this Court should affirm the decision of the District Court finding that the Lon Smith Appellants' roof repair contract with the Reyelts violated Section 4102.051 of the Texas Insurance Code.

Respectfully submitted,

/s/Brian S. Goodman
Brian S. Goodman
bgoodman@pklaw.com
PESSIN KATZ LAW, P.A.
901 Dulaney Valley Road, Suite 401
Towson, Maryland 21204
(410) 938-8800

/s/Steven J. Badger
Steven J. Badger
SBadger@zelle.com
ZELLE HOFMANN VOELBEL & MASON LLP
901 Main Street, Suite 4000
Dallas, Texas 75202
(214) 742-3000

COUNSEL FOR *AMICUS CURIAE*
NATIONAL ASSOCIATION OF PUBLIC
INSURANCE ADJUSTERS

CERTIFICATE OF SERVICE

This is to certify that the foregoing BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF PUBLIC INSURANCE ADJUSTERS IN SUPPORT OF APPELLEES was served this 26th day of December, 2013 by first-class United States mail, postage pre-paid, and by electronic mail, on:

Rick K. Disney, Esquire
COTTEN SCHMIDT & ABBOTT, LLP
550 Bailey Avenue
Suite 600
Fort Worth, Texas 76107

Counsel for Appellants Lon Smith & Associates, Inc. and A-1 Systems, Inc. d/b/a Lon Smith Roofing and Construction

Cary J. Cross, Esquire
CARY JAY CROSS P.C.
545 E. John Carpenter Freeway
Suite 300
Irving, Texas 76052

Counsel for Appellants Cary Jay Cross and Cary Jay Cross, P.C.

Charles W. Fillmore
THE FILLMORE LAW FIRM, L.L.P.
901 Lake Street
Fort Worth, Texas 76102

Counsel for Appellees Gerald Reyelts and Beatriz Reyelts

/s/Steven J. Badger
Steven J. Badger

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

- this brief contains 3,203 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and at 14 pages is less than one-half the maximum length authorized for a party's principal brief, or
- this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

- this brief has been prepared in a proportionally spaced typeface using Word 2010 in 14 point Times New Roman, except footnotes which are in 12 point Times New Roman, or
- this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and type of type style*].

/s/Steven J. Badger

Dated: December 26, 2013

NO. 13-10896

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GERALD REYELTS and BEATRIZ REYELTS,

Plaintiffs-Appellees

v.

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On Appeal from the United States District Court for the Northern District of Texas,
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No. 4:12-CV-00112

APPENDIX TO MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*
NATIONAL ASSOCIATION OF PUBLIC INSURANCE
ADJUSTERS IN SUPPORT OF APPELLEES

Brian S. Goodman
PESSIN KATZ LAW, P.A.
901 Dulaney Valley Road, Suite 400
Towson, Maryland 21204
(410) 938-8800

Steven J. Badger
ZELLE HOFMANN VOELBEL & MASON LLP
901 Main Street, Suite 4000
Dallas, Texas 75202
(214) 742-3000

Attorneys for Amicus Curiae

APPENDIX 1



COMMISSIONER'S BULLETIN #B-0017-12

June 26, 2012

TO: ALL AGENTS, PUBLIC INSURANCE ADJUSTERS, AND ADJUSTERS, AND TO ALL INSURANCE COMPANIES, CORPORATIONS, EXCHANGES, MUTUALS, COUNTY MUTUALS, RECIPROCAL, ASSOCIATIONS, LLOYDS, AND OTHER INSURERS WRITING PROPERTY AND CASUALTY INSURANCE IN THE STATE OF TEXAS

RE: Adjusting claims by unlicensed individuals and entities

It has come to the attention of the Texas Department of Insurance that a number of contractors, roofing companies, and other individuals and entities not licensed by the department have been advertising or performing acts that would require them to hold a public insurance adjuster license. Additionally, the department has learned that the tactics used by these unlicensed individuals include visiting neighborhoods and areas of the state where languages other than English are commonly spoken. These unlicensed individuals often prey on unknowing consumers by promising to 'work' insurance claims to achieve a higher settlement.

All agents, adjusters, and insurers should be mindful that, pursuant to the Insurance Code Chapter 4102:

1. A person who, for direct, indirect, or any other compensation, acts on behalf of an insured to negotiate or effect the settlement of an insurance claim is performing the acts of a public insurance adjuster.
2. A person who advertises, solicits business, or holds himself or herself out to the public as an adjuster of claims for loss or damage under any policy of insurance covering real or personal property is also performing the acts of a public insurance adjuster.

With limited exceptions, a person performing the acts of a public insurance adjuster or holding himself or herself out as a public insurance adjuster in this state must be licensed under the Insurance Code Chapter 4102. Additionally, insurers cannot utilize roofers as de facto public insurance adjusters nor provide commissions to them in the form of direct or indirect payments or rebates that are in excess of amounts owed under the policy.

The department takes seriously the harm unlicensed individuals and entities can cause on the marketplace when they prey on unsuspecting consumers and the industry. I urge insurers, agents, adjusters, and consumers to help call attention to and halt attempts by unlicensed persons to negotiate insurance claims, and I encourage everyone to report these practices to the department and the TDI Fraud Unit (1-800-252-3439 – Report Fraud).

The Insurance Code provides for both civil and criminal penalties for violating this licensing requirement. The department will refer unlicensed persons performing the acts of a public insurance adjuster to the Texas Attorney General, pursue all remedies available under the Insurance Code, and highlight these practices to the Legislature so that it may consider further steps to regulate these persons and activities.

Eleanor Kitzman
Commissioner of Insurance

Frequently Asked Questions (FAQs) - Unlicensed Individuals, Entities Adjusting Claims

For more information contact:

ConsumerProtection@tdi.texas.gov or 1-800-252-3439

Texas Department of Insurance

333 Guadalupe, Austin, TX 78701

P.O. Box 149104, Austin 78714

512-463-6169 | 1-800-252-3439

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APPENDIX 2

NEW MEXICO PUBLIC REGULATION COMMISSION

COMMISSIONERS

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 DISTRICT 5 BEN L. HALL



P.O. Box 1269
 1120 Paseo de Peralta
 Santa Fe, NM 87504-1269

John Gaherty
 Chief Investigator
 505-827-4439

CHIEF OF STAFF

Johnny L. Montoya

DIVISION OF INSURANCE
 John Franchini, Superintendent

Insurance Division Bulletin No. 2012-02
 January 26, 2012

2012 JAN 31 11:44:52
 COMMUNICATIONS SECTION

TO: PROPERTY CASUALTY INSURERS, ADJUSTING FIRMS AND ADJUSTERS

**RE: CLARIFICATION OF LICENSING AND REGISTRATION REQUIREMENTS FOR
 ADJUSTING FIRMS AND ADJUSTERS**

THE FOLLOWING BULLETIN is issued pursuant to Insurance Division rule 13 NMAC 1.2.1 through 1.2.10. This Bulletin is also issued pursuant to NMSA 1978 §59A-13-1 *et seq.* (Adjusters), NMSA 1978 §59A-11-1 *et seq.* (Licensing Procedures) and NMSA 1978 §59A-61 *et seq.* (Fees).

Purpose:

The purpose of this Bulletin is to clarify the position of the Division of Insurance regarding all adjuster licenses and adjusting firm licenses. Currently "adjusting firms" have been required to register with the Insurance Division, but only individual adjusters have been licensed. Henceforth, any entity performing adjusting services will be required to obtain and maintain a valid adjusting license with the Insurance Division. This will apply to business entities as well as individuals.

Clarification:

The Insurance Code prohibits any "persons" from performing adjusting services in New Mexico unless licensed under the Insurance Code. See NMSA 1978 §59A-13-3. The Insurance Code defines "person" as individuals as well as business entities. See NMSA 1978 §59A-1-10. The Division of Insurance defines "adjusting firms" as any business engaged in processing and handling claims for any insurance company authorized under the Insurance Code operating in New Mexico. All adjusting firms must obtain and maintain a Business Entity Registration with the Division of insurance. All Adjusting firms must also ensure that all licensed adjusters employed by the adjusting firm are affiliated with the firm in accordance with the Insurance Code.

Procedures

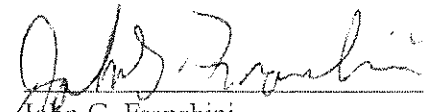
All adjuster firm registrations and adjuster licenses are renewable on March 1 of each calendar year. Effective March 1, 2012, the Division of Insurance will ensure compliance by all adjusting firms and adjusters employed by the adjusting firm.

The Superintendent reminds all adjusting firms and adjusters of the following requirements:

1. All adjusting firms operating in New Mexico are required to obtain a Business Entity License from the Division of Insurance
2. All adjusters operating in New Mexico are required to obtain an adjuster license and to be affiliated with an adjusting firm.
3. All adjusting firms and adjuster are required to renew their respective licenses on March 1 of each calendar year

The Division of Insurance, Agent Licensing Bureau has posted all the required forms and fee schedules on the Division's website. For specific questions contact the Agent License Bureau at 505-827-4601 or agents.licensing@state.nm.us.

DONE AND ORDER on this 3/5th day of January, 2012



John G. Franchini
Superintendent of Insurance



North Carolina DEPARTMENT OF INSURANCE

Wayne Goodwin | Commissioner of Insurance

AGENT SERVICES

TO: Property Insurers Licensed to do Business in North Carolina.
Other Interested Parties

FROM: Eitta Maynard

DATE: May 6, 2010

RE: Public Adjusting Relative to Storm Damage Claims/Roofing Repair

The North Carolina Department of Insurance ("The Department") has become aware of questionable advertising and business practices by a small number of construction firms operating in the State. Last year, many home and small business owners experienced damage to their properties from storms, especially wind and hail storms.

As a result, many policyholders filed roof damage claims with their insurers. Multiple policyholders were also approached by contractors, especially those who regularly repair roofs, offering their repair or reconstruction services.

By itself, of course, a contractor offering his/her repair or construction services is a normal trade practice, is legal, and is not regulated by the Department. Some contractors, however, have offered their "representation" services by offering to "exclusively negotiate" the claim settlement with the insurer(s) involved, often as part of the repair contract. In some instances, the contracts have "required" the property owner to allow the contractor to "negotiate" the terms of the claim settlement on the owner's behalf.

The Department views this type of arrangement as "public adjusting" which is defined in North Carolina insurance law as "investigating, reporting to and assisting an insured in relation to first party claims arising under insurance contracts, other than life and annuity, that insure the real or personal property, or both, of the insured..."

The contractor's actions, offerings, or representations may constitute the contractor's acting as a public adjuster. **In North Carolina, it is a misdemeanor to act as a public adjuster without a license.**

The terms, written or otherwise, of the agreement with the property owner would determine whether the actions constitute violations of insurance law. Even the offering, in a marketing sense, of such "representation" may constitute a violation.

Insurers are encouraged to make their contractor clients aware of the Department's concerns, and advise their claims staff to be alert to possible violations. Please advise Agent Services Division of any apparent violations by contacting the Complaint Section at (919) 807-6800 ext 76816.



Oklahoma Insurance Department
State of Oklahoma

SPECIAL NOTICE

**TO: ALL LICENSED INSURANCE PRODUCERS, INSURANCE
ADJUSTERS AND INSURERS**

FROM: KIM HOLLAND, INSURANCE COMMISSIONER

RE: ROOFING CONTRACTORS

DATE: MAY 27, 2010

PURPOSE OF THIS BULLETIN

Wind and hail storms in recent years have resulted in many Oklahoma homeowners and business owners filing claims for roof damage with their insurance companies. As a result, the Oklahoma Insurance Department is increasingly receiving complaints regarding the advertising and business practices of roofing contractors in the state. Roofing contractors that advertise to be "claim specialists", claim analysts", who refer to "denied claims", "deductibles" or assert they "deal with insurance companies" in their advertisements are acting as unlicensed public adjusters.

It is legal for contractors to approach homeowners and business owners, offering repair or reconstruction services. A roofing contractor may offer an opinion to an insured as to whether roof damage is from a storm or other incident normally covered by a homeowner's policy. The roofing contractor may recommend to the insured to file an insurance claim with the insurer. The roofing contractor may provide an estimate of repair which the insured may submit to the insurer. The roofing contractor may be present when the insurance adjuster inspects the damage. The roofing contractor may answer the adjuster's questions.

However, 36 O.S. § 6202(4) provides:

A public adjuster is any person, firm, association, company, or corporation that suggests or presents to members of the public that said public adjuster represents the interests of an insured or third party for a fee or compensation. Public adjusters may investigate claims and negotiate losses to property only.

A roofing contractor must be licensed as a public adjuster in order to negotiate and act as an intermediary between the insured and the insurer. A contractor who asks an insured to sign a power of attorney or any other contract authorizing him to act on the insured's behalf for a fee is acting as a public adjuster. For example, a roofing contractor must be licensed as a public adjuster in order to: (1) enter into a contract for services authorizing the contractor to negotiate or effect the settlement of a claim for a fee or compensation; (2) advocate on behalf of the insured or offer assistance to the insured to prepare, file or complete the insurance claim; and/or (3) advertise or solicit for employment as an adjuster of such claims.

Public adjusters may not:

Directly or indirectly, own or have a pecuniary interest in any business entity which provides construction or reconstruction related services on behalf of an insurance claimant or insured for which the adjuster is providing services, nor may the adjuster, directly or indirectly, own or have a pecuniary interest in any other business entity which furnishes any supplies, material, services or equipment purchased by or on behalf of the claimant or insured in settlement of the claim, other than the usual and customary supplies, materials, services or equipment utilized in the adjusting process". 36 O.S. §6220.1(A).

There is an exception if the adjuster:

Provides services on a claim which is located in the county in which the adjuster maintains his principal place of business or in a municipality having a population of less than 6,000 persons; provided that the adjuster gives written disclosure of the potential conflict of interest to both the insured and insurer prior to the performance any adjuster services.

Therefore, a roofing contractor can not be a licensed public adjuster except in the county the contractor has its principal place of business in or in municipalities of less than 6,000 persons. Any person who violates § 6220.1 shall be subject to disciplinary action or a civil fine, or both, as set forth in 36 O.S. § 6220.

As a general rule, to avoid disciplinary action, roofing contractors should act only as contractors and stay out of claim negotiation, participating in the claim process and advertising as "claim specialists". Insurers are encouraged to make their contractor clients aware of the Department's concerns and to advise their adjuster staff to be alert to possible violations of the Oklahoma Insurance Adjusters Licensing Act.