TOWARD NATIONAL UNIFORMITY IN THE TREATMENT OF PUBLIC INSURANCE ADJUSTERS UNDER STATE UNAUTHORIZED PRACTICE OF LAW PROVISIONS

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Public insurance adjusters should be allowed to practice anywhere in the country. At present, forty-four states, plus the District of Columbia, specifically permit public adjusting activities and regulate the practice through industry-specific licensing schemes.[1] In the six states that do not license public adjusting,[2] however, there remains the risk that state authorities will conclude that the profession as a whole, by its very nature, constitutes the unauthorized practice of law. Arkansas, and until very recently, Kansas, flatly prohibits public adjusting on this basis.

Blanket prohibitions of public adjusting are not only unfair to the industry, but they also work an injustice upon policyholders whose claims do not involve questions of law. In contrast to public adjusters, who typically charge contingency fees of approximately ten to twenty percent of the amount recovered by the policyholder, the standard contingency fee for attorneys is thirty-three percent, regardless of the complexity of the claim. Allowing a legal monopoly on public adjusting activities thus obliges policyholders to pay higher fees for legal representation where the services of a non-attorney adjuster would be sufficient, if not preferable.

The aim of this paper is to identify the most effective legal arguments for challenging prohibitions of public adjusting under the pretense of state unauthorized practice of law (UPL) regulation. As the vast majority of states have recognized,[3] first-party public adjusting[4]—defined broadly as assisting an insured in the settlement of claims for property loss or damages

[1] Brian S. Goodman, PROPERTY INSURANCE LITIGATOR'S HANDBOOK 42 (2007). Since the publication of this article, Idaho, Iowa, Kansas, and Mississippi have enacted public adjusting licensing provisions. Kansas's licensing law, which was signed by the Governor on April 13, 2009, will enter into effect on July 1, 2009.

[2] These states include: Alabama, Alaska, Arkansas, South Dakota, Virginia, and Wisconsin.

[3] *See infra* Part II.B.

[4] State prohibitions of third-party public adjusting, which may be defined as "represent[ing] a stranger to the insurance contract on a claim asserted against a tortfeaser," Utah State Bar v. Summerhayes & Haden, 905 P.2d 867, 868 (Utah 1995), are beyond the scope of this paper. Courts have consistently found third-party adjusting, which is based upon principles of tort law, to constitute the practice of law. *Id*. at 868–70.

under an insurance contract[5]—does not require specialized legal skills or knowledge, and as such, does not in and of itself constitute the practice of law. Of course, individual adjusters may engage in activities amounting to unauthorized practice, but questions as to the lawfulness of their conduct must be determined on a case-by-case basis. As will be discussed, states may not use UPL provisions, either directly or indirectly, to completely bar public adjusters from practicing within their borders.

To contextualize this analysis, this paper is divided into three main parts. Part I discusses as background the history, justifications for, and limitations of, state UPL regulation. Part II introduces the problems that may arise in the grey area between the practice of law and the business of public adjusting and outlines current state practice regarding the treatment of public adjusters under UPL doctrine. Building upon this discussion, Part III presents four potential legal challenges to blanket prohibitions of public adjusting.

I. UNAUTHORIZED PRACTICE OF LAW—GENERALLY

A. Background and Justification

At the onset of the Great Depression, the American Bar Association, driven at least in part by a desire to curtail outside competition,[6] created a committee on unauthorized practice and launched a nation-wide effort to encourage state regulation of UPL. By the 1960s, every state bar association in the country had a committee investigating instances of unauthorized practice.[7] Today, every state restricts the practice of law to individuals licensed as attorneys.[8]

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[5] NAIC Model Laws, Regulations and Guidelines 228-1, § 2

[6] J.W. HURST, THE GROWTH OF AMERICAN LAW 323 (1950).

[7] STANLEY A. BASS, UNAUTHORIZED PRACTICE SOURCEBOOK (1965).

[8] Most states, either by statute, caselaw, court rules, or a combination of thereof, permit injunctive suits to bar unauthorized practice. LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 637

The regulation of UPL is justified on the basis that it protects the public from "being advised or represented in legal matters by incompetent or unreliable persons."[9] This concern is underscored by the fact that clients are often not in a position to judge whether they are receiving proper professional attention.[10] In recent years, however, scholars have become increasingly critical of the consumer protection rationale. First, they argue, many of the tasks frequently regarded by courts as the practice of law, such as the preparation of loan and title documents, for example, do not require formal legal training.[11] Secondly, they contend that UPL doctrine erroneously assumes that clients are incapable of deciding for themselves whether it is in their best interest to pay higher fees for a lawyer as opposed to a non-lawyer specialist.[12] These criticisms are especially relevant in the context of public adjusting.

B. Defining the "Practice of Law"

The most significant (and also most perplexing) aspect UPL regulation is the lack of a single, uniform definition of the "practice of law." Efforts by the American Bar Association to create a model definition have failed,[13] and most courts addressing the subject have concluded

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(2005). Such conduct is punishable as a crime in at least twenty-seven states. *Survey of Unauthorized Practice Committees*, ABA Standing Committee on Client Protection (2009), at 2.

[9] Huls v. Criger, 247 S.W.2d 855 (Mo. 1952). Other suggested justifications for UPL regulation include ensuring the effective administration of justice and providing an economic incentive for trained lawyers to submit to professional regulation. Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2594 (1982).

[10] Model Code of Professional Responsibility, Ethical Considerations 3-4 (1981).

[11] *See* Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 708 (1977).

[12] *See* Denckla, *supra* note 9 at 2595.

[13] *ABA Group Opts Not to Set Model Definition*, 19 ABA/BNA LAW. MAN. ON PROF. CONDUCT 212 (2003).

that a precise definition is both undesirable and practically impossible.[14] As a consequence, this task has been left to the states, most of which define "practice of law" as broadly as possible.[15]

In the absence of a workable definition of "practice of law," state courts have employed a variety of tests to determine the scope of state UPL provisions. The most common of these tests include: the "Professional Judgment" test, which considers whether the activities in question require specialized legal skills or knowledge;[16] the "Traditional Area of Practice" test, which defines the practice of law as activities traditionally performed by lawyers;[17] the "Incidental to Non-Law Activity" test, which excludes from the practice of law activities regularly performed by nonlawyers as an incident to another commercial transaction;[18] and the "Public Interest" test, whereby courts weigh the public interest in protecting clients from incompetent representation against the interest in reducing the costs of professional services to consumers.[19]

Against this backdrop, three broad and non-exclusive categories of activities have commonly been found to constitute the practice of law: representing or advocating on behalf of another, particularly before a judicial tribunal or administrative agency; preparing legal

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[14] *See, e.g.* State *ex rel.* Florida Bar v. Sperry, 140 So. 2d 587, 591 (Fla. 1962) (defining the practice of law "is nigh onto impossible . . . .").

[15] The Texas UPL statute, for example, defines the practice of law as including, among other things, "the giving of advice or the rendering of any service requiring the use of legal skill or knowledge . . . ." TX. CODE ANN. § 81.101(a). It further provides that, "[t]he definition in this section . . . does not deprive the judicial branch of the power . . . to determine whether other services and acts not enumerated may constitute the practice of law." TX. CODE. ANN. § 81.101(b).

[16] *See, e.g.*, Baron v. City of Los Angeles, 469 P.2d 353, 358 (Cal. 1970).

[17] *See, e.g.*, State Bar v. Arizona Land Title & Trust Co., 366 P.2d 1, 15 (Ariz. 1961).

[18] *See, e.g.*, Cultum v. Heritage House Realtors, Inc., 649 P.2d 630, 633 (Wash. 1985).

[19] *See, e.g.*, *id*. at 633–64. These and several additional tests are described in full in Derek Denckla's article, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, *supra* note 9 at 2588–89.

instruments or documents; and the giving of legal advice or counsel.[20] Most courts agree that, because of the abstract nature of the practice of law definition, determinations as to whether a particular activity constitutes unauthorized practice must be made on a case-by-case basis.[21]

C. External Limitations

The reach of UPL regulation, and likewise the definition of "practice of law," is guided by three external constraints: antitrust laws;[22] the constitutional guarantee of due process;[23] and the constitutional limitations on laws discriminating against interstate commerce.[24]

1. Antitrust Laws

In *Goldfarb v. Virginia State Bar*,[25] the Supreme Court considered for the first time whether the practice of law qualifies as "trade or commerce" under the Sherman Antitrust Act. Answering this question in the affirmative, the Supreme Court held that the Sherman Act's prohibition of anti-competitive restraints on trade extends to the activities of state and local bar associations.[26] A number of individuals and organizations have since, with limited success, relied upon antitrust laws to challenge overly-broad applications of UPL doctrine.

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[20] *See generally*, Susan W. Harrell & Karen McGuffee, *Common Ground? The Definition of "The Practice of Law" in the United States*, 14 PROF. LAW. 18 (2004).

[21] *See* Oregon State Bar v. Security Escrows, Inc., 377 P.2d 344 (Or. 1962) ("In Oregon, as in many other jurisdictions, the particularized definition of 'the practice of law' was committed to case-by-case development by the courts.").

[22] *See* SHERMAN ANTITRUST ACT, 15 U.S.C. § 1, *et seq*.

[23] U.S. CONST. AMEND. XIV.

[24] U.S. CONST. art. 1, § 8.

[25] 421 U.S. 773 (1975) (striking down a minimum fee schedule for title examinations proscribed by the Fairfax County Bar Association).

[26] *Id*. at 785–87.

Most notably, in *Surety Title Insurance Agency v. Virginia State Bar*,[27] a federal district court sustained an antitrust challenge to Virginia's UPL procedures, under which the state's unauthorized practice committee, comprised entirely of lawyers, was given the authority to issue binding advisory opinions without any participation whatsoever from non-interested parties.[28] The court found that the procedures constituted an illegal boycott and an attempt to monopolize in violation of Sections 1 and 2 of the Sherman Act, reasoning that Virginia's process for issuing UPL opinions "place[d] attorneys in the unique position of being able to define the extent of their own monopoly."[29] In so concluding, the court rejected a defense raised by the Virginia Bar under the "state action" exception to the Sherman Act, which shields conduct intended to further official state policy from antitrust liability.[30] The court explained that, even though the Virginia Bar was authorized to regulate unauthorized practice, "the harms of the system greatly outweigh[ed] its purported benefits."[31]

Only six months after the Eastern District's decision in *Surety Title*, however, the Supreme Court clarified the state action exception in *Bates v. State Bar of Arizona*.[32] The Supreme Court held that an Arizona Bar disciplinary rule prohibiting advertising of legal

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[27] 431 F. Supp. 298 (E.D. Va. 1977); *vacated and remanded*, 571 F.2d 205 (4th Cir. 1978). On remand, the district court was instructed to withhold decision until the conclusion of a challenge to Virginia's unauthorized practice procedures raised in a Virginia state court. In the interim, Virginia revised its UPL procedures to address many of the issues raised by the district court. *See* Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 Stan. L. Rev. 1, 55 (1981).

[28] *Surety Title*, 431 F. Supp. at 308–309.

[29] *Id*. at 308.

[30] *See* Parker v. Brown, 317 U.S. 341, 350 (1943) (observing that nothing in the language or history of the Sherman Act suggests that Congress intended to restrain states from authorizing certain anticompetitive activities within their borders).

[31] *Surety Title*, 431 F. Supp. at 307.

[32] 433 U.S. 350 (1977).

services did not violate the Sherman Act because the rule was an act of the state, was "clearly and affirmatively expressed," and was subject to "active" "state supervision."[33] Notably, the Supreme Court's analysis did not include a discussion as to whether the state's interest in regulating legal advertising outweighed the federal interest in insuring free and fair competition. This omission, some scholars have argued, calls into question the validity of the balancing approach taken in *Surety Title*.[34]

2. **Due Process**

Importantly, however, the court's reasoning in *Surety Title*—that the Bar should be constrained in defining the parameters of its own monopoly—is also central to the second restraint on UPL regulation: the constitutional guarantee of due process. The Fourteenth Amendment protects individuals against deprivations of life, liberty, and property without due process of law, and has been interpreted as including the right to practice one's profession.[35]

In *Gibson v. Berryhill,*[36] for example, the Supreme Court affirmed an order enjoining the Alabama Board of Optometry from initiating delicensing proceedings against certain individuals found to have engaged in unprofessional conduct. Under Alabama Law, the Board, whose membership was limited to independent optometrists *not* employed by others, was authorized to issue and revoke licenses for the practice of optometry.[37] Acting under this authority, the Board initiated delicensing proceedings against the plaintiffs, who were licensed optometrists employed

[33] *Id*. at 362.

[34] *See* Rhode, *supra* note 27 at 54 (acknowledging these criticisms, but noting that, "On that point, no federal court has spoken."). At least one court has since found the state action exception available as a defense to state UPL enforcement proceedings. *See* Lender's Service, Inc. v. Dayton Bar Ass'n, 758 F. Supp. 429 (S.D. Ohio 1991).

[35] Martin v. Stites, 203 F.Supp. 2d 1237, 1250 (D. Kan. 2002) (citing Greene v. McElroy, 360 U.S. 474, 492 (1959)).

[36] 411 U.S. 564 (1973).

[37] *Id*. at 570 n. 7.

by Lee Optical Co., on the basis that, *by accepting employment with a corporation*, they were aiding and abetting in the unauthorized practice of optometry.[38] Reasoning that, "[b]ecause . . . the Board of Optometry's efforts would possibly redound to the personal benefit of members of the Board," the Supreme Court held that the possibility of bias, either through prejudgment of the facts or personal interest, "constitutionally disqualified" the board from entertaining unauthorized practice charges of the type in question.[39]

Whether *Gibson*'s reasoning applies with equal force in the context of UPL regulation is unclear. In *Ferguson v. Skrupa*,[40] the Supreme Court sustained the constitutionality of a Kansas law restricting the practice of "debt adjusting" to licensed attorneys.[41] The court stated:

> Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to [the courts]. . . . [W]e emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws . . . because they may be unwise, improvident, or out of harmony with a particular school of thought.'[42]

As will be discussed in Part III.C., however, *Ferguson* is distinguishable from *Gibson* in that it concerns the substantive, rather than procedural guarantees of the Due Process Clause.

3. The Dormant Commerce Clause

The final restraint on UPL regulation is the Commerce Clause of Article 1, section 8 of the U.S. Constitution. By vesting Congress with the authority to "regulate commerce . . . among the states," the Commerce Clause also forbids, by implication, "economic protectionism"

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[38] *Id*. at 567–68.

[39] *Id*. at 587–579.

[40] 372 U.S. 726 (1963)

[41] *Id* at 732–733. The statute defined "debt adjusting" as entering into a contract with a debtor "whereby the debtor agrees to pay a certain amount of money to a [debt adjuster] who shall for a consideration distribute the same among certain specified creditors . . . ." *Id*. at 727.

[42] *Id*. at 731–32 (citing Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955)).

through "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[43] This aspect of Article 1, section 8 is popularly known as the "Dormant Commerce Clause."[44]

The Supreme Court has adopted a two-tiered analysis for determining the validity of state regulations under the Dormant Commerce Clause. First, if the provision "directly regulates or discriminates against interstate commerce," or if "its effect is to favor in-state economic interests over out-of state interests,"[45] then it is unconstitutional unless it "promotes a legitimate state interest that cannot be achieved through any reasonable non-discriminatory means."[46] If, however, the provision only indirectly affects interstate commerce, then it will survive constitutional scrutiny "unless the burden imposed on such commerce is clearly excessive in relation to putative local benefits."[47]

Applying this test in the context of UPL regulation, in *National Revenue Corp. v. Violet*[48] the Court of Appeals for the First Circuit struck down a Rhode Island statute which defined the business of debt collecting as the practice of law. Deciding the case under the first prong of the Supreme Court's Dormant Commerce Clause analysis, the court held that "a statute that forecloses out-of-state debt collectors, en masse, from seeking to collect debts from Rhode Island citizens imposes . . . a substantial burden [on commerce], both 'on its face [and] in practical

[43] W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 205 (1994) (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273–274 (1988)).

[44] *Healy*, 512 U.S. at 212 (Scalia, J., dissenting).

[45] Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 559 (1986) (emphasis added).

[46] Pike v. Bruce Church, Inc. 397 U.S. 137, 142 (1970).

[47] *Id.*

[48] 807 F.2d 285 (1st Cir. 1986).

effect.'"[49] By limiting debt adjusting activities to members of the Rhode Island bar, the court reasoned, the statute favored a class of individuals comprised almost exclusively of state citizens at the expense of out-of-state debt collectors.[50] The court further found that, even had Rhode Island asserted an interest in restricting the practice of debt adjusting, which it did not, the statute would still have been unconstitutional in light of several non-discriminatory alternatives.[51] Specifically, the court pointed to the fact that twenty-seven other states regulated debt adjusting through licensing schemes, rather than UPL doctrine.[52]

II. APPLICATION OF UPL DOCTRINE TO THE BUSINESS OF PUBLIC INSURANCE ADJUSTING

Since 1934, when unauthorized practice of law doctrine was first found to bar certain public adjusting activities,[53] various courts have wrestled with the question of whether and under what circumstances public insurance adjusting—or, indeed, whether the entire industry—may be regarded as the practice law.[54] Using the Indiana Supreme Court's decision in *Professional Adjusters, Inc. v. Tandon*[55] as a starting point, this section will highlight the challenges of

[49] *Id*. at 289 (citing Maine v. Taylor, 477 U.S. 131, 138 (1986)); *see also* Real Estate Bar Association for Massachusetts, Inc. v. National Real Estate Information Services, 2009 U.S. Dist. LEXIS 31014 *25 (D. Mass. 2009).

[50] *Violet*, 807 F.2d at 290.

[51] *Id*.

[52] *Id*.

[53] Fitchette v. Taylor, 191 Minn. 582 (1934).

[54] The legal issues surrounding the intersection between UPL doctrine and public adjusting arise in one of two situations. First, state UPL committees can directly initiate injunctive proceedings against public adjusters who they believe to be engaging in unauthorized practice. Because this process can be time consuming and expensive, however, individual UPL enforcement actions are uncommon. Far more common is the situation where a public adjuster has filed suit seeking the recovery of unpaid fees, and either the policyholder or his insurer challenges the validity of the underlying contract.

[55] 433 N.E. 2d 779 (Ind. 1982).

applying UPL doctrine to the business of public adjusting, and will provide an overview of how states currently approach this issue.

A. The "Twilight Zone": Professional Adjusters, Inc. v. Tandon

The textbook case for discussing the nexus between UPL doctrine and the business of public insurance adjusting is *Professional Adjusters, Inc. v. Tandon*, which involved the validity of a contract for the delivery of public adjusting services. As a defense to the enforcement of the contract, the defendant, Tandon, challenged the legality of Indiana's public adjuster licensing statute, which authorized public adjusters to "negotiate[e] for, or effect[] the settlement of" claims for loss or damages to property under insurance policies on behalf of an insured.[56] If the statute authorized public adjusters to engage in the practice of law in violation of the state constitution, Tandon argued, then the underlying contract would be invalid, and the plaintiff, Professional Adjusters, Inc. (PAI), would not be entitled to recover uncollected fees.[57]

In a 3–2 decision, a majority of the court found that the activities permitted under the statute were, "pure and simple, the practice of law."[58] The court justified this conclusion on the basis that the statute authorized public adjusters to determine rights and liabilities under insurance contracts and to negotiate settlements—activities which, in the majority's view, necessarily require the interpretation of contractual terms.[59] The court was not persuaded, moreover, by the fact that PAI only made a determination of the insured's loss and submitted a

[56] IND. CODE § 27-1-24-1 (1975).

[57] *Tandon*, 433 N.E.2d at 780

[58] *Id.*at 782.

[59] *Id*. at 783.

claim to his insurer. "The fact that the negotiations did not reach the stage where there was a bargaining process," the court explained, "[did] not make it any less [sic] negotiation."[60]

In dissent, Justice Hunter criticized the majority's attempt to draw a bright line between the activities that can and cannot be performed by nonattorney public adjusters. As a practical matter, he explained, the drawing of such a line will always be arbitrary—especially with regard to activities such as negotiating settlements, examining damaged property, and assessing pecuniary losses, which lie within the "twilight zone" between lawful conduct and unauthorized practice.[61] Accordingly, he concluded that, whereas the public interest in "facilitating the expeditious settlement of [disputes]" and "placing assureds on the same footing as insurance companies" will often outweigh concerns about incompetent representation, the court should have evaluated the lawfulness of PAI's activities on an individualized basis, rather than striking down the statute in its entirety.[62]

B. Spread of the Pragmatic Approach

The disagreement between *Tandon*'s majority and dissenting opinions continues to provoke debate. In general, while many courts agree with the majority's conclusion that negotiating and settling insurance claims on behalf of an insured constitutes the practice of law, particularly when there is a coverage dispute,[63] Justice Hunter's opinion, which suggests the need for a pragmatic, case-by-case approach to UPL determinations involving adjusting activities, is representative of recent state trends.

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[60] *Id*.

[61] *Id*. at 785 (Hunter, J., dissenting).

[62] *Id*. at 786–787.

[63] *See*, e.g. Duncan v. Gordon, 476 So.2d 896 (La. 1985); Gross v. Reliance Ins. Co., 462 N.Y.W.2d 776 (N.Y. Sup. Ct. 1983); Cincinnati Bar Ass'n v. Cromwell, 695 N.E.2d 243 (Ohio 1998).

Two concurrent developments in public adjusting and UPL regulation explain the shift toward a pragmatic approach. Most significantly, the vast majority of states have enacted public adjuster licensing statutes.[64] And while it is true that, just because an activity is licensed does mean that it is exempt from UPL regulation, since it is the duty of courts, not legislatures, to regulate the practice of law,[65] courts are unlikely to bar an entire profession when their state legislature has determined that the public is adequately protected through a comprehensive licensing scheme.[66] Instead, consistent with the growing consensus among the courts that it is both impossible and undesirable to define precisely what is, and what is not, the "practice of law," [67] most courts would agree that the determination of whether a public adjuster has engaged in unauthorized practice "is best decided in the context of an actual case or controversy."[68]

C. Blanket Prohibitions of Public Adjusting

Nevertheless, at least one state, Arkansas, continues to regard public adjusting as unlawful under any circumstances. Under Arkansas law, individuals who are "licensed as an adjuster or employed as an adjuster by an insurer" are specifically exempted from the state's unauthorized practice statute.[69] Significantly, however, the Arkansas Insurance Code defines an "adjuster" as "an individual . . . who . . . investigates and negotiates, *on behalf of the insurer*,

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[64] *See* Goodman, *supra* note 1 at 42.

[65] *See* Scheehle v. Justices of the Supreme Court of Ariz. 120 P.3d 1092, 1099 (2005) ("Although the legislature may, by statute, regulate the practice of law, such regulation cannot be inconsistent with the mandates of this Court.").

[66] *See Gross*, 119 Misc.2d at 272.

[67] *See supra* notes 13–21 and accompanying text.

[68] *See* Linder v. Insurance Claims Consultants, Inc , 560 S.E.2d 612, 618 (S.C. 2002) (citing In re Unauthorized Practice of Law Rules, 309 S.C. 304, 305 (1992)). In addition to negotiations involving coverage issues, there are certain adjusting activities which courts have routinely found to constitute the practice of law, such as advising policyholders of their legal rights, duties, or privileges and advising whether or not to settle their claim. *Id*. at 621.

[69] ARK. CODE. ANN. § 16–22–501.

settlement of claims arising under insurance contracts."[70] Adjusters who work on behalf of policyholders are ineligible for licenses and thus subject to state unauthorized practice laws. Accordingly, Arkansas insurance officials have concluded that public adjusting, as a profession, constitutes the practice of law.[71]

Arkansas is not unique. Of the five other states that do not license public adjusters, two of these states have licensing requirements for insurance company adjusters.[72] Like Arkansas, these states may eventually conclude that, by licensing insurance company adjusters but not public adjusters, their legislatures intended to completely prohibit public adjusting as the unauthorized practice of law. Likewise, the three states that do not license any type of adjusting activities may also conclude that public adjusting is illegal.[73] Indeed, until very recently, Kansas maintained that public adjusting was prohibited, despite the fact that its state law made no specific reference to adjusters of any kind.[74]

III. POTENTIAL LEGAL CHALLENGES TO BLANKET PROHIBITIONS OF PUBLIC INSURANCE ADJUSTING

As most states have recognized, the most effective way to ensure that the public receives both the benefits of public insurance adjusting and adequate protection against unscrupulous adjusting practices is to adopt state licensing requirements. Until such time as every state licenses public adjusters, however, action must be taken to ensure that they are allowed to

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[70] ARK. CODE. ANN. § 23–64–102(4)(A) (emphasis added).

[71] *See Arkansas Insurance Consumers Warned of Illegal Property Adjusters*, Ark. Ins. Dep. Press Release (August 24, 1999) ("It's akin to practicing law without a license.") The state encourages consumers to report "illegal activities of public adjusters," whose names are forwarded to the Arkansas Supreme Court. *Id*.

[72] *See* AL. CODE. ANN. § 27–9–1, *et seq*.; AK. STAT. ANN. § 21.27.010, *et seq.*

[73] These states include: South Dakota, Virginia, and Wisconsin.

[74] *Public insurance adjusters not permitted in Kansas*, Kansas Ins. Dep. Press Release (Dec. 19, 2007). On April 13, 2009, Kansas signed into law the Kansas Public Adjusters Licensing Act, which will go into effect in July 2009. *See* H.B. 2052 (Kan. 2009).

practice anywhere in the country. In practice, this means that states must apply UPL doctrine pragmatically and evaluate the conduct of public adjusters on a case-by-case basis. With this goal in mind, this section will analyze four potential legal challenges to blanket prohibitions of public adjusting.[75]

A. Challenging the State's Interpretation of the Law

The first and most basic way to challenge blanket prohibitions of public adjusting is to seek a declaration, either from a court or the state's unauthorized practice committee, that the state (most likely the insurance commissioner) has misinterpreted its unauthorized practice laws. No state in the country, including Arkansas, specifically defines public adjusting as the practice of law. Rather, as discussed above,[76] this conclusion may only be reached by reading state laws as impliedly prohibiting non-attorneys from assisting policyholders in the settlement of insurance claims. This interpretation is strongest when the state licenses or exempts from UPL regulation insurance company adjusters, but not public adjusters.

An equally persuasive argument can be made, however, that the fact that a statutory scheme makes no reference to public adjusting implies only that the profession *should* be allowed, subject to the possibility that individual adjusters may be punished for *specific instances* of unauthorized practice. This interpretation, which has been applied to laws of this type in Alaska,[77] is consistent with the pragmatic approach most states now apply to UPL doctrine.

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[75] These arguments presuppose that, either the state's justification for the prohibition is grounded upon a belief that public adjusting, as a profession, constitutes the practice of law, or that the state, as an act of in-state protectionism, has limited public adjusting activities to members of the state bar. Were a state to completely prohibit public adjusting by attorneys and non-attorneys alike, the courts are not likely to interfere. *See generally* Ferguson v. Skrupa, 372 U.S. 726, 730–31 (1963).

[76] *See supra* Part II.C.

[77] *Frequently Asked Questions*, Alaska Div. of Ins. ("[W]hile public adjusters are not licensed under the insurance law, licensing *may be required* under other provisions of Alaska laws. In particular, public adjusting *may* constitute

Additionally, it is also the most sensible interpretation in light of the fact that insurance company adjusters, who handle claims from beginning to end, are more likely than public adjusters to participate in negotiations involving coverage disputes.[78]

B. A Legal Monopoly?

Should an unauthorized practice committee conclude that public adjusting is akin to the practice of law, such a determination may be challenged under federal antitrust laws. Specifically, it may be argued that the state's UPL procedures, to the extent that they empower a committee comprised exclusively of lawyers to limit the entire profession of public adjusting to members of the bar, constitute an illegal boycott and attempt to monopolize under Sections 1 and 2 of the Sherman Act.

The crux of an argument based upon antitrust law will be the "state action" exception, which exempts anticompetitive state regulations from antitrust liability where: (1) the regulation is "clearly articulated and affirmatively expressed as state policy;"[79] and (2) the policy is "actively supervised by the state itself."[80] To overcome this defense, it should be argued that the policy of the state, as embodied in its unauthorized practice laws, is simply to authorize UPL committees to make *individualized determinations* of liability, not to empower them to define an

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the practice of law and, therefore, *may* require a license to practice law *depending on the nature and scope of the activities performed* . . . .") (emphasis added), *available at* http://www.commerce.state.ak.us/insurance/pub/faq.pdf.

[78] Policyholders whose claims involve coverage disputes are likely to seek the aid of an attorney rather than a public adjuster. Moreover, when coverage issues arise, public adjusters will recommend that the client retain council. *See* Goodman, *supra* note 1 at 44.

[79] Southern Motor Carriers Rate Conference v. U.S., 471 U.S. 48, 57 (1985). As noted in *Lender's Service, Inc. v. Dayton Bar Ass'n*, even though UPL committees are comprised of private parties, since their authority flows from the state's highest court, their actions are "deemed in effect acts of the state itself." 758 F. Supp. 429, 435 (S.D. Ohio 1991).

[80] Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 105 (1980).

entire profession as the practice of law.[81] It should further be argued that the harm of vesting UPL committees with such authority significantly outweighs the state's interest in protecting consumers from incompetent representation.[82]

There are two weaknesses to this argument. First, courts have interpreted the "clear articulation" requirement as demanding only that the regulation be a reasonable and foreseeable exercise of authority vested by the state.[83] By defining the practice of law broadly, it will be argued, the legislature intended UPL committees to have wide discretion in declaring certain activities as unlawful. Additionally, as a matter of policy, the state action exception is rooted in concerns about federal interference with state matters. As noted in *Bates*, "the regulation of the activities of the bar is at the core of the state's power to protect the public."[84] Thus, the state action exception will likely be a significant obstacle to a challenge under antitrust law.[85]

C. Procedural Due Process and the Deprivation of the Right to Practice One's Profession

Nonetheless, the core argument in support of an antitrust challenge—that a committee comprised solely of lawyers may not restrict the entire profession of public adjusting to members of the bar—can easily be recast as a due process challenge under the Fourteenth Amendment. As explained by the court in *Surety Title*,[86] it is "offensive to notions of basic fairness" to allow a

[81] *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 790 (1975) ("[W]e need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent.").

[82] *See* Surety Title Ins. Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298, 307 (E.D. Va. 1977).

[83] Lender's Service, Inc. v. Dayton Bar Ass'n, 758 F.Supp. 429 (S.D. Ohio 1991) (citing Hybud Equipment Corp. v. City of Akron, 742 F.2d 949 (1984)).

[84] Bates v. State Bar of Arizona, 433 U.S. 350, 361 (1977).

[85] An important limitation of this argument is that it applies only to decisions by UPL committees. In Arkansas, for example, it is the state's insurance department that has equated public adjusting with the practice of law.

[86] *See supra* notes 27–31 and accompanying text.

group with a "direct pecuniary interest" in establishing an "expansive definition of the practice of law" to deprive an entire class of individuals of their right to practice their profession.[87] This is especially true given the availability of an alternative procedure that promises to be fairer to the parties involved: individualized determinations.[88]

Again, there are two potential obstacles to this argument. First, it may be argued that blanket prohibitions do not entirely preclude public adjusters from practicing their profession—they can still work for insurers.[89] It is not so clear, however, that the constitutional right to practice one's profession is so limited.[90] As an illustration, imagine the response one would receive upon telling a state public defender that, although she can no longer represent criminal defendants, she can always work for the prosecution. In both cases, compelling arguments may be made as to how the professions differ.

The second obstacle is the *Ferguson* decision, where the Supreme Court upheld a Kansas statute defining debt adjusting as the practice of law.[91] Significantly, however, *Ferguson* dealt only with the narrow *substantive* issue of whether the Due Process Clause prohibits state legislatures from determining that, in the interest of the public, certain business practices must be performed by an attorney. By contrast, arguments based upon *Gibson* and *Surety Title* concern

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[87] Surety Title Ins. Agency, Inc. v. Virginia State Bar, 431 F.Supp. 298, 308 (1977); *see* Gibson v. Berryhill, 411 U.S. 564, 578–579 (1973). *See also* Rhode, *supra* note 27 at 51 (observing that "The very concept of due process presupposes a dispassionate decisionmaker . . . .").

[88] *See* Guy M. Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967). Individual determinations are fairer because they afford individual adjusters the opportunity to argue that their conduct, under the circumstances, did not constitute the unauthorized practice of law. Additionally, they minimize the possibility of bias by watering down committee members' personal interest in the outcome of the decision.

[89] *See* State ex rel. Stovall v. Martinez, 375 Kan. App. 2d, 9, 13 (Kan. 2000).

[90] *See* Bd. of Regents of State Colleges, et al. v. Roth, 408 U.S. 564, 573 (1973) (recognizing a right "to engage in any of the common occupations of life").

[91] *See supra* notes 40–42 and accompanying text.

the *procedural* guarantees of due process, such as the right to a fair and impartial hearing when one's life, liberty, or property is at stake. Thus, although *Ferguson* spoke to directly to the issue of overly-broad UPL regulation under the Due Process Clause, it has no bearing on the extent to which due process demands certain procedural safeguards when depriving one of their right to practice their profession.

D. Challenging Blanket Prohibitions as a Form of Economic Protectionism

The final and strongest argument against blanket prohibitions of public insurance adjusting derives from the Dormant Commerce Clause's limitation on in-state economic protectionism. By labeling the entire profession of public adjusting as the practice of law, including activities that, standing alone, do not require the application legal skills or knowledge, blanket prohibitions "place an impermissible burden on interstate commerce."[92] First, such prohibitions directly discriminate against out-of-state competition by conferring the exclusive right to provide public adjusting services—and to reap the associated economic benefits—upon the members of state bar associations,[93] which are comprised almost entirely of in-state residents.[94] Secondly, the state's interest in protecting the public against incompetent representation can be achieved through non-discriminatory means: state licensing requirements.[95]

Arguably, the interstate effects of protectionist measures are not as great in the public adjusting context as they are in the debt collecting context, which was the focus of the First

[92] *See* Real Estate Bar Association for Massachusetts, Inc. v. National Real Estate Information Services, (REBA) 2009 U.S. Dist. LEXIS 31014 *25 (D. Mass. 2009) (enjoining REBA from defining real estate conveyancing as the practice of law).

[93] *See* National Revenue Corp. v. Violet, 807 F.2d 285, 290 (1st Cir. 1986).

[94] *REBA*, 2009 U.S. Dist. LEXIS at *31 ("REBA contends that . . . [UPL doctrine] 'applies even-handedly against all non-attorneys, whether they reside in Massachusetts or they reside out-of-state.' This argument is flawed, however, because the majority of individuals who are licensed to practice law in Massachusetts would undoubtedly also be Massachusetts residents.").

[95] Or, alternatively, by applying a case-by-case approach to unauthorized practice determinations.

Circuit's decision in *Violet*.[96] No doubt, the anticompetitive effects of limiting the practice of debt collecting to in-state lawyers would be severe; national businesses frequently rely on such services.[97] The effect of similar restrictions on public adjusting, however, should not be discounted. For example, in the wake of Hurricanes Katrina and Rita, had Louisiana not lifted its ban on non-attorney public adjusting,[98] thousands of consumers would have been forced to make a costly choice between hiring a local attorney (assuming an attorney would have been available) and settling their claims without the assistance of an expert. In any event, any counter-arguments are likely to be mitigated by the fact that forty-three of fifty states have found it sufficient to regulate the profession through comprehensive licensing schemes.

IV. CONCLUSION

In sum, by pushing for uniform state licensing procedures, the public insurance adjusting industry is on the right track toward securing national uniformity in the treatment of public adjusters under state UPL provisions. In the meantime, however, public adjusters must be assured that they can practice anywhere in the country without the risk of civil or criminal liability. To this end, this paper has presented four legal bases upon which to challenge blanket prohibitions of public adjusting. Considered collectively, these arguments are likely to weigh heavily on a state court's interpretation of a broadly-worded UPL statute. Independently, they each highlight from a different angle the unfairness of treating the profession of public insurance adjusting and the "practice of law" as one and the same.

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[96] *See supra* notes 48–52 and accompanying text.

[97] *Violet*, 807 F.2d at 288.

[98] *See* David. J. Rosenberg, et. al., *Insurance Industry Woes in the Aftermath of Hurricanes Katina and Rita*, 73 DEF. COUNS. J. 141, 146 (2006).