

Shifting Gears

Toward Better Enforcement of the
Prohibition against the Unauthorized
Practice of Public Adjusting

Josh Shettle

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All 50 states should enact statutes providing for the licensing of public insurance adjusters. Over the past several decades, public adjusters have successfully fought the allegation that public adjusting is the “unauthorized practice of law.” As of April 2012, 45 States and the District of Columbia provide for the licensing and regulation of public adjusters.¹ Two states, Alaska and Arkansas, still consider public adjusting the unauthorized practice of law. The remaining three states – Alabama,² Wisconsin and South Dakota – allow public adjusting, but do not have any licensing requirements.³ If this trend continues, public adjusting will likely become a licensed and regulated profession in all 50 states. As a result, state legislatures and insurance departments should turn their attention towards an issue that affects both consumers, public adjusters and the insurance industry as a whole – the unauthorized practice of public adjusting (“UPPA”).

The UPPA occurs when “an individual acts on behalf of or aids in any manner an insured for compensation in the negotiation, adjustment and settlement of coverage and claim benefits in a first-party context without being licensed and under the jurisdiction of [the relevant state’s department of insurance].”⁴ The UPPA has the effect of harming insureds, because unlicensed practice may compromise the benefits received by insureds. Thus, the UPPA is contrary to the public policy of the 45 states that have enacted public adjuster licensing statutes.

¹ Licensing and Education Requirements for Public Adjusters, 0110 REGSURVEYS 61 (West May 2011); Brian S. Goodman, NAPIA Legislative Blog, A Tale of Three States, <http://www.napia.com/news/documents/NAPIALegislativeBlog3-28-12.pdf> (last visited April 24, 2012).

² The Alabama legislature is currently considering legislation that would provide for the licensing and regulation of public adjusters. As a result, it may soon become the 46th state to regulate the activities of public adjusters. Goodman, *supra* note 1.

³ Ronald R. Reitz, Hazard Insurance Recovery: A Regulatory Overview, SERVICE MANAGEMENT ONLINE (March 2010), available at http://www.qualityclaims.com/articles/svm1003_Quality.pdf (last visited April 24, 2012).

⁴ United Policyholders, Well Adjusted: Masood Khan, http://www.uphelp.org/news_articles/article_welladjusted_June2010.html (last visited April 24, 2012).

Introduction

In October of 2005, the National Association of Insurance Commissioners (“NAIC”) adopted the Public Adjuster Licensing Model Act (“Model Act”).⁵ The Model Act defines a “public adjuster” as “any person who, for compensation or any other thing of value, acts on behalf of an insured,” and sets out the qualifications and procedures for the licensing of public adjusters, thereby providing a framework under which a State can ensure that its citizens may reap the benefits of public adjusting, yet are protected from unlicensed, fly-by-night operators whose business practices pose a threat to consumers.⁶ Many States that had no statute providing for the licensing and regulation of public adjusting prior to 2005 adopted the Model Act in whole, while others enacted statutes based heavily on the Act.

With a view towards protecting consumers, state licensing statutes typically set minimum requirements that an applicant must satisfy in order to obtain a license as a public adjuster. For example, Florida’s Insurance Adjuster’s Law⁷ requires that an applicant for a public adjuster’s license be 18 years of age, permitted to work in the United States, have a good business reputation, have sufficient experience, training or instruction in the adjusting of damages under insurance contracts, possess adequate knowledge of the terms and laws relating to such contracts, maintain a bond with the department of insurance, and pass an examination issued by the department.⁸

⁵ NAIC Model Laws, Regulations and Guidelines 228–1.

⁶ *Id.*

⁷ Fla. Stat. § 626.851 *et seq.* (2012).

⁸ § 626.865(1)–(3).

If an insured mistakenly hires an unlicensed public adjuster, the contract with the adjuster is voidable.⁹ However, the insured may have to move to void the contract prior to performance of the contract and the payment of the adjuster; if he or she pays the unlicensed public adjuster and the adjuster has performed under the contract, the insured likely will not be able to recoup this payment.¹⁰ These requirements serve to protect insureds from individuals who are not qualified to act as a public adjuster because they lack either the ability or trustworthiness required of a competent public adjuster.

Finally, public adjusters typically handle first party insurance claims resulting from property damage, such as damage caused by flood, fire, hurricane, windstorm, smoke, riot, vandalism or theft.¹¹ They also adjust business losses resulting from property damage, including business income, builders' risk, leasehold interest, mechanical and electrical breakdown, and extra expense and expediting expense.¹² However, perhaps the most important aspect of the role of the public adjuster lies in the fact that the public adjuster is an agent of the insured who has a duty to act in the best interests of the insured.¹³ As a result, the public adjuster serves as an

⁹ See, e.g., *Bldg. Permit Consultants, Inc. v. Mazur*, 122 Cal. App. 4th 1400 (2004) (holding that plaintiff firm's failure to obtain a license to act as a public insurance adjuster voided its agreement with defendant insured) (citing Cal. Ins. Code § 15006(b) (2012) ("Any contract for services regulated by this chapter that is entered into by an insured with any person who is in violation of subdivision (a) may be voided at the option of the insured, and the insured shall not be liable for the payment of any past services rendered, or future services to be rendered, by that person under that contract or otherwise.")).

¹⁰ *Electrovoice Int'l, Inc. v. Sarasohn Adjusting Co., Inc.*, 567 N.Y.S.2d 568 (Sup. Ct. 1990) (holding that defendant who violated licensing statute is not required to return compensation paid after completion of job, even though he would have been unable to sue upon the contract).

¹¹ NAPIA, Welcome to the National Association of Public Insurance Adjusters, <http://www.napia.com/> (last visited April 24, 2012).

¹² *Id.*

¹³ 46A C.J.S. Insurance § 1874.

effective counterweight to the company or independent adjuster, who owes a similar duty to protect the best interests of the insurer.

This paper seeks contextualize the harms to the insurance industry and the public presented by the UPPA and, in doing so, search for ways to minimize and hopefully even prevent those harms. Part I identifies the policy reasons why the UPPA poses a risk to insureds, insurers and licensed public adjusters. Part II examines the statutory and regulatory framework that state departments of insurance use to combat the UPPA. Part III reviews four recent enforcement actions brought by four different states and notes that state licensing statutes can have a profound effect on the effectiveness of enforcement actions. Part IV presents several strategies that the public adjusting industry should advocate to further curb, and hopefully prevent, the UPPA.

I. The Unauthorized Practice of Public Adjusting

In recent years, concerns over the UPPA have risen amongst the 45 states that have public adjuster licensing laws on their books. Prior to the financial crisis of 2008, such concerns usually accompanied catastrophic events, such as hurricanes, wildfires or hailstorms, and often centered on contractors who engaged in the UPPA through offering to negotiate, adjust or settle claims with an insurance company on behalf of the insured.¹⁴ Contractors that offer adjusting services that are not licensed public adjusters present serious problems for both the insured and insurer. First, although a contractor's expertise is helpful in determining the extent of the property damage and in creating an estimate of the costs necessary for its repair, that expertise does not extend to an understanding of the very technical terms found in most insurance

¹⁴ William F. Merlin and Mary Kestenbarum, THE UNLICENSED PRACTICE OF LAW AND UNLICENSED PUBLIC ADJUSTING 17, http://www.merlinlawgroup.com/user_uploads/file/Papers_Presentations/The%20Unlicensed%20Practice%20of%20Law.PDF (last visited April 24, 2012).

policies.¹⁵ Without the minimum understanding of the laws and regulations affecting insurance policies that is provided by the certification of public adjusters, consumers could easily fall prey to individuals who are good salesman, but poor adjusters. Second, even if the contractor in question is also a licensed public adjuster, there is an undeniable conflict of interest where an individual or company acts as both contractor and public adjuster to the same claim. Several states have formally recognized the adverse affects inherent in this conflict of interest and, unsurprisingly, prohibit contractors from performing the dual role of public adjuster and contractor on the same claim.¹⁶

The economic climate left in the wake of 2008 financial crisis has only increased the concerns of many states that construction firms will pose as public adjusters. In fact, this concern has spread to other areas besides the more traditional construction and water and smoke remediation firms. For example, accounting companies that offer “loss services” may be engaging in the UPPA.¹⁷ Although public adjuster licensing acts generally do not prohibit an employee of the insured from aiding in the adjusting, negotiation or settlement of a claim because the employee is usually not otherwise compensated for their adjusting activity, an outside consultant that is retained by an insured for the purpose of aiding the insured with a claim – such as an accounting firm offering loss services – very likely falls within the ambit of

¹⁵ United Policyholders, Well Adjusted: Masood Khan, http://www.uphelp.org/news_articles/article_welladjusted_June2010.html (last visited April 24, 2012).

¹⁶ See, e.g., Fla. Stat. § 626.8795 (2012) (“A public adjuster may not participate, directly or indirectly, in the reconstruction, repair, or restoration of damaged property that is the subject of a claim adjusted by the licensee; may not engage in any other activities that may be reasonably construed as a conflict of interest, including soliciting or accepting any remuneration from, of any kind or nature, directly or indirectly; and may not have a financial interest in any salvage, repair, or any other business entity that obtains business in connection with any claim that the public adjuster has a contract or an agreement to adjust.”)

¹⁷ Khan, *supra* note 15.

most state licensing laws.¹⁸ Thus, while outside consultants such as contractors and accountants may give estimates directly to the insured and even to the insurer, they may not aid the insured in the claims process by acting or holding themselves out to be acting on behalf of the insured. As with attorneys, doctors and real estate agents, states have public policy grounds for requiring the licensing of individuals who practice public insurance adjusting.

II. State Surveillance and Enforcement Mechanisms Aimed at UPPA

A. Surveillance

State insurance departments are keenly aware of the risks posed by the UPPA. As a result, several departments have issued directives that seek to increase both the public's awareness of the UPPA and the state's surveillance and enforcement capabilities. Following hurricanes Charley and Frances in 2004, the Florida Department of Financial Services issued an Informational Memorandum stating that the UPPA was prohibited under Florida law. The memorandum states that all such instances should be reported to the department and provides contact information making such a report.¹⁹ Approximately one month after issuing the Information Memorandum, the department issued an Emergency Order requesting that all insurers operating in Florida who either received a copy of a contract between their insured and a public adjuster or correspondence from a public adjuster notifying the insurer that the public adjuster represents the insured forward a copy of the contact or notice to the department.²⁰ Other departments have issued similar directives following catastrophic events.²¹ Thus, insurance

¹⁸ *Id.*

¹⁹ Tom Gallaher, Informational Memorandum re: Unlicensed Public Adjusting, DFS-01-2004 (August 17, 2004), <http://www.myfloridacfo.com/agents/industry/bulletins-memos/index.htm#2004> (last visited April 24, 2012).

²⁰ Merlin, *supra* note 14 at 17–18.

²¹ Missouri Department of Insurance, Joplin consumers: Beware of offers to negotiate your insurance claim (July 20, 2011),

departments are aware of the risks posed by the unlicensed practice of public adjusting and are actively warning consumers to be wary of those offering help with insurance claims.

B. Enforcement Mechanisms

Several state insurance departments have filed both civil and criminal enforcement actions against individuals engaging in the UPPA. Under most public adjuster licensing statutes, unlicensed persons are prohibited from engaging in the practice of “public adjusting” as defined under the statute.²² Typically, the UPPA involves individuals who engage in adjusting a first party claim without a license. However, even properly licensed adjusters may engage in the UPPA where certain conflicts of interest, such as acting as both contractor and public adjuster for one claim, are prohibited under state law.²³

Penalties for acting as an unlicensed public adjuster range from consent orders, which require the unlicensed person or entity to become licensed by a certain date, to cease and desist orders, which mandate that the unlicensed person or entity stop acting as a public adjuster and pay a hefty fine for each day subsequent the order that they fail to do so.²⁴ In addition to consent and cease and desist orders, many public adjuster licensing statutes include stiff civil and

http://insurance.mo.gov/news/2011/Joplin_consumers_beware_of_offers_to_negotiate_your_insurance_claim#.T5fPmdnkrkd (last visited April 25, 2012).

²² See, e.g., Fla. Stat. § 626.854(1) (“A ‘public adjuster’ is any person, except a duly licensed attorney at law as exempted under s. 626.860, who, for money, commission, or any other thing of value, prepares, completes, or files an insurance claim form for an insured or third-party claimant or who, for money, commission, or any other thing of value, acts on behalf of, or aids an insured or third-party claimant in negotiating for or effecting the settlement of a claim or claims for loss or damage covered by an insurance contract or who advertises for employment as an adjuster of such claims. The term also includes any person who, for money, commission, or any other thing of value, solicits, investigates, or adjusts such claims on behalf of a public adjuster.”).

²³ See, e.g., § 626.8795.

²⁴ Reitz, *supra* note 3; see also, Cal. Ins. Code § 15006(d) (“Any person who fails to comply fully with an order of the commissioner issued under subdivision (c) shall be liable to the state for a civil penalty in an amount not exceeding one hundred dollars (\$100) per day for each and every day that the violation or failure to comply continues, but in no event to exceed a maximum amount of five thousand dollars (\$5,000). The commissioner shall collect the amount so payable and may bring an action in a court of competent jurisdiction in the name of the people of the State of California to enforce collection. This penalty is in addition to any other penalties provided by law.”)

criminal penalties (including jail time) for individuals or entities that act or hold themselves out as public adjusters by negotiating, adjusting or settling claims on behalf of an insured. However, such penalty provisions can vary greatly from state to state.²⁵

The civil and criminal penalties under the licensing statutes of two of the most populous states, California and Florida, provide examples of state licensing statutes that provide for an effective enforcement mechanism – and therefore a more effective deterrent. In 2004, California increased its civil fines for acting as an unlicensed public adjuster under its “Public Insurance Adjusters Act”²⁶ from up to \$5,000 per violation to up to \$10,000 per violation. If the violation is held to be willful, the fine increases to up to \$25,000 per violation.²⁷ When explaining the increase in its civil fines for the UPPA, the state legislature stated that its purpose was to further protect the public against unlicensed public adjusters.²⁸ As an additional deterrent, the act also provides that any individual acting as an unlicensed public adjuster commits a misdemeanor, punishable by imprisonment for up to 1 year or a fine of up to \$500, or both.²⁹

²⁵ Compare Public Insurance Adjusters Act, Cal. Ins. Code § 15000 *et seq.* (2012) (providing for both civil and criminal penalties for the UPPA) with Licensing of Public Insurance Adjusters, 28 Tex. Admin. Code §§ 19.701–713 (2012) (providing for neither civil nor criminal penalties for the UPPA).

²⁶ Cal. Ins. Code § 15000 *et seq.*

²⁷ § 15006(a) (“No person shall engage in a business regulated by this chapter, or act or assume to act as, or represent himself or herself to be, a licensee unless he or she is licensed under this chapter. Any person who violates this subdivision shall, in addition to any other penalties provided by law, be liable to the state for a civil penalty in an amount not exceeding ten thousand dollars (\$10,000), or if that violation is willful, in an amount not exceeding twenty-five thousand dollars (\$25,000). The penalty shall be assessed and recovered in a civil action brought by the commissioner in a court of competent jurisdiction in the name of the people of the State of California.”)

²⁸ GOVERNOR OKS RAISE IN PENALTIES FOR ACTING AS UNLICENSED PUBLIC ADJUSTER, 16 No. 8 Cal. Ins. L. & Reg. Rep. 202.

²⁹ § 15053. “Any person who knowingly falsifies the fingerprints or photographs submitted under subdivision (f) of Section 15010 is guilty of a felony. Any person who violates any of the other provisions of this chapter is guilty of a misdemeanor punishable by fine not to exceed five hundred dollars (\$500) or by imprisonment in the county jail not to exceed one year, or by both that fine and imprisonment.”

Florida’s “Insurance Adjusters Law” contains even stiffer criminal penalty provisions than California’s Public Insurance Adjusters Act. Under the Insurance Adjusters Law, any person who acts as a public adjuster or holds himself out to be a public adjuster without being licensed by the state’s insurance department commits a *felony* in the third degree.³⁰ Such a felony is punishable by a term of imprisonment not to exceed 5 years (that is, if the individual is not a repeat offender)³¹ and a fine of either \$5,000 per violation or double the amount gained from the offense, whichever is greater.³² Finally, a civil penalty of up to the \$5,000 for each violation may be imposed under the Insurance Adjusters Law.³³

III. Enforcement Actions Against the UPPA

Enforcement actions brought by state attorneys general or insurance commissioners under statutes similar to California’s Public Insurance Adjusters Act and Florida’s Insurance Adjusters Act can be effective deterrents against the UPPA because of the stiff penalties that result from successful prosecutions. Even if these actions are brought only rarely, they should serve to curb the UPPA. Several recent state enforcement actions are discussed below.

A. Paramount Disaster Recovery, Inc.

In August of 2007, the California Department of Insurance (“CDI”) issued a Cease and Desist Order to Paramount Disaster, Inc. (“Paramount”) and three of its agents ordering Paramount to stop acting as an unlicensed public adjuster. Paramount solicited homeowners for repair and unlicensed public adjusting work after the June 2007 Angora fire in South Lake

³⁰ Fla. Stat. § 626.8738 (2012).

³¹ § 775.082.

³² § 775.083.

³³ § 626.8698.

Tahoe.³⁴ The CDI's order alleged that Paramount and its agents had violated the Public Insurance Adjusters Act by acting, assuming to act, and/or representing themselves to be public insurance adjusters without a license and "acting on behalf of or aiding an insured in negotiating for or effecting the settlement of a claim or claims for loss or damage and advertizing, soliciting business, or holding [themselves] out to the public as an adjuster of those claims ..."³⁵

According to the order, Paramount caused four homeowners to sign agreements that guaranteed the Paramount 20% of the insurance proceeds if *either* the homeowner *or* Paramount elected not to do the repairs.³⁶ In one of the four cases, when the company adjuster arrived at the home site, Paramount attempted to negotiate a settlement with him.³⁷ Paramount subsequently delivered to the insurer a written notice on behalf of the insured stating that the insurer should directly contact Paramount regarding the claim and include Paramount as an additional payee on each draft issued toward payment of the claim.³⁸

The California Department of Insurance discovered Paramount's actions through its use of "strike teams" consisting of undercover enforcement officers.³⁹ These strike teams conducted undercover operations designed to identify and help prosecute unlicensed public adjusters who

³⁴ AP, Company will pay fine over Angora fire insurance claim (January 17, 2008), available at <http://www.tahodailytribune.com/article/20080117/NEWS/276073993> (last visited April 25, 2012).

³⁵ First Amended Order to Cease and Desist; Order to Show Cause; Notice of Right to Hearing; and Notice of Additional Fine, File Nos. SAC 10701-A; SAC 10704-A; SAC 10705-A; and SAC 10706-A at 10–12, http://www.insurance.ca.gov/0400-news/0100-press-releases/0070-2008/upload/CeaseDesist_ParamountDisasterRecovery107249.pdf (last visited April 21, 2012).

³⁶ *Id.* at 5, 7, 9, and 10.

³⁷ *Id.* at 6.

³⁸ *Id.*

³⁹ California Department of Insurance, Commissioner Poizner Announces Unlicensed Contractors Sentenced for Soliciting 2007 Wildfire Victims (April 14, 2009), <http://www.insurance.ca.gov/0400-news/0100-press-releases/0080-2009/release040-09.cfm> (last visited April 25, 2012).

attempted to scam wildfire victims.⁴⁰ As a result of the CDI's investigation and subsequent enforcement action, Paramount and its agents eventually settled with the California Department of Insurance. The company agreed to pay \$200,000 in fines and \$75,000 in litigation costs for their UPPA.⁴¹ Additionally, one of Paramount's agents, Darrien Carl Webster, pled guilty to acting as an unlicensed public adjuster and was sentenced to 3 years probation and ordered to pay \$600 in fines and restitution.⁴²

B. True-Built Construction, LLC

On May 11, 2011, the Arizona Department of Insurance issued a Cease and Desist Order against True-Built Construction, LLC ("True-Built"). The order required True-Built to stop acting as an unlicensed public adjuster.⁴³ In October of 2010, Arizona was hit by a hailstorm that produced 100,000 claims in one day.⁴⁴ The sheer volume of claims attracted many contractors to the Phoenix valley area. This group included True-Built, a contractor that was not licensed as an insurance adjuster in the state of Arizona.⁴⁵ The department issued the order because True-Built caused its homeowner client to sign an "Authorization" form which stated that the company would represent the homeowner in negotiations with the insurance company "to obtain full reimbursement under the terms of [her] policy for a property damage claim."⁴⁶ In

⁴⁰ *Id.*

⁴¹ AP, *supra* note 34.

⁴² California Department of Insurance, *supra* note 39.

⁴³ Arizona Department of Insurance Press Release, Building Contractor Ordered to Cease & Desist from Acting as an Adjuster without a License (May 10, 2011), <http://www.id.state.az.us/press/press11-01.pdf> (last visited April 25, 2012).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

short, True-Built's contract unambiguously offered to aid the insured in negotiating his or her claim.

C. Douglas Flaherty and Continental Fire Adjusters

On September 17, 2010 the Securities Bureau of the Iowa Insurance Division issued a Cease and Desist Order against Douglas Flaherty, owner and operator of Continental Fire Adjusters, for the unlicensed practice of public adjusting.⁴⁷ The division issued the order because Flaherty continued to practice and hold himself out as a public adjuster for several months after his public adjuster's license expired on April 30, 2010.⁴⁸ In addition to ordering Flaherty to "Cease and Desist acting as a public adjuster without a license or certificate of authority ... in violation of Iowa Code §§ 507A.3 and 507A.5 (2009)," the Commissioner required that Flaherty pay a civil fine of \$5,000 pursuant to the Iowa Licensing of Insurance Producers Act.⁴⁹

D. Holden Roofing

In June of 2011, the Texas Office of the Attorney General filed a complaint against Holden Roofing, Inc. ("Holden"). The complaint alleged facts indicating that Holden was engaged in the UPPA. In its complaint, the attorney general's office stated that Holden caused homeowners to sign contracts for repairs that indicated that Holden would act as "intermediaries to negotiate insurance claims for roof damage."⁵⁰ The complaint also alleged that Holden and its agents engaged in other false, misleading and deceptive practices, including imposing a charge

⁴⁷ 2010 WL 3785938 (Iowa Sec.Bur.), *1.

⁴⁸ *Id.*

⁴⁹ *Id.* at *2 (citing Iowa Code §§ 507A.10(1) and 522B.17 (2009)).

⁵⁰ *State of Texas v. Holden Roofing, Inc.*, Plaintiff's Original Petition and Application for Injunction, ¶¶ 13–17, https://www.oag.state.tx.us/newspubs/releases/2011/062111holden_pop.pdf (last visited April 25, 2012).

of 20% of the costs of repairs if the homeowner decided to use another contractor to perform the repairs specified under the “Consulting Agreement” that Holden had its customers sign.⁵¹ In October of 2011, Holden settled with the Office of the Attorney General and agreed to pay a \$25,000 civil fine and \$10,000 in attorney’s fees.⁵²

Holden is noteworthy not for its result, which might have been the similar (or even better for the consumer) under California’s or Florida’s public adjusting statutes; rather, it is important because it points out the need for an effective enforcement mechanism (read: civil and criminal penalties) in public adjuster licensing statutes. The Texas Office of the Attorney General, unlike the attorneys general in California or Florida, could not bring an effective case under only Texas’ public adjuster licensing statute, because that statute does not provide for any civil or criminal penalties for the UPPA.⁵³ Thus, if presented with a case where an individual or entity’s only offense is the unlicensed or unauthorized practice of public adjusting, Texas is likely to be unable to effectively enforce its public adjuster licensing requirement.

Fortunately for the Texas’ Attorney General, Holden committed several acts, including the misrepresentation of the services it was contracting to provide, that violated Texas consumer protection laws.⁵⁴ As a result, the attorney general was not forced to rely on a relatively weak Texas public adjuster licensing statute. Instead, he was able to bring suit under the state’s

⁵¹ *Id.*

⁵² Jacqueline Armendariz, *Roofing Company Settles Lawsuit on Alleged Scam*, THE BROWNSVILLE HERALD, Sept. 30, 2011, available at <http://www.brownsvilleherald.com/articles/roofing-131866-company-alleged.html> (last visited April 25, 2012).

⁵³ Licensing of Public Insurance Adjusters, 28 Tex. Admin. Code §§ 19.701–713 (2012).

⁵⁴ *Holden*, *supra* note 50.

consumer protection laws and thereby to obtain a favorable result for the public.⁵⁵ However, *Holden* serves as a warning to states that do not have an effective enforcement mechanism written into their public adjuster licensing laws. Without the civil and criminal penalties and enforcement mechanisms found under licensing statutes like those found in California and Florida, including a provision allowing the state insurance commissioner to issue cease and desist orders for the UPPA, public adjuster licensing statutes cannot accomplish the purpose for which they are enacted – the protection of insureds from incompetent, untrained and predatory individuals acting as unlicensed public adjusters.⁵⁶

IV. Suggestions for Limiting and Preventing the UPPA

First and foremost, the best way to prevent unscrupulous and unqualified individuals or companies from acting as public adjusters (and likely injuring consumers) is to advocate for the enactment of uniform and robust licensing statutes in all 50 states. At present, those states that do not require licensing yet still allow public insurance adjusting – Alabama, Wisconsin and South Dakota – are especially vulnerable to the problems associated with the UPPA.⁵⁷ Thus, in the interests of both uniformity and the provision of an effective enforcement mechanism, legislatures in those three states should be encouraged to enact public adjuster licensing statutes that are both in line with the NAIC Model Act and contain tough criminal and civil penalties for those who engage in the UPPA.

⁵⁵ The attorney general alleged claims against Holden under the Texas Deceptive Trade Practices – Consumer Protection Act, TEX. BUS. & COM. CODE ANN. § 17.41, *et seq.* (“DTPA”); Chapter 601 of the Texas Business and Commerce Code, Cancellation of Certain Consumer Transactions, TEX. BUS.&COM. CODE ANN. § 601.001 *et seq.* (“Home Solicitation Act” or “HSA”); and the Texas Debt Collection Act, TEX. FIN. CODE ANN. § 392.001 *et seq.* (“TDCA”).

⁵⁶ See discussion of public adjuster statutes, *supra* Part II.B.

⁵⁷ See *supra* note 3.

A statute designed to limit the UPPA should: (1) allow the state’s insurance commissioner to issue consent orders, without a hearing, requiring an individual or entity to become licensed as a public adjuster by a certain date; (2) allow the state’s insurance commissioner to issue “cease and desist” orders, again without a hearing, requiring individuals and companies subject to the order to stop the UPPA; (3) provide for civil penalties of between \$5,000 and \$10,000 for each instance of the UPPA, with such penalties escalating to between \$10,000 and \$25,000 for the willful UPPA; and (4) provide that anyone who engages in the UPPA commits a felony subject to up to 5 years imprisonment or a fine of up to \$5,000, or both.

In addition to lobbying for more effective licensing statutes, the public adjusting industry should encourage state insurance commissioners to increase their surveillance capabilities by requesting that insurance companies submit contract and correspondence data from public adjusters representing their insureds.⁵⁸ Since insurers deal with public adjusters on a daily basis, they are an excellent source of data that insurance departments should mine. State insurance commissioners could also work in conjunction with law enforcement officials to create undercover sting operations similar to those used by the CDI in the *Paramount* case.⁵⁹ While likely too expensive to maintain year-round, these undercover operations could be targeted to areas that recently experienced a catastrophic event.

Conclusion

In sum, the public insurance adjusting industry is following the correct path by encouraging state legislatures to enact state licensing statutes that provide effective enforcement mechanisms to state agencies. In keeping with the need for effective enforcement and deterrence (the two are inextricable), licensed public adjusters should continue to inform their state

⁵⁸ See *supra* Part II.A.

⁵⁹ See *supra* Part III.A.

legislatures of the necessity of including both significant civil *and* criminal penalties for the UPPA in their licensing statutes. In states like Florida and California, where licensing statutes with strong civil and criminal penalties are already in place, public adjusters should encourage insurance commissioners and other relevant enforcement agencies to prosecute the UPPA.