

**THE COSTS OF THE UNLICENSED PRACTICE OF PUBLIC ADJUSTING:
A LEGAL AND ECONOMIC ANALYSIS**

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The Unlicensed Practice of Public Adjusting (“UPPA”) is a vehicle of consumer fraud that preys upon some of the most vulnerable elements of our society—the disaster stricken, the elderly, the unsophisticated, and those for whom English is a second-language.¹ Individuals’ losses range from a couple thousand to tens of thousands of dollars, and frequently victims are left without a remedy because UPPA offenders disappear or are not worth suing.² But outright fraud³ is only one piece of the UPPA problem. A less malicious but nonetheless harmful variant seeks to help homeowners but executes poorly, sometimes leaving consumers far worse off than when they began. Particularly for smaller damages, this incompetent execution is especially troubling because it is difficult to detect and, if not quickly discovered, it becomes permanently concealed once home repairs cover up the evidence. The resulting financial losses from UPPA trigger a tangled web of social and economic consequences to the public, the insurance industry, and the economy. State legislatures have made great strides in recent years to curtail UPPA’s impact,⁴ but significant consumer costs remain. By analyzing these costs, this Essay seeks to reframe the UPPA problem in order to better tailor future solutions.

¹ See, e.g., Complaint at ¶¶ 98–129, 160–87, *Illinois v. Tropical Home Improvement*, No. 2012-CH-35470 (Ill. Cir. Ct. filed Sept. 20, 2012) (taking advantage of a “heavily medicated” non-English speaker while using English-language contracts); see also Brief of National Ass’n of Public Insurance Adjusters as Amicus Curiae Supporting Appellees, *Reyelts v. Cross*, No. 13-10896, 2013 WL 6979584, at *8–11 (5th Cir. Dec. 26, 2013); *Commissioner’s Bulletin B-0017-12*, TX DEP’T OF INS. (June 26, 2012), <http://www.tdi.texas.gov/bulletins/2012/cc16.html>; Ronald J. Papa, *Good, Bad, Ugly: Looking Back at Sandy and at Industry’s Readiness*, INS. ADVOCATE (July 22, 2013), <http://www.insurance-advocate.com/2013/07/22/good-bad-ugly-looking-back-at-sandy-and-at-industrys-readiness/>. For further discussion of individual enforcement actions, see *infra* Part II.

² For a discussion of representative losses and consumers’ general lack of success with recovery, see *infra* Part II.

³ While a lax definition of fraud may encompass all UPPA, “fraud” often insinuates a degree of intentional harm to the victim that is missing from some populations of UPPA offenders. See *Fraud*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“[Fraud is a] knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.”); see also *infra* Part VI. Therefore, for the sake of clarity, “fraud” in this Essay will exclusively refer to malicious UPPA.

⁴ See Brian S. Goodman, *Public Adjusters*, in LEONARD E. MURPHY, ANDREW B. DOWNS & JAY M. LEVIN, PROPERTY INSURANCE LITIGATOR’S HANDBOOK 42 (2007); *Unlicensed Public Adjusting*, NAT’L INS. RESTORATION COUNCIL, <http://www.nirc4change.org/unlicensed-public-adjusting-penalties/> (last visited March 5, 2016).

Public adjusters are heavily regulated insurance professionals that represent consumers in negotiations of first-party property damage claims with insurance carriers.⁵ Public adjusters are not affiliated with insurance companies. They only become involved when a consumer independently retains their services to negotiate a claim on his behalf.⁶ The industry is best thought of as a form of private insurance regulation that serves to counterbalance insurance companies' greater access to information and expertise in adjusting claims. While skeptics of the industry abound,⁷ the common sense value of public adjusting is historically unassailable: insurance companies did not become one of the most regulated industries in America by altruistically having their customers' best interests at heart.⁸

UPPA has become synonymous with fraud perpetrated by disreputable contractors, ne'er-do-well storm chasers, and similar predatory ilk. The stereotypical transaction involves the fraudsters going door-to-door after a natural disaster advertising repair and insurance negotiating services. Then, once retained, the fraudsters engage in pro forma negotiations with the insurance company and, depending on the circumstances, (1) invalidate the insurance claim due to incompetence, (2) steal the settlement check, (3) demand a steep public adjusting fee, (4)

⁵ See Goodman, *supra* note 4, at 42–43 (discussing the extent of public adjuster licensing regulation).

⁶ *Id.* at 42–44. A public adjuster “work[s] for the insured by fully and fairly documenting and measuring the loss, effectively presenting the claim to the insurance carrier, [and] negotiating with the insurance carrier.” *Id.* at 43.

⁷ See, e.g., Mark Paskell, *Contractor Convinces Insurance Company to Increase Claim by \$35,000*, CONTRACTOR COACHING P'SHIP BLOG (Mar. 16, 2015), <http://www.thecontractorcoachingpartnership.com/Blog-Contractor-Coaching--Construction-Business-Coach-EPA-RRP-Lead-Rule/bid/73708/Contractor-convinces-insurance-company-to-increase-claim-by-35-000>; Lila Hayes Zubik, *A Public Adjuster May Not Be Your Best Option*, CMTY ASSISTING RECOVERY (Nov. 29, 2008), <http://www.carehelp.org/blog/63-public-adjuster-may-not-be-your-best-choice>. See also the criticisms in the comments to the Paskell Blog, *supra*.

⁸ See TOM BAKER & KYLE D. LOGUE, *INSURANCE LAW AND POLICY: CASES AND MATERIALS* 573 (3d ed. 2013) (“[F]ew sectors of the U.S. economy are more heavily regulated than insurance.”); *FAQ's*, NAT'L ASSOC. OF PUB. INS. ADJUSTERS, <http://www.napia.com/faq> (last visited Apr. 14, 2016) (“Insurance companies offer to pay what is due to you as they see it. Public insurance adjusters are your exclusive representatives. With their experience and knowledge they are better able to obtain a more favorable adjustment”); *Hiring a Public Adjuster*, BANKRATE, <http://www.bankrate.com/finance/insurance/hiring-a-public-adjuster-1.aspx> (last visited Apr. 14, 2016).

perform shoddy repairs, or (5) some combination thereof.⁹ Less frequently discussed, however, is the variant of UPPA not found in malice, but mediocrity. These contractors conduct the pro forma negotiations but then actually complete the repairs. No obvious harm is done and no impetus for complaint is provided. But, nonetheless, the consumers are assessed the opportunity cost of substandard adjusting—the additional recovery, peace-of-mind, and time-savings they could have enjoyed with a licensed public adjuster.¹⁰

This Essay explores the financial cost of malice, the opportunity cost of mediocrity, and the numerous social and economic costs of UPPA that flow from reduced recoveries, diminished home equity, delays in storm repair, and the loss of credibility by the public adjusting industry. The Essay then reframes the UPPA problem as not one problem, but two: malice and mediocrity. Each problem is driven by distinct motivations, results in unique costs, and requires tailored solutions not addressed by the current regulatory schemes. The Essay concludes offering solutions: states must enforce the current laws; additional regulations should be enacted to end insurers' enabling of UPPA; and the current regulations should be modified to uniformly criminalize UPPA to facilitate further sentencing discretion.

Part I offers a brief primer to economic analysis. Parts II and III detail the economic costs of UPPA directly to victims and indirectly to the greater public. Part IV explains the noneconomic costs to the insurance industry. Parts V and VI reframe the UPPA problem then assess the efficacy of the current enforcement schemes. Part VII proffers some solutions.

⁹ See *infra* Part II; see also William Bell, *Bucking the Trend: The Reyelts Case and the End to the Unauthorized Practice of Public Adjusting*, ROCKY MOUNTAIN ASSOC. OF PUB. INS. ADJUSTERS, <http://rmapia.org/news/news/102-unauthorized-practice-of-public-adjusting> (last visited Mar. 18, 2016).

¹⁰ See, e.g., NAT'L ASSOC. OF PUB. INS. ADJUSTERS, *supra* note 8; see also *infra* note 32. The opportunity cost will not be uniform because it in part depends on the fairness of the insurer. Furthermore, the services of a public adjuster are not practical for many smaller claims. But to the extent consumers of UPPA believe the advertised expertise is warranted, they are not reaping the advertised benefits.

I. AN ECONOMIC APPROACH

The touchstone of economics is efficiency. Therefore, the economic cost of UPPA is not necessarily the aggregate dollar value of defrauded insurance settlements. Rather, the economic cost looks to the costs attendant to recovery—the efficiency of the system to make the consumer whole.¹¹ Therefore, if the losses are litigated and the defendants are able satisfy judgments, the economic cost is the cost of litigation and any costs flowing from the delay in recovery. If the loss is never recovered, or is unrecoverable because the defendant is judgment-proof, the economic cost is both the full loss and all the consequential damages that flow therefrom. An economic approach assesses the cost of UPPA in the context of current statutory schemes, not in a vacuum where no recovery is ever obtained. In this way economics is both a tool to frame the UPPA problem and a metric to assess the efficacy of the states’ solutions.

Another distinct aspect of an economic approach is its focus on “opportunity cost.” The opportunity cost of UPPA captures the lost marginal benefit that could have been gained by using a licensed, experienced public adjuster.¹² This measure of opportunity cost assumes that unlicensed practitioners are generally mediocre or incompetent—no better than the consumers themselves. This assumption is, of course, riddled with exceptions of when the contractor places the consumer in a far *worse* position than they could have accomplished themselves.¹³ In these cases, the opportunity cost is even greater because of the widened disparity between a licensed public adjuster’s services and the UPPA offender’s incompetence.

¹¹ Cf. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 26–29 (1970) (analyzing the efficiency of the fault system in reducing automobile accidents, reimbursing damages, and reducing the administrative costs of the tort system).

¹² See N. GREGORY MANKIW, *PRINCIPLES OF ECONOMICS* 6 (7th ed. 2014) (defining “opportunity cost”).

¹³ See, e.g., Complaint, *supra* note 1 (describing several instances where consumers were worse off after an UPPA offender’s “assistance”); see also *infra* Part II.

II. THE DIRECT ECONOMIC COSTS OF UPPA TO INDIVIDUALS

Individuals bear the most obvious costs of UPPA with losses, sometimes numbering tens of thousands of dollars, delineated in denied insurance claims, stolen settlements, fraudulently obtained public adjuster fees, reduced recoveries, and property damage from delays. While a portion of these losses may be recovered through litigation or regulatory schemes, litigation is expensive and, even if successful, UPPA offenders are likely judgment-proof.¹⁴ Making matters worse, the affected individuals generally hail from populations that are the least able to bear the loss, sometimes with tragic consequences.¹⁵ Individuals also bear the hidden opportunity costs of UPPA's mediocre public adjusting services. Public adjusting is a highly regulated specialty requiring considerable expertise.¹⁶ Inexperienced contractors cannot provide the same level of services. Since no empirical studies have measured the economic extent of UPPA, the costs must be extrapolated from representative litigation, enforcement actions, and anecdotes.¹⁷

¹⁴ See Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH & LEE L. REV. 603 (2006) (discussing the prevalence of judgment-proof tortfeasors and difficulties with collection). While some UPPA offenders may be businessmen, many likely possess few to no assets that could be seized to compensate victims and satisfy judgments.

¹⁵ See, e.g., Complaint for Injunctive and Other Relief at ¶¶ 186–272, *Illinois v. Midwest Pub. Adjuster Grp.*, No. 2014-CH-20690 (Ill. Cir. Ct. filed Dec. 29, 2014) (alleging an unlicensed public adjuster, carrying on business entirely in Spanish, delayed a claim for months, costing the consumer \$2,064.56 in recoverable depreciation, his homeowner's insurance, and additional weather-related damage to his property). The delay stemmed from a dispute over the contractor's 35% public adjuster fee for filing the insurance claim. *Id.* ¶¶ 226–35.

¹⁶ Goodman, *supra* note 4, at 42–43; Exhibit A to Complaint, *Minton v. Ill. Dept. of Ins.*, No. 2014-CH-19512 (Ill. Cir. Ct. filed Dec. 5, 2014) (denying public adjusting licensing due to lack of competence and unfamiliarity with the Illinois Insurance Code); see also NAT'L ASSOC. OF PUB. INS. ADJUSTERS, *supra* note 8 (delineating the licensing requirements and expertise of public adjusters).

¹⁷ See *infra* notes 33–36 and accompanying text (discussing existing empiricism). An important caveat to the impact of UPPA is its limited applicability to only insured homeowners. While homeowner's insurance is customary because it is required by mortgagers, significant regional variance abounds; some estimate as many as 17% of the homes in the South are uninsured. Lori Johnston, *After the Disaster: Uninsured Homeowners Have Little to Fall Back on*, UNITED POLICYHOLDERS, <http://www.uphelp.org/news/after-disaster-uninsured-homeowners-have-little-fall-back/2012-02-01> (last visited Mar. 17, 2016); Harry R. Weber & Mike Schneider, *Uninsured Homes a Way of Life in Twister Areas*, NBC NEWS (May 26, 2011, 1:25 PM), http://www.nbcnews.com/id/43183344/ns/business-going_green/t/uninsured-homes-way-life-twister-areas/#.Vusbl_krKUI (“The South has the highest rate of homes without hazard insurance, at 17.4 percent . . . This is followed by the Northeast at 12.2 percent, the Midwest at 8.4 percent and the West at 3.3 percent.”).

The clearest financial cost of UPPA arises when mishandling of a claim leads to a complete forfeiture of the right to recover. The most famous example of this type of loss is found in *Reyelts v. Cross*.¹⁸ In *Reyelts*, consistent with the UPPA stereotype, a roofing contractor went door-to-door after a hail storm and entered into a contract with elderly homeowners to pursue an insurance claim and make repairs.¹⁹ The contractor then collected the insurance information and represented he would “handle” the \$14,775.48 insurance claim. But he never did. In fact, he never made any contact with the insurance company even as he completed the repair work. After he completed repairs, he collected \$1,176 for agreed upon “upgrades” and then a month later he billed the Reyelts for the \$14,775.48 and began aggressive collection efforts.²⁰ At this point, Mrs. Reyelts contacted her insurance company and learned of her contractor’s inaction. But it was too late. Her insurance company refused to pay because they were unable to evaluate the damage; the repairs eliminated the evidence.²¹

Fortunately for the Reyelts, they retained a lawyer instead of paying the demanded \$14,775.48 and, since the contractor violated the Texas Debt Collection Practices Act and the Texas Deceptive Trade Practices Act, they made a complete recovery, even receiving \$30,000 for mental anguish, \$42,000 in punitive damages, and \$246,695.80 in attorneys fees.²² *Reyelts* is an unusual success story for UPPA victims that was only made possible by Texas’s strict

¹⁸ 968 F. Supp. 2d 835 (N.D. Tex. 2013), *aff’d mem.* 566 Fed. Appx. 316.

¹⁹ *Id.* at 839–40 (“By signing the ‘Agreement,’ [the Plaintiff] reasonably believed she had . . . give[n] the Lon Smith Defendants, in exchange for compensation, the authority and obligation to act on behalf of the Reyelts in negotiating or effecting the settlement of a claim for the . . . damage to the Reyelts’ roof under the Farmers’ homeowners insurance policy . . .”).

²⁰ *Id.* at 840–43.

²¹ *Id.* at 842–43.

²² *Id.* at 847–52. The remedies in *Reyelts* far exceeded those allowed under common law, which would have been limited to declaring the contract void and \$1,176 in economic damages. *See id.*

statutory schemes—the types of damages awarded are uncommon and generally not available under the common law. Furthermore, *Reyelts* was atypical in that the loss was worth litigating, the fraud was readily apparent, and the contractor was able to pay. Similar circumstances with smaller losses, less clear-cut facts, or insolvent perpetrators are far less likely to be worth litigating, leaving the consumer to bear a loss without a remedy. But *Reyelts* remains interesting because it quantifies the extent of UPPA’s noneconomic harm and, via the attorneys fees, offers a glimpse of the barriers to litigation. The noneconomic damages in *Reyelts* are not normally recoverable but that does not mean the harms are unusual. *Reyelts* quantifies hidden damages and suggests the costs of UPPA may far exceed the financial losses.

Losses from UPPA may also be addressed collectively through enforcement actions of state attorneys general.²³ For example, in *Illinois v. Tropical Home Improvement*, the Consumer Fraud Bureau of the Illinois Attorney General’s office filed an action after receiving thirty-seven complaints of UPPA associated with harassment for public adjusting fees in return for low quality adjusting work and related consumer fraud.²⁴ Losses averaged around \$4,000 with mixed results: one consumer managed to recover \$3,592.95 she had paid after considerable harassment and coercion for inconsequential unlicensed public adjusting services; another consumer sought \$4,834.97 for unrefunded, stolen insurance proceeds.²⁵ Contingent fees for UPPA services are commonly used by disreputable contractors as penalty clauses to discourage consumers from

²³ See, e.g., Complaint, *supra* note 1 (brought by the Attorney General of Illinois); see also Bell, *supra* note 9 (noting enforcement actions in Florida, Illinois, Kansas, Ohio, and Texas).

²⁴ Complaint, *supra* note 1, at ¶¶ 59–73 (“Defendants attempt to negotiate the consumer’s claim with the insurance company. . . . Defendants are often not successful . . .”). The business was at times conducted completely in Spanish. *E.g., id.* ¶ 108.

²⁵ *Id.* ¶¶ 144–59; 179–87. The refund was requested after negotiations broke down with the insurer. *Id.* ¶¶ 150–59. Several consumers complained of aggressive debt collection and harassment. *Id.* ¶¶ 91–97, 125–29.

cancelling repair contracts or seeking refunds—sometimes with tragic success.²⁶ The fraudsters generally offer the UPPA negotiating services as a free bonus if the consumer also hires them to make the repairs. Then, if the consumer seeks to rescind the repair contract, the fraudsters threaten the consumer with an often multi-thousand dollar public adjusting bill.²⁷

Other times, disreputable contractors do not actually perform any unlicensed adjusting, but rather commit UPPA through advertising. Specifically, the contractors advertise that they have “expertise” with insurance negotiations as part of their contracting and repair services.²⁸ This selling point allows them to secure business and then they defraud the customers—either by stealing down payments or performing shoddy work after long delays. In *Illinois v. National Restoration*, for example, an action was filed after nine complaints of UPPA associated with the theft of down payments of \$17,650, \$16,059.15, \$8,008.81, and \$5,000 and weather-related damages from delays in submitting documents to insurers.²⁹ Delays attendant to UPPA have also caused consumers to lose thousands of dollars of recoverable depreciation, and, in extreme cases, has resulted in the cancellation or non-renewal of homeowners insurance policies, leaving consumers subject to increased insurance rates or vulnerable to future calamity.³⁰

²⁶ See, e.g., *id.* ¶¶ 44, 63, 68, 185 (“[The consumer paid Defendants approximately 30% of her insurance proceeds . . . because she felt threatened by the pressure Defendants put on her.”); Complaint at ¶¶ 47–53, *Illinois v. 1st Choice Exteriors, Inc.*, No. 2015-CH-06077 (Ill. Cir. Ct. filed Apr. 13, 2015) (“If homeowners choose a [different] contractor . . . , Defendants charge the homeowners a fee that is 20% of the adjusted claim . . . when in fact no labor has been done other than unlicensed adjusting.”).

²⁷ See, e.g., Complaint, *supra* note 1, at ¶ 63; Complaint at ¶ 39, *Illinois v. Concasa Renovations, Inc.* No. 2014-CH-08582 (Ill. Cir. Ct. filed May 21, 2014).

²⁸ See, e.g., Complaint, *1st Choice Exteriors*, *supra* note 26, at ¶¶ 30–34; Complaint at ¶¶ 19–24, *Illinois v. N. Point Exteriors, Inc.*, No. 2012-CH-35467 (Ill. Cir. Ct. filed Sept. 20, 2012).

²⁹ Complaint at ¶¶ 57–84, 98–107, 114–27, 138–144, *Illinois v. Nat’l Restoration of Ill.*, No. 2012-CH-35471 (Ill. Cir. Ct. filed Sept. 20, 2012).

³⁰ See, e.g., Complaint, *supra* note 15, at ¶¶ 186–272 (alleging a multi-month delay cost the consumer \$2,064.56 in recoverable depreciation, his homeowner’s insurance, and additional weather-related damage to his property).

A less noticeable cost of UPPA is the opportunity cost of not enjoying the benefits of a properly licensed, experienced public adjuster. While not every consumer of UPPA would necessarily employ a public adjuster, at least some consumers probably would.³¹ The stated benefits of using a licensed public adjuster include increased awards, faster claim resolution, and peace of mind.³² All of the benefits, however, are difficult to empirically verify.

One Florida state agency made a colorable effort to quantify the benefits of licensed public adjusters in 2010 by comparing 21,545 claims filed by public adjusters to 54,776 claims filed without a public adjuster.³³ Predictably, the agency found that claims filed by public adjusters were associated with significantly greater settlements.³⁴ But the agency also found that claims filed by public adjusters took significantly longer to process.³⁵ The study, however, was fundamentally flawed because it failed to control for the diversity of insurance claims. For example, the study ignored the common-sense principle that public adjusters tend to only work on claims involving larger losses. Since no effort was made to only compare similar claims, both findings have limited value.³⁶ Therefore, instead of relying on empiricism, the opportunity cost of UPPA must rest on the laurels of the literature touting the merits of public adjusting and

³¹ See Bell, *supra* note 9.

³² See, e.g., NAT'L ASSOC. OF PUB. INS. ADJUSTERS, *supra* note 8; *Benefits of Hiring a Public Adjuster*, TUTWILER & ASSOC., <https://www.publicadjuster.com/need-an-adjuster/benefits-of-hiring-a-public-adjuster> (last visited Mar. 25, 2016).

³³ OFFICE OF PROGRAM POLICY ANALYSIS & GOVERNMENTAL ACCOUNTABILITY, Report No. 10-06, at Appendix A, <http://www.oppaga.state.fl.us/reports/pdf/1006rpt.pdf> (discussing methodology).

³⁴ *Id.* at 7. For 2004, the OPPAGA Study reported average settlements at \$22,266 for public adjuster claims and \$18,659 for non-public adjuster claims, respectively. *Id.* These averages shifted significantly in 2005 with \$17,187 reported for public adjuster claims and \$2,029 reported for non-public adjuster claims. *Id.*

³⁵ *Id.* at 6–7. The study reported that claims involving public adjusters took between 132 and 296 days longer than claims without public adjuster representation. *Id.* at 6.

³⁶ The author's request for the underlying claim data was denied by the OPPAGA General Counsel.

common sense policy.³⁷ Public adjusters frequently advertise that they are able to secure larger settlements and identify damages that company adjusters miss.³⁸ While this economic benefit is counterbalanced by the public adjuster's fee, depending on the accuracy of the company adjuster, the total marginal benefit may be significant.³⁹ Further study is required, however, to precisely quantify public adjusters' financial benefits. Further study should also investigate the time-saving benefits. The peace-of-mind from using a public adjuster, however, particularly during the emotional turmoil of a catastrophe, offers enough benefit to justify the industry by itself.

III. THE INDIRECT ECONOMIC COSTS OF UPPA TO INDIVIDUALS

The indirect costs of UPPA flow from the collective impact of the losses to individuals. Since UPPA is difficult to detect and its prevalence unknown, the precise monetary impact of UPPA is impossible to quantify. The economic consequences of UPPA, however—including delays in storm recovery, reduced home equity, and the “domino effect” of geographically and temporally concentrated losses—can be extrapolated by analogy from the 2009 Housing Crisis.

UPPA impedes and delays recovery in disaster-stricken communities. Specifically, UPPA extends the recovery process by inciting litigation, requiring homeowners to hire new contractors, and exacerbating damages by delaying repairs. Even if the financial costs of UPPA are eventually reimbursed, these delays by themselves may have profound economic

³⁷ See, e.g., *Benefits of Hiring a Public Adjuster*, *supra* note 32; *Hiring a Public Adjuster*, *supra* note 8; Nicole Wilson, *Three Reasons to Hire a Public Adjuster*, PROP. COVERAGE INS. LAW BLOG (Nov. 20, 2010), <http://www.propertyinsurancecoveragelaw.com/2010/11/articles/insurance/three-reasons-to-hire-a-public-adjuster/>; see also NAT'L ASSOC. OF PUB. INS. ADJUSTERS, *supra* note 8; text accompanying *supra* notes 7–8.

³⁸ See, e.g., PUB. ADJUSTERS USA, <http://www.publicadjustersusa.com/Q'S%20AND%20A'S.htm> (last visited Mar. 19, 2016); see also NAT'L ASSOC. OF PUB. INS. ADJUSTERS, *supra* note 8; Paul Leftwich, *The Public Adjuster Paradox*, PROP. CAS. 360 (Feb. 1, 2010), <http://www.propertycasualty360.com/2010/02/01/the-public-adjuster-paradox?t=risk-management&slreturn=1458404825&page=2>.

³⁹ See, e.g., *Tutwiler Success Stories*, TUTWILER PUB. ADJUSTING, <https://www.publicadjuster.com/company/success-stories> (last visited Mar. 19, 2016) (listing hundreds of stories); see also *Hiring a Public Adjuster*, *supra* note 8.

consequences on the local community. The value of a home is codependent with the value of the homes in the surrounding neighborhood. Therefore, delays in disaster recovery—particularly if they are highly visible like a tarped roof—impact the value of the entire community.⁴⁰

The collective, unreimbursed losses from UPPA also impact the economy at-large.⁴¹ The individual losses borne by UPPA victims must be paid from somewhere—a home has been damaged; a settlement check was perhaps stolen; the repairs still need to be made. Some UPPA victims may be able to pay for repairs from available cash reserves; others may not and will lose home equity as their property value declines; still others may only be able to afford inferior repairs and lose some of both. Home equity, in particular, as modeled by the 2009 Housing Crisis, is a key driver of economic growth, consumer expectations, and general financial health.⁴² For most American consumers, their home is their largest asset.⁴³ It is both a metric of wealth and a savings vehicle for emergencies and retirement. Thus when the 2009 Housing Crisis struck, it had a prolonged effect on consumer confidence with a direct impact on consumer spending—the largest contributor to U.S. GDP.⁴⁴ The unreimbursed costs of UPPA will not lead to another housing crisis, but they will have an economic impact through a similar mechanism, collectively weighing upon consumption and general financial health.

⁴⁰ See, e.g., Complaint, *supra* note 15, at ¶¶ 211–52 (describing an UPPA victim that has had a tarped roof for a year and cannot afford to fix it).

⁴¹ Individual economic losses from UPPA include denied insurance claims, stolen settlements, forfeited recoverable depreciation, unearned public adjusting fees, lost homeowner’s insurance, and weather-related consequential damages arising from delayed repairs. See *supra* Part II.

⁴² See FIN. CRISIS INQUIRY COMM’N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 389–94 (2011), <https://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf>.

⁴³ *Id.* at 391–92.

⁴⁴ *Id.* at 394 (“[c]onsumer spending . . . makes up more than two-thirds of GDP”).

The economic impact of UPPA is magnified by its concentration in already vulnerable, disaster-stricken areas and its propensity to prey upon those least able to afford it. Individually, UPPA is not an isolated economic cost, but rather one more cost on top of many with the potential to have a disproportionate impact. Collectively, UPPA tends to be geographically and temporally concentrated—storm chasers prey on affected communities shortly after the storm.⁴⁵ Therefore UPPA has the potential to cause synergistic, domino effects in which the collective costs are greater than the sum of individual harms. This type of domino effect was one of the root causes of the 2009 Financial Crisis. Rating agencies failed to appreciate the codependency of home prices and account for the systemic risk that mass foreclosures would impact neighborhood home values, which in turn would trigger more foreclosures.⁴⁶ While UPPA by no means represents the same degree of economic impact, its effect is concentrated, indicating similar systemic risk and disproportionate economic harm.

IV. THE NONECONOMIC COSTS OF UPPA TO THE PUBLIC AND THE INDUSTRY

The greatest non-economic costs of UPPA stem from the irony of warping an industry bent on consumer protection into a vehicle of consumer fraud. The public adjusting industry plays important consumer protection and regulatory roles, aiding disaster-stricken consumers and counterbalancing the insurance industry's disproportionate knowledge and expertise. UPPA directly and indirectly undermines both roles. In part, UPPA directly diverts homeowners that would seek public adjusting services, robbing them of proper assistance.⁴⁷ But more importantly, UPPA undermines the public adjusting industry's credibility, causing ripple effects

⁴⁵ Bell, *supra* note 9.

⁴⁶ See FIN. CRISIS INQUIRY COMM'N, *supra* note 42, at 129, 146–50.

⁴⁷ See *supra* Part II.

far beyond the consumers directly affected. UPPA and the attendant fraud is a black mark on the industry, sapping consumers' confidence and leading homeowners that would otherwise employ a public adjuster's aid to think twice or perhaps forgo a public adjuster altogether.

The bitter irony is that, like the practice of law, public adjusters hold a position of trust and fiduciary responsibility.⁴⁸ In fact, for decades states struggled with whether public adjusting *was* the practice of law. Even today, the textbook example of the unauthorized practice of law, *Professional Adjusters v. Tandon*, features one such struggle.⁴⁹ In *Professional Adjusters v. Tandon*, the Indiana Supreme Court considered whether a public adjuster licensing statute adequately mitigated the ethical concerns of the unauthorized practice of law. The court's concern was rooted in the ethical responsibility of public adjusters given the sensitivity of the public adjuster-client relationship, the client confidences, and the legal rights at issue.⁵⁰ Ultimately, the 1982 Indiana court ruled against public adjusters, striking down the statute because it offered *insufficient oversight and disciplinary policing* given the sensitive relationship.⁵¹ Indiana, along with forty-four other states, have since recognized the value of public adjusting and adhere to comprehensive licensing regulations that do not implicate the

⁴⁸ See Goodman, *supra* note 4, at 44; Bell, *supra* note 9; Jason Wolf, *Erasing the Abuse of Unlicensed Public Adjusters*, CLAIMS JOURNAL (Feb. 17, 2014), <http://www.claimsjournal.com/magazines/idea-exchange/2014/02/17/244531.htm>.

⁴⁹ *Prof'l Adjusters, Inc. v. Tandon*, 433 N.E.2d 779 (Ind. 1982), in STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 469–72 (10th ed. 2015). Giller's casebook is widely used in the Professional Responsibility courses required by law schools. See *Stephen Gillers Biography*, NYU LAW, <https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.biography&personid=19943> (last visited Apr. 1, 2016). *Professional Adjusters* is the sole case in the section on the unauthorized practice of law. GILLERS, *supra*.

⁵⁰ *Prof'l Adjusters*, 433 N.E.2d at 782–83 (“The core element of practicing law is the giving of legal advice to a client and the placing of oneself in the very sensitive relationship wherein the confidence of the client, and the management of his affairs, is left totally in the hands of the attorney. . . . [M]erely entering into such relationship constitutes the practice of law.” (quoting *In re Perrello*, 386 N.E.2d 174, 179 (Ind. 1979))).

⁵¹ *Id.* at 783 (“The very criteria required under [the statute] . . . is knowledge and competency in dealing with rights and liabilities of other persons as required [of lawyers] . . . , but [the statute] does not require admission to the Bar in this State and therefore does not subject [licensees] to the disciplinary rules of this Court.”). The court hinges its reasoning on the lack of aggressive oversight by a disciplinary committee. *Id.*

unauthorized practice of law, but the ethics concerns of the 1982 Indiana court remain only partially resolved.⁵² UPPA implicates the same sensitive client relationship, yet UPPA offenders rarely face discipline or oversight. The continuing persistence of UPPA is therefore inimical to the public policy forbidding the unauthorized practice of law.

V. THE EFFICACY OF CURRENT UPPA PREVENTION

The costs of UPPA thus far have been illustrated by anecdotes of successful enforcement. The far more concerning cases, however, are those that go unnoticed and unlitigated. Private litigation, in particular, is rarely worth the cost and is only viable if the defendant can pay. Enforcement actions by state attorneys general are more affordable, but they are pragmatically limited to only the worst offenders. Attorneys general have limited resources and therefore must triage complaints; they only act if a consistent trend emerges. The downside inherent to this approach is that consumers must complain—they must be aware of the harm and see fit to do something about it—and enough consumers must do so to come to the states' attention. Lesser offenders and hidden fraud are far less likely to be addressed.

The available enforcement mechanisms vary widely among the states, perhaps in part because the influential Public Adjuster Licensing Model Act fails to provide any enforcement guidance.⁵³ At least fourteen states criminalize UPPA; many others rely exclusively on civil fines.⁵⁴ Criminal penalties generally align with misdemeanor offenses with discretionary punishments ranging from up to one year of imprisonment, up to \$10,000 in fines, or some

⁵² Brief of National Ass'n of Public Insurance Adjusters, *supra* note 1, at *8 n.3 (5th Cir. Dec. 26, 2013) (“The five states that do not have such licensing statutes are Alabama, Alaska, Arkansas, South Dakota and Wisconsin.”).

⁵³ PUBLIC ADJUSTER LICENSING MODEL ACT, NAIC (2005), <http://www.naic.org/store/free/MDL-228.pdf>.

⁵⁴ *Unlicensed Public Adjusting*, *supra* note 4 (listing eleven states that criminalize UPPA); *see also* KAN. STAT. ANN. §§ 40-205e, 40-5503 (West 2015) (providing general penalties); N.Y. INS. LAW §§ 109(a), 2101(g), 2102(a)(1)(A) (McKinney 2015) (same); TEX. INS. CODE ANN. §§ 4102.051, 4102.206 (West 2015) (same).

combination thereof.⁵⁵ Civil fines are generally within the same sub-\$10,000 range.⁵⁶ Both types of penalties have serious problems. The problem with criminal penalties is jurisdictional. State insurance departments must rely on the state attorney general for *discretionary* enforcement.⁵⁷ The attorney general decides whether to prosecute; the insurance department has no say in the matter. The problem with civil penalties is that fines offer only limited deterrents for poor, judgment-proof offenders. The state cannot take what offenders do not have. For these offenders, criminal sanctions provide a much more effective deterrent. Furthermore, from an economic standpoint, for civil fines to have effect they must approach potential profits from UPPA. Otherwise UPPA will remain profitable and the deterrent will not deter.

Another problem with the enforcement mechanism is the unnatural enforcer. Contractors and other UPPA fraudsters are not traditionally within the jurisdiction of a state department of insurance, nor are they naturally on the department's radar. Similarly, a homeowner's instinct after being harmed by a contractor is probably not to call and complain to the state department of *insurance*. The mismatch is problematic and is likely why many of the available enforcement actions come from consumer protection divisions of a state attorney general.⁵⁸

VI. REFRAMING THE UPPA PROBLEM

⁵⁵ *Id.*; *see, e.g.*, CONN. GEN. STAT. ANN. § 38a-725 (“fined not more than [\$10,000] or imprisoned not more than [3] months, or both”); 215 ILL. COMP. STAT. 5/512.53, 730 ILL. COMP. STAT. 5/5-4.5-55 (2015) (establishing a “Class A Misdemeanor” punishable by less than 1-year imprisonment or a fine not to exceed \$2,500); MD. CODE ANN., INS. § 10-403(b) (“fine not exceeding \$500 or imprisonment not exceeding 6 months or both for each violation”).

⁵⁶ *See, e.g.*, CAL. INS. CODE § 15006 (2015) (“\$10,000”); HAW. REV. STAT. § 431:9-201(c)–(d) (2015) (“\$5,000” or up to “10,000” for knowing violations).

⁵⁷ *See, e.g.*, MD. CODE ANN., INS. §§ 2-201(c), 10-403 (West 2015) (“Whenever the Commissioner believes that a person has committed a violation of this article for which criminal prosecution is provided, the Commissioner shall refer the alleged violation to the [State’s Attorney or the Attorney General].”); *see also* GA. CODE ANN. §§ 33-2-24(d), 33-23-43(d) (West 2015) (“If . . . criminal prosecution is provided, [the Commissioner] shall so inform the prosecuting attorney”); 215 ILL. COMP. STAT. ANN. §§ 5/1605, 5/1610 (West 2015).

⁵⁸ *See supra* Part II (discussing actions brought by the Illinois Consumer Fraud Bureau).

UPPA is not one problem but two: malice and mediocrity. While each varies in degree and even some overlap exists, the motivations and actors are distinct and each category requires tailored solutions. Some problems are aptly addressed by existing regulations, others not at all.

The worst UPPA offenders—the storm chasers and disreputable contractors—are criminals. When they defraud consumers, they do so with malicious intent, and UPPA is just one component of a multi-faceted con.⁵⁹ When they are caught, penalties for UPPA are the least of their worries—UPPA is one infraction among a list of crimes.⁶⁰ For these offenders, the current statutory schemes are not working. They do not deter, and, arguably, they are not meant to. Most of the current licensing regulations are not designed for criminals—UPPA is not even a crime in most states.⁶¹ But even if UPPA was uniformly a crime, licensing statutes are likely not the best vehicle to deter criminals that are already flaunting several consumer protection laws. Malicious UPPA offenders may require more oversight than the current regulations can offer.

The middle ground UPPA offenders, where malice and mediocrity overlap, are more representative of what the licensing regulations are designed for. The incompetent UPPA offender in *Reyelts*, for example, was an established, bonded contractor who completed the repairs without complaint. While his UPPA conduct was inexcusable, he was not a scam artist—or if he was, he was incompetent at that as well. No, the contractor in *Reyelts* had something to lose both directly in terms of lost revenue and indirectly from bad publicity and lost sales. This population is exactly what the licensing statutes and private litigation are geared to address—businessmen easily deterred because they have much to lose.

⁵⁹ See, e.g., Complaint, *1st Choice Exteriors*, *supra* note 26, at ¶¶ 71–93 (complaining that UPPA fraudsters faked hail damage by pounding on the consumer’s roof with hammers and then committed insurance fraud by pursuing an insurance claim, on the homeowner’s policy, to pay the fraudsters to make repairs).

⁶⁰ See, e.g., *id.* (detailing multiple crimes and infractions including insurance fraud).

⁶¹ *Unlicensed Public Adjusting*, *supra* note 4; see also *supra* note 54 and accompanying text.

The mediocre UPPA offenders, however, barely register among the available UPPA enforcement anecdotes. This population is made up of contractors that “negotiate” insurance claims—likely doing no better than the homeowner himself—and complete the repairs. Even when this arrangement draws complaints, consumers are not likely complaining about UPPA. Unless a mediocre offender assesses a large public adjuster fee for no work,⁶² why would a consumer think to complain about UPPA? How could a consumer know if he received a fair settlement? These questions go to the heart of the mediocre UPPA problem. Consumers believe they are benefiting from expert services, but in fact they are being assessed the opportunity cost of not hiring a licensed public adjuster. Since consumers are generally unaware of the loss, enforcement mechanisms that hinge upon consumer participation will have limited efficacy.

VII. SOLUTIONS AND FURTHER QUESTIONS

First and foremost, the most immediate way to combat UPPA is to encourage states to enforce the current statutes. The enforcement efforts, however, should be tailored to the offending populations. The predominant focus of the public licensing statutes is regulating public adjusters, not wayward contractors.⁶³ As a practical matter, contractors are just not naturally within the purview of a state department of insurance. Therefore, UPPA enforcement should be relegated, either in whole or part, to the consumer protection divisions of the state attorneys general. Consumer protection divisions are both better equipped enforcers and more intuitive recipients of consumer complaints against contractors. Furthermore, in states with criminal penalties, the state attorney general must be involved in enforcement anyway. Illinois

⁶² See, e.g., Complaint, *supra* note 1, at ¶ 63; see also *supra* Part II.

⁶³ See, e.g., PUBLIC ADJUSTER LICENSING MODEL ACT, *supra* note 53.

has successfully pioneered this delegation of enforcement responsibilities.⁶⁴ This type of delegation and partnership should become more uniform.

But enforcement actions alone cannot address all the manifestations of UPPA. They are too dependent on victim participation and post hoc complaints. Instead, UPPA regulation should focus on the parties best able to prevent the harm: the insurance companies.⁶⁵ Insurers enable UPPA. They communicate with UPPA offenders, engage in negotiations, and allow contractors to handle claims.⁶⁶ If insurance companies stopped enabling the practice, a significant portion of UPPA offenses would become impossible.⁶⁷ Some insurance companies refuse to do business with UPPA offenders voluntarily⁶⁸ but, given the continued prevalence of UPPA, they are not doing enough and could do more. Some states have already enacted statutes prohibiting insurance companies from doing business with unlicensed adjusters with hefty civil fines for violations.⁶⁹ Similar statutes should be uniformly adopted and aggressively enforced.

But why stop at prohibition? If regulating insurers is the most effective way to prevent UPPA, perhaps insurers should be charged with an affirmative duty to warn their insureds of UPPA when a contractor becomes involved in the claim process. The insurer does not need to

⁶⁴ See *supra* Part II (discussing actions brought by the Illinois Consumer Fraud Bureau).

⁶⁵ Cf. CALABRESI, *supra* note 11, at 50–54 (arguing that the burden of liability should be borne by the party best able to minimize and spread the harm).

⁶⁶ See, e.g., Complaint, *supra* note 29, at ¶¶ 26–30 (“Defendants met with consumers’ insurance agents and negotiated the amounts awarded”).

⁶⁷ See Papa, *supra* note 1, at 5 (“[Insurers] may be the only party ‘in the know’ who can call out someone engaged in UPPA; it should be part of their obligation as licensees of the state to do so.”). Ronald J. Papa further writes that UPPA should not be difficult for insurers to identify. *Id.* at 5 n.2.

⁶⁸ See, e.g., Complaint, *supra* note 1, at ¶ 61 (“In some instances, the consumer’s insurance company will not speak to Defendants because Defendants are general contractors and not licensed public adjusters.”).

⁶⁹ See, e.g., KY. REV. STAT. §§ 304.9-436, 304.99-020 (2015) (prohibiting insurers from doing business with unlicensed adjusters with stiff potential penalties).

discern if the contractor is engaging in UPPA; the contractor's mere presence could be enough to trigger a duty to warn. The warning does not need to be complex or burdensome; even a cautionary sentence or two could have a profound effect.

The downside of regulating insurers, however, is that it may slow down the claims process. While a duty to warn would likely take little time, prohibiting direct communications with unlicensed contractors could significantly delay information gathering. But, given the danger of UPPA, the delay may be warranted. Further study of the national prevalence and empirical cost of UPPA may be necessary to inform a full cost-benefit analysis.

Another important weapon to combat UPPA is criminalization. Legislators cannot expect to deter criminals from UPPA if UPPA is not a crime. For these types of malicious offenders, incarceration is necessary to effectively deter. Civil fines are important too, but they are best against a different population of offenders. Given the variance among UPPA offenders, the available penalties should be broadly prescribed to provide judges with significant sentencing discretion. While this is not a complete solution—because the worst offenders are already flaunting far more serious penalties—uniform criminalization will help to some degree.

The current mechanisms to combat UPPA have focused on deterrence—ex post enforcement to punish offenders and make victims whole. The problem with deterrence is in order to be effective, the threat must be known and, if violated, the punishment carried through. With UPPA, both sides of the problem—publicity and enforcement—face serious obstacles.⁷⁰ Therefore, further consideration should be given to prevention such as requiring insurers to warn their insureds. While these measures will not stop all cases of UPPA, as in *Reyelts* where the insurer was never contacted, they have the potential to make a significant dent in UPPA overall.

⁷⁰ See *supra* Parts V–VI.

To address the inevitable cases, however, legislators should consider borrowing from consumer protection statutes like those operative in *Reyelts*.⁷¹ At a minimum, legislators should create private rights of action for UPPA with the possibility of collecting attorneys fees.⁷² Legislators should also consider provisions for mental anguish and punitive damages. While this will not help against judgment-proof offenders, in some cases it may alleviate some of the prohibitive costs of litigation.

The costs of UPPA are known,⁷³ but the extent and prevalence are not. Further study is required to determine the number of UPPA offenders, the aggregate size of UPPA damages, and the size of the offender subpopulations.⁷⁴ Further understanding of the costs of UPPA would help frame the UPPA problem, inform lawmakers, and guide judges as they set discretionary penalties. Additional study of the empirical benefits offered by public adjusters would also help elucidate the opportunity costs of UPPA victims and lend credibility to the industry as a whole. Given the frequent overlap of UPPA with violations of consumer protection statutes, further inquiry should also be conducted to determine if licensing enforcement is the best vehicle to address the UPPA problem.

⁷¹ See *supra* text accompanying note 22.

⁷² See HOWELL E. JACKSON, LOUIS KAPLOW, STEVEN M. SHAVELL, W. KIP VISCUSI & DAVID COPE, *ANALYTICAL METHODS FOR LAWYERS* (2003) (explaining that tort recovery may have a cost advantage over other enforcement, if victims are able to bring suit, because the costs are only assessed when harm occurs as opposed to the constant administrative costs of a preventative regulatory scheme).

⁷³ See *supra* Parts II–IV.

⁷⁴ This type of empirical study would likely require a dedicated team of researchers, including economists, and grant money. Given UPPA's national scope and the reliance on state law for regulation, state government participation is necessary to gather UPPA data but states are ill-equipped to study the problem on a national scale.