

WHAT PUBLIC INSURANCE ADJUSTERS CAN AND CANNOT DO UNDER TEXAS LAW

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As we enter the time of year with the most hurricane and hail activity, we also enter the time of year when public insurance adjusters (herein referred to as “public adjusters”) are likely at their most active. However, the limits on public adjusters’ activities have not been widely analyzed in Texas legal scholarship. This article sets forth what public adjusters can and cannot do under Texas law.

Background

A public adjuster represents an insured in connection with insurance claims, generally on a contingency fee basis in an agency relationship.¹ According to the National Association of Public Insurance Adjusters (“NAPIA”), “a public adjuster inspects the loss site immediately, analyzes the damages, assembles claim support data, reviews the insured’s coverage, determines current replacement costs and exclusively serves the client, not the insurance company.”² Public adjusters usually pitch their services as a way to level the playing field in a “David versus Goliath” fight against unfair, cheating insurance companies. NAPIA is sponsored by well-known policyholder law firms, who make the same pitch.³ As discussed herein, there is often interplay between public adjusters and policyholder attorneys, and the Texas Legislature has recently increased regulation of both.

Public adjusters must be licensed under Texas law,⁴ and are therefore part of the heavily regulated Texas insurance industry. Indeed, public adjusters are subject to a comprehensive regulatory statute contained within Title 13 of the Texas Insurance Code, Regulation of Professionals, under which agents and insurer-side adjuster are also regulated.⁵ The Texas Department of Insurance lists 944 individual licensed public adjusters.⁶ By contrast, the Texas Department of Insurance lists 117,745 individual licensed insurer-side adjusters.⁷

The Texas Administrative Code includes a Code of Ethics for public adjusters, most recently amended in 2020.⁸ Among other things, this Code of Ethics requires:

(1) Licensees must conduct business fairly with their clients, insurance companies, and the public.

..

(6) Licensees must have appropriate knowledge and experience for the work they undertake and should obtain competent technical assistance, when necessary, to help handle claims and losses outside their area of expertise.

...

(8) Licensees must avoid conflicts of interest, including acquiring any interest in salvaged property or participating in any way, directly or indirectly, in the reconstruction, repair, or restoration of damaged property that is the subject of a claim adjusted by the licensee, except as allowed in Insurance Code Chapter 4102 and this subchapter.⁹

Several provisions in the Texas Administrative Code’s Code of Ethics for public adjusters simply reiterate the statute that governs public adjusters, for example, prohibiting misrepresentations, prohibiting deceptive advertising, and requiring continuing education.¹⁰ NAPIA published a Code of Conduct in 2015 applicable to members of the association.¹¹ The Texas Administrative Code’s Code of Ethics is similar to NAPIA’s.

Public adjusters are often criticized by both insureds and insurers for predatory and unscrupulous practices, particularly following natural disasters.¹² The Texas Insurance Code sections governing public adjusters were amended in 2015 and 2019 to address perceived abuses by public adjusters.¹³ Similarly, the Texas Insurance Code was amended in 2017 to add an entirely new section to address perceived abuses by policyholder attorneys.¹⁴

What Public Adjusters Can Do Under Texas Law

Texas Insurance Code §4102.001 defines a “public insurance adjuster” as

(A) a person who, for direct, indirect, or any other compensation:

(i) acts on behalf of an insured in negotiating for or effecting the settlement of a claim or claims for loss or damage under any policy of insurance covering real or personal property; or

(ii) on behalf of any other public insurance adjuster, investigates, settles, or adjusts or advises or assists an insured with a claim or claims for loss or damage under any policy of insurance covering real or personal property; or

(B) a person who advertises, solicits business, or holds himself or herself out to the public as an adjuster of claims for loss or damage under any policy of insurance covering real or personal property.¹⁵

Texas Insurance Code §4102.101 provides:

(a) A license issued under this chapter authorizes the adjusting of claims on behalf of insureds for fire and allied coverages, burglary, flood, and all other property claims, both real and personal, including loss of income, but only when the client is an insured under the insurance policy.¹⁶

A public adjuster can also receive insurance claim proceeds under limited circumstances, as set forth in Texas Insurance Code §4102.111:

(a) All funds received as claim proceeds by a license holder acting as a public insurance adjuster are received and held by the license holder in a fiduciary capacity. A license holder may not divert or appropriate fiduciary funds received or held.¹⁷

These are the only Texas Insurance Code sections authorizing activities by public adjusters. As discussed below, the prohibitions on activities by public adjusters in the Texas Insurance Code and Texas common law are much more extensive. Thus, public adjusters have a very limited scope of authorized activities under Texas law.

What Public Adjusters Cannot Do Under Texas Law

A. Cannot Practice Public Adjusting Without a License

As mentioned, public adjusters must first obtain a license before practicing.¹⁸ In order to obtain a license, the applicant must take an examination, undergo a background check, and then submit an application.¹⁹ Temporary, provisional, and emergency licenses are not allowed.²⁰ Insureds, insurers, and any member of the public can check the Texas Department of Insurance’s list of licensed public adjusters online.²¹

B. Cannot Practice Law

Texas Insurance Code § Sec. 4102.156 provides: A license holder may not render services or perform acts that constitute the practice of law, including the giving of legal advice to any person in the license holder’s capacity as a public insurance adjuster.²²

There is also case law concerning prohibition of the unauthorized practice of law by public adjusters.²³ But when does public adjusting trespass into the practice of law?



The State Bar Act provides in relevant part:

(a) In this chapter the “practice of law” means the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.

(b) The definition in this section is not exclusive and does not deprive the judicial branch of the power and authority under both this chapter and the adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law.²⁴

Under the common law, the following activities constitute the practice of law:

- (1) Contracting with persons to represent them with regard to their personal causes of action for property damages or personal injury.
- (2) Advising persons as to their rights and the advisability of making claims for personal injuries or property damages.
- (3) Advising persons whether to accept an offered sum of money in settlement of claims for personal injuries or property damages.
- (4) Entering into contracts with persons to represent them in their personal injury or property damage matters on a contingent fee together with an attempted assignment of a portion of the person’s cause of action.
- (5) Entering into contracts with third persons which purport to grant the exclusive right to select and retain legal counsel to represent the individual in any legal proceeding.
- (6) Advising clients of their legal rights, duties and privileges under the law.²⁵

Using similar terminology, the Texas Penal Code prohibits the unauthorized practice of law and provides in relevant part:

(a) A person commits an offense if, with intent to obtain an economic benefit for himself or herself, the person:

- (1) contracts with any person to represent that person with regard to personal causes of action for property damages or personal injury;
- (2) advises any person as to the person’s rights and the advisability of making claims for personal injuries or property damages;
- (3) advises any person as to whether or not to accept an offered sum of money in settlement of claims for personal injuries or property damages;
- (4) enters into any contract with another person to represent that person in personal injury or property damage matters on a contingent fee basis with an attempted assignment of a portion of the person’s cause of action; or
- (5) enters into any contract with a third person which purports to grant the exclusive right to select and retain legal counsel to represent the individual in any legal proceeding.

(b) This section does not apply to a person currently licensed to practice law in this state, another state, or a foreign country and in good standing with the State Bar of Texas and the state bar or licensing authority of any and all other states and foreign countries where licensed.²⁶

Courts have found that the following activities by public adjusters do not constitute the unauthorized practice of law:

- (1) measuring and documenting first-party insurance claims and to presenting them to insurers;
- (2) legitimately investigating the facts and negotiating for the claimant;
- (3) advising claimants on property damage valuations.²⁷

Courts have found that the following activities by pub-

lic adjusters (or persons otherwise representing insurance claimants) *do constitute* the unauthorized practice of law or likely constitute the unauthorized practice of law:

- (1) interpreting insurance contracts;
- (2) discussing or negotiating coverage matters with insurers;
- (3) engaging in a course of conduct that encourages litigation and the prosecution of claims;
- (4) determining liability, extent of legally compensable damages, and a claimant's legal rights and privileges; and
- (5) advising a claimant to accept a settlement under some circumstances.²⁸

As the Court in *Johnson v. McLeaish* summarized, “a ‘public adjuster’ is not authorized to engage in the practice of law, which embraces, in general, all advice to clients and all action taken for them in matters connected with the law.”²⁹ These lists are not exclusive. Because cases of alleged unauthorized practice of law often involve unique facts, courts can decide what constitutes the practice of law on a case-by-case basis.³⁰

Some legal commentary has stated that there is a “fine line” between public adjusting and the unauthorized practice of law. Respectfully, such commentary is incorrect. The statutes, common law, and codes of ethics governing public adjusters make it clear that the practice of public adjusting is very different than the practice of law, and the public adjuster should not even come close to the line.

C. Cannot Accept Referral Fees

As mentioned, public adjusters are usually compensated on a contingent fee basis tied to the amount of insurance proceeds that they help recover. To combat barratry, conflicts of interest, and the unauthorized practice of law, the Texas Insurance Code places further limits on public adjusters' compensation:

- (a) A licensed public insurance adjuster may not accept a fee, commission, or other valuable consideration of any nature, regardless of form or amount, in exchange for the referral by a licensed public insurance adjuster of an insured to any third-party individual or firm, including an attorney, appraiser, umpire, construction company, contractor, or salvage company.³¹

This section does not prevent the referral from happening. Such referrals are common. Rather, this section merely prevents collecting a fee for such a referral.

D. Cannot Participate in Repair and Reconstruction or Act as Agent for Attorney

Similarly, Texas Insurance Code §4102.158 provides as follows regarding conflicts of interest:

- (a) A license holder may not:
 - (1) participate directly or indirectly in the reconstruction, repair, or restoration of damaged property that is the subject of a claim adjusted by the license holder; or
 - (2) engage in any other activities that may reasonably be construed as presenting a conflict of interest, including soliciting or accepting any remuneration from, having a financial interest in, or deriving any direct or indirect financial benefit from, any salvage firm, repair firm, construction firm, or other firm that obtains business in connection with any claim the license holder has a

contract or agreement to adjust.

(b) A license holder may not, without the knowledge and consent of the insured in writing, acquire an interest in salvaged property that is the subject of a claim adjusted by the license holder.

(c) A license holder may not represent an insured on a claim or charge a fee to an insured while representing the insurance carrier against which the claim is made.

(d) A license holder may not directly or indirectly solicit, as described by Chapter 38, Penal Code, employment for an attorney or enter into a contract with an insured for the primary purpose of referring an insured to an attorney and without the intent to actually perform the services customarily provided by a licensed public insurance adjuster. This section may not be construed to prohibit a license holder from recommending a particular attorney to an insured.

(e) A license holder may not act on behalf of an attorney in having an insured sign an attorney representation agreement.

(f) A license holder must become familiar with and at all times act in conformance with the criminal barratry statute set forth in Section 38.12, Penal Code.³²

The court in *Lon Smith & Assocs. v. Key* recently reaffirmed these prohibitions and also made it clear that roofers cannot work as unlicensed public adjusters to negotiate claims with insurers and refer themselves repair work.³³

E. Cannot Pay Referral Fees or Put the Insured “On Salary”

In further recognition of the problems created by referral fees and conflicts of interest, the Texas Insurance Code prohibits public adjusters from paying referral fees to a third party in order to obtain the insured's business.³⁴ This section, and the sections discussed immediately above, prohibit what might otherwise become a chain or ring of referrals from repair contractors to public adjusters to attorneys, with referral fees collected at each stage, making profit the primary interest of the referring parties, rather than the consumer's best interest.

Policyholder attorneys, and plaintiff's attorneys in general, often advance money to clients, or “put them on salary.” This can be very profitable for the attorney. The Texas Insurance Code prohibits this practice between public adjusters and potential clients or insureds.³⁵

F. Cannot Server as an Appraiser

The typical appraisal clause in insurance policy requires that the insured's appraiser be “unbiased” or “independent.”³⁶ Under Texas law, “an appraiser with a financial interest in the outcome of an insurance appraisal is not impartial.”³⁷ Even public adjusters who are not on a contingency fee basis will have confirmation bias and will not be “independent” since they had previously served as the insured's agent and advocate. Thus, a public adjuster on a loss cannot serve as the appraiser on that same loss.

G. Cannot Solicit New Clients During a Natural Disaster

Texas Insurance Code §4102.151 provides:

A license holder may not solicit or attempt to solicit a client for employment during the progress of a loss-producing natural disaster occurrence.³⁸

This common sense prohibition recognizes that consumers



are vulnerable during natural disasters and that travel within disaster zones should be limited to emergency responders.³⁹

H. Cannot Serve as an Expert Without More

Under Texas law, a person may qualify as an expert by his or her knowledge, skill, experience, training, or education.⁴⁰ Simply holding a title or license is not enough to qualify a person as an expert.⁴¹ Therefore, a licensed Texas public adjuster is not necessarily qualified to opine regarding every aspect of a property insurance claim, such as forensic damage evaluation or costs of repair, simply because he or she is a licensed Texas adjuster. More is required.⁴²

Other Issues

A. Enforcement

Because of limited budgets at the Texas Department of Insurance and Unauthorized Practice of Law Committee,⁴³ enforcement of the regulatory scheme governing public adjusters is difficult. Violation of the statute governing public adjusters is actionable by the consumer under the DTPA.⁴⁴ However, as the *Guerra* case discussed above shows, a consumer wronged by a public adjuster may be mired in a web of attorneys and contractors aligned with the public adjuster, and finding a separate attorney to successfully prosecute a claim against the public adjuster may be difficult. Also, insurers lack swift and sure vehicles to address wrongdoing by public adjusters on their claims. The Texas legislature may wish to address these issues.

B. Imputation

When a public adjuster provides the insurer with false or inflated claim information, there may be sufficient grounds to void the policy by enforcement of a policy's misrepresentation or concealment provision.⁴⁵ There are sound legal and public policy reasons for such accountability and the Texas legislature may also wish to address these issues.

C. Do Your Homework

If an insured is inclined to retain a public adjuster, he should do his homework. He should make sure that the public adjuster is licensed and reputable. Also, beware the public adjuster who wears more than one hat, for example a public adjuster who is also a roofer, because it can be easy to run afoul of the statutory scheme governing public adjusters and become embroiled in litigation.⁴⁶

Conclusion

Public adjusters have a very limited scope of permissible action under Texas law. It is likely that regulation of public

adjusters will continue to evolve following major weather events like hurricanes.

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1 See TEX. INS. CODE §4102.104(a). In addition to contingent fees, public adjusters are allowed to chart flat fees, hourly rates, or another method that does not result in a total commission that exceeds 10% of the amount of the insurance settlement on the claim. See *id.*

2 <https://www.napia.com/aboutnapia1> (last access June 17, 2020).

3 <https://www.napia.com> (last accessed June 17, 2020).

4 See TEX. GOV'T CODE §4102.051.

5 See TEX. INS. CODE §4102.001 *ET SEQ.*

6 <https://www.tdi.texas.gov/agent/agentlists.html> (last accessed June 16, 2020).

7 *Id.*

8 TEX. ADMIN. CODE TITLE 28, PART I, CHAPTER 19, RULE 19.713.

9 See *id.*

10 See *id.*

11 <https://www.napia.com/codeofconduct> (last accessed June 17, 2020).

12 See, e.g., *Int'l Risk Control, LLC v. Seascope Owners Ass'n*, 395 S.W.3d 821, 823 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (insureds' counsel who took over claim from public adjusters alleged that the public adjusters' work product was "rife with errors and improper calculations"); *Nat'l Claims Negotiators, LLC v. Guerra*, 2020 Tex. App. LEXIS 2835, *2 (Tex. App.—Dallas 2020, no pet.) (ruling that plaintiff homeowners can proceed with their claims against defendant public adjusters without waiting for arbitration of claims against attorneys allegedly involved in scam; defendants including public adjusters are accused of an elaborate scam in which homeowners are charged excessive fees); see also *Liberty Mut. Ins. Co. v. Land*, 2010 N.J. Super. Unpub. 89, *4 (N.J. Sup. Ct. App. Div. Jan. 24, 2010) (insured's nephew/public adjuster was caught on tape smashing a tree into a roof to increase damage).

13 See TEX. INS. CODE §4102.001 *et seq.*

14 See TEX. INS. CODE §542A.001 *et seq.*

15 See TEX. INS. CODE §4102.001(3)(A) *et seq.* This section of the Texas Insurance Code impliedly limits public adjusters to working on property insurance damage claims, but another section explicitly forbids public adjusters from working on bodily injury claims. See Tex. Ins. Code §4102.157.

16 TEX. INS. CODE §4102.101.
17 TEX. INS. CODE §4102.111.
18 See TEX. INS. CODE §4102.051.
19 <https://www.tdi.texas.gov/agent/adjuster-public-insurance-apply.html> (last accessed June 19, 2020); see also generally *Tex. Ins. Code* §4102.001 et seq. (providing the regulatory scheme for becoming a licensed public adjuster and maintaining licensure).
20 *Id.*
21 See <https://www.tdi.texas.gov/agent/agentlists.html> (last accessed June 16, 2020).
22 TEX. INS. CODE §4102.156. For good measure, Texas Insurance Code §4102.003 provides: “This chapter may not be construed as entitling a person who is not licensed by the Supreme Court of Texas to practice law in this state.”
23 See, e.g., *Kubala Pub. Adjusters, Inc. v. Unauthorized Practice of Law Comm.*, 133 S.W.3d 790 (Tex. App.—Texarkana 2004, no pet.); *Unauthorized Practice of Law Comm. v. Jansen*, 816 S.W.2d 813 (Tex. App.—Houston [14th Dist.] 1991, no writ).
24 Tex. Gov’t Code §81.101.
25 *Brown v. Unauthorized Practice of Law Comm.*, 742 S.W.2d 34, 42 (Tex. App.—Dallas 1987, writ denied); *Johnson v. McLeaish*, 1995 Tex. App. LEXIS 3341, *16 (Tex. App.—Dallas 1995, no writ).
26 Tex. Penal Code §38.123.
27 See *Jansen*, 816 S.W.2d at 816.
28 *Id.*; see also *Brown*, 742 S.W.2d at 42; *Johnson*, 1995 Tex. App. LEXIS at *14.
29 *Johnson*, 1995 Tex. App. LEXIS at *30.
30 *Brown*, 742 S.W.2d at 41; see also *Linder v. Ins. Claims Consultants, Inc.*, 560 S.E.2d 612, 260 (S.C. 2002) (same, also analyzing Texas authorities and providing comprehensive discussion about unauthorized practice of law with regard to public adjusters).
31 TEX. INS. CODE §4102.164.
32 TEX. INS. CODE §4102.158(a)-(f).
33 *Lon Smith & Assocs. v. Key*, 526 S.W.3d 604, 617-635 (Tex. App.—Fort Worth 2017, pet. denied) (commenting also: “Looking to the entirety of chapter 4102, the legislature’s enactment of the following provisions applicable to licensed public insurance adjusters demonstrates that the disgorgement provisions of section 4102.207 are punitive—intended to punish and to deter roofing and construction companies from taking advantage of Texas consumers by purporting to act, while unlicensed, as public insurance adjusters for insureds. See *id.* § 4102.103 (providing that the contract used by a public insurance adjuster must include “a prominently displayed notice in 12-point boldface type that states ‘WE REPRESENT THE INSURED ONLY’”), § 4102.111 (providing that all funds received as claim proceeds by a license holder acting as a public insurance adjuster are received and held by the license holder in a fiduciary capacity), § 4102.151 (prohibiting a license holder from soliciting or attempting to solicit a client for employment during the progress of a loss-producing, natural-disaster occurrence), § 4102.158 (prohibiting a license holder from participating directly or indirectly in reconstruction, repair, or restoration of damaged property that is the subject of a claim adjusted by the license holder). Because unlicensed public insurance adjusters are not subject to the checks, balances, and penalties that licensed public insurance adjusters are, section 4102.207’s disgorgement provision is a punitive deterrent. *Morton*, 412 S.W.3d at 511 (holding property code provision was subject to common-law rescission principles because it “was not intended to be punitive”). To construe section 4102.207 as LSRC desires would in effect render it toothless; if construction companies and roofing companies that are unlicensed as public insurance adjusters are able to successfully solicit repair contracts by agreeing to act as the insured’s public insurance adjuster and

nonetheless retain the monies paid to them for their repair or roofing services, then from a cost-benefit standpoint, the statute imposes no financial incentive for such companies to stop acting as unlicensed public insurance adjusters.”); see also <https://www.law360.com/articles/1106125/there-s-a-storm-brewing-for-some-texas-contractors> (last accessed July 13, 2020).

34 TEX. INS. CODE §4102.160(2).

35 TEX. INS. CODE §4102.160(1).

36 See *Franco v. Slavonic Mut. Fire Ins. Ass’n*, 154 S.W.3d 777, 786–87 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *Gardner v. State Farm Lloyds*, 76 S.W.3d 140, 143-44 (Tex. App.—Houston [1st Dist.] 2002, no pet.); see also generally Karl A. Schulz, *Accurate Outcomes in Appraisal – The Importance of the Umpire’s Subject Matter Expertise*, 15 J. Consumer & Commercial Law 54 (2012).

37 *General Star Indem. Co. v. Spring Creek Village Apt. Phase V Inc.*, 152 S.W.3d 733, 737 (Tex. App.—Houston [14th Dist.] 2004, no pet.); see also *Devonshire Real Estate and Asset Management, LP v. The American Insurance Company*, 2013 U.S. Dist. Lexis 194668, *4 (N.D. Tex. 2013) (a disqualifying pecuniary interest may be found, for example, where an appraiser has entered into a contingency fee contract with the insured); *Colo. Hospitality Servs. v. Owners Ins. Co.*, 2015 U.S. Dist. LEXIS 91307, *7 (D. Colo. 2015) (as a matter of law, a public adjuster who was originally paid an hourly rate but later had a contingency fee agreement was not “impartial” within the meaning of the policy, and the appraisal award must be vacated); *State Farm Florida Ins. Co. v. Sanders*, 2019 Fla. App. LEXIS 11655, *3 (3d DCA July 24, 2019) (insured’s public adjuster, who had been involved in the claim from the beginning, was not “disinterested” as required by the appraisal clause because the public adjuster had a financial interest in whether the insured recovered and how much the insured recovered; public adjuster contract created agency relationship between public adjuster and the insured, and the resulting fiduciary relationship precludes the public adjuster from serving as an appraiser as a matter of law).

38 TEX. INS. CODE §4102.151.

39 However, the limitation of this prohibition to “during the progress of a loss-producing natural disaster occurrence” seems vague and unnecessarily short. The need for consumer protection and free movement of emergency responders does not stop the moment the rain and wind stop. The legislature should consider revising this section. An adjacent section of the Texas Insurance Code, §4102.152, limits the times of day during which public adjusters can solicit or attempt to solicit business.

40 See TEX. R. CIV. PRO.702.

41 See *Green v. Brantley*, 11 S.W.3d 259, 263 (Tex. App.—Fort Worth 2000, pet. denied) (“A license to practice a profession does not inherently qualify the licensee as an expert in every matter related to the profession.”); *Bakker v. Ferman*, 2001 Tex. App. LEXIS 5112, *12 (Tex. App.—Dallas 2001, no pet.) (same).

42 See *id.* (requiring proof of the expert’s qualifications and the basis for opinions).

43 Indeed, the Unauthorized Practice of Law Committee depends on *pro bono* lawyers to represent it. <http://www.txuplc.org/Home/about> (last accessed July 8, 2020).

44 See *Reyelts v. Cross*, 968 F. Supp. 2d 835, 844 (N.D. Tex. 2013).

45 See *Reverse Now VII, LLC v. Or. Mut. Ins. Co.*, 341 F. Supp. 3d 1233, 1240 (W.D. Wash. 2018); *Chubb & Son Inc. v. Consoli*, 283 A.D.2d 297, 298, 726 N.Y.S.2d 398 (1st Dept. 2001); *Harold J. Warren, Inc. v. Federated Mut. Ins. Co.*, 386 F.2d 579, 582 (1st Cir. 1967).

46 See *Hill v. Spracken*, 2018 Tex. App. LEXIS 5313 (Tex. App.—Dallas 2018, pet. denied); *Lon Smith*, 527 S.W.3d at 635.