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Oregon State Legislature
Senate Committee on Judiciary

March 4, 2019

Submitted through electronic submission system to: sjud.exhibits@oregonlegislature.gov

RE: SB 728, Unfair Trade Practices Act - NAMIC's Written Testimony in Opposition

Dear Senator Prozanski, Chair; Senator Thatcher, Vice-Chair; and honorable committee members:

Thank you for affording the National Association of Mutual Insurance Companies (NAMIC) an opportunity to submit written testimony to the Senate Committee on Judiciary for the public hearing on SB 728.

The National Association of Mutual Insurance Companies (NAMIC) is the largest property/casualty insurance trade association in the country, with more than 1,400 member companies. NAMIC supports regional and local mutual insurance companies on main streets across America and many of the country's largest national insurers. NAMIC members represent 40 percent of the total property/casualty insurance market, serve more than 170 million policyholders, and write nearly $225 billion in annual premiums. NAMIC has 153 members who write property/casualty in the State of Oregon, which represents 44% of the insurance market.

NAMIC appreciates the bill sponsor's desire to make sure that insurance consumers have appropriate remedies to address disputes with their insurance company. **However, NAMIC is concerned that the proposed legislation will needlessly expand the Unlawful Trade Practices Act (UTPA) to include insurance: thereby, adding redundant and costly new regulatory oversight to an already highly-regulated insurance industry and incentivizing the filing of frivolous lawsuits.**

On behalf of NAMIC's members, we respectfully submit the following comments *in opposition to* the proposed legislation:

1) SB 728 is inconsistent with the national trend on regulating insurance claims settlement practices and would turn Oregon into a legal hot-bed for pro-plaintiff attorney litigation

The proposed legislation would amend the Oregon Unlawful Trade Practices Act (UTPA) to include insurance within the purview of the UTPA and would make an insurance unfair claims settlement practice an unlawful trade practice.

NAMIC is concerned that SB 728 would effectuate a radical departure from the regulatory purpose of the Unfair Claims Settlement Practices Act (ORS 746.230), by creating a private civil cause of action against an insurer for a violation of a regulatory guideline or business practice standard.

The vast majority of states in the nation *do not allow* for a first-party and/or third-party civil cause of action to be filed against an insurer for a mere regulatory violation of the state's unfair claims settlement practices act. Only ten states have combined their Unfair Claims Settlement Practices (UCSP) statute into their Unlawful Trade Practices Acts (UTPA), and only five of those states allow private rights of action. Only two states, (FL, MA), allow both first *and* third parties to sue insurers for alleged UCSP violations.

SB 728 would authorize first-party and third-party bad faith claims against insurers and insurance producers for nominal and/or technical violations of claims adjusting standards and would incentivize the filing of costly civil lawsuits in cases that should be resolved by the Department of Consumer and Business Services (DCBS) through their cost-effective and expedited regulatory process[1].

2) **There is no evidence to support the conclusion that there is a pattern and practice of insurers routinely violating the Unfair Claims Settlement Practices Act, so as to justify creating a private cause of action that is rife with adverse societal consequences**

A review of the DCBS's records on the frequency and severity of insurer violations of the UCSP demonstrate that SB 728 is a legislative solution in search of a regulatory problem.

Further, there is nothing in the record to support the contention that the DCBS has failed to properly regulate claims settlement practices and/or adequately protect consumers against violations of the UCSP. Consequently, one must ponder the public policy question - why should a private civil cause of action be authorized by statute to address a regulatory compliance problem that does not exist?

Not only is there no evidence to support the contention that insurers are routinely failing to settle claims in compliance with the UCSP, the vast majority of insurance consumers are satisfied with their claims experience and their insurance settlement. One need only look at the number of insurance claims filed each year and the very small number of consumer complaints filed with the DCBS to see that this bill is entirely unnecessary. Moreover, studies have shown that most insurance consumers believe that they are treated fairly by their insurance company. In a 2015 polling study of Oregonians, DHM Research found that "**91% of voters who filed claims with their insurance companies within the last five years believed that their insurance company handled their claim fairly."**

Further, most insurance consumers believe that the DCBS has the regulatory authority and professional acumen to assist them in any claims dispute they may have with an insurer. In the same DHM polling study of Oregonians, the researchers found that "**69% of voters believe they are adequately protected by options for recourse currently offered when a consumer believes their claim was unfairly denied**."

Specifically, the DCBS has a number of regulatory tools to address insurance consumer disputes with an insurer. The DCBS may utilize its civil restitution authority to investigate, negotiate and order settlements of disputed claims, and/or initiate a market conduct examination of an insurer to evaluate insurance company claims settlement practices. The DCBS may also order insurer remediation and/or impose fines and sanctions upon any insurer the violates the UCSP. The DCBS may also suspend or revoke the license of any insurer, who fails to comply with the UCSP, to transact insurance business in the state.

3) **The proposed legislation will make the insurance claims settlement process needlessly protracted, expensive, and contentious without providing claimants with any necessary consumer protections**

SB 728 amends the UTPA in a manner that will allow the filing of class action law suits against insurers and insurance producers for any alleged violation of a provision of the UCSP or any of the dozens of other business trade practice violations enumerated in the UTPA.

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[1] In a 2004 study on the effect bad faith laws have on insurance claims settlements, the researchers concluded that **higher overall settlement amounts are paid in states that recognize first-party bad faith liability**, and that the higher overall settlement amounts are a result of higher payments for both economic and noneconomic damages. (Mark J. Browne, Ellen S. Pryor, and Bob Puelz, "The Effect of Bad Faith Laws on First-Party Insurance Claims Decisions," Journal of Legal Studies*,* 2004).

* In a similar study conducted in 2009, researchers who looked at how claims settlements changed over 20 years concluded that **claims payments are higher in states that permit tort actions for insurer first-party bad faith.** (Sharon Tennyson and Danial P. Asmat, "Bargaining in the Shadow of the Law: How do 'Bad Faith' Laws Affect Insurance Settlements?" May 2010).

* The insurance claims cost impact of "double lawsuit" legislation is clearly illustrated by the fact that **since the enactment of the first-party bad faith law in Washington, more than 5,000 lawsuit notices have been filed with the insurance department, and property insurance loss costs have risen by nearly $200 million.** Further, the severity of injury claims more than doubled in first-party insurance coverage lines like PIP, UM/UIM and med pay from 2008-2010.

The proposed legislation will expose insurers to legal liability for punitive damages, and "one-way" attorney's fees awards that could be exploited by plaintiff attorneys to coerce insurers into paying unreasonable and excessive settlement demands or risk having to defend against a costly second insurance claim lawsuit (one lawsuit against the insurer's policyholder and then a second lawsuit directly against the insurer for their claims adjusting or business activities) and/or complex class action litigation.

NAMIC is also concerned that the proposed legislation will encourage more extensive "litigation posturing", which will make it more difficult and costly for insurers to settle claims in a fair, accurate, and timely manner to the benefit of insurance consumers.[2]

In effect, SB 728 will turn every insurance claim into a protracted, expensive, and contentious proceeding that will require insurers to start preparing for a potential second insurance claim lawsuit whenever a claimant is unsatisfied with the settlement of his/her insurance claim, even if the settlement is equitable and consistent with the terms and conditions of the insurance policy or state case law.

Additionally, since the UCSP is regulatory in nature and does not authorize a private cause of action against insurers, it was drafted broadly to provide general "standards of conduct" for insurers to use as claims settlement practice guidelines. It was not intended to set forth clear prohibitions that could be the basis for legal liability civil lawsuit. Alleged violations of the UCSP were intended to be evaluated by a regulator, who has subject matter expertise and experience with insurance claims settlement practices, not by a juror, who neither has knowledge nor experience with the intricacies of claims adjusting.

SB 728 would expose insurers to second insurance claim lawsuits for alleged violations of very nebulous "standards of conduct", that could easily be leveraged by a claimant to force an insurer to pay a higher settlement than is warranted by the facts of the claim.

> For example, what must an insurer do or fail to do in order to be in violation of the UCSP provision, "failing to adopt and implement reasonable standards for the prompt investigation of claims"?
>
> For example, when has an insurer violated the UCSP provision, "refusing to pay claims without conducting a reasonable investigation based on all available information"?

These are inquiries that require regulatory experience and subject matter expertise in claims adjusting and a working knowledge of the UCSP. Otherwise any and every insurance claims practice could potentially be the basis for a first-party or third-party bad faith lawsuit pursuant to SB 728.

4) SB 728 will facilitate the "padding of insurance claims" and the filing of frivolous lawsuits, and hinder insurers in their efforts to prevent insurance fraud[3]

The proposed legislation specifically authorizes a minimum recovery of $200 or actual damages for "any person who suffers *any ascertainable* loss of money or property".

Consequently, a mere nominal loss of money by an insured or claimant (e.g. the cost of postage to resend something to the insurer as a result of an inconsequential mistake or omission by the insurer in the claims adjusting process) would

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[2] In a 2013 U.S. Chamber of Commerce Institute for Legal Reform study on the impact of bad faith lawsuits on consumers and businesses in Florida and nationwide, it was noted that, "[w]hen a state authorizes bad faith lawsuits, it changes the economic incentives for both individuals and insurance companies. It does so by significantly increasing the insurer's potential loss and the claimant's potential recovery . . . *With more money at stake: Individuals have a greater economic incentive to pursue weak claims; There is a greater economic incentive for individuals to commit insurance fraud; Insurers have an economic disincentive to investigate instances of possible insurance fraud; and Insurers have a greater economic incentive to enter into artificially inflated settlements.*"

[3] According to the Federal Bureau of Investigations, "[t]he total cost of insurance fraud (non-health insurance) is estimated to be more than $40 billion per year. That means Insurance Fraud costs the average U.S. family between $400 and $700 per year in the form of increased premiums." (FBI website).

trigger civil liability, which would expose an insurer to consequential damages, punitive damages, attorney's fees, and court costs. The potential liability exposure created by this overly-broad civil damages trigger will have a chilling effect upon an insurer's willingness and ability to thoroughly investigate "padded insurance claims" and prevent insurance fraud that is a costly insurance rate cost-driver.[4]

5) The proposed legislation will increase insurance defense costs, which could adversely impact the affordability and availability of insurance products for consumers

It is an inescapable business reality that legal fees are substantial cost-drivers that significantly increase business operating costs. As operating costs rise for insurers, so too will the cost of insurance products to the consumer. Empirical studies have *repeatedly found* that double insurance claim lawsuit legislation adversely impacts the affordability of insurance rates.[5]

For the aforementioned reasons, NAMIC respectfully requests that the members of the Senate Committee of Judiciary **VOTE NO on SB 728**, and prevent this special interest legislation from turning Oregon's insurance marketplace and judicial system into a haven for frivolous and costly litigation.

Thank you for your time and consideration. Please feel free to contact me at 303.907.0587 or at crataj@namic.org, if you would like to discuss NAMIC's written testimony.

Respectfully,

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[4] In a study by Drs. Tennyson and Warfel on the impact of bad faith laws on claims adjusting and settlement practices, they found that tort liability for first-party bad faith reduces insurers' incentives to investigate insurance claims fraud, and that claims submitted in states with bad faith laws contained more characteristics often associated with insurance fraud. (Sharon Tennyson and William J. Warfel, "The Law and Economics of First-Party Insurance Bad Faith Liability," Connecticut Insurance Law Journal*,* Vol. 16, 2009).

[5] In the 2001 RAND Study on the impact of the California's Supreme Court ruling in the case of Royal Globe*,* which allowed for third-party bad faith lawsuits, the researchers found that bodily injury claims rose sharply and insurance premiums increased between 32 and 53 percent as a result of the bad faith case ruling. (Angela Hawken, Stephen J. Carroll, and Allan F. Abrahamse, "The Effects of Third-Party Bad Faith Doctrine on Automobile Insurance Costs and Compensation," RAND Institute for Civil Justice, 2001).

* In a 2005 study by the West Virginia Department of Insurance, the Commissioner estimated that insurers in third-party bad faith states incur about 25 percent higher bodily injury claim costs when compared to non-third-party bad faith states. Applying the 25 percent to West Virginia's personal lines of liability coverage, the study concluded that third-party bad faith costs about $166.7 million per year. ("Third Party Causes of Action: Effects on West Virginia Insurance Markets," Office of the Insurance Commissioner, February 2005).

* In the 2007 Milliman study on the potential impact of the proposed Washington State first-party bad faith law (ESSB 5726), it was estimated that the law would increase insurance premiums in Washington by about 7 percent, thereby increasing costs to consumers and businesses in Washington by more than $650 million per year. ("The Impact of Engrossed Substitute Senate Bill 5726 on Insurance Rates," Prepared by Milliman Inc, for Consumers Against Higher Insurance Rates, September 20, 2007).

* In the 2013 U.S. Chamber of Commerce Institute for Legal Reform study on the impact of bad faith lawsuits on consumers and businesses in Florida and nationwide, Dr. Hamm concluded that "Florida's **bad faith legal regime may add over $200 per year to the amount an average Florida family with two cars must pay for automobile insurance coverage**." (William G. Hamm, Jeannie Kim. Rebbecca Reed-Arthurs, "The Impact of Bad Faith Lawsuits on Consumers in Florida and Nationwide," U.S. Chamber of Commerce's Institute for Legal Reform, 2013).