

BILL ANALYSIS

Senate Research Center

S.B. 128
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DIGEST AND PURPOSE

Currently, there is no licensing and regulatory framework under state or federal law set up for persons who, for compensation, act on behalf of or aid in any manner a homeowner in negotiating the settlement of a claim under the homeowner's residential property insurance policy. The lack of regulation has contributed to the mold-related homeowners insurance crisis in Texas, including unreasonably and unnecessarily high claims costs causing significant increases in homeowners insurance premiums. This bill ensures that homeowners will be able to identify and employ licensed, competent, and ethical professionals to assist them in the claims adjustment process. As proposed, S.B. 128 requires a person who acts as or holds himself or herself out to be a public adjuster to be licensed by the Texas Department of Insurance and provides administrative and criminal penalties for those who violate the provisions of this Act.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the commissioner of insurance in SECTION 2 (Sections 12, 19, 22, 28, and 29, Article 21.07-5, Insurance Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Article 21.07-4, Insurance Code, to provide that the term "adjuster" does not include a public insurance adjuster who is licensed under Article 21.07-5, Insurance Code.

SECTION 2. Amends Chapter 21A, Insurance Code, by adding Article 21.07-5, as follows:

Art. 21.07-5. PUBLIC INSURANCE ADJUSTERS

Sec. 1. DEFINITIONS. Defines "licensee," "person," and "public insurance adjuster."

Sec. 2. NOT LAW LICENSE. Requires that nothing in this article be construed as entitling any person who is not an active member of the State Bar of Texas to practice law in the state.

Sec. 3. LICENSE REQUIRED; EXEMPTION. (a) Prohibits a person from acting as a public insurance adjuster in this state, except as provided by Section 17 of this article, or holding himself or herself out to be a public insurance adjuster in this state, unless the person holds a license issued by the commissioner of insurance (commissioner) under Section 5 or Section 16 of this article.

(b) Provides that a license is not required for an attorney licensed by this state; a licensed local recording agent; or a solicitor for a local recording agent while acting for an insured concerning a loss under a policy issued by that agent.

(c) Provides that any contract for services regulated by this article that is entered into by an insured with a person who is in violation of Subsection (a) of this section may be voided at the option of the insured, and provides that if a contract is so voided, the

insured shall not be liable for payment of any past services rendered, or future services to be rendered, by that person under that contract or otherwise.

(d) Authorizes the commissioner, without notice or hearing, to issue and cause to be served on the person an order requiring the person to immediately cease and desist from engaging further in those acts or practices, if the commissioner believes that the person is engaging in acts or practices in violation of Subsection (a) of this section.

Sec. 4. APPLICATION FOR LICENSE. (a) Requires an application for a license under this article to be on a form prescribed by the commissioner.

(b) Requires the completed application to be notarized and be accompanied by a license application fee, as provided by Section 12 of this article, for each application submitted. Provides that the application fee is nonrefundable.

Sec. 5. QUALIFICATIONS FOR LICENSE; ISSUANCE. Requires the commissioner to issue a public insurance adjuster license to an applicant on determining that the application meets the requirements of this article, that the application license fee has been paid, and that the applicant is an individual who meets certain requirements.

Sec. 6. SECURITY REQUIREMENTS. (a) Requires each applicant for a public insurance adjuster license to file a surety bond or other security with the commissioner, in accordance with this section.

(b) Requires a surety bond to meet certain criteria.

(c) Sets forth other actions an applicant may take to demonstrate financial responsibility in lieu of filing a bond under Subsection (b).

(d) Provides that a professional liability policy provided by a public insurance adjuster's employer constitutes satisfactory compliance with the requirements of this section, if the employer's professional liability policy has a minimum liability limit of \$250,000 for all employees.

(e) Prohibits the aggregate liability of the surety for all damages from exceeding the amount of the bond, if a bond is used to satisfy the requirements of this section.

(f) Sets forth conditions under which a deposit made to satisfy the requirements of this section may be withdrawn.

(g) Provides that securities deposited under this section may be exchanged periodically for other qualified securities.

(h) Provides that a binding commitment to issue an insurance policy, bond, or the tender of the securities in connection with a license application is sufficient evidence of the applicant's ability to comply with this section on issuance of a license.

(i) Provides that all or part of a deposit may be paid to a person on a showing that a final judgment has been rendered against the licensee in connection with the licensee's business as a public insurance adjuster and the final judgment remains unsatisfied. Provides that final judgment may be paid from the deposit only to the extent of deficiency in satisfaction of the final judgment.

(j) Requires a licensee to comply with the security requirements of this section for the license to remain effective. Provides that failure to comply with the security

requirements will result in immediate forfeiture or suspension of the license.

Sec. 7. SURETY BOND REQUIREMENT. (a) Requires a licensee at all times to maintain the surety bond on file with the commissioner and in full force and effect, if the licensee uses a surety bond to comply with Section 6 of this article.

(b) Requires that the license of a public insurance adjuster who fails to maintain a surety bond in compliance with this section be immediately suspended and not be reinstated until an application for reinstatement, in the form prescribed by the commissioner, is filed with a proper bond.

(c) Provides that the commissioner may deny the application, notwithstanding the applicant's compliance with this section, for any reason that would justify a refusal to issue, or a suspension or revocation of, a license; or for the performance by the applicant of any practice for which a license under this article is required while the applicant is under suspension for failure to keep the surety bond in force.

(d) Requires bonds executed and filed with the commissioner in compliance with this article to remain in force and effect until the surety bond has terminated future liability. Requires the surety company to notify the commissioner not less than 30 days before the date of termination.

Sec. 8. LICENSE AUTHORIZATION. Requires a license issued under Section 5 or Section 16 of this article to include, but not be limited to, adjusting claims for fire and allied coverages, burglary, flood, and all other property claims, both real and personal, and loss of income.

Sec. 9. EXAMINATION FOR LICENSE; ADVISORY COMMITTEE. (a) Requires each applicant for a license as a public insurance adjuster to, before the issuance of the license, personally take and pass an examination to the satisfaction of the commissioner.

(b) Requires the examination required by this section to be prescribed by the commissioner and to be of sufficient scope to reasonably test certain criteria.

(c) Requires the commissioner to appoint a public insurance adjusters examination advisory committee composed of at least five members to assist in developing the examination required by this section. Requires that at least three members be eligible for licensure as public insurance adjusters. Requires at least one member to be a person from the insurance industry who is not a public insurance adjuster. Prohibits compensation for service on the committee. Provides that a member is entitled to reimbursement for reasonable and necessary expenses incurred in performing services for the committee.

(d) Requires the commissioner to, within a reasonable period not to exceed 30 days after the date of the examination, transmit the results of the examination and the action taken on the application to the applicant.

(e) Provides that an examination is not required for the renewal of a license issued under Section 5 or Section 16 of this article.

Sec. 10. EXAMINATION; FORM; TIME. (a) Requires the answers of the applicant to an examination required under this article to be made by the applicant in writing. Provides that a written examination may be supplemented by oral examination.

(b) Requires the examination to be given at such times and places within the state as the commissioner deems necessary to reasonably serve the convenience of both the

commissioner and applicants.

(c) Authorizes the commissioner to require a waiting period of reasonable duration before an applicant who fails the examination, but who is otherwise qualified, may be reexamined.

(d) Requires the scheduling and administration of examinations required under Section 9 of this article to be effected by persons approved by the commissioner.

Sec. 11. FORM OF LICENSE. Requires the commissioner to prescribe the form of the licenses issued under Section 5 or Section 16 of this article, which must contain certain information.

Sec. 12. FEE FOR LICENSE, RENEWAL, AND EXAMINATION. (a) Requires the commissioner to collect in advance certain nonrefundable fees.

(b) Requires the amount of the fee for the renewal of a license or a certificate issued under this article to be determined by rule by the commissioner.

Sec. 13. USE OF FEES COLLECTED. (a) Requires that when collected, the fees authorized by this article be deposited in the state treasury to the credit of the Texas Department of Insurance (department) operating fund.

(b) Sets forth the purposes for which the department may use any portion of the collected fees.

(c) Requires the commissioner to set the fees in amounts reasonable and necessary to implement this article.

Sec. 14. PLACE OF BUSINESS; AGENT FOR SERVICE OF PROCESS. (a) Requires each licensee who is a resident of the state to maintain a place of business in the state that is accessible to the general public and to maintain in the place of business the records required by this article. Requires the address of the place of business to appear on the face of the license. Requires the licensee to promptly notify the commissioner of any change in the address of the licensee's place of business.

(b) Requires each nonresident licensee to maintain an agent in the state for service of process. Requires the name and address of the nonresident licensee's out-of-state business address and the name and address of the agent to appear on the face of the license. Requires the licensee to promptly notify the department of any change in the address of the licensee's place of business or in the agent for service of process.

(c) Requires a license issued under this article to at all times be posted in a conspicuous place in the principal place of business of the licensee.

Sec. 15. LICENSE NOT ASSIGNABLE. Provides that a license issued under this article is not assignable.

Sec. 16. NONRESIDENT LICENSE. (a) Authorizes the commissioner to issue a nonresident license to an applicant for a public insurance adjuster license who is not a permanent resident of the state on determining that the application meets the requirements of this article, that the nonresident application license fee has been paid, and that the applicant is an individual who meets certain criteria.

(b) Requires an applicant for a nonresident license to file a surety bond with the

department in the amount of \$50,000.

(c) Requires a nonresident licensee to comply with all of the requirements of this article in performing any of the activities of a public insurance adjuster in this state, including the requirements on record maintenance in Section 25 of this article. Provides that failure of a nonresident licensee to properly maintain records in accordance with this article and make them available to the department on request constitutes grounds for the immediate suspension of the nonresident license issued under this article.

(d) Requires each individual who holds a nonresident license to comply with all other laws and rules of this state applicable to public insurance adjusters, including the law governing the collection of state sales tax as appropriate for services performed under this article.

(e) Requires that, after licensure as a nonresident public insurance adjuster, as a condition of doing business in this state, the licensee annually, submit an affidavit certifying that the licensee is familiar with and understands the laws specified in Section 9 of this article, the applicable rules adopted under those laws, and the terms and conditions of the types of insurance contracts that provide coverage on real and personal property. Specifies that compliance with the filing requirement provided by this subsection is necessary to the issuance, continuation, reinstatement, or renewal of a nonresident public insurance adjuster license.

Sec. 17. REGISTRATION PROGRAM FOR TRAINEES. (a) Requires a public insurance adjuster trainee to register with the department for a temporary certificate under this section. Requires an applicant for a temporary certificate as a trainee to apply to the commissioner on a form prescribed by the commissioner. Requires the form to be accompanied by a nonrefundable registration fee as prescribed by Section 12(a)(4) of this article.

(b) Authorizes a temporary certificate to be issued under this section only for educational and training purposes. Authorizes the holder of a temporary certificate to practice only under the direction and sponsorship of a licensee.

(c) Requires the sponsor of a public insurance adjuster trainee to attest, on a form prescribed by the commissioner, that the trainee is under the supervision and control of the sponsor and that the sponsor has met the security requirements of Section 6 of this article.

(d) Provides that a temporary certificate expires on the 180th day after the date of issuance and may be renewed once on application to the commissioner. Provides that an individual is not entitled to hold more than two consecutive temporary certificates.

(e) Requires each individual who holds a temporary certificate under this section to comply with the security requirements imposed under Section 6 of this article. Authorizes the security requirement to be fulfilled by a surety bond purchased by the sponsoring licensee, if the bond also covers the acts described by Section 6(b) of this article with regard to the temporary certificate holder. Provides that the security requirement may also be fulfilled if the sponsoring licensee complies with the requirements in Section 6(c)(1) of this article and the temporary certificate holder is an employee of the sponsoring licensee covered under a professional liability policy or similar policy or contract of professional liability coverage purchased by the sponsoring licensee in compliance with Section 6(c)(1) of this article.

Sec. 18. CONDUCT TO COMPLY WITH CONTRACT. Requires a licensee to prepare each claim for an insured represented by the licensee in accordance with the terms and

conditions of the contract of insurance under which recovery is sought.

Sec. 19. CODE OF ETHICS. Requires the commissioner by rule to adopt:

- (1) a code of ethics for public insurance adjusters that fosters the education of public insurance adjusters concerning the ethical, legal, and business principles that should govern their conduct;
- (2) recommendations regarding the solicitation of the adjustment of losses by public insurance adjusters; and
- (3) any other principles of conduct or procedures that the commissioner deems necessary and reasonable.

Sec. 20. PUBLIC INSURANCE ADJUSTER AUTHORITY; EXEMPTION FROM INSURANCE LAWS. (a) Provides that this article does not limit or diminish the authority of a licensee to investigate or adjust a loss to less than the authority for that purpose that may be exercised by an adjuster licensed under Article 21.07-4, Insurance Code.

(b) Provides that a licensee is exempt from certain statutory provisions.

Sec. 21. LICENSE RENEWAL. (a) Provides for the term and renewal of a license issued under this article.

(b) Requires a licensee to submit the completed renewal application, evidence of compliance with the continuing education requirements, and the renewal fee to the commissioner not later than the 30th day before the second anniversary date of the license. Provides that the original license continues in force until the department issues the renewal license or the commissioner issues an order revoking the license.

(c) Authorizes a person whose license has been expired for 90 days or less to renew the license by filing a completed renewal application in the form prescribed by the commissioner and evidence of compliance with the continuing education requirements and by paying to the department the required renewal fee and an additional fee that is equal to one-half of the renewal fee for the license.

(d) Prohibits a person whose license has been expired for more than 90 days but less than one year from renewing the license but entitles the person to a new license without taking the applicable examination, if the person submits to the department a new application, evidence of compliance with the continuing education requirements, the license fee, and an additional fee equal to one-half of the license fee.

(e) Prohibits a person whose license has been expired for one year or more from renewing the license. Authorizes the person to obtain a new license by submitting to reexamination, if examination is required for original issuance of the license, and by complying with the requirements and procedures for obtaining an original license.

(f) Authorizes the department to renew without reexamination an expired license of a person who was licensed in this state, moved to another state, and is currently licensed and has been in continual practice in the other state up to and including the date of the application. Requires the person to pay to the department a fee that is equal to the license fee.

(g) Requires a nonresident or resident public insurance adjuster licensed in this state to file with the department, not later than the 30th day after moving from one state to

another state, the licensee's new address and proof of authorization to engage in the business of public insurance adjuster in the new state of residence.

(h) Prohibits the department from charging a fee or requiring a license application under Subsection (g) of this section.

(i) Requires the department to send written notice of the impending license expiration to the licensee at the licensee's last known mailing address according to the records of the department, at least 30 days before the expiration of a license.

Sec. 22. CONTINUING EDUCATION REQUIREMENT. Requires each licensee to annually complete at least 15 hours of continuing education courses. Requires the commissioner by rule to prescribe the requirements for continuing education courses under this section.

Sec. 23. CONTINGENT FEES. (a) Authorizes a licensee, except as provided by Subsection (b) of this section, to receive a contingent fee for adjusting a claim under this article. Prohibits a contingent fee collected under this section from exceeding 10 percent of the amount of the insurance settlement on the claim.

(b) Prohibits a licensee from receiving a contingent fee on a claim for which an insurance company, not later than 72 hours after the date on which the loss is reported to the insurance company, either pays or commits in writing to pay to the insured the policy limit of the insurance policy in accordance with Section 862.053 of this code. Provides that the licensee is entitled to reasonable compensation from the insured for services provided by the licensee on behalf of the insured, based on the time spent on a claim that is subject to this subsection and expenses incurred by the licensee, until the claim is paid or the insured receives a written commitment to pay from the insurance company.

Sec. 24. PROHIBITED CONDUCT. (a) Prohibits licensee from, directly or indirectly, acting within this state as a public insurance adjuster without having first entered into a contract, in writing, on a form approved by the commissioner, executed in duplicate by the licensee and the insured or the insured's duly authorized representative. Requires one copy of the contract to be kept on file by the licensee and to be available at all times for inspection, without notice, by the commissioner or the commissioner's representative.

(b) Prohibits a licensee from soliciting or attempting to solicit a client for employment during the progress of a loss-producing natural disaster occurrence.

(c) Prohibits a licensee from soliciting or attempting to solicit business on a loss or a claim in person, by telephone, or in any other manner at any time except between the hours of 9 a.m. and 9 p.m. on a weekday or a Saturday, and between noon and 9 p.m. on a Sunday. Provides that this subsection does not prohibit a licensee from accepting phone calls or personal visits during the prohibited hours from an insured upon the insured's initiation.

(d) Prohibits a licensee from using any form of contract that is not approved by the commissioner. Requires the contract to contain a provision allowing the client to rescind the contract by written notice to the licensee within 72 hours of signature and to include in 12-point boldface type, prominently displayed, the statement: "WE REPRESENT THE INSURED ONLY."

(e) Prohibits a licensee from knowingly making any false report to the licensee's employer or client and from divulging to any other person, except as the law may require, any information obtained except at the direction of the employer or the client for whom the information is obtained.

(f) Prohibits a licensee from using a badge in connection with the official activities of the licensee's business.

(g) Prohibits a licensee from permitting an employee or agent, in the employee's or agent's own name, to advertise, solicit or engage clients, furnish reports or present bills to clients, or in any manner conduct business for which a license is required under this article.

(h) Prohibits a licensee from rendering legal advice to any person in the licensee's capacity as a public insurance adjuster.

(i) Prohibits a licensee from representing an insured on a claim or charging a fee to an insured while representing the insurance carrier against which the claim is made.

(j) Prohibits a licensee from soliciting or attempting to solicit business, directly or indirectly, on a bodily injury loss covered by a life, health, or accident insurance policy.

(k) Prohibits a licensee, without the knowledge and consent of the insured in writing, from acquiring an interest in salvaged property that is the subject of a claim adjusted by the licensee.

(l) Prohibits a licensee from participating directly or indirectly in any activities that may reasonably be construed as presenting a conflict of interest.

(m) Prohibits a licensee from engaging in certain activities.

Sec. 25. RECORD MAINTENANCE. (a) Requires a licensee to keep a complete record of each of the licensee's transactions as a public insurance adjuster. Requires the records to include certain elements.

(b) Requires records kept under this section to be maintained for at least five years after the termination of a transaction with the insured and to be open to examination by the commissioner.

Sec. 26. FIDUCIARY CAPACITY. (a) Provides that all funds received as claim proceeds by a licensee acting as a public insurance adjuster are received and held by the licensee in a fiduciary capacity. Provides that a licensee who diverts or appropriates any fiduciary funds for the licensee's personal use is guilty of theft and is punishable for theft as provided by law.

(b) Requires an applicant for a license to act as a public insurance adjuster to, as part of the application, endorse an authorization for disclosure to the commissioner of all financial records of any funds the public insurance adjuster holds as a fiduciary. Requires the authorization to continue in force and effect for as long as the licensee continues to be licensed under this article.

Sec. 27. NOTICE TO LAST ADDRESS. Provides that notice by registered mail, return receipt requested, sent to the last known address of an applicant for a license, licensee, or other person to whom notice is required to be sent under this article, as reflected by the records of the department, constitutes sufficient notice under this article.

Sec. 28. ADVERTISEMENTS. Requires every advertisement by a licensee soliciting or advertising business to display the licensee's name, address, and license number as they appear in the records of the commissioner. Authorizes the commissioner to adopt rules defining the term "advertisement" as used in this section.

Sec. 29. RULES. Authorizes the commissioner to adopt reasonable and necessary rules to implement this article.

Sec. 30. DENIAL, SUSPENSION, OR REVOCATION OF LICENSE. (a) Authorizes the commissioner to deny an application for a license under this article or suspend or revoke a license issued under this article on the basis of certain factors.

(b) Provides that if the department proposes to refuse to issue an original license under this article or to suspend, revoke, or refuse to renew a license under this article, the person affected is entitled to notice and hearing as provided by this code.

(c) Provides that a final order entered as a result of a hearing under this section may be appealed to a court of competent jurisdiction as provided by this code.

(d) Requires an order suspending a license issued under this article to specify the period of the suspension not to exceed 12 months.

(e) Requires the holder of a license that is revoked or suspended for cause to surrender the license to the commissioner on demand.

(f) Authorizes the commissioner to issue a license or reinstate a suspended or revoked license on a finding that the cause for suspension, revocation, or refusal no longer exists.

(g) Authorizes a person whose license is suspended under this article to apply for a new license only after the expiration of the period of suspension. Prohibits a person whose license is revoked or whose application for a license is denied from applying for a new license until the fifth anniversary of the effective date of the denial or revocation; or if the applicant or licensee seeks judicial review of the department's action, the date of the final court order or decree affirming that action.

(h) Authorizes the commissioner to deny a timely application filed under Subsection (g) of this section if the applicant does not show good cause why the denial of the previous license application or the revocation of the license should not be considered a bar to the issuance of the new license. Provides that this subsection does not apply to an applicant whose license application was denied for failure to pass the required written examination or failure to submit a properly completed license application.

(i) Authorizes the commissioner, in lieu of suspending or revoking a license for a violation of this article or a rule adopted under this article, to impose on a licensee an administrative penalty in an amount not to exceed \$1,000 per violation if the commissioner determines that such action better serves the purposes of this article.

(j) Authorizes the department to institute a disciplinary proceeding against a licensee for conduct that the licensee committed before the effective date of a voluntary surrender or automatic forfeiture of the license. Provides that in the proceeding, the fact that the licensee has surrendered or forfeited the license does not affect the licensee's culpability for the conduct.

Sec. 31. AUTOMATIC FINES. Provides that Section 5A (Automatic Fines), Article 21.01-2 of this code, applies to violations of this article.

Sec. 32. CRIMINAL PENALTY; SANCTIONS. (a) Provides that a person commits an offense if the person violates this article. Provides that except as provided by Section 26(a) of this article, an offense under this subsection is a misdemeanor punishable by a fine in an amount

not to exceed \$1,000; confinement in county jail for a term not to exceed six months; or both the fine and confinement.

(b) Provides that in addition to the criminal penalties imposed under Subsection (a) of this section, a person in violation of this article is subject to the sanctions provided by Section 7 (Cease and Desist Orders), Article 21.21 of this code, as if the person had violated an order under that section.

SECTION 3. (a) Requires the commissioner to appoint the members of the public insurance adjusters examination advisory committee created under Section 9(c), Article 21.07-5, Insurance Code, as added by this Act, not later than the 60th day after the effective date of this Act.

(b) Requires the commissioner to adopt the examination required by Section 9, Article 21.07-5, Insurance Code, as added by this Act, not later than January 1, 2004. Authorizes the commissioner, pending the adoption of the examination, to issue a temporary license to practice as a public insurance adjuster to an individual who satisfies all the requirements for issuance of the license except the examination requirement. Provides that a temporary license issued under this subsection expires June 1, 2004, and may not be renewed except as determined by the commissioner.

(c) Requires the commissioner to adopt the code of ethics prescribed under Section 19, Article 21.07-5, Insurance Code, as added by this Act, not later than September 1, 2004.

(d) Requires the commissioner, subject to the provisions of Subsections (a), (b), and (c) of this section, to adopt rules as necessary to implement Article 21.07-5, Insurance Code, as added by this Act, not later than January 1, 2004.

SECTION 4. Effective date: June 1, 2003, or September 1, 2003.