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Colorado State Legislature
Senate Judiciary Committee

April 23, 2019

(Sent via email to committee staff)

RE: HB 1289, Consumer Protection Act – NAMIC’s written testimony in opposition

Thank you for affording the National Association of Mutual Insurance Companies (NAMIC) an opportunity to submit written testimony for the April 24, 2019, public hearing. Unfortunately, I will be unable to attend the public hearing, because of a prior professional commitment.

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 163 members who write property/casualty in the State of Colorado, which represents 45% of the insurance marketplace.

NAMIC appreciates the importance of providing consumers with enhanced consumer protections when there is a clear need for additional legal and regulatory protections and when the proposed legislative measure does not create duplicative and potentially conflicting regulatory oversight for insurers. Redundant regulatory oversight creates increased administrative expenses and claims settlement costs which are insurance rate cost drivers that adversely impact affordability of insurance for consumers.

We respectfully submit the following concerns, questions and suggested revisions to the proposed legislation:

- 1) **Insurance companies should be expressly exempted from the bill, because the Insurance Code already specifically addresses inappropriate insurance claims settlement and business practices.**

NAMIC is concerned that there is no evidence to support the contention that the Division of Insurance (DOI), which has exclusive jurisdiction over the regulation of the insurance industry, including regulation of consumer protection, has failed to effectively regulate the industry and protect consumers from unfair, unconscionable, abusive or deceptive insurance practices.

The DOI currently has a number of regulatory tools available to investigate and sanction insurers for engaging in practices that violate the Insurance Code. Specifically, the DOI may investigate





consumer complaints against an insurer as to a specific claim or underwriting practice and conduct an extensive market conduct examination to evaluate general insurer business practices. If the DOI determines that an insurer has violated the Insurance Code, the DOI may order the insurer to change its business practices, impose fines and sanctions on the insurer, and suspend or revoke the insurer's license to transact insurance in the state. There is no evidence to support the belief that the DOI is lacking regulatory authority or regulatory acumen to effectively protect insurance consumers from unfair or deceptive insurance practices.

2) NAMIC is concerned that the proposed legislation is extremely broad and likely to lead to unnecessary legal conflict.

The proposed legislation would expand Colorado Revised Statute 6-1-105, Unfair or Deceptive Trade Practices, to include liability for *accidental* conduct. The bill specifically adds the legal standard of "recklessness" to the scope of legal liability. "Recklessness" is a form of *accidental* conduct, it is more culpable than mere "negligent" conduct, which is *accidental* conduct that merely fails to meet the "reasonably prudent person" legal standard. However, it is significantly less culpable than "knowing" misconduct which is not *accidental* in nature, but rather it is *intentional* in nature. The public policy objective of the deceptive trade practices acts is to punish *intentional* misconduct. It is not intended to create liability exposure for *accidental* misconduct, even if the *accidental* misconduct is caused by more than mere negligent behavior.

NAMIC is concerned that this language is vague and overly subjective, which makes it rife with potential for disagreement as to interpretation of what is "recklessness". This nebulous language could arguably empower the Attorney General to go after a broad array of *accidental* conduct that should be left to the purview of standard civil litigation. NAMIC believes that the "recklessness" legal liability trigger should be removed from the bill.

Additionally, NAMIC is concerned about the new provision (kkk), which reads:

(kkk) KNOWINGLY OR RECKLESSLY ENGAGES IN ANY UNFAIR, UNCONSCIONABLE, DECEPTIVE, DELIBERATELY MISLEADING, FALSE, OR FRAUDULENT ACT OR PRACTICE.

This provision is extremely vague and will likely lead to inconsistent legal interpretations and unequal enforcement. Specifically, what does "deceptive" and "unfair" mean? NAMIC is concerned that the bill defines a deceptive trade practice as a "deceptive act or practice", which provides no guidance to stakeholders required to comply with the act. From a public policy and due process of law standpoint, it is inappropriate to expose insurers to serious financial penalties for conduct that a company would have no rational reason for knowing that the behavior is considered a "deceptive" or "unfair" activity. The common-sense purpose of the act is to provide stakeholders with *clearly articulated* prohibitions so that they are aware that a "knowing" violation of the prohibition will expose them to financial sanctions.

Further, NAMIC is concerned that the overly broad language in the bill will lead some plaintiff attorneys to plead a violation of this law in every single lawsuit they file against an insurer as a way to unfairly leverage an inflated damages settlement. In effect, an alleged violation of this new law will become a routine allegation in every bad faith legal action asserted against an insurer. The proposed legislation is likely to make the insurance claims settlement process unnecessarily costly and contentious.

3) NAMIC is concerned about the significant increase in the proposed penalty for violation of the statute.

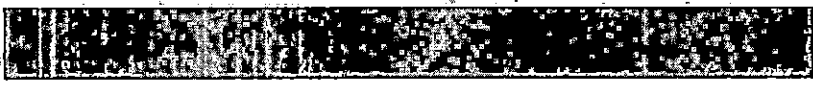
The proposed increase in the penalty from \$2k to \$20k and \$10k to \$50k is quite extreme. Why does there need to be a 10x and 5x increase respectively? NAMIC believes that the proponents of the bill should be required to explain, in detail, why such a significant increase is both necessary and reasonable.

Additionally, NAMIC is concerned about proposed penalties being considered “damages”. We appreciate that the bill was amended to say that this consideration is “for accounting purposes”, but this still creates legal ambiguity that is unnecessary and likely to be exploited by plaintiff attorney’s trying to increase their damages. This is particularly concerning in light of the provision in Section 3 that authorizes prejudgment interest at eight percent per year. If the penalty in Section 2 is only to be considered to be damages “for accounting purposes”, why is there an imposition of prejudgment interest, which is associated with civil “damages” not administrative “penalties”?

4) NAMIC is concerned that the proposed legislation would remove the well-established requirement that there must be a “significant public impact” for deceptive trade practices penalties to be imposed.

The very purpose of Attorney General legal action is to protect the *public* welfare. It is not intended to be part of the civil litigation process where one party brings a *private* cause of action against another party. By removing the “significant public impact” requirement for Attorney General involvement and the imposition of penalties, the proposed legislation improperly blurs the lines of demarcation between *public* and *private* civil actions.

For the aforementioned reasons, NAMIC respectfully requests that you **VOTE NO** on HB 1289, because this bill is overly-broad and unnecessary, **or in the alternative that you amend the bill to expressly exempt insurance transactions** from the purview of the bill, because insurance consumers are already provided with extensive regulatory protection by the DOI.



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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