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Oregon State Legislature 3/14/13
Oregon State Capitol
Senate General Government, Consumer and Small Business Protection Committee
900 Court Street NE
Salem, OR 97301

Sent via electronic transmission to committee administrator at: channa.newell@state.or.us

RE: SB 512 and SB 513, Unlawful Insurance Practices; SB 514, Private Right of Action for Unfair Claims Settlement Practices; and SB 686, Unlawful Trade Practices Act - NAMIC's Written Testimony in Opposition to All Four Proposed Legislation

Dear Senator Chip Shields, Chair; Senator Larry George, Vice-Chair; and members of the Senate General Government, Consumer and Small Business Protection Committee:

Thank you for providing the National Association of Mutual Insurance Companies (NAMIC) an opportunity to submit written testimony to the committee for the March 15, 2013 public hearing. Unfortunately, I will be in another state at a previously scheduled legislative meeting at the time of this hearing, so I will be unavailable to attend. Please accept these written comments in lieu of my testimony at the hearing. This letter need not be formally read into the committee hearing record, but please reference the letter as a submission to the committee at the hearing.

NAMIC is the largest and most diverse property/casualty trade association in the country, with 1,400 regional and local mutual insurance member companies serving more than 135 million auto, home, and business policyholders and writing in excess of $196 billion in annual premiums that account for 50 percent of the automobile/ homeowners market and 31 percent of the business insurance market. More than 200,000 people are employed by NAMIC member companies. NAMIC has 143 members who write P. & C. Insurance in the State of Oregon, which represents 45% of the marketplace.

SB 512 and SB 513 would amend the Oregon Trade Practices Act (ORS Chapter 746) to allow for class action lawsuits, an award of one-sided attorney's fees at trial court proceedings, and punitive damages against insurance companies (health insurers are excluded) for any nominal violation of the extensive list of prohibited trade practices in the OTPA. The bills allow for a private right of action for any "ascertainable loss", and they create statutory damages of $200, when there are no actual damages. SB 512 and SB 513 also establish a 2 year statute of limitations for actions.

SB 514 would create a private right of action for any violation of the unfair claims settlement practices act and would allow for admission of evidence of claims settlement practices in an action. The bill would also allow for all the damages provided for in SB 512 and SB 513.

SB 686 would: 1) Include personal lines insurance in the definition of real estate, goods and services that are subject to penalties for unlawful trade practices; and 2) Permit a person to obtain, and court to award, appropriate equitable relief in addition to monetary damages in an action under the Unlawful Trade Practices Act.

On behalf of NAMIC's members, we respectfully *oppose* all of these bills for the following reasons:

- **The proposed legislation are all unnecessary and excessive** – There is *no evidence* to support the contention that there is a problem, let alone a wide-spread problem, in how insurers settle their claims with policyholders or claimants to support a bill that authorizes class action lawsuits, punitive damages, and one-sided attorney's fees awards.

  Moreover, the Oregon Department of Insurance (ODI) already has comprehensive regulatory oversight authority and a host of remedial measures and sanctions it can use to prohibit and/or punish insurer misconduct. Consequently, there is no need to include personal lines insurance within the purview of the Unlawful Trade Practices Act.

- **The proposed legislation will encourage and facilitate the filing of frivolous lawsuits –**The proposed legislation allows a party to file a lawsuit for an award of punitive damages and attorney's fees in cases where there is any "ascertainable loss of money or property" by the party. The bill is even drafted so as to encourage the filing of frivolous lawsuits, by creating statutory damages of $200, if the party doesn't have any actual damages. Consequently, a mere alleged nominal loss of money by a party, even one resulting from an inconsequential mistake or omission by the insurer in the claims adjusting process or in a general business practice could trigger civil liability exposure for the insurer to punitive damages and attorney's fees.

  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."

- **The proposed legislation is likely to have an adverse impact upon the affordability of insurance for consumers -** It is an irrefutable fact, that litigation is expensive and that it drives-up the cost of *all* business products and services. These bills will force insurance companies to have to use financial resources, which should be used to pay insurance claims and develop new insurance products, on extensive attorney's fees to defend against baseless legal claims over an alleged unlawful insurance practice. These bills will turn every insurance claim into a possible 1st or 3rd party bad faith claim and/or class action lawsuit, which insurance consumers will ultimately be forced to pay for, via higher insurance rates and/or reduced insurance consumer services.

  Empirical studies have *repeatedly found* that bad faith lawsuits adversely impact the affordability of insurance rates:

  * 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 **annual bodily injury 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 the state about $166.7 million per year**. ("Third Party Causes of Action: Effects on West Virginia Insurance Markets," Provided by the Offices 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).

- **The Oregon Department of Insurance (ODI) presently possesses all the regulatory authority it needs to effectively investigate, regulate, and sanction any insurance company that fails to comply with the insurance code and state insurance law -** There is no evidence to support the contention that the ODI has failed to properly and thoroughly perform its regulatory responsibilities, or that these bills are necessary to ensure that insurance carriers adjust and settle claims in a fair, equitable, and timely manner.

  Moreover, insurance consumers already have a number of effective legal causes of action under current law that may be asserted against an insurer who fails to comply with the terms and conditions of the insuring agreement and/or who engages in tortious conduct during the claims adjusting and settlement process.

  These bills will only create duplicative regulatory oversight between the OID, the executive agency authorized to regulate the business of insurance, and the Attorney General (AG), who is empowered to enforce the OTPA. Since there is no evidence to support the contention that the OID needs the assistance of the AG to protect insurance consumers, including personal lines insurance within the purview of the OTPA is excessive, unnecessary, and an imprudent use of the state's financial resources.

- **The proposed legislation isn't really about providing consumers with necessary legal protections, it is really about providing trial attorneys with the ability to financially coerce insurers into paying unfair and excessive settlements –** These bills will provide plaintiff attorneys with the "legal weapon" of being able to threaten insurers with costly punitive damages and attorney's fees claims as leverage to secure a settlement that is higher than what the consumer is legally entitled to. Plaintiff attorneys know that insurers will have to factor in to their valuation of the claim (especially nominal damages claims) the high cost of defending against an alleged unlawful insurance practice claim, so this will allow attorneys to economically coerce insurers into paying excessive settlements. Ultimately, insurance consumers will be the ones, who will have to pay for these unreasonable and inequitable settlements.

  * 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); and

  * In a similar study conducted in 2009, the researchers, who looked at how claims settlements changed over 20 years at three different time intervals, 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?," Working Paper, May 2010).

- **The proposed legislation will also adversely impact insurer's ability to investigate and prosecute insurance fraud, which is an insurance rate cost-driver for consumers**– The threat of a bad faith lawsuit, which will cost an insurer a significant amount of money in legal defense costs/attorney's fees and expose them to punitive damages, adversely impacts an insurer's fraud investigation decision-making and ability to engage in reasonable fraud prevention activities. If these bills become law, an unscrupulous claimant need only threaten a bad faith claim, when the insurer starts to investigate alleged insurance fraud, to discourage the insurer from pursing the fraud investigation. Once the bad faith threat is made, the insurer is placed in a no-win situation – pursue insurance fraud and be sued for bad faith, with the risk of having to pay punitive damages and attorney's fees, or pay the fraudulent claim and prevent bad faith liability exposure.

  * 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); and

  * 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).

- **The proposed legislation will also have a number of unintended adverse consequences for insurance consumers, civil litigants, and citizens of the State of Oregon –**

  * **Possible delays in the adjusting and settlement of undisputed insurance claims** – These bills will turn every insurance claim into a possible bad faith lawsuit and/or AG legal action. Consequently, insurers will have to adjust each insurance claims as though it was a litigation file, which will increase claims adjusting costs and could lead to delays in the settlement of all insurance claims;

  *** Potential delays in the legal adjudication of meritorious lawsuits** – These bills will encourage plaintiff attorneys to file lawsuits, as a tactical settlement strategy, to economically coerce insurers into paying their excessive settlement demands. The likely

impact of this flood of litigation is that it will congest court trial dockets with frivolous lawsuit; thereby, delaying the resolution of legitimate legal disputes; and

* **Possible adverse consequences for the state's economy (i.e. increased cost of non-insurance consumer goods and services, decreased state and local government tax resources, and reduced employment creation)** - These bills will not only have a direct adverse economic impact upon insurance consumers and business that need to procure insurance protection, but it will also send a "symbolic statement" to businesses contemplating entry into the Oregon market, that the state legislature cares more about the outrageous desires of the plaintiff bar than it does about the reasonable needs of the business community. If out-of-state companies perceive that Oregon is not a business-friendly state, they are more likely to domicile their business in another state, which means a loss to the state of business tax contributions and financial investments in the state. Moreover, these bills would enact the *most onerous bad faith law in the country*, which could scare away business development in the state and adversely impact job growth that results from the entry of new employers in the business marketplace.

For more information on the adverse impact of bad faith laws, please refer to NAMIC's 2008 public policy paper, "*First-Party Insurance Bad Faith Liability: Law, Theory, and Economic Consequences."*(http://www.namic.org/pdf/publicpolicy/080926BadFaith.pdf).

In light of the aforementioned public policy arguments, NAMIC respectfully requests that the committee **VOTE NO on SB 512, SB 513, SB 514 and SB 686, so that citizens of the state of Oregon are not adversely impacted by these anti-business and anti-consumer bills.**

Thank you for your time and consideration of NAMIC's written testimony. If you have any questions pertaining to our submission, please feel free to contact me at 303.907.0587 or at crataj@namic.org.

Respectfully,

Christian J. Rataj, Esq.
NAMIC's Western State Affairs Manager