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April 28, 2016

Commissioner David Mattax
Texas Department of Insurance
333 Guadalupe, Austin, TX 78701

Via E-mail

Re: NAMIC follow up comments on hail litigation data call meeting

Commissioner Mattax:

At the April 21 stakeholder meeting to discuss the hail litigation data call, you asked insurers to provide feedback on the recommendations from the Office of Public Insurance Counswl (OPIC) and Texas Watch. We wanted to provide you our feedback on those items in addition to other general feedback we have heard from our member companies.

Feedback regarding comments from OPIC

OPIC asks three questions which we will attempt to address.

Why are so many lawsuits being filed?

Simply put, we believe the data shows that changes in the frequency and severity of hail storms have not matched the massive increase in litigation over that same time frame. The mass tort litigation model is being applied to hail litigation, which by its nature involves filing a large volume of lawsuits.

OPIC raises the hypothesis that the spike in hail litigation frequency is due to fraudulent behavior by a number of actors in the litigation process. It concludes that since no one has been indicted for insurance fraud related to these lawsuits, fraud must not be driving the litigation trends that insurers are seeing.

As you and your staff are aware, proving insurance fraud is a difficult proposition. While there may be evidence of fraud in some situations, often it is not enough to warrant the commitment of resources necessary to prove it. It would also involve filing more fraud reports with the Department. In short, our members report that decisions to pursue fraud must be made judiciously to ensure resources are used appropriately.

We believe it would be a mistake to say that the spike in hail litigation is directly attributable to insurance fraud. Rather, we believe that shifts in litigation trends – whereby plaintiff lawyers are using a mass tort model to generate substantial numbers of claims - are the more prevalent driver in the lawsuit frequency increase.

How are the Texas courts handling these cases?

While this makes for interesting discussion, determining the answers for the various questions raised by OPIC would be a difficult task. That's because the question presupposes that every case is similar - similar facts, similar witnesses, similar venue, similar predisposition of the plaintiffs to settle, etc. Even if you had the data sought by OPIC's questions, we are not sure it would be meaningful.

The reality is that cases settle for reasons and amounts which vary widely, and often for reasons which are quite intangible and unrelated to the underlying litigation. Aside from the additional labor required to glean this information from each claim file, the probative value of such data would be questionable at best.

Why are insurers settling these lawsuits?

At the risk of repeating our answers from the first two questions, the simple answer is that lawsuits settle for a host of reasons. Some of these reasons include:

- the credibility of the witnesses,
- the amount in controversy,
- the willingness of the parties to be amenable to settlement,
- venue considerations,
- preliminary rulings on evidentiary matters,
- the merits of the case,
- litigation costs, compared to the likelihood of success
- the financial exposure to the insurer.

It is no secret that the cost of defending a complex first party insurance through verdict, especially one with bad faith or insurance code violation allegations, can be significant. The experience of our member companies indicates that hail claim litigation generates a large number of claims in a short period of time – meaning an insurer wishing to preserve its surplus to pay for future claims must make decisions based not only upon the particulars a litigating claim file but also need to preserve the financial strength of the company long-term.

Turning now from the three questions posed by OPIC to their specific suggestions to be added to the data call, we would like to spend some time sharing our thoughts on these as well.

Definition of "weather-related"

We see no reason to make this change to the data call. To our knowledge, insurers are not reporting a dramatic increase in litigation stemming from lightning or freezing weather. We encourage the Department to stick to the issue at hand, rather than expanding the scope of the data call to include perils which are not generating large lawsuit counts.

Questions 5 & 6 County & ZIP Code

As OPIC indicates, the data call elements will be capturing ZIP code and county information. We are not opposed to the Department taking this data and creating regional analysis from it, as outlined on page 4 of OPIC's letter. We do think this may lead to helpful information for the Legislature.

We would like to take this opportunity to address the portion of the data call which is aimed at capturing county data. Some of our members report they do not collect data on a county basis. Providing county data would require many insurers to manually match a ZIP code to a county.

Question 23 Name of Law Firm

We're not convinced identifying every law firm involved in the case will provide helpful information for the Legislature. In addition to adding more time to what is already a lengthy data call template, this would require more time be spent on a per file basis with the *de minimus* probative value. Further, some of our members report they do not necessarily track this information. Such a request goes beyond the scope of the Legislature's charge.

OPIC's Specific Data Requests to Add to Data Call

- **Proposed Questions 8-10:** these questions would require the insurer to make a fair number of judgment calls. It is common that insureds and insurance companies will negotiate the amount of claim payments. If an insured is negotiating for a higher claim payment, are they really "disagreeing" with the amount of the original claim payment? If the insured provides additional information after the original claim payment is made, does that constitute the insured "disagreeing" with the original claim payment?

  We believe that it would be very difficult – and likely impossible -- for insurers to accurately answer these questions in a way that would provide meaningful data for

analysis. Given the extra time that would be required to glean the information in the subjective interpretation of the question, we would oppose these questions being added to the data call.

- **Proposed Questions 26-27:** As indicated earlier in our letter, we believe the emphasis that OPIC is making on the existence or lack of fraud investigation will lead to misleading results. Again, we believe collecting this information goes beyond the scope of the Legislative charge, and the costs incurred to provide this information will far outweigh any perceived possible benefit.

  With respect to Question 26, we note that "internal fraud investigation" is not defined. Claims adjusters are often trained to pay attention for indicators of fraud. If an adjuster were to investigate an indicator of fraud, would that constitute an "internal fraud investigation" for purposes of answering this question in the affirmative?

  Furthermore, assuming that there was a fraud investigation done by a company's special investigation unit (SIU), what value would there be in knowing that? Adjusters often refer claims to SIU for discussion of fraud indicators, which may or may not rise to the level of a "fraud investigation."

  With respect to Question 27, we fail to see information responsive to this question will lead to meaningful data for the Legislature. While we appreciate OPIC's position that insurance fraud should be investigated and prosecuted (a sentiment NAMIC and its members wholeheartedly share), decisions to refer fraud cases to third parties for further investigation are based on a variety of factors. We believe any data captured by this question would be of little use in determining the correct public policy to adopt. Accordingly, we would oppose these questions being added to the data call.

- **Proposed Questions 28-45**: While some may believe this information is interesting, we do not believe that it fits within the scope of the Legislature's interim charge. Accordingly, we would oppose these questions being added to the data call. The cost incurred to collect the data would far outweigh any perceived probative value.

Feedback regarding comments from Texas Watch

We preface our comments by stating the obvious – the insurance industry has an entire department within state government tasked with overseeing and regulating its activities within the marketplace. Through various grants of statutory authority, the Department has ample tools. These tools include the ability to:

- issue data calls and market conduct exams,
- maintain a consumer complaint monitoring program, and
- investigate allegations and take action against a licensee's ability to conduct business in the state.

From these tools, the Department already has a good sense for how insurers are resolving hail litigation claims.

We are unaware of the industry making significant changes in their claim management models which would precipitate a massive increase in litigation over the last five to six years. If that were in fact the case, the Department would have picked up on it during the normal course and scope of its regulatory activities. Thus, broadening the data call in an effort to capture information that doesn't go to the heart of explaining the increase in hail litigation is an inefficient use of Department and industry resources.

With regards to the specific recommendations from Texas Watch, we believe none of these requests are appropriate for this data call. We would respond as follows:

Texas Watch Recommendation No. 1: We believe market conduct exams and the Department complaint records already capture much of this information. Other pieces of information would be found in the individual claim files. However, as stated above, the relative value of such data (given the fact the Department already conducts regular examinations into company practices) is questionable compared to the additional time required to capture it from claim files.

Texas Watch Recommendation No. 2: While much of this information would be found in the claim files of an insurer, we would suggest that there needs to be an objective demonstration that insurers do not try to resolve claims pre-suit. We would further suggest that any value increase in a claim that goes into litigation does not mean that the claim was originally undervalued. Given the various remedies available to policyholders and their lawyers in the forms of attorney's fees and penalty interest, a file in litigation may be settled for more money than the last pre-suit offer made by the insurer. A number of factors – many having nothing to do with the adequacy of the adjustment of the claim – could determine the value of the lawsuit.

Texas Watch Recommendation No. 3: We would refer you to our previous comments regarding fraud investigations.

Texas Watch Recommendation No. 4: The Department has access to much if not all of this information from previous filings of insurers. NAMIC has no objection to the Department preparing a report using previously filed data to address this recommendation.

Texas Watch Recommendation No. 5: The Department has access to much if not all of this information from previous filings of insurers. NAMIC has no objection to the Department preparing a report using previously filed data to address this recommendation.

Additional Comments From NAMIC Regarding the Data Call

We would add a few more observations about the data call in its current form:

Confidentiality. As you might imagine, this data call seeks quite a bit of information that could be used by a competitor to determine the business practices of an insurer. We would ask that the Department confirm that any submission of data stemming from this data call be deemed confidential and not subject to disclosure pursuant to an open records request. We would also ask that all due care be taken to protect the information via disclosure through legislative channels.

Compliance costs for data call as written. We anticipate that in the data call's current form, an insurer will spend somewhere between fifteen and thirty minutes per claim file to capture the requested information. This does not include the time necessary to identify and locate the responsive files. Thus, the man hours needed – and related costs – should be factored into the scope of the data call. **We encourage the Department to limit the scope of the call to that data which a responding insurer can glean quickly from electronic records.** We understand this may be different for each carrier, but it will provide a good result with a lower compliance cost.

In addition, it is important for the Department to recognize that not all carriers may collect each of the requests data points. As a result, even with the extraordinary expenditure of time dedicated to manually reviewing each claim, it is very likely the case that many of the data elements cannot be reported. We would request that a text box be inserted to allow companies to report which data elements they do not capture in individual claim files.

Challenges answering the "Underwriting Action Survey." We believe any "yes" answer to the elements in Section III could potentially be misleading. These underwriting decisions are often made for a combination of reasons. The increased risk of hail litigation could have a varying weight within the decision to change course from an underwriting perspective. It would be virtually impossible to extract the hail litigation risk component from an amalgamation of reasons why a company might make a change to its underwriting practices.

In conclusion, we urge the Department consider three final thoughts:

1. *The Department already has much of the data it seeks in its possession.* In addition to filings made by companies in the regular course of business, the Department has received a number of complaints regarding public adjusters as well. There is significant data within TDI that would be of benefit to the Legislature. We urge the Department to make that data available to the Legislature, taking due care to protect information disclosed through legislative channels.

2. *Many of the questions about whether X, Y or Z should be included in the data call can be answered by simply referring back to the scope of the interim charge.* Many of the suggestions from OPIC and Texas Watch are simply outside the scope of the interim charge. Focusing on that will help direct the Department's efforts in determining the proper scope of the data call.

3. *The market is the ultimate indicator of the existence of a problem with hail litigation.* To the extent the Department can report to the Legislature the changes in the marketplace stemming from hail litigation, **that should be the ultimate data set** – not the identify of a law firm, whether a public adjuster was involved, or whether companies are reporting fraud. Insurers do not build their IT systems with data calls in mind; they are built to help the company run a business. The degree to which insurers can provide data ought not be a factor in determining the need for litigation reform, especially since we can see what's actually happening in the marketplace as a result of the hail litigation trends over the last few years.

Commissioner Mattax, we know this data call is a sizeable undertaking for the Department – it certainly is for our members. We appreciate the thoughtfulness put into the original draft and your willingness to hear from the industry on how best to provide meaningful data to the Legislature while minimizing the compliance expense in the process.

Please let me know if I can be of service.

Sincerely,

Paul Martin
Director-State Affairs
Southwest Region