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Oregon State Legislature
Oregon State Capitol
Senate Committee on Judiciary
900 Court Street NE
Salem, OR 97301

March 13, 2015

Sent via email to: mike.reiley@state.or.us

Re: SB 313 and SB 314 - NAMIC's Written Testimony in <u>Opposition</u>

Dear Senator Prozanski, Chair; Senator Kruse, Vice-Chair; and members of the Senate Committee on Judiciary:

Thank you for providing the National Association of Mutual Insurance Companies (NAMIC) an opportunity to submit written testimony to the committee for the March 16, 2015 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.

We are the largest property/casualty insurance trade association in the country, serving regional and local mutual insurance companies on main streets across America as well as many of the country's largest national insurers.

The 1,300 NAMIC member companies serve more than 135 million auto, home and business policyholders and write more than $208 billion in annual premiums, accounting for 48 percent of the automobile/homeowners market and 33 percent of the business insurance market. NAMIC has 153 members who write property/casualty insurance in the State of Oregon, which represents 46 percent of the insurance marketplace.

Through our advocacy programs we promote public policy solutions that benefit NAMIC member companies and the policyholders they exist to serve. Our educational programs enable members to become better leaders in their companies and the industry.

NAMIC appreciates and shares the legislature's commitment to promoting the best interest of insurance consumers, and with that in mind NAMIC respectfully *opposes* SB 313 and SB 314 for the following reasons:

1) SB 313 and SB 314 are both unnecessary and excessive – There is *no evidence* to support the contention that there is *any* problem, let alone a wide-spread problem, in how insurers settle their claims with policyholders or claimants to justify such a radical departure from the current tort law and the authorization of excessive legal remedies like punitive damages and one-sided attorney's fees awards, or the authorization of class action lawsuit. On the contrary, the evidence supports the conclusion, that 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 Oregon Insurance Division (OID) to see that these bills are a "solution in search of a problem." Moreover, studies have shown that the 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 their insurance company handled the claim fairly."**

Further, most insurance consumers believe that the OID has the 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**."

2) 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. SB 313 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 by a party, even one resulting from an inconsequential mistake by the insurer in the claims adjusting process or in the insurer's general business practices 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.*"

3) 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. The proposed legislation will force insurance companies to have to use financial resources which should be used to pay insurance claims and develop new insurance products on attorney's fees to defend against baseless legal claims over an alleged unlawful insurance practice. In effect, these bills will turn every insurance claim into a possible "double lawsuit" case (one lawsuit over the disputed insurance claim and one lawsuit over how the claim was handled), which insurance consumers will likely have to pay for, via higher insurance rates and/or reduced consumer services and insurance products.

Empirical studies have *repeatedly found* that "double lawsuit" legislation adversely impacts 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 **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).

4) The Oregon Insurance Division 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 OID has failed to properly and thoroughly perform its regulatory responsibilities, or that these bills are necessary to ensure that insurance carriers settle claims in a fair, equitable, and timely manner.

NAMIC is also concerned about the inclusion of insurance within the purview of the UTPA. Unlike businesses subject to the UTPA, the insurance industry is already *extensively regulated* by the OID, which has a proven track-record of pro-consumer regulatory oversight of insurers' claims settlement practices. In addition to the OID's long list of regulatory enforcement powers, which include imposition of fines and sanctions, use of market conduct examinations that are quite costly for insurers, and the suspension or revocation of the insurer's license to transact insurance in the state, the Oregon State Legislature granted the OID civil restitution powers in 2013, so that the OID could assist insurance consumers (at no cost to the consumer) in resolving disputed claims. Pursuant to SB 414, the OID may order an insurer to pay an insurance consumer civil restitution on a disputed claim.

Since this new regulatory power to resolve insurance claims disputes in a fast, efficient, and cost-effective manner has yet to be given ample opportunity to be used to the benefit of insurance consumers, NAMIC suggests that the legislature afford the OID time to use this new regulatory power to address consumer needs before considering the adoption of unnecessary "litigation-oriented" legislation.

The proposed UTPA legislation (SB 314) will only create duplicative and overlapping regulatory oversight between the OID (the executive agency specifically authorized to and experienced in regulating the business of insurance) and the Attorney General, who is empowered to enforce the UTPA. Further, since there is no evidence to support the contention that the OID needs the assistance of the AG to protect insurance consumers, NAMIC believes that the proposed legislation is excessive, unnecessary, and an imprudent use of the state's financial resources.

5) The fact of the matter is that the proposed legislation isn't really about providing consumers with necessary legal protection it is really about providing trial attorneys with the ability to financially coerce insurers into paying unfair and excessive settlements. SB 313 will provide plaintiff attorneys with the ability to threaten insurers with costly punitive damages and attorney's fees claims in order to secure a settlement that is higher than the consumer's "actual damages". Plaintiff attorneys know that insurers will have to factor in to their valuation of the claim (especially in nominal damages claims) the high cost of defending against an alleged unlawful insurance practice claim, so this will allow plaintiff

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).

* 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.

6) The proposed legislation will also adversely impact insurers ability to investigate and prosecute insurance fraud, which is a significant 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 the proposed legislation is passed, 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.

* 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).

* 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).

7) 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** – The proposed legislation 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 is likely to cause settlement delays for all insurance claims;

*** Potential delays in the legal adjudication of meritorious lawsuits** – The proposed legislation 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 legitimate trials; 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)** - The proposed legislation 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 financial 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, the proposed legislation, which would enact the *most onerous bad faith law in the country*, could scare away business development in the state, which could adversely impact job growth that results from the entry of new employers in the business marketplace.

8) Oregonians don't want or need the "alleged protections" created by SB 313 and SB 314

In a 2015 polling study of Oregonians, DHM Research found that:

- **74% of voters believe the types of reform being considered to bring extra lawsuits against insurance companies would cause their home and auto insurance rates to increase.**

- **75% of voters are not willing to pay an increase in their insurance rates for an additional means of recourse against their insurance companies.**

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).

For the aforementioned reasons, NAMIC respectfully requests that the Senate Committee on Judiciary **VOTE NO on SB 313 and SB 314, because insurance consumers don't want or need unnecessary litigation that could adversely impact the cost of insurance.**

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

Respectfully,

Christian J. Rataj, Esq.
NAMIC's Senior Director State Affairs -Western Region