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Via Email to DORA_Ins_RulesandRecords@state.co.us; bobbie.baca@state.co.us; and peg.brown@state.co.us

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RE: Comment on Proposed Withdrawing of Bulletin No. B-5.1

Dear Madam or Sir:

This law firm represents United Policyholders (“UP”), a nonprofit 501(c)(3) corporation. UP hereby respectfully submits its comments concerning the proposed withdrawal of Bulletin No. B-5.1 (the “Bulletin”) by the Colorado Division of Insurance (“DOI”).

About United Policyholders

Since 1992, UP’s mission has been to preserve the integrity of the insurance system by serving as an information resource and voice for insurance policyholders in Colorado and the other 49

States. UP assists individual and business policyholders of all types (as well as those harmed by insurers' actions or operations) be their own advocate when faced with insurable events, such as natural disasters.

In Colorado, UP has been engaged with public officials in El Paso, Boulder, and Larimer counties, and the Colorado Insurance Commissioner's office, since 2010, when UP began providing local recovery support services to residents and businesses after a series of wildfires and flooding events. Loss adjustment, construction, and financing delays during the recovery process led UP to help draft and support the Colorado Homeowners Insurance Act of 2013 (House Bill 12-1225, signed on May 10, 2013 by Governor John Hickenlooper).

UP's work is supported by donations, grants, and volunteer labor. UP does not sell insurance or accept funding from insurance companies. UP publishes free-of-charge materials that give practical guidance to insurance consumers in print and online at www.uphelp.org.

In addition to general advocacy, UP advances policyholders' interests in courts across the U.S. by filing *amicus curiae* briefs in cases involving important insurance principles. UP has filed *amicus curiae* briefs on behalf of policyholders in more than 400 cases throughout the United States, including numerous cases before the United States Supreme Court, the U.S. Circuit Courts of Appeal, and the courts of the State of Colorado. *See, e.g., Thompson v. Catlin Ins. Co. (UK) Ltd.*, 431 P.3d 224, 226 (Colo. 2018); and *MarkWest Energy Partners v. Zurich American Ins. Co.*, 2016COA110, July 14, 2016 (Court of Appeals Case No. 2015CA770, District Court Case No. 14CV31489). UP's *amicus* brief was cited in the United States Supreme Court's opinion in *Humana, Inc. v. Forsyth*, 525 U.S. 299, 314 (1999).

In fact, UP has even been invited by many courts to participate in oral argument as *amicus curiae* and UP's arguments have been cited with approval in opinions issued by numerous state and federal courts, including, *e.g., Association of California Insurance Companies v. Dave Jones*, Insurance Commissioner, Case No. S226529, Cuellar, J., January 23, 2017 (Ct.App. 2/1 B248622, Los Angeles County Super. Ct. No. BC463124).

Commentary on Withdrawal of the Bulletin by DOI

UP believes that the DOI's decision to withdraw the Bulletin is premature. UP therefore urges the DOI to either leave the Bulletin in place or arrange a process to obtain the meaningful input of stakeholders, as noted in the conclusion of this letter, to revise it. UP's reasoning follows.

As you know, the Bulletin provides, in relevant part:

The position of the Division of Insurance is that the actual cash value of a structure under a replacement cost policy, when the policyholder does not repair or replace the structure, is the full replacement cost with proper deduction for depreciation. Deduction of contractors' overhead and profit, in addition to depreciation, is not consistent with the definition of actual cash value. The Division of Insurance will interpret policy provisions containing the foregoing or similar language to prohibit deduction of contractors' overhead and profit, in the calculation of actual cash value, where the dwelling is not repaired or replaced by the policyholder.

In promulgating this Bulletin, the DOI presumably was addressing concerns that insurers were improperly withholding contractor overhead and profit ("O&P") from actual cash value ("ACV") payments. UP has concerns not only with the substantive rationale DOI provided for the proposed withdrawal of the Bulletin, but also with the manner in which DOI announced the proposed withdrawal, sought commentary, and arrived at the decision to withdraw the Bulletin.

First, UP must draw the DOI's attention to the manner in which it sought commentary. On January 18, 2019, the undersigned, who has represented UP in other matters, received a copy of an email announcement from the DOI concerning the proposed withdrawal and commentary request due a mere seven days later, on January 25, 2019. That brief period for commentary did not allow a meaningful opportunity to gather information and express any concerns UP or other stakeholders may have had. Fortunately, presumably at the urging of other stakeholders equally concerned about the lack of a meaningful opportunity to comment, the DOI extended the commentary period to February 15, 2019.

Second, even the initial email announcing the proposed withdrawal was problematic. That email stated, "This bulletin is being considered for withdrawal as stakeholder meeting indicated that it was no longer necessary, and that prohibiting the application of depreciation on work not yet done conflicts with the conditions of a Replacement Cost policy." This truncated and confusing explanation did not provide the transparency required of government agencies, created confusion, provided insufficient context for the DOI's decision, and failed to sufficiently account for the history and reasons the DOI issued Bulletin in the first place.

Third, UP is concerned about the manner in which the DOI arrived at this decision. It is UP's understanding that DOI held a meeting among a small group of stakeholders in December 2018.

UP further understands that the meeting was attended only by, among others, insurance industry representatives, contractors, a public adjuster, and an appraiser/umpire who was a former independent adjuster. We are concerned that no members of the Colorado policyholder's bar or other policyholder advocates, like UP or the Colorado Trial Lawyers Association, were in attendance.

UP is further informed that the purpose of the meeting was to determine if the Bulletin contained confusing language that needed clarification or whether the DOI should withdraw the Bulletin completely. We understand that the DOI stated that some contractors are misinterpreting the Bulletin and filing complaints with the DOI asserting that overhead and profits are being depreciated or not paid at all, in contravention to the Bulletin. Apparently, UP decided to simply withdraw the Bulletin, concluding that insurance companies may depreciate overhead and profit ("O&P") but cannot completely withhold O&P in addition to depreciation.

Fourth, substantively, we believe the DOI's concerns and actions are misplaced. DOI issued this Bulletin on December 21, 1998. In the 20 years that the Bulletin has been in effect, this is the first time UP and other policyholder advocates have heard of any issues involving the Bulletin.

Compelling public policy reasons supported the issuance of the Bulletin. A replacement cost policy provides coverage for not only the cost of the building materials and labor, but also associated items like the contractor's overhead and profit, sales tax on building materials, permitting costs, etc. Insurers factor in payment of such items in their actuarial calculations and include them in their premium calculations. If insurers are allowed to deduct contractor O&P from their calculation of ACV on a loss that will never be paid because the insured decides not to make repairs, the insurers would receive an illegal windfall.

Moreover, with respect to the rationale that O&P should be excluded from actual cash value settlements because the insured has not incurred these expenses, the same rationale applies just as forcefully to the cost of building materials, contractor labor, etc. Thus, theoretically under this rationale, insureds should never collect an ACV settlement. This result would be contrary to the purposes of a homeowners or property insurance policy as well as its plain language. Thus, although actual payment of O&P doesn't occur unless or until the insured actually makes repairs and collects the depreciation holdback from the insurer, for purposes of an ACV payment, O&P is indistinguishable from other components of the ACV calculation. The majority of courts around the nation considering the issue have so held. *See, e.g., Salesin v. State Farm Fire & Cas Co.*, 581 N.W. 2d 781 (1998 Mich.App.); *Mills v. Foremost Ins. Co.*, 511

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F.3d 1300, 1306 (11th Cir. 2008); *Tritschler v. Allstate Ins. Co.*, 144 P.3d 519, 529 (Ariz. App. 2d Div. 2006), as corrected (Dec. 19, 2006).

Currently, when some insurers improperly argue that O&P should be excluded from ACV settlements entirely along with depreciation, policyholders can respond by citing the Bulletin. UP is concerned that withdrawing the Bulletin will only embolden such insurers to increasingly make such misplaced arguments and reduce the ability of policyholders to thwart the improper exclusion of O&P without having to litigate the issue in expensive and time-consuming court actions.

Conclusion

For these reasons, UP strongly discourages the DOI from withdrawing Bulletin No. B-5.1. Instead, to the extent the DOI or other stakeholders perceive any confusion or other issues associated with the Bulletin, the DOI should convene a meeting to discuss revisions narrowly focused on eliminating or reducing those issues, with sufficiently broad and advance notice to allow a meaningful dialogue.

UP welcomes the opportunity to participate further in the DOI's consideration of this issue. Thank you for your consideration.

Respectfully,

A handwritten signature in blue ink, appearing to read 'Damian J. Arguello', with a stylized, flowing script.

Damian J. Arguello

cc: Amy Bach, Esq., United Policyholders