



BULLETIN 2010-4

TO: Insurance adjusters, property and casualty insurers and building trade industries

FROM: Glenn Wilson, MN Commissioner of Commerce
Commissioner Steve Sviggum, MN Department of Labor and Industry

RE: Public adjusting relative to storm damage and general roofing repair

DATE: September 17, 2010

The Minnesota Departments of Commerce and Labor and Industry ("The Departments") have become aware of potentially questionable advertising and business practices by a small number of contracting businesses operating in Minnesota. In the past few years, many property owners experienced damage to their homes or buildings from storms, especially wind and hail storms.

As a result, many policyholders have filed roof and siding damage claims with their insurers. Contractors who regularly offer roofing repair, reconstruction or replacement services have approached policyholders.

By itself, of course, a contractor offering his or her repair, reconstruction, or replacement services is a normal trade practice.

- A contractor may offer an opinion to an insured as to whether roof damage is from a storm or other incident normally covered by a homeowner's policy.
- The contractor may recommend to the insured to file an insurance claim with the insurer.
- The contractor may provide an estimate of repair which the insured may submit to the insurer.
- The contractor may be present when the insurance adjuster inspects the damage. The roofing contractor may answer the adjuster's questions.

Some contractors, however, have offered their "representation" services by offering to "exclusively negotiate" the claim settlement with the insurer(s) involved, often as part of the repair contract. In some instances, the contract "requires" the property owner to have the contractor "negotiate" the terms of the claim settlement on the owner's behalf.

The Departments view this service as the actions of a public adjuster. A public adjuster means "any person who, for compensation or any other thing of value on behalf of the insured ... acts or aids, solely in relation to first-party claims arising under insurance contracts that insure the real or personal property of the insured, on behalf of an insured in negotiating for, or effecting the settlement of, a claim for loss or damage covered by an insurance contract ..." [Minnesota Statutes § 72B.02, subd. 6 (1)].

Further, M.S. § 72B.02, subd. 6 (2) continues the definition of adjuster as one who "advertises for employment as a public adjuster of insurance claims or solicits business or represents to the public as a public adjuster of first-party insurance claims for losses or damages arising out of policies of insurance that insure real or personal property."

The contractor's actions, offerings, or representations may constitute the contractor's acting as a public adjuster. The terms, written or otherwise, of the agreement with the property owner and other facts may demonstrate whether the actions constitute violations of Minnesota insurance law. Even the offering, in a marketing sense, of such "representation" may constitute a violation, which could result in action by the Minnesota Department of Commerce.

Accordingly, a contractor must be licensed as a public adjuster in order to negotiate and act as a representative of the insured with the insurer. A contractor who asks an insured to sign a power of attorney or any other document authorizing him to act on the insured's behalf for a fee may be acting as a public adjuster. A contractor must be licensed as a public adjuster in order to:

- (1) enter into a contract authorizing the contractor to negotiate or effect the settlement of a claim for a fee or compensation;
- (2) advocate on behalf of the insured or offer assistance to the insured to prepare, file or complete the insurance claim; or
- (3) advertise or solicit for employment as an adjuster of such claims.

It must be noted further that M.S. § 72B.135, subd. 4, states in part that no public adjuster shall:

- 6) have an interest directly or indirectly in a construction firm, salvage firm, or appraisal firm. "Firm" includes a corporation, partnership, association, or individual firm

Consumers are encouraged to take time before entering into a contractual agreement with anyone soliciting repair work. If anyone claims to have the ability to represent you in an insurance adjustment, ask to see their public adjuster license. Record of individuals who are properly licensed as adjusters may be search on the Commerce website at www.insurance.mn.gov.

While consumers are asking if the solicitors are also acting as contractors, ask to see evidence they are licensed as a residential building contractor or residential roofer with the Minnesota Department of Labor and Industry. It is not impolite for consumers to ask anyone to prove they are properly licensed to offer or to perform services. In fact, the legitimate contractors and public adjusters will be more than willing to show that they are licensed. Contractors' licensing status can be checked online at www.dli.mn.gov.

On July 1, 2010, significant changes to laws governing the regulation of adjusters went into effect. Important to note are changes that now require education and testing for adjusters, moving to a birth month renewal cycle and bonding requirements for public adjusters. Please see the website (<http://www.insurance.mn.gov>) for a complete list of changes and detailed explanation about how the conversion to birth month renewals will occur.

In addition, effective Aug. 1, 2010, a number of statutory changes occurred affecting the building trades industries. Please note the new language found under:

- M.S. § 325E.66, which prohibits a residential roofer from advertising or promising to pay or rebate all or part of an insurance deductible, when providing goods and services to an insured who will pay for the goods and services from the proceeds of a property or casualty insurance policy. Allows the insured or insurer to bring an action in court for damages if a residential roofer violates this section.
- M.S. § 326B.811, which provides that a homeowner has the right to cancel a contract with a residential roofer for goods and services to be paid from the proceeds of a property or casualty insurance policy within 72 hours after notification by the insurer that the claim has been denied. Requires a residential roofer to provide a disclosure and a cancellation form to the homeowner before entering into a contract. Requires a residential roofer to refund any payments within ten days after a contract is canceled, unless the roofer is entitled to compensation for emergency services performed.

For general questions about adjuster licensing contact the:

Minnesota Department of Commerce, Licensing Division
1-800-657-3978 (Minnesota only, 8 a.m. to 4:15 p.m.)
(651) 296-6319 (8 a.m. to 4:15 p.m.)
(651) 284-4107 FAX

E-mail: licensing.commerce@state.mn.us (General)
E-mail: education.commerce@state.mn.us (Pre-license and continuing ed inquiries)

For general questions regarding contractor licensing or conduct, contact the:

Minnesota Department of Labor and Industry, CCLD – Enforcement Services Unit

Phone: (651) 284-5069 or 1-800-657-3944

(651) 284-5746 FAX

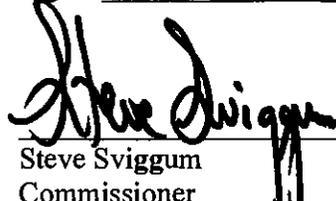
E-mail: DLI.contractor@state.mn.us

Signed 9-19-10



Glenn Wilson
Commissioner
MN Department of Commerce

Signed _____

 9-17-10

Steve Sviggum
Commissioner
MN Department of Labor and Industry

BULLETIN 2010-4 FAQs

Since Bulletin 2010-4 was issued, Commerce and DLI have received a number of questions on the application of the bulletin. This set of Frequently Asked Questions (FAQs) will hopefully address the most common questions.

Questions and Answers

1) What's the origin of the bulletin?

Commerce and DLI had received complaints from consumers and the insurance industry about what they perceived as abusive practices being done by building contractors. In particular, consumers were concerned about contract language that required payment even in the event that the consumer did not pick that contractor to do the repairs. In addition, insurers were complaining that certain contractors were asserting the right to negotiate coverage terms, including the assertion that the right to appraisal could be asserted by the contractor. To address any concerns arising from those practices, Commerce and DLI issued 2010-14

2) Is the bulletin articulating new law?

No. Although recent changes have been made to Minnesota Statutes regarding Adjuster Licensing, Bulletin 2010-4 relies on existing Minnesota law. Furthermore, except in the very limited situations as described in the bulletin, the bulletin was not intended in any way to regulate, amend or otherwise interfere with any contractual relationship between a contractor and a consumer.

3) Is Minnesota acting outside the norm in issuing this bulletin?

No. The issue of when is a contractor acting as an "adjuster" has been the subject of much discussion at the national level. For example, we are aware of at least three other states that have issued a similar bulletin or alert (Oklahoma, Iowa and North Carolina). We also understand that Florida is (or has) issued an alert. Finally, we understand that the National Association of Public Insurance Adjusters (NAPIA) has been reviewing this issue and may issue additional guidance.

4) Does the bulletin prohibit a "price agreeable contract"?

No. A "price agreeable contract" states that the homeowner agrees to allow the contractor to perform whatever repair work the homeowner's insurance company agrees to cover, for the price that the insurer agrees to pay for the repairs. Most of these contracts also have a provision that calls for the cancellation of the contract if no agreement can be reached between the contractor and the insurer. The bulletin was not intended to prohibit the use of price agreeable contracts.

While the departments do not object to the price agreeable contract in principle, the manner in which it is presented to the homeowner can cause concern. We are noting an increase in complaints from homeowners who claim that the contractor failed to tell them that the document

they were asked to sign is in fact a contract. They were led to believe that it was merely an authorization for the contractor to examine the homeowner's roof or to talk to their insurance company. DLI has taken enforcement action against several contractors for these types of misrepresentations

5) What type of behavior was the bulletin intended to address?

Contractors can still negotiate the scope of work called for in their contract with their customer and the price that they feel is fair for their work. However, they need to be cautious about negotiating terms of coverage on the consumer's behalf. Commerce is stepping up its review of such activities and may take administrative action in those cases where we find unlicensed activity being conducted.

For example, DLI and Commerce have noticed contractors who advertise or otherwise claim to act as the homeowner's representative in negotiating a claim with the insurer. Some contractors' price agreeable contracts also contain provisions that state that the contractor will negotiate an insurance claim with the insurance company on the homeowner's behalf. This can be construed as the services of a public adjuster – someone who, for a fee or any other thing of value, negotiates a claim settlement on a homeowner's behalf and may therefore require licensing as a public adjuster.

While the determination of whether a contractor is acting as a public adjuster is made by the Commerce Department only, both Departments advise licensed contractors to be sure that they stick to discussing with insurance adjusters only the scope of damage to a homeowner's property, and the fee that the contractor seeks for the required repair work. Contractors should avoid making statements, verbally or in their advertisements or contracts, that they will act as a homeowner's "representative" or "agent" in negotiating with an insurer.

6) Once a project is started, it is not uncommon for additional damage to be found. The contractor contacts the insurance adjuster to describe that additional damage and discuss any additional costs of repair. This is how the market has always behaved and I don't believe that this bulletin should change these practices. Is my interpretation of the bulletin correct or am I missing something?

It is okay for the contractor to negotiate the scope and payment for his/her work. In addition, it is okay for a contractor to identify for the insurer and make the insurer aware of damage that may not have been included in the initial scope and settlement offer. However, it is not okay for the contractor to say he or she "represents" the homeowner or that the contractor is "adjusting" the claim. Statements or contractual provisions containing such language may expose the contractor to concerns that it is acting as an unlicensed adjuster.

7) Is it possible for someone to be a licensed roofer and a licensed adjuster at the same time? (See, MS 72B.135, sub 4)

Yes it is possible but it is our position that you can't wear both hats for the same claim. Minnesota Statute 72B.135 Subd. 4 prohibits public adjusters from having any interest "directly or indirectly in a construction firm, salvage firm, or appraisal firm." Having a licensed adjuster of your staff does not necessarily violate the statute. However, if your company adjusts the claim and also does the same repair, we would need to do additional investigation. We would strongly advise companies not to do both the adjustment and the repair.

8) What about the interactions that the contractor can have with the insurer. I understand that the contractor may not represent the insured in matters related to policy interpretation and claim preparation. But where the contractor is experienced and has knowledge related to scope of damage, and the insured does not, can the contractor identify for the adjuster and make the adjuster aware of damage that the adjuster did not include in its scope and settlement offer?

As we previously stated, the contractor has the ability to negotiate the scope and terms of that contractor's bid including any supplementals. In addition, nothing in statute or this bulletin should be construed by the insurance industry as a new basis for limiting direct discussions between the parties on the scope and cost of repairs.

9) We are a general contractor, and yes, we do handle insurance claims and work with the insurance companies for supplements and to release the final depreciation. It sounds like you want everyone involved with this to become a public adjuster, which would also include me. I submit the final billing and write up the supplements and fax them to the insurance companies, and do talk to them if they have questions. Our sales reps do as well, in more detail. They meet the adjusters and if our figures do not match what they have, then we do have to negotiate with them until an agreement is made. All of our sales reps are independent contractors. So now they have to be public adjusters?

Again nothing in statute or this bulletin would require licensure for the services described in these questions.

10) Does this restriction (72B.135 subd 4) extend to all construction companies, or only those working on a project with which the public adjuster is involved?

As we understand this question, the licensed employed adjuster is not working on the particular claim. This statutory provision still applies.

11) Is the "interest" limited to an ownership interest? Can a construction company employee hold a public adjuster license and work with the insurer on settling the claim on behalf of the insured? Can a construction company and an independent contractor public adjuster have a contractual arrangement that creates an exclusive relationship?

The statute prohibits both "direct and indirect" interests so we believe the statute would prohibit such arrangements.

12) If the answers to #11 allow a non-ownership relationship (employee or exclusive IC) can the contractor be an agent of the homeowner for the purpose of engaging the public adjuster's services? Can the contractor pay for the services of the public adjuster? If so, does the sales rep who meets with the insured require a public adjuster solicitor license?

If we understand the first question, the contractor would either recommend or select the public adjuster for the homeowner. We would refer you to subd 4 (5) to ensure that the compensation arrangement for such a selection or referral is not illegal.

Payment by the contractor would also be subject to a similar analysis and require a case by case review.

A sales rep is not required to be licensed as a public adjuster provided the scope of the discussions is limited to the bid for repair services. Any offer to provide adjustment services or otherwise negotiate the claim with the insurer may subject the sales rep to scrutiny.

13) A firm's website lists what services they provide. The list of services makes statements such as "We will represent your best interests when meeting the insurance adjuster". Would advertising services such as this require licensure as a public adjuster? Some competitors have contract provisions with language similar to the following, ... (home)owner gives full authority to Contractor to negotiate with owner's insurance company insurance company to pay for any damages ... Isn't this illegal under the terms of this bulletin?

Both of these statements would warrant our attention,

14) Can an insurance company take our bid and share it with another contractor in order to secure a lower claim settlement amount?

Yes. Under Minnesota law, an insurer is obligated to pay their insured only the amount it would take any properly licensed contractor to perform the scope of work covered in the claim. Nothing prohibits the insurer from contacting other licensed contractors to get bids for the same scope of work, nor are they prohibited from sharing the original contractor's bid with another contractor.

If a second contractor agrees to perform the work for a lower price, and the first contractor does not want to do the work for that price, the second contractor must offer to contract with the insured to perform the same scope of work for the amount they quoted the insurer. The Department of Labor and Industry will pursue enforcement action against any contractor who offers "phantom bids" to insurers with no intent to actually perform the work.

15) So you're saying that the insurance company can use the bid that we spent a lot of time on putting together, and use it to lowball us? Our sales representatives work on commission – how is that fair?

Nothing in Minnesota law requires that a contractor be paid to put together an estimate or bid, and insurers are free to find another contractor to do the work at a lower cost. Under most price agreeable contracts, if the contractor and the insurer cannot agree on a price, the contractor will have to walk away. In that case, the time spent by the salesperson or estimator will simply have to be chalked up to a cost of doing business, just as it would be for a bid prepared for a potential customer where the homeowner is paying for the work out of their own pocket and chooses to go with another bidder.

Questions regarding the bulletin and these FAQs should be addressed to the Commerce Department's Market Assurance Division at (651) 296-2488 or market.assurance@state.mn.us.

Appendix A

MN Stat 72B.02 Subd. 6 Public adjuster.

"Public adjuster" means any person who, for compensation or any other thing of value on behalf of the insured:

- (1) acts or aids, solely in relation to first-party claims arising under insurance contracts that insure the real or personal property of the insured, on behalf of an insured in negotiating for, or effecting the settlement of, a claim for loss or damage covered by an insurance contract;
- (2) advertises for employment as a public adjuster of insurance claims or solicits business or represents to the public as a public adjuster of first-party insurance claims for losses or damages arising out of policies of insurance that insure real or personal property; or
- (3) directly or indirectly solicits business, investigates or adjusts losses, or advises an insured about first-party claims for losses or damages arising out of policies of insurance that insure real or personal property for another person engaged in the business of adjusting losses or damages covered by an insurance policy, for the insured.

MN Stat. 72B.135 Subd. 4 Prohibited practices.

No public adjuster shall:

- (1) pay money or give anything of value to a person in consideration of a direct or indirect referral of a client or potential client;
- (2) pay money or give anything of value to a person as an inducement to refer business or clients;
- (3) rebate to a client a part of a fee specified in an employment contract;
- (4) initiate contact with a prospective client between the hours of 8 p.m. and 8 a.m.;
- (5) split the fee received or pay money to a person for services rendered to a client unless the other person is also licensed as a public adjuster;
- (6) have an interest directly or indirectly in a construction firm, salvage firm, or appraisal firm. "Firm" includes a corporation, partnership, association, or individual firm;
- (7) in connection with the transaction of business as a public adjuster, make a willful or knowing misrepresentation of facts or advise a person on questions of law;
- (8) make willful or knowing false statements about an insurance company or its employees, agents, or representatives;

(9) solicit employment of a client in connection with a loss that is the subject of an employment contract with another public adjuster;

(10) represent both an insurer and insured simultaneously; or

(11) advance money to a client pending the settlement of a loss where the amount would be included in a final settlement.

Subd. 5. Disclosures.

(a) A public adjuster shall disclose in writing to the client any interest the public adjuster has in loss proceeds other than those acquired by the public adjuster's employment contract.

(b) A public adjuster in soliciting a client for employment shall display a license and immediately inform the client that the adjuster does not represent an insurance company or insurance company adjusting firm. The adjuster shall inform the client that services are available for a fee to be paid by the client and shall give the client a card identifying the public adjuster. The public adjuster shall disclose in writing to the client the fee charged by the public adjuster.