THE 2017 LEGISLATIVE SESSION . . . PROPERTY & CASUALTY INSURANCE INDUSTRY PRIMARILY FOCUSED ON CONSTRUCTION DEFECT AND TORT LEGISLATION

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OVERVIEW

The 2017 legislative session adjourned on Wednesday, May 10, 2017. The 2017 legislative session marked the third consecutive year where one party controlled one legislative chamber and the other party controlled the other legislative chamber. Additionally, for the third year, Republicans controlled the Senate by one, razor-thin vote. Meanwhile, Democrats controlled the House by five votes, an increase of three votes from the previous two years.

Notwithstanding this split legislature, House and Senate leadership convened the 2017 legislative session by committing to work in a bipartisan manner to resolve several significant issues confronting the State of Colorado, including construction defect litigation reform, transportation funding, funding for rural hospitals, and equitable funding for all public schools. Unfortunately, towards the end of the legislative session, the Legislature had yet to pass any bills addressing these issues and the commitment to work in a bipartisan manner seemed like an empty promise. All that changed, however, in the last few days of the legislative session. With just days remaining, the Legislature reached bipartisan compromises on funding for rural hospitals; equitable funding for all public schools, including charter schools; the state budget; and the school finance act. In addition, the Legislature reached a bipartisan compromise on a bill that represents an incremental step towards construction defect litigation reform.

The legislative session saw the introduction of several bills impacting the property and casualty ("P&C") insurance industry. Most of these bills addressed issues relating to construction defect litigation and tort reform. A few bills, however, addressed issues relating to workers' compensation insurance, auto insurance, and appraisers in property insurance claims. The following is a sample of the P&C insurance bills the Legislature introduced during the 2017 legislative session, along with their final dispositions.

CONSTRUCTION DEFECT BILLS

The Legislature introduced six bills to address various issues associated with construction defect litigation. Throughout most of the legislative session, it seemed the Legislature would adjourn for the fourth consecutive year without passing legislation addressing construction defect litigation. In late April, however, the Legislature reached a compromise on HB 1279, which represents an incremental step towards construction defect litigation reform.

Specifically, HB 1279 requires a majority of unit owners belonging to a homeowners' association to approve the filing of a construction defect action and the governing board of the homeowners' association to disclose certain information to the unit owners regarding the implications associated with filing a construction defect action. In general, the P&C insurance industry took a neutral position on HB 1279. On May 25, 2017, the Governor signed HB 1279 into law.

While the Legislature reached a compromise on, and passed, HB 1279, it failed to pass the remaining five bills addressing construction defect litigation. SB 45, sought by Hall & Evans, LLC ("H&E") and the P&C

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insurance industry, would have allowed a court, throughout a construction defect action, to equitably apportion defense costs among all insurers with a duty to defend. After the construction defect action, a court could have apportioned defense costs among the insurers in proportion to each insured's liability. SB 45 died during the last days of the legislative session due to strong opposition by homebuilders and general contractors.

SB 156 would have required a construction defect claim to be submitted to arbitration or mediation when the governing documents of a homeowners' association require the mediation or arbitration of a construction defect claim and the requirement is subsequently amended or removed. The trial lawyers opposed SB 156 and were successful in killing the bill in the House. Nevertheless, the demise of SB 156 is likely moot because of the recent decision rendered by the Colorado Supreme Court in *Vallagio at Inverness Residential Condo. Ass'n v. Metro. Homes, Inc.*, No. 15SC508, 2017 CO 69 (Colo. June 5, 2017).

SB 155 would have defined the term "construction defect" in Colorado's Construction Defect Action Reform Act. Additionally, HB 1169 would have allowed a contractor to repair a construction defect or tender an offer of settlement before a claimant files a construction defect action. The trial lawyers opposed both bills and were successful in killing the bills in the House. Finally, SB 157, which was similar to HB 1279, would have required a majority of unit owners belonging to a homeowners' association to approve the filing of a construction defect action and the governing board of the homeowners' association to disclose certain information to the unit owners regarding the potential costs and benefits of filing a construction defect action. Unlike the compromise reached on HB 1279, the Legislature never reached a compromise on SB 157. SB 157, therefore, died quickly in the Senate.

TORT BILLS

In partial response to rising auto insurance premiums, a group of insurers introduced a package of tort reform bills. The trial lawyers strongly opposed the entire package, and the demise of the package in the House was never in doubt.

SB 181 would have allowed, under certain circumstances, evidence of collateral source payments or benefits and the net charges billed by a health care provider to be admitted in a civil action for damages. SB 182 would have clarified that insurers are not required to pay benefits under UI/UIM coverage and medical payments coverage if the amount of the collective benefits exceeds the amount of the insured's damages caused by an auto accident. SB 191 would have reduced the pre-judgment and post-judgment interest rates on damages in a civil action to 2 percentage points above the interest rate a commercial bank pays to the Federal Reserve Bank of Kansas City. The new rates would have, therefore, risen and fallen with inflation. Due to the trial lawyers' opposition, the aforementioned bills died quickly in the House.

The package of tort reform bills also included SB 204. As introduced, SB 204 would have eliminated the ability of a third-party to sue a P&C insurer for the unreasonable delay or denial of payment of benefits (under Colorado's bad faith statutes). In response to the package of tort reform bills, the trial lawyers introduced HB 1254. HB 1254 would have eliminated the cap (currently at $436,070) on non-economic damages for the wrongful death of a person under the age of 21. The P&C insurance industry, along with the business community, strongly opposed HB 1254.

During the latter half of the legislative session, H&E, along with the P&C insurance industry, actively engaged in a series of meetings with the trial lawyers to discuss potential compromises on both SB 204

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and HB 1254. Because of these meetings, H&E, along with the P&C insurance industry, secured an amendment to SB 204 that would have precluded additional insureds from suing a P&C insurer for the unreasonable delay or denial of payment of benefits, prevented first-party claimants from assigning their rights under Colorado's bad faith statutes in a P&C cause of action, and precluded Colorado's bad faith statutes from applying to surety bonds. In return, the trial lawyers sought to amend HB 1254 by increasing the cap on non-economic damages for the wrongful death of any person to $800,000. The trial lawyers also sought to amend SB 204 by clarifying that the statute of limitations for actions filed under Colorado's bad faith statutes is 2 years. Ultimately, the parties could not reach a compromise on both bills. Consequently, SB 204 died in the House, while HB 1254 died in the Senate.

WORKERS' COMPENSATION INSURANCE BILLS

Legislation regarding workers' compensation insurance was not at the forefront during the legislative session. The Legislature, however, still passed 3 bills regarding benefits to employees of uninsured employers, mental impairment benefits, and cancer benefits.

HB 1119, a priority for the Division of Workers' Compensation, creates the Uninsured Employer Fund (the "Fund"). The purpose of the Fund is to pay workers' compensation benefits to injured workers employed by employers who don't have workers' compensation insurance. The introduced version of HB 1119 subjected members, directors, and officers of an employer to personal liability for payment of benefits owed to an injured worker if the employer does not have workers' compensation insurance. This provision could have created additional risk for P&C insurers writing D&O coverage. As such, H&E worked with the business community to convince the sponsor of the bill to remove the provision. The final version of the bill no longer contains the provision. The Governor signed HB 1119 into law on June 5, 2017.

In recent years, the Legislature unsuccessfully sought to expand workers' compensation coverage for various types of workers, including first responders, who suffer from post-traumatic stress disorder ("PTSD"). This year, Pinnacol Assurance and the Colorado Fraternal Order of Police reached a compromise and introduced HB 1229. The bill expands coverage for mental impairment benefits to any worker diagnosed with PTSD that arises from an event that occurs within the worker's usual experience if the worker experiences or observes certain types of events. Because the types of events outlined in HB 1229 are narrowly defined, the proponents of the bill argue the expansion of coverage will generally be limited to first responders. The Governor signed HB 1229 into law on June 5, 2017.

SB 214 authorizes certain public entities to participate in a firefighter cancer benefits program by issuing contributions into a self-insured trust to pay for costs incurred by firefighters who are diagnosed with cancer. This program is similar to a program enacted in 2014 that created a self-insured trust to pay for costs incurred by firefighters suffering from heart disease. The Governor signed SB 214 into law on May 3, 2017.

AUTO BILLS

Legislation impacting the auto insurance industry centered on autonomous vehicles, the definition of salvage vehicles, and access to owner and lienholder information pertaining to a motor vehicle.

SB 213, sought by General Motors, authorizes the use of an automated driving system if the system complies with all state and federal laws that govern the driving of a motor vehicle. If the system does not

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comply with all applicable state and federal laws, a person may not test the system unless approved by the Colorado State Patrol and the Colorado Department of Transportation. During the House's consideration of SB 213, the trial lawyers sought an amendment to specify how liability for an auto accident involving an automated driving system would be determined. H&E actively negotiated with the trial lawyers to ensure that liability can only be determined in accordance with applicable state law, federal law, or common law. The Governor signed SB 213 into law on June 1, 2017.

In recent years, the independent auto dealers have sought to change the definition of a "salvage vehicle." This year, the independent auto dealers and auto insurance industry reached a compromise and introduced HB 1205. HB 1205 expands the definition of a "salvage vehicle" to include a vehicle that is determined to be a total loss by an insurer. The bill also excludes a vehicle damaged by theft from the definition of a "salvage vehicle." The Governor signed HB 1205 into law on April 28, 2017.

SB 251 authorizes insurers, under certain circumstances, to use the Department of Revenue's electronic system to access owner and lienholder information pertaining to a motor vehicle. The Governor signed SB 251 into law on June 2, 2017.

MISCELLANEOUS BILLS

The Legislature also introduced several other bills on a wide array of topics impacting the P&C insurance industry. These bills covered topics relating to the Colorado Fair Debt Collection Practices Act, appraisers in property insurance claims, market conduct examinations and financial examinations, the financial exploitation of elders, and disability insurance.

Colorado Fair Debt Collection Practices Act

SB 216 implements certain recommendations of the sunset review and report on the continuation of the Colorado Fair Debt Collection Practices Act (the "FDCPA"). As introduced, SB 216 would have changed the definition of "debt" under the FDCPA by no longer requiring a consumer's payment obligation to arise out of a transaction. In Colorado, a subrogation claim arising out of a tortious activity is not a debt under the FDCPA because the tortious activity does not arise out of a transaction. *See Ybarra v. Greenberg & Sada, P.C.*, No. 15CA0485, 2016 Colo. App. LEXIS 1172 (Colo. App. Aug. 11, 2016). The Attorney General's Office, however, sought to change the definition of "debt" under the FDCPA to overturn the existing case law in Colorado. H&E worked with the trial lawyers and other stakeholders to persuade the Senate sponsor of SB 216 that the provisions of the FDCPA should not apply to subrogation claims arising out of a tortious activity. These efforts proved to be fruitful as the Senate sponsor and the Attorney General's Office ultimately agreed to amend SB 216 and restore the existing definition of "debt" under the FDCPA. The Governor signed SB 216 into law on June 1, 2017.

Appraisers in Property Insurance Claims

HB 1319, sought by the public adjusters, would have very narrowly defined the conditions an appraiser involved in a property insurance claim must satisfy to be considered impartial. The public adjusters, through HB 1319, intended to circumvent evolving case law in Colorado that more broadly defines the conditions an appraiser involved in a property insurance claim must satisfy to be considered impartial. For example, courts in Colorado have ruled an appraiser to be partial and biased when the appraiser has a current or previous relationship with any of the parties, including their counsel; has a current or previous relationship with any of the participants in the appraisal proceeding, including a public adjuster; or is

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compensated on a contingent-cap fee basis. *See Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 198 F. Supp. 3d 1239 (D. Colo. 2016). H&E worked closely with the P&C insurance industry to educate the sponsor of the bill of the true intent behind HB 1319. These efforts proved to be worthwhile as the sponsor of the bill ultimately asked the House Judiciary Committee to kill HB 1319. On May 2, 2017, at the sponsor's request, the House Judiciary Committee killed HB 1319.

Market Conduct/Financial Examinations

Dating back to 2015, H&E, along with the P&C insurance industry, actively participated in a series of meetings with the Division of Insurance to discuss legislation that would harmonize existing statutes pertaining to market conduct examinations and financial examinations that are intertwined and, in some cases, overlap and conflict. During these meetings, H&E succeeded in preserving existing provisions allowing an insurance carrier to meet with the Division of Insurance prior to the issuance of a draft market conduct examination report to resolve any outstanding issues. H&E also succeeded in preserving existing provisions affording an insurance carrier the right to appeal to district court any findings issued, and any penalties or fines imposed, by the Division of Insurance as part of either a market conduct examination or a financial examination.

HB 1231, a priority for the Division of Insurance, is the result of the aforementioned meetings. In general, HB 1231 amends existing statutes by separating market conduct examination provisions from financial examination provisions. However, HB 1231 and SB 249 amend existing statutes by creating new provisions regarding the imposition of civil penalties. For instance, HB 1231 requires the Commissioner of Insurance to include in the Final Agency Order any civil penalties she seeks to impose as part of a market conduct examination. Moreover, HB 1231 requires the Commissioner of Insurance to consider certain factors when determining the amount of the civil penalty. Finally, SB 249, which continues the functions of the Division of Insurance for 13 years, requires any fine or penalty imposed as part of a market conduct examination to relate to the "general business practices and compliance activities" of the insurance carrier and not to "clearly infrequent or unintentional random errors that do not cause significant consumer harm." The Governor signed HB 1231 and SB 249 into law on June 1, 2017.

Financial Exploitation of Elders

In recent years, the Legislature introduced bills that would have required insurance producers to report to law enforcement agencies the financial exploitation or physical abuse of elderly individuals. These bills subjected insurance producers to criminal prosecution for the failure to report the financial exploitation or physical abuse of elderly individuals. Ultimately, these bills either died or were amended to exclude insurance producers from the mandatory reporting requirements.

HB 1253, a priority for the Division of Securities, requires certain individuals or entities licensed by the Division of Securities to report to the Commissioner of Securities when there is a reasonable belief of the financial exploitation of certain individuals, including individuals 70 years of age or older. H&E, along with the P&C insurance industry, actively participated in a series of meetings with the Division of Securities to ensure the bill does not apply to insurance producers. In addition, H&E actively negotiated with the Division of Securities to ensure the bill requires someone other than a sales representative, such as the broker-dealer, to report the financial exploitation of the protected individuals. The Governor signed HB 1253 into law on June 2, 2017.

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Disability Insurance

SB 274 allows non-admitted insurers to offer disability insurance as a type of surplus lines insurance. The bill defines "disability insurance" as insurance that is in excess of policy limits available under a policy issued by an admitted insurer, provides income replacement to an insured who becomes disabled, and does not provide coverage for the diagnosis or treatment of an insured's disability. The Governor signed SB 274 into law on June 5, 2017.

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