

SECOND REGULAR SESSION

HOUSE BILL NO. 2323

95TH GENERAL ASSEMBLY

INTRODUCED BY REPRESENTATIVES MOLENDORP (Sponsor) AND CALLOWAY (Co-sponsor).

5279L.011

D. ADAM CRUMBLISS, Chief Clerk

AN ACT

To repeal sections 374.046 and 374.049, RSMo, and to enact in lieu thereof three new sections relating to public adjusters, with penalty provisions.

Be it enacted by the General Assembly of the state of Missouri, as follows:

Section A. Sections 374.046 and 374.049, RSMo, are repealed and three new sections enacted in lieu thereof, to be known as sections 325.060, 374.046, and 374.049, to read as follows:

325.060. 1. A public adjuster shall not directly or indirectly through any other person or entity:

(1) Solicit an insured or claimant by any means except on Monday through Saturday of each week and only between the hours of 8:00 a.m. and 8:00 p.m. of such days; or

(2) Initiate contact or engage in face-to-face or telephone solicitation or enter into a contract with any insured or claimant under an insurance policy until at least forty-eight hours after the occurrence of an event that may be the subject of a claim under the insurance policy unless contact is initiated by the insured or claimant.

2. It is an unfair and deceptive insurance trade practice under the unfair trade practices act in sections 375.930 to 375.948 for a public adjuster or any other person to circulate or disseminate any advertisement, announcement, or statement containing any assertion, representation, or statement with respect to the business of insurance which is false, deceptive, or misleading.

3. A public adjuster, public adjuster apprentice, or any person or entity acting on behalf of such adjuster or apprentice shall not give or offer to give:

EXPLANATION — Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted from the law. Matter in **bold-face** type in the above bill is proposed language.

- 17 (1) A monetary loan or advance to a client or prospective client; or
- 18 (2) Directly or indirectly, any article of merchandise having a value in excess of
- 19 twenty-five dollars to any individual for the purpose of advertising or as an inducement
- 20 to entering into a contract with a public adjuster.

21 **4. A public adjuster's written contract shall contain the following:**

22 (1) The name, address, and license number of the public adjuster negotiating the

23 contract and, if applicable, the name, address, and license number of the public adjuster's

24 employer;

25 (2) The public adjuster's telephone and facsimile number, including the area code;

26 (3) The mailing and physical addresses to which notice of cancellation and all

27 communications to the public adjuster may be delivered;

28 (4) If any part of the contract or solicitation is made via the internet, the email and

29 website addresses to which notice of contract cancellation and all communications to the

30 public adjuster may be delivered; and

31 (5) The following separate statements in twelve-point boldface type on the signature

32 page of the contract:

33 (a) **"NOTICE: THE INSURED MAY CANCEL THIS CONTRACT BY**

34 **WRITTEN NOTICE TO THE PUBLIC ADJUSTER WITHIN 72 HOURS OF**

35 **SIGNATURE FOR ANY REASON.";** and

36 (b) **"YOU ARE ENTERING INTO A SERVICE CONTRACT. YOU ARE BEING**

37 **CHARGED A FEE FOR THIS SERVICE. YOU DO NOT HAVE TO ENTER INTO**

38 **THIS CONTRACT TO MAKE A CLAIM FOR LOSS OR DAMAGE ON A POLICY OF**

39 **INSURANCE.".**

40 **5. The written contract shall detail the public adjuster's commission, including:**

41 (1) The method of calculating compensation for the public adjuster, either hourly,

42 flat fee, or percentage of settlement; and

43 (2) That a public adjuster shall not charge, agree to, or accept any compensation,

44 payment, commission, fee, or other thing of value in excess of:

45 (a) Ten percent of the amount of insurance claim payments by the insurer for

46 claims based on events that are the subject of a declaration of a state of emergency by the

47 governor. Such provision applies to claims made during the period of one year after such

48 declaration of emergency;

49 (b) Twenty percent of the amount of all other insurance claim payments;

50 (3) That if the insurer pays or commits in writing to pay to the insured the policy

51 limits of the insurance policy within ninety-six hours of the loss being reported to the

52 insurer, the public adjuster is not entitled to compensation based on a percentage of the

53 **insurance settlement, but is entitled to reasonable compensation as specified in the written**
54 **contract for the public adjuster's actual time and expenses provided to the insured before**
55 **the claim was paid or the written commitment to pay was received.**

56 **6. Any violation of this section is a level two violation under section 374.049.**

374.046. 1. If the director determines based upon substantial and competent evidence
2 that a person has engaged, is engaging in or has taken a substantial step toward engaging in an
3 act, practice, omission, or course of business constituting a violation of the laws of this state
4 relating to insurance in this chapter, [chapter] **chapters 325 and 354**, RSMo, and chapters 375
5 to 385, RSMo, or a rule adopted or order issued pursuant thereto or that a person has materially
6 aided or is materially aiding an act, practice, omission, or course of business constituting a
7 violation of the laws of this state relating to insurance in this chapter, [chapter] **chapters 325**
8 **and 354**, RSMo, and chapters 375 to 385, RSMo, or a rule adopted or order issued pursuant
9 thereto, the director may order the following relief:

10 (1) An order directing the person to cease and desist from engaging in the act, practice,
11 omission, or course of business;

12 (2) A curative order or order directing the person to take other action necessary or
13 appropriate to comply with the insurance laws of this state;

14 (3) Order a civil penalty or forfeiture as provided in section 374.049; and

15 (4) Award reasonable costs of the investigation.

16 2. In determining any relief sought, the director shall consider, among other factors,
17 whether:

18 (1) The violations are likely to continue or reoccur;

19 (2) Actual financial loss was sustained by consumers and restitution has been made;

20 (3) The act, practice, omission, or course of business was detected as part of a self-audit
21 or internal compliance program and immediately reported to the director; and

22 (4) The act, practice, omission, or course of business had previously been detected, but
23 inadequate policies and procedures were implemented to prevent reoccurrence.

24 3. Unless the director determines that a summary order is appropriate under subsection
25 4 of this section, the director shall provide notice of the intent to initiate administrative
26 enforcement by serving a statement of the reasons for the action upon any person subject to the
27 proceedings. A statement of reasons, together with an order to show cause why a cease and
28 desist order and other relief should not be issued, shall be served either personally or by certified
29 mail on any person named therein. The director shall schedule a time and place at least ten days
30 thereafter for hearing, and after notice of and opportunity for hearing to each person subject to
31 the order, the director may issue a final order under subsection 6 of this section.

32 4. If the director determines that sections 375.014, 375.144, or 375.310, RSMo, are being
33 violated and consumers are being aggrieved by the violations, the order issued under subdivision
34 (1) of subsection 1 of this section may be summary and be effective on the date of issuance.
35 Upon issuance of the order, the director shall promptly serve each person subject to the order
36 with a copy of the order and a notice that the order has been entered.

37 5. A summary order issued under subsection 4 of this section must include a statement
38 of the reasons for the order, notice within five days after receipt of a request in a record from the
39 person that the matter will be scheduled for a hearing, and a statement whether the department
40 is seeking a civil penalty or costs of the investigation. If a person subject to the order does not
41 request a hearing and none is ordered by the director within thirty days after the date of service
42 of the order, the order becomes final as to that person by operation of law. If a hearing is
43 requested or ordered, the director, after notice of and opportunity for hearing to each person
44 subject to the order, may modify or vacate the order or extend it until final determination.

45 6. If a hearing is requested or ordered pursuant to subsection 3 or subsection 5 of this
46 section, a hearing before the director or a hearing officer designated by the director must be
47 provided. A final order may not be issued unless the director makes findings of fact and
48 conclusions of law in a record in accordance with the provisions of chapter 536, RSMo, and
49 procedural rules promulgated by the director. The final order may make final, vacate, or modify
50 the order issued under subsection 5 of this section.

51 7. In a final order under subsection 6 of this section, the director may impose a civil
52 penalty or forfeiture as provided in section 374.049. No civil penalty or forfeiture may be
53 imposed against a person unless the person has engaged in the act, practice, omission, or course
54 of business constituting the violation.

55 8. In a final order under subsection 6 of this section, the director may charge the actual
56 cost of an investigation or proceeding for a violation of the insurance laws of this state or a rule
57 adopted or order issued pursuant thereto. These funds shall be paid to the director to the credit
58 of the insurance dedicated fund.

59 9. The director is authorized to issue subpoenas, compel attendance of witnesses,
60 administer oaths, hear testimony of witnesses, receive evidence, and require the production of
61 books, papers, records, correspondence, and all other written instruments or documents relevant
62 to the proceeding and authorized in contested cases under the provisions of chapter 536, RSMo,
63 and procedural rules promulgated by the director.

64 10. Statements of charges, notices, orders, and other processes of the director may be
65 served by anyone duly authorized by the director either in the manner provided by law for service
66 of process in civil actions, or by registering or certifying and mailing a copy thereof to the person
67 affected by such statement, notice, order, or other process at his or its residence or principal

68 office or place of business. The verified return by the person so serving such statement, notice,
69 order, or other process setting forth the manner of such service shall be proof of the same, and
70 the return postcard receipt for such statement, notice, order, or other process, registered and
71 mailed as aforesaid, shall be proof of the service of the same.

72 11. If a petition for judicial review of a final order is not filed in accordance with section
73 374.055, the director may file a certified copy of the final order with the clerk of a court of
74 competent jurisdiction. The order so filed has the same effect as a judgment of the court and
75 may be recorded, enforced, or satisfied in the same manner as a judgment of the court.

76 12. If a person violates or does not comply with an order under this section, the director
77 may under section 374.048 petition a court of competent jurisdiction to enforce the order. The
78 court may not require the director to post a bond in an action or proceeding under this section.
79 If the court finds, after service and opportunity for hearing, that the person was not in compliance
80 with the order, the court may, in addition to relief authorized in section 374.048, adjudge the
81 person in civil contempt of the order. A violation of or failure to comply with an order under this
82 section is a level three violation under section 374.049. The court may impose a further civil
83 penalty against the person for contempt in an amount not less than five thousand dollars but not
84 greater than one hundred thousand dollars for each violation and may grant any other relief the
85 court determines is just and proper in the circumstances.

86 13. Until the expiration of the time allowed under section 374.055 for filing a petition
87 for judicial review, if no such petition has been duly filed within such time or if a petition for
88 review has been filed within such time, then until the transcript of the record in the proceeding
89 has been filed in the circuit court of Cole County, the director may at any time, upon such notice
90 and in such manner as he shall deem proper, modify or set aside in whole or in part any order
91 issued by him under this section.

92 14. The enforcement authority of the director under this section is cumulative to any
93 other statutory authority of the director.

94 15. The director is authorized to issue administrative consent orders in the public interest
95 as complete or partial settlement of any investigation, examination, or other proceeding, which
96 curative orders may contain any provision necessary or appropriate to assure compliance with
97 the insurance laws of this state, require payment of restitution to be distributed directly or by the
98 director to any aggrieved consumers, civil penalties, or voluntary forfeiture, reimbursement for
99 costs of investigation or examination, or any other relief deemed by the director to be necessary
100 and appropriate. Any remaining matters not addressed in settlement may be submitted to the
101 director through a contested proceeding under this section.

102 16. (1) Any person willfully violating any provision of any cease and desist order of the
103 director after it becomes final, while the same is in force, upon conviction thereof shall be

104 punished by a fine of not more than one hundred thousand dollars, by imprisonment of up to ten
105 years, or by both such fine and imprisonment.

106 (2) In addition to any other penalty provided, violation of any cease and desist order shall
107 subject the violator to suspension or revocation of any certificate of authority or license as may
108 be applicable under the laws of this state relating to the business of insurance.

109 17. The term "person" as used in this chapter shall include any individual, partnership,
110 corporation, association or trust, or any other legal entity.

111 18. The term "order" as used in this chapter shall include a formal administrative
112 direction or command of the director issued under this section or in any contested case subject
113 to the provisions of section 536.063, RSMo, or any lawful administrative proceeding subject to
114 judicial review, but shall not include department bulletins, no-action letters, advisory opinions,
115 or any other statement of general applicability that should be adopted by rule.

374.049. 1. Violations of the laws of this state relating to insurance in this chapter,
2 [chapter] **chapters 325 and 354**, and chapters 375 to 385, RSMo, or a rule adopted or order
3 issued by the director, are classified for the purpose of civil penalties and forfeitures into the
4 following five classifications:

5 (1) Level one violations;

6 (2) Level two violations;

7 (3) Level three violations;

8 (4) Level four violations; and

9 (5) Level five violations.

10 2. An order to impose a civil penalty or forfeiture, when imposed by the director in an
11 administrative proceeding under section 374.046 on a person for any violation of the laws of this
12 state relating to insurance in this chapter, chapter 354 and chapters 375 to 385, RSMo, or a rule
13 adopted or order issued by the director, shall be an order to pay an amount not exceeding the
14 following:

15 (1) No civil penalty or forfeiture for a level one violation;

16 (2) One thousand dollars per each level two violation, up to an aggregate civil penalty
17 or forfeiture of fifty thousand dollars per annum for multiple violations;

18 (3) Five thousand dollars per each level three violation, up to an aggregate civil penalty
19 or forfeiture of one hundred thousand dollars per annum for multiple violations;

20 (4) Ten thousand dollars per each level four violation, up to an aggregate civil penalty
21 or forfeiture of two hundred fifty thousand dollars per annum for multiple violations;

22 (5) Fifty thousand dollars per each level five violation, up to an aggregate civil penalty
23 or forfeiture of two hundred fifty thousand dollars per annum for multiple violations.

24 3. An order to impose a civil penalty or forfeiture, when imposed by the court in an
25 enforcement proceeding under section 374.048 on a person for any violation of the laws of this
26 state relating to insurance in this chapter, [chapter] **chapters 325 and 354**, and chapters 375 to
27 385, RSMo, or a rule adopted or order issued by the director, shall be an order to pay an amount
28 not exceeding the following:

29 (1) No civil penalty or forfeiture for a level one violation;

30 (2) One thousand dollars per each level two violation, up to an aggregate civil penalty
31 or forfeiture of fifty thousand dollars per annum for multiple violations;

32 (3) Five thousand dollars per each level three violation, up to an aggregate civil penalty
33 or forfeiture of two hundred thousand dollars per annum for multiple violations;

34 (4) Twenty thousand dollars per each level four violation, up to an aggregate civil
35 penalty or forfeiture of one million dollars per annum for multiple violations;

36 (5) One million dollars per each level five violation, with no limit to civil penalties or
37 forfeitures for multiple violations.

38 4. No civil penalty or forfeiture may be imposed against a person, unless the person has
39 engaged in the act, practice, omission or course of business constituting the violation.

40 5. Any violation of the laws of this state relating to insurance in this chapter, [chapter]
41 **chapters 325 and 354**, and chapters 375 to 385, RSMo, which is not classified or does not
42 authorize a specific range for a civil penalty or forfeiture for violations, shall be classified as a
43 level one violation. In bringing an action to enforce a rule adopted by the director, unless the
44 conduct that violates the rule also violates the enabling statute, the violation shall be classified
45 as a level one violation and shall not be subject to any provision in this section regarding the
46 enhancement of a civil penalty or forfeiture.

47 6. The civil penalties or forfeitures set forth in this section establish a maximum range.
48 The court, or the director in administrative enforcement, shall consider all of the circumstances,
49 including the nature of violations to determine whether, and to any extent, a civil penalty or
50 forfeiture is justified.

51 7. In any enforcement proceeding, the court, or director in administrative enforcement,
52 may enhance the civil penalty or forfeiture with a one-classification step increase under this
53 section, if the violation was knowing. The court, or director in administrative enforcement, may
54 enhance the civil penalty or forfeiture with a two-level increase if the violation was knowingly
55 committed in conscious disregard of the law.

56 8. In any enforcement proceeding, the court, or director in administrative enforcement,
57 may, after consideration of the factors specified in subsection 2 of section 374.046, enhance the
58 civil penalty or forfeiture with a one-classification step increase under this section, if the
59 violations resulted in actual financial loss to consumers.

60 9. In any enforcement proceeding, the court, or director in administrative enforcement,
61 shall reduce the civil penalty or forfeiture on that person with up to a two-classification step
62 reduction under this section, if prior to receiving notice of the violation from the department, the
63 person detects the violation through a self-audit or internal compliance program reasonably
64 designed to detect and prevent insurance law violations and immediately reports the violation
65 to the director.

66 10. If more than one error is caused by a single act or omission in the use of data
67 processing equipment and such errors are not known by the violator at the time the error occurs,
68 then any such errors shall be regarded as a single violation under this section.

69 11. Any civil penalty or forfeiture recovered by the director shall be paid to the treasurer
70 and then distributed to the public schools as required by Article IX, section 7 of the Missouri
71 Constitution.

72 12. The penalties and forfeitures authorized by this section govern all actions and
73 proceedings that are instituted on the basis of conduct occurring after August 28, 2006.

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