

# What does California Senate Bill 488 mean for post-disaster advocacy for 2017 and beyond?

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*A white paper that shows influence and importance of SB 488*

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# What is Senate Bill 488?

*A brief understanding of Senate Bill 488 and who it affects.*

On Jan. 1, 2017, amendments to the California Public Insurance Adjusters Act were enacted into law after almost two years of deliberations. Politicians, insurance companies, and public adjusters collaborated to exact changes to a previous version of the California Public Insurance Adjuster Act which had been in place since 1986. The new legislation creates additional protections for consumers, including but not limited to new fee limitations, more stringent restrictions following wildfires and other disasters, and most notably, who can rightfully and legally advocate, or act in any meaningful capacity, for the policyholder following an insured first party event (administrative and support roles are exempt). We will be specifically addressing the last point in this paper.

The current and previous California Public Insurance Adjuster Act define a public adjuster as:

“...a person who, for compensation, acts on behalf of or aids in any manner, an insured in negotiating for or effecting the settlement of a claim or claims for loss or damage under any policy of insurance covering real or personal property or any person who advertises, solicits business, or holds himself or herself out to the public as an adjuster of those claims and any person who, for compensation, investigates, settles, adjusts, advises, or assists an insured with reference to claims for those losses on behalf of any public insurance adjuster...”

The previous Public Insurance Adjusters Act exempted insurance brokers and attorneys, among others, from needing a license to act as a public adjuster. It has always been our opinion that the law did apply to all other types of entities not specified in the exemptions, including contractors, forensic accountants, and property managers. However, for years, many of these entities felt for various reasons, they were exempt from the Public Insurance Adjusters Act.

“Admitted insurers, agents, and insurance brokers licensed by the state performing duties in connection with insurance transactions by them” has been stricken from the exemptions in the new law. This is a significant change to the Public Insurance Adjuster Act. By denying an exemption to insurance brokers, it is clear that brokers and agents can no longer advocate for insureds in the course of their business relationship – it is a conflict of interest. Additionally, although not explicit in prohibiting others such as contractors and property managers, the new law again supports the argument that other entities not listed are also prohibited from practicing without a license.

# Historical Context and the Ramifications of the New Law

In recent years, the unauthorized practice of public adjusting (UPPA) has come under closer scrutiny in many states. There has been a move by state insurance departments to protect consumers by enacting more regulations against UPPA.

As Brian Goodman, General Counsel to the National Association of Public Insurance Adjusters ([www.napia.com](http://www.napia.com)) has pointed out, "NAPIA has worked hard on a national level, particularly with the National Association of Insurance Commissioners ([www.naic.org](http://www.naic.org)) to educate regulators, Attorneys General, and others about the pervasive and dangerous practice of the Unauthorized Practice of Public Adjusting. In point of fact, the NAIC has just appointed a Public Adjuster Working Group to deal with this very problem. Case

law has arisen also declaring the work of unlicensed individuals performing the services of a public insurance adjuster to be illegal. See Reyes's, 5th Circuit United States Court of Appeals. These efforts, along with various Bills such as California Senate Bill 488 , will help as a start to eradicate this pervasive and illegal practice which victimizes vulnerable consumers. It is vitally important that only trained and licensed public adjusters, fully regulated by and under the supervision of the State Insurance Departments, represent policyholders navigating the difficult and emotional aftermath of a property loss. This is a long term issue and a long term project. Senate Bill 488 joins the growing list of statutes and case law which should one day fully eliminate this practice."

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**In California, insurance brokers – previously exempt from the Public Adjusters Insurance Act – and others who might have assumed that they were - may now face legal repercussions for acting as public adjusters without a license. The language and intent of the new state law brings changes in post-disaster advocacy.**  
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## Insurance brokers

Clearly, charging for post-loss services by brokers is illegal. But what about brokers who don't specifically charge for such services and postulate that the services are just part of the overall package they provide their insureds, pointing out that that the act specifies that public adjusters act "for compensation?"

It's our opinion that insurance brokers can no longer represent themselves as not charging for claims assistance. Although an insurance broker is not directly sending a bill to a client for claims assistance, they are in fact charging for services provided by someone in the organization with claims

handling expertise. The salaries of those employees are built into the price that is charged to their client.

Ivo Labar, Esq., Kerr & Wagsatffe LLC supports this opinion, stating, “There is no language in the amended statute that would support the argument that simply because a broker is not directly charging a fee for claims assistance, he or she is not working for ‘compensation.’ The word ‘compensation’ has a broad meaning. Under similar laws, compensation has been found to include any benefit or thing promised to someone. So, if a broker promised to provide claims assistance as part of its services, the broker is plainly receiving compensation for those services as part of any payments it receives in the transaction.”

Providing representation for the client may be deemed illegal under the new Public Adjuster Insurance Act. Imagine a situation in which the insurance broker takes on the responsibility of representing the client in a claims adjustment negotiation with the insurance company. The broker has helped the client review their policy, make estimates, document the claim and actively speaks for the client at meetings with the insurance company. Throughout the process, the client has placed their trust in the insurance broker to advocate for their best interests. Then, about three-quarters of the way into the process, the insurance company decides to stop recognizing the broker as having the right to legally prepare, present, and negotiate the claim. They refuse to meet again with this representative.

In this case, the broker will end up leaving the client in a difficult situation. The insurance company has the right under the new law to refuse recognizing the broker at any time in the process. The intention to help the client by assisting with claims may in fact hurt the client in the long run, as the person they have put their confidence in for negotiations can no longer represent them.

### **What about the conflict of interest that exists?**

Imagine a broker representing an insured following a fire. Part way through the adjustment, it becomes clear the coverages are written improperly, for example the policy might have been written blanket instead of specific; or there should or should not have been an ordinary payroll exclusion; or perhaps there is insufficient code coverage; or perhaps the COC policy on a renovation project excludes the existing building – how will the broker respond when facing potential litigation against itself? Will it recommend to the insured he/she engage counsel? Will he/she keep the issue “quiet?”

And lastly, why wouldn’t brokers apply for and secure public adjusters’ licenses? We would argue that public adjuster’s fees, typically excluded from professional fees endorsements, would then place brokers on a level playing field and that they then too would be unable to receive compensation under policies – a strong argument why brokers have historically shied away from securing such professional status – it affects their bottom line!

## Accounting Firms

For years, accounting firms have also argued that they do not need a public adjuster's license to provide a range of claims assistance services. Forming the basis of the argument is the idea that they are not technically negotiating a claim for a client, but helping with the preparation of the claim and then advising clients throughout the process, not representing them. Under both the new and old Public Insurance Adjusters Act, these practices are not acceptable. The language of the new law only underscores this point. No different than brokers, why wouldn't accountants apply for and secure public adjusters' licenses? Again, we would argue that public adjuster's fees, typically excluded from professional fees endorsements, would then place accountants on a level playing field and that they then, too, would be unable to receive compensation under policies – a strong argument why accountants, as well, have shied away from securing such professional status – it affects their bottom line, too!

## Property Managers

Property managers often unknowingly violate the Public Insurance Adjusters Act. In agreements with property owners, managers commonly receive a specified amount of payment for adjusting claims in the event of a property loss or will charge property owners slightly more to provide this service. This is in clear violation of both the previous and new Public Insurance Adjusters Act, which states that those compensated for public adjusting services, must obtain a license.

## Contractors

Contractors have long offered to take care of customer needs from beginning to end in the rebuilding process. In addition to rebuilding damaged property, they have also been known to provide claims adjusting and inventory services as part of a whole package. Contractors are the most common violators of the Public Insurance Adjusters Act. Aside from acting as public adjusters without the proper licensing, there is a significant conflict of interest that arises when contractors take on the role of public adjusting in addition to helping their clients rebuild. In these cases, one entity (the contractor) is negotiating the settlement and spending those dollars on the rebuild. The Public Insurance Adjusters Act specifically prohibits public adjusters from taking on any interest in the rebuilding process. Whereas public adjusters work exclusively in the interest of the policyholder, an entity that first negotiates a settlement - and then spends it - has a definite interest in its own profits.

With the passing of the new Public Insurance Adjusters Act, each of the entities above must exercise more discretion. These types of firms cannot carry on business as usual when handling claims, since the new law underscores their exclusion from preparing, presenting, and negotiating claims. Given these developments, the best course of action for these entities is to enlist the help of public adjusters.

# Building Permit Consultants, Inc. v Mazur

The 2004 decision handed down by the Court of Appeal, Second District, Division 3, California is particularly telling and on point. Building Permit Consultants (BPC), in its suit to be paid fees under their agreement to an insured (Mazur) argued that:

“...BPC insists that the statute, when properly construed, should only be applied to one ‘who directly represents or acts on behalf of the insured in the negotiation or settlement of a claim’ (italics added) and nothing alleged in the FAC reflects that BPC did any such acts.

The defendants, on the other hand, argue that the plain language of section 15007, which defines a ‘public insurance adjuster,’ is very broad and clearly encompasses the very services that BPC had promised in the agreement to provide.

We agree with the trial court and the defendants on this point.”

In addition, in its decision the court wrote:

“2. The Insurance Code Contains Very Broad Provisions Regarding The Scope of the Public Adjuster Law

Section 15007, in pertinent part, provides: ‘A public insurance adjuster within the meaning of this chapter is a person who, for compensation, acts on behalf of or aids in any manner, an insured in negotiating for or effecting the settlement of a claim or claims for loss or damage under any policy of insurance covering real or personal property or any person who, for compensation, investigates, settles, adjusts, advises, or assists an insured with reference to claims for those losses on behalf of any public insurance adjuster.’

BPC’s principal argument is that this language requires that a public insurance adjuster be one who directly represents or acts on behalf of the insured in the negotiation or settlement of a claim. We disagree.



Section 15007 is much broader than this. BPC's narrow reading of the statute is not justified by the language used. Section 15007 does not limit the definition of a public insurance adjuster to persons who only directly represent or act on behalf of the insured in the negotiation or settlement of a claim, but rather applies to anyone 'who, for compensation, acts on behalf of or aids in any manner, an insured in negotiating for or effecting the settlement of a claim or claims for loss or damage under any policy of insurance. The statute does not use the word 'directly,' does not limit its scope to negotiations directly with insurance company personnel and, in fact, is drafted in broad terms so as to apply to anyone who 'aids in any manner' an insured in negotiating for or 'effecting the settlement of a claim.'"

The terms of the statute are broad, and concern all persons (except those listed in Insurance Code section 15008) whose conduct or involvement impacts the resolution of the insurance claim. The breadth of such language sharply conflicts with the meaning that BPC argues that we should adopt which would limit the scope of the statute to one who actually talks directly to insurance company representatives and discusses the terms of a settlement. Further, the statute also requires licensing of those who receive compensation for services (investigate, settle, adjust, advise) or provide assistance to the insured with reference to claims."

And lastly the court wrote:

"It is, therefore, insignificant that BPC's business strategy does not precisely match the approach taken by other public adjusters which were in operation at the time the law was enacted. In our view, the agreement between BPC and Mazur is the very kind of transaction that the Legislature intended to control and regulate. It is not important for present purposes that BPC's services are characterized as litigation support and assistance. As already stated, BPC's agreement would give it effective control over the client's attorney.

Furthermore, the legislative history also indicates that one of the law's purposes was to prevent circumvention of existing professional standards. [Emphasis added] In a letter to the Governor, advocates of the bill stated: 'It is very likely that some public adjusters operate without a license contending that current definitions do not apply to their practices.' It would be improper and contrary to the clear legislative intent of the Public Adjusters Act to allow firms to bypass the licensure requirement and associated standards by packaging public adjusting services while still presenting the same dangers of dishonesty, sharp dealing, and incompetence to the consumer.

BPC argues that a ruling that anyone who does not directly handle an insured's claim is subject to the license requirement would lead to absurd results. BPC contends that the logic of such a ruling would compel application of the licensure requirement to anyone remotely involved in the insurance claims process, including auto body shops and building contractors, inasmuch as they furnish bills, estimates, and other documents used in adjusting claims. We disagree. A public adjuster's function is essentially to determine what services an insured needs and is entitled to after an insured-against event and then to help in achieving a full and fair settlement. Contractors and auto body shops merely provide a service without any reference to the event occasioning the need for that service. So long as they do not seek to involve themselves in the settlement negotiation process with their customers' insurers or represent that they will do so, businesses like these do not present the same consumer protection problems as do public insurance adjusters. Furthermore, in enacting the law, the Legislature foresaw the need to avoid confusion by exempting certain professionals commonly involved in the claims adjusting process from the licensure requirement. Among the exempt are photographers, estimators, appraisers, engineers and arbitrators employed by public insurance adjusters. (§ 15008(g).) However, these persons are only exempt when they are retained by a public adjuster who, in turn, must be licensed so that honesty and fair dealing are reasonably ensured."

# Building Relationships with Public Adjusters

*How can a Public Adjuster help your clients?*

Public adjusters act exclusively on behalf of the policyholder to settle insurance claims. They have special training and expertise to perform comprehensive reviews of insurance policies and devise effective strategies to help clients reach maximum settlements quickly. Public adjusters perform a thorough review of the insurance policy and loss in order to detail and substantiate every aspect of the claim, including the valuation of building damages, contents, business interruption, and extra expense claims. They serve as the liaison between the policyholder and the insurance company.

To best advocate for your client, we would recommend that you pre-establish a relationship with a professional public adjusting company before your claimants need their services. It's advisable to establish that relationship now, so that if a disaster strikes your client's property, you can act quickly and prudently to assist them with their insurance claim.

It is also our recommendation to negotiate a standby agreement with a public adjusting firm. For the standby agreement, structures and fees are agreed upon in advance between parties so that they can work together immediately after a localized event. This type of arrangement with a public adjusting firm assures you priority in the event of a large scale disaster.

**Here are some key considerations when you are evaluating professional public adjusting companies:**

1. Make sure to meet with them.
2. Who do they have on staff?
3. How long have they been in business? What is their history?
4. What is their capacity to handle claims during a disaster? Their capacity to expand their resources to address increased volume during a disaster?

5. Do they historically limit the amount of claims they handle to assure proper customer satisfaction? This especially important during catastrophes.
6. Do they have the depth and flexibility to use in-house expertise, or outside vendors, for estimating, inventory, etc., depending on the best strategies to advocate for their client?
7. Are they a “boutique” firm? Can they only handle a few claims a year? Are they a larger firm?
8. Are they members of the NAPIA? CAPIA?
9. What is their reputation? Do they have many references that you can contact? Do they have the relevant references?
10. What is their typical client base? What type and size claims do they customarily handle?

# Conclusion

Senate Bill 488 - effective as law on January 1, 2017 – makes it clear that representing insureds following disasters shall only be undertaken by those legally sanctioned to do so. The Appellate Court in 2004 was clear in its delineation of what constituted public adjusting and where the line is ostensibly drawn. The Department of Insurance has a duty and a mandate to make sure that the insuring public is protected against those handling claims without licenses or authority. Brokers, agents, contractors, property managers and accountants need to recognize that effective adjustments of claims are performed by a team; and the best directors of the best teams are licensed, professional public adjusters.

