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ASSISTANT VICE PRESIDENT,
STATE GOVERNMENT RELATIONS

March 22, 2022

The Honorable Mia Costello and Members of
the Senate Labor & Commerce Committee
State Senate
Alaska State Capitol
Juneau, Alaska 99801-1182

Via Email

RE: Senate Bill 208, Contractor's Insurance

Dear Chair Costello and Members of the Committee:

The American Property Casualty Insurance Association (APCIA), representing nearly half of Alaska's property casualty insurance market, promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA members represent all sizes, structures, and regions—protecting families, communities, and businesses in the U.S. and across the globe.

APCIA opposes Senate Bill 208, which would permit direct action against insurers under certain circumstances in construction contractor liability cases. The APCIA is strongly opposed to permitting direct action against insurers by third parties and there is no public policy case to be made for why direct action should be available here.

Allowing direct action against insurers is unnecessary because claimants already have the right to sue a contractor directly, and the contractor's liability insurer would have a duty to defend the contractor if there is even a potential for coverage for that contractor under a policy. Importantly, a claimant's remedy to sue a contractor is available even if the contractor does not submit a liability claim to its insurer.

In addition to suing a contractor, a claimant may file a claim directly against a contractor's surety bond. Contractors in Alaska are required to obtain surety bonds covering negligent or improper work or breach of contract occurring during the course of a construction project. Claimants are permitted to make claims on a bond directly because surety bonds are intended to protect consumers. By contrast, a contractor's liability insurance is intended to protect the contractor from liability to third parties.

Furthermore, there is no public policy justification for allowing direct action against insurers. Notably, there is no assertion in SB 208 that the contractor would have to be unavailable for service in any litigation. Instead, the bill permits direct action against an insurer relying on a number of vague contingencies about a contractor being non-responsive to a claimant. For direct action against the insurer to be available, the contractor would only have to fail to "acknowledge or act *promptly* on the person's communications about the claim," including failing to respond to phone calls or e-mails and failing to "attempt in good faith to

resolve the person's claim" (emphasis added). The bill never asserts that the construction contractor cannot be served with process in a civil suit; only that the contractor does not timely return calls. This appears to be an awkward workaround to allow direct suits against a contractor.

Allowing direct action against an insurer would also circumvent Alaska's existing law (AK ST §§ 09.45.881-09.45.899) concerning notice and opportunity to repair. These requirements apply to claims against construction professionals for defects in design, construction, or remodeling of a dwelling. In these instances, a claimant must provide written notice to the contractor describing the defect and allow the contractor an opportunity to respond or repair the defect before bringing suit. If the contractor fails to respond within the statutory timeframe or fails to repair the defect to the satisfaction of the claimant, the claimant is then permitted to bring suit against the contractor. The purpose of these pre-litigation procedures is to encourage contractors and claimants to resolve claims outside of court, but SB 208 would circumvent the entire pre-litigation process.

Moreover, the trigger for direct action under SB 208 is ambiguous. Section 2 of the bill would apply only when a person has a claim against a contractor for "grossly negligent work". Construction liability claims are usually not brought as gross negligence actions. These claims are generally stated as negligence, breach of contract, or breach of warranty actions. Thus, it is unclear what "grossly negligent work" refers to in such instances.

SB 208 leaves considerable ambiguity as to when the direct action would be available against an insurer and is likely to create new litigation burdens for the courts. The bill, if enacted, could have the unintended consequence of opening the flood gates for litigation against insurers where a homeowner or business thinks that a contractor did poor work and did not quickly return calls.

Finally, there is nothing in SB 208 that would limit an insurer's liability to damages covered under the policy. It would create an unprecedented cause of action against insurers beyond policy limits even without so much as an assertion of bad faith by the insurer.

Accordingly, APCIA respectfully urges the legislature to reject SB 208. If you have any questions or would like additional information, please contact me at Lyn.elliott@apci.org or 720-610-9473.

Sincerely,



Lyn D. Elliott
Assistant Vice President, State Government Relations
Mountain Region

Cc: Lori Wing-Heier, Director, Alaska Division of Insurance