

3601 Vincennes Road, Indianapolis, Indiana 46268  
Phone: 317.875.5250 | Fax: 317.879.8408

[www.namic.org](http://www.namic.org)

122 C Street N.W., Suite 540, Washington, D.C. 20001  
Phone: 202.628.1558 | Fax: 202.628.1601

January 30, 2017

Colorado State Legislature  
House Business Affairs and Labor Committee

*sent via email to:*  
[Luisa.Altmann@state.co.us](mailto:Luisa.Altmann@state.co.us)

**RE: HB 1098 – Rental Car Loss of Use/Loss of Profits - NAMIC’s written testimony IN SUPPORT**

Dear Representative Kraft-Tharp, Chair; Representative Winter, Vice Chair; and honorable members of the House Business Affairs and Labor Committee:

Thank you for affording the National Association of Mutual Insurance Companies (NAMIC) an opportunity to submit written testimony to the House Business Affairs and Labor Committee for the February 2, 2017, public hearing.

The National Association of Mutual Insurance Companies (NAMIC) is the largest property/casualty insurance trade association in the country, with more than 1,400 member companies. NAMIC supports regional and local mutual insurance companies on main streets across America and many of the country’s largest national insurers. NAMIC members represent 40 percent of the total property/casualty insurance market, serve more than 170 million policyholders, and write nearly \$225 billion in annual premiums. NAMIC has 163 members who write property/casualty in the State of Colorado, which represents 45% of the insurance marketplace.

The proposed legislation states:

***13-21-129. Civil damages related to rental motor vehicles. IN ANY ACTION ALLEGING A CLAIM FOR THE LOSS OF USE OF A RENTAL MOTOR VEHICLE, AS DEFINED IN SECTION 6-1-201, A CLAIMANT'S DAMAGES ARE LIMITED TO THE ACTUAL LOST PROFITS AS A RESULT OF SUCH LOSS OF USE.***

It is a fundamental principle of jurisprudence and intuitive common-sense that the purpose of civil damages is to *compensate* the injured party for their *actual* monetary loss. The age-old common law doctrine was referred to as “*restitutio in integrum*”, which means “to place the person in the position the person would have occupied had the legally actionable wrong not occurred”.

In other words, the purpose of civil damages is to compensate the injured party for the monetary loss they *actually* incurred as a result of the other party’s negligence or breach of contract. In the world of civil damages, this legal concept of making the aggrieved party monetarily “whole again” is referred to as “compensatory damages”. In order to make the plaintiff “whole again”,

the legal system developed the requirement that the plaintiff prove their *actual* damages, so that the trier of fact could award the injured party the specific money damages necessary to compensate them for their *actual* loss.

In a business context, compensatory damages includes a calculation of the amount of the “loss of profits” incurred by the business-plaintiff as a result of the other party’s legally actionable wrong. For rental car companies, “loss of profits” is determined by evaluating the loss of rental car use as a result of the vehicle being in an auto repair shop and not available for rental to another customer, and an assessment of how that loss of rental use adversely impacted the company’s profits.

Historically, rental car companies, like all other defendants, were required to specifically prove their *actual* compensatory damages, which meant proving *actual* loss of rental use and *actual* loss of profits resulting from inability to rent the damaged vehicle to another customer. In order to recover their “loss of profits”, the plaintiff had to prove that the damaged vehicle would have *actually* been rented by another customer if it was in the rental car parking lot.

However, in 2012, the Colorado Supreme Court decided the case of *Koenig v. PurCo.*, where it held that a rental car company could recover “loss of profits”, merely by having an established fee set for loss of rental car use. This “loss of profits” approach disregarded *actual* loss of rental car use as measured by fleet utilization, i.e. would the rental car have actually been rented to another customer while it was in the auto repair shop or would the vehicle have just been parked in the rental car lot, not in actual rental car use. In effect, would the damaged vehicle have been earning profits for the rental car company on a day it was in the auto repair shop or would it have just be part of the unused, non-profit generating rental car fleet that day.

In essence, the court departed from the long-standing legal doctrine requiring the plaintiff to prove *actual* “loss of profits” and instead allowed rental car companies to recover “loss of profits” based upon *presumed* loss of rental car use.

The problem with awarding “loss of profits” compensatory damages to rental car companies based upon *presumed* loss of rental car use is that it is inconsistent with the modern realities of the rental car business model, where rental car companies regularly maintain huge fleets of vehicles, that are the exact same make, model, and color parked in the lot not being rented (i.e. not earning profits) on a given day. The legal fiction of *presumed* “loss of profits” is entirely in conflict with the facts of the situation. If the rental car company would not have actually rented out the entire fleet of similar rental vehicles on the day the damaged vehicle was in the auto repair shop, and no customer was turned away, there would be no *actual* rental business lost, ergo no *actual* “loss of profits”.

In effect, pursuant to Koenig, the rental car company ends up receiving an *economic windfall*, because they may get to recover more than their *actual* “loss of profits” compensatory damages - they get to possibly collect fictitious “loss of profits” damages. This approach is legally unnecessary, because rental car companies can easily prove whether or not their entire fleet of similar vehicles was fully utilized for rental purposes on a given day. Further, it is patently unfair to rental car clients, who end up having to pay out of pocket illusory “loss of profit” damages to

the rental car company when there are several similar rental vehicles parked in the rental car lot ready to be rented for profit, and is needlessly detrimental to insurance consumers, whose insurance rates are adversely impacted by fictitious “loss of profits” damages paid out by their insurance company.

From a legal and public policy standpoint, why should rental car companies, with their sophisticate accounting and automated rental car fleet inventory practices be allowed to collect *presumed and often times unjustified* “loss of profits”, when other businesses and plaintiffs have to demonstrate *actual* “loss of profits” as part of their legal burden to prove their compensatory damages?

For the aforementioned reasons, NAMIC respectfully requests that the House Business Affairs and Labor Committee **VOTE YES on this pro-consumer protection and pro-judicial fairness legislation.**

Thank you for your time and consideration. Please feel free to contact me at 303.907.0587 or at [crataj@namic.org](mailto:crataj@namic.org), if you would like to discuss NAMIC’s written testimony.

Respectfully,



Christian John Rataj, Esq.  
NAMIC – Senior Director of State Affairs  
Western Region