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Original: 2001
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September 7, 1999

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VIA HAND DELIVERY

Peter J. Salvatore, Regulatory Coordinator
Commonwealth of Pennsylvania,
Department of Insurance
1326 Strawberry Square
Harrisburg, PA 17120

Re: **Comments and Questions**
Proposed Regulation No. 11-149, Chapter 62, Title 31

Dear Mr. Salvatore:

Enclosed is an original and one copy of the Comments of the Pennsylvania Collision Trade Guild, also t/a Coalition for Collision Repair Equality ("Guild"), to the above-referenced proposed final form regulations. For the reasons set forth in the attached, the Guild believes that the Department should not proceed with its regulatory amendments.

99 SEP -8 AM 7:59

Mr. Salvatore
September 7, 1999
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Please contact us if you have any questions concerning this letter and the attached comments.

Sincerely,


Walter W. Cohen

Enclosures

c: Hon. Edwin G. Holl, Chair
Senate Banking & Insurance Committee
Hon. Nicholas A. Micozzie, Chair
House Insurance Committee
Robert E. Nyce, Executive Director
Charles A. Tyrrell, Jr., Regulatory Analyst
Fiona E. Wilmarth, Regulatory Analyst
Independent Regulatory Review Commission
Jack Aigner
Steve Behrmdt

**COMMONWEALTH OF PENNSYLVANIA
INSURANCE DEPARTMENT
and
INDEPENDENT REGULATORY REVIEW COMMISSION**

In re: :
DEPARTMENT OF INSURANCE :
REGULATION, MOTOR VEHICLE : **No. 11-149**
PHYSICAL DAMAGE APPRAISERS :

99 SEP -8 PM 8:00

**COMMENTS OF THE
PENNSYLVANIA COLLISION TRADE GUILD
TO THE DEPARTMENT'S FINAL FORM REGULATIONS**

I. INTRODUCTION

The Pennsylvania Collision Trade Guild, also t/a the Coalition for Collision Repair Equality (the "Guild"), by and through their counsel Obermayer Rebmann Maxwell & Hippel LLP, hereby submits these comments to the Commonwealth of Pennsylvania, Department of Insurance's ("Department") proposed final form regulations for the Motor Vehicle Physical Damage Appraisers Act, 63 P.S. §§851 *et seq.* ("Appraisers Act"). These comments supplement the Guild's Comments and Questions dated March 8, 1999, a true and correct copy of which is attached hereto.

II. BACKGROUND

The final form regulations published by the Department on August 23, 1999, impact on, not only the Appraisers Act and the regulations promulgated thereto at 31 Pa. Code §§62.1 *et seq.* ("Regulations"), but also the Unfair Insurance Practice Act, 40 P.S. §§1171.1 *et seq.* ("UIPA") and the regulations promulgated thereto at 31 Pa. Code §§146.1 *et seq.* The Appraisers Act, enacted as a *consumer protection-based law*, generally requires an appraiser to prepare an independent appraisal of all the repairs

necessary to return a consumer's damaged vehicle to its pre-accident or pre-loss condition.

For several years, the Department has permitted the weakening of the purpose and intent of the Appraisers Act by appraisers and the insurance industry, through the creation and proliferation of "direct repair shops" and "direct repair and referral programs."¹ The publication of these final form regulations by the Department is further evidence of the Department's disregard for the protections afforded consumers under the Appraisers Act.² The approval of these regulations will adversely affect, *inter alia*, consumers, the members of the Guild and other auto repair shops and other entities, like the Automotive Services Association and the Automotive Service Professionals.

The Department drafted and issued these final form regulations partially in response to a Complaint filed by consumer Connie Principato and the Guild with the Insurance Department. In their Complaint, Ms. Principato and the Guild request that the Department enforce the provisions of the Appraisers Act and UIPA, which require

¹ "Direct repair and referral programs" are oral and written contractual arrangements negotiated between insurance companies and auto repair shops wherein the insurance companies agree to refer insured consumers and claimants to the auto repair shops for appraisal and repair of their damaged vehicles and, in exchange, the auto repair shops agree to appraise and repair damaged vehicles in accordance with the insurance company's rates and procedures. The rates demanded by the insurance companies are below the rates charged by independent, non-participating, auto repair shops. The insurance companies also demand parts discounts and other concessions from their selected auto repair shops in exchange for the referral of business. Insurance companies are also providing financing to "consolidators" who purchase independent auto repair shops and convert them into participating direct repair shops. By contracting with selected auto repair shops and consolidating service, insurance companies are monopolizing the auto repair industry, which has negatively affected the quality of service throughout the industry and adversely impacted the rights of insured consumers. Since the members of the Guild believe the insurance companies' direct repair and referral programs violate the Appraisers Act and the Regulations, and the UIPA, and result in poor quality of work for their customers, they refuse to participate in such programs and remain independent, non-participating, auto repair shops.

² In Senate Resolution No. 35 of 1999, the Senate directed the Legislative Budget and Finance Committee to evaluate direct repair programs and steering practices of insurers.

preparation of an independent appraisal of damage and which prohibit unfair methods of competition by insurers, including boycotting and steering. The Department published the regulations initially and requested a stay of the litigation in January 1999.

The Department's publication of these final form regulations, which addresses and modifies a portion of the issues in the administrative Complaint, confirms that the violations alleged in the Complaint, including the Department's failure to enforce the Act, are true and correct. Since these final form regulations are inconsistent with law and will neither resolve the litigation nor the prevailing problems which exist in the auto appraisal and repair industry, they should not be enacted.

The Guild submits these comments and questions to the proposed regulations of the Department.

III. COMMENTS

A. Summary Of The Position Of The Guild.

The Department's proposed final form regulations are inconsistent with the Appraisers Act and the UIPA because they:

(1) erode the principal purpose and intent of the Appraisers Act, which requires an independent appraisal of damage, by diminishing the direct and indirect conflict of law provisions, and permits insurers to *influence* the actions of appraisers in preparation of an independent appraisal of damage;

(2) permit appraisers to write an appraisal of damage (a) using repair procedures and parts that have the "function and appearance" of original manufacturer equipment and parts, (b) which *does not contain a list of all the items* necessary to repair a motor vehicle and return it to its *pre-loss condition* and

the cost of those items necessary for repair and (c) which contains the use of *after-market, non-warranty, nonoriginal equipment manufacturer parts*;

(3) permit appraisers to *direct* insured Pennsylvania consumers and claimants to particular auto repair shops for appraisal and repair of their damaged motor vehicle; and

(4) fail to provide a dispute resolution mechanism.

The Department's proposed final form regulations should not be implemented because they are inconsistent with the purpose, intent and interpretation of the Appraisers Act, as evidenced by the original regulations, promulgated pursuant to the Appraisers Act in 1973.³ Furthermore, the proposed regulations will adversely affect the health, safety and welfare of Pennsylvania consumers, and the prices, products and competition in the auto body repair industry. Finally, the proposed regulations are unreasonable in that they will authorize and approve the existing illegal actions of insurance companies and appraisers under the law and regulations, and provide additional unregulated and unfettered power to insurance companies and appraisers to promote unfair methods of competition to their competitive advantage.

For all these reasons, the Guild believes the Department should not proceed with its amendments to the Regulations.

B. Specific Objections And Comments.

1. Conflict of Interest

A complete discussion of the Guild's position concerning the Department's

³ The 1973 regulations were published at 31 P.S. §1.1 *et seq.*

changes to the conflict of interest provisions is contained in Section B(4)(page 15) of its March 8th Comments attached hereto, which is incorporated herein. The Department now proposes additional amendments to the conflict of interest provisions, including deletion of the references to “direct and indirect” conflicts of interest by an appraiser when preparing an estimate of damage. All the changes proposed by the Department are in direct contravention of the purpose and intent of the Act.

The existing Regulations were drafted to protect consumers and auto repairs shops from any conflict of interest that may arise between an appraiser and an insurer with regard to the cost, scope and manner of repairs. The problem for consumers and the independent auto repair industry is, notwithstanding these provisions, it is standard industry practice for appraisers to favor the interests of insurers when preparing appraisals.

With regard to the direct repair programs, insurance companies require auto repair shops participating in their programs to have a licensed appraiser on their staff, who is an employee of the auto repair shop, and who will prepare appraisals consistent with the directives, criteria, rates and procedures set forth in the insurers’ manuals for appraisal and repair of a damaged motor vehicle.⁴ Moreover, appraisers prepare appraisals of damage based on the type of damages and repairs insurers will agree to pay for, rather than writing an appraisal listing all the repairs that are necessary to return the damaged vehicle to its pre-loss condition. Finally, insurance companies provide incentives and

⁴ Black’s Law Dictionary defines “Conflict of Interest” as a situation “in which regard for one duty tends to lead to disregard of another.” If an appraiser is charged with the duty to prepare an independent appraisal of damage, it is a direct conflict of interest for an appraiser to prepare that appraisal dependent on or with any reference to directives, criteria, rates and procedures set forth by the insurer.

bonuses to appraisers and participating direct repair shops: (1) to prepare appraisals which reduce the costs of repair to insurance companies; (2) to ensure that repairs to a damaged motor vehicle are made at an auto repair shop participating in their direct repair and referral programs; and (3) to write appraisals at reduced labor rates and which omit necessary costly procedures and provide for use of after-market, rather than original equipment manufacturer parts.

Accordingly, deletion of the existing Regulations will adversely affect consumers and the auto repair shop industry. The existing Regulations should remain since they protect consumers and auto repair shops. If any amendment should be made to the existing Regulations, the Department should enhance and strengthen the conflict of interest provisions.

2. Aftermarket Parts

There is no greater demonstration of unlawful far reaching by the Department in these final form regulations than its inclusion of a provision concerning the use of aftermarket parts. There is simply no authority in the Appraisers Act for the Department to authorize appraisers to write an estimate of damage using aftermarket parts and procedures. By its proposed changes, the Department is providing insurers with regulatory authority over a matter that is a purely private contract between the insurer and its consumer for the repairs of a damaged vehicle.

A complete discussion of the Guild's position concerning the Department's proposed use of aftermarket parts is contained in Section B(2)(page 10) of its March 8th Comments attached hereto, which is incorporated herein. The Department now proposes additional amendments to permit an appraiser to use aftermarket parts and procedures

when preparing an estimate of damage. All the changes proposed by the Department are in direct contravention of the purpose and intent of the Act.

As stated above, no authority exists in the Appraisers Act which permits an appraiser to write an appraisal of monetary damage to a vehicle using Non-OEM or aftermarket, imitation, crash parts. The Department's proposal is beyond the scope of its authority to infuse, what amounts to, statutory changes into the regulatory process. Thus, unless the General Assembly amends the Appraisers Act to permit the use of imitation parts, the Department is powerless to authorize the same.

The Department's proposed changes are also inconsistent with the clear language of the Appraisers Act. The Appraisers Act provides that, "... Because an appraiser is charged with a high degree of regard for the public safety, the operational safety of the vehicle shall be paramount in considering the specification of new parts...". 63 P.S. §861(b). Since public safety must be highly regarded and paramount consideration must be given to the operational safety of the motor vehicle, it is inconsistent for the Department to authorize use of imitation parts, which have not been crash tested and for which no Material Safety Data Sheets⁵ are available.

By virtue of the fact that aftermarket parts are not crash tested, the proposed regulation adversely affects the health, safety and welfare of consumers. Furthermore, regardless of the Department's consideration of warranties, consumers should not have to waive their rights to the manufacturer's warranty for the purpose of accepting imitation parts in repair of a motor vehicle.

⁵ "Material Safety Data Sheets" are documents that provide detailed information on chemical substances.

Finally, the proposed regulation will adversely affect auto repair shops. If an appraiser requires the use of aftermarket parts and the parts malfunction or fail, the repair shop may be held liable for installing the malfunctioning, imitation part. With new or used original equipment manufacturer parts, the repair shop is protected by the manufacturer's warranty and the empirical data existing, which supports the safety and specifications of the parts.

3. Predamaged Condition

A complete discussion of the Guild's position concerning the Department's changes to the definition of predamaged condition is contained in Section B(5)(page 19) of its March 8th Comments attached hereto, which is incorporated herein. The Department now proposes additional amendments including the insertion of the terms "function and appearance" to purportedly enhance the definition of predamaged condition, which will permit an appraiser to use aftermarket parts and procedures when preparing an estimate of damage. All the changes proposed by the Department are in direct contravention of the purpose and intent of the Act.

The critical change in the final form regulations from the prior draft is the inclusion of the phrase "function and appearance" when defining the term "predamaged condition." Permitting an appraiser to prepare an estimate of damages using replacement parts or procedures that meets the qualification of function and appearance is beyond the scope of the Act and the UIPA. The current Regulations and UIPA provide that repairs must be made to restore the vehicle to its condition prior to loss. A standard based on function and appearance may permit the use of parts and repair procedures that will not return a vehicle to its condition prior to loss. The interests of the consumer are not

protected. This definition is inconsistent with the express language of the Act and UIPA and contrary to the interest of consumers.

4. Steering

A complete discussion of the Guild's position concerning the Department's changes permitting appraisers to direct consumers to particular repairs shops in an insurer's direct repair program is contained in Section B(1)(page 5) of its March 8th Comments attached hereto, which is incorporated herein. The Department now proposes that the amendments be amended to permit an insurer only to advise the consumer that it has information on particular repair facilities. The proposed regulatory changes give authority to insurers to promote direct repair programs. All the changes proposed by the Department are in direct contravention of the purpose and intent of the law, which permits the consumer to select the shop of his or her choice.

Consistent with the Act and the UIPA, no change should be made to the regulations to permit appraisers to provide unsolicited information concerning particular repair facilities to a consumer. The current Regulations prohibit an appraiser or insurer from requiring or recommending that repairs be made at a particular shop (See existing Regulation §62.3(f)(8)), and from directly or indirectly coercing, persuading, inducing or advising the consumer that appraised motor vehicle physical damage must be, should be or could be repaired at a particular shop (See existing Regulation §62.3(f)(9)). This proposed change is also inconsistent with the intent and spirit of the Act. The intent and spirit of the Appraisers Act was to, *inter alia*, protect a consumer's right to choose a repair facility. Under the original regulations promulgated in 1973, appraisers could not even "recommend or require that repairs be made at a particular place or by a particular

individual” (31 Pa. Code §1.1(B)(1)(c)(1)), and were only permitted to provide the names and addresses of repair shops where the work could be performed, “upon the unsolicited request of the consumer.” (31 Pa. Code §1.3(B)(5)(c)). In fact, as originally drafted, the consumer selected the appraiser. (31 Pa. Code §1.1(B)(2)(c)(1)).

The proposed changes are also inconsistent with the regulations promulgated pursuant to the UIPA. 31 Pa. Code §146.1 *et seq.* In §146.8(d), the regulations provide that, “The insurer shall give a copy of the appraisal to the claimant and may furnish to the claimant, *upon his unsolicited request*, the names of two or more conveniently located repair shops.” (Emphasis added). Thus, the Department’s proposed deletion of §62.3(g)(12)(iii) conflicts with §146.1(d).

Finally, the proposed change requested by the Department was previously considered by the House Insurance Committee and never submitted for vote to the full House. In House Bill No. 1394 of 1995, the insurance industry offered legislation for consideration by the General Assembly which would have permitted appraisers to refer or recommend particular shops to consumers. The Guild provided written and oral testimony before the Insurance Committee of the House in opposition to the Bill, and the Bill never made it out of that Committee. Thus, the Department is now attempting to accomplish by regulation what it was unable to accomplish by legislation.

5. Dispute Resolution

A complete discussion of the Guild’s position concerning the Department’s changes to the dispute resolution provision is contained in Section B(3)(page 14) of its March 8th Comments attached hereto, which is incorporated herein. The Department now proposes additional amendments including deletion of the dispute resolution provision.

All the changes proposed by the Department are in direct contravention of the purpose and intent of the Act.

The dispute resolution mechanism is a sound consumer protection clause, and would provide a mechanism to resolve disputes over the appraisal of damages that may arise between an appraiser, insurer and consumer. The regulations should not be amended to delete this provision when it is obvious that many disputes arise between consumers and appraisers, and no procedure exists to remedy these disputes.

VI. CONCLUSION

The Department's proposed final form regulations are inconsistent with law and are contrary to the interest of consumers and those involved in the auto repair industry. The problems which exist in the auto repair industry, which the Department currently ignores, will not be resolved or even alleviated by these proposed regulations. Thus, no legal or practical basis exists for passage and implementation of the proposed regulations.

Many, if not all of the problems in the auto repair industry occur because the purpose and intent of the Appraisers Act has been undermined by the fact that the Department has permitted insurers the creation and proliferation of direct repair programs. In these programs, appraisers, hired by insurers, favor the insurer's interest by preparing an estimate of damage in accordance with the insurer's guidelines and procedures. No protection is then afforded the consumer or the auto repair industry members who refuse to partake in the direct repair programs. Only when a consumer takes a damaged vehicle to the shop of his or her choice and an independent appraisal of damage is made, is the consumer's interest protected.

All the specific objections of the Guild, contained in both this document and its March 8, 1999 comments, are interrelated and stem from the Department's tacit approval permitting interrelationships among appraisers, insurers and auto repair shops. Through these incestuous relationships, insurers reduce their costs to repair a damaged vehicle, by employing and engaging appraisers and auto body repair personnel, who are compelled to advance the interest of the insurance company, to the detriment of the consumer. Once a part of these programs, no one is compelled to protect the interest of the consumer.

In order to properly address these issues and settle the litigation, the Department should simply enforce the regulations as drafted, and as they were intended to regulate these matters. If the Department wants to advocate the use of direct repair programs by insurers, then the only option to ensure the protection of consumers is for the Department to engage and regulate appraisers internally so as to ensure the interests of consumers are protected. Only then will conflicts of interest cease to exist and the interests of consumers be protected, rather than the interests of the insurers.

For all these reasons, the Guild respectfully requests that the Department should not proceed with its regulatory changes, and enforce the Act as written.

Respectfully submitted,

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Date: September 7, 1999