May 31, 2016

Geoffrey Margolis
Deputy Commissioner & Special Counsel
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RE: Labor Rate Survey & Anti-Steering Proposed Regulations

Dear Mr. Margolis:

Since our April 21 and 22, 2016 comment submissions to the California Department of Insurance (CDI) regarding the "Labor Rate Survey" regulations (Reg-2012-00002) and the "Anti-Steering" regulations (Reg-2015-00015) (together, the "Proposed Regulations"), the above-listed associations have worked diligently to formulate a suggested approach for the Proposed Regulations which would simultaneously ensure the CDI accomplishes its policy goals while regulating the insurance industry in a lawful, prudent manner.

We offer the following additional comments on the Proposed Regulations. We hope to resolve these issues in a collaborative fashion with the CDI without need for further action following the CDI's closure of the rulemaking file.

Labor Rate Survey Regulations

Our additional consideration of the Labor Rate Survey regulations has only strengthened the concerns we outlined in our April 21, 2016 comment submission. With its proposal, the CDI is offering a model methodology for conducting labor rate surveys which would produce claims costs that are unreasonably and unnecessarily expensive. The proposal would artificially inflate the cost of insured auto repairs with no corresponding benefit for insurance customers.

Because the Labor Rate Survey regulations would be voluntary, insurers would face two choices: 1) adopt new business practices which produce unwarranted claims payment inflation which they cannot readily pass along due to the difficult rating environment in California, or 2) use alternative methods that are currently allowed (like Cost of Living Adjustments) but not recognized in the Proposed Regulations, leading to uncertainty as to whether the CDI would attempt to force insurer use of the Proposed Regulations when reviewing consumer complaints or conducting field examinations. Our guess is that most carriers would take the second option, which would defeat the whole point of doing regulations in the first place. Our thought is that this is counterproductive for the CDI and insurers.

A better option would be to fix the Labor Rate Survey regulations so they ensure fair results and provide flexibility and options for the industry that can be widely adopted. To accomplish this, we urge the CDI to revise the Labor Rate Survey regulations, in addition to the comments we submitted, as follows:

Arithmetic Mean or Simple Majority

Proposed Section 2695.81(d)(5) requires insurers to calculate a local "prevailing auto body rate" that is based on "posted rates" and, therefore, results in inflated payments. This would create a system in which body shops are paid one rate with a cash customer and another, higher rate for insured jobs. Insurers look forward to meeting their contractual and legal obligations to make fair offers to pay for car repairs, but will not accept a state regulation which requires obvious overpayment.

We urge the CDI to fix its proposal for calculating a "prevailing auto body rate." We request eliminating the regulation's reference to the "arithmetic mean" and, instead, just rely upon a median survey result that would eliminate the bias of outliers -- which could be particularly acute when used with the regulation's requirement to only use survey results from six body shops.

Use of DRP Rates in a Labor Rate Survey

Proposed Section 2695.81(d)(6) prohibits labor rate surveys from including any discounted labor rate obtained as part of a direct repair program. We understand that the CDI strongly believes that labor rate surveys should only include labor rate survey results that an auto repair customer could get without the benefit of a contracted discount. However, CDI must address our legitimate concerns about the mischief that body shop survey respondents can play with their "posted" rates. There has to be a check and balance to address the possibility of inflated labor rates.

The labor rate survey regulations should include a provision that allows survey results to be adjusted when an insurer documents that body shops accept payment at rates less than their reported, posted labor rates. There is no justification for a state regulation which creates two, different "market" rates: the lower rate that cash-pay customers pay and then a higher rate which shops are able to extract from insurance companies. If the CDI ensures that insurers have a mechanism for challenging body shop collusion or falsification of labor rates, then insurers will accept the exclusion of DRP rates from labor rate surveys without further disagreement.

Geocoding & Permissible Methodologies

Proposed Section 2695.81(d)(8) sets forth the one, and only one, acceptable method for surveying a geographic area for determining a local, prevailing labor rate. The CDI method would require survey of the closest six (6) body shops, when measured in a straight-line distance, to the shop making the repair in question. The CDI method would require the survey to use a "geocoding" method selecting the surveyed shops based upon their latitude and longitude.

Such a geocoding method is, to our knowledge, not a commonly-used method in the insurance industry. While staff at the CDI may have concluded that this method is the only one capable of producing consistent and fair survey results, this is certainly not the consensus viewpoint in the insurance industry. Insurers would be open to participating in a presentation where CDI staff could explain its proposed methodology and attempt to educate insurers on why this methodology is feasible. Absent such dialogue, it seems unlikely that the CDI's geocoding proposal would be broadly adopted.

Insurers urge the CDI to add additional, permissible methodologies that would increase the likelihood that insurers adopt a model survey approach. For instance, the CDI distributed a working draft of an alternate methodology, dated October 1, 2015, which relies upon commonly-understood city, and, when necessary, county, boundaries for the selection of a survey area. Insurers would be willing to seek a negotiated resolution of this particular issue with the addition of a methodology substantially similar to the approach in that working draft. Providing multiple defensible methodologies for selecting a geographic survey area, including methods with appropriate sampling techniques, will increase the likelihood of broad adoption, as opposed to only one, new, untested methodology.

Also, the proposed Labor Rate Survey regulations should allow the option to pursue greater accuracy in determining a market rate by weighting survey responses according to shop capacity. In most markets, larger shops with greater repair volume capacity (number of vehicle bays, for example) will repair proportionally more vehicles. For instance, if a city had 5 shops with 1 bay each and 1 shop with 5 bays, as many as half of all vehicle repairs might be completed by the latter. On a per vehicle basis, then, the larger shop will mathematically play a larger role in the prevailing labor rate in that market than the other shops. But the Proposed Regulations preclude a standardized survey from accounting for a shop's relative volume of repairs, and instead requires a "one shop, one vote" approach, making no allowance for the practical effect of shop capacity on the prevailing labor rate in a given market.

Further, we are willing to explore the feasibility of insurers being able to voluntarily subscribe to a statewide labor rate survey conducted by a neutral, credible organization. Some have mentioned the possibility of the Bureau of Automotive Repair being involved with such an endeavor, which seems appropriate for consideration.

Duration of Surveys

Proposed Section 2695.81(d)(1) restricts use of a particular labor rate survey to one year. This time period is too short.

While the CDI attempts to provide a mechanism for use of a survey for a second year of time, the method is based upon broad consumer data unrelated to the price of auto repairs. Interestingly, and unacceptably, the Proposed Regulations actually prohibit insurers from adjusting survey results downward if the consumer price index (CPI) has gone down – abandoning the CDI's own argument that CPI should be used to adjust labor rate surveys in the second year of use.

Insurers believe that a two year period of use for labor rate surveys is reasonable. We request abandonment of the CDI's upward-bias CPI method for the second year of a survey and, instead, simplify the process by allowing a labor rate survey to be used for two years.

Anti-Steering Regulations

Our additional consideration of the Anti-Steering regulations has similarly strengthened the concerns we outlined in our April 22, 2016 comment submission. The proposed Anti-Steering regulations would impose unnecessary, new expenses on insurers for no perceptible consumer benefit. The regulations would prohibit insurers from conducting inspections at many locations that currently serve customers without problem, which would then require insurers to lease new physical locations for inspection and hire new employees/contractors who must travel to conduct inspections when a permissible inspection location is not within the CDI's new requirements. The CDI public notice fails to acknowledge any of these costs when, in fact, the industry-wide costs will be in the tens of millions of dollars.

In trying to understand why the CDI would add costs to the insurance system with no consumer benefit, we have concluded that the proposed Anti-Steering regulations have, at their core, too many unfounded, negative assumptions about insurer claims behavior. These assumptions have lead the CDI to seek to ban many forms of honest insurer conduct in hopes of stopping some bad conduct along the way. A better approach would be to work collaboratively to target bad insurer behavior with these regulations, instead of erecting barriers and punishments to insurers who are trying to act morally, efficiently, and consistent with California law.

In order to fix the proposed Anti-Steering regulations and eliminate the need for further action following the CDI's closure of the rulemaking file, we suggest the following changes to the proposed Anti-Steering regulations:

Travel Distance to Inspect Vehicles

Current law prohibits an insurer from requiring a claimant to drive an "unreasonable" distance to enable an insurer to conduct a damaged vehicle inspection. Proposed Section 2695.8(e)(4)(C) would define an "unreasonable" distance, which it defines as more than a ten (10) mile drive in urban areas (defined as population of 100,000 or more) and a twenty-five (25) mile drive in areas with a smaller population.

Ten miles is an inadequate distance to allow insurers to conduct their business. Sticking to this ten mile rule will force insurers to open many more inspection facilities and, when opening a new facility is impracticable, to hire personnel to drive to the vehicle location. It is difficult to see how injecting these substantial costs into the system is pro-customer, particularly when we are unaware of any consumer complaint trend highlighting this issue. There is, simply, no point of requiring a ten mile limit other than to raise claims adjustment costs.

While a "hard" distance limit will undoubtedly lead to many bad outcomes, we propose a compromise of a fifteen (15) mile "urban inspection" limit. While such a limit will still increase insurer costs, we believe the costs will be significantly mitigated while still allowing the CDI the certainty of a specific distance limitation.

Further, we request an exception allowing an insurer to specify an inspection location farther than fifteen miles when circumstances warrant following a catastrophe situation where nearby inspection locations would be overwhelmed.

Six Day Inspection Requirements

While current law makes no reference to requiring an inspection on a specific time frame, proposed Section 2695.8(e)(4)(A) would create a new time limit requiring insurers to inspect a damaged vehicle within six (6) business days after receiving the notice of claim, provided the claimant makes the vehicle reasonably available for inspection. While insurers regularly compete against each other to market customers on their efficient claims service, the CDI feels obligated to add this new law regarding inspection deadlines.

In order to make this six business day requirement work, two changes are necessary. First, in the aftermath of a catastrophe situation, it is not always possible to inspect vehicles in six days and the Proposed Regulations should be amended to provide such an exception. Second, the six business day requirement should only apply when the insurance company's liability to pay for the vehicle is clear, the vehicle owner is identifiable and known to the insurer, and the car is available for inspection. As currently written, the six business day requirement would mandate hundreds of thousands of inspections every year when an insurer would not, in the end, even be required to pay to repair those cars. This cannot be what the CDI intends.

Inspection at Body Shops in a Direct Repair Program

Proposed Section 2695.8(e)(5) provides that, after the claimant has chosen an automobile repair shop, an insurer may not require that the claimant have the vehicle inspected at or by an automobile repair shop where the insurer has a Direct Repair Program or by any other automobile repair shop identified by the insurer. This provision is unlawful and bad public policy.

California Insurance Code Section 758.5 prohibits insurers from suggesting or recommending "that a claimant select a different automotive repair dealer" after a claimant has "chosen" a shop, but it, in no way, prohibits inspection at a "non-chosen" shop, including DRP shops. There is absolutely no authority for the CDI to prohibit inspection at a particular body shop.

If the CDI is concerned that an insurer would break the law regarding "suggesting" or "recommending" a different shop, it should focus on that behavior and punish bad actors. But, instead, this overbroad provision would wrongly assume an inspection at a DRP shop is done for the purpose of getting a claimant to "un-choose" a body shop and be "steered" by the insurer into getting the car repaired at the inspection facility. So, the CDI would rather force insurers to have cars inspected at unknown body shops that may be farther away from the consumer than known body shops, or force insurers to lease new "inspection only" facilities

which add unnecessary costs to the claims system, or force insurers to hire new employees for the purpose of driving to conduct in-person inspections – rather than simply punish insurers who break the current anti-steering laws.

Proposed Section 2695.8(e)(5) treats consumers like they are children who cannot handle their own affairs, will drive up the cost of auto insurance for all, has absolutely no public benefit, and is drafted solely for the benefit of protecting an auto body shop which "already has a job" and is afraid it will be "taken away" by an inspection at another shop. Why is the CDI so concerned about body shops that it would completely disrupt a system that ensures repairs of hundreds of thousands of cars every year with little to no complaints from actual car owners?

This section needs to be removed from the Proposed Regulations.

Conclusion

The insurance industry has worked diligently to determine an appropriate compromise position that would further the CDI's goals of protecting auto insurance consumers while permitting cost-effective operations of insurance companies, which benefits all auto insurance consumers. We ask that the CDI consider making the above changes to the Proposed Regulations in addition to the comments we submitted. Our requested changes are not an over-reach and, in our view, are significant enough to continue pursuing in the event that the CDI closes its rulemaking file without addressing them.

If our proposed changes are not feasible for adoption, we reiterate our request for CDI to consider a reasonable alternative: Given the many unresolved questions and issues with the Department's Proposed Regulations on auto labor rate surveys and steering, we would like to work with the Department to convene a task force involving all the stakeholders to discuss a more comprehensive approach to these issues rather than moving forward with an incomplete and flawed regulation

Should you have any questions or concerns, please feel free to contact any of the following: Michael Gunning, PIFC Vice President, (916-442-6646/mgunning@pifc.org; Armand Feliciano, ACIC Vice President, (916-205-2519/armand.feliciano@acicnet.org); Shari McHugh, on behalf of PADIC, (916-769-4872, smchugh@mchughgr.com); Christian Rataj, NAMIC Senior Director, (303-907-0587/crataj@namic.org); Katherine Pettibone, AIA Vice President Western Region, (916-718-9568/kpettibone@aiadc.org) or Marti Fisher, California Chamber of Commerce, (916-930-1265/marti.fisher@calchamber.com).