Association of California Insurance Companies
An affiliate of PCI

STATEMENT OF THE ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES ON INSURER RECOMMENDATIONS OF AUTOMOTIVE REPAIR DEALERS REGULATION FILE: REG-2008-00036

The Association of California Insurance Companies (ACIC) is an affiliate of the Property Casualty Insurers Association of America (PCI) and represents more than 300 property/casualty insurance companies doing business in California. ACIC member companies write 40.5% of the property/casualty insurance in California, including 50.8% of personal auto insurance. PCI is composed of more than 1,000 member companies, representing the broadest cross-section of insurers of any national trade association.

ACIC believes that adoption of the proposed regulation would create a significant disservice to insurance consumers by limiting the information regarding their choice of automotive repair dealers. In essence, the regulation would create circumstances in which consumers – while clearly possessing the right to choose – cannot be fully informed of alternatives available to them by virtue of regulatory impediments to the free flow of information.

A brief summary of the applicable constitutional law is appropriate to establish the context in which the proposed regulation should be examined.

Commercial speech is entitled to protection under the First Amendment of the U.S. Constitution **(***Bigelow v. Virginia,* 421 U.S. 809 (1975)). Commercial speech is afforded protection so long as it is truthful, not misleading, speech about lawful activity (*Central Hudson Gas & Electric Co. v. Public Service Commission of N.Y.* 447 U.S. 557 (1980)). Any regulation of commercial free speech (1) must directly advance a substantial state interest and (2) must be narrowly drawn to accomplish that purpose without restricting more speech than is necessary.

A particularly instructive case involving a New York law that was found unconstitutional by the U.S. District Court for the Southern District of New York is *Allstate Insurance Co. v. Serio,* 2000 WL 554221 (S.D.N.Y. 2000). New York law prohibited an insurer from recommending or suggesting that vehicle repairs be made in a particular place or shop after a claim had been filed unless expressly requested by the insured. The District Court rejected the argument that insurer speech recommending a repair shop was false or misleading and found the statute violative of the *Central Hudson* test noted above. The court found that the statute itself caused consumers to be misled because the statute had the effect of denying information to policyholders. The court noted, "[t]he statute's provisions actually lead to consumers receiving

misleading information. It is obvious to the Court that the glaring omission …from the available information to the insureds, in effect, keeps them in the dark about their rights and provides them with a half-truth….. [T]he end result is that the statute does keep consumers from learning about their rights."(*Allstate, supra at 23)*

That is precisely the effect of the regulation at issue here. The regulation would prohibit truthful speech about a lawful activity because its proscription is not limited to false or misleading speech about repair facilities or the subject matter of autobody repair in general.

The statute that underlies the proposed regulation, Insurance Code §758.5, is clearly intended to [1] prevent an insurer from compelling a claimant to have an automobile repaired at a specific automotive repair dealer and [2] preserve the consumer's right to choose the repair facility at which his/her vehicle will be repaired. Insurers do not question or challenge either of those objectives. However, ACIC objects to the proposed regulation because it would have a dual negative impact of both [1] preventing a consumer from having all relevant information necessary to make an informed decision in selecting an automotive repair facility and [2] preventing an insurer from fully informing its customers of programs available under their insurance policies. This dual result would hurt consumers and would not positively contribute to claims resolution.

Administrative Procedure Act – Review Criteria

(1) Necessity

Beyond the constitutionally suspect nature of the regulation's restriction on insurers' commercial speech rights and consumers' right to know, ACIC questions the necessity for the proposed regulation. The "Initial Statement of Reasons" issued by the department admits that "[t]here are no specific studies relied upon in the adoption of this article." There are no studies at all that form the basis for this proposed regulation. This is a classic "cart-before-the-horse" approach. The department has proposed a regulation to resolve a problem that has neither been documented nor investigated by the department.

Prior to promulgating any regulation to implement Insurance Code §758.5, the department should undertake a comprehensive study to determine the need to implement, interpret or make specific the provisions of the underlying statute. At a minimum, a study should explore the following issues (1) the number of consumers who object to receiving information from their insurers about automotive repair choices; (2) the number of consumers who have complained about having too much information prior to selecting an automotive repair dealer: and (3) the number of consumers who believe an insurer prevented their exercise of free choice in making a decision.

ACIC suggests that the department follow the approach taken by the New York State Insurance Department. The New York department conducted a thorough investigation of insurers' compliance with a New York statute that is similar to current California law.

Insurance Superintendent Eric R. Dinallo concluded, “This very thorough investigation is reassuring in that it shows auto insurers are largely complying with the laws that preserve consumer choice.” The California Department of Insurance is obliged to determine whether current insurer practices are restricting consumer choice before promulgating the broad prohibitations in the proposed regulation.

(2) Clarity

The proposed regulation does not meet the standard of clarity because the proposed language only mimics the vagueness of terms used in the underlying statute without adequately specifying the conduct that is required or prohibited. For example, the terms “suggest or recommend,” as defined in the regulation, could arguably prohibit all communication of any nature regarding automotive repair dealers rather than narrowly limiting prohibited communication to that which affirmatively recommends selection of a different dealer than the one selected by the claimant.

Merely mentioning a specific repair dealer should not be adequate demonstration of a consumer’s choice without an insurer having had an opportunity to explain policy benefits. The regulation should clearly state a claimant’s right to have all information available from the insurer regarding the choice of a repair dealer before that choice is deemed to be conclusively made under the statute.

(3) Consistency

The proposed regulation is not in harmony with constitutional protections of free speech – especially commercial speech that is both lawful and intended to benefit consumers. The U.S. Constitution recognizes and protects commercial free speech as an essential underpinning of a free market economy and political system. The Constitution seeks to preserve and encourage the unfettered communication of ideas and information – something the proposed regulation would unavoidably curtail.

The proposed regulation also is inconsistent with department regulations applicable to fair settlement of insurance claims. Specifically, §2695.4(a) of the Fair Claims Settlement Practices regulations requires that insurers advise an insured of all the benefits to which the claimant is entitled. The proposed regulation stifles that communication and conflicts with §2695.4(a). The proposed regulation is inconsistent with the Fair Claims Settlement Practices regulations in both purpose (i.e. assuring equitable treatment of claimants) and effect (assuring a fair result for claimants). This conflict can only be resolved by allowing insurers to comply with the letter and spirit of the Fair Claims Settlement Practices regulations.

There is no public policy argument justifying a limit on an insurer’s ability to provide information to a claimant. Consumers do not want to make uninformed choices, and, to the contrary, want

to be advised of relevant information. Consumers overwhelmingly are satisfied with the services provided by their insurers in resolving automotive repair claims.

Comments on Specific Sections

Section 2698.93(b):

The objection to this subsection is based upon its lack of clarity -- also a defect of the underlying statute. If the purpose of regulation is to implement, interpret or make specific provisions that exist in statute, there is no purpose served by this subsection. The section could be deleted because it does nothing but repeat language of the statute. Alternatively, the section should be used to clarify that an insurer has the right to describe the availability of repair options to a claimant without violating the prohibition on "suggesting or recommending" a specific repair dealer.

Section 2698.93(c):

Clarity is critical in determining precisely the point in time at which a claimant is deemed to have "chosen" a particular automotive repair dealer. ACIC believes that a claimant should not be deemed to have chosen a specific automotive repair dealer under the statute prior to the time an insurer has had an opportunity to explain policy benefits and options available to the consumer that are offered by the insurer. This opportunity will assure that consumers have access to all relevant information prior to making a decision, and will further serve the department's objective to achieve insurer compliance with mandated fair claims practices.

Section 2698.93(d):

(1) This provision arguably could prohibit all communication regarding the insurer's direct repair program. If a claimant walked through the door and specified a repair facility, that act in itself could, under the regulation, be interpreted to prevent the insurer from explaining programs available to the insured under the policy. Commercial free speech rights assure that an insurer must have the opportunity to explain its direct repair program or other policy benefits at any time, regardless of a customer's preliminary selection of a repair facility.

Indeed, insurers not only have the right to explain benefits to which the claimant is entitled, but have an obligation to do so. The unfair claims practices provisions of the Insurance Code [§790.03(h)(1),(3) and (4)] impose on insurers the obligation to fully inform policyholders of all benefits to which they are entitled under their policies. Insurers take this responsibility seriously and certainly resist any effort, such as that reflected in the proposed regulation, to curtail their ability to fulfill their obligations. This provision is a "gag" order that will benefit no one but a handful of repair shops. Insurers'

interest in automotive repair claims is to assure that policyholders – to the extent possible -- have a positive experience and remain as policyholders with their insurers. The proposed regulation unduly restricts an insurer's ability to achieve that objective.

(3) This restriction – another prior restraint on an insurer's ability to discuss the claim with the policyholder – is contrary to the consumer's best interest. Not only is an insurer prohibited from commenting on the quality of the selected facility, the insurer would be prohibited from providing information about any other shops that do quality work. No one benefits from silence. No benefits inure to consumers under this prohibition.

(4) An insurer should not be prohibited from describing a direct repair program that offers a list of facilities from which the claimant may choose. This information exchange can only benefit consumers, and is critical to making an informed choice.

Section 2698.93(e):

This subsection targets a frequent concern of insurers that claimants may choose a repair facility without understanding that the insurer is only obligated to pay the reasonable costs of repair to restore a vehicle to its pre-accident condition and that the insurer does not necessarily have to pay the full invoice of any shop selected by the customer. This has been a source of complaints from consumers.

However, the section should not be limited to costs. An insurer should be allowed to describe the existence or nonexistence of applicable warranties. Many insurers warranty the work performed by repair facilities participating in their direct repair programs, and consumers have a right to know that information before getting their vehicles repaired. Many insurers assure the timely performance of repairs performed by shops participating in their direct repair programs. Consumers should have that information as well. Preferably, consumers will ask for information before making their selections of a repair facility, but they should have the information even if they didn't think to ask for it before making a choice.

Conclusion

Generally, in objecting to this regulation, ACIC seeks no more than insurers' right to serve their own customers by providing information and services that those customers are then free to accept or reject. The foundation of any free choice is information, and the proposed regulation would have the effect of curtailing the free flow of information from insurers, who have the information, to claimants who need the information. As the court stated in *Thompson v. Western States Medical Center, 535 U.S. 357, 374,* (quoted in *Allstate Insurance Co. and Sterling Collision Centers v. Abbott* (495 F.3d151): "Consumers benefit from more, rather than less, information. Attempting to control the outcome of the consumer decisions following such communications by restricting lawful commercial speech is not an appropriate way to advance a state interest in protecting consumers."

ACIC respectfully urges the department to investigate and document the existence of actual problems in insurer compliance with Insurance Code §758.5 before proceeding to adopt a regulation that would have the undesirable effect of limiting consumer access to relevant information. Moreover, any regulation should explicitly recognize an insurer's right and obligation to explain all of the benefits to which an insured is entitled.