



April 22, 2016

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RE: Notice of Proposed Rulemaking and Notice of Public Hearing – Anti-Steering in Auto Body Repairs
CDI Regulation File: Reg-2015-00015

Dear Ms. Potts:

On behalf of all the property casualty insurance trade organizations listed above, and the California Chamber of Commerce, we are writing to express our comments and questions to the California Department of Insurance's ("Department") proposed regulations on "Steering."

In these comments, we will, first, outline our view of the scope of the Department's legislatively-granted power to regulate in these areas. Thereafter, we will offer suggestions and questions which we hope will help the Department to improve the proposals.

The proposed amendments to subdivision (e) of section 2695.8 fail to comply with the standards of authority, reference, consistency, and necessity.

Authority – The Department has no authority to adopt the amendments to subdivision (e) of section 2695.8.

Government Code section 11349.1 requires all regulations to comply with the standard of authority. Government Code section 11349(b) provides, "'Authority' means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation."

Insurance Code sections 790.10, 12921 and 12926; Civil Code section 3333; and Government Code sections 11152 and 11342.2 are cited as authority for the proposed amendments to subdivision (e) of section 2695.8. However, none of the cited statutes permit or obligate the adoption of the amendments.

Insurance Code section 790.10 does not authorize the adoption of the proposed amendments.

Insurance Code sections 790.03 and 790.10 are part of the Unfair Insurance Practices Act (UIPA). The 11 subdivisions of section 790.03 define unfair and deceptive acts or practices in the business of insurance. The Informative Digest for the proposed amendments notes that section 790.10 gives the Insurance Commissioner the power to "administer" section 790.03 and the other provisions of the UIPA.

In citing section 790.10 as authority for the adoption of the proposed amendments, the Department of Insurance reasons that the Commissioner's power to administer the UIPA gives the Commissioner the authority adopt regulations which delineate conduct which constitutes unfair or deceptive acts within the meaning of the definitions set forth in section 790.03; the Informative Digest refers specifically to subdivisions (b) and (h) of section 790.03.

This reasoning was rejected by the Court of Appeal in *Association of California Insurance Companies v. Jones* (2015) 235 Cal.App.4th 1009. The Commissioner argued in *Jones* that the Commissioner's power to promulgate regulations to administer the UIPA gives the Commissioner the authority to define conduct that is unfair or deceptive through the adoption of a regulation. The Court of Appeal reviewed the provisions of the UIPA and concluded, "Read together, these provisions demonstrate that the Legislature did not give the Commissioner power to define by regulation acts or conduct not otherwise deemed unfair or deceptive in the statute." (*Jones* at p. 1030.)

The ruling in the *Jones* decision compels the conclusion that the power granted to the Commissioner in section 790.10 to adopt regulations to administer the UIPA does not authorize the adoption of the proposed amendments.

None of the other cited statutes provides authority for the adoption of the proposed amendments.

Insurance Code Sections 12921 and 12926

Subdivision (a) of section 12921 simply directs the Commissioner to perform the duties imposed upon him or her by the provisions of the Insurance Code and other laws relating to the business of insurance and to enforce those provisions and laws. As explained above, the provisions of the Insurance Code do not give the Commissioner the authority to adopt the proposed amendments, and therefore the Commissioner has no authority to enforce the amendments.

The other two subdivisions of section 12921 have no relevance to the authority for the proposed regulations. Subdivision (b) relates to the Commissioner's authority to delegate the power to approve settlements. Subdivision (c) relates to the Commissioner's acceptance and maintenance of records.

Insurance Code section 12926 does not provide authority for the adoption of the proposed amendments. Section 12926 states that the Commissioner must require every insurer to be in full compliance with the provisions of the Insurance Code. As explained above, the provisions of the Insurance Code do not authorize the adoption of the proposed amendments. It follows that the Commissioner may not require insurers to comply with the amendments.

Civil Code section 3333

Civil Code section 3333 specifies the measurement of damages for the breach of an obligation not arising from contract. The section has no relationship to the Commissioner's authority to adopt the proposed amendments.

Government Code sections 11152 and 11342.2

Section 11152 gives the head of each state department the authority to adopt regulations governing the activities of the department. The section has no direct relevance to the Commissioner's authority to adopt the proposed amendments.

Section 11342.2 gives a state agency general authority to adopt regulations to implement a statute, as long as the regulations do not conflict with the statute. The proposed amendments seek to implement Insurance Code section 790.03; however, as explained above, the proposed amendments are in conflict with section 790.03.

Reference - The proposed amendments to subdivision (e) of section 2695.8 fail to comply with the reference standard.

Government Code section 11349.1 requires all regulations to comply with the standard of reference. Government Code section 11349(e) provides, "'Reference' means the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation."

Insurance Code sections 758.5 and 790.03 are cited as reference for the proposed amendments; however, neither statute provides reference for the amendments.

Insurance Code section 758.5 is an inappropriate reference for the proposed amendments to section 2695.8(e).

The proposed amendments would be included in a regulatory section that is part of the Fair Claims Settlement Practices Regulations (Section 2695.1 *et seq.*).

The Department of Insurance may have authority to adopt regulations that interpret or implement section 758.5; however, any such regulations may not be included in the Fair Claims Settlement Practices Regulations.

The existing section 2695.8 and the proposed amendments seek to define conduct that violates Insurance Code section 790.03. The Court of Appeal's ruling in the *Jones* decision makes clear that the department does not have the authority to establish any such definition through the adoption of a regulation.

Subdivision (f) of section 758.5 states, "(f) The powers of the commissioner to enforce this section shall include those granted in Article 6.5 (commencing with Section 790) of Chapter 1 of part 2 of division 1."

Subdivision (f)'s reference to the Commissioner's enforcement powers does not grant the Commissioner new powers to adopt regulations. The enforcement powers mentioned in the subdivision are the enforcement powers the Commissioner has under the UIPA. Those powers do not include the authority to adopt regulations which define unfair or deceptive insurance practices. In the *Jones* decision, the Court of Appeal reviewed the provisions of the UIPA, including section 790.08 which describes the powers vested in the Commissioner. The court concluded, "Thus, section 790.08 emphasizes that the enforcement role of the Commissioner is tethered to acts and practices 'hereby declared to be unfair or deceptive,' to wit, defined or determined in the UIPA." (*Jones*, at p. 1032.)

Insurance Code section 790.03 is an inappropriate reference for the proposed amendments to subdivision (e) of section 2695.8.

The proposed amendments may not be adopted as an implementation or an interpretation of Insurance Code section 790.03.

In the *Jones* case, the Insurance Commissioner pointed to two California Supreme Court decisions which held that statutes gave two state agencies the authority to adopt regulations in order to fill in the details of the statutes. The Commissioner contended that the UIPA gave him similar authority to fill in the as to what is "misleading" under section 790.03.

The Court of Appeal rejected the Commissioner's contention. The first case on which the Commissioner relied, *Ford Dealers Assn. v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, upheld a DMV regulation that defined prohibited practices that were identified in the Vehicle Code. The Court of Appeal distinguished the Commissioner's regulation from the DMV regulation. The court explained, "We do not doubt that the Legislature could have delegated to the Commissioner the kind of broad authority conferred on the DMV in *Ford Dealers*; it did not do so in the UIPA." (*Jones* at p. 1033.)

The second case relied on by the Commissioner, *Credit Ins. Gen. Agents Assn. v. Payne* (1976) 16 Cal.3d 651, upheld the Insurance Commissioner's authority to adopt a regulation interpreting credit insurance statutes. The Court of Appeal concluded that the *Payne* decision was not applicable to the Commissioner's authority to adopt a regulation which sought to interpret or implement Insurance Code section 790.03. The court observed, "Once again, these statutes governing credit insurance do not contain the same language or fit the same statutory context as section 790.03 does in the UIPA." (*Jones* at p. 1036.)

The department's reliance on section 790.03 as reference for the proposed amendments is not warranted. The amendments may not be adopted under the guise of implementing Insurance Code section 790.03. In ruling that the Legislature did not give the Commissioner the authority to adopt a regulation defining an unfair and deceptive practice set forth in section 790.03, the *Jones* decision concluded that "under that guise of 'filling in the details,' the Commissioner therefore could not do what the Legislature has chosen not to do." (*Jones* at p. 1033.)

Consistency - The proposed amendments to subdivision (e) of section 2695.8 fail to comply with the consistency standard.

Government Code section 11349.1 requires all regulations to comply with the standard of consistency. Government Code section 11349(d) provides, "'Consistency' means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law."

The proposed amendments are inconsistent with the *ACIC v. Jones* decision.

The Court of Appeal stated its fundamental holding in the *Jones* decision as follows: "The language of the UIPA reveals the Legislature's intent to set forth in statute what unfair or deceptive trade practices are prohibited, and not delegate that function to the Commissioner." (*Jones* at p. 1030.)

The proposed amendments' attempt to define conduct that falls within the meaning of provisions in Insurance Code 790.03 is at odds with the holding in *Jones*.

Furthermore, in our view, the proposed amendments to subdivision (e) of section 2695.8 is in conflict with the first amendment right to free speech under the United States Constitution and California Constitution (Cal. Const. art.1, Section 2 (a)). Insurers have the right to freely communicate with their policyholders. We do not believe the Department's proposed regulation requiring an insurer to have a "clear documentation in the claim file" before we can say anything is consistent with our constitutional rights. We are not aware of any case law that would indicate that what the Department is proposing passes constitutional muster; and therefore, must be stricken.

Necessity - The proposed amendments to subdivision (e) of section 2695.8 fail to comply with the necessity standard.

Government Code section 11349.1 requires all regulations to comply with the necessity standard. Government Code 11349(a), which defines the necessity standard, provides that the need for the regulation must be demonstrated in the rulemaking record "by substantial evidence." Title 10 CCR section 10(b) explains that in order to meet the necessity standard, the rulemaking file must include "facts, studies, or expert opinion."

The Informative Digest fails to include substantial evidence for the need for the proposed amendments. The Digest states that "the Department has received information that insurers are making statements that are in direct violation of Ins. Code section 758.5." The Government Code requires more than this general statement in order to achieve compliance with the standard of necessity. The department needs to put forward numbers and facts that prove the amendments are needed.

Industry Proposed Changes to the Anti-Steering in Auto Body Repairs

The coalition offers the following changes to the proposed regulations:

Subdivision (e)(3)(B) and (C)—Clear Documentation

Insurance Code section 758.5 does not include any provision on documentation. The amendments' requirement for "clear" documentation is itself unclear. It is unclear to insurers what documentation would satisfy the amendments' requirement.

Subdivision (e)(4)(A)(B)(C) of Section 2695.8.

The regulations would require insurers to inspect a claimant's car within 6 days from the time the claimant makes the car available. In regulatory terms, "claimant" means the person filing the claim, including policy holders and the third party claimants. We have no contractual relationship with third party claimants and think the regulations should only apply to our insureds. The regulations should also allow for inspection times beyond 6 days in unusual circumstances, such as catastrophes.

- In Subsection (e)(4)(A)(B)(C) of Section 2695.8: change the word "claimant" to "insured"
- In Section (e)(4)(A): "...the insurer shall provide an option to inspect the damaged vehicle within six (6) business days after receiving the notice of claim, provided the ~~claimant~~ insured makes the vehicle available for inspection."
- In Section (e)(4)(A): Include an exception for instances where the insured has requested a date later than 6 days and include an exception for catastrophic events.

The regulations propose that insurers not ask customers to travel more than 10 miles for urban areas with populations over 100,000 and 25 miles for everywhere else. We believe that the 25 mile limit, state wide is more reasonable approach given the geography of California.

- In Section (e)(4)(C): Change the reasonable distance requirement to 25 miles (regardless of city size)

The regulations would not allow insurers to have inspection centers in claim offices or located at their direct repair shops. This restriction is costly and prohibitive. Requesting a vehicle inspection at a repair shop is a good claims practice. It helps to assure a claimant that the repair evaluation provided by the chosen shop will result in a safe and satisfactory repair. It also facilitates timely and cost-efficient inspections, which benefits consumers. There is nothing in section 758.5 that justifies or requires the elimination of this good claims practice. A parenthetical note, it is difficult to understand why this proposed amendment makes a specific reference to shops in an insurer's direct repair program. The prohibition against requiring an inspection is intended to apply to any shop designated by an insurer; there is no reason to single out shops in a direct repair program.

- In Section (e)(5): "...require that the claimant have the vehicle inspected at ~~or~~ by an automobile repair shop where the insurer has a Direct Repair Program..."

Conclusions

The coalition believes that the proposed amendments to subdivision (e) of section 2695.8 and section 2695.8 itself may not be adopted as part of the Fair Claims Settlement Practices Regulations. The department may have the authority to adopt regulations which implement section 758.5, but any such regulations must be adopted outside of the Regulations.

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), or Steve Suchil, AIA Assistance Vice President (916-718-9568/ssuchil@aiadc.org), or Marti Fisher, California Chamber of Commerce, (916-930-1265/marti.fisher@calchamber.com).