

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
JOHN O. PASTORE COMPLEX
1511 PONTIAC AVENUE
CRANSTON, RHODE ISLAND 02920**

IN THE MATTER OF:

Mitchell International, Inc. and its Workcenter Total Loss Product's Application Under R.I. Gen. Laws § 27-9.1-4(25) and 23-RICR-20-40-2.8(A)(2) (Formerly Insurance Regulation 73)

**Division of Insurance Written Comments Regarding the
Application of Mitchell International, Inc. and its'
Workcenter Total Loss Product's Application**

The Division of Insurance of the Department of Business Regulation (the "Insurance Division" or the "Division") submits these written comments pursuant to a request from the Hearing Officer at the March 12, 2018 Pre-Hearing Conference. At that Conference, the Hearing Officer requested the Division to explain why it was not opposing the Application, and to explain its position on whether Mitchell International, Inc.'s WorkCenter Total Loss Product ("Mitchells" or "Applicant") should be qualified as a nationally recognized compilation of retail values commonly used by the automotive industry (the "Application" submitted on February 23, 2018). The Division will briefly explain the history behind why this process exists and then identify criteria the Hearing Officer should consider in her decision.

Historical Backdrop

In 2013, the Rhode Island legislature adopted changes to Rhode Island General Laws § 27-9.1-4 in passing H5263 and S0465, which were signed into law by Governor Chafee and codified in 2013 Public Law Chapters 504 and 509. The Division needed to amend Insurance Regulation 73

(“Reg. 73,” now known as 230-RICR-20-40-2, attached as Exhibit 1). The Division conducted a full rulemaking process, receiving more than twenty comments and supplemental comments on how the regulation should be revised. On January 28, 2014, the Division issued a Concise Explanatory Statement (attached as Exhibit 2) of its final changes to Reg. 73, listing the changes and addressing the comments it did not agree with. Reg. 73, Section 8(A)(2) stated: “fair market value means the retail value of the motor vehicle as set forth in a current edition of a nationally recognized compilation of retail values commonly used by the automotive industry to establish values of motor vehicles.” Section 8A(2)(a) then required that filings needed to be submitted for valuation companies to be considered for qualification as a “nationally recognized compilation of retail values commonly used by the automotive industry to establish values of motor vehicles.” Eight entities submitted applications for consideration in February and March. On March 24, 2014, the Division issued Insurance Bulletin 2014-2 Total Loss Valuation Services (attached as Exhibit 3) articulating a position on the language in Reg. 73. The Bulletin approved two valuation companies, National Automobile Dealers Association (“N.A.D.A.”) and Kelly Blue Book (“KBB”), and denied the six other applicants, including Mitchell International, Inc because they had “not established that they are ‘used by the automotive industry’ which is a necessary criteria under the statute.”

After the Division issued the Bulletin, the Property Casualty Insurance Companies of America (also known as PCI) filed suit alleging violations of the Rhode Island Administrative Procedures Act, seeking declaratory and injunctive relief regarding Reg. 73 and Bulletin 2014-2 on April 18, 2014. On September 10, 2014, Justice Silverstein issued a decision denying the injunctive relief (attached as Exhibit 4). PCI filed a second amended complaint on December 8, 2015 seeking declaratory relief regarding the regulation and bulletin, and that suit remains ongoing.

Criteria for Consideration

The Division recommends the Hearing Officer adopt a three-part standard when reviewing

any application under this law and regulation. The first inquiry should be to determine whether the applicant is “a nationally recognized compilation of motor vehicle values.” The second inquiry should be whether the applicant is “commonly used by the automotive industry to establish values of motor vehicles.” And third, whether the applicant applies arbitrary deductions taken from comparable vehicle values when calculating the total loss value.

In order to reach such a determination, the Division believes the Hearing Officer may need to define several terms, including “compilation” and “automotive industry.” The Division has issued guidance regarding both terms previously. In Bulletin 2014-2, the Division stated that it “interprets the term automotive industry to be those entities that actually sell automobiles.” The Division believes that this definition represents the legislative intent behind the 2013 amendments to R.I. Gen. Laws § 27-9.1-4(25), and that it is a reasonable interpretation of the words of the statute, which do not arise elsewhere in Title 27. Without explicitly defining “national compilation,” the Division did accept an electronic or paper form of a compilation. Both KBB and N.A.D.A. exist and are used by insurers in both a book and an electronic format, and the Division believes that they are primarily used by consumers in those electronic formats. Looking beyond the Division’s guidance, we would provide that Merriam-Webster defines compile as “to collect and edit into a volume,” and Black’s Law Dictionary (8th Edition) defines compilation as “a collection of literary works arranged in an original way.” But neither definition restricts a compilation to a paper format.

In September 2017, Mitchells began discussing submitting the Application with the Division. During those discussions, the Division questioned whether the company intended to apply arbitrary deductions taken from comparable vehicle values its calculations of total loss values. Mitchells assured the Division that while its programming had an option to apply such deductions, that feature would be disabled in Rhode Island. 230-RICR-20-40-2.8(A)(4)(b) prohibits such

deductions, and the Division had wanted to ensure the applicant would comply with the regulation. Having received that assurance, the Division explained that it would not oppose the current Application. But to be clear, not opposing the Application does not mean the Division endorses the Application. Rather, the Division believes the Applicant has due process rights and deserves a fair hearing and a written decision on its Application. In Bulletin 2014-2, the Division denied the Applicant's 2014 application for approval, and the current application is similar to the company's 2014 application (attached as Exhibit 5).

RESPECTFULLY SUBMITTED:
Division of Insurance
By its attorney:



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CERTIFICATION

I hereby certify that on this 2nd day of April, 2018, a copy of these comments were sent by first class mail postage prepaid or by email to the following:

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Philadelphia Insurance Companies Sam Garro, VP Compliance Dept. One Bala Plaza, Suite 100 Bala Cynwyd, PA 19004	Audatex Diane Klund, Director Reg. & Gov't Affairs -- address unknown --
Auto Bid LLC. 7930 Santa Fe. Drive Ste. 201 Overland Park, Kansas 66204	National Automobile Dealers Assoc. - NADA 8400 Westpark Drive, Tysons, VA 22102
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Exhibit 1

State of Rhode Island and Providence Plantations
DEPARTMENT OF BUSINESS REGULATION
Division of Insurance
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INSURANCE REGULATION 73

UNFAIR PROPERTY/CASUALTY CLAIMS SETTLEMENT PRACTICES

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Section 1. **Authority**

This Regulation is adopted under the authority of R.I. Gen. Laws § 27-9.1-1 *et seq.* and R.I. Gen. Laws § 42-14-17.

Section 2. **Purpose**

The purpose of this Regulation is to establish minimum standards for the investigation and disposition of property and casualty claims arising under insurance policies or certificates as defined in this Regulation and issued to residents of Rhode Island. It is not intended to cover claims involving workers' compensation, fidelity, suretyship, or boiler and machinery insurance. The various provisions of this regulation are intended to define procedures and practices which constitute unfair claims practices. Nothing herein shall be construed to create nor imply a private cause of action for violation of this regulation. This is merely a clarification of original intent and does not indicate any change of position.

Section 3. Definitions

All definitions contained in R.I. Gen. Laws §§ 27-9.1-1 *et seq.*, and 27-29-1 *et seq.* are hereby incorporated by reference. As otherwise used in this regulation:

- A. "Aftermarket Part," as defined in R.I. Gen. Laws § 27-10.2-1, means a motor vehicle body replacement part that is not an original equipment manufacturer part.
- B. "Automobile Body Shop," as defined in R.I. Gen. Laws § 5-38-1, means any establishment, garage, or work area enclosed within a building where repairs are made or caused to be made to motor vehicle bodies, including fenders, bumpers, chassis and similar components of motor vehicle bodies as distinguished from the seats, motor, transmission and other accessories for propulsion and general running gear of motor vehicles, except as provided in R.I. Gen. Laws § 5-38-20.
- C. "Agent" means any individual, corporation, association, partnership or other legal entity authorized to represent an insurer with respect to a claim.
- D. "Claimant" means either a first party claimant, a third party claimant, or both.
- E. "Claim File" means any retrievable electronic file, paper file or combination of both.
- F. "Days" means calendar days.
- G. "Department" means the Rhode Island Department of Business Regulation.
- H. "Director" means the Director of the Department of Business Regulation or his or her designee.
- I. "Division" means the Insurance Division of the Department of Business Regulation.
- J. "Documentation" includes, but is not limited to, all pertinent communications, transactions, notes, work papers, claim forms, bills, and explanation of benefits forms relative to the claim.
- K. "Fair Market Value" means the retail value of a motor vehicle as set forth in a current edition of a nationally recognized compilation of retail values commonly used by the automotive industry to establish values of motor vehicles.

- L. "First Party Claimant" means an individual, corporation, association, partnership or other legal entity asserting a right to payment under his, her or its insurance policy or insurance contract arising out of a loss covered by the policy or contract.
- M. "Investigation" means all activities of an insurer directly or indirectly related to the determination of liabilities under coverages afforded by an insurance policy or insurance contract.
- N. "Notification of Claim" means any notification, by a claimant, whether in writing or other means, acceptable under the terms of an insurance policy to an insurer or its agent which reasonably apprises the insurer of the facts pertinent to a claim.
- O. "Original equipment manufacturer part" or "OEM part" shall be defined as in R.I. Gen. Laws § 27-10.2-1(2).
- P. "Replacement Vehicle" means a motor vehicle which is of like kind and quality. A motor vehicle of like kind and quality shall be: (i) manufactured by the same manufacturer; (ii) be the same or newer model year; (iii) have a similar body style; (iv) have similar options and mileage; and (v) be in as good or better overall condition as the motor vehicle deemed to be a total loss.
- Q. "Third Party Claimant" means any person asserting a claim against any person holding insured status under a policy or certificate of an insurer.
- R. "Writing" includes electronic communications pursuant to R.I. Gen. Laws § 42-127.1-1 *et seq.*
- S. "Written communications" includes all correspondence, regardless of source or type, that is materially related to the handling of the claim.

Section 4. File and Record Documentation

Each insurer's claim files for policies or certificates are subject to examination and investigation by the Director or by the Director's duly appointed designees. To aid in such examination:

- A. The Insurer shall maintain claim data that is accessible and retrievable for examination. An insurer shall be able to provide the claim number, line of coverage, date of loss and date of payment of the claim, date of denial or date closed without payment. This data must be available for all open files and for closed files for the current year and four (4) preceding years.

- B. Detailed documentation shall be contained in each claim file in order to permit reconstruction of the insurer's activities relative to each claim.
- C. Each relevant document within the claim file shall be noted as to date received, date processed, or date mailed.
- D. For those insurers that do not maintain hard copy files, claim files must be in appropriate electronic media and be capable of duplication to hard copy.

Section 5. Misrepresentation of Policy Provisions

- A. No insurer shall fail to fully disclose to first party claimants all pertinent benefits, coverages, or other provisions of a policy or contract under which a claim is presented.
- B. No agent shall conceal from first party claimants benefits, coverages or other provisions of any insurance policy or insurance contract when such benefits, coverages or other provisions are pertinent to a claim.
- C. A first party claim shall not be denied on the basis of failure to exhibit property unless there is documentation of breach of the policy provisions in the claim file.
- D. No insurer shall deny a claim based upon the failure of a first party claimant to give written notice of loss within a specified time limit unless the written notice is a written policy condition, or first party claimant's failure to give written notice after being requested to do so is so unreasonable as to constitute a breach of the first party claimant's duty to cooperate with the insurer.
- E. No insurer shall indicate to a first party claimant on a payment draft, check or in any accompanying letter that said payment is "final" or "a release" of any claim or specified part of a claim unless the policy limit has been paid or there has been a compromise settlement agreed to by the first party claimant and the Insurer as to coverage and amount payable under the contract.
- F. No insurer shall issue checks or drafts in partial settlement of a loss or claim under a specific coverage that contains language purporting to release the insurer or its insured from total liability.

Section 6. Failure to Acknowledge Pertinent Communications

- A. Every insurer, upon receiving notification of claim shall, within fifteen (15) days acknowledge the receipt of such notice in writing unless payment is made within that period of time.

- B. In addition to the requirements in subsection 6(A), the insurer upon receiving notification of claim shall inform the claimant in the insurer's written acknowledgment of receipt of the claim, or sooner if the claimant inquires, if coverage exists for the rental of an automobile comparable to the claimant's damaged vehicle.
- C. Every insurer, upon receipt of any inquiry from the Department regarding a claim shall, within twenty-one (21) days of receipt of such inquiry, furnish the Department with an adequate written response to the inquiry.
- D. An appropriate reply in writing shall be made within fifteen (15) days on all other pertinent communications from a claimant which reasonably suggest that a response is expected.
- E. Upon request by an Automobile Body Shop, an insurer must notify the Automobile Body Shop of the name(s), address(es), telephone number(s) of any lienholder(s) on the vehicle which is the subject of the claim.
- F. Every insurer, upon receiving notification of claim, shall promptly provide necessary claim forms, instructions and reasonable assistance so that first party claimants can comply with the policy conditions and the insurer's reasonable requirements. Compliance with this paragraph within fifteen (15) days of notification of a claim shall constitute compliance with Subsection A of this section.

Section 7. Standards for Prompt, Fair and Equitable Settlements Applicable to All Insurers

- A. Within twenty one (21) days after receipt by the insurer of properly executed proofs of loss, the first party claimant shall be advised of the acceptance or denial of the claim by the Insurer. No insurer shall deny a claim on the grounds of a specific provision, condition, or exclusion unless reference to such provision, condition, or exclusion is included in the denial. The denial must be given to the first party claimant in writing and the claim file of the insurer shall contain such documentation of the denial as required by section 4.

Where there is a reasonable basis supported by specific information available for review by the Department that the first party claimant has fraudulently caused or contributed to the loss, the insurer is relieved from the requirements of this subsection; provided, however, that the first party claimant shall be advised of the acceptance or denial of the claim within a reasonable time for full investigation after receipt by the insurer of a properly executed proof of loss.

- B. If the Insurer needs more time to determine whether a first party claim should be accepted or denied, it shall notify the first party claimant within twenty-one (21) days after receipt of the proofs of loss, giving the reasons more time is needed. If the investigation remains incomplete, the insurer shall, forty-five (45) days from the initial notification and every forty-five (45) days thereafter, send to the first party claimant a letter setting forth the reasons additional time is needed for Investigation.

Where there is a reasonable basis supported by specific information for suspecting that the first party claimant has fraudulently caused or contributed to the loss, the first party claimant shall be advised of the acceptance or denial of the claim by the insurer within a reasonable time for full investigation after receipt by the insurer of a properly executed proof of loss.

- C. Insurers shall not fail to settle a first party claims on the basis that responsibility for payment should be assumed by others except as may otherwise be provided by policy provisions.
- D. No insurer shall commence or continue negotiations for settlement of a claim if the claimants rights may be affected by a statute of limitations, unless the insurer has given the claimant written notice of such limitation. Notice shall be given to first party claimants at least thirty (30) days and to third party claimants at least sixty (60) days before the date on which any such statute of limitations may expire.
- E. No insurer shall make statements indicating that the rights of a third party claimant may be impaired if a form or release is not completed within a given period of time unless the statement is given for the purpose of notifying the third party claimant of the provision of a statute of limitations.
- F. The insurer shall affirm or deny liability within a reasonable time and shall tender payment of all claims in which damages are not in dispute within thirty (30) days of affirmation of liability. In claims where multiple coverages are involved payments which are not in dispute and where the payee is known should be tendered within thirty (30) days if such payment would terminate the insurer's known liability under that individual coverage.
- G. No insurer shall request or require any first party claimant to submit to a polygraph examination unless authorized under the applicable insurance contract and state law.
- H. If, after an insurer denies a claim, the claimant objects to such denial, , the insurer shall notify the Claimant in writing that he or she may have the

matter reviewed by the Rhode Island Department of Business Regulation, Division of Insurance, via the contact information for the Department promulgated in a Bulletin for this specific purpose

Section 8. Standards for Prompt, Fair and Equitable Settlements Applicable to Automobile Insurance

A. Total Loss Vehicles

- (1) Pursuant to R.I. Gen. Laws § 27-9.1-4(25) an insurer may not designate a vehicle a total loss if the cost to rebuild or reconstruct the motor vehicle to pre accident condition is less than 75% of the fair market value of the motor vehicle immediately preceding the time it was damaged unless the requirements of subsection (3) below are met.
- (2) Fair market value means the retail value of the motor vehicle as set forth in a current edition of a nationally recognized compilation of retail values commonly used by the automotive industry to establish values of motor vehicles.
 - a. To qualify as “nationally recognized compilation of retail values commonly used by the automotive industry,” a filing must be made with the Department requesting that the entity be deemed to qualify under R.I. Gen. Laws § 27-9.1-4(25). The filing may be made by the entity itself or any person seeking qualification of an entity for this purpose. Initial filings should be made within ten (10) days of the effective date of this section.
 - b. The Department will review the filings and determine whether it will hold a hearing on those entities that have made such application to obtain input from all interested persons or approve or reject the filings without further information.
 - c. The Department will publish a bulletin identifying those entities that qualify. The bulletin will be updated as entities are added or removed due to changes in circumstances.
 - d. Applications requesting to add entities may be filed at any time and will be addressed by the Department in due course.
- (3) If the total cost to rebuild or reconstruct the motor vehicle is less than 75% the vehicle may be considered a total loss with the written agreement of the owner. The owner is the person or entity listed on the title to the motor vehicle if a title exists.

- (4) a. A cash settlement shall be based upon the fair market value of the motor vehicle less any deductible provided in the policy, if applicable, including all applicable taxes, title, registration and other fees incident to transfer of evidence of ownership of a comparable automobile.
- b. When the cash settlement amount is affected by betterment or depreciation, the insurer must support the deviation by documentation in the claim file by giving particulars of the automobile condition that warrant said deviation. Any deductions or betterment from fair market value, including deduction for salvage, must be measurable, discernible, itemized and specified as to dollar amount and shall be appropriate in amount. Deduction shall not be made for reconditioning or dealer preparation. The basis for determining fair market value shall be fully explained to the claimant. All information that is the basis for such reduction shall be contained in the claim file and a copy of the valuation shall be provided to the claimant.
- c. If the insurer in the process of adjusting a total loss makes a deduction for salvage of the claimant's vehicle, the insurer must furnish the claimant with the name and address of a salvage dealer who will purchase the salvage for the amount deducted.

B. Replacement Vehicles and Cash Settlement.

When the policy provides for the adjustment and settlement of first party automobile total losses on the basis of fair market value or a replacement with another of like kind and quality, one of the following methods shall apply:

- (1) The insurer may elect to offer a replacement automobile that is at least comparable in that it will be by the same manufacturer, same or newer year, similar body style, similar options and mileage as the first party claimant vehicle and in as good or better overall condition and available for inspection at a licensed dealer within a reasonable distance of the first party claimant's residence. The insurer shall pay all applicable taxes, title, registration and other fees incident to transfer of evidence of ownership of the automobile paid, at no cost other than any deductible provided in the policy. The offer and any rejection thereof must be documented in the claim file.
- (2) (i) The insurer may elect a cash settlement based upon the fair market value of the motor vehicle less any deductible provided in the policy including all applicable taxes, title, registration and fees incident to transfer of evidence of ownership of a comparable automobile.

- (ii) When the cash settlement amount is affected by betterment or depreciation, the insurer must support the deviation by documentation in the claim file by giving particulars of the automobile condition that warrant said deviation. Any deductions or betterment from fair market value, including deduction for salvage, must be measurable, discernible, itemized and specified as to dollar amount and shall be appropriate in amount. Deduction shall not be made for reconditioning or dealer preparation. The basis for determining fair market value shall be fully explained to the claimant. All information that is the basis for such reduction shall be contained in the claim file and a copy of the valuation shall be provided to the claimant.

If the insurer in the process of adjusting a total loss makes a deduction for salvage of the claimant's vehicle, the insurer must furnish the claimant with the name and address of a salvage dealer who will purchase the salvage for the amount deducted.

- (3) Right of Recourse - If the insurer is notified within thirty-five (35) Days of the receipt of the claim draft that the insured cannot purchase a comparable vehicle for the fair market value, the insurer shall reopen its claim file and the following procedure(s) shall apply:
 - (i) The insurer may locate a comparable vehicle by the same manufacturer, same year, similar body style and similar options and price range for the insured for the fair market value determined by the insurer at the time of settlement. Any such vehicle must be available through licensed dealers;
 - (ii) The insurer shall either pay the insured the difference between the fair market value before applicable deductions and the cost of the comparable vehicle of like kind and quality which the insured has located, or negotiate and effect the purchase of this vehicle for the insured;
 - (iii) The insurer may elect to offer a replacement in accordance with the provisions set forth in Section 8(B)1; or
 - (iv) The insurer may conclude the loss settlement as provided for under the appraisal section of the insurance contract in force at the time of loss. This appraisal shall be binding against both parties, but shall not preclude or waive any other rights either party has under the insurance contract or a common law.

The insurer is not required to take action under this subsection if its documentation to the claimant at the time of settlement included written notification of the availability and location of a specified and comparable vehicle of the same manufacturer, same year, similar body style and similar options in as good or better condition as the total loss vehicle which could have been purchased for the fair market value before applicable deductions. The documentation shall include the vehicle identification number.

C. Vehicle Repairs

- (1) Partial losses shall be settled on the basis of a written appraisal or for claims less than \$2,500 on the basis of an appraisal or estimate. The insurer shall supply the claimant with a copy of the appraisal upon which the settlement is based. The appraisal shall be reasonable, in accordance with applicable policy provisions, and of an amount which will allow for repairs to be made in a workmanlike manner. If the claimant subsequently claims, based upon a written appraisal which he or she obtains, that necessary repairs will exceed the written appraisal prepared by or for the insurer, the insurer shall:
 - (i) pay the difference between the written appraisal and a higher appraisal obtained by the claimant, or
 - (ii) promptly provide the claimant with the name of at least one Automobile Body Shop that will make the repairs for the amount of the written appraisal . If the insurer designates only one or two such repairers, the insurer shall assure that the repairs are performed in a workmanlike manner. The insurer shall maintain documentation of all such communications. The claimant shall not be required to use said Automobile Body Shop; however, the insurer shall not be required to pay for the difference between the insurer's written appraisal and the claimant's appraisal if the claimant chooses to use another Automobile Body Shop.
- (2) When settling a claim, the amount of the settlement shall allow for the motor vehicle to be repaired to its condition prior to the loss within a reasonable time period.
- (3) When the amount claimed is reduced because of betterment or depreciation all information for such reduction shall be contained in the claim file. The deductions shall be itemized and specified as to dollar amount and shall be appropriate for the amount of deductions.
- (4) An insurer may not withhold payment to a claimant, pending reinspection under R.I. Gen. Laws § 27-10.1-9.

(5) Aftermarket Crash Parts

- (a) The purpose of this subsection is to set forth standards for the prompt, fair and equitable settlements applicable to automobile insurance with regard to the use of aftermarket crash parts. It is intended to regulate the use of aftermarket crash parts in automobile damage repairs paid by insurers. It also requires that all aftermarket crash parts, as defined in this section, be identified and be of the same quality as the original part.
- (b) For motor vehicles less than thirty (30) months beyond the date of manufacture, the insurer shall not specify the use of an aftermarket crash part or used parts whether OEM or otherwise, for the repair of the motor vehicle unless the automobile body shop has written consent from the claimant pursuant to R.I. Gen. Laws § 27-10.2-2.
- (c) All aftermarket crash parts, which are subject to this section and manufactured after the effective date of this section, shall carry sufficient permanent non-removable identification so as to identify its manufacturer. Such identification shall be accessible to the extent possible after installation.
- (d) For all motor vehicles thirty (30) months or more beyond date of manufacture, no insurer shall require the use of aftermarket crash parts in the repair of an automobile unless the aftermarket crash part is at least equal in kind and quality to the original part in terms of fit, quality and performance. Insurers specifying the use of aftermarket crash parts, when allowable under R.I. Gen. Laws § 27-10.2-2, shall consider the cost of any modifications which may become necessary when making the repair.

D. Steering

- (1) The purpose of R.I. Gen. Laws § 27-29-4 is to protect consumers from unfair methods of competition or unfair or deceptive acts or practices. Specifically, the legislative intent of subsection (15) is to assure consumers (first and third party claimants) the right to have a free choice in selecting an automobile body repair shop. The purpose of this section is to clarify insurance companies' obligations pursuant to R.I. Gen. Laws § 27-29-4(15).
- (2) R.I. Gen. Laws § 27-29-4(15) defines one unfair method of competition and unfair or deceptive act or practice in the business of insurance as:

[r]equiring that repairs be made to an automobile at a specified auto body repair shop or interfering with the insured's or claimant's free choice of

repair facility. The insured or claimant shall be promptly informed by the insurer of his or her free choice in the selection of an auto body repair shop. Once the insured or claimant has advised the insurer that an auto body repair shop has been selected, the insurer may not recommend that a different auto body repair shop be selected to repair the automobile. [Emphasis added]

- (3) When a claim is reported to an insurer, the insurer must promptly inform the claimant (first or third party) of his or her free choice in the selection of an automobile body repair shop. The insurer may not require repairs to be made at a specific auto body shop or interfere with the insured's or claimant's free choice of repair facility. In addition, once the insured or claimant tells the insurer that he/she has selected an automobile body repair shop, the insurer may not recommend a different auto body repair shop.
- (4) R.I. Gen. Laws § 27-29-4(15) does not prevent an insurer from communicating true information to a consumer. The mere transmittal of information does not constitute "steering." Providing truthful, non-coercive information about options available to consumers is not a "recommendation" prohibited by the statute. The fact that a consumer alters his or her choice of repairer after speaking with an insurer does not itself establish a violation of the statute. However, an insurer may not disseminate false information. At no time shall an insurer make any misrepresentation to the claimant (first or third party) about any of the following: the limitations, scope, and/or quality of the work of any automobile body repair shop or of the warranty or guarantee provided by any shop for the work performed.
- (5) The choice of an auto body shop is the consumers. Insurers should guide their conduct by that principle. Examples of conduct, in the totality of the circumstance, that constitute "interfering" can be found in the Department's administrative decision in [Providence Auto Body v. Allstate Insurance Company, DBR 07-I-0114](#). Further, the Department does not interpret R.I. Gen. Laws § 27-29-4(15) as prohibiting the insured or claimant from receiving, or the insurance company from conveying to, the insured or claimant information concerning the insurer's obligations and benefits under the contract (policy).
- (6) The provisions of this section also apply to claims involving motor vehicle glass installation.
- (7) Insurers shall not require that vehicles be removed from a repair shop for purposes of appraisal, where an appraisal may reasonably be conducted at the repair shop in question. While insurers may request appraisal at a centralized location, if the owner does not agree the appraisal should occur

at the consumers' selected repair shop or other requested location unless there are documented circumstances of impossibility.

E. Miscellaneous Requirements

- (1) Where liability and damages are reasonably clear, insurers shall not recommend that third party claimants make claim under their own policies solely to avoid paying claims under such insurer's policy.
- (2) Insurers shall not require a claimant to travel an unreasonable distance to inspect a replacement automobile.
- (3) In order to fully compensate for the loss to the consumer, the insurer must include applicable sales tax in its calculation of settlement value in any total loss claim.
- (4) The claimant may exercise his or her right to arbitration pursuant to R.I. Gen. Laws § 27-10.3-1.
- (5) An insurer shall include the first party claimant's deductible, if any, in subrogation demands. Pursuant to R.I. Gen. Laws § 27-8-12 upon settlement of the subrogation claim, the first party claimant's insurer shall pay the first party claimant the full deductible or the amount collected if less than the full deductible, less the first party claimant's prorated share of the subrogation expenses, if any. The subrogation expenses, as opposed to the first party claimant's deductible, are subject to prorating based on percentage of fault. The insurer may only retain funds in excess of the deductible portion of the recovery as set forth in this section.
- (6) When the insurer elects to repair and designates a specific repair shop for automobile repairs, the insurer shall cause the damaged automobile to be restored to its condition prior to the loss at no additional cost to the claimant other than as stated in the policy and within a reasonable period of time.
- (7) Storage and Towing. Storage and towing rates set by regulation or order of an administrative agency with jurisdiction over that subject matter, shall be considered the appropriate and reasonable charges for those services. The insurer shall provide reasonable notice to a first or third party claimant prior to termination of payment for automobile storage. Such insurer shall provide reasonable time for the claimant to remove the vehicle from storage prior to the termination of payment.

The insurer shall provide written notice to a claimant, with a copy to the storage facility, prior to termination of payment for motor vehicle storage charges. Such notice shall be given in reasonable time so as to provide the

claimant the opportunity to remove the vehicle from storage prior to the termination of payment.

- (8) An insurer taking possession of a motor vehicle with a Rhode Island certificate of title that has been declared a total loss because of damage to that vehicle shall
 - (a) Apply for a salvage certificate of title within ten (10) days in accordance with R.I. Gen. Laws § 31-46-1 and R.I. Gen. Laws § 31-46-1.1.
 - (b) Prior to making application with the division of motor vehicles, evaluate the damage to the vehicle and properly classify the salvage as either “parts only” or “repairable” as defined in R. I. Gen. Laws §31-46-1.1.
 - (c) Maintain copies of all documents utilized to evaluate the damage for classification purposes.
 - (d) Produce such documentation as required by the division of motor vehicles upon applying for the salvage certificate of title.
 - (e) In accordance with R.I. Gen. Laws §27-8-14 all insurers shall report all vehicle thefts within thirty (30) days of the theft and all salvage declarations to the National Insurance Crime Bureau (NICB) or similar organization that maintains a central database of automobile theft and salvage.

Section 9. Standards for Prompt, Fair and Equitable Settlements Applicable to Fire and Extended Coverage Type Policies with Replacement Cost Coverage

A. Replacement Cost

When the insurance policy provides for the adjustment and settlement of first party claimant losses based on replacement cost, the following shall apply:

- (1) When a loss requires repair or replacement of an item or part, any consequential physical damage incurred in making such repair or replacement not otherwise excluded by the policy, shall be included in the loss. The first party claimant shall not have to pay for betterment nor any other cost except for the applicable deductible.
- (2) When a loss requires replacement of items and the replaced items do not match in quality, color or size, the insurer shall replace all such items so as to conform to a reasonably uniform appearance. This applies to interior

and exterior losses. The first party claimant shall not bear any cost over the applicable deductible, if any.

B. Actual Cash Value

- (1) When the insurance policy provides for the adjustment and settlement of losses on an actual cash value basis on residential fire and extended coverage, the Insurer shall determine actual cash value as follows: replacement cost of property at time of loss less depreciation, if any. Upon the first party claimant 's request, the insurer shall provide a copy of the claim file worksheet(s) detailing any and all deductions for depreciation.
- (2) In cases in which the first party claimant 's interest is limited because the property has nominal or no economic value, or a value disproportionate to replacement cost less depreciation, the determination of actual cash value as set forth above is not required. In such cases, the insurer shall provide, upon the first party claimant 's request, a written explanation of the basis for limiting the amount of recovery along the amount payable under the policy.

Section 10. Department Complaint Review

A claimant who believes that there has been a violation of this Regulation may file a written complaint with the Division. All complaints filed with the Department shall be processed in accordance with the Division's internal complaint review process and, if the Division determines that reasonable cause exists, the complaint shall be handled in accordance with the Department's Rules of Practice and Procedure in Administrative Hearings.

All complaints filed with Department must be in writing. The Department will only accept complaints filed by the individual claimant, the claimant's designated immediate family member (spouse, parent, sibling or offspring), an insurance producer licensed by the Department with regard to policies of insurance effected by him or her, claimant's attorney admitted to practice law in this state, executor and/or administrator or other court-appointed legal representative of the claimant's estate. If a complaint relates to a claim which is under consideration by any court of this or any other state, the Division may defer jurisdiction over the matter to that court. Nothing herein shall be deemed to prohibit either the insurer or the claimant from seeking redress in the appropriate judicial forum.

Section 11. Effective Date

This Regulation shall become effective twenty (20) days after filing with the Secretary of State as indicated below.

EFFECTIVE DATE:	February 14, 1994
AMENDED:	March 29, 1999
REFILED:	December 19, 2001
AMENDED:	February 18, 2014

Exhibit 2

**State of Rhode Island and Providence Plantations
DEPARTMENT OF BUSINESS REGULATION**

Division of Insurance

**1511 Pontiac Avenue, Bldg. 69-2
Cranston, Rhode Island 02920**

CONCISE EXPLANATORY STATEMENT

Insurance Regulation 73 – Unfair Claims Settlement Practices

The Department of Business Regulation (“Department”) hereby adopts amendments to Insurance Regulation 73 effective February 18, 2014 and makes this statement in accordance with R.I. Gen. Laws § 42-35-2.3. The Department makes these amendments in order to address the recent enactment of R.I. Gen. Laws 27-9.1-4 (25) regarding total loss vehicles; to bring the remaining portions of the regulation into conformance with the NAIC model other than those areas for which there is specific Rhode Island language, to address issues that have arisen since the last amendment of this regulation and to incorporate the substance of bulletins previously issued by the Department into the regulation. There are 22 differences between the text of the proposed rule as published in accordance with R.I. Gen. Laws § 42-35-3 and the rule as adopted. Those differences are:

1. A portion of the proposed amendment to section 3(D) was eliminated.
2. Two typographical errors in section 3(N) were corrected.
3. A phrase proposed to be included in section 3(L) was eliminated and the words “his, her or its” were added to clarify the meaning of the definition.
4. The phrase “by a claimant” contained in the definition was moved to the first line from the third line in section 3(N).
5. The phrase “holding insured status” was added to section 3(Q).
6. The phrase “first party” was added to section 5(C) to clarify the applicability of the section.
7. In section 7(A) the Department declined to change the phrase “properly executed proofs of loss” to “notification of claim” as it had proposed and the word “Department” was substituted for “insurance regulatory authority.”
8. Section 7(F) was amended to clarify that it did not apply to claims in which damages are in dispute.
9. Section 7(G) was amended to substitute “first party claimant” for “insured.”

10. Section 8(A)(1) was amended to fix a grammatical error and to clarify that section 8(A)(3) provided an exception to the general rule.

11. Section 8(A)(2)(a) and (d) were amended to clarify that a filing to qualify an entity under R.I. Gen Laws § 27-9.1-4(25) can be made by any interested person not just the entity itself.

12. Section 8(A)(2)(b) was amended to clarify that filings under this section can be approved or rejected or the Department can hold a hearing on the filings.

13. Section 8(A)(2)(c) was amended to clarify that a bulletin would be issued identifying qualifying entities and that the bulletin may be amended from time to time.

14. Section 8(A)(3) was amended to provide for those situations in which a title does not exist.

15. Section 8(A)(4) was added to address questions as to whether various portions of Section 8 apply to first party claims, third party claims or both. This section contains the substantive provisions of 8(B)(2) but its repeat here clarifies that fair market value, as defined in the statute, must be paid on all vehicles regardless of whether the claim is a first or third party claim.

16. Section 8(B)(1) and (2) were amended to substitute “first party claimant” for “insured” for clarity; change the phrase “taxes, license fees and registration fees” contained in the NAIC model act to “taxes, title, registration and other fees” to properly represent the fees charged in Rhode Island and to eliminate the proposed phrase “to purchase a comparable automobile” to clarify that the minimum that must be used is the statutory “fair market value.”

17. Section 8(B)(3) was amended to clarify that it applies to first party claims and the final paragraph was moved to 8(E)(3) as it is applicable to both first and third party claims.

18. Section 8(C)(1) was amended to change the word “estimate” used in the NAIC model to “appraisal” used in Rhode Island statute and to add a phrase contained in the NAIC model but inadvertently omitted from the proposal. In section 8(C)(1)(i) The Department rewrote the second sentence to clarify its applicability to all repairs in accordance with the Rhode Island statute.

19. Section 8(C)(5) was amended to change the word “replacement” used in the NAIC model to the word “aftermarket” used in Rhode Island statute.

20. Section 8(D)(7) was amended to change the word “customers” to “consumers.”

21. Sections 8(E) and 9 were amended to substitute “first part claimant” for “insured”

22. Section 10 was amended to clarify that an insurance producer may file a complaint on behalf of his or her customer and to add back the last line of the section which had been proposed to be deleted.

The Department received other comments which it declined to address by changes in the regulation. Those comments were so numerous that it is impractical to address each individually. However, the following is the departments reasoning in the consideration of some of the more pervasive comments:

1. With regard to section 8, numerous comments were received advocating the position that the use of the words “for the purpose of this subdivision” evidence a legislative intent that R.I. Gen. Laws § 27-9.1-4(25) should only be applied to the determination of whether the vehicle was a total loss with the actual claim payment made to the claimant determined by another method. The basis for the analysis is an assumption that the undefined term “subdivision” means subsection (25) of section 4 of chapter 9.1 of title 27. However, when read in the context of the statute as a whole, a more reasonable interpretation of “subdivision” is that it refers to the chapter in which the section belongs – chapter 9.1 of title 27. To hold otherwise is to accept that the legislature included this section in the chapter entitled “Unfair Claim Settlement Practices” but did not intend it to apply to the actual claim only to the determination as to whether or not the vehicle would be repaired. The interpretation advocated would appear to violate the “purpose” section of the chapter at R.I. Gen. Laws § 27-9.1-1 which provides in relevant part “[t]he purpose of this chapter is to set forth standards for the investigation and disposition of claims arising under policies or certificates of insurance issued to residents of Rhode Island.” In fact, such an interpretation could actually result in a violation of another “unfair claims practice.” R.I. Gen. Laws § 27-9.1-4(a)(3) requires an insurer to “...adopt and implement reasonable standards for the prompt investigation and settlement of claims arising under its policies.” If the insurer “totals” a vehicle using one method of valuation and then offers to pay the insured a lower amount than that valuation the use of these two separate standards for the same valuation could be considered to be “unreasonable.” The definition of “subdivision” adopted by the Department is consistent with the fact that the same phrase is used in R.I. Gen. Laws § 31-46-3 but has a different meaning than the use in Title 27, chapter 4. For these reasons the Department has declined to amend its proposal.

2. With regard to other comments made concerning “fair market value” the Department would like to clarify that this regulation applies to insurers and provides the minimum value of a vehicle. The inclusion of this definition does not prevent an insurer from paying a first or third party claimant more for a vehicle with special characteristics that increase its value. A number of insurers asked for a “safe harbor” provision for insurers that used an approved source. This is a misunderstanding of the regulation. The regulation does not alter any additional amounts that may be owed under the insurance contract to an insured (e.g. aftermarket enhancements that the insurer agreed to cover) nor does it alter the civil law on the amount of actual damages owed to a third party in a unique situation. Rather it provides a minimum in recognition of the fact that the insurer is in a superior bargaining position to the first or third party claimant. There were also a

number of comments contending that until vendors are approved insurers cannot settle claims. This is simply not true. Every insurer is more than aware of at least one entity that clearly qualifies as “nationally recognized compilation of retail values commonly used by the automotive industry to establish values of motor vehicles.” If there is any question that source should be used until the approval process is completed. Insurers that use a source which is not a “nationally recognized compilation of retail values commonly used by the automotive industry to establish values of motor vehicles” subsequent to the passage of the statute will be subject to administrative action.

3. The Department declined to make changes to the NAIC model language in sections 3(N) and 3(P) as the language proposed reflects the Departments intent.

4. The Department eliminated the definitions of “Person” and “Policy” in sections 3(R) and 3(S) because it did not feel that they were necessary to the regulation and are not included in the NAIC model.

5. The Department declined to include the NAIC model time limits in section 4(A) because that time limit conflicts with Rhode Island Insurance Regulation 67.

6. The Department declined to change section 6(A) to the NAIC language which allows an insurer to document a conversation in its claim notes rather than send notification in writing. The Department has encountered too many disputes between claimants and insurers regarding notification to accept claim notes as evidence of the conversation. Allowing the expanded definition of writing will simplify the procedure for insurers while providing appropriate evidence of the communication if a dispute arises.

7. The Department declined to substitute the word “detailed” for the word “adequate” in section 6(C) although an adequate response is required to be detailed.

8. The Department declined to limit section 7(D) to situations in which the claimant or insured is not represented by counsel.

9. The Department declined to amend section 7(E) to allow insurers to make time sensitive offers of settlement.

10. The Department rejected the suggestion that section 7(F) be limited to property damage.

11. The Department rejected the suggestion that sections 8(C) and (E)(5) (now (6)) be amended to eliminate the requirement that the insurer assure that the repair is done properly. This provision only applies where the insurer has designated the shop (in the very limited circumstances where that is permissible.) In that circumstance the insurer should be required to stand behind its selection of the shop.

12. The Department declined to amend the provisions of section 8(D). This provision comes from a bulletin which was subject to a federal lawsuit. The resulting language was carefully negotiated between the parties to that lawsuit. While many of the

suggestions are good, the Department does not feel comfortable making language changes to language negotiated in settlement of a lawsuit.

Dated – January 28, 2014

Exhibit 3



Department of Business Regulation

Insurance Division

1511 Pontiac Avenue, Bldg. 69-2

Cranston, Rhode Island 02920

Insurance Bulletin 2014-2

Total Loss Valuation Services

Pursuant to [R.I. Gen. Laws § 27-9.1-4\(25\)](#) insurers must pay the “fair market value” for a vehicle that is declared a total loss. The statute defines “fair market value” as “... the retail value of the motor vehicle as set forth in a current edition of a nationally recognized compilation of retail values commonly used by the automotive industry to establish values of motor vehicles.” Over the past decade the Department has been presented with numerous consumer complaints concerning the amount consumers are offered by insurers for total loss vehicles. In virtually every situation, the conflict results from arbitrary deductions taken from comparable vehicle values when calculating the total loss value.

In implementing R.I. Gen. Laws § 27-9.1-4(25) the Department amended Insurance Regulation 73 and required that a filing be made by or on behalf of any entity that advocated that it had a program that qualified under the statute. Filings were made by or on behalf of eight entities (National Automobile Dealers Association (NADA); Kelly Blue Book (KBB); Price Digests, Vehicle Valuations Service, Inc., Audatex, Auto Bid LLC, CCC Information Services Inc. and Mitchell International Inc.) Following review of the filings the Department concludes that the minimum “fair market value” can be derived from the compilation of values provided by NADA and KBB. The remaining applicants have not established that they are “used by the automotive industry” which is a necessary criteria under the statute. The Department interprets the term automotive industry to be those entities that actually sell automobiles.

Insurers may not pay less than the NADA or KBB value adjusted pursuant to [Insurance Regulation 73\(8\)\(A\)\(4\)](#). Insurers may not, under any circumstance, utilize valuations that reduce the minimum value for items such as dealer preparation, reconditioning or an amount that a dealer might accept in sale of a comparable vehicle (i.e. “take price”). Insurers are, however, required to pay the actual loss and if that amount exceeds the minimum value the insurer must pay the higher amount. In cases where NADA or KBB do not have a listing for a particular vehicle, insurers may use services that provide comparable vehicles, however, insurers may not vary those comparable vehicle listings other than by mileage, options and condition.

Insurers are not required to obtain the valuations directly from NADA or KBB. A number of the valuation services that filed indicated that they either currently provide or

are able to provide the NADA or KBB valuations along with other data about comparable vehicles. Insurers may utilize valuations from any of the applicants, however, insurers may not offer less than NADA or KBB in settlement of the claim.

Joseph Torti III
Superintendent of Insurance
March 24, 2014

Exhibit 4

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: September 10, 2014)

PROPERTY CASUALTY INSURERS :
ASSOCIATION OF AMERICA, :
Plaintiff, :

v. :

C.A. No. PB 14-1983

PAUL MCGREEVY, in his official :
capacity as Director of the Department :
of Business Regulation for the State of :
Rhode Island and in his official capacity :
as Insurance Commissioner for the State :
of Rhode Island; and PETER F. :
KILMARTIN, in his official capacity as :
Attorney General for the State of Rhode :
Island, :
Defendants. :

DECISION

SILVERSTEIN, J. Property Casualty Insurers Association of America (Plaintiff)¹ brings this suit against Paul McGreevy, in his official capacity as Director of the Department of Business Regulation for the State of Rhode Island and in his official capacity as Insurance Commissioner for the State of Rhode Island (Defendant), and Peter F. Kilmartin, in his official capacity as Attorney General for the State of Rhode Island (Attorney General), seeking a determination that § 8A(4)(a) of Insurance Regulation 73 (the Regulation) unlawfully extends the definition of “fair market value.” Plaintiff asserts that the Regulation as promulgated by Defendant violates both the Administrative Procedures Act (APA) and the Contracts Clause of the United States and Rhode Island Constitutions. Currently before the Court is Plaintiff’s Motion for Temporary and

¹ Plaintiff brings this suit in a representational capacity on behalf of its member insurers who are licensed property and casualty insurers authorized to sell motor vehicle insurance in Rhode Island.

Permanent Injunctive Relief pursuant to Super. R. Civ. P. 65 (Motion). Defendant opposes Plaintiff's Motion.

I

Facts and Travel

Plaintiff is a trade association representing 328 insurers licensed in Rhode Island to write property and/or casualty insurance, including motor vehicle insurance.² Plaintiff's members write 50.7% of property and/or casualty insurance issued in Rhode Island. Among the standard insurance contracts issued by Plaintiff's members are the standardized forms developed by the Insurance Services Office, Inc. (ISO) and approved by the state insurance commissioner. On total loss claims, Plaintiff is required to indemnify policyholders and other third-party claimants by paying an amount equal to the "[a]ctual cash value of the stolen or damaged property" at the time of loss. See Auto Policy, Pl.'s Ex. B, at 11. The ISO standard policies do not define the term "actual cash value."

On July 17, 2013, G.L. 1956 § 27-9.1-4(a)(25) became effective, establishing it as an unfair claims practice to designate "a motor vehicle a total loss if the cost to rebuild or reconstruct the motor vehicle to its pre-accident condition is less than seventy-five percent (75%) of the 'fair market value' of the motor vehicle immediately preceding the time it was damaged[.]" Furthermore, § 27-9.1-4(a)(25)(i) provides that "[f]or the purposes of this subdivision, 'fair market value' means the retail value of a motor vehicle as set forth in a current edition of a nationally recognized compilation of retail values commonly used by the automotive industry to establish values of motor vehicles[.]" (emphasis added).

² For ease of reference, the Court will not distinguish between Plaintiff and Plaintiff's members, unless necessary.

On January 28, 2014, Defendant issued a “Concise Explanatory Statement” that accompanied the most recent amendment of the Regulation. In the statement, Defendant stated that the Regulation was amended:

“to address the recent enactment of R.I. Gen. Laws 27-9.1-4(25) regarding total loss vehicles; to bring the remaining portions of the regulation into conformance with the [National Association of Insurance Commissioners] model . . . , to address issues that have arisen since the last amendment of this regulation and to incorporate the substance of bulletins previously issued by the Department into the regulation.” Pl.’s Ex. C.

Section 8(A)(1) of the Regulation states that:

“[p]ursuant to R.I. Gen. Laws § 27-9.1-4(25) an insurer may not designate a vehicle a total loss if the cost to rebuild or reconstruct the motor vehicle to pre accident condition is less than 75% of the fair market value of the motor vehicle immediately preceding the time it was damaged unless the requirements of subsection (3) below are met.” Pl.’s Ex. D.

Section 8(A)(2) of the Regulation mirrors the language of § 27-9.1-4(a)(25)(i), which provides that “fair market value” determinations are to be determined by consulting a nationally recognized compilation of automotive retail values. Furthermore, § 8(A)(4)(a) of the Regulation directs that “[a] cash settlement shall be based upon the fair market value of the motor vehicle less any deductible provided in the policy.” Additionally, § 8(A)(4)(b) of the Regulation states that in calculating the cash settlement amount, “[d]eduction shall not be made for reconditioning or dealer preparation.” However, the Regulation does allow insurers to adjust for “betterment or depreciation,” so long as any deviation can be supported with “documentation in the claim file by giving particulars of the automobile condition that warrant said deviation. Any deductions . . . must be measurable, discernible, itemized and specified as to dollar amount and shall be appropriate in amount.” Regulation § 8(A)(4)(b).

In order to qualify as a “nationally recognized compilation,” a valuation service applicant had to apply to Defendant within ten days of the effective date of the Regulation. Defendant was then to “review the filings and determine whether it will hold a hearing on those entities that have made such application[,]” and then “publish a bulletin identifying those entities that qualify[.]” Regulation § 8(A)(2)(b)-(c). On March 24, 2014, Defendant published “Insurance Bulletin 2014-2” which approved the National Automobile Dealers Association (NADA) and Kelley Bluebook (KBB) as the “nationally recognized compilation[s].” See Pl.’s Ex. E.

Prior to the amendment of the Regulation, Defendant required insurers to base total loss valuations on NADA or “substantially similar” valuation services. (“In determining the actual cash value of a motor vehicle to settle motor vehicle property damage liability and collision damage claims, Insurers shall use as a guide, the average retail values indicated by the [NADA] official User Car Guide (Guide) or some service substantially similar (with appropriate adjustment for such factors as vehicle condition, high and low mileage, accessory options).”). Operating under this framework, Plaintiff would determine actual cash value by considering the year, make and model of the vehicle, condition, mileage, wear and tear, prior damage, location and other factors. See Compl. ¶ 26.

Plaintiff seeks a preliminary injunction restraining Defendant from implementing or enforcing the Regulation as amended until this Court reaches the merits of Plaintiff’s claims. Defendant objects to Plaintiff’s motion. Additionally, by agreement of the parties, the Attorney General was previously dismissed as a defendant from the case.

II

Standard of Review

“In deciding whether to issue a preliminary injunction, the hearing justice must consider whether the moving party: (1) has a reasonable likelihood of success on the merits; (2) will suffer irreparable harm without the requested relief; (3) has the balance of equities in his or her favor; and (4) has shown that the requested injunction will maintain the status quo.” Pucino v. Uttley, 785 A.2d 183, 186 (R.I. 2001) (citations omitted). In determining the reasonable likelihood of success on the merits, it is only required that the moving party make out a prima facie case. DiDonato v. Kennedy, 822 A.2d 179, 181 (R.I. 2003) (citing and quoting Fund for Cmty. Progress v. United Way of Se. New England, 695 A.2d 517, 521 (R.I. 1997)). Furthermore, irreparable harm is considered an injury “presently threatened or imminent and for which no adequate legal remedy exists to restore that plaintiff to its rightful position.” Fund for Cmty. Progress, 695 A.2d at 521 (citations omitted). The equities are determined by “examining the hardship to the moving party if the injunction is denied, the hardship to the opposing party if the injunction is granted and the public interest in denying or granting the requested relief.” Id. (citing In re State Emps.’ Unions, 587 A.2d 919, 925 (R.I. 1991)). In total, “a preliminary injunction is not ordinarily to achieve a final and formal determination of the rights of the parties or of the merits of the controversy, but is merely to hold matters approximately in status quo.” Fund for Cmty. Progress, 695 A.2d at 521 (quoting Coolbeth v. Berberian, 112 R.I. 558, 564, 313 A.2d 656, 659 (1974)).

III

Discussion

A

Likelihood of Success

To determine whether the moving party has met its burden to warrant injunctive relief, the Court must first assess whether the moving party has shown a reasonable likelihood of success on the merits. See Fund for Cmty. Progress, 695 A.2d at 521; see also Iggy’s Doughboys v. Giroux, 729 A.2d 701, 705 (R.I. 1999); Pawtucket Teachers Alliance Local No. 920 v. Brady, 556 A.2d 556, 557 (R.I. 1989). This showing need not rise to the level of a certainty of success, but instead the moving party is only required to make out a prima facie case. See Coolbeth, 112 R.I. at 566, 313 A.2d at 660.

1

APA Appeal

Plaintiff argues that Defendant exceeded their legislative authority when adopting the Regulation. Specifically, Plaintiff argues that the unambiguous language of § 27-9.1-4(a)(25)(i) makes it evident that the General Assembly intended that the definition of “fair market value”—to be determined by reference to approved compilations—was limited to “total loss determinations” and not “total loss valuations” because of the phrase “[f]or the purposes of this subdivision[.]” Plaintiff asserts that if the General Assembly had intended broader use of approved compilations, then the General Assembly would have used different language to make the definition applicable to either the entire title, chapter, or section. See e.g., G.L. 1956 § 9-26-4.1(b) (“For the purposes of this section . . .”); G.L. 1956 § 11-41-32(c) (“For the purposes of this chapter . . .”); G.L. 1956 § 17-1-2 (“For the purposes this title . . .”). Additionally,

Plaintiff argues that Defendant has exceeded its authority because “actual cash value” is the proper legal measure of damages in Rhode Island and not “fair market value.”

Defendant responds by arguing that, unless its interpretation is either clearly erroneous or unauthorized, then it must be given deference by this Court and found to be lawful. Defendant cites § 27-9.1-8, which provides that “[t]he director may, after notice and a hearing, promulgate reasonable rules, regulations, and orders as are necessary or proper to carry out and effectuate the provisions of this chapter.” Defendant asserts that the General Assembly failed to define “fair and equitable settlement of claims” or “reasonable standards” for the “settlement of claims” within §§ 27-9.1-1, et seq. (the Unfair Claims Settlement Practices Act), and accordingly, it is within Defendant’s authority to supply meaning to those terms. Defendant claims that the Regulation provides the standards by which those undefined terms will be implemented. Furthermore, Defendant contends that it was within its authority of extending the use of “fair market value” as defined in § 27-9.1-4(a)(25) to “total loss valuations” because, according to Defendant, the definition applies to the whole chapter, 9.1 of title 27. Defendant posits that the term “subdivision” is not the same as “title,” “chapter,” “section,” or “sub-section”—the recognized classifications into which our General Laws generally are divided—and thus, it was up to Defendant to determine the breadth of the definitions’ application. Furthermore, Defendant argues that utilizing “fair market value” for “total loss determinations” but not “total loss valuations” would lead to absurd results where consumers would have their vehicles declared a total loss but not be fully compensated. Finally, Defendant asserts that while “actual cash value” and “fair market value” do differ in the context of homeowner insurance, they are actually the same for the purpose of automobile insurance determinations.

Our General Assembly does not recognize “subdivision” as one of the enumerated parts of the General Laws. Rather, our General Laws are divided into “titles,” “chapters,” “sections,” and “sub-sections.” Without a clear intention by the General Assembly as to what it intended by including the phrase “[f]or the purposes of this subdivision[.]” it is left up to Defendant to interpret the statute in a reasonable manner. While Plaintiff cites two cases where other courts determined that use of the limiting phrase “for purposes of this subdivision” confined the use of the term at issue to the specific subdivision, these decisions were based in states where “subdivision” is commonly used within the specific state’s general laws. In Thomas v. W. Nat’l Ins. Grp., 562 N.W.2d 289, 290 (Minn. 1997), the Minnesota Supreme Court found that the word “disability” was confined to the subdivision it was set forth in because of the use of “for purposes of this subdivision[.]” However, Minnesota statutes are actually divided into “titles,” “chapters,” and “subdivisions.” See Minn. Stat. § 72A.201.6 (Standards for automobile insurance claims handling, settlement offers, and agreements). Furthermore, in Small v. Going Forward Inc., 879 A.2d 911, 914 (Conn. App. Ct. 2005), the Appellate Court of Connecticut found that “legislature’s use of the terms ‘[f]or the purposes of this subdivision’ and ‘means’ reflects that the statement that follows, concerning the two types of fees, is intended to assign meaning to terms used in the subdivision.” Connecticut statutes are subdivided into “titles” and “chapters,” and then both into “sections” and “subdivisions.” Compare Conn. Gen. Stat. Ann. § 38a-363 (“As used in sections 38a-17, 38a-19 and 38a-363 to 38a-388, inclusive . . .”) with Conn. Gen. Stat. Ann. § 38a-336a (“Such description of coverage shall be included in a conspicuous manner with the informed consent form specified in subdivision (2) of subsection (a) of section 38a-336.”) (emphasis added).

Here, without a common usage of the term “subdivision” in our General Laws, this Court determines that Defendant’s interpretation to apply “fair market value” to all of § 27-9.1, et seq. is a “reasonable construction by the agency charged with its implementation.” Labor Ready Ne., Inc. v. McConaghy, 849 A.2d 340, 346 (R.I. 2004) (quoting Barnhart v. Thomas, 540 U.S. 20, 26 (2003)). A court must give deference to an agency interpretation that is neither clearly erroneous nor unauthorized when a statutory provision is susceptible to more than one reasonable interpretation. Labor Ready, 849 A.2d at 345-46. See also Pawtucket Power Assocs. Ltd. P’ship v. City of Pawtucket, 622 A.2d 452, 456-57 (R.I. 1993) (“Deference is accorded even when the agency’s interpretation is not the only permissible interpretation that could be applied.”). Therefore, because Defendant has not exceeded their authority, and Defendant’s interpretation is entitled to due deference, the Court finds that Plaintiff does not have a reasonable likelihood of success on the merits with regard to their challenge of the Regulation under the APA.

2

Contracts Clause Claim

Plaintiff argues that the Regulation requiring payment based on “fair market value” violates established insurance contracts that Plaintiff has with customers which obligate it to pay “actual cash value.” Plaintiff asserts that the difference between the two calculations is more than incidental, but rather has actual economic consequences. Plaintiff contends that the Regulation does not allow for adjustments such as “take price,”³ and therefore, it ensures that the price to be paid will not be “actual cash value.” Finally, Plaintiff claims that no legitimate public purpose can be served by implementing the Regulation.

³ “Take price” is the price that a dealer would “take” for a vehicle, as opposed to the asking price.

Defendant counters by arguing that any alleged interference occurred with a contract previously in existence because insurance contracts typically last for a term of either six or twelve months. Furthermore, Defendant contends that the term “actual cash value” is not defined in the insurance policies, including the standard ISO policy. Thus, Defendant asserts that the Regulation does not impair any obligation of Plaintiff under the contract. Moreover, Defendant claims that, if an impairment did exist, it would be minimal and hardly burdensome to Plaintiff. Further, Defendant states that any impairment is not substantial, but rather, was actually foreseeable since the insurance industry is highly regulated. Finally, Defendant suggests that the Regulation serves the legitimate public purpose of protecting customers from inadequate total loss cash settlements.

Our Supreme Court has adopted a three-part test announced by the United State Supreme Court when deciding Contracts Clause violations. R.I. Depositors Econ. Prot. Corp. v. Brown, 659 A.2d 95, 106 (R.I. 1995).

“First, has the state law in fact substantially impaired a contractual relationship? Second, if the law constitutes a substantial impairment, can the state show a legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem? Third, is the legitimate public purpose sufficient to justify the impairment of the contractual rights?” Id. (internal quotations and citations omitted).

Here, a prerequisite to finding a potential violation of the Contract Clause is the existence of an unchanged contractual relationship before the Regulation was enacted. It can at least be argued by Plaintiff that, even though the contracts may have been renewed since the Regulation was enacted, the parties intended to enter into a single policy with multiple renewals. See Montague v. Dixie Nat. Life Ins. Co., C/A 3:09-687-JFA, 2010 WL 2428805 (D.S.C. June 11, 2010) (“The court finds these provisions incompatible with a policy term of thirty days and that

the intent of the parties as manifested by the Policy language reflects an intent to form a ‘continuous contract of insurance for life subject to forfeiture for nonpayment of premiums.’”).

Having found that Plaintiff could potentially get past the burden of proving a contractual relationship, the Court next turns to whether the Regulation substantially impairs the contracts. Here, the Regulation sets forth standards for how Plaintiff must calculate settlement offers on total loss claims. Previously, Plaintiff made these calculations based upon an undefined term in the policies it has with consumers. Operating under this paradigm, Plaintiff would base these calculations upon mileage, condition, options, location, and other factors. However, because of the Regulation, Plaintiff may now only make adjustments for condition, mileage, and options. Thus, effectively, the only impairment is that Plaintiff may not adjust for location or other factors.⁴ Such a minimal alteration will not constitute a substantial impairment, especially in light of the fact that such an alteration should have been foreseeable. See City of El Paso v. Simmons, 379 U.S. 497, 516-17 (1965).

“In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past.” Energy Reserves Grp., Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411 (1983). Here, the industry of Plaintiff, the automobile insurance industry, is without a doubt a highly-regulated industry in Rhode Island. See G.L. tit. 27.; see also Maine Educ. Ass’n Benefits Trust v. Cioppa, 842 F. Supp. 2d 373, 383 (D. Me. 2012) (“[E]xpectations are necessarily adjusted when the parties are operating in a heavily regulated industry, such as insurance, when the parties can readily foresee future regulation involving the subject matter of their contract.”). Further, as this Court stated previously, “[i]n Energy Reserves the United State Supreme Court noted that ‘at the time of the

⁴ Other factors presumably being something like “take price.”

execution of these contracts, Kansas did not regulate natural gas prices specifically, but its supervision of the industry was extensive and intrusive.” Blue Cross/Blue Shield of R.I. v. State Dep’t of Bus. Regulation, PB-04-5769, 2005 WL 1530449 (R.I. Super. June 23, 2005) (quoting Energy Reserves, 459 U.S. at 414). Thus, it could have been expected by Plaintiff that the calculation of total loss settlement offers would be regulated by Defendant because of the prior extensive and intrusive supervision and regulation of the automobile insurance industry.

Furthermore, this Court finds that the essential purpose of Plaintiff’s insurance policies have not been impaired. See In re GTE Reinsurance Co., PB-10-3777, 2011 WL 7144917, at *15 (R.I. Super. Apr. 25, 2011) (In re GTE) (citing 1 Steven Plitt, et al., Couch on Insurance 3d § 1:6, at 1-16 (2009)). In In re GTE, this Court stated that “[w]hile the Court acknowledges that the ‘essence’ of insurance is the transfer of risk, the Court is of the opinion that at its most basic level, the risk involved is essentially about the right to receive, and the obligation to make, a monetary payment when a claim arises.” Id. After making this determination, this Court found that the essential purpose of the contract at issue in In re GTE was not interfered with despite the fact that a change in the law resulted in a different method for calculating the monetary payment. Id. at *16 (citing Faitoute Iron & Steel Co. v. City of Asbury Park, 316 U.S. 502, 511 (1942) (holding that under a Contract Clause analysis, the state statute should be designed to permit performance of contractual obligations, even if it entails some modification, because “[i]mpairment of an obligation means refusal to pay an honest debt; it does not mean contriving ways and means for paying it”). Similarly, here the Regulation does not interfere with the purpose of the insurance contracts at issue, but rather the Regulation only affects the “ways and means for paying it,” and thus, the minor modification still permits compliance with the essential purpose of the insurance contracts. In re GTE, 2011 WL 7144917, at *15-16.

Moreover, the In re GTE decision cited the fact that no evidence had been produced that established that an actual injury would result from the change in computation methods. See id. at *16-17 (“This is particularly true where, as here, Hudson has failed to establish beyond a reasonable doubt that the actuarial-based payout will, as a matter of fact, be less than its recovery if GTE RE remained in run-off. Frankly, the evidence before the Court is simply insufficient to establish with any certainty that Hudson indemnification rights would be substantially impaired by the Commutation Plan.”). Here too, Plaintiff has absolutely failed to produce any actual evidence that the use of NADA or KBB will result in substantial impairment to Plaintiff’s contractual rights. Rather, Plaintiff relies on the argument that the NADA and KBB valuations are based on “asking prices” that automobile dealers use in negotiations with customers and, thus, different than “actual cash value.” Plaintiff even cites to NADA’s website for the proposition that “[a]ll values and related content contained within this NADAguides product are the opinions of NADAguides’ editorial staff and may vary from vehicle to vehicle.” See Pl.’s Ex. G. Yet, the NADA website also states, “vehicles sell for both higher and lower than the guide value.” See Pl.’s Ex. F, at 2. At best, all that Plaintiff has established is that the method of calculating “fair market value,” as required by the Regulation, may not always be consistent with the prior calculation method used by Plaintiff in determining “actual cash value.” However, as Plaintiff recognized through the citation to the NADA website, the “fair market value” may be more or less than vehicles actually sell for. Thus, without actual evidence of impairment, this Court declines to suppose one based on a mere difference in calculation methods. See Nonnenmacher v. City of Warwick, 722 A.2d 1199, 1203 (R.I. 1999) (holding that plaintiff had failed to establish that the ordinance would necessarily impair or reduce the pension benefits that plaintiff ordinarily would receive); Retired Adjunct Professors of the State of R.I. v. Almond,

690 A.2d 1342, 1347 (R.I. 1997) (finding it was not clear “as a factual matter” that the statutory enactment would “actually have” an adverse impact, and therefore, declined to find substantial impairment); In re Advisory Op. to the Governor (DEPCO), 593 A.2d 943, 949 (R.I. 1991) (finding that the statute merely affected timing of payments and did not substantially impair the contractual relationship).

Finally, even assuming arguendo that Plaintiff was able to prove substantial impairment, there has not been a showing that the legitimate public purpose is not reasonable and appropriate. Plaintiff argues that Defendant’s stated public purpose of protecting consumers is at odds with Defendant’s suggestion that Plaintiff could have sought a rate increase to offset any increased costs. However, Defendant’s stated public purpose is a legitimate one, in line with the overall purpose of §§ 27-9.1-1, et seq. Plaintiff’s assertion that Defendant’s stated public purpose is negated by the suggestion of seeking a rate increase is mere supposition. Any requested rate increase would need to be supported properly by Plaintiff with documented evidence. Defendant’s suggestion was only an alternative remedy that Defendant proposed Plaintiff may be able to seek to set off an alleged, but unproven, harm. Based on the foregoing, Plaintiff has not set forth a reasonable likelihood of success on the merits for its Contracts Clause claim.

B

Irreparable Harm and Balancing of the Equities

Even assuming arguendo that Plaintiff could succeed on the merits of its claim, the “irreparable harm” requirement that is critical to granting injunctive relief cannot be adequately demonstrated. Plaintiff claims that any amounts that it has to pay out based on “fair market value” over “actual cash value” constitute irreparable harm because it will not be able to recoup those payments. However, as noted above, the Court does not even see a substantial harm facing

Plaintiff. Furthermore, if Plaintiff does believe they face the loss of potential payments, they are able to heed Defendant's suggestion of filing for a rate increase with evidence supporting such increased payments. This rate increase would presumably offset any alleged irreparable harm Plaintiff claims it imminently faces.

With respect to balancing the equities, this Court adopts the reasoning set forth above when it essentially weighed the public purpose as stated by Defendant against the alleged harm to Plaintiff. The Court finds that any minimal impact that enforcement of the Regulation may have is outweighed by Defendant's protection of insurance consumers.

IV

Conclusion

Based on the foregoing analysis, the Court finds that Plaintiff has failed on the first three prongs of the standard for granting a preliminary injunction.⁵ Accordingly, the Court denies the Plaintiff's request to grant a preliminary injunction. Prevailing counsel may present an order consistent herewith, to be settled after due notice to counsel of record.

⁵ As Plaintiff failed on the first three prongs, the Court declines to address the fourth prong, maintaining the status quo.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: **Property Casualty Insurers Association of America v. McGreevy, et al.**

CASE NO: **PB 14-1983**

COURT: **Providence County Superior Court**

DATE DECISION FILED: **September 10, 2014**

JUSTICE/MAGISTRATE: **Silverstein, J.**

ATTORNEYS:

For Plaintiff: **Mark W. Freel, Esq.**
Jon M. Anderson, Esq.
Mackenzie Mango, Esq.

For Defendant: **Elizabeth Kelleher Dwyer, Esq.**
Jenna R. Algee, Esq.

Exhibit 5



Mitchell International, Inc.
6220 Greenwich Drive
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858.368.7000 | 800.238.9111
mitchell.com

February 18, 2014

Department of Business Regulations
Division of Insurance
Attention: Elizabeth Dwyer
1511 Pontiac Avenue
Cranston, RI 02920

RE: Regulation 73 Filing for Mitchell's WorkCenter Loss Product

Dear Ms. Dwyer:

The following filing is made by Mitchell International, Inc. ("Mitchell") pursuant to Regulation 73 (and R.I. Gen. Laws § 27-9.1-4(25)) to support a finding by the Department of Business Regulations (the "Department") that Mitchell's WorkCenter Total Loss product qualifies as a "*nationally recognized compilation of retail values commonly used by the automotive industry* to establish values of motor vehicles".

Founded in 1964, Mitchell is now the nation's leading provider of property and casualty claims technology solutions. Nationally, Mitchell's full suite of products processes over 50 million transactions annually for over 300 insurance companies and claims payers and over 30,000 collision repair facilities.

Mitchell released its WorkCenter Total Loss product in 2005. For nearly a decade, this product has functioned as a nationally recognized compilation of retail values of automobiles. Specifically, WorkCenter Total Loss is the result of collaboration between Mitchell and JD Power and Associates - a nationally recognized authority on customer satisfaction and vehicle pricing. Today, Mitchell has approximately 80 customers using the WorkCenter Total Loss product nationwide - including two of the top five national insurers. Of these 80 customers, 21 are already using the product in Rhode Island. Last year, the WorkCenter Total Loss product provided over 3,850 claims valuation reports in Rhode Island alone. Nationally, it was used to process approximately *one million transactions*.

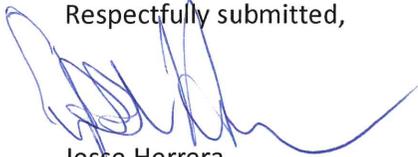
Mitchell's WorkCenter Total Loss application uses a number of other nationally recognized data sources to build its databases of comparable vehicles. Through Mitchell's contractual relationships with these data sources (including AutoTrader.com, Cars.com, Vast and JD Power and Associates), Mitchell receives data feeds containing information on vehicles listed for sale and vehicles sold by licensed dealers throughout the United States. Approximately ninety percent (90%) of the comparable vehicle records in the WorkCenter Total Loss application are dealer records, so all or nearly all of the comparable vehicles on an individual valuation report will be dealer vehicles. See [Exhibit A](#) for a sample list of data providers to the Work Center Total Loss application.

In addition to its insurance industry clients, Mitchell also has contractual relationships with the automobile industry, including nationally recognized entities such as Manheim Auto Actions, the world's leading provider of vehicle remarketing services, which provides sold data to Mitchell for incorporation and use in the WorkCenter Total Loss product. Nationwide automobile rental companies also rely on Mitchell's WorkCenter Loss application.

It is noteworthy that there are six other states (Connecticut, New Hampshire, New Jersey, New York, Pennsylvania and West Virginia) that have implemented an approval process for the sources used by insurers to determine the fair market value of comparable vehicles in the settlement of total loss claims. In each of these states, Mitchell's WorkCenter Total Loss has been approved as an authorized source of vehicle values.

We hope that the foregoing information will be sufficient for the Department to determine that Mitchell's WorkCenter Total Loss product qualifies as a nationally recognized compilation of retail values pursuant to Regulation 73. Please feel to contact Rebecca Greene at 858-368-7952 if you need any additional information about Mitchell or the WorkCenter Total Loss product

Respectfully submitted,



Jesse Herrera

Executive V.P. and General Manager, Auto Physical Damage
Mitchell International, Inc.

EXHIBIT A

Comparable Vehicle Data Sources – Available for Sale



AutoTrader.com is the Internet's leading auto classifieds marketplace and consumer information website. AutoTrader.com aggregates in a single location more than **2.8 million vehicle listings** from **40,000 dealers and 250,000 private owners**, which provide the largest selection of vehicles attracting more than 11 million qualified buyers each month.



Visited by more than **8 million car shoppers** each month, Cars.com is the most comprehensive destination for those looking to buy or sell a new or used car. Cars.com includes vehicle listings from more than **13,000 dealers** alongside nationwide classified advertising and private-party listings to offer the best selection of new and used cars online, as well as the content, tools and advice to support the shopping experience.



Vast operates the largest publishing and analytics platform in automotive today and powers such large sites as AOL, Bing, [Overstock.com](#) and Yellow Pages. Vast maintains over **5.5 million daily vehicle listings** and its publishing network covers over 40 large sites which represents more than **15 million monthly car shoppers**.



TrueCar, Inc. is an online automotive information and communications platform focused on creating a better car buying experience for dealers and consumers. TrueCar currently works with more than 4,000 dealerships nationwide and will facilitate over 250,000 new and used car sales in 2012. Some of the nation's largest and most well respected membership and service organizations rely on websites powered by TrueCar to help educate their members and customers who are in the automotive market.