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INDEPENDENT REGULATORY REVIEW COMMISSION

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

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

Dear Mr. Salvatore:

Enclosed is an original and one copy of the Comments and Questions of the Pennsylvania Collision Trade Guild, also t/a Coalition for Collision Repair Equality ("PCTG") to the above-referenced proposed regulations. For the reasons set forth in the attached, the PCTG believes that the Department should not proceed with its regulatory amendments. If the Department chooses to proceed, the PCTG has suggested proposed language consistent with the provisions of the Motor Vehicle Physical Damage Appraisers Act for your review.

Please contact us if you have any questions concerning this letter and the attached comments and questions.

Sincerely,

Walter W. Cohen

Enclosures

c: Hon. Edwin G. Holl, Chair
Senate Banking & Insurance Committee
Hon. Nicholas A. Micozzie, Chair
House Insurance Committee
Robert E. Nyce, Executive Director
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INDEPENDENT REGULATORY REVIEW COMMISSION

Peter J. Salvatore
Regulatory Coordinator
1326 Strawberry Square
Harrisburg, PA 17120

Re: Chapter 62 of Title 31 - Motor Vehicle Physical Damage Appraisers

Dear Mr. Salvatore:

The following comments are submitted on behalf of the Insurance Federation, our national trade association counterparts, the Alliance, the American Insurance Association, the National Association of Independent Insurers, and the member insurers of these trades.

At the outset, we have a general recommendation that, I hope, will help the Department, the Independent Regulatory Review Commission, the General Assembly and all other interested parties in their review of the regulation and the myriad of comments that will be submitted on it: All of us need to remember the limits of the proposed regulation. As the Department points out, it is to implement, not expand or rewrite, the Motor Vehicle Physical Damage Appraiser Act.

As such, the regulation cannot - and should not - resolve every issue between auto insurers and certain repair shops. Many of those issues - as with the existence of direct repair programs and the determination of what a repair shop's rate should be - are policy questions that are either addressed in other laws, or are the topics of bills that have come before the General Assembly.

Whatever one's view on those policy questions, they cannot - and should not - be addressed in this regulation, at least where they are not already addressed in the Appraiser Act. It may be that the Appraiser Act should be amended to reflect changes in the auto repair, auto parts and auto insurance industries; certainly we and the other industries have strong views on what those changes should be.

But the forum for debating those changes is the General Assembly and legislation, not the IRRC and this regulation. While tempting to answer legislative concerns by regulation, it is not allowed under the Regulatory Review Act - where the principal question is whether the regulation is consistent with the legislative intent in the underlying statute, not whether the legislature should change that statute.

Nor can or should this regulation serve as the definitive guide in evaluating, processing and paying all auto physical damage claims. Again, the regulation must follow the limits of the Appraiser Act. The Act is limited to the licensure and conduct of assigned appraisers, not to all parties involved in the evaluation and repair of an automobile; indeed, Section 12 of the Act expressly states that it does not apply where no appraisal has been assigned, and it recognizes that many claims do not merit a formal appraisal.

Our comments on the specifics of the proposed regulation are intended, first and foremost, to follow this general recommendation and stay within the confines of the Appraiser Act - while still providing needed clarity of the Act's provisions and requirements not just for appraisers, but also for the insurers, repair shops and consumers who deal with them in auto physical damage claims.

Section 62.1 - Definitions

"Aftermarket crash part:" We recommend the definition delete the references to the materials, "sheet metal or plastic." Given current technology, that is already outdated - as with the use of fiberglass and glass; further developments may lead to other materials being used. Instead, the definition should refer generically to "**non-mechanical parts**."

"Appraisal:" Our principal concern with this definition is that it is broader than contemplated in the Appraiser Act. I use the term "contemplated" because the Act does not define "appraisal" in its section on definitions, an ambiguity the regulation understandably should address.

Under the first sentence of this definition, an appraisal would include any determination that is assigned by any party in order to return a motor vehicle to its pre-damaged condition. That is consistent with Section 12 of the Appraiser Act, which notes that the Act does not apply unless there has been an assignment of an appraisal, and that many auto physical damage claims do not require a formal appraisal. Section 11(b) is also relevant here, at least for insurers, as it requires the name of the insurer "ordering" the appraisal.

The second sentence of this definition, however, suggests that any determination of damage to a vehicle made by an insurer, its employees, its agents or related entities would constitute an "appraisal" even if there has been no assignment: Its reference to assignment arguably is limited to "other individuals or entities."

Such a result would go beyond the Appraiser Act and its pre-condition of an assignment. It would also result in the absurdity that anybody who questions or reviews an appraisal - whether an insurer or a repair shop acting on a consumer's request - would also have to be an appraiser.

Accordingly, we recommend the second sentence be revised to refer to determinations "**assigned for a fee** by the insurer, its employees, its agents or related entities, or by other individuals or entities." The inclusion of the fee requisite recognizes the business reality that insurers (or their employees who might be viewed as "assigned" to do this) and auto body shops review and estimate auto damage claims as part of their ongoing responsibility of submitting, processing and paying those claims. That does not make them appraisers; that is a separate, independent act - and the fee requisite is a logical means of measuring this.

We also recommend two editorial changes. First, the definition's reference to "determinations" should be changed to "**estimates**." As the rest of the regulation acknowledges, the monetary amount in an appraisal is subject to change, and labeling appraisals as estimates rather than determinations is consistent that flexibility. In any event, the regulation already suggests this in Section 62.2(a)(1), dealing with competency of those seeking to be licensed appraisers: They must show six continuous months of direct involvement "in the estimation of physical damage to motor vehicles."

Second, the definition should refer to an appraisal being an estimate of the cost to return a motor vehicle to "**its pre-damaged condition**." That is presumably the Department's purpose in supplying the definition of "pre-damaged condition."

"Consumer:" We recommend this definition be clarified to refer to a consumer's "**lawfully designated**" representative. At times, insurers are confronted with repair shops or other outfits claiming they are calling on the consumer's behalf, with no way of verifying that the consumer has actually given such authorization. Adding the phrase "lawfully designated" would bring needed clarity that the consumer must affirmatively authorize a representative before somebody can claim this status.

"Pre-damaged condition:" We recommend the definition's circular reference to "condition" be corrected by defining "pre-damaged condition" as "**the function and appearance** of the motor vehicle just prior to the damage in question incurred."

To a large extent, this is simply a clarification. It also prevents others from using this regulation to argue that the pre-damaged condition of the car should be its value before the damage. Whether an insurer should pay for any "diminished value" of a damaged motor vehicle is an ongoing issue before the courts and the General Assembly. But it is not within the intent or scope of the Appraiser Act, and it should not be within the arguable reach of this regulation.

Section 62.2 - Licensing requirements

The requirements are reasonable, depending on resolution of the issues related to the scope of the definition of "appraisal."

Section 62.3 - Applicable standards for appraisal

Subsection (a)

We recommend the requirement that an appraisal be "signed" by the appraiser be changed to "**authenticated**." This recognizes that many appraisals are now electronically transmitted; the Department has provided for similar recognition of technological advancements in communications in other areas (as with agents' signatures in the Life Insurance Marketing Act). Further, a signature is not required in the act itself.

Subsection (b) - Disclosure

We recommend the first sentence be revised to read, "**In addition to the requirements in the Act, the appraisal shall disclose in writing the following:**" This clarifies that the items to be disclosed are part of the appraisal itself and need not be listed in a separate disclosure form.

As to the specific items to be disclosed, we offer the following recommendations:

Subsection (b)(2): We recommend the appraisal state that the excess costs are the responsibility of the "**consumer**," not the "vehicle owner," consistent with the definition of "consumer."

Subsection (b)(3): We recommend deletion of the second sentence, which combines the permissive with the mandate by saying an appraiser "may" give the consumer names of "at least two repair shops" able to repair the car consistent with his appraisal.

First, the sentence does not make sense: It seems to require that an appraiser name at least two shops able to do the repairs in accordance with the appraisal - but only if he elects to name any shop. Why require the naming of at least two shops when this is done, if the appraiser is not required to do this in the first place?

Second, the "two shop" requirement is impractical, at least if the regulation envisions that the listed shops be ones that could realistically be used by the consumer: In certain regions, there may be only one shop in the area.

Third, there is no support in the Appraiser Act for this type of disclosure or requirement. Under the Act, the appraiser's job is to provide an estimate. It is not his job to find a particular shop to do the work. That is the responsibility of the insurer - which is why consumers look to their insurers, not an appraiser, to identify a shop that can do the work at the price the insurer is willing to pay; it is also why insurers, not appraisers, are currently the ones who identify shops that can do the work at the appraiser's estimate.

Subsection (b)(4): We recommend deletion of the second sentence, which suggests that every motor vehicle insurance policy have an "appraisal clause" to handle disputes between insurers and insureds.

Nowhere in the Appraiser Act is there a suggestion that such a clause must be in motor vehicle insurance policies. The Act covers the licensing and conduct of appraisers, not contractual obligations and terms between insurers and insureds. If the General Assembly wanted such a clause in auto polices, it could have done so through Title 75 dealing with auto polices - not Title 71 dealing with auto physical damage appraisers.

The regulation itself seems to acknowledge that a mandatory "appraisal clause" in auto policies is a requirement that falls outside the regulation of appraisers: It refers to disputes between insurers and insureds. But many auto claims come from third parties, not insureds (presumably, that is why the rest of the regulation refers to "consumers" rather than

insureds). Further, it makes no mention of the role, if any, of appraisers in such disputes - whereas the Appraiser Act is limited to the licensure and conduct of appraisers.

Further, we believe the Department lacks the legal authority to mandate a dispute resolution clause in an insurance policy absent a clear delegation of legislative authority to do so.

A related issue is currently before the Insurance Commissioner in In Re: The Requirement of an Arbitration Provision in Private Passenger Uninsured and Underinsured Motorist Coverage, Docket No. DO97-07-001, where the Federation has challenged the lawfulness of a Department regulation mandating binding arbitration absent express legislative authority. While we are awaiting the Commissioner's ruling, the legal points have been extensively briefed, and I refer you and the IRRC to them for more detailed analysis.

Finally, we object to such a clause as bad public policy, at least within the confines of existing statue and regulation. The clause could easily be abused: Any formal resolution process takes time and money for all parties; thus, invoking it - regardless of the legitimacy of a dispute - could become a means of negotiating any settlement figure.

The protections against insurers doing this are already in other laws, notably the Unfair Insurance Practices Act and Section 8371 of Title 42 allowing bad faith actions against insurers for claims disputes. No such protections exist for potential abuse by auto repair shops. This only highlights that this is a policy decision that merits legislative, not regulatory, action.

We recognize the need to resolve disputes with insureds quickly and fairly, and many insurance policies provide for various means of doing as a matter of private contract. I think the Department's December 31, 1998 Collision Repair Task Force Report shows the relatively small number of disputes about the proper cost to repair damaged vehicles - and the even smaller number of disputes that are between insurers and insureds, as opposed to insurers and certain repair shops. Mandating a dispute resolution appraisal clause in all auto policies will, we believe, hinder rather than further this.

We also recommend that the first sentence's listing of all parts needed to repair a motor vehicle be qualified by adding, "**as known at the time of appraisal**." Going back to our recommendation that the definition of "appraisal" refer to estimates, not determinations, this recognizes that all the needed parts are not always known at the time of the appraisal.

Subsection (b)(5): As with the preceding subsection, we recommend the qualifier, "**as known at the time of appraisal**" with respect to disclosure of incidental charges.

Subsection (b)(6): We offer an editorial comment: Some items in an appraisal are non-taxable, so the reference to the tax payable on the "total dollar amount of the appraisal" would be more accurately stated as the tax payable on the "**taxable items** of the appraisal."

Subsection (b)(7): Consistent with our recommendations for subsections (b)(4) and (5), we recommend the qualifier, "**as known at the time of appraisal**" with respect to disclosure of the date after which an insurer is not responsible for towing and storage charges.

Subsection (b)(8): We recommend the location requisite be limited to "listed parts**, other than new OEM parts,**" consistent with the current regulation. It makes no sense to require an appraiser to list the location of the new OEM parts; our experience is that no repair shop has ever complained that it could not find these parts.

We also recommend this subsection be revised to refer to listed parts "**needed to return the motor vehicle to its pre-accident condition**," rather than parts "in a condition equivalent to, or better than, the condition of the replaced parts prior to the accident." First, this is consistent with the Department's addition of the term, "pre-accident condition," and it is consistent with the central purpose of an appraisal - figuring out what is needed to fix the car.

Second, the requisite that a particular part be "in a condition equivalent to, or better than, the condition of the replaced part" needlessly invites disputes on the use of non-OEM parts. Opponents of these parts claim that they are never the "equivalent" of their OEM counterparts, even if they restore the vehicle to its pre-accident condition (at least in terms of function and appearance), and even if they come with a warranty equal to that of the part being replaced; they claim that only an OEM part can be the literal equal of the OEM part it is replacing.

Whatever the merits (and motives) of this contention, it is not one that is resolved in the Appraiser Act, and it should not be raised in this regulation. It has been the subject of legislation, and of litigation under other laws. This highlights that putting limits on the use of non-OEM parts - at least beyond whether they return a vehicle to its pre-accident condition - is a decision for the General Assembly and the courts, not the Appraiser Act and this regulation.

Subsection (b)(9): Our concerns here are with the warranty language. First, we recommend the language be changed to refer to the warranty on "**the part being replaced**," rather than "the original part." We also recommend the deletion of the phrase "or better than" as extraneous.

Second, the subsection should clarify that the warranty of the non-OEM part be "**equal to the lesser of the remaining warranty on the part being replaced or the warranty of an OEM part.**" An example: If an OEM fender being replaced has two years left on a five year warranty, the non-OEM replacement fender should need only a two year warranty, not a five year one, to match the part being replaced. And if the OEM replacement fender would only have a one year warranty, the non-OEM fender should only have that, too - unless the matching warranty requisite extends to OEM parts as well.

Third, this subsection should clarify that the warranty can come from the insurer or the non-OEM manufacturer. There are thousands of OEM and non-OEM parts, with warranties that vary widely - not just in terms of duration, but in terms of what is covered. Some of the differences are significant, while

many are minor or semantic - and that holds true not just between OEM and non-OEM parts, but also among OEM parts themselves. If non-OEM manufacturers had to literally match the warranties of their OEM counterparts, you would be inviting a "cat and mouse" game of slight variations among OEM warranties designed to prevent the use of non-OEM parts.

This potential manipulation of the regulation's proposed warranty requisite can be prevented from the outset by clarifying that the matching warranty of a non-OEM part may come from the insurer as well as the non-OEM manufacturer. Many insurers already do this in their coverage of non-OEM parts, by warranting those parts for as long as the consumer owns the vehicle. That may be shorter or longer than the duration proposed in this regulation, but the point is the same: It does not matter who supplies the warranty of a non-OEM part, so long as it matches that remaining on the part being replaced or that of its OEM counterpart.

Subsection (c) - Salvage value

Our recommendations here are editorial, with the goal being to clarify what has always been a confusing section.

First, the fact that the subsection applies only in cases where consumers keep the damaged vehicle should be stated at the outset, with the first sentence therefore reading, "In the appraisal of salvage value **where the consumer does not retain ownership of the vehicle**, the following standard shall be used:" This allows deletion of subsection (c)(3); it also changes he reference from "owner" to "consumer," consistent with the regulation's proposed definitions.

Second, subsections (c)(1) and (2) should be merged; as drafted, they suggest a difference between a salvage being known and listed, when the reality is that the latter is in addition to the former. This could be done as follows: "**The appraiser shall inform the consumer, with written confirmation, of the salvage value of the vehicle, the name and address of the source of the salvage value, and of any related towing and storage charges as of the date of the appraisal.**"

It is important to allow this information to be given with written confirmation rather than only in writing; many times, consumers want the information over the phone.

We have an additional concern that should be clarified in the preamble explaining the regulation: The use of salvage pools in giving the estimated value of the car is common-place in the salvage industry. Presumably, nothing in this regulation is meant to change this - but that should be confirmed by the Department.

Subsection (d) - Amount of an appraisal

We agree with the proposed changes. Notably, this section incorporates the phrase "pre-damaged condition" in place of "condition just prior to the damage in question." We have recommended that same change in other sections, consistent with the Department's addition of that term.

Subsection (e) - Total loss appraisals

We recommend the first sentence be revised to refer to a motor vehicle that "**cannot be returned to its pre-accident condition**" rather than a motor vehicle that "cannot be satisfactorily or reasonably repaired to its condition just prior to the damage in question being incurred."

Again, this is consistent with the Department's addition of the term "pre-accident condition." It is important to use that term consistently throughout the regulation, as not including it in one section suggests a different set of rules for that section than in the rest of the regulation.

Second, the regulation's use of the phrase "satisfactorily or reasonably repaired" is troublesome. I am not sure of the difference between satisfaction and reasonableness, but I am sure lawyers could argue this for years. In addition, whose satisfaction and reasonableness is covered here - the consumer, the repair shop, the appraiser, the insurer or the Department? The phrase should be deleted as causing, not curing, confusion and argument.

(e)(1 through 3) - Methods of valuing a total loss: We recommend these subsections be merged and modernized.

(e)(1)(i): This should include the use of electronic data sources, as already allowed by the Department and accepted in the appraisal industry, with a resultant change in the heading and the first sentence to read, "**Electronic data source or guide source method: The appraiser shall determine the replacement value utilizing one of the electronic data sources approved by the Commissioner or by calculating** the average of two figures...."

(e)(1)(ii): We recommend the actual cost method refer to the cost of purchasing a vehicle of "like kind and quality **to the pre-damaged condition of** the motor vehicle being appraised." As noted before, it is important to use the term "pre-accident condition" consistently throughout the regulation. In addition, the reference to a condition better than the vehicle's pre-accident condition is extraneous.

(e)(2 and 3): We recommend these subsections be merged for to read, "**If the motor vehicle is not contained in the electronic data sources or at least two guide book sources as provided for in (e)(1)(i), or if the vehicle differs materially from the average vehicle, for example, because of factors of antiquity or uniqueness, then the replacement value shall be calculated by the actual cost method, provided a similar vehicle can be located, or by the dealer quotation method, provided a similar vehicle cannot be located.**"

This is substantively the same as what is in these subsections - but is shorter and more easily tracked. We also recommend that subsection (e)(5) be added to the end of this section, as detailed below.

(e)(4): As with our recommendation to subsection (b)(6), we recommend the editorial clarification that the "applicable" sales tax refer only to the tax "on **the taxable items in** the replacement cost of a motor vehicle...."

(e)(5): We recommend this subsection be moved to the end of merged (e)(2 and 3) above, with the addition of the introductory clause, "**For actual cost and dealer quotation methods,** the licensed appraiser's total loss evaluation report shall contain...." Those are the only times this subsection is applicable.

(e)(7): We recommend this subsection be revised to allow either the appraiser or the insurer to send a copy of the total loss evaluation report to the consumer, as is allowed in the current regulation. This is consistent with current practice, and I do not believe there have been problems with that practice. As the Appraiser Act is silent on this, I am not sure why the Department wants to change a practice that has not been a problem.

Further, this subsection presents a timing problem in sending and receiving this information: It requires that both be done in five days; if only the mail was that fast. This could be corrected by revising the last sentence to refer to "the consumer's right **to be sent** a copy within 5 days after its completion."

Subsection (f) - Appraiser duties and prohibitions

(f)(1): We recommend deletion of "direct or indirect" in terms of an appraiser not having a conflict of interest. The appraiser either does or does not have a conflict; adding the condition of "direct or indirect" only adds confusion.

Further, we recommend deletion of the second sentence on "strict interpretation to protect the consumer and place the burden on the appraiser." This is gratuitous and lacks statutory support. The rules of statutory and regulatory construction are already well-established, and it is settled case law that all provisions under the Insurance Department's jurisdiction are to be interpreted to further the consumer interest. The sentence also needlessly raises the question of how other sections are to be interpreted: Are they somehow to be interpreted less strictly or not to protect consumers?

(f)(2): We recommend that subsection (ii), regarding information appraisers must send to salvage yards, clarify that such information may be sent on a broad basis rather than with each vehicle, as through a letter of understanding or contract with the salvage yard. This conforms to existing practices and has not created any problems for consumers or salvage yards.

Accordingly, we recommend the addition of the following sentence: "**Such information may be provided to the salvager through a letter of understanding or contract that covers all motor vehicles which an appraiser authorizes to be removed to the salvager.**"

(f)(3): We recommend this subsection be revised to require that the appraiser "**review the appraisal with a lawfully designated representative of the repair shop selected by the consumer to demonstrate that the costs of repair are adequately covered in the appraisal**."

This entails several changes. First, it changes "discuss" to "review," which better describes the duty of the appraiser. Second, it replaces "authorized" with "lawfully designated" representative of a repair shop; this is consistent with our recommended revision to the consumer definition in Section 62.1. Third, it deletes the reference to the "actual" costs. "Actual cost" is a term of art in appraisals, as shown in its use in Section 62.3(e)(1)(ii); it is not needed here and only adds confusion.

The Department likely will hear from some repair shops complaining about its proposed deletion of the last sentence of Section 62.3(g)(9) (now Section 62.3(f)(1)). That sentence prohibited an appraiser from giving any advice to a consumer as to where the vehicle could be repaired. Some repair shops have cited it as effectively barring insurers from suggesting repair shops to consumers.

We support the deletion as necessary to bring the regulation into compliance with the Appraiser Act. Section 11(d) of the Act is far more limited than the current regulation:

It states only that "No appraiser or his employer shall require that repairs be made in any specified shop." The Department has correctly incorporated this statutory requisite in Section 62.3(b)(3) as an item to be disclosed in any appraisal. It has also correctly deleted the broader language in the current regulation - which has absolutely no statutory foundation in the Appraiser Act.

We also recommend the addition of two new subsections to Section 62.3. While they do not regulate appraisers, they do regulate appraisals, and they do clarify insurers' duties when they have assigned appraisals under the Appraiser Act and this regulation. Both subsections would come before the final one here dealing with penalties.

Subsection (g) (new) Inspection

We recommend the addition of a subsection clarifying the right of an appraiser to inspect the vehicle under repair. As noted in our comments to several of the preceding sections, the appraisal process is, at times, an ongoing one. Section 11(e) of the Appraiser Act itself recognizes that an appraiser may have to reinspect a vehicle because of changes that may occur in the course of repairs.

Our experience, however, is that some repair shops (not many, but a vocal minority) try to deny an appraiser the opportunity to inspect a vehicle under repair, saying that they have no right to do so. Accordingly, we recommend the regulation clarify that this right exists by adding the following language:

"**(g) Inspection. Where an insurer assigns an appraisal, the appraiser shall be afforded the reasonable opportunity to enter a repair shop and examine repairs being made to a vehicle during regular business hours.**"

That language matches the inspection right given to adjusters under the Motor Vehicle Financial Responsibility Law at 75 P.S. Section 1799.4.

It is an important recognition that the appraisal process is a two-way street. Much of the Department's regulation is intended to ensure that appraisers deal fairly with repair shops. The regulation should also acknowledge that repair shops have an obligation to deal fairly with appraisers - and allowing appraisers the right to inspect vehicles under repair is an essential part of that.

I am not sure why (or whether) repair shops would object to this subsection, as they are already obligated to allow for these inspections from adjusters. Nonetheless, it is an important clarification to address the repair shop that views the appraisal process as only rights for it and obligations for appraisers.

Subsection (h) (new) Insurer obligations

We recommend a subsection clarifying that insurers' payment and settlement duties do not begin until an assigned appraisal has been carried out.

Many times, insurers are faced with complaints from consumers that they should be paying or settling a claim even before an appraisal has been completed. It would help in explaining to consumers, and it would help expedite the appraisal process, if insurers could point to a regulation clarifying that they cannot pay or settle a claim where an appraisal has been assigned until the appraisal has been completed.

Accordingly, we recommend the following language:

"(h) Insurer obligations. Where an insurer assigns an appraisal, its obligation to pay or otherwise settle the damage claim shall be conditioned on such an appraisal being conducted in accordance with this Act and its regulations."

We appreciate the opportunity the Insurance Department has provided to all parties for input on this regulation. We welcome the opportunity to work with the Department, the Independent Regulatory Review Commission, the Senate and House standing committees and other interested parties as this regulation undergoes IRRC review.

Sincerely,

Samuel R. Marshall

c: Honorable Edwin G. Holl, Chairman
Senate Banking and Insurance Committee

Honorable Nicholas A. Micozzie, Chairman
House Insurance Committee

Robert E. Nyce, Executive Director
Fiona E. Wilmarth, Regulatory Analyst
Independent Regulatory Review Commission

Helfried G. LeBlanc
Deputy Insurance Commissioner
Office of Consumer Services and Enforcement

COMMONWEALTH OF PENNSYLVANIA
INSURANCE DEPARTMENT
OFFICE OF SPECIAL PROJECTS
1326 Strawberry Square
Harrisburg, PA 17120

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March 3, 1999

Mr. Robert Nyce
Executive Director
Independent Regulatory Review Comm.
333 Market Street
Harrisburg, PA 17120

ORIGINAL: 2001
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Legal

Re: Insurance Department Proposed Regulation No. 11-149, Motor Vehicle Physical Damage Appraisers

Dear Mr. Nyce:

Pursuant to Section 5(c) of the Regulatory Review Act, the Department is required to submit all comments on proposed regulations received during the public comment period to the Independent Regulatory Review Commission and the Legislative Standing Committees within 5 days.

Attached is a list of commentators that have submitted comment on the above-mentioned regulation and the respective comment that was received.

If you have any questions regarding this matter, please contact me at (717) 787-4429.

Sincerely yours,

Peter J. Salvatore
Regulatory Coordinator

11-149c2.doc

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Comments on the regulation listed below have been received from the following commentators:

Reg #	*Regulation Title*
11-149	*Motor Vehicle Physical Damage Appraisers*

Mr. P. Michael Riffert
Engle's Frame & Body Service
60 Bethany Road
Ephrata, PA 17522-

Date Received *3/3/1999*

Date sent to Committes and IRRC 3/3/1999

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Bulletin No. 53

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Proper Interpretation of Motor Vehicle Physical Damage Appraiser Act and Regulation Thereunder

September 9, 1977

During recent months, the Insurance Department has received a number of allegations of potential violations of the Motor Vehicle Physical Damage Appraiser Act, act of December 29, 1972 (P.L. 1713, No. 367), or 75 P.S. § 3001, *et seq.*. and of the Department's rules and regulations pursuant therof which are found at 31 Pa. Code, § 62.1 *et seq.* This notice is being published in view of the possibility that a number of licensees are misinterpreting certain key provisions of the law.

(1) Improper referrals – One of the most common complaints relates to the improper referral of claimants to firms engaged in motor vehicle physical damage repair. The regulation reads:

31§62.3(g)(8) "No appraiser shall recommend, or require that repairs be made at any particular place or by a particular individual."

31§62.3(g)(9) "*** a licensed appraiser shall not, in any manner whatsoever, attempt to directly or indirectly coerce, persuade, induce or advise the customer that appraised motor vehicle physical damage must be, should be, or could be repaired at any particular location or by any particular individual or business."

31§62.3(g)(12)(iii) "Upon the unsolicited request of the customer, an appraiser shall provide names and addresses of auto body shops, garages or repair shops within a reasonable distance of where the motor vehicle is located and where work will be done in accordance with the written appraisal."

Plainly stated, the law emphatically prohibits:

(a) direct referral;
(b) unrequested recommendations;
(c) solicitation of a request from a claimant for such recommendations.

(2) Failure to discuss an appraisal and/or a rendered estimate with a selected repair shop owner – Another prevalent complaint concerns the failure of the appraiser to discuss his appraisal with a selected repair shop owner, as well as with the owner of the vehicle. The regulation reads:

31§62.3(g)(12)(ii) "***the appraiser shall discuss the appraisal with the selected repair shop owner, its authorized representative or any other parties as is reasonably necessary to insure that the actual cost or repairs is adequately covered in the appraisal."

Clearly, it is the intent of the law that the appraiser make an attempt to reconcile fairly any discrepancy between his own appraisal and a selected repair shop's estimate. A number of complaints have been received by this Department involving appraisers assuming a "take it or leave it" attitude.

(3) Failure to explain an appraisal and/or a rendered estimate to a claimant – It is further the intent of the law that the appraiser discuss and explain any discrepancies between his own appraisal and a rendered estimate with the claimant at the claimant's request.

Confusion frequently arises with the claimant because the appraiser has failed to explain appraisal factors such as those relating to depreciation or discounting for new parts. The law specifies that such factors be thoroughly disclosed on the appraisal form. The regulation reads:

31§62.3(b)(1) "*** there shall be a specification [in the appraisal statement] of any charges relating to towing, protective care, custody, storage, depreciation, including but not limited to new battery and tire replacement, applicable sales tax payable on the total dollar amount of the appraisal, and all other matters incidental to repair of the incurred damage."

It is also the clearly stated intent of the law that the appraisal statement plainly disclose to the claimant any dollar amount that he or she will be required to pay.

(4) Failure to reappraise when supplementary allowances are requested by repair shops – Closely related to the failure to discuss discrepancies with a selected repair shop is the failure to provide a prompt reappraisal when supplementary allowances are requested by the repair shop. The regulation states:

31§62.3(g)(13) "An appraiser shall promptly reinspect damaged vehicle prior to the repairs in question when supplementary allowances are requested by repair shops and/or the amount of damage is in dispute."

(5) Failure to make a personal inspection of damages – The law provides that all appraisals are to be based upon personal inspection of the damages. It also provides that all repair estimates used or secured by an appraiser must be based on personal inspection. The regulation reads:

31§62.3(g)(11)	"Personal inspection of damaged property by the appraiser is required***
31§62.3(g)(11)(i)	"No appraiser shall secure or use repair estimates that have been obtained by use of photographs, telephone calls or in any manner other than personal inspection."

(6) Failure to base appraisal upon full restoration to prior condition – As stated in §62.3(b)(1) of the act a prime objective of the law is to insure the restoration of automobiles to pre-crash condition. This is the purpose for which the consumer pays his insurance premium. This should be the standard upon which all appraisals are made. This factor should be kept very much in mind when considering the use of new parts as against used parts. This is especially important in repair of new cars which are still under factory warranty. In most instances, new car warranties require replacement with new parts manufactured by the manufacturer of the automobile. Accordingly, used parts should never be recommended when their use would result in a disclaimer by the manufacturer of the manufacturer's warranty, or would result in accelerated depreciation of the vehicle. The same applies to repair procedures.

In consideration of used parts, the law requires that the operational safety of the motor vehicle shall be paramount. Also, the law requires that when used parts are specified, the appraiser shall have certain knowledge of convenient locations where these parts are available and must specify these locations when requested to do so. The regulation reads:

31§62.3(c)	"In the specification of new or used parts, the following standards shall be used for the appraisal statement:
31§62.3(c)(1)	"The operational safety of the motor vehicle shall be paramount especially when the parts involved pertain to the drive train, steering gear, suspension units, brake system or tires.
31§62.3(c)(2)	"If used parts are specified in the appraisal, the appraiser shall have certain knowledge of one or more relatively convenient locations where the particular used parts are actually and reasonably available in usable condition equivalent to or better than the condition of the damaged parts prior to the accident. On request, the appraiser shall specify the locations where such used parts are in fact available.

(7) Compelling Claimants to secure appraisal at a specified location – **While it is understood that certain carriers have found it more efficient to provide so-called "drive-in claims service," the operational safety of the motor vehicle is a vital factor in determining whether or not a claimant should avail himself of such a service. Therefore, the law is clear that no person shall request a consumer to drive his motor vehicle to any location for inspection or appraisal without first being satisfied through inquiry or otherwise, that said motor vehicle is safe for operation on the public highways and meets the requirements of the Pennsylvania Motor Vehicle Code. If the owner of such vehicle, or his representative, states a belief that such vehicle may not meet the foregoing criteria, the appraiser shall arrange for inspection and appraisal at the location where the vehicle then is, or, in the alternative, shall make a suitable agreement for towing said vehicle to another location. The law is clear that even in such cases, inspection and appraisal shall be executed within a reasonable time period.**

(8) Needless or improper delay in assignment and/or execution of inspection and appraisal – While the law requires that inspection of a vehicle shall be make within six working days of an assignment to an appraiser, no time is specified in which an assignment of appraisal must be made after notice of loss is received. While not time is specified, it is the thrust of the law to provide speedy redress to the consumer. The regulations should, therefore, be read to mean that an appraisal should be assigned promptly and within a reasonable time after a loss is reported. A common complaint is that appraisals are not promptly assigned but rather await assignment for several days, sometimes as much as a month. This is clearly contrary to the intent of the law.

(9) Penalties – Violators of the Motor Vehicle Physical Damage Appraisers Act are subject to loss of license, fine and/or imprisonment. The legislature has also deemed violations of the act to be criminal offenses, and the perpetrators of such violations to be further subject to arrest, prosecution and conviction in a court of law.

William J. Sheppard
Insurance Commissioner

The above Bulletin No. 53 was suddenly repealed mid – 1996.

Crawford's AUTO CENTER, INC.
302 WEST UWCHLAN AVENUE • DOWNINGTOWN, PA 19335 • PHONE: 610-269-1610

March 5, 1999

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REVIEW COMMISSION

Independent Regulatory Review Commission
333 Market Street - 14th Floor
Harrisburg, PA 17101

Attention: Mr. Robert Nyce
Executive Director

Reference: Proposed Changes to Pennsylvania Code Title 31, Chapter 62
Motor Vehicle Physical Damage Appraisers

Dear Mr. Nyce,

It is with great concern that I submit this response to the proposed changes to Pennsylvania Code Title 31, Chapter 62. I have read the proposed revisions to Motor Vehicle Physical Damage Appraiser, Regulation and find the direction of The Insurance Department most intolerable. I have relied on this document as proper interpretation of The Motor Vehicle Physical Damage Appraiser Act and believe the only change needed to this important consumer protection regulation is enforcement. The significance of offering my opinion in regards to enforcement and compliance of our current regulation versus a revision to its legislative purpose is the neglectful manner in which the Department of Insurance and the people who work there disregard the rights of citizens of our Commonwealth.

I am a citizen of the Commonwealth of Pennsylvania. I operate and manage a collision service facility in the county of Chester. It has been my experience as a third generation collision repair professional that consumers are generally unaware as to, what is a pre-loss / pre-accident repair. Insurance companies on the other hand, have a tremendous understanding of the insurance industry, the collision repair industry and the unaware consumer. Unfortunately, for these identical reasons the citizens of Pennsylvania need to be safeguarded. Not only is the consumer's capitol investment at risk, the health, safety and welfare of their families is jeopardized as insurance companies and their contracted collision repair facilities become more influenced by the economics and cost control of the claim rather than one's investment and safety.

My difficulty in attempting to comprehend the proposed revisions to Title 31 Chapter 62 is the elimination of consumer protection. Why has the Department of Insurance proposed to weaken an originally powerful regulation designed to protect the citizens of Pennsylvania from the abusive behavior of insurance companies and their representatives. Historically, the Motor Vehicle Physical Damage Appraiser Act and

Regulation was created to provide strict guidelines for physical damage appraisers. A huge element of this legislation is the "Conflict of Interest" discipline written into the original Regulation (1973) and kept intact until this revision. What is the reason behind the Department's soft approach? I have provided The Independent Regulatory Review Commission with my professional opinions and research in regards to these unnecessary proposed changes. Please take into consideration the fact that my qualifications are from a lifelong career in the collision repair profession, a consumer and a citizen of the Commonwealth. If you have any questions or concerns with my observations please contact me.

Sincerely,

Stephen E. Behrndt, President

Enclosures

cc: Peter J. Salavatore, Regulatory Coordinator
Representative Nicholas A. Micozzie
Representative Anthony M. DeLuca
Representative Curt Schroder
Senator James Gerlach
Walter W. Cohen, Esq.
Andrew J. Giorgione, Esq.
H. Michael Cohen, Esq.
Ross DiBono, P.C.T.G. Executive Director
Lance Haver, C.E.P.A. Executive Director

Michael K. Burke
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Office of Special Projects

March 4th, 1999

Peter J. Salvatore, Regulatory Coordinator
Pennsylvania Insurance Commissioners Office
1326 Strawberry Square
Harrisburg, Pa 17120

Re - Proposed changes

Dear Mr. Salvatore,

I am writing to you to as a Licensed Pennsylvania Appraiser with 13 years experience appraising for insurance companies, an Auto Body Repair shop owner, but more importantly as an "Interested Consumer" who potentially may be affected in all three positions by the proposed changes to the Appraisers Act. Obviously there is a need to upgrade the Act and my services are available if you so deem necessary. Specifically I take issue with the following amendments and offer comment as noted.

Section 62.3 (a)(3)
Regarding abbreviations it is a standard of the industry to use abbreviations as noted however with the various computer estimating systems in place as well as handwritten estimates they offer confusion to those trying to read an appraisal by those unfamiliar with the systems or their abbreviations. More importantly every point and method of repair should be spelled out clearly in it entirety for the consumer, as it is the consumer who is not familiar with the wording and verbiage of the auto repair or the insurance business.

Section 62.3 (b)
Regarding;
(2) excess costs above the appraised amount may be the responsibility of the vehicle owner;
(3) a statement that there is no requirement to use any specific repair shop. The appraiser may provide the consumer with the names of at least two repair shops that will perform the repairs in accordance with the appraisal;
(4) that part relating dispute regarding the cost of repairs etc.. and the appraisal clause provision....
(9) Non-OEM parts....

It has been my experience as an appraiser and a shop owner that consumers are not clearly made aware in writing on the appraisal that it may not be all inclusive, and should there be related damages not noted on the appraisal or additional damages uncovered, that the consumer is entitled to be compensated for those damages. It is the position of many carriers to pay for all repairs only if and when the vehicle in question makes it into the repair shop for repairs. It is also the position of many insurance carriers to instruct there staff and independent appraiser to write a "Street" appraisal for the damages. These "Street" appraisals specifically omit damages and compensation that ordinarily would be included on the appraisal had the vehicle been inspected at a repair facility and an attempt to reach an agreed price made with a manager, owner or other knowledgeable party.

We previously had repaired a consumers vehicle that had suffered hail damage. The Insured was instructed by the insurance carrier that it was there policy that if the car was driveable that it had to be taken to the insurance companies drive in claims location. Not knowing any better, and not offered any alternatives the insured did as instructed. Keep in mind that hail damage is all exterior damage and hidden damage is very rare. The Insured received an appraisal for the damages for $1151.00 and received payment less $100.00 her deductible. Subsequently the Insured/Consumer choose our shop for repairs and the carrier paid additionally $2800.00 for obvious external damages that were clear and visible and omitted from the drive in "Street" appraisal. Clearly no one from the insurance carrier followed up to see if the consumer had been properly compensated for their damages before it had arrived at our shop. This way of conducting business has become the "norm" as opposed to the exception. More importantly the Insurance Department does not check to make sure that the consumers claim is being properly handled and the consumer is being properly compensated. Instead the department responds only when a complaint is made by the consumer. Paramount is that the fiduciary obligation of the insurance policy, either as an insured or claimant is clearly not being fulfilled

An inherent conflict exists as the appraiser who is employed and compensated by the insurance company is also graded, rated, given raises, promoted, placed on probation, suspended and fired based upon his appraisal activities that save the employer money In all the years I worked in the insurance industry I was frequently criticized by managers for paying by their standards, to much to repair a vehicle, but never once was I ever told that I didn't pay enough or missed damages in settling a claim. A blind eye was turned on these situations and condoned. The obligation of many appraisers today is to save the insurance company money as opposed to the written standards as outlined in the act below;

Specifically 62.3 (g)

(1) **Conduct to inspire public confidence by fair and honorable dealings**.

(2) **Appraisal of damaged property done without prejudice against, or favoritism toward, any party involved.**

(3) **Disregard of attempts of others to influence his judgement in the interest of the parties involved**

(4) **Preparation of an independent appraisal of damage.**

(8) <u>No appraiser or his employer shall recommend or require that repairs be made at any particular place or by a particular individual.</u>
(9) <u>An appraiser shall not have any direct or indirect conflict of interest in the making of an appraisal. Provisions of the chapter and the act, and this section in particular, shall be strictly interpreted to protect the interest of the consumer and place the burden upon the appraiser to fully eliminate any conflict of interest in the making of an appraisal. Unless as otherwise specified in this chapter or act, a licensed appraisal shall not, in any manner whatsoever, attempt to directly or indirectly coerce, persuade, induce, or advise the consumer that appraised motor vehicle physical damage must be, should be, or could be repaired at any particular location or by any particular individual or business.</u>

Ultimately the consumer should be the person deciding where he chooses to have his vehicle repaired (or not repaired) without coercion from any parties. Frequently the problem of steering consumers to shops that are preferred by carriers is not a blatant problem with appraiser working the field, but more with the office staff that have the initial and follow-up phone contacts with insureds and claimants. In one week an attempt was made by the office staff of one carrier to steer five of our customers to their preferred shops or drive in against their will. In all these conversations the steering was iniated by the carriers office employees stating such things as "that shop is not on our preferred list", "it will take a week to get an appraiser out to the shop to look at your car", "we can't guarantee that shops repairs" etc...etc..etc.. One of these consumers was an employee of our shop who was told he would have to take his vehicle to one of the preferred shops to have it repaired. Another was our office managers best friend who was told she would have to take the car to the drive in for an appraisal. The other three were repeat customers who contacted us with their concerns and we had to get involved to have the vehicles appraised at our shop as the consumers had initially requested. I personally contacted the Insurance Commissioners Office to file a complaint on this occasion and others and was advised that the department will still not accept a complaint from a body shop for steering, and will only accept one from the consumer. Obviously by the Insurance Departments standard the 14 people our shop employs are not considered consumers. It is ironic that if I see an accident or a crime or an infraction I can call the police and they will accept my call and complaint and respond and do something. L & I will also do the same as well as many other governmental agencies, however the Insurance department will not accept my complaint about alleged violations. While I was employed in the insurance business it was my experience that every company but one I worked for rewarded there employees with contests for steering consumers to the insurance companies preferred shops or their drive in claims centers. Frequently the safety of the consumer or the driving public is not a primary interest but the prize of a T-shirt, towels, luncheons and dinner are. One of our customers was told by their claim rep that they could always cancel their drive in appointment later, but she was going to make the appointment anyway. This was after the consumer told her three times to send an appraiser to the repair shop. It would be extremely difficult for him to drive his car to the drive in 11 miles away with a leaking radiator and blown airbags. He didn't go to the drive in, an assignment was never made to have the car appraised at the shop, and a week

was lost in the mean time, till another call to a claims manager was made. Not only is the consumers need not being met it borders on restraining trade for the shops who loose the repair work. Clearly there is no need to recommend two shops as is proposed as it echoes an air of impropriety.
This became an issue in the past that warranted an interpretation that was published in the Pennsylvania Bulletin, Vol. 7, NO 37- Saturday, September 10, 1977, as printed
"Plainly stated, the law emphatically prohibits:
(a) direct referral;
(b) unrequested recommendations
(c) Solicitation of a request from a claimant for such recommendations.

When a dispute in damages arises more time that not it can be settled promptly and fairly with compromise on parties involved. However when the situation of appraisal presents itself it can be a time consuming delay tactic employed by the carrier to force a consumer to settle under duress. Usually the consumer does not have the financial resources nor the expertise required to handle the situation but more importantly he is usually without his vehicle and rushed into making a rash decision. Some companies have even made it a point not to include an appraisal clause in their policy therefore creating more problems for the consumer. Ideally, a fast and efficient fashion to settle these differences should be the implemented and the responsibility of the Commissioners office to oversee.

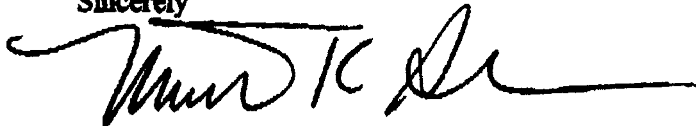
If the obligation of an insurance policy is to restore you to the condition you were prior to the loss then the use of non-OEM parts fail to do that. Aftermarket parts are frequently included on appraisals today without regard to obligation as noted, but because the appraiser is told to allow for them by his employer. When pressed on the issue I have never met an appraiser or repair tech that can agree that these parts are of like kind and quality. When I questioned aftermarket venders about these parts I was emphatically told that these parts are not of like kind and quality, because if the were then the original manufacturer patent rights would be infringed upon and they would have to pay them royalties. Therefore the defects in body lines, fit and finish and manufacturers logos are planned intentionally in the production of these products. Repairs to vehicles using these parts can and frequently lower the resale value or have an effect on the trade in value and market value the of vehicles when discovered. As a course of business we invite our customers to have us inspect any vehicle they intend to buy for defects, Aftermarket parts usage and proper repairs. Remanufactured wheels or reconditioned parts currently have no safety standard as do new OEM parts.

Clearly it is senseless to have these regulations, rewrite or change them unless the Insurance Commissioner and the Commissioners staff take a pro active position in protecting the contractual rights and obligations that a policy holder or beneficiary is entitled to receive. Enforcement and financial sanctions against appraisers, office staff and the Insurance company for permitting these violations will stop violations. Stiffer penalties and fines against companies that condone or coerce their employees to engage in these activities will also stop the violations (e.g. fine the company 10 times the employees fine).

I might point out that there are still some companies and appraisers, and their office staff that hold themselves to a higher standard in dealing with consumers in claim handling and they are to be applauded.

Hopefully these recommendations can be of some aid and if I can be of assistance I look forward to being contacted.

Sincerely



Michael K. Burke

CC: Representative Nick Micozzie
Chairman House Insurance Committee

The Insurance Federation of Pennsylvania, Inc.

1600 Market Street
Suite 1520
Philadelphia, PA 19103
Tel: (215) 665-0500 Fax: (215) 665-0540

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John R. Doubman
Secretary & Counsel
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Birchard T. Clothier
Investment Officer &
Assistant Treasurer
Jeffrey D. Sharp
Director of
Government Affairs

March 5, 1999

Fiona E. Wilmarth
Regulatory Analyst
Independent Regulatory Review Commission
333 Market Street
Harrisburg, PA 17101

Re: Non-OEM parts

Dear Fiona:

While I regard the use of non-OEM parts as an issue outside the appraiser Act regulation, I am always happy to share some thoughts with others on this.

First, an insurer's consideration of non-OEM parts is needed to avoid monopolistic pricing by the original manufacturer. That holds true in other forms of insurance (e.g., homeowner coverage). But it is most applicable in auto coverage, since most parts for damaged vehicles are covered by insurers, not paid directly by consumers.

That is not the case with many auto parts, as with spark plugs or filters or batteries, but it is with things like fenders or bumpers. Imagine if Ford Motor Company said consumers could only use a Ford battery, not a Sears Die-Hard, as a replacement, leaving Ford with the ability to put whatever price it wanted on the battery. Well, the same holds true with bumpers and fenders - but the manufacturers get to tell this to insurers rather than consumers. Still, while we cover the parts, consumers ultimately pay for them through their premiums.

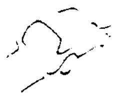
Second, the insistence from some repair shops on OEM parts to repair a car mistakes the insurer's obligation in covering the repair. Insurers pay for the repairs and parts needed to get the car back to its original function and appearance. It is not the source of the repair part that does this - it is the function and appearance of that part. Otherwise, Ford parts would have to be replaced not only with other Ford parts, but by Ford's repair people.

Third, my experience is that the objection to non-OEM parts comes from some repair shops, not consumers. The objection from repair shops comes, I think, because they also wear a retailer's hat - the more expensive the part, the more money they get as the retailer of that part.

Enclosed are some general materials that might serve as a good primer on the use of non-OEM parts. I know the next month will be a hectic one for you, but it might make for enjoyable side reading.

Sincerely,

Samuel R. Marshall



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March 4, 1999

HELFRIED G. LEBLANC
DEPUTY INSURANCE COMMISSIONER
OFFICE OF CONSUMER SERVICES AND ENFORCEMENT
PENNSYLVANIA INSURANCE DEPARTMENT
STRAWBERRY SQUARE
HARRISBURG, PA 17120

ORIGINAL: 2001
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RE: Correspondence of January 28, 1999 to Brian Passell

Dear Ms. LeBlanc,

Thank you for forwarding a copy of the PA Appraiser Regulation revision to our attention. We have reviewed the document, and support the changes proposed in its entirety.

The opportunity for Insurers to offer consumers amicable repair facility options not only fosters efficient customer service and satisfaction, but can also contribute to lowered claims severity and premium rate. Based on our own research, customers appreciate choice. Furthermore, the proposal to add appraisal disclosure statements regarding non-OEM crash parts usage and potential consumer responsibility for excess costs above appraised amounts, for example, are necessary standards towards greater customer enlightenment.

There are some areas still open for interpretive debate. It seems a fine line has evolved between assessing pre-accident condition and repairing a vehicle to a condition better than it was before the accident. Vague regulatory language, such as estimates to be written to "pre-damaged condition", "relatively convenient locations" regarding used parts availability and "necessary painting or refinishing operations" could be probed for complaint generation. However, we feel confident we can respond to such complaints, if necessary, as it is this very language that can be explicated in support of a lower cost estimate as well.

In addition, is there any consideration towards appraisal license requirements for those beyond representatives or entities of insurers? More specifically, there may be repair facility representatives who assess and/or negotiate damages who may not be licensed appraisers. Therefore, it could be argued these individuals are not bound by the same quality appraisal standards. Does the definition of "appraiser", clarifying "any natural person in this Commonwealth who makes appraisals of motor vehicle physical damage" extend to those within repair facilities who challenge an insurer representative's estimate? Is there any current review within the Commonwealth to enforce the actual repairs performed by a repair facility in accordance to repair items agreed to and paid for by insurers, particularly when said items were additional damages argued by repairers above an appraiser's original estimate of damages?

Thank you for giving us the opportunity to review this regulation proposal. If you have any questions or comments regarding this matter, please feel free to direct any communication to the undersigned at the address stated above or I may be contacted at (717) 561-7121.

Sincerely,

Alan S. Tate
Claims Manager

cc Peter J. Salvatore, Regulatory Coordinator
Brian Passell, Progressive Insurance
Mike Sieger, Progressive Insurance
Eric Lehr, Progressive Insurance
Craig Moore, Progressive Insurance

DIRECT REPLY TO: Robert L. . . .ing, Jr., Washington Representative
313 Massachusetts Avenue, N.E., Washington, D.C. 20002, (202) 543-1440, Fax (202) 543-. . 5

AUTOMOTIVE SERVICE ASSOCIATION®

Street Address: 1901 Airport Freeway, Suite 100, Bedford, Texas 76021-5732
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99 MAR -9 AM 8:37
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March 4, 1999

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Mr. Peter Salvatore
Insurance Department
Regulatory Coordinator
1326 Strawberry Square
Harrisburg, Pennsylvania 17120

Dear Mr. Salvatore:

We are writing to respond to the Department of Insurance's recent proposed regulation revising Title 31 Chapter 62 of the Pennsylvania Code. ASA is the oldest and largest trade association representing the independent repair industry in the United States.

After reviewing the proposed regulation, we have serious concerns about several provisions. Understanding that several revisions do not directly impact collision repairers, as small businesses, we are fearful of the long-term implications of key changes in the method our industry has historically operated.

Section 62.3(a)(1) and (3) have been deleted. ASA believes that removing the identity of the insurance company in the appraisal statement provides no benefit to the process. We also believe that this deletion will produce confusion in the request for supplement repairs. As you are aware, at times additional repairs are necessary after further damage is determined in the repair process. Who is responsible for the supplement? This new provision allows the consumer to be confused and uninformed. Specifically, to now allow industry symbols that most consumers are not familiar with only lessens the ability of the consumer to understand an already complicated process.

The revised Section 62.3(b)(3) opens Pennsylvania to possible steering abuses. Your current regulation protects the small businessperson from an anti-competitive marketplace. Collision repairers are able to market their businesses based on quality and service. Under the new provision, mischief is available to those that are now able to promote specific repair facilities. Although the provision still reads that there is "no requirement to use any specific repair shop", it becomes contradictory by allowing two repair facilities to then be named. It is difficult to imagine in today's managed care environment that consumers are demanding to be limited in their choices for any

insurance related matters. Finally, there are no geographic protections for the consumer in the recommendation process. The two facilities recommended could be anywhere. The Department has now opened the system for widespread abuse.

Section 62.3(b)(9) attempts to establish a replacement crash parts policy. Although Pennsylvania would now have a substantive notice statute, there is no "consent" opportunity for the consumer. Why give notice? What are the consumer's rights to reject the particular part offered? Allowing for written consumer consent on the second most important purchase of a consumer's lifetime is very important. Who is responsible for the aftermarket part warranty? Aftermarket parts are virtually unregulated by federal and state governments. How would this process work for parts shipped from another country to Pennsylvania with no warranty? Is the Pennsylvania distributor responsible? The Department should also consider reviewing the current definition of aftermarket parts. Many recylced parts are now used in our industry and the current definition does not address these parts.

The change offered for Section 62.3 (c)(1) is very serious. Many of the collision parts used on a vehicle involved in an accident directly impact the safety of the consumer, i.e. hoods, headlights, structural reinforcement components. As members of the U.S. Department of Transportation's Motor Vehicle Titling and Salvage Federal Advisory Committee, one of the most debated issues was the safety of a newly repaired vehicle. Congress is now considering a national uniform titling bill. By deleting Section 62.3(c)(2), the consumer is again denied vital information. Under the new provision, used tires could be placed on the vehicle with no information provided the consumer.

Section 62.3(d) as recommended would have broad implications. The language indicates that those parts other than aftermarket, used or recycled parts improve the quality of the vehicle. This creates a bias against original equipment manufactured parts. The language currently in the regulation is accepted across the industry and should be maintained in its current form.

Sections 62.3(g)(11)(i) and (ii) have been deleted. Without the personal inspection of the vehicle, the risks abound for error. Telephone, fax and photo communications are not sufficient for review of the damaged property. You will also find a loss in confidence in the system by the consumer without the personal inspection of the vehicle.

Section 62.3(g)(13) provides a logical, systematic process for supplement requests. Without this provision, what is the process for a supplement review? Section (14) has also been deleted. We believe this revision will severely limit settlements and lead to a much less time-efficient process.

The deletion of Sections 62.4(a), (b), (c), (d), (e) and (f) also raises questions as to what ethical safeguards are now in place other than the initial license approval. During the course of the one-year license, does the Department have a process for revoking or suspending a license?

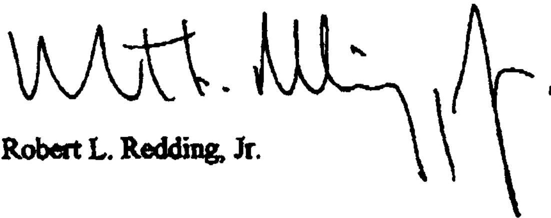
The policy implications for this proposed rule are extreme for the collision repair industry. ASA requests that you take into consideration the thousands of small businesspersons in Pennsylvania that this rule will impact. Clearly, consumers are demanding more choice in relation to managed care systems. This proposal limits choice by allowing repair facility lists. In what appears to be an attempt at replacement crash parts reform, it discriminates against original equipment manufactured parts. It also fails to allow consumers to consent to the type parts on the vehicle being repaired.

Finally, process questions as to supplements and the Department's ability to inject itself in the activities of an appraiser if the need arises is also in question.

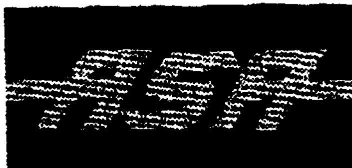
ASA requests that you reconsider these provisions and limit reform to a pro-consumer notice and consent provision as to the use of replacement crash parts. We will be pleased to meet with the Department's staff to discuss a rule that moves the industry forward and not back to a position adverse to the consumer.

Thank you for allowing our Association to comment.

Sincerely,



Robert L. Redding, Jr.



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Facsimile Transmission

TO: Mr. Peter Salvatore

717-705-3873

FROM: Bob Redding

DATE: March 4, 1999

RE:

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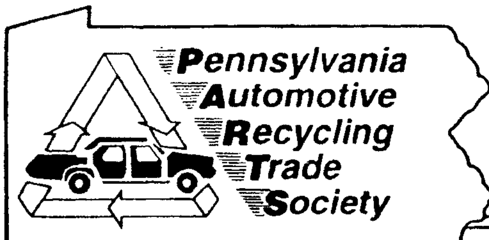
Comments:



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Peter J. Salvatore, Regulatory Coordinator
1326 Strawberry Square
Harrisburg, PA 17120

Dear Mr. Salvatore:

We wish to comment upon the proposed changes to regulations found in Chapter 62, Title 31 of the "Pennsylvania Code", Motor Vehicle Physical Damage Appraisers, as published in the "Pennsylvania Bulletin" on February 6, 1999.

These comments are being filed on behalf of the **Pennsylvania Automotive Recycling Trade Society** ("PARTS"), a **trade association representing** approximately 400 member businesses who are the **responsible, quality automotive recyclers in Pennsylvania.**

Automotive recyclers purchase damaged, abandoned, or used vehicles from insurance companies or individuals. **Recycled** vehicles go through a dismantling process similar to an automotive assembly line running in reverse. The usable, undamaged recycled OEM parts are removed from vehicles, inspected, tested, inventoried, and stored for resale. These **reusable** OEM parts are typically marketed and sold to body shops, garages, used car dealers and retail customers. **Recycled** OEM parts have been factory assembled, and meet the original manufacturer's specifications.

Accordingly, our industry has an interest in the regulations concerning independent automotive appraisals.

Our recommendations/comments are as follows:

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I. We have reviewed the definitions of "Aftermarket crash part" and "Non-original equipment manufacturer ("Non-OEM") aftermarket crash part" in Section 62.1. Although these definitions appear satisfactory, neither recognizes or addresses the fact that there are many "Non-OEM" automotive replacement parts not encompassed by these definitions (e.g. rotors, wheels, gas tanks, carburetors, etc.). Many of these parts may indeed be included in an appraiser's damage report; repairs necessitated by an accident frequently encompass more than sheet metal parts, but also mechanical, electric, and electronic parts. Accordingly, we believe it may be equally important that the consumer be informed concerning these parts.

Therefore, we recommend for your consideration that either the definition of "Aftermarket crash part" be modified to encompass all replacement parts or add definitions for "Aftermarket Mechanical Parts" and "Non-Original equipment manufacturer ("Non-OEM") aftermarket mechanical part".

II. We recommend adding a definition for: "Recycled Original Equipment Manufacturer Aftermarket Crash Parts" ("Recycled OEM") - An aftermarket crash part originally made for or by the original manufacturer of a motor vehicle and which has been utilized as such and later resold."

This establishes a clearer distinction between "Non-OEM" and "OEM" parts, and clearly acknowledges the fact that there are used OEM parts. We believe it important that appraisers and consumers understand same.

III. We are opposed to the use of the current second sentence in Section 62.3(b)(3) which states: "The appraiser may provide the consumer with the names of at least two repair shops able to perform the repair in accordance with the appraisal."

The clear intent of the Pennsylvania Motor Vehicle Physical Damage Appraiser Act, the Act of 1972, P.L. 1713, No. 367, pursuant to which these regulations are promulgated, is to not only encourage, but to require independence and integrity among motor vehicle physical damage appraisers. To allow them to list the names of repair shops constitutes very strongly implied "steering of consumers" to such listed repair shops, especially if those repair shops are in any manner directly or indirectly affiliated with the appraiser.

As you may be aware, there is a growing system of "direct repair shops" which are affiliated with insurance companies, either formally or informally through contractual arrangements. At a bare minimum, there should be a strict prohibition against listing repair shops with whom the physical damage appraiser or his/her employer has any direct or indirect relationship. For example, if an appraiser is employed directly or indirectly by an insurance company, he/she should not be able to list any of the repair shops that are directly or indirectly affiliated with such insurance company. To do otherwise, truly violates the statutorily stated policy of integrity and independence, which are the foundation for these Regulations and the law.

It is the Insurance Department's responsibility to assure that an Appraiser is not only "independent" in title, but in actuality, and to preclude not only actual conflicts of interest, but any perception of conflict of interest.

IV. We suggest the substitution of the word "manufactured" for "supplied" in Section 62.3(b)(9), which would read, in part: "If the appraisal includes Non-OEM aftermarket crash parts, a statement that the appraisal has been prepared based on the use of aftermarket crash parts manufactured by a source other than the manufacturer of the motor vehicle, ..."

The word "supplied" is misleading. OEM parts may be supplied by someone other than the original manufacturer of the motor vehicle. We do not believe it was intended, directly or indirectly, to limit the acquisition of new or used OEM parts only from a manufacturer. The key is to distinguish between "OEM" and "Non-OEM" parts, not their source of supply.

V. We recommend that additional language be added to Section 62.3(c)(1) as follows: "If the salvage value of the vehicle being appraised is known or could reasonably be determined, the appraiser shall advise the consumer in writing of: (a) the salvage value; (b) **the provisions of Section 1117(a) of the Pennsylvania Vehicle Code requiring the filing of an application for certificate of salvage with PennDOT**; and (c) additional charges for towing services or storage chargeable against the motor vehicle as of the date of the appraisal."

The consumer should be fully advised of all legal requirements, including the Motor Vehicle Code requirement that a certificate of salvage must be applied for when a vehicle is deemed "totaled". This is an area in which consumers normally are not knowledgeable, and therefore, in the interest of consumer protection, this disclosure

should be made to the consumer to prevent fraud.

VI. We do not fully understand the logic behind the re-writing of Section 62.3(g), which now appears as Section 62.3(f). We understand an intent to eliminate sections which are redundant or restatements of the statutory language, but this "standard" does not seem to have been applied on a consistent basis, and thus, leaves open to question the intent as to why some statutory provisions are repeated and some are not.

Further, for the reasons stated in paragraph III above, we believe that this is the section for re-emphasis of the underlying policy that appraisers must be completely independent and not traffic in or have an economic affiliation, directly or indirectly, with any other form of automotive business, including automotive salvage repair facilities, insurance companies, vehicle or salvage auctions, etc.

VII. Section 62.3(f)(2)(ii) currently reads as follows: "An appraiser authorizing removal of a motor vehicle to a <u>salvage yard</u> shall inform the <u>salvager</u> in writing that possession is merely for safekeeping purposes and that the <u>salvager</u> does not have an ownership right to the motor vehicle, its parts or accessories, until a <u>certificate of title</u> is received indicating that ownership has been transferred." (Emphasis added).

The terms "salvage yard" and "salvager" are outdated terms deleted from other Pennsylvania statutory language, and not reflective of the current state of our industry. We suggest three alternative terms for the term "salvage yard", specifically, either: "Vehicle salvage dealer" <u>or</u> "Vehicle salvage dealer business" <u>or</u> "Automotive dismantling and recycling business". Definitions for same are contained in Section 1337 of Title 75 of the Pennsylvania Vehicle Code and Section 2719.2 of the Pennsylvania Highway Beautification Act.

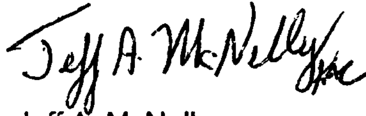
Further, the term "or salvage certificate" should be inserted in the last line to reflect the reality that either ownership document (certificate of title or salvage certificate) may be received for a vehicle, depending upon its condition and/or valuation.

Accordingly, Section 62.3(f)(2)(ii) would read as follows: "An appraiser authorizing removal of a motor vehicle to a <u>vehicle salvage dealer</u> (or <u>vehicle salvage dealer business</u> or <u>automotive dismantling and recycling business</u>) shall inform the <u>dealer</u> (or <u>business owner</u> or <u>authorized representative</u>, or <u>automotive recycler</u>) in writing that possession is merely for safekeeping purposes and that the <u>vehicle salvage dealer</u> (or <u>vehicle salvage dealer business</u> or <u>automotive dismantling and recycling</u>

business) does not have an ownership right to the motor vehicle, its parts or accessories, until a certificate of title or salvage is received indicating that ownership has been transferred.".

Thank you for allowing our industry to comment upon these proposed regulations. We regret that our industry was not initially contacted by the Department prior to the writing of the regulations "regarding issues arising out of the existing regulations" as noted in the preamble to your proposed regulations,. We trust that our comments and suggestions are given the same consideration as other affected parties.

Yours truly,



Jeff A. McNelly
President/CEO

cc: PA Senate Banking and Insurance Committee
PA House Insurance Committee
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Peter J. Salvatore
Regulatory Coordinator
1326 Strawberry Square
Harrisburg, PA 17120

Dear Mr. Salvatore:

I would like to introduce myself and give you a little background into the information I am sending, and the reason for my request. My name is Samuel McEwen; I am the owner of Hedlund Glass Company located in Erie, Pennsylvania. I have been in the glass business for over 10 years and have held several positions.

I started out working as an auto glass installer, then moved into sales and marketing, and then in 1993 I purchased Hedlund Glass Company.

Since then, I have been actively involved in many organizations geared to the automotive industry. I am currently the President of the Pennsylvania Glass Association and an active member of the Pennsylvania Collision Trade Guild and the National Association for Safe Auto Glass Replacement.

As you can see, I assure you that I am speaking from education and experience on the safety issue I bring forth.

I am writing regarding the recent changes in the auto insurance regulations. I am requesting that I may have the opportunity to address some very serious consumer safety issues that have developed over the last decade, that are directly related to these regulatory changes.

Federal Motor Vehicle Safety Standards were developed for occupant safety with special attention given to the manufacturers structural design, and built in Crash Management System. The most critical parts of this system are the windshield, airbag, and seating restraints, they all work in combination with each other to perform their life saving duty. The windshield and its correct bonding are the most important part of this system. The windshield plays several life saving rolls in today designs. It is directly involved in five of the Federal Motor Vehicle Safety Standards, 205, 208, 212, 216 and 219 all dealing with occupant safety.

Your windshield if installed correctly is responsible for up to 60% of your roof structure and therefore helps prevent you from being crushed during a roll over collision. It also keeps you from being ejected from the vehicle during a head on collision. The passenger side airbag was designed to deploy against the windshield at up to 150 to 200 mph. The windshield and it's bonded installation must then also absorb the force of a passenger moving forward and impacting the airbag, and then both striking the windshield again; two major impacts to the windshield in a split second. The passenger side airbag must rely totally on the windshield as a backboard to perform its duty. If the windshield is installed improperly or the adhesive has not had proper time to cure and

bond, the airbag will eject the windshield and the passenger. Poor installation practices render a major, highly engineered safety system totally ineffective.

Nearly all vehicles manufactured today have airbags in the design, which makes this issue of windshield replacement of extreme importance than in past years when only a few vehicles were equipped with airbags, and few relied on the windshield as a major component of the vehicle's crash management system.

Things have changed, and for the better. Today's vehicles are much safer than those of only a few years ago, but these changes and improvements have created new responsibilities for the automotive repair professionals, and also to you.

The issue of consumer safety, when it involves windshields and the proper installation has sadly never been taken seriously in Pennsylvania. In fact, the changes proposed intend to remove the "Operational Safety" section of the automobile insurance regulations. This is a step backwards for the consumer and a disregard of their safety, and the life threatening consequences may be critical. We cannot allow this to happen. Operational Safety is not a redundant statement in the regulation, and I believe was repeated and defined to enforce the law that requires strict attention to the Operational Safety of the motoring public when repairs are made to a motor vehicle.

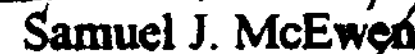
I would like the opportunity to explain the Crash Management System and how it plays a major roll in saving lives. I would like to explain how and where windshields can and are being improperly installed.

These proposed changes would make it even easier for these types of installations to occur. The adhesive bonding between the windshield and the vehicle body are critical and your life and the lives of your families, and every family of the Pennsylvania motoring public depend on it.

I cannot stress to you enough the potential dangerous consequences these changes will have to motoring safety in Pennsylvania. If these changes are allowed the future will look back to us, for explanations and responsibility for the injuries these changes will lead to and the lives that will surely be lost. We cannot allow the visions of someone's cost cutting business plans to place peoples lives at risk.

I look forward to hearing from you in this matter.

Sincerely,



Samuel J. McEwen

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Office of Special Projects

Mr. Peter J. Salvatore
Regulatory Coordinator
1326 Strawberry Square
Harrisburg, PA 17120

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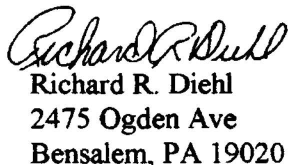
I would like to comment about the proposed changes to the "Motor Vehicle Physical Damage Appraiser Act". Specifically, the following changes "...the appraisal shall include the statement that there is no requirement to use any specific repair shop". This statement would be welcome and clearly would allow the consumer the right to choose a repair shop. However, I believe the following proposed change clearly eliminates or severely restricts a consumer to choose a repair facility. The statement "the appraiser may provide the consumer with the names of at least two repair shops able to perform the repair in accordance with the appraisal" and "a statement that any excess costs above the appraised amount may be the responsibility of the vehicle owner" raises the very real potential for abuse, and allows much to the imagination. For example, how will the repair shops be chosen for inclusion on the appraisers list? Will shops be included on the appraisers list because of the high quality of the repairs performed, convenient location, or recommendation of the Better Business Bureau, which would be very pro consumer, or will the appraisers recommended shops be chosen due to 1.)the willingness to use cheap, poor fitting, potentially dangerous, "aftermarket parts" (see Consumer Reports Magazine, February, 1999), 2.) friendships or financial interests between the recommended repair shop and the appraiser or insurer, without regard to the consumers right to have their auto repaired properly? If repair shops are recommended will there be a limit on how far a consumer will have to travel and, will standard repair procedures based on manufactures recommendations or other recognized industry authorities be followed during the repair process? How or who will determine what is excess cost, what basis will be used to determine such costs. Will there be an appeal process to determine if items and procedures deemed to be "excess cost" by the appraiser are really so, or will the appraiser have the ultimate authority to deny payment for anything deemed "excessive..." Without clear answers to these questions I believe the proposed changes are not acceptable in their present form and urge their removal from the proposed regulation.

Sincerely,



Richard R. Diehl
2475 Ogden Ave
Bensalem, PA 19020

cc: Senator Robert Tomlinson
Representative Nicholas Micozzie
Representative Gene DiGirolamo

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COMMONWEALTH OF PENNSYLVANIA
INSURANCE DEPARTMENT
OFFICE OF SPECIAL PROJECTS
1326 Strawberry Square
Harrisburg, PA 17120

Phone: (717) 787-4429
Fax: (717) 705-3873
E-mail: psalvato@ins.state.pa.us

March 1, 1999

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Mr. Robert Nyce
Executive Director
Independent Regulatory Review Comm.
333 Market Street
Harrisburg, PA 17120

Re: Insurance Department Proposed Regulation No. 11-149, Motor Vehicle Physical Damage Appraisers

Dear Mr. Nyce:

Pursuant to Section 5(c) of the Regulatory Review Act, the Department is required to submit all comments on proposed regulations received during the public comment period to the Independent Regulatory Review Commission and the Legislative Standing Committees within 5 days.

The attached list represents comments received on the above-mentioned regulation.

If you have any questions regarding this matter, please contact me at (717) 787-4429.

Sincerely yours,

Peter J. Salvatore
Peter J. Salvatore
Regulatory Coordinator

11-xxc

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Comments on the regulation listed below have been received from the following commentators:

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Reg #	*Regulation Title*
11-149	*Motor Vehicle Physical Damager Appraisers*

Mr. Jon McNeill — *Co-President*
Sterling Autobody
1 Reservoir Road
West Chester, PA 19380-
Date Received *3/1/1999*

Mr. Robert Thompson — *Senior Vice-President*
Sterling Autobody
1 Reservoir Road
West Chester, PA 19380-
Date Received *3/1/1999*

Mr. Richard R. Diehl

2475 Ogden Avenue
Bensalem, PA 19020-
Date Received *3/1/1999*

Date sent to Committes and IRRC 3/1/1999

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March 1, 1999

Mr. Robert Nyce
Independent Regulatory Review Commission
333 Market Street-14th Floor
Harrisburg, Pa. 17101

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Subject: Pennsylvania Code
Chapter 62, Title 31

Gentlemen:

The proposed revision of the referenced regulation appears to be a response to Insurance Federation complaints more than an attempt to comply with Executive Order 1996-1.

For decades, the existing regulation did not present a problem to the insurance industry because it was not enforced. I told many victimized motorists through the years that they "could complain to the Insurance Department, but it will not do any good," and Senator Wenger can confirm from a meeting with Department personnel in his office in 1992 that there was no enforcement in those days. It has only been in the past two years that the Department has acknowledged obvious, blatant violations, albeit with the imposition of wrist-slapping sanctions. Thus, the Federation must have the regulation changed. The Federation and its friends in the Insurance Department have been arguing that the present regulation goes beyond the requirements of the Act, but this is a normal situation. We have a Pennsylvania Code because legistation cannot possibly be drafted in such a detailed form so as to require no clarification in daily application. The test is whether a regulation is consistent with the intent of the legistation. (It should be noted that where expansion upon Act No. 367 suits the Federation, they are happy to have it, as with providing the consumer with the names of repair shops when there is no basis for such in the act whatsoever.) One also wonders why only this regulation is being revised if the Executive Order requires a complete update of all of Title 31.

The Federation seeks three main changes: 1) the right to pay only for cheap imitation parts, 2) elimination of the prohibition of recommending repair shops, and 3) the right to routinely list their recommended repair shops on their appraisals.

1. Imitation Parts The essence of Act 367 is to have cars restored to pre-loss condition. Imitation parts do not accomplish this and should be PROHIBITED, unless the part to be replaced was an imitation part. Years of tests and a U.S. District Court ruling have proven conclusively that these parts are inferior. Please read the February issue of "Consumer Reports" magazine. Insurance companies must replace a Rolex wristwatch, a Steuben vase, or a Michelin tire with the genuine article. I sincerely believe the main objective of the Insurance Federation in calling for revision of the regulation is to establish authority for use of imitation parts.

2. Recommending Shops The regulation now permits recommendations only upon the "unsolicited request" of the consumer and this prohibits (but has not prevented) insurance companies from asking motorists whether they want shop names. The Federation argues that the act merely prohibits "requiring" motorists to use a particular repair shop, and wants to entirely delete 62.3 (g) (11) & (12). They also want to delete the last sentence in 62.3 (g) (9) which just may be the heart of the regulation. The intent of the act obviously is to allow the motorist choice, to prevent steering, and that sentence was deemed a necessary clarification in 1973. Nothing has changed since then. Rep. Micozzie said it best on July 9, 1997. In his hearing on HB 1250 he said that since motorists live in fear of their insurance companies, even a suggestion or recommendation about a repair shop will be construed as a requirement that the motorist must go to that facility.

3. Listing Shops in Appraisals It was thought in 1973 that requiring an appraiser to back-up his appraisal with two shop names protected the consumer against an unreasonably low appraisal, and this was to occur only upon an "unsolicited request." There is no need for any such language because it accomplishes nothing. (A shop that has not seen the vehicle cannot logically agree to the appraisal, but any shop will do so because every shop is eager to bail out an appraiser in a jam, knowing that it will be rewarded eventually. In reality, when a vehicle is towed to a second shop because the first shop would not accept the appraisal, the second shop receives more money through a supplement at the end of the job, and this can be verified in insurance company records.) To now routinely allow listing of suggested repair shops in appraisals, absent any request, totally destroys the intent of Act 367. Motorists will be effectively steered to those shops, and insurers will increase their cash flow because their plan is to explain to motorists in the drive-in claims center that no check is being issued because they pay the recommended shops directly. They will add that if those shops are too busy and the motorist wants to select his own, the motorist should tell them and they will then issue a check.

SPECIFIC COMMENTS (Referring to Article Nos. in the Proposed Revision)

62.3 (b) The proposed revision in referring to "in addition to the requirements of the Act" then apparently eliminates the need to repeat language already in the act. This is the logic for deleting 62.3 (c) (1):

> (c) In the specification of new or used parts, the following standards shall be used for the appraisal statement:
>
> (1) The operational safety of the motor vehicle shall be paramount especially when the parts involved pertain to the drive train, steering gear, suspension units, brake system or tires.

If there were a genuine desire in the Department to update this regulation and provide "additional protections for Pennsylvania consumers" the Department surely would have seen a need to "add additional language which enhances the Act" in this area, for there is one critical difference between vehicles in 1973 and 1999: SRS (airbag)

systems. Insurance companies are already considering use of junk yard airbags. If Chapter 62 is to be revised, the first revision should be to add "Supplemental Restraint Systems" to the list of critical components in the act.

62.3 (b) (3) Repair shops should not be named because to do so is a form of steering consumers and because no shop can know whether it can "perform the repair in accordance with the appraisal" without seeing the vehicle. Furthermore, Act 367 in Section 11 (c) clearly prohibits an appraiser from securing repair estimates that have been obtained by use of photographs or telephone calls.

62.3 (b) (4) "All items" should remain, but if deleted, it should read, "A complete description."

There is no need to mention the appraisal clause which exists in the insured's policy and which is of no use to a claimant who has a dispute.

62.3 (b) (5) This language is less encompassing than the original text, "and all other matters incidental to the repair of the incurred damage."

62.3 (b) (8) This language falls seriously short of protecting the consumer because it drops "the appraiser shall have certain knowledge of one or more relatively convenient locations where the particular used parts are actually and reasonably available" and " appraiser shall specify the locations where such used parts are in fact available." Appraisers routinely list non-existant used parts in appraisals at low prices. Obviously there was a need for this strong language in 1973 and there still is such a need today. Why does the Insurance Department feel otherwise?

62.3 (b) (9) As stated earlier, imitation parts should be prohibited, and requiring a supposedly equivalent warranty does make these parts equal. Furthermore, please consider that no warranty on imitation parts could offer equivalent consumer protection for these reasons:

1. Imitation parts manufacturers in Taiwan and U.S. distributors are more likely to go out of business than is the vehicle manufacturer.

2. It is far more difficult to obtain warranty service from an imitation parts distributor than it is to simply drive in to the nearest General Motors dealership.

3. While neither the OEM manufacturer nor the imitation parts distributor accepts liability for labor and paint when replacing a rusted out fender, the likelihood of needing a replacement fender (and incurring labor and paint costs) is FAR greater with imitation parts.

If you do not prohibit imitation parts in appraisals, then you should require that:

1. they be manufactured from identical materials.

2. they undergo and pass identical tests, including crash testing and corrosion testing.

3. the insurer specifying imitation parts (i.e., refusing to pay for genuine parts) be responsible for additional bodyshop costs resulting from use of these parts.

4. the insurer be liable for diminished vehicle value resulting from use of these parts, even if not realized until such time as the vehicle is sold.

The Department has stated that it presently has no authority to handle complaints about imitation parts because the existing regulation does not discuss them, and so it wishes to address them in this revision. Curiously, the Department has included mention of only "nonmechanical sheet metal or plastic parts..." Mechanical imitation parts are also specified in great numbers by insurance companies. (We have today on our premises a 1998 Ford with 3655 miles for which the insurance company specified imitation mechanical (suspension) parts and refused to pay the higher price for Ford parts. Naturally Ford's new car warranty will not apply to imitation parts.

How would you feel if on your vacation your car overheated in South Carolina and you stopped at the local Jeep dealer expecting warranty service, only to learn that your engine damage was not covered because it was caused by an "aftermarket" radiator which was installed in Pennsylvania after a minor accident (by an authorized Jeep dealer's DRP bodyshop). Incredulous, after you pay your repair bill and return home, you review your crash appraisal and learn for the first time that a "Quality Replacement Part" purchased from the New Hampshire Radiator Company had been installed in your Jeep.

Imitation parts (mechanical or body) are not equivalent and should not be permitted in adjusting insurance claims.

Why has the Department consciously chosen not to address mechanical imitation parts in this proposed revision?

62.3 (d) The language "requests the use of parts other than those listed on the appraisal... appraisal need only specify the cost of repairing the vehicle to its pre-damaged condition" obviously allows insurers to pay only for imitation parts and in fact makes them equal. This language must be changed.

62.3 (f) The obvious omission is "No appraiser or his employer shall recommend or require that repairs be made at any particular place or by a particular individual." This was added to the language in the Act in 1973 as necessary emphasis and clarification of the intent of the Act. The need is the same today.

62.3 (f) (1) Elimination of "shall not, in any manner whatsoever, attempt to directly or indirectly coerce, persuade, induce, or advise the consumer that appraised motor vehicle physical damage must be, should be, or could be repaired at any particular location or by any particular individual business" totally goes against the intent of the act.

Citizens of this Commonwealth are to have the choice of a repair facility. Where is the legislation that took that right from them and gave it to insurance companies?

Also in this section of what is supposed to be a comprehensive update of the 1973 regulation, we find that clarification of "conflict of interest" has been overlooked. Here is an area that does indeed need to be clarified because of changes in industry practice since 1973. In 1973 most appraisals were written by independent appraisers; today many, if not most, are written either by insurance company employees or by employees of body shops (myself included). Act 367 requires that the appraiser:

> (2) Approach the appraisal of damaged property without prejudice against, or favoritism toward, any party involved in order to make fair and impartial appraisals.
>
> (3) Disregard any efforts on the part of others to influence his judgement in the interest of the parties involved.
>
> (4) Prepare an independent appraisal of damage.

How can any insurance company employee or any repair facility employee possibly comply with this requirement?

It is unthinkable that the Department would purport to bring the regulation up to date without addressing this glaring example of unlawful activity.

62.3 (f) (2) This section would no longer contain the important consumer safeguard now existing in 62.3 (g) (11) (ii) pertaining to photographing wrecks before an appraisal is presented. This well written clarification in 1973 has an obvious value since appraisers are prohibited in the act from using photographs to obtain bids.

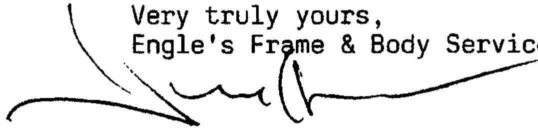
62.3 (f) (3) As discussed above, the existing paragraph 62.3 (g)(12)(iii) should be deleted, since shops that have not personally examined a vehicle cannot agree to perform the repairs. The Department, however, wants to allow routine suggestion of repair shops in 62.3 (b)(3). If it is felt that there is any valid reason to allow insurers to name shops, the language "unsolicted request" must be retained if Pennsylvania motorists are to be protected against steering. Perhaps someone should review the files of horror stories in the 1960's which gave rise to this language.

Additionally, this revised section would delete what is now 62.3(g)(14), which benefits the consumer by allowing for reappraisals. The Department should be asked for its rationale in requesting this change.

In summary, anyone who has worked in this business knows that Act 367 is not being enforced. Check insurance company files, for example, to see whether appraisers do "leave a legible copy of his appraisal with... the repair shop selected by the consumer." Any revision of the regulation should maintain the intent of Act 367 and then should be enforced diligently. This proposed revision is a transparent attempt to remove provisions that the Insurance Department has not enforced, does not wish to enforce, and now finds to be an embarrassment. Until things change, Pennsylvania consumers will be correct in believing that a wrecked car will never be the same again, because, in most cases, wrecked cars are not being repaired properly.

For the Department to state in their preamble that this revision "enhances the Act and which provides additional protections for Pennsylvania consumers" is poppycock.

Very truly yours,
Engle's Frame & Body Service



P. Michael Riffert

CC: Hon. Noah W. Wenger
Hon. Leroy Zimmerman
Hon. Jere Strittmatter
Mr. Peter J. Salvatore, Insurance Department

PMR/vc

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HARRISBURG

February 19, 1999

Honorable Edwin G. Holl
Chairman, Pennsylvania State Senate Committee of Banking & Insurance
130 Main Capital
Harrisburg, PA 17120

Original: 2001
Harbison
Copies: Tyrrell
Wilmarth
Sandusky
Legal

Dear Mr. Holl:

On behalf of Sterling Collision Centers, Inc., we would like to express our support for the Insurance Department's proposed amendment to Chapter 62 of Title 31 of the Pennsylvania Code, Motor Vehicle Physical Damage Appraisers. In our view, the revisions make Chapter 62 consistent with existing statutory language, remove several duplicative provisions and most importantly, ensure additional protection for Pennsylvania consumers. We applaud the systematic manner in which the Insurance Department's task force has investigated the concerns raised originally in April, 1996 by just a handful of collision repair professionals. As an owner of nine professional collision repair facilities serving customers across Pennsylvania and an employer of approximately 150 people in the state, we at Sterling fully support the stipulated revisions.

The revisions effectively advance the interests of consumers in Pennsylvania in several important ways. Firstly, they mandate clear and simple changes designed to enable consumers to make informed decisions during their collision repair experience—namely, consumers should be able to easily obtain referrals from their insurance company. Secondly, the amendment contains language that fully apprises consumers of their rights and responsibilities. Thirdly, the revisions explicitly preserve the right of Pennsylvania consumers to choose their own repair shop.

Consumers win with choice, great service and great quality. As the collision industry "professionalizes" and services customers in state of the art facilities that turn around cars faster, at higher quality and lower costs, consumers actually win in two ways: less life interruption around the time of the accident and lower insurance premiums through lower repair costs.

We are committed to offering excellent service and quality to our customers, and we anxiously await the final publication of the amendment. Thank you for your attention to this matter, and please do not hesitate to contact either of us should you like us to elaborate on any of the thoughts expressed in this letter of support.

Sincerely,

Jon McNeill
Co-President

Robert Thompson
Senior Vice-President

STERLING COLLISION CENTERS, INC.
1 Reservoir Road, West Chester, PA 19380 / Phone 610.696.3336 Fax 610.696.6171

STERLING.
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Office of Special Projects

February 19, 1999

Mr. Peter J. Salvatore
Regulatory Coordinator
1326 Strawberry Square
Harrisburg, PA 17120

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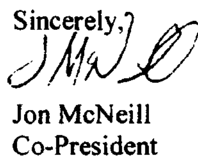

Jon McNeill
Co-President

Robert Thompson
Senior Vice-President

STERLING COLLISION CENTERS, INC.
1 Reservoir Road, West Chester, PA 19380 / Phone 610.696.3336 Fax 610.696.6171

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FEBRUARY 11, 1999

REPRESENTATIVE NICHOLAS A. MICOZZIE
6 SOUTH SPRINGFIELD RD.
CLIFTON HEIGHTS, PA. 19018

REFERENCE: INSURANCE (AUTO) REGULATIONS

DEAR REP. MICOZZIE;

AT THIS POINT IN TIME, I AM LITERALLY BEGGING YOU TO PLEASE HELP US INNOCENT VICTIM CONSUMERS IN THE FIGHT AGAINST THE INSURANCE FEDERATION TO STOP THEM FROM CHANGING THE REGULATIONS WHICH WILL "HURT" CONSUMERS, AND TAKE AWAY THEIR RIGHTS.

IT IS ONE THING THAT WITH AN HMO YOU HAVE TO USE A DOCTOR FROM THE "LIST"; HOWEVER, I WILL BE DAMNED, IF I AM GOING TO HAVE NO CHOICE IN GETTING MY SMASHED CAR FIXED. IF THESE REGULATIONS GET PASSED THAT MEANS IF MY CAR GETS IN AN ACCIDENT, I WILL BE FORCED TO USE AN APPOINTED CONGLOMERATE BODY SHOP APPOINTED BY THE INSURANCE COMPANY. IN RETURN, MY CAR WILL BE "HACKED UP, BUTCHERED UP, AND THE USE OF AFTERMARKET" PARTS WILL BE USED ON MY NEW VEHICLE. THIS IN RETURN DEPRECIATES THE VALUE OF MY CAR.

I REALIZE THAT I DO NOT LIVE IN YOUR TERRITORY; HOWEVER, HAVING KNOWLEDGE OF THIS PROMPTED ME TO OBTAIN A LIST OF REPS ON THE INSURANCE COMMITTEE WHO COULD INTERVENE FOR HELP.

SINCERELY,

D.J. RUDOLPH
259 LEXINGTON AVENUE
EDDYSTONE, PA 19022

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MAGNUSON-MOSS WARRANTY ACT

Public Law 93-637
93rd Congress, S. 356
January 4, 1975

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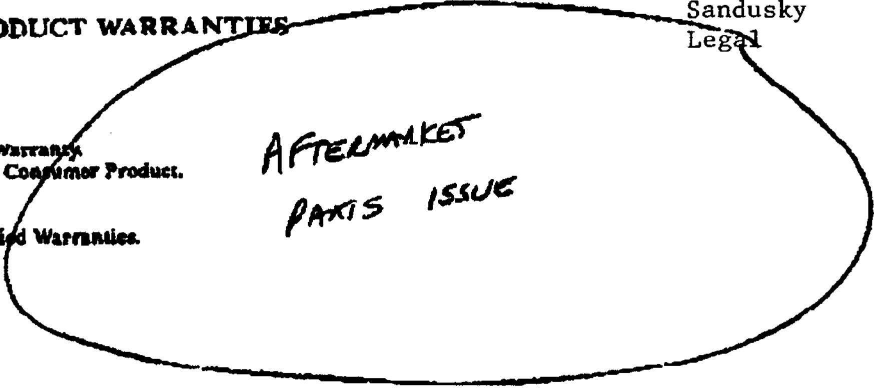
TITLE I — CONSUMER PRODUCT WARRANTIES



Sec.
101 Definitions.
102 Warranty Provisions.
103 Designation of Warranties.
104 Federal Minimum Standards for Warranty.
105 Full and Limited Warranting of a Consumer Product.
106 Service Contracts.
107 Designation of Representatives.
108 Limitation on Disclaimer of Implied Warranties.
109 Commission Rules.
110 Remedies.
111 Effect on Other Laws.
112 Effective Date.

§101 Definitions.

For the purposes of this title:

(1) The term "consumer product" means any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed).

(2) The term "Commission" means the Federal Trade Commission.

(3) The term "consumer" means a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and any other person who is entitled by the terms of such warranty (or service contract) or under applicable state law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract).

(4) The term "supplier" means any person engaged in the business of making a consumer product directly or indirectly available to consumers.

(5) The term "warrantor" means any supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty.

(6) The term "written warranty" means

(A) Any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

(B) Any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

(7) The term "implied warranty" means an implied warranty arising under state law (as modified by sections 108 and 104(a)) in connection with the sale by a supplier of a consumer product.

(8) The term "service contract" means a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair (or both) of a consumer product.

(9) The term "reasonable and necessary maintenance" consists of those operations
- (A) Which the consumer reasonably can be expected to perform or have performed and
- (B) Which are necessary to keep any consumer product performing its intended function and operating at a reasonable level of performance.

(10) The term "remedy" means whichever of the following actions the warrantor elects:
- (A) Repair,
- (B) Replacement, or
- (C) Refund;

  except that the warrantor may not elect refund unless
  - (i) The warrantor is unable to provide replacement and repair is not commercially practicable or cannot be timely made, or
  - (ii) The consumer is willing to accept such refund.

(11) The term "replacement" means furnishing a new consumer product which is identical or reasonably equivalent to the warranted consumer product.

(12) The term "refund" means refunding the actual purchase price (less reasonable depreciation based on actual use where permitted by rules of the Commission).

(13) The term "distributed in commerce" means sold in commerce, introduced or delivered for introduction into commerce, or held for sale or distribution after introduction into commerce.

(14) The term "commerce" means trade, traffic, commerce, or transportation
- (A) Between a place in a state and any place outside thereof, or
- (B) Which affects trade, traffic, commerce, or transportation described in subparagraph (A).

(15) The term "state" means a state, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Canal Zone, or American Samoa. The term "state law" includes a law of the United States applicable only to the District of Columbia or only to a territory or possession of the United States; and the term "federal law" excludes any state law.

§102 Warranty Provisions.

(a) In order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products, any warrantor warranting a consumer product to a consumer by means of a written warranty shall, to the extent required by rules of the Commission, fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty. Such rules may require inclusion in the written warranty of any of the following items among others:
- (1) The clear identification of the names and addresses of the warrantors.
- (2) The identity of the party or parties to whom the warranty is extended.
- (3) The products or parts covered.
- (4) A statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform with such written warranty—at whose expense—and for what period of time.
- (5) A statement of what the consumer must do and expenses he must bear.
- (6) Exceptions and exclusions from the terms of the warranty.
- (7) The step-by-step procedure which the consumer should take in order to obtain performance of any obligation under the warranty, including the identification of any person or class of persons authorized to perform the obligations set forth in the warranty;

(8) Information respecting the availability of any informal dispute settlement procedure offered by the warrantor and a recital, where the warranty so provides, that the purchaser may be required to resort to such procedure before pursuing any legal remedies in the courts.
(9) A brief, general description of the legal remedies available to the consumer.
(10) The time at which the warrantor will perform any obligations under the warranty.
(11) The period of time within which, after notice of a defect, malfunction, or failure to conform with the warranty, the warrantor will perform any obligations under the warranty.
(12) The characteristics or properties of the products, or parts thereof, that are not covered by the warranty.
(13) The elements of the warranty in words or phrases which would not mislead a reasonable, average consumer as to the nature or scope of the warranty.

(b) (1) (A) The Commission shall prescribe rules requiring that the terms of any written warranty on a consumer product be made available to the consumer (or prospective consumer) prior to the sale of the product to him.
(B) The Commission may prescribe rules for determining the manner and form in which information with respect to any written warranty of a consumer product shall be clearly and conspicuously presented or displayed so as not to mislead the reasonable, average consumer, when such information is contained in advertising, labeling, point-of-sale material, or other representations in writing.
(2) Nothing in this title (other than paragraph (3) of this subsection) shall be deemed to authorize the Commission to prescribe the duration of written warranties given or to require that a consumer product or any of its components be warranted.
(3) The Commission may prescribe rules for extending the period of time a written warranty or service contract is in effect to correspond with any period of time in excess of a reasonable period (not less than 10 days) during which the consumer is deprived of the use of such consumer product by reason of failure of the product to conform with the written warranty or by reason of the failure of the warrantor (or service contractor) to carry out such warranty (or service contract) within the period specified in the warranty (or service contract).

(c) No warrantor of a consumer product may condition his written or implied warranty of such product on the consumer's using, in connection with such product, any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name; except that the prohibition of this subsection may be waived by the Commission if
(1) The warrantor satisfies the Commission that the warranted product will function properly only if the article or service so identified is used in connection with the warranted product, and
(2) The Commission finds that such a waiver is in the public interest.
The Commission shall identify in the Federal Register, and permit public comment on, all applications for waiver of the prohibition of this subsection, and shall publish in the Federal Register its disposition of any such application, including the reasons therefor.

(d) The Commission may by rule devise detailed substantive warranty provisions which warrantors may incorporate by reference in their warranties.

(e) The provisions of this section apply only to warranties which pertain to consumer products actually costing the consumer more than $5.00.

§103 Designation of Warranties.

(a) Any warrantor warranting a consumer product by means of a written warranty shall clearly and conspicuously designate such warranty in the following manner, unless exempted from doing so by the Commission pursuant to subsection (c) of this section:

(1) If the written warranty meets the federal minimum standards for warranty set forth in section 104 of this Act, then it shall be conspicuously designated a "full (statement of duration) warranty."

(2) If the written warranty does not meet the federal minimum standards for warranty set forth in section 104 of this Act, then it shall be conspicuously designated a "limited warranty."

(b) Sections 102, 103, and 104 shall not apply to statements or representations which are similar to expressions of general policy concerning customer satisfaction and which are not subject to any specific limitations.

(c) In addition to exercising the authority pertaining to disclosure granted in section 102 of this Act, the Commission may by rule determine when a written warranty does not have to be designated either "full (statement of duration)" or "limited" in accordance with this section.

(d) The provisions of subsections (a) and (c) of this section apply only to warranties which pertain to consumer products actually costing the consumer more than $10.00 and which are not designated "full (statement of duration) warranties."

§104 Federal Minimum Standards for Warranty.

(a) In order for a warrantor warranting a consumer product by means of a written warranty to meet the federal minimum standards for warranty

(1) Such warrantor must as a minimum remedy such consumer product within a reasonable time and without charge, in the case of a defect, malfunction, or failure to conform with such written warranty;

(2) Notwithstanding section 108(b), such warrantor may not impose any limitation on the duration of any implied warranty on the product;

(3) Such warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on such product, unless such exclusion or limitation conspicuously appears on the face of the warranty; and

(4) If the product (or a component part thereof) contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in such product, such warrantor must permit the consumer to elect either a refund for, or replacement without charge of, such product or part (as the case may be). The Commission may by rule specify for purposes of this paragraph, what constitutes a reasonable number of attempts to remedy particular kinds of defects or malfunctions under different circumstances. If the warrantor replaces a component part of a consumer product, such replacement shall include installing the part in the product without charge.

(b) (1) In fulfilling the duties under subsection (a) respecting a written warranty, the warrantor shall not impose any duty other than notification upon any consumer as a condition of securing remedy of any consumer product which malfunctions, is defective, or does not conform to the written warranty, unless the warrantor has demonstrated in a rulemaking proceeding, or can demonstrate in an administrative or judicial enforcement proceeding (including private enforcement), or in an informal dispute settlement proceeding, that such a duty is reasonable.

(2) Notwithstanding paragraph (1), a warrantor may require, as a condition to replacement of, or refund for, any consumer product under subsection (a), that such consumer product shall be made available to the warrantor free and clear of liens and other encumbrances, except as otherwise provided by rule or order of the Commission in cases in which such a requirement would not be practicable.

(3) The Commission may, by rule, define in detail the duties set forth in section 104(a) of this Act and the applicability of such duties to warrantors of different categories of consumer products with "full (statement of duration)" warranties.

(4) The duties under subsection (a) extend from the warrantor to each person who is a consumer with respect to the consumer product.

(c) The performance of the duties under subsection (a) of this section shall not be required of the warrantor if he can show that the defect, malfunction, or failure of any warranted consumer product to conform with a written warranty was caused by damage (not resulting from defect or malfunction) while in the possession of the consumer, or unreasonable use (including failure to provide reasonable and necessary maintenance).

(d) For purposes of this section and of section 102(c), the term "without charge" means that the warrantor may not assess the consumer for any costs the warrantor or his representatives incur in connection with the required remedy of a warranted consumer product. An obligation under subsection (a)(1)(A) to remedy without charge does not necessarily require the warrantor to compensate the consumer for incidental expenses; however, if any incidental expenses are incurred because the remedy is not made within a reasonable time or because the warrantor imposed an unreasonable duty upon the consumer as a condition of securing remedy, then the consumer shall be entitled to recover reasonable incidental expenses which are so incurred in any action against the warrantor.

(e) If a supplier designates a warranty applicable to a consumer product as a "full (statement of duration)" warranty, then the warranty on such product shall, for purposes of any action under section 110(d) or under any state law, be deemed to incorporate at least the minimum requirements of this section and rules prescribed under this section.

§105 Full and Limited Warranting of a Consumer Product.

Nothing in this title shall prohibit the selling of a consumer product which has both full and limited warranties if such warranties are clearly and conspicuously differentiated.

§106 Service Contracts.

(a) The Commission may prescribe by rule the manner and form in which the terms and conditions of service contracts shall be fully, clearly, and conspicuously disclosed.

(b) Nothing in this title shall be construed to prevent a supplier or warrantor from entering into a service contract with the consumer in addition to or in lieu of a written warranty if such contract fully, clearly, and conspicuously discloses its terms and conditions in simple and readily understood language.

§107 Designation of Representatives.

Nothing in this title shall be construed to prevent any warrantor from designating representatives to perform duties under the written or implied warranty: *provided,* that such warrantor shall make reasonable arrangements for compensation of such designated representatives, but no such designation shall relieve the warrantor of his direct responsibilities to the consumer or make the representative a cowarrantor.

§108 Limitation on Disclaimer of Implied Warranties.

(a) No supplier may disclaim or modify [except as provided in subsection (b)] any implied warranty to a consumer with respect to such consumer product if

- (1) Such supplier makes any written warranty to the consumer with respect to such consumer product, or
- (2) At the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.

(b) For purposes of this title [other than section 104(a)(2)], implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.

(c) A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this title and state law.

§109 Commission Rules.

(a) Any rule prescribed under this title shall be prescribed in accordance with section 553 of title 5, United States Code; except that the Commission shall give interested persons an opportunity for oral presentations of data, views, and arguments, in addition to written submissions. A transcript shall be kept of any oral presentation. Any such rule shall be subject to judicial review under section 18(e) of the Federal Trade Commission Act (as amended by section 202 of this Act) in the same manner as rules prescribed under section 18(a)(1)(B) of such Act, except that section 18(e)(3)(B) of such Act shall not apply.

(b) The Commission shall initiate within one year after the date of enactment of this Act a rulemaking proceeding dealing with warranties and warranty practices in connection with the sale of used motor vehicles; and, to the extent necessary to supplement the protections offered the consumer by this title, shall prescribe rules dealing with such warranties and practices. In prescribing rules under this subsection, the Commission may exercise any authority it may have under this title, or other law, and in addition it may require disclosure that a used motor vehicle is sold without any warranty and specify the form and content of such disclosure.

§110 Remedies.

(a) (1) Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms.

(2) The Commission shall prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this title applies. Such rules shall provide for participation in such procedure by independent or governmental entities.

(3) One or more warrantors may establish an informal dispute settlement procedure which meets with requirements of the Commission's rules under paragraph (2). If

(A) A warrantor establishes such a procedure,

(B) Such procedure, and its implementation, meets the requirements of such rules, and

(C) He incorporates in a written warranty a requirement that the consumer resort to such procedure before pursuing any legal remedy under this section respecting such warranty, then

(i) The consumer may not commence a civil action (other than a class action) under subsection (d) of this section unless he initially resorts to such procedure; and

(ii) A class of consumers may not proceed in a class action under subsection (d) except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless the named plaintiffs (upon notifying the defendant that they are named plaintiffs in a class action with respect to a warranty obligation) initially resort to such procedure. In the case of such a class action which is brought in a district court of the United States, the representative capacity of the named plaintiffs shall be established in the application of rule 23 of the Federal Rules of Civil Procedure. In any civil action arising out of a warranty obligation and relating to a matter considered in such a procedure, any decision in such procedure shall be admissible in evidence.

(4) The Commission on its own initiative may, or upon written complaint filed by any interested person shall, review the bona fide operation of any dispute settlement procedure resort to which is stated in a written warranty to be a prerequisite to pursuing a legal remedy under this section. If the Commission finds that such procedure or its implementation fails to comply with the requirements of the rules under paragraph (2), the Commission may take appropriate remedial action under any authority it may have under this title or any other provision of law.

(5) Until rules under paragraph (2) take effect, this subsection shall not affect the validity of any informal dispute settlement procedure respecting consumer warranties, but in any action under subsection (d), the court may invalidate any such procedure if it finds that such procedure is unfair.

(b) It shall be a violation of section 5 (a)(1) of the Federal Trade Commission Act [15 U.S.C. §45(a)(1)] for any person to fail to comply with any requirement imposed on such person by this title (or a rule thereunder) or to violate any prohibition contained in this title (or a rule thereunder).

(c) (1) The district courts of the United States shall have jurisdiction of any action brought by the Attorney General (in his capacity as such), or by the Commission by any of its attorneys designated by it for such purpose, to restrain

(A) Any warrantor from making a deceptive warranty with respect to a consumer product, or

(B) Any person from failing to comply with any requirement imposed on such person by or pursuant to this title or from violating any prohibition contained in this title. Upon proper showing that, weighing the equities and considering the Commission's or Attorney General's likelihood of ultimate success, such action would be in the public interest and after notice to the defendant, a temporary restraining order or preliminary injunction may be granted without bond. In the case of an action brought by the Commission, if a complaint under section 5 of the Federal Trade Commission Act is not filed within such period (not exceeding 10 days) as may be specified by the court after the issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect. Any suit shall be brought in the district in which such person resides or transacts business. Whenever it appears to the court that the ends of justice require that other persons should be parties in the action, the court may cause them to be summoned whether or not they reside in the district in which the court is held, and to that end process may be served in any district.

(2) For the purposes of this subsection, the term "deceptive warranty" means

(A) A written warranty which

(i) Contains an affirmation, promise, description, or representation which is either false or fraudulent, or which, in light of all of the circumstances, would mislead a reasonable individual exercising due care; or

(ii) Fails to contain information which is necessary in light of all of the circumstances, to make the warranty not misleading to a reasonable individual exercising due care; or

(B) A written warranty created by the use of such terms as "guaranty" or "warranty," if the terms and conditions of such warranty so limit its scope and application as to deceive a reasonable individual.

(d) (1) Subject to subsections (a)(3) and (e), a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this title, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief

(A) In any court of competent jurisdiction in any state or the District of Columbia; or

(B) In an appropriate district court of the United States, subject to paragraph (3) of this subsection.

(2) If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

(3) No claim shall be cognizable in a suit brought under paragraph (1)(B) of this subsection

(A) If the amount in controversy of any individual claim is less than the sum or value of $25;

(B) If the amount in controversy is less than the sum or value of $50,000 (exclusive of interest and costs) computed on the basis of all claims to be determined in this suit; or

(C) If the action is brought as a class action, and the number of named plaintiffs is less than one hundred.

(e) No action (other than a class action or an action respecting a warranty to which subsection (a)(3) applies) may be brought under subsection (d) for failure to comply with any obligation under any written or implied warranty or service contract, and a class of consumers may not proceed in a class action under such subsection with respect to such a failure except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless the person obligated under the warranty or service contract is afforded a reasonable opportunity to cure such failure to comply. In the case of such a class action (other than a class action respecting a warranty to which subsection (a)(3) applies) brought under subsection (d) for breach of any written or implied warranty or service contract, such reasonable opportunity will be afforded by the named plaintiffs and they shall at that time notify the defendant that they are acting on behalf of the class. In the case of such a class action which is brought in a district court of the United States, the representative capacity of the named plaintiffs shall be established in the application of rule 23 of the Federal Rules of Civil Procedure.

(f) For purposes of this section, only the warrantor actually making a written affirmation of fact, promise, or undertaking shall be deemed to have created a written warranty, and any rights arising thereunder may be enforced under this section only against such warrantor and no other person.

§111 Effect on Other Laws.

(a) (1) Nothing contained in this title shall be construed to repeal, invalidate, or supersede the Federal Trade Commission Act (15 U.S.C. §41 *et seq.*) or any statute defined therein as an Antitrust Act.

(2) Nothing in this title shall be construed to repeal, invalidate, or supersede the Federal Seed Act (7 U.S.C. §§1551-1611) and nothing in this title shall apply to seed for planting.

(b) (1) Nothing in this title shall invalidate or restrict any right or remedy of any consumer under state law or any other federal law.

(2) Nothing in this title [other than section 108 and 104(a) (2) and (4)] shall
(A) Affect the liability of, or impose liability on, any person for personal injury, or
(B) Supersede any provision of state law regarding consequential damages for injury to the person or other injury.

(c) (1) Except as provided in subsection (b) and in paragraph (2) of this subsection, a state requirement
(A) Which relates to labeling or disclosure with respect to written warranties or performance thereunder;
(B) Which is within the scope of an applicable requirement of sections 102, 103, and 104 (and rules implementing such sections), and
(C) Which is not identical to a requirement of section 102, 103, or 104 (or a rule thereunder),
shall not be applicable to written warranties complying with such sections (or rules thereunder).

(2) If, upon application of an appropriate state agency, the Commission determines (pursuant to rules issued in accordance with section 109) that any requirement of such state covering any transaction to which this title applies
   (A) Affords protection to consumers greater than the requirements of this title and
   (B) Does not unduly burden interstate commerce, then such state requirement shall be applicable (notwithstanding the provisions of paragraph (1) of this subsection) to the extent specified in such determination for so long as the state administers and enforces effectively any such greater requirement.

(d) This title [other than section 102(c)] shall be inapplicable to any written warranty the making or content of which is otherwise governed by federal law. If only a portion of a written warranty is so governed by federal law, the remaining portion shall be subject to this title.

§112 Effective Date.

(a) Except as provided in subsection (b) of this section, this title shall take effect 6 months after the date of its enactment but shall not apply to consumer products manufactured prior to such date.

(b) Section 102(a) shall take effect 6 months after the final publication of rules respecting such section; except that the Commission, for good cause shown, may postpone the applicability of such sections until one year after such final publication in order to permit any designated classes of suppliers to bring their written warranties into compliance with rules promulgated pursuant to this title.

(c) The Commission shall promulgate rules for initial implementation of this title as soon as possible after date of enactment of this Act but in no event later than one year after such date.

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16 C.F.R. PART 700
INTERPRETATIONS OF MAGNUSON-MOSS WARRANTY ACT

Sec.
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700.11 Written Warranty, Service Contract, and Insurance Distinguished for Purposes of Compliance under the Act.
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Authority: Magnuson-Moss Warranty Act, Pub. L. 93-637, 15 U.S.C. §2301.

Source: 42 FR 36114, July 13, 1977, unless otherwise noted.

§700.1 Products Covered.

(a) The Act applies to written warranties on tangible personal property which is normally used for personal, family, or household purposes. This definition includes property which is intended to be attached to or installed in any real property without regard to whether it is so attached or installed. This means that a product is a "consumer product" if the use of that type of product is not uncommon. The percentage of sales or the use to which a product is put by any individual buyer is not determinative. For example, products such as automobiles and typewriters which are used for both personal and commercial purposes come within the definition of consumer product. Where it is unclear whether a particular product is covered under the definition of consumer product, any ambiguity will be resolved in favor of coverage.

(b) Agricultural products such as farm machinery, structures and implements used in the business or occupation of farming are not covered by the Act where their personal, family, or household use is uncommon. However, those agricultural products normally used for personal or household gardening (for example, to produce goods for personal consumption, and not for resale) are consumer products under the Act.

(c) The definition of "consumer product" limits the applicability of the Act to personal property, "including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed." This provision brings under the Act separate items of equipment attached to real property, such as air conditioners, furnaces, and water heaters.

(d) The coverage of separate items of equipment attached to real property includes, but is not limited to, appliances and other thermal, mechanical, and electrical equipment. (It does not extend to the wiring, plumbing, ducts, and other items which are integral component parts of the structure.) State law would classify many such products as fixtures to, and therefore a part of, realty. The statutory definition is designed to bring such products under the Act regardless of whether they may be considered fixtures under state law.

(e) The coverage of building materials which are not separate items of equipment is based on the nature of the purchase transaction. An analysis of the transaction will determine whether the goods are real or personal property. The numerous products which go into the construction of a consumer dwelling are all consumer products when sold "over the counter," as by hardware

and building supply retailers. This is also true where a consumer contracts for the purchase of such materials in connection with the improvement, repair, or modification of a home (for example, paneling, dropped ceilings, siding, roofing, storm windows, remodeling). However, where such products are at the time of sale integrated into the structure of a dwelling they are not consumer products as they cannot be practically distinguished from realty. Thus, for example, the beams, wallboard, wiring, plumbing, windows, roofing, and other structural components of a dwelling are not consumer products when they are sold as part of real estate covered by a written warranty.

(f) In the case where a consumer contracts with a builder to construct a home, a substantial addition to a home, or other realty (such as a garage or an in-ground swimming pool) the building materials to be used are not consumer products. Although the materials are separately identifiable at the time the contract is made, it is the intention of the parties to contract for the construction of realty which will integrate the component materials. Of course, as noted above, any separate items of equipment to be attached to such realty are consumer products under the Act.

(g) Certain provisions of the Act apply only to products actually costing the consumer more than a specified amount. Section 103 applies to consumer products actually costing the consumer more than $10, excluding tax. The $10 minimum will be interpreted to include multiple-packaged items which may individually sell for less than $10, but which have been packaged in a manner that does not permit breaking the package to purchase an item or items at a price less than $10. Thus, a written warranty on a dozen items packaged and priced for sale at $12 must be designated, even though identical items may be offered in smaller quantities at under $10. This interpretation applies in the same manner to the minimum dollar limits in section 102 and rules promulgated under that section.

(h) Warranties on replacement parts and components used to repair consumer products are covered; warranties on services are not covered. Therefore, warranties which apply solely to a repairer's workmanship in performing repairs are not subject to the Act. Where a written agreement warrants both the parts provided to effect a repair and the workmanship in making that repair, the warranty must comply with the Act and the rules thereunder.

(i) The Act covers written warranties on consumer products "distributed in commerce" as that term is defined in section 101(3). Thus, by its terms the Act arguably applies to products exported to foreign jurisdictions. However, the public interest would not be served by the use of Commission resources to enforce the Act with respect to such products. Moreover, the legislative intent to apply the requirements of the Act to such products is not sufficiently clear to justify such an extraordinary result. The Commission does not contemplate the enforcement of the Act with respect to consumer products exported to foreign jurisdictions. Products exported for sale at military post exchanges remain subject to the same enforcement standards as products sold within the United States, its territories and possessions.

§700.2 Date of Manufacture.

Section 112 of the Act provides that the Act shall apply only to those consumer products manufactured after July 4, 1975. When a consumer purchases repair of a consumer product, the date of manufacture of any replacement parts used is the measuring date for determining coverage under the Act. The date of

manufacture of the consumer product being repaired is in this instance not relevant. Where a consumer purchases or obtains on an exchange basis a rebuilt consumer product, the date that the rebuilding process is completed determines the Act's applicability.

§700.3 Written Warranty.

(a) The Act imposes specific duties and liabilities on suppliers who offer written warranties on consumer products. Certain representations, such as energy efficiency ratings for electrical appliances, care labeling of wearing apparel, and other product information disclosures may be express warranties under the Uniform Commercial Code. However, these disclosures alone are not written warranties under this Act. Section 101(6) provides that a written affirmation of fact or a written promise of a specified level of performance must relate to a specified period of time in order to be considered a "written warranty."[1] A product information disclosure without a specified time period to which the disclosure relates is therefore not a written warranty. In addition, section 111(d) exempts from the Act [except section 102(c)] any written warranty the making or content of which is required by federal law. The Commission encourages the disclosure of product information which is not deceptive and which may benefit consumers, and will not construe the Act to impede information disclosure in product advertising or labeling.

(b) Certain terms, or conditions, of sale of a consumer product may not be "written warranties" as that term is defined in section 101(6), and should not be offered or described in a manner that may deceive consumers as to their enforceability under the Act. For example, a seller of consumer products may give consumers an unconditional right to revoke acceptance of goods within a certain number of days after delivery without regard to defects or failure to meet a specified level of performance. Or a seller may permit consumers to return products for any reason for credit toward purchase of another item. Such terms of sale taken alone are not written warranties under the Act. Therefore, suppliers should avoid any characterization of such terms of sale as warranties. The use of such terms as "free trial period" and "trade-in credit policy" in this regard would be appropriate. Furthermore, such terms of sale should be stated separately from any written warranty. Of course, the offering and performance of such terms of sale remain subject to section 5 of the Federal Trade Commission Act, 15 U.S.C. §45.

(c) The Magnuson-Moss Warranty Act generally applies to written warranties covering consumer products. Many consumer products are covered by warranties which are neither intended for, nor enforceable by, consumers. A common example is a warranty given by a component supplier to a manufacturer of consumer products. (The manufacturer may, in turn, warrant these components to consumers.) The component supplier's warranty is generally given solely to the product manufacturer, and is neither intended to be conveyed to the consumer nor brought to the consumer's attention in connection with the sale. Such warranties are not subject to the Act, since a written warranty under section 101(6) of the Act must become "part of the basis of the bargain between a supplier and a buyer for purposes other than resale." However, the Act applies to a component supplier's warranty in writing which is given to the consumer. An example is a supplier's written warranty to the consumer covering a refrigerator that is sold installed in a boat or recreational vehicle. The supplier of the refrigerator relies on the boat or vehicle assembler to convey the written agreement to the consumer. In this case, the supplier's written warranty is to a consumer, and is covered by the Act.

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[1] A "written warranty" is also created by a written affirmation of fact or a written promise that the product is defect free, or by a written undertaking of remedial action within the meaning of section 101(6)(B).

§700.4 Parties "Actually Making" a Written Warranty.

Section 110(f) of the Act provides that only the supplier "actually making" a written warranty is liable for purposes of FTC and private enforcement of the Act. A supplier who does no more than distribute or sell a consumer product covered by a written warranty offered by another person or business and which identifies that person or business as the warrantor is not liable for failure of the written warranty to comply with the Act or rules thereunder. However, other actions and written and oral representations of such a supplier in connection with the offer or sale of a warranted product may obligate that supplier under the Act. If under state law the supplier is deemed to have "adopted" the written affirmation of fact, promise, or undertaking, the supplier is also obligated under the Act. Suppliers are advised to consult state law to determine those actions and representations which may make them co-warrantors, and therefore obligated under the warranty of the other person or business.

§700.5 Expressions of General Policy.

(a) Under section 103(b), statements or representations of general policy concerning customer satisfaction which are not subject to any specific limitation need not be designated as full or limited warranties, and are exempt from the requirements of sections 102, 103, and 104 of the Act and rules thereunder. However, such statements remain subject to the enforcement provisions of section 110 of the Act, and to section 5 of the Federal Trade Commission Act, 15 U.S.C. §45.

(b) The section 103(b) exemption applies only to general policies, not to those which are limited to specific consumer products manufactured or sold by the supplier offering such a policy. In addition, to qualify for an exemption under section 103(b) such policies may not be subject to any specific limitations. For example, policies which have an express limitation of duration or a limitation of the amount to be refunded are not exempted. This does not preclude the imposition of reasonable limitations based on the circumstances in each instance a consumer seeks to invoke such an agreement. For instance, a warrantor may refuse to honor such an expression of policy where a consumer has used a product for 10 years without previously expressing any dissatisfaction with the product. Such a refusal would not be a specific limitation under this provision.

§700.6 Designation of Warranties.

(a) Section 103 of the Act provides that written warranties on consumer products manufactured after July 4, 1975, and actually costing the consumer more than $10, excluding tax, must be designated either "Full (statement of duration) Warranty" or "Limited Warranty." Warrantors may include a statement of duration in a limited warranty designation. The designation or designations should appear clearly and conspicuously as a caption or prominent title, clearly separated from the text of the warranty. The full (statement of duration) warranty and limited warranty are the exclusive designations permitted under the Act, unless a specific exception is created by rule.

(b) Section 104(b)(4) states that "the duties under subsection (a) (of section 104) extend from the warrantor to each person who is a consumer with respect to the consumer product." Section 101(3) defines a consumer as "a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product. . . ." Therefore, a full warranty may not expressly restrict the warranty rights of a transferee during its stated duration.

However, where the duration of a full warranty is defined solely in terms of first purchaser ownership there can be no violation of section 104(b)(4), since the duration of the warranty expires, by definition, at the time of transfer. No rights of a subsequent transferee are cut off as there is no transfer of ownership "during the duration of (any) warranty." Thus, these provisions do not preclude the offering of a full warranty with its duration determined exclusively by the period during which the first purchaser owns the product, or uses it in conjunction with another product. For example, an automotive battery or muffler warranty may be designated as "full warranty for as long as you own your car." Because this type of warranty leads the consumer to believe that proof of purchase is not needed so long as he or she owns the product, a duty to furnish documentary proof may not be reasonably imposed on the consumer under this type of warranty. The burden is on the warrantor to prove that a particular claimant under this type of warranty is not the original purchaser or owner of the product. Warrantors or their designated agents may, however, ask consumers to state or affirm that they are the first purchaser of the product.

§700.7 Use of Warranty Registration Cards.

(a) Under section 104(b)(1) of the Act, a warrantor offering a full warranty may not impose on consumers any duty other than notification of a defect as a condition of securing remedy of the defect or malfunction, unless such additional duty can be demonstrated by the warrantor to be reasonable. Warrantors have in the past stipulated the return of a "warranty registration" or similar card. By "warranty registration card" the Commission means a card which must be returned by the consumer shortly after purchase of the product and which is stipulated or implied in the warranty to be a condition precedent to warranty coverage and performance.

(b) A requirement that the consumer return a warranty registration card or a similar notice as a condition of performance under a full warranty is an unreasonable duty. Thus, a provision such as, "This warranty is void unless the warranty registration card is returned to the warrantor," is not permissible in a full warranty, nor is it permissible to imply such a condition in a full warranty.

(c) This does not prohibit the use of such registration cards where a warrantor suggests use of the card as one possible means of proof of the date the product was purchased. For example, it is permissible to provide in a full warranty that a consumer may fill out and return a card to place on file proof of the date the product was purchased. Any such suggestion to the consumer must include notice that failure to return the card will not affect rights under the warranty, so long as the consumer can show in a reasonable manner the date the product was purchased. Nor does this interpretation prohibit a seller from obtaining from purchasers at the time of sale information requested by the warrantor.

§700.8 Warrantor's Decision As Final.

A warrantor shall not indicate in any written warranty or service contract either directly or indirectly that the decision of the warrantor, service contractor, or any designated third party is final or binding in any dispute concerning the warranty or service contract. Nor shall a warrantor or service contractor state that it alone shall determine what is a defect under the agreement. Such statements are deceptive since section 110(d) of the Act gives state and federal courts jurisdiction over suits for breach of warranty and service contract.

§700.9 Duty to Install under a Full Warranty.

Under section 104(a)(1) of the Act, the remedy under a full warranty must be provided to the consumer without charge. If the warranted product has utility only when installed, a full warranty must provide such installation without charge regardless of whether or not the consumer originally paid for installation by the warrantor or his agent. However, this does not preclude the warrantor from imposing on the consumer a duty to remove, return, or reinstall where such duty can be demonstrated by the warrantor to meet the standard of reasonableness under section 104(b)(1).

§700.10 Section 102(c).

(a) Section 102(c) prohibits tying arrangements that condition coverage under a written warranty on the consumer's use of an article or service identified by brand, trade, or corporate name unless that article or service is provided without charge to the consumer.

(b) Under a limited warranty that provides only for replacement of defective parts and no portion of labor charges, section 102(c) prohibits a condition that the consumer use only service (labor) identified by the warrantor to install the replacement parts. A warrantor or his designated representative may not provide parts under the warranty in a manner which impedes or precludes the choice by the consumer of the person or business to perform necessary labor to install such parts.

(c) No warrantor may condition the continued validity of a warranty on the use of only authorized repair service and/or authorized replacement parts for non-warranty service and maintenance. For example, provisions such as, "This warranty is void if service is performed by anyone other than an authorized 'ABC' dealer and all replacement parts must be genuine 'ABC' parts," and the like, are prohibited where the service or parts are not covered by the warranty. These provisions violate the Act in two ways. First, they violate the section 102(c) ban against tying arrangements. Second, such provisions are deceptive under section 110 of the Act, because a warrantor cannot, as a matter of law, avoid liability under a written warranty where a defect is unrelated to the use by a consumer of "unauthorized" articles or service. This does not preclude a warrantor from expressly excluding liability for defects or damage caused by such "unauthorized" articles or service; nor does it preclude the warrantor from denying liability where the warrantor can demonstrate that the defect or damage was so caused.

§700.11 Written Warranty, Service Contract, and Insurance Distinguished for Purposes of Compliance Under the Act.

(a) The Act recognizes two types of agreements which may provide similar coverage of consumer products, the written warranty, and the service contract. In addition, other agreements may meet the statutory definitions of either "written warranty" or "service contract," but are sold and regulated under state law as contracts of insurance. One example is the automobile breakdown insurance policies sold in many jurisdictions and regulated by the state as a form of casualty insurance. The McCarron-Ferguson Act, 15 U.S.C. §1011 *et seq.*, precludes jurisdiction under federal law over "the business of insurance" to the extent an agreement is regulated by state law as insurance. Thus, such agreements are subject to the Magnuson-Moss Warranty Act only to the extent they are not regulated in a particular state as the business of insurance.

(b) "Written warranty" and "service contract" are defined in sections 101(6) and 101(8) of the Act, respectively. A written warranty must be "part of the basis of the bargain." This means that it must be conveyed at the time of sale of the consumer product and the consumer must not give any consideration beyond the purchase price of the consumer product in order to benefit from the agreement. It is not a requirement of the Act that an agreement obligate a supplier of the consumer product to a written warranty, but merely that it be part of the basis of the bargain between a supplier and a consumer. This contemplates written warranties by third-party non-suppliers.

(c) A service contract under the Act must meet the definitions of section 101(8). An agreement which would meet the definition of written warranty in section 101(6)(A) or (B) but for its failure to satisfy the basis of the bargain test is a service contract. For example, an agreement which calls for some consideration in addition to the purchase price of the consumer product, or which is entered into at some date after the purchase of the consumer product to which it applies, is a service contract. An agreement which relates only to the performance of maintenance and/or inspection services and which is not an undertaking, promise, or affirmation with respect to a specified level of performance, or that the product is free of defects in materials or workmanship, is a service contract. An agreement to perform periodic cleaning and inspection of a product over a specified period of time, even when offered at the time of sale and without charge to the consumer, is an example of such a service contract.

§700.12 Effective Date of 16 CFR Parts 701 and 702.

The Statement of Basis and Purpose of the final rules promulgated on December 31, 1975, provides that Parts 701 and 702 of this chapter will become effective one year after the date of promulgation, December 31, 1976. The Commission intends this to mean that these rules apply only to written warranties on products manufactured after December 31, 1976.

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 50--CONSUMER PRODUCT WARRANTIES
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Current through P.L. 104-207, approved 9-30-96

15 USCA s 2302
TEXT (c) (1)

(c) Prohibition on conditions for written or implied WARRANTY; waiver by Commission
No warrantor of a consumer product may condition his written or implied WARRANTY of such product on the consumer's using, in connection with such product, any article or service (other than article or service provided without charge under the terms of the WARRANTY) which is identified by brand, trade, or corporate name; except that the prohibition of this subsection may be waived by the Commission if--

(1) the warrantor satisfies the Commission that the warranted product will function properly only if the article or service so identified is used in connection with the warranted product, and

(2) the Commission finds that such a waiver is in the public interest.

The Commission shall identify in the Federal Register, and permit public comment on, all applications for waiver of the prohibition of this subsection, and shall publish in the Federal Register its disposition of any such application, including the reasons therefor.

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15 U.S.C.A. s 2304

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 50--CONSUMER PRODUCT WARRANTIES
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Current through P.L. 104-207, approved 9-30-96

s 2304. Federal minimum standards for warranties

(a) Remedies under written warranty; duration of implied warranty; exclusion or limitation on consequential damages for breach of written or implied warranty; election of refund or replacement

In order for a warrantor warranting a consumer product by means of a written warranty to meet the Federal minimum standards for warranty--

(1) such warrantor must as a minimum remedy such consumer product within a reasonable time and without charge, in the case of a defect, malfunction, or failure to conform with such written warranty;

(2) notwithstanding section 2308(b) of this title, such warrantor may not impose any limitation on the duration of any implied warranty on the product;

(3) such warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on such product, unless such exclusion or limitation conspicuously appears on the face of the warranty; and

(4) if the product (or a component part thereof) contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in such product, such warrantor must permit the consumer to elect either a refund for, or replacement without charge of, such product or part (as the case may be). The Commission may by rule specify for purposes of this paragraph, what constitutes a reasonable number of attempts to remedy particular kinds of defects or malfunctions under different circumstances. If the warrantor replaces a component part of a consumer product, such replacement shall include installing the part in the product without charge.

(b) Duties and conditions imposed on consumer by warrantor

(1) In fulfilling the duties under subsection (a) of this section respecting a written warranty, the warrantor shall not impose any duty other than notification upon any consumer as a condition of securing remedy of any consumer product which malfunctions, is defective, or does not conform to the written warranty, unless the warrantor has demonstrated in a rulemaking proceeding, or can demonstrate in an administrative or judicial enforcement proceeding (including private enforcement), or in an informal dispute settlement proceeding, that such a duty is reasonable.

(2) Notwithstanding paragraph (1), a warrantor may require, as a condition to replacement of, or refund for, any consumer product under subsection (a) of this section, that such consumer product shall be made available to the warrantor free and clear of liens and other encumbrances, except as otherwise provided by rule or order of the Commission in cases in which such a requirement would not be practicable.

(3) The Commission may, by rule define in detail the duties set forth in subsection (a) of this section and the applicability of such duties to warrantors of different categories of consumer products with "full (statement of duration)" warranties.

(4) The duties under subsection (a) of this section extend from the warrantor to each person who is a consumer with respect to the consumer product.

(c) Waiver of standards

The performance of the duties under subsection (a) of this section shall not be required of the warrantor if he can show that the defect, malfunction, or failure of any warranted consumer product to conform with a written warranty, was caused by damage (not resulting from defect or malfunction) while in the possession of the consumer, or unreasonable use (including failure to provide reasonable and necessary maintenance).

(d) Remedy without charge

For purposes of this section and of section 2302(c) of this title, the term "without charge" means that the warrantor may not assess the consumer for any costs the warrantor or his representatives incur in connection with the required remedy of a warranted consumer product. An obligation under subsection (a)(1)(A) of this section to remedy without charge does not necessarily require the warrantor to compensate the consumer for incidental expenses; however, if any incidental expenses are incurred because the remedy is not made within a reasonable time or because the

warrantor imposed an unreasonable duty upon the consumer as a condition of securing remedy, then the consumer shall be entitled to recover reasonable incidental expenses which are so incurred in any action against the warrantor.

(e) Incorporation of standards to products designated with full warranty for purposes of judicial actions

If a supplier designates a warranty applicable to a consumer product as a "full (statement of duration)" warranty, then the warranty on such product shall, for purposes of any action under section 2310(d) of this title or under any State law, be deemed to incorporate at least the minimum requirements of this section and rules prescribed under this section.

****

15 U.S.C.A. s 2307

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 50--CONSUMER PRODUCT WARRANTIES
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Current through P.L. 104-207, approved 9-30-96

s 2307. Designation of representatives by warrantor to perform duties under written or implied warranty

Nothing in this chapter shall be construed to prevent any warrantor from designating representatives to perform duties under the written or implied warranty: Provided, That such warrantor shall make reasonable arrangements for compensation of such designated representatives, but no such designation shall relieve the warrantor of his direct responsibilities to the consumer or make the representative a cowarrantor.

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15 USCA s 2310
TEXT (c)(1)

(c) Injunction proceedings by Attorney General or Commission for deceptive warranty, noncompliance with requirements, or violating prohibitions; procedures; definitions

(1) The district courts of the United States shall have jurisdiction of any action brought by the Attorney General (in his capacity as such), or by the Commission by any of its attorneys designated by it for such purpose, to restrain (A) any warrantor from making a deceptive warranty with respect to aconsumer product, or (B) any person from failing to comply with any requirement imposed on such person by or pursuant to this chapter or from violating any prohibition contained in this chapter. Upon proper showing that, weighing the equities and

considering the Commission's or Attorney General's likelihood of ultimate success, such action would be in the public interest and after notice to the defendant, a temporary restraining order or preliminary injunction may be granted without bond. In the case of an action brought by the Commission, if a complaint under section 45 of this title is not filed within such period (not exceeding 10 days) as may be specified by the court after the issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect. Any suit shall be brought in the district in which such person resides or transacts business. Whenever it appears to the court that the ends of justice require that other persons should be parties in the action, the court may cause them to be summoned whether or not they reside in the district in which the court is held, and to that end process may be served in any district.

(2) For the purposes of this subsection, the term "deceptive warranty" means (A) a written warranty which (i) contains an affirmation, promise, description, or representation which is either false or fraudulent, or which, in light of all of the circumstances, would mislead a reasonable individual exercising due care; or (ii) fails to contain information which is necessary in light of all of the circumstances, to make the warranty not misleading to a reasonable individual exercising due care; or (B) a written warranty created by the use of such terms as "guaranty" or "warranty", if the terms and conditions of such warranty so limit its scope and application as to deceive a reasonable individual.

(d) Civil action by consumer for damages, etc.; jurisdiction; recovery of costs and expenses; cognizable claims

(1) Subject to subsections (a)(3) and (e) of this section, a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief--

(A) in any court of competent jurisdiction in any State or the District of Columbia; or

(B) in an appropriate district court of the United States, subject to paragraph (3) of this subsection.

(2) If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

(3) No claim shall be cognizable in a suit brought under paragraph (1)(B) of this subsection--

(A) if the amount in controversy of any individual claim is less than the sum or value of $25;

(B) if the amount in controversy is less than the sum or value of $50,000 (exclusive of interests and costs) computed on the basis of all claims to be determined in this suit; or

(C) if the action is brought as a class action, and the number of named plaintiffs is less than one hundred.

15 USCA s 2310 - ANNOTATIONS (Notes of Decisions Index)

3. Opportunity to cure default

MAGNUSON-MOSS Act "opportunity to cure" requirement was met by allegation that defendant AUTOMOBILE MANUFACTURER knew of alleged braking system defects at time of AUTOMOBILE sales. Alberti v. General Motors Corp., D.C.D.C.1985, 600 F.Supp. 1026.

Normally, failure to comply with requirement of presenting vehicles to MANUFACTURER in accordance with terms of WARRANTY constitutes failure to state claim for breach of written WARRANTY, but those buyers who complained to MANUFACTURER in timely fashion and were turned away could assert claim because they justifiably relied on MANUFACTURER'S assertions and conduct and honestly believed that they neither had claim for WARRANTY service or were required to present their vehicles to proceed with such claim, and MANUFACTURER was accordingly estopped from asserting blanket defense of presentment. Walsh v. Ford Motor Co., D.C.D.C.1984, 588 F.Supp. 1513, amended 592 F.Supp. 1359, amended 612 F.Supp. 983.

Opportunity given by buyer to AUTOMOBILE dealer to repair AUTOMOBILE as MANUFACTURER'S designated representative to whom buyer was required to bring AUTOMOBILE for repair, satisfied subsec. (c) of this section. Ventura v. Ford Motor Corp., N.J.Super.A.D.1981, 433 A.2d 801, 180 N.J.Super. 45.

Where WARRANTY expressly stated that defects would be remedied within 30 days, and substantial defect was not remedied after two attempts, buyers were not required to give retailers third chance to repair defect. Murphy v. Mallard Coach Co., N.Y.A.D. 3 Dept.1992, 582 N.Y.S.2d 528, 179 A.D.2d 187.

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15 USCA s 2311
ANNOTATIONS (Notes of Decisions Index)

1. State WARRANTY laws
Implied WARRANTY claims brought under MAGNUSON-MOSS Act were subject to state law privity rules. Abraham v. Volkswagen of America, Inc., C.A.2 (N.Y.) 1986, 795 F.2d 238.

MAGNUSON-MOSS WARRANTY ACT does not create private, independent cause of action for personal injuries that are otherwise state law claims for breach of WARRANTY. Santarelli v. BP America, M.D.Pa.1996, 913 F.Supp. 324.

Count of complaint, which incorporated by reference state law personal injury claim set forth in another count of the complaint, failed to state a cause of action under the MAGNUSON-MOSS Warrant Act for discolored teeth allegedly caused by ingestion of tetracycline manufactured by defendant. Cowan by Cowan v. Lederle Laboratories, a Div. of American Cyanamid Co., D.C.Kan.1985, 604 F.Supp. 438.

Plaintiff could not recover under the MAGNUSON-MOSS WARRANTY--FEDERAL Trade Commission Improvement Act for personal injuries sustained on a bicycle manufactured by

defendant since Act does not create a federal cause of action for personal injury claims which are otherwise state law claims for breach of WARRANTY. Washington v. Otasco, Inc., N.D.Miss.1985, 603 F.Supp. 1295.

Determination whether AUTOMOBILE buyer asserting breach of WARRANTY actions could recover damages for emotional distress under state law governing WARRANTIES and under this chapter rested upon state law of the forum. Wise v. General Motors Corp., W.D.Va.1984, 588 F.Supp. 1207.

[illegible] federal standards for WARRANTIES provided to buyers of consumer

defendant since Act does not create a federal cause of action for personal injury claims which are otherwise state law claims for breach of WARRANTY. Washington v. Otasco, Inc., N.D.Miss.1985, 603 F.Supp. 1295.

Determination whether AUTOMOBILE buyer asserting breach of WARRANTY actions could recover damages for emotional distress under state law governing WARRANTIES and under this chapter rested upon state law of the forum. Wise v. General Motors Corp., W.D.Va.1984, 588 F.Supp. 1207.

This chapter creates federal standards for WARRANTIES provided to buyers of consumer goods, and it also provides specific remedies to purchasers where sellers of consumer goods fail to comply with the federal WARRANTY standards; notwithstanding, causes of action for personal injuries arising out of the sale of allegedly defective products generally remain a matter of state law. Bush v. American Motors Sales Corp., D.C.Colo.1984, 575 F.Supp. 1581.

This chapter was not designed completely to supplant state law of warranties and sales, but, rather, was intended primarily to regulate transactions involving written, usually formal, warranties, and in such transactions, this chapter not only regulates contents and effect of warranty document itself, but is also designed to provide basic level of honesty and reliability to the entire transaction and therefore requires certain written representations which trigger this chapter's protections. Skelton v. General Motors Corp., N.D.Ill.1980, 500 F.Supp. 1181, reversed 660 F.2d 311, certiorari denied 102 S.Ct. 2238, 456 U.S. 974, 72 L.Ed.2d 848.

Pursuant to subsec. (b)(1) of this section, granting of remedy of refund of purchase price under N.J.S.A. 12A: 2-608 and 711 for breach of limited warranty is not barred by or inconsistent with s 2304 of this title. Ventura v. Ford Motor Corp., N.J.Super.A.D.1981, 433 A.2d 801, 180 N.J.Super. 45.

Since this section preserves consumer's rights and remedies under state law, notification under UCC s 2-607 should be given as soon as possible in order to safeguard consumer's right to damages under UCC s 2-714, but prelitigation notice required by former UCC s 2-607 is not required by this chapter. Mendelson v. General Motors Corp., N.Y.Sup.1980, 432 N.Y.S.2d 132, 105 Misc.2d 346, affirmed 441 N.Y.S.2d 410, 81 A.D.2d 831.

MAGNUSON-MOSS Act did not preempt state remedies for violation of AUTOMOBILE WARRANTY law; statute expressly allowed state remedies. (Per Dixon, C.J., with two Justices joining.) MAGNUSON-MOSS WARRANTY. Boudreaux v. Ford Motor Co., La.1988, 533 So.2d 1213.

FAX

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Date 3/18/99

Number of pages including cover sheet 26

To: MARY S. WYATTE
IRRC

From: SAM MARSHALL

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Fax Phone 717-783-2664

CC:

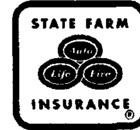
Phone 215-665-0500

Fax Phone 215-665-0540

REMARKS:

☐ Urgent ☐ For your review ☐ Reply ASAP ☐ Please comment

State Farm Insurance Companies



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INDEPENDENT REGULATORY
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Linda S. Cooper
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March 8, 1999

Fiona Wilmarth, Regulatory Analyst
Independent Regulatory Review Commission
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Harristown 2
Harrisburg, PA 17101

Original: 2001
Harbison
Copies: Tyrrell
Wilmarth
Sandusky
Legal

Re: Motor Vehicle Physical Damage Appraisers Regulation

Dear Ms. Wilmarth:

Attached please find a copy of the comments submitted by State Farm Mutual Automobile Insurance Company regarding the proposed amendments of the Department of Insurance to the Pennsylvania Motor Vehicle Physical Damage Appraisers Regulation, as set forth in Title 31, Pa. Code Section 62.

As a major personal lines insurer in the Commonwealth of Pennsylvania, State Farm is particularly concerned that any changes to the regulation not only address ongoing concerns by both the insurance industry and the repair industry, but that they also reflect the everyday practical operation of the business.

Please review these comments with that thought in mind, and I certainly encourage you to share them with other members of the Commission. Should you or any other member if the IRRC have additional questions, please feel free to contact me. I will make myself available to discuss your concerns either by telephone or in person.

Sincerely,

Linda S. Cooper

Linda S. Cooper
Counsel

LSC:ch

Enclosure

State Farm Insurance Companies

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March 8, 1999

Original: 2001
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Legal

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

Re: Motor Vehicle Physical Damage Appraisers Regulation

Dear Mr. Salvatore:

These comments on the amendments proposed by the Department of Insurance to the Motor Vehicle Physical Damage Appraisers Regulation (Appraisers Regulation) 31 Pa. Code Section 62, are submitted on behalf of the State Farm Mutual Automobile Insurance Company (State Farm). Based upon market share, State Farm insures approximately one in five automobiles in the Commonwealth of Pennsylvania. Consequently, the Company has a great depth of experience with the Appraisers Regulation, and State Farm's claim operation would be significantly impacted by the proposed changes. For these reasons, the Company is submitting individual comments in addition to concurring with those submitted by the Insurance Federation of Pennsylvania.

The Department is to be lauded for its efforts to address deficiencies and eliminate inconsistencies in the existing regulation. However, it is the opinion of State Farm that additional clarification is needed in some provisions and that other segments do not reflect the reality of the vehicle appraisal process as it occurs in actual practice. The following comments are limited to those provisions with which State Farm has a concern relative to whether they meet the Department's stated goal of clarification or furthering the intent of the underlying statute.

DEFINITIONS

Appraisals, It is unclear why the phrase "to fix the value of insurance claims" was deleted. While the Motor Vehicle Damage Appraisers Statute (Appraisers Law) recognizes that there will be some minor damage claims that do not require an appraisal, it also contemplates that the vast majority will involve the valuation of an insurance claim. 63 PS Sections 861, 862. It therefore appears that for consistency with the Appraisers Law, the language proposed for deletion should be retained. The proposed definition replaces "to fix the value of an insurance claim" with "to return the vehicle to its condition prior to the damage in question." The latter phrase consists almost entirely of the language used to define "pre-damaged condition", a defined term in a subsequent portion of the definition section ("just"--a necessary modifier of the word condition--and "incurred" are not included). It appears that using the term "pre-damaged condition" would be more appropriate.

This inconsistency is also reflected in the fact that the definition of "appraisal" refers to returning the vehicle to its "condition prior to the damage in question", while in new subsection 62.3(d)(1) the quote "just prior to the damage in question" language is deleted and replaced by "pre-damaged condition". It is recommended that either the existing language be retained and used consistently throughout the regulation, or if replaced by the new "pre-damaged condition" language, the latter term be handled in the same manner.

Consumer. It is recommended that this definition be limited to the owner of the vehicle who is the real party in interest, or, in the alternative, that "representative" be limited to "the legal representative." Either modification would further clarify which persons fall within the ambit of the definition of this term.

Pre-Damaged Condition. Clarification is needed regarding what this term means and how it is used in the regulation. As noted above, both this new

defined term and a portion of its definition are used interchangeably in different sections of the regulation. In addition, it is recommended that "condition" be changed to "physical condition" to clarify that "pre-damaged condition" refers to the appearance and function of the motor vehicle prior to its sustaining damage.

SECTION 62.2 - LICENSING REQUIREMENTS

Subsection (b)(3). This subsection raises a question regarding due process based upon the second sentence, which appears to give the Department a subjective and arbitrary right to make a determination regarding the competency and trustworthiness of an appraiser. The Appraisers Law at 63 PS Section 856(6) authorizes the Commissioner to deny issuance, suspend, revoke or refuse to renew an appraisers license if she deems him incompetent or untrustworthy. And at Section 857, it provides that all actions by the Commissioner are subject to a right of notice, hearing, and adjudication with a right of appeal, which afford due process. It is recommended that the sentence, "Such a determination will be made by the Department" be deleted, because its inclusion does not further the intent of the underlying statute, strongly suggests a lack of due process in addressing these licensing requirements, and is adequately addressed elsewhere.

SECTION 62.3 - APPLICABLE STANDARDS FOR APPRAISAL

Subsection (a) states that the appraisal "shall be signed by the appraiser". The requirement that an appraisal be signed is a carryover from the existing regulation at Section 62.3(a)(2). It is not, however, required by the statute, which focuses on the appraisal being legible, properly identifying the insurance company (if any), the appraiser's license number, and the vehicle inspected. This requirement for a signature does not appear to further the intent of the Appraisers Law, which provides a baseline of information needed to verify that the appraisal was properly performed. It also does not take into account current technology, which utilizes electronic

estimating systems; the supplement process, which often handles additions to appraisals over the telephone; or the increasing use of electronic signatures in business. It is recommended that "signed by the appraiser" be deleted and replaced by "authenticated by the appraiser".

Subsection (b) Written Disclosure. This subsection, which is a revision of the current subsection (b), raises a number of issues. The introductory sentence suggests that a separate, written disclosure statement is contemplated by the Department. Such a requirement would be both cumbersome and costly. Consistent with the current regulation and the statute, all pertinent information should simply be a part of the actual appraisal statement. It is recommended that the opening sentence "In addition to the requirements in the Act, the appraisal shall contain a written disclosure which includes the following" be changed to "The appraisal statement shall disclose" or that the current language be retained.

Subsection (b)(3). This new requirement appears to have been added in an effort to clarify current Section 62.3(g)(8). However, since it deals with a standard of behavior, rather than an appraisal standard, it would be more appropriate placed in another part of the regulation. In addition, the ability to make such a recommendation regarding the availability of repair shops should not be limited to the appraiser. The reality of the claim process is that the initial contact by a vehicle owner with the Company may be through an agent or a claim representative. As a result, the insurer, its agents and employees should be included as persons able to make a recommendation regarding a repair shop. It should be further noted that while the recommendation of at least two shops may be feasible in many parts of the Commonwealth, in some rural areas there may not be more than one available repair shop.

Subsection (b)(4) - A Description of Repairs. It is recommended that this be changed to "description of repairs known at the time of the appraisal" to reflect the fact that the initial appraisal may not contain the full and final description of repairs, as additional damage may be found after

the vehicle is opened up at the repair shop.

It is also recommended that the requirement for an appraisal clause provision in the policy contract be deleted. First, there does not appear to be any statutory authority for such a requirement. Second, this provision does not currently exist in the automobile policy of State Farm, nor in the policies of a number of other insurance companies. Third, the inclusion of such a provision would be unwieldy and potentially cause significant delays in reaching an agreed price on repairs and returning the vehicle to its owner.

Subsection (b)(7) requires that the date after which an insurer will not be responsible for any related towing or storage charges be included in the appraisal. It is recommended that this date be limited by the phrase "if known" to reflect the fact that this information may not be available at the time the appraisal statement is written.

Subsection (b)(8). This provision needs to clarify to which listed parts it refers. In the current regulation at 62.3(c)(2), "used parts" are expressly noted. It is recommended that same specificity be carried over in the new regulation.

Subsection (b)(9). Rather than including a statement in the appraisal that a non-OEM part has been included, it is recommended that the current practice of identifying which parts are non-OEM in the itemized appraisal be continued.

It is recommended that the warranty language be further clarified so that it is clear what the Department is requiring. As written, this provision appears to place the burden on the appraiser of knowing whether an aftermarket part has any impact on the warranty of the part removed. It also appears to assume that an original part is being replaced when, in fact, a like kind and quality or other non-OEM part may be the one damaged at the time of the loss.

SECTION 62.3(C) - SALVAGE VALUE

Although this section only applies to salvage that is retained by the owner of the vehicle, it is not clear. And it is recommended that the modifying phrase "owner-retained" be included. In the opening sentence, it is recommended that "of a total loss vehicle" be added after the words "salvage value".

Subsection (c)(1). It is recommended that the "in writing" requirement regarding advising the vehicle owner of the salvage value, towing and storage charges, be deleted. Although this information is made available to the owner of the vehicle in the normal course of business, the discussion of the total loss valuation takes place over the telephone, and that information is imparted to the owner prior to his receipt of a Total Loss Settlement Report detailing all charges. Requiring that this information be put in writing may result in unnecessary delays in the settlement process.

Subsection (c)(2). Again, it is recommended that the "in writing" requirement regarding the name of the salvage buyer be deleted, as it does not reflect the manner in which business is normally conducted. And, as with the items noted in subsection (c)(1), the addition of the writing requirement appears to address an area that is not of major concern. It is further recommended that salvage "bidder" be changed to "source of salvage value", in recognition of the fact that salvage may be sold in various ways other than through the bid process.

Subsection (d)(1) - Betterment. It is recommended that this section be cross-referenced to Section 62.1 and its definition of "pre-damaged condition" and the deletion of "just prior to damage in question" language so that there is consistency throughout the regulation.

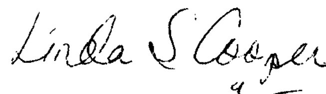
Subsection (e)(l) - Guide Source Method. The proposed language would eliminate the references in the regulation to the Red Book and NADA and authorizes the Department to publish a list of guide sources on an annual

basis. It is recommended that the current language, which includes the phrase, "or any similar source of information approved by the Commissioner" be retained. This allows the existing process, which is quite viable, to continue in operation, and it also encompasses electronic vendor products and eliminates the need for the Department to address this area on an annual basis. If the Department's recommendation is approved, it is recommended that "electronic methods" be included as a category of guide sources to ensure that current technology is included.

Subsection (e)(8) - Total Loss Evaluation Report. The new language provides that only an appraiser has the authority to give a total loss evaluation report to the vehicle owner. It is recommended that the current language, which provides that the evaluation may be given by either the appraiser or the insurer, be retained. This is consistent with the manner in which a total loss settlement transaction occurs, and also prevents delays in getting this information to the vehicle owner.

State Farm appreciates the opportunity to share its comments on these proposed changes to the Appraisers Regulation and hopes they will be utilized for the clarification and strengthening of this regulation for the benefit of the industry and its customers.

Sincerely,



Linda S. Cooper
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Automotive Service Professionals of Pennsylvania

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March 8,1999

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

Dear Mr. Salvatore:

The Automotive Service Professionals of Pennsylvania (until recently the Automotive Service Association of Pennsylvania) represents 2,000 independent repair facilities in the state.

This is to respond to the Insurance Department's proposed regulation revising Title 31 Chapter 62 of the Pennsylvania Code, as published in the Pennsylvania Bulletin on February 6, 1999.

It should be noted that although the subject matter incorporated by the proposed regulation has been the focus of several legislative hearings and discussions with the Department over the last few years, this is the first opportunity that ASP-PA has had to review and comment on this specific regulation.

The proposed regulations raise a number of serious concerns, including (but not limited to) the following:

1. Section 62.3(b) (3) of the proposed regulation would allow appraisers to provide consumers with two or more names of repair facilities. In our view, there is nothing in the Act itself that permits appraisers to make any recommendations as to particular shops. This proposed revision exceeds the power given to the Department in this regard, and opens up the system to possible significant abuses injurious to consumers and independent repair facilities alike. In our view, recommending shops never was (and never should be) the business of an appraiser.

2. Section 62.3(b) (9) refers to a required notification to the consumer that non-original aftermarket crash parts have been used in preparing the repair appraisal. This falls far short of the proposals made by this Association that would not only require a disclosure that non-original parts may be considered for the repair of the vehicle, but that the consumer be given an opportunity to make the choice as to the category of parts that will ultimately be used. Recent revelations in consumer publications regarding this issue reinforce our position. This concern is especially relevant to safety concerns and the restoration of the net worth of the vehicle to its pre-loss condition.

3. Section 62.3(e)(1) is problematic in that it limits the replacement value to one specific method of calculation. ASP-PA feels an alternative method should be instituted, including the averaging of the listed methods.

4. Sections 62.3(b)(4) and (b)(5) refer to items listed on the appraisal that ultimately will be paid to the repair facility. In our view, this list is too limiting. Other charges need to be considered to be fair to the repair facilities, including environmental fee, etc.

5. Section 62.3 (b)(2) is troubling in that it is not clear what constitutes "excess charges." Restoration to pre-loss condition should mean just that. The use of a supplement adds a layer of confusion that opens the way to abuses of consumer rights and repair facilities.

6. Consideration should be given to retaining the penalty and prohibition sections of the regulations even if they are redundant to the Act itself. Repetition of the Act in the regard of preventing appraiser violations would reinforce the seriousness of the violations.

7. In general, ASP-PA believes in the consumer's right to know and his right to be informed and afforded actual choice in how a vehicle is returned to pre-loss or pre-accident condition. The proposed regulation attempts to address these policy areas, but falls short in several significant ways.

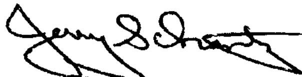
ASP-PA appreciates the discussions that the Association has had with the Department in the past. However, it does not appear to us that the Department has made a compelling case as to why the current regulations need changed, or that in those areas of the proposed regulation where new policy areas are explored, the Department's effort falls short of completeness when consumer or repair facility interests are concerned.

We would respectfully request that these proposed regulations be withdrawn or delayed to allow further discussion of these crucial issues.

ASP-PA offers its cooperation in participating in such discussions.

Thanking you for the opportunity to comment.

Regards,



Jerry Schantz, Executive Director

DIRECT REPLY TO: Robert L. Redr Jr., Washington Representative
313 Massachusetts Avenue, N.E., Was. gton, D.C. 20002, (202) 543-1440, Fax (202) 543-4

AUTOMOTIVE SERVICE ASSOCIATION®

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March 31, 1999

Ms. Fiona E. Wilmarth
Independent Regulatory Review Commission
333 Market Street
Harrisburg, Pennsylvania 17101

Dear Fiona:

Thank you for meeting with us yesterday. We appreciate your interest in an issue that will severely impact collision repairers across Pennsylvania.

With regard to the personal inspection of the vehicle and appraiser ethical considerations, we did review the provisions in 63 Pa.S. 861 and 63 Pa.S. 856 and agree that this should be sufficient to assure personal inspections as well as a high degree of professionalism amongst appraisers.

ASA still has concerns with two key provisions in the proposed regulations. Specifically, the steering considerations in the revised Section 62.3(b)(3) and the weak replacement crash parts notice provision advocated in Section 62.3(b)(9). Without a written acknowledgement from the consumer, this provision will provide little.

I have enclosed a copy of our proposed consumer authorization form as agreed to by new car dealers, automobile manufacturers, recyclers and some aftermarket manufacturers. This acknowledgement form should not require legislative authority. It does not provide for a rejection of the parts. It also does not discriminate against any particular parts class.

Please let me know if we can do anything else to assist. Again, thanks for your time.

Sincerely,

Robert L. Redding, Jr.

Replacement Crash Parts Notice and Authorization Form

NOTICE TO CONSUMER:

1. "Replacement crash parts" are the parts typically replaced during the repair of a damaged vehicle. These parts include, but (are) not limited to exterior sheet metal and plastic components (such as fenders, hoods, doors, bumper systems and related structural components).

2. The type(s) of replacement crash parts listed on your estimate/repair order #___________________ (copy attached) are from the categories checked below

3. Warranties for the type(s) of replacement crash parts listed below are provided by the Manufacturer or Distributor of the replacement parts. Warranty coverage varies. Ask your insurer or collision repair professional for specific, written warranty information. Additional warranties for replacement crash parts will be provided by

   ___________________________.

4. Replacement Crash Parts Types:

   ☐ New Original Equipment Manufacturer (OEM)
   Parts which are made by the vehicle manufacturer or one of its licensees and distributed through its normal channels. These parts maintain the OEM Vehicle Factory Warranty for the replaced part and any other adjoining or associated OEM part or systems.

   ☐ NEW Aftermarket
   Parts which are made by companies other than the vehicle manufacturer or its licensees. All parts in this category are warranted by the distributor and/or manufacturer of these parts.

   ☐ Recycled/Recyclable
   Used parts which have been removed from another vehicle. All parts in this category are warranted by the salvage vendor.

   ☐ Remanufactured
   Parts which have been returned to like-new condition by repairing, remachining or re-building. All parts in this category are warranted by the remanufacturer of the part.

I understand that my vehicle will be repaired using the parts described above, and I authorize the repair facility to install those parts.

____

Customer Signature   Date

COMMONWEALTH OF PENNSYLVANIA
INSURANCE DEPARTMENT
HARRISBURG REGIONAL OFFICE
BUREAU OF CONSUMER SERVICES
1321 Strawberry Square
Harrisburg, PA 17120

Telephone: (717) 783-2165
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October 24, 1996

Mr. Jack Aigner
Master Craft Body & Paint
1841 West Lincoln Highway
Penndel, PA 19047

RE: Dept. File #: 96-125-06550

Dear Mr. Aigner:

This letter responds to your questions directed to Deputy Insurance Commissioner Helfried LeBlanc regarding the Motor Vehicle Physical Damage Appraisers Act and Bulletin 53.

Please accept my apologies for the delay in responding. We have completed our review and will provide simple and easy to understand answers as you have requested.

31 §62.3(b)(1) - The appraisal must identify all items, expenses and work necessary to return the damaged vehicle to its condition prior to the accident or incident (labor, painting or refinishing, towing, protective care, custody, storage, depreciation, tire replacement, applicable sales tax payable on the total dollar amount of the appraisal etc.)

Section 11 of the Motor Vehicle Physical Damage Appraisers Act (63 P.S. §861) also specifies that all unrelated or old damage should be clearly indicated on the appraisal which must include an itemized listing of all damages, specifying those parts to be replaced or repaired.

31 §62.3(g)(2) - The appraisal must be factual as to the repair of the vehicle and not in favor of any party involved.

31 §62.3(g)(3)- The appraiser must not be influenced by any repair facility, insurer, insured or claimant in the preparation of the appraisal.

31 §62.3(g)(4)- The appraiser must prepare the appraisal of damage based on his/her own independent assessment of the damage.

31 §62.3(g)(11)(ii)- The appraiser must conclude the appraisal and provide the repair shop with a copy of the appraisal prior to taking any photographs of the damaged vehicle which is in the custody of the repair shop. The appraisal may contain items or areas where possible damage exists but cannot be determined until the vehicle repairs commence.

31 §62.3(g)(12)(ii)- Upon the request of the repair shop, insurer, insured or claimant or as is otherwise necessary, the appraiser must provide the repair shop with a copy of the appraisal. see paragraph below To insure that the actual costs of repairs are adequately covered in the appraisal or if there are any questions pertaining to the appraisal and the actual cost to repair the vehicle, the appraiser must discuss the appraisal with the repair shop owner, its authorized representative or any other parties.

Section 11 of the Motor Vehicle Physical Damage Appraisers Act requires that the appraiser leave a legible copy of his appraisal with the repair shop selected by the consumer to make the repairs and also furnish a copy to the owner of the vehicle.

31 §62.3(g)(12)(iii)- The appraiser may only provide the name and address of auto body shops, garages or repair shops within a reasonable distance of where the motor vehicle is located and where work will be done in accord with the written appraisal when asked by the insured or claimant.

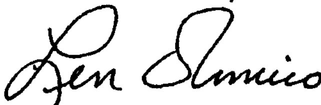
31 §62.3(g)(13)- Upon the repair shop's request for supplementary allowance, when the amount or extent of damage is in dispute, the appraiser must promptly reinspect the vehicle prior to the repair shop's commencement of the repairs in question.

31 §62.3(g)(14)- Once an appraisal has been performed, the Act does not prohibit another appraisal from being performed by a different licensed appraiser if requested by the insured, claimant, repair facility or insurer.

I regret that we are unable to provide you with the information you have requested with respect to Bulletin 53. The Bulletin you referenced had no force and effect of law and has been repealed along with other Bulletins on September 7, 1996.

I trust that we have provided you with the simple and easy to understand answers you have requested.

Sincerely,



Leonard D'Amico, Manager
Harrisburg Regional Office

cc: Senator Robert Tomlinson
Representative Nicholas Micozzie
Representative Nicholas Colafella
Representative Gene DiGirolamo
Representative Matthew Wright

Testimony of

Jack Gillis
Executive Director
Certified Automotive Parts Association

Before the
Wisconsin
Senate and Assembly
on
Assembly Bill 416

July 31, 1997

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My name is Jack Gillis; I am Executive Director of the Certified Automotive Parts Association. I also serve as Director of Public Affairs for the Consumer Federation of America and am author of The Car Book, which is prepared in cooperation with the Center for Auto Safety. I am here today representing the Certified Automotive Parts Association to comment on Assembly Bill 416.

CAPA is a non-profit organization, which oversees a testing and inspection program that certifies the quality of parts used for auto body repairs. CAPA's goal is to promote price and quality competition in the crash parts industry, thereby reducing the cost of crash repairs to consumers without sacrificing quality. We establish standards for competitive parts in order to ensure their equivalency to car company parts and provide consumers, auto body shops, and insurance companies with an objective method of evaluating their functional equivalency.

As a consumer advocate, I have spent over eight years working on this program in order to protect American consumers from a car company parts monopoly. Car companies spend millions of dollars to discredit aftermarket parts,

scare consumers, co-opt body shops and intimidate state legislatures into protecting their monopoly with thinly veiled legislation like this bill. This state by state approach has been adopted by car companies because they were unsuccessful achieving the same results on the national level when they tried to alter federal design patent laws in 1993. Supporting this legislation will, in effect, promote a monopoly and destroy the free market that Wisconsin consumers have traditionally embraced.

Consumers should also have the right to know that tying the use of an aftermarket part to the voiding of a new car warranty, as body shops and car companies imply, is against Federal law.

What is really at stake is the consumer protection inherent in a truly free and responsible marketplace. What the car companies and body shops are asking this Assembly to do is to legislate out of business an industry which is forcing them to offer competitive prices. For example, from the time of their introduction in 1983 to 1989, prices for fenders for the Chevrolet Chevette and Honda Accord, which were subject to competition, dropped 44 and 38 percent, respectively, once competition was introduced. During the same period, front-door prices, not subject to competition, rose 30 and 45 percent for the same two models. One of the most powerful examples of how consumers are hurt by this monopoly is best exemplified by comparing a Ford hood with a combination TV/VCR. A hood for a 1994 Ford Taurus retails at $400 Comparably, a combination TV/VCR made by RCA retails for $389. It is not uncommon for a car company to charge the same price for a simple stamped piece of metal as RCA charges for something that requires complex assembly, has thousands of parts, performs multiple operations, includes various

buttons and controls, transports video tape into place, is full of electronic parts all surrounding a fragile, sophisticated, cathode ray tube. Ford's pricing is what happens when a product exists in a monopoly. RCA has many competitors forcing it to provide high quality at a low price, Ford does not. These are many examples of price gouging by car companies when competition is absent.

This bill effectively establishes car companies as the benchmark for quality. BEWARE. As a consumer advocate who has spent over 20 years studying automobiles, may I respectfully offer a serious warning: Using car companies as your benchmark for quality is inviting disaster.

Each year, automakers recall millions of vehicles for safety related problems. In fact, in 1995, a record 17.8 million cars and trucks were recalled for safety-related defects -- more cars were recalled than sold that year. Furthermore, each year autos are the most complained about product sold in the United States. A simple check with the Wisconsin Attorney General's office will tell you what your citizens think of car company quality. Yet, this legislation puts you in the position of telling the car owner, "Insist on quality--use only General Motors parts. Insist on quality--use only Ford parts." The Wisconsin Legislature ought to beware of using car companies as its benchmark of quality and safety. Wisconsin consumers know better.

<u>The car companies claim that the CAPA standards do not cover safety</u>. Comments that there is something wrong with the safety of CAPA parts are irresponsible. CAPA certified parts do not have significant safety ramifications--nor are there any federal safety standards for these types of parts. And I should be concerned--I've spent over 20 years of my life fighting for safer cars. Crash tests

conducted on the one part that could potentially have safety ramifications (the hood) show that it performs no differently in crash tests than those hoods made by the car companies. Ironically, in a recent attempt to discredit CAPA parts before body shops at a body shop trade show, an organization conducted an unscientific crash test on a vehicle with a certified fender and hood. While the test was designed to find fault with CAPA certified parts, the sponsors had to acknowledge publicly that the CAPA certified hood and fender performed in the same manner expected of a car company part.

Is there reason to prohibit aftermarket parts because some are bad? No manufacturing process I know of is perfect -- certainly not that of a car company. However, in the CAPA program, when we discover bad parts, they are decertified and recalled. The car companies do not do this. Nevertheless, would it make sense to force the industry out of business because of mistakes? If that were the case, what would this Assembly's position be on Ford, GM, and Chrysler whose safety defects force the recall of millions of cars each year? CAPA's presence in the marketplace assures the consumer that quality will not be sacrificed in the name of competition. This legislation would essentially take away that assurance.

On another note, there are those who would like you to believe that there is something wrong with the fact that CAPA is funded by the insurance industry. This allegation flies in the face of logic. If the insurance industry was, in fact, interested in foisting poor quality parts on the American consumer, the last thing they would do is establish a non-profit, independent, certification organization that fully complies with generally accepted guidelines for third party certification programs-- and hire consumer advocates to manage it.

Additionally, I want to point out that some of the most outspoken critics of the insurance industry, including the Consumer Federation of America, Ralph Nader's Public Citizen, and Consumer's Union, have gone on record in support of CAPA and aftermarket parts--quite an unlikely event if there were something inherently wrong with the insurance industry's initially funding such an organization.

It is clear, ladies and gentlemen, that this legislative effort is a thinly veiled attempt to provide the car companies with a monopoly on aftermarket parts. Consumer groups are concerned any time a monopoly is protected, and this legislation will go a long way to protect car company monopolies. Americans are not afraid of competition. Nor, I assume, are Wisconsin consumers. Yet, the spirit, intent and result of this legislation is to kill competition. CAPA Standards offer a marketplace solution, rather than a legislated one. Again, I urge you to vote for competition and quality. Vote for consumer's right to protection against a monopoly. Vote against this bill. Thank you for your time.

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Report on OEM Hood Failures

Based on Data from the

National Highway Traffic Safety Administration

U.S. Department of Transportation

1987-1997

Compiled by

The Certified Automotive Parts Association

1518 K St., Ste. 306

Washington, DC 20005

Recently, Mr. Charles Barone, a reporter for ABRN and an operator of a company called Accident Check, allegedly found a hood that he claims flew open unexpectedly. He asserts that the hood is CAPA certified. Here are the facts as accurately as we can determine:

1. The hood was on a car owned by Daniel Dellarova.
2. Mr. Barone discovered it through a collision repair shop by the name of Dick's Autobody in Fleetwood, PA.
3. No injuries resulted from the event.
4. The dealership from which the original owner purchased the car replaced the hood when the car was 3 months old.
5. The repair was done in 1988.
6. An insurance claim was not filed for the original repair.

CAPA is concerned whenever anyone has even a potential problem with a CAPA certified part. For this reason, we vigorously solicit complaints about problem parts, immediately decertify parts that do not meet our standards and, unlike car companies, have a recall program designed to remove problem parts from the marketplace. As a result of this complaint, we have reviewed this part's complaint and production history as well as current production lots and the part is in compliance with our standards.

In order to put the issue of this particular hood into perspective, we have analyzed U.S. Government records regarding OEM hood problems. As the part in question is over 10 years old, we looked at NHTSA hood recalls during the past ten years. Here's what we found:

From 1987-1997 the government recalled 2,659,084 vehicles for hood related problems that could cause the hood to fly open while the vehicle is in motion.

We agree with Mr. Barone that a problem with any part is serious. However, in ten years there has been only one reported, albeit questionable, incident associated with CAPA certified hoods, compared to the 2,659,084 OEM hood recalls. Given that potentially one million of these OEM hoods have yet to be checked by the car companies (estimated open recalls), it seems that there is a very serious problem – but it is with OEM hoods.

OEM Hood Problems 1987-1997
Manufacturer Ranking
Based on U.S. Department of Transportation Recall Actions

Car Company	No. of Recalls	No. of Recalled Hood Problems	10 Year Rank
General Motors	8	1,183,617	1
Ford	5	1,182,637	2
Chrysler	2	192,000	3
Mercedes	1	44,114	4
Suzuki	1	38,229	5
Lexus	1	16,036	6
Porsche	1	2,451	7

OEM Hood Problems 1987-1997
10 Year Detailed History
Based on U.S. Department of Transportation Recall Actions

Car Company	Model	Model Year	Recall Year	Number Recalled	Problem with Recalled Hood
Cadillac	DeVille	96	95	12,783	Does not meet requirements of FMVSS No. 113 "Hood latch systems."
Ford	Crown Victoria	96	97	125,000	Hood or latch striker can wear or become detached from the hood.
Ford	Windstar, Mustang	96	97	769,000	Tearing of bond between inner and outer door panels can cause outer panel to fly up during minor collisions.
Mercedes	Mercedes Benz	96	96	44,114	Does not meet requirements of FMVSS No. 113 "Hood latch systems."
Dodge	RAM	94	95	175,000	Secondary hood latch rod can bind on the guide bracket and prevent engagement of secondary latch--can cause the hood to fly up
Chevrolet	Cavalier	92	91	3,212	Secondary hood latch not installed properly or missing.
Chrysler	LeBaron	92	92	17,000	Hood latch assembly may not have been properly installed.
Lexus	ES300	92	94	16,036	Dust or other foreign matter can accumulate, causing hood not to engage properly.
Buick	Roadmaster	91	91	224,588	Secondary hood latch can corrode, causing hood not to latch properly when closed.

Car Company	Model	Model Year	Recall Year	Number Recalled	Problem with Recalled Hood
Lincoln	Town Car	91	95	142,800	Corrosion of Hood Latch Striker Plate causes detachment of the plate from the hood assembly resulting in an unexpected opening of the hood while vehicle is being driven.
Lincoln	Town Car	91	95	73,837	Secondary hood latch may not engage when the hood is closed. If primary hood latch releases or is not properly latched, the hood could fly up.
Lincoln	Town Car	91	91	72,000	Secondary hood latch may not engage when hood is closed.
Porsche	Coupe	90	91	2,451	Safety latch may be prevented from locking properly.
GEO	Metro	89	93	356,097	Mislocated attaching spot welds of the hood striker assembly cause cracks to start on the hood inner panel.
Suzuki	Swift	89	93	38,229	Mislocated attaching spot welds of the hood striker assembly cause cracks to start on the hood inner panel.
Buick	Regal	88	88	12,457	Secondary hood latch may not properly engage.
Chevrolet	Beretta	87	91	290,408	Secondary hood latch assembly may not be properly adjusted and could become bent.
Chevrolet	Beretta	87	88	282,052	Secondary hood latch assembly may not have been properly adjusted resulting in latch becoming bent.
Chevrolet	Beretta	87	87	2,020	Loss of skid plate could lead to disengagement of secondary and primary latches.

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Peter J. Salvatore, Regulatory Coordinator
1326 Strawberry Square
Harrisburg, PA 17120

Dear Mr. Salvatore:

We wish to comment upon the proposed changes to regulations found in Chapter 62, Title 31 of the "Pennsylvania Code", Motor Vehicle Physical Damage Appraisers, as published in the "Pennsylvania Bulletin" on February 6, 1999.

These comments are being filed on behalf of the **Pennsylvania Automotive Recycling Trade Society** ("PARTS"), a **trade association representing** approximately 400 member businesses who are <u>the</u> **responsible, quality automotive recyclers in Pennsylvania**.

Automotive recyclers purchase damaged, abandoned, or used vehicles from insurance companies or individuals. **Recycled** vehicles go through a dismantling process similar to an automotive assembly line running in reverse. The usable, undamaged <u>recycled OEM</u> parts are removed from vehicles, inspected, tested, inventoried, and stored for resale. These **reusable** OEM parts are typically marketed and sold to body shops, garages, used car dealers and retail customers. **Recycled** OEM parts have been factory assembled, and meet the original manufacturer's specifications.

Accordingly, our industry has an interest in the regulations concerning <u>independent automotive</u> appraisals.

Our recommendations/comments are as follows:

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I. We have reviewed the definitions of "Aftermarket crash part" and "Non-original equipment manufacturer ("Non-OEM") aftermarket crash part" in Section 62.1. Although these definitions appear satisfactory, neither recognizes or addresses the fact that there are many "Non-OEM" automotive replacement parts not encompassed by these definitions (e.g. rotors, wheels, gas tanks, carburetors, etc.). Many of these parts may indeed be included in an appraiser's damage report; repairs necessitated by an accident frequently encompass more than sheet metal parts, but also mechanical, electric, and electronic parts. Accordingly, we believe it may be equally important that the consumer be informed concerning these parts.

Therefore, we recommend for your consideration that either the definition of "Aftermarket crash part" be modified to encompass all replacement parts or add definitions for "Aftermarket Mechanical Parts" and "Non-Original equipment manufacturer ("Non-OEM") aftermarket mechanical part".

II. We recommend adding a definition for: "Recycled Original Equipment Manufacturer Aftermarket Crash Parts" ("Recycled OEM") - An aftermarket crash part originally made for or by the original manufacturer of a motor vehicle and which has been utilized as such and later resold."

This establishes a clearer distinction between "Non-OEM" and "OEM" parts, and clearly acknowledges the fact that there are used OEM parts. We believe it important that appraisers and consumers understand same.

III. We are opposed to the use of the current second sentence in Section 62.3(b)(3) which states: "The appraiser may provide the consumer with the names of at least two repair shops able to perform the repair in accordance with the appraisal."

The clear intent of the Pennsylvania Motor Vehicle Physical Damage Appraiser Act, the Act of 1972, P.L. 1713, No. 367, pursuant to which these regulations are promulgated, is to not only encourage, but to require independence and integrity among motor vehicle physical damage appraisers. To allow them to list the names of repair shops constitutes very strongly implied "steering of consumers" to such listed repair shops, especially if those repair shops are in any manner directly or indirectly affiliated with the appraiser.

As you may be aware, there is a growing system of "direct repair shops" which are affiliated with insurance companies, either formally or informally through contractual arrangements. At a bare minimum, there should be a strict prohibition against listing repair shops with whom the physical damage appraiser or his/her employer has any direct or indirect relationship. For example, if an appraiser is employed directly or indirectly by an insurance company, he/she should not be able to list any of the repair shops that are directly or indirectly affiliated with such insurance company. To do otherwise, truly violates the statutorily stated policy of integrity and independence, which are the foundation for these Regulations and the law.

It is the Insurance Department's responsibility to assure that an Appraiser is not only "independent" in title, but in actuality, and to preclude not only actual conflicts of interest, but any perception of conflict of interest.

IV. We suggest the substitution of the word "manufactured" for "supplied" in Section 62.3(b)(9), which would read, in part: "If the appraisal includes Non-OEM aftermarket crash parts, a statement that the appraisal has been prepared based on the use of aftermarket crash parts manufactured by a source other than the manufacturer of the motor vehicle, ..."

The word "supplied" is misleading. OEM parts may be supplied by someone other than the original manufacturer of the motor vehicle. We do not believe it was intended, directly or indirectly, to limit the acquisition of new or used OEM parts only from a manufacturer. The key is to distinguish between "OEM" and "Non-OEM" parts, not their source of supply.

V. We recommend that additional language be added to Section 62.3(c)(1) as follows: "If the salvage value of the vehicle being appraised is known or could reasonably be determined, the appraiser shall advise the consumer in writing of: (a) the salvage value; (b) **the provisions of Section 1117(a) of the Pennsylvania Vehicle Code requiring the filing of an application for certificate of salvage with PennDOT**; and (c) additional charges for towing services or storage chargeable against the motor vehicle as of the date of the appraisal."

The consumer should be fully advised of all legal requirements, including the Motor Vehicle Code requirement that a certificate of salvage must be applied for when a vehicle is deemed "totaled". This is an area in which consumers normally are not knowledgeable, and therefore, in the interest of consumer protection, this disclosure

should be made to the consumer to prevent fraud.

VI. We do not fully understand the logic behind the re-writing of Section 62.3(g), which now appears as Section 62.3(f). We understand an intent to eliminate sections which are redundant or restatements of the statutory language, but this "standard" does not seem to have been applied on a consistent basis, and thus, leaves open to question the intent as to why some statutory provisions are repeated and some are not.

Further, for the reasons stated in paragraph III above, we believe that this is the section for re-emphasis of the underlying policy that appraisers must be completely independent and not traffic in or have an economic affiliation, directly or indirectly, with any other form of automotive business, including automotive salvage repair facilities, insurance companies, vehicle or salvage auctions, etc.

VII. Section 62.3(f)(2)(ii) currently reads as follows: "An appraiser authorizing removal of a motor vehicle to a salvage yard shall inform the salvager in writing that possession is merely for safekeeping purposes and that the salvager does not have an ownership right to the motor vehicle, its parts or accessories, until a certificate of title is received indicating that ownership has been transferred." (Emphasis added).

The terms "salvage yard" and "salvager" are outdated terms deleted from other Pennsylvania statutory language, and not reflective of the current state of our industry. We suggest three alternative terms for the term "salvage yard", specifically, either: "Vehicle salvage dealer" or "Vehicle salvage dealer business" or "Automotive dismantling and recycling business". Definitions for same are contained in Section 1337 of Title 75 of the Pennsylvania Vehicle Code and Section 2719.2 of the Pennsylvania Highway Beautification Act.

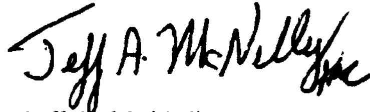
Further, the term "or salvage certificate" should be inserted in the last line to reflect the reality that either ownership document (certificate of title or salvage certificate) may be received for a vehicle, depending upon its condition and/or valuation.

Accordingly, Section 62.3(f)(2)(ii) would read as follows: "An appraiser authorizing removal of a motor vehicle to a vehicle salvage dealer (or vehicle salvage dealer business or automotive dismantling and recycling business) shall inform the dealer (or business owner or authorized representative, or automotive recycler) in writing that possession is merely for safekeeping purposes and that the vehicle salvage dealer (or vehicle salvage dealer business or automotive dismantling and recycling

business) does not have an ownership right to the motor vehicle, its parts or accessories, until a certificate of title or salvage is received indicating that ownership has been transferred.".

Thank you for allowing our industry to comment upon these proposed regulations. We regret that our industry was not initially contacted by the Department prior to the writing of the regulations "regarding issues arising out of the existing regulations" as noted in the preamble to your proposed regulations,. We trust that our comments and suggestions are given the same consideration as other affected parties.

Yours truly,



Jeff A. McNelly
President/CEO

cc: PA Senate Banking and Insurance Committee
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