

STATE OF MAINE
BUREAU OF INSURANCE

<i>In re:</i>)	
)	
APPEAL OF DISAPPROVAL OF)	
RATE FILINGS BY)	THE STAFF ADVOCACY
PROGRESSIVE CASUALTY)	PANEL'S BRIEF IN REPLY
INSURANCE COMPANY,)	TO THE INSURERS'
PROGRESSIVE)	RESPONSE TO QUESTIONS
NORTHWESTERN INSURANCE)	POSED BY THE
COMPANY, PROGRESSIVE)	SUPERINTENDENT OF
NORTHERN INSURANCE)	INSURANCE
COMPANY, AND UNITED)	
FINANCIAL CASUALTY)	
COMPANY)	
)	
Docket No. INS-15-1001)	

Introduction

On June 15, 2015, Progressive Casualty Insurance Company, Progressive Northwestern Insurance Company, Progressive Northern Insurance Company, and United Financial Casualty Company (collectively, "the Insurers") made filings seeking approval of revised rates for their private passenger automobile insurance products ("the initial filings").

On July 10, 2015, the Superintendent, through staff, disapproved the Insurers' initial filings. The basis for disapproval was the filings' violation of 24-A M.R.S. § 2916. (The text of § 2916 is set forth in the Introduction to the Advocacy Panel's initial brief.)

On August 4, 2015, the Insurers filed an Amended Notice of Appeal challenging the disapproval of their initial filings.

On August 8, 2015, the Insurers made new filings.

Argument

At issue is the meaning of 24-A M.R.S. § 2916. In their initial briefs, the Insurers and the Advocacy Panel have presented very different conclusions about what the statute means. This is the Advocacy Panel's reply to the Insurers' initial brief.

I. THIS CASE IS MOOT, AND THE SUPERINTENDENT SHOULD DISMISS THE INSURERS' APPEAL.

On August 8, 2015, the Insurers made new rate filings after the disapproval of their initial filings. (The SERFF File Tracking Numbers for the new filings are PRGS-30200321 and PRGS-130200139.) The Bureau has approved those filings, which supersede the Insurers' initial filings and do not violate § 2916. Consequently, this case is moot. *Cf. Anthem Health Plans of Maine, Inc. v. Superintendent of Insurance*, 2011 ME 48, ¶¶ 5-14, 18 A.3d 824 (dismissing appeal as moot and finding exceptions to mootness inapplicable to a rate-setting decision of the Superintendent).

II. THE INSURERS HAVE WAIVED ANY RIGHT TO APPROVAL OF THEIR INITIAL FILINGS.

In 2011, Progressive Northwestern Insurance Company entered into a consent agreement with the Bureau of Insurance and the Attorney General, by which the Company accepted discipline for its institution of a plan denying automobile liability coverage to individuals 75 years of age or older who did not pay first premiums by credit card or debit card.¹ That Company plan was a substitute for the Company's original filing charging rates based on actuarial data for individuals aged 75 or older. The Bureau had disapproved the original filing. The Bureau also disapproved the second filing, finding, *inter alia*, a violation of § 2916's coordinate statute, 24-A M.R.S. § 2902-C.

In its 2011 Consent Agreement, Progressive covenanted that it would not adopt any procedure or impose any condition for issuing motor vehicle liability insurance that has the effect of excluding or discouraging persons 65 years of age or older from obtaining coverage. It also explicitly waived "any further hearings *or appeals*" (emphasis added) regarding its promise not to adopt any such procedure or condition. The

¹ A copy of the Consent Agreement is annexed hereto as Exhibit A.

Insurers initial filings are the kind of action they have waived the right to bring.² See Point I of the Advocacy Panel's initial brief.

III. THE INSURERS' VIEW OF 24-A
M.R.S. § 2916 VIOLATES BASIC
TENETS OF STATUTORY
INTERPRETATION AND IGNORES
THE STATUTE'S ROLE IN THE
INSURANCE CODE AS A WHOLE.

As noted in the Advocacy Panel's initial brief, the first step in determining the meaning of a statute is to examine the plain meaning of the statute's words. *Bankers Life and Casualty Company v. Superintendent of Insurance*, 2013 ME 7, ¶15, 60 A.3d 1272. Unless the statute is ambiguous, the plain meaning of its words control. *Maine Association of Health Plans v. Superintendent of Insurance*, 2007 ME 69, ¶ 34, 923 A.2d 918. The Insurers not only profess adherence to these rules for discerning Legislative intent but also concede that the rules apply to § 2916 because it "is unambiguous." Footnote 3 of their brief. At page 1 of their brief, they correctly state the limitation that must therefore be put on interpretation of § 2916: "Section 2916's scope and application should not be extended beyond its plain language." (citation omitted)

Notwithstanding the Insurers' correct assertion that interpretation of § 2916 must be limited to its plain language, they build their argument on what the statute does not say rather than what it unequivocally does say. At page 3 of their brief, they argue that because § 2916 does not contain words prohibiting an ability to raise premiums as they have proposed they have license to do as they propose. They misapply the rule of statutory interpretation stating that the mention of one thing excludes others. When that rule is applied to § 2916, the correct conclusion is that the mention of age excludes consideration of other factors, including an actuarially justified analysis of loss expectation.

The Insurers cite 24-A M.R.S. § 2303(1)(C)(1), at page 3 of their brief, for the proposition that "rates *must reflect* 'past and prospective loss experience.'" (emphasis added) That overstates matters. The principal rate requirements are expressed in the preceding subsection

² Considering the corporate interrelationships of the Insurers, as evidenced, *e.g.*, by their collective presentations in this matter, they are all bound by covenants in the 2011 Consent Agreement

2303(1)(B): "Rates shall not be excessive, inadequate or unfairly discriminatory." Subsection 2303(1)(C) is a list of matters to which an insurer must give "due consideration" when it attempts to make rates that comply with § 2303(1)(B). Loss experience is such a matter, but it is not a principal rate requirement and does not drive the meaning of § 2916.

Section 2916 is an expression of Legislative policy that protects personal motor vehicle policyholders from having their rates go up merely because they age. It is a rate-making statute and a deliberate exception to the mandates in § 2303(1)(B). There are other statutes by which the Legislature has similarly promoted policy. The plain meanings of those statutes in the Insurance Code protect certain classifications from premium increases while excluding reliance on an actuarially justified analysis of loss expectation. For example, there is a prohibition against an increase in premium for public employees, 24-A M.R.S.A. § 2174-A; for law enforcement personnel and emergency responders, 24-A M.R.S.A. § 2174-B; for individuals aged 65 and older, 24-A M.R.S. § 2902-C, *see* Point II of the Advocacy Panel's initial brief; for an insured who has had a license suspension for certain violations, 24-A M.R.S. § 2902-E; and for volunteer drivers, 24-A M.R.S. § 2902-F. *Accord*, 2902-G (mandatory premium discount for insureds aged 55 or older who have taken an accident prevention course). As with § 2916, these laws apply narrowly and exclusively to certain insureds, with consideration of other factors, including an actuarially justified analysis of loss expectation ruled out by the exclusive mention of one determinant relating to the ability to raise premiums.

IV. THE INSURERS' EQUAL PROTECTION CLAIM AND REQUEST FOR A HEARING ARE UNJUSTIFIED.

At 4 of their brief, the Insurers argue that disapproval of their filings is improper because the Bureau has approved a "similar" filing by Travelers. The Bureau did approve that filing in error. When the Insurers brought the error to our attention, Bureau staff initiated action to remedy the error. The Bureau has filed an objection to the Travelers Filing.

The Superintendent has the authority to withdraw the previous approval of any filing that violates the Rates and Rating Organizations or Trade Practices and Frauds chapters. 24-A M.R.S. § 2306. The Advocacy Panel believes that the Travelers Filing will likely suffer the same fate as the Insurers' initial filings. The true similarity of the

Insurers' filings with the Travelers Filing as improper will not work to the Insurers' advantage.

Also at page 4 of their brief, the Insurers argue for discovery and a hearing, processes that are antithetical to a recognition that this case is one of statutory interpretation and that the unambiguous language of § 2916 controls the outcome of the case.

Conclusion

This case is moot, so the Superintendent should dismiss it.

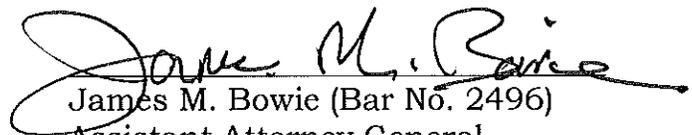
Even if this case is not moot, by their failure to abide by their 2011 Consent Agreement with the Superintendent and the Attorney General, the Insurers have waived their right to have it considered, so the Superintendent should dismiss it.

Even if this case were not moot and the Insurers had not waived their right to have it considered, a correct application of the most basic rules of statutory interpretation leads ineluctably to the conclusion that 24-A M.R.S. § 2916 requires disapproval of the Insurers' initial filings.

The Insurers' complaint about unequal treatment and their allegation that a hearing is necessary add nothing to their argument.

Dated at Augusta, Maine this 5th day of February 2016.

Respectfully submitted,



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STATE OF MAINE
BUREAU OF INSURANCE



IN RE:

PROGRESSIVE
NORTHWESTERN INSURANCE
COMPANY

Maine License No. PCF27738
NAIC Code 42919

CONSENT AGREEMENT

Docket No. INS-10-236

INTRODUCTION

Progressive Northwestern Insurance Company ("Progressive"), a Maine-licensed insurance company, the Maine Superintendent of Insurance ("the Superintendent"), and the Office of the Maine Attorney General hereby enter into this Consent Agreement pursuant to 10 M.R.S. § 8003(5)(B) to resolve, without an adjudicatory proceeding, the Superintendent's findings of violations of the Maine Insurance Code under a license issued by the Bureau. As more fully set out below, the Superintendent finds Progressive violated the Maine Insurance Code by unfairly discriminating against applicants for automobile liability insurance who were over the age of 75 years.

PARTIES

1. The Superintendent of Insurance is the official charged with administering and enforcing Maine's insurance laws and regulations, and the Bureau of Insurance is the administrative agency with such jurisdiction. The Superintendent has jurisdiction over this matter pursuant to 24-A M.R.S. §§ 12-A and 211.
2. Progressive has been licensed in Maine as a foreign property and casualty insurance company since June 7, 1990. Progressive's Maine Certificate of Authority number is PCF27738. Its NAIC Code is 42919.

STATUTORY AUTHORITY

3. Under 10 M.R.S. § 8003(5)(A) and 24-A M.R.S. § 12-A, the Superintendent may issue a warning, censure, or reprimand to an insurer, may suspend, revoke or refuse to renew the license of an insurer, may impose conditions of probation on the insurer, may levy a civil penalty, or may take any combination of such actions, for violating any insurance laws, or violating any rule, regulation, subpoena, or order of the Superintendent.

4. Pursuant to 10 M.R.S. § 8003(5)(B), the Superintendent may resolve a complaint by entering into a consent agreement with a licensee and with the agreement of the Attorney General.

FACTS

5. In early 2009, officials from Progressive contacted the Bureau of Insurance indicating that the company wanted to begin charging rates supported by the company's actuarial data for individuals aged 75 and older. The company's data indicated higher rates were appropriate.

6. Bureau staff informed Progressive that the Bureau would not allow this increased pricing based on age.

7. In June 2009, Progressive instituted a premium down payment practice in its Agency channel whereby it required all applicants for automobile liability insurance in Maine aged 75 years and older to make their premium down payment by either credit card or debit card and would not permit them to pay by cash or check.

8. Progressive notified its Maine agents of this practice in a notice on its For Agents Only web site, in part as follows: "Maine does not allow us to adjust rating factors with age, as many other states do . . . so we have implemented what we hope to be a temporary pay plan restriction."

9. Under this practice, these applicants would not learn about the limits on their payment options until they had completed all other parts of the application.

10. Under this practice, Progressive denied individuals aged 75 years or older the opportunity to purchase automobile liability insurance coverage through its Agency channel unless they made the premium down payment by either a credit card or debit card.

11. Under this practice, Progressive still permitted individuals under the age of 75 years to apply for automobile liability insurance coverage in Maine without having to make their premium down payment by means of either credit card or debit card.

COVENANTS

12. Progressive consents to the Facts as stated above and acknowledges its duty to comply with all applicable laws and regulations of the State of Maine. The Superintendent finds the following violations occurred:

- a. Pursuant to 24-A M.R.S.A. § 2152 by engaging in an unfair or deceptive act or practice in the business of insurance;

- b. Pursuant to 24-A M.R.S. § 2162(2) by making or permitting unfair discrimination between insureds having like insuring or risk characteristics in the terms and conditions of the insurance;
 - c. Pursuant to 24-A M.R.S. § 2902-C by refusing to issue motor vehicle liability insurance to applicants aged 75 years or older unless they made their first premium payments by credit card or debit card without imposing the same condition for obtaining insurance on applicants under the age of 75 years.
13. Progressive accepts the Superintendent's findings in paragraph 12 above.
14. Progressive accepts as disciplinary action the imposition of a civil penalty in the amount of One Hundred Thousand Dollars (\$100,000.00). Progressive shall remit payment of this civil penalty within thirty (30) days after the date of the last signature to this Consent Agreement. Payment shall be by certified check or money order made out to "Treasurer, State of Maine" and delivered to the Bureau.
15. Progressive agrees that it will not adopt any procedures or impose any conditions for issuing motor vehicle liability insurance that have the effect of excluding or discouraging persons 65 years of age or older from obtaining coverage.
16. The Parties to this Consent Agreement understand that nothing herein shall affect any rights or interest that any person not a party to this Agreement may possess.
17. In consideration of Progressive's execution of and compliance with the terms of this Consent Agreement, the Superintendent and Office of the Attorney General agree to forgo pursuing against Progressive any further disciplinary measures or other civil or administrative sanctions available under the Maine Insurance Code concerning the specific conduct described in this Consent Agreement, other than those agreed to herein.
18. This Consent Agreement is enforceable by an action in Maine Superior Court.
19. This Consent Agreement is not subject to appeal. Progressive waives any further hearings or appeals regarding the matters that are the subject of this Consent Agreement.
20. This Consent Agreement may be modified only by a written agreement executed by all of the parties hereto. The parties each retain absolute discretion to reject any request to modify, continue, or terminate any or all of the provisions of this Consent Agreement.
21. This Consent Agreement is a public record subject to the provisions of the Maine Freedom of Access Law, 1 M.R.S. §§ 401 through 410, will be available for public inspection and copying as provided for by 1 M.R.S. § 408, and will be reported to the Regulatory Information Retrieval System database at the National Association of Insurance Commissioners.

22. Progressive agrees that it has read the Agreement, that it understands the Agreement, that it has reviewed the statutory provisions set forth herein, that it has been advised of its right to consult with counsel and has had an opportunity to consult with counsel before signing the Agreement, and that it enters into the Agreement voluntarily and without coercion of any kind from any person.

**PROGRESSIVE NORTHWESTERN
INSURANCE COMPANY**

Dated: 7-26, 2011

By: Kathleen M. Cerny
Its Authorized Representative

KATHLEEN M. CERNY, ASST. SECY.
Print Name and Title

Subscribed and sworn to before me this 26th day of July, 2011.

Kristina Crews
Notary Public

~~NOTARY PUBLIC - STATE OF OHIO~~
KRISTINA CREWS
COMMISSION EXPIRES APRIL 17, 2013

Date commission expires

**THE MAINE SUPERINTENDENT OF
INSURANCE**

Dated: July 29, 2011

By: Eric Cioppa
Eric Cioppa
Acting Superintendent of Insurance

**THE MAINE OFFICE OF THE
ATTORNEY GENERAL**

Dated: July 29, 2011

By: Andrew L. Black
Andrew L. Black
Assistant Attorney General