

plain language of Section 2916 prohibits a rate increase only when caused exclusively by an increase in age.¹

The only source of disagreement is whether increased age is the exclusive cause of rate factor increases in Progressive's Filing. The Filing's rate factors are a product of a multivariate analysis of loss expectation using volumes of underlying analysis and data. As with practically any Rate Filing with the Bureau, Progressive did not submit this underlying data in support of The Filing. It did however, in response to the Advocacy Panel's Third Informational Request, provide an Excerpt of Countrywide Auto Pricing Project 156 Factor Support for BI-Driver Class: Married Males. This table demonstrates the analysis underlying one particular portion of The Filing, and is representative of the analysis underlying the entire Filing.

The Advocacy Panel's position that the only factors used to determine rates (and rate changes) in The Filing are age, gender, and marital status belies actuarial practice; it would be impossible to establish actuarially justified rates which reflect "past and prospective loss experience" (as required by 24-A M.R.S. §2303(1)(C)) with reference to only these three factors. The Filing does not include its volumes of underlying data because, as a matter of practice, the Bureau has not traditionally required submission of this data. However, if it is disputed that the Filing's rates are created through actuarially-justified analysis of loss expectation, Progressive will be prepared to offer testimony and evidence that the Filing's rate increases are caused by increase loss expectation.²

Because rate increases in The Filing are caused by increased loss expectation, which merely correlate to increased age of an insured, The Filing does not violate Section 2916.

II. Applying both Section 2916 and Section 2902-C (the statute cited by the Advocacy Panel) the Bureau has traditionally permitted consideration of variables other than age, even when those variables correlate to age.

In Section II of its Brief, the Advocacy Panel relies on legislative history of a different section of Maine's Insurance Code and its own interpretation of Bulletin 334 to argue that Section 2916 requires disapproval of The Filing.

First, the Advocacy Panel relies on the language of Section 2902-C of the Insurance Code to argue for a more expansive interpretation of Section 2916. But Section 2902-C (which

¹ The Advocacy Panel relies on a First Circuit opinion which establishes exactly this point. *Laracuate v. Chase Manhattan Bank*, 891 F.2d 17, 23 (1st Cir. 1989) establishes that an employee's bankruptcy status cannot be the "sole reason" for her termination when the employer also produced uncontroverted affidavits that she was fired for abusing her authority with the bank. Even if the employee's bankruptcy status contributed to her termination in *Laracuate*, it was not the 'sole reason' because she was also terminated for other reasons.

² The first step for the Bureau is to properly interpret Section 2916, and to apply the statute according to its plain language. If the Bureau does so, and any questions remain as to whether increased loss expectation is the cause of increased rates in The Filing, the Bureau has the option to remand the Filing for consideration subject to a proper interpretation of Section 2916.

prohibits refusal to insure a driver “solely because the applicant is 65 years of age or older”) actually provides additional support for Progressive’s interpretation of Section 2916 because (1) it uses similar language (“solely” versus “sole reason”), and (2) the Bureau interprets Section 2902-C to mean that insurers can require medical underwriting for applicants older than 64. Specifically, the Bureau permits medical underwriting for new business because, according to the Bureau’s website, insurers “have a right to know if there are medical conditions that have developed which might make it impossible or difficult for you to operate a motor vehicle.”^[1] And the Bureau has decided that it is permissible for insurers to require medical underwriting only for seniors. *See, e.g., Vermont Mutual Filing* approved Sept. 4, 2014.

Because the Bureau permits consideration of other factors that could reasonably correlate with age (e.g. those inherent to medical underwriting) under Section 2902-C, it should do the same with Section 2916. Like medical underwriting, multivariate analysis of loss expectation may be correlated to age, but are nevertheless permissible for an Insurer to consider when insuring, renewing, and setting rates.

Second, the Advocacy Panel argues that because the legislature has not changed the language of Section 2916 since the Bureau issued Bulletin 334, Bulletin 334 accurately interprets Section 2916. However, Section 2916 is unambiguous and therefore Bulletin 334 cannot change its meaning. *See Cobb v. Bd. Of Counseling Prof’ls Licensure*, 2006 ME 48, ¶13, 896 A.2d 271 (agency’s construction of an unambiguous statute does not affect the statute’s effect or interpretation). Furthermore, the legislature may have acquiesced to Bulletin 334’s interpretation of Section 2916 but, as Progressive pointed out in its Brief, Bulletin 334 does not disallow rate increases caused by multivariate analysis of loss expectation, and actually distinguishes such rate increases from those caused solely by increased policyholder age. Finally, there is no more potent measure of Bureau interpretation than the Bureau’s actual disposition of Filings. If the legislature has acquiesced to the Bureau’s interpretation of section 2916, then it has acquiesced to the Bureau’s approval of other filings which increase rates when policyholders turn 65 (such as the 2014 approval of the Travelers Filing attached to Progressive’s Brief).

The Bureau has traditionally interpreted the words “solely”/“sole reason” to permit consideration of variables other than age even when those variables correlate to age. It did so approving the Travelers Filing, and it has done so in the context of Section 2902-C. There is no reason for the Bureau to deviate now from the plain meaning of Section 2916.

III. Section 2916 does not prohibit rate increases driven by increased loss expectation, and its plain language and meaning are not altered by the legislature’s choice to use different wording to accomplish a different goal in a different statute.

In Section III of its brief, the Advocacy Panel relies on what Section 2916 does not say—rather than what it does say—to argue that the statute does not ‘permit’ rates to increase for drivers of a certain age if the increase is caused by an actuarially justified multivariate analysis of

^[1] Bureau of Insurance, ‘Frequently Asked Questions – Auto Insurance’, online at <http://www.maine.gov/pfr/insurance/faq/auto_ins.htm#d>

loss expectation. In particular, the Panel attempts to compare Section 2916 to another section of the Insurance Code, 24-A M.R.S. §2169-B(2)(c) concerning credit history and information, and argues that because Section 2169-B contains language that Section 2916 does not, “the Legislature intended not to allow consideration of the result of an actuarially justified multivariate analysis of loss expectation.” (Advocacy Panel Brief at 6.) The mere fact that other distinct statutes contain language not contained in Section 2916 is not relevant to interpretation of this unambiguous statute because “as a rule, the intent of the legislature is indicated by its action and not by its failure to act....Legislative inactivity is inherently ambiguous and affords the most dubious foundation for drawing positive inference when interpreting a statute.” 73 Am. Jur. 2d Statutes §82 (2nd 2015).

Regardless of the precise wording of a different statute dealing with credit information, Section 2916 is a straightforward and narrow prohibition on rate increases in one and only one circumstance: when caused exclusively by increased policyholder age. The statute does not say that this prohibition extends to rate increases caused by increased loss expectation, and therefore cannot be held to disallow such rate increases. As argued at length in Progressive’s Brief, the words “sole reason” would be without effect if Section 2916 is expanded to prohibit rate increases caused by increased loss expectation or any other non-age factor.

Section 2916 does not address multivariate analysis of loss expectation. Therefore, the statute simply does not address the use of such analysis in a Filing, or the effect of such analysis on insurance rates, and cannot by its plain language prohibit rates affected by this analysis.

IV. The Advocacy Panel has identified questions of fact for a hearing. The Hearing Panel should find that rate increases in The Filing are caused by increased loss expectation since this does not seem to be disputed, but if necessary Progressive is entitled to a hearing to present witnesses and testimony that rates increase for reasons other than age.

The Advocacy Panel correctly notes that the meaning of Section 2916 is a question of law. But whether The Filing complies with Section 2916—whether increased age is the “sole reason” for increased rates in The Filing—is a question of fact. As noted above, Progressive is prepared to offer testimony and evidence at a hearing that increased loss expectation—not increased age—is the reason for increased premiums and therefore The Filing complies with Section 2916. The Advocacy Panel does not actually seem to disagree with Progressive that multivariate analysis of loss expectation underlies and causes rate increases in The Filing, but simply disputes that this is permissible under Section 2916.

To the extent that there is any dispute whether age, and age alone, causes rate increases in The Filing, the Advocacy Panel’s own brief highlights the factual disputes which must be resolved to decide this appeal. The Advocacy Panel, for example, states that in The Filing “an operator’s age is sometimes the sole reason for increased premium” and “that age is the only explanation for some premium increases.” (Advocacy Panel Brief at 4.) If this is true, then it must be determined which premium increases in The Filing result from factors other than age and which result only from age. Of course Progressive takes the position that all of the premium

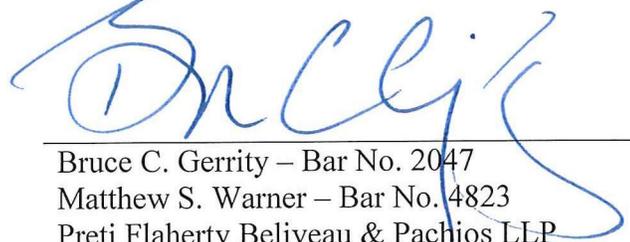
increases result from factors other than age, and should be afforded the opportunity to present evidence to this effect at a hearing.

Conclusion

Ironically, if you accept the Advocacy Panel's interpretation of Section 2916 and choose not to allow insurers to use multivariate analysis to set rates for all risk profiles, the Bureau will be forcing insurers to discriminate against drivers with lower risk classifications by charging them higher-than-justified rates to subsidize the rates of those with greater risk profiles. This is contrary to the multiple provisions of the Insurance Code, and cannot be the desired result of the Bureau.

The parties agree that Section 2916 is unambiguous, and has the narrow function of prohibiting premium increases caused solely by increased driver age. The statute is silent on premium increases caused by increased loss expectation, and so cannot prohibit such increases. Progressive's Filing does not contain any rate increases caused solely by increasing driver age, and therefore does not violate Section 2916. The Advocacy Panel has admitted that some of the rate increases in The Filing are not driven solely by increased driver age, but argues that age is the only cause of other premium increases. If the Hearing Panel is not prepared to accept without a hearing that factors other than age contribute to increased rate factors, then Progressive is entitled to a hearing to present testimony and evidence that The Filing does not violate Section 2916.

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



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