

ROBERT C. PASSMORE
SENIOR DIRECTOR – PERSONAL LINES POLICY

October 6, 2009

Candace Thorson
Deputy Executive Director
National Conference of Insurance Legislators
385 Jordan Road
Troy, NY 12180

Re: NCOIL Proposed Model Act Regarding Motor Vehicle Crash Parts and Repair

Dear Ms. Thorson:

At the July meeting of the National Conference of Insurance Legislators (NCOIL), the Property Casualty Committee considered model legislation that would place limitations upon what information could be provided to consumers and what options are available to consumers who seek to repair their cars after the accident. The Property Casualty Insurers Association of America (PCI) submitted a joint statement with the American Insurance Association and the National Association of Mutual Insurance Companies (NAMIC) opposing the provisions of the model as those restrictions would “not only limit consumer choice in how vehicles are repaired, but force consumers to bear higher repair costs”.

PCI’s position on the proposed model act has not changed. However, in light of the committees’ discussion of the “steering” portion of the model on its most recent conference call, we would like to take the opportunity to provide the committee with additional information on one of the points made in that statement, that the proposed model includes language that violates the commercial free speech rights of insurers.

PCI supports consumer freedom of choice in selecting the auto repair option that best suits their needs. However an essential part of consumer choice is the ability to receive information about those repair options. The right of consumers to receive recommendations and suggestions from insurers and the right of insurers to provide them is protected by the free speech provisions of the First Amendment to the U.S. Constitution.

The Model Act, in its present form, contains unconstitutional restrictions on commercial free speech.

Section 6(B) provides:

In processing any such claim, the insurer shall not, unless expressly requested by the insured, recommend or suggest repairs be made to such vehicle in a particular place or shop or by a particular concern.

Federal courts have consistently held that statutes prohibiting insurers from recommending repair facilities violate the constitutional free speech protections of the First Amendment.¹

Courts that have addressed this issue have held that insurer recommendations regarding repair facilities do not involve inherently false or misleading representations.²

¹ *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 166 (5th Cir. 2007); *Allstate Ins. Co. v. South Dakota*, 871 F.Supp. 355, 358 (1994); *Allstate Ins. Co. v. Serio*, 2000 WL 554221, 21 (S.D.N.Y. 2000), rev’d on other grounds, *Allstate v. Serio*, 261 F.3d 143 (2nd Cir. 2001). That information may potentially be presented in a misleading manner does not justify state prohibition. *In re R.M.J.*, 455 U.S. 191, 203, 102 S.Ct. 929, 937 (1982).

Where commercial free speech involves otherwise lawful activity and is not misleading, the government may only restrict it where:

- 1) There is a substantial government interest;
- 2) The restriction directly advances the government interest; and
- 3) The restriction is not more extensive than necessary to serve that interest.³

The burden of proving that a substantial government interest is advanced in an appropriately narrow manner is on the government, and was not been met in the cases addressing this issue.⁴

While courts have found that states have a substantial government interest in protecting consumers, they have also found that prohibitions on insurer recommendations do not directly advance that interest and fail on that ground.⁵

One federal appellate court, addressing the constitutionality of a prohibition on insurer shop recommendations, noted that:

Consumers benefit from more, rather than less, information. Attempting to control the outcome of the consumer decisions following such communications by restricting lawful commercial speech is not an appropriate way to advance a state interest in protecting consumers.⁶

The United State Supreme Court, addressing commercial free speech issues, has repeatedly held that,

Bans against truthful, nonmisleading commercial speech ... usually rest solely on the offensive assumption that the public will respond "irrationally" to the truth... The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.⁷

The statutes ruled unconstitutional in the cases discussed above prohibited only insurer recommendations. The Model Act goes even further than these statutes by prohibiting even the mere suggestion of a shop.

The Model Act is based on language of a New York statute that has already been declared unconstitutional by a United States District Court.⁸ The District Court's decision in that case was ultimately reversed on grounds unrelated to the commercial free speech analysis. The federal appellate court held that state law should have been considered prior to applying federal constitutional analysis. In the end, the procedures in question were held not compliant with state law and it became unnecessary to consider the constitutional issues.⁹ The underlying constitutionality of the New York statute has not been revisited by any court since the initial decision declaring it unconstitutional. If the Model Act is adopted and this language is ultimately re-litigated, there is no reason to believe a different result will be reached.

² *Abbott*, at 165, citing *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 564, 100 S.Ct. 2343, 2350 (1980).

³ *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 564, 100 S.Ct. 2343, 2350 (1980).

⁴ *Abbott*, at 168; See *South Dakota*, at 358; *Serio*, at 21.

⁵ *Abbott*, at 167; See *Serio* at 24; See, *South Dakota*, at 358.

⁶ *Abbott*, at 167.

⁷ See *Thompson at 1508* (2002), quoting *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503, 116 S.Ct. 1495 (1996).

⁸ See *Serio* at 24. rev'd on other grounds, *Allstate v. Serio*, 261 F.3d 143 (2nd Cir. 2001).

⁹ *Allstate Ins. Co. v. Serio*, 98 N.Y.2d 198, 774 N.E.2d 180 (N.Y. 2002); *Allstate Ins. Co. v. Serio*, 293 F.3d 95 (2d Cir. 2002).

While insurers have not recently challenged the New York statute, this acceptance has more to do with the New York Insurance Department's particular application of the statute than with the statute itself.

Establishing the New York language as model legislation would lead to widespread confusion, as evidenced by the convoluted history of the *Serio* litigation, and would be quite likely to generate constitutional challenges.

Thank you for the opportunity to provide this information to the committee.

Sincerely,

A handwritten signature in black ink, appearing to read "R. C. Passmore". The signature is fluid and cursive, with the first and last names being more prominent than the middle initial.

Robert C. Passmore