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“No insurer shall be required to record or report its loss experience on a classification basis that is inconsistent with the rating system filed by it.” Pennsylvania Rate Act.¹

“Plaintiffs failed to present any evidence as to insurance claim costs for vehicles at different annual mileages” and “[t]here is no evidence that . . . private passenger vehicles driven solely or principally by women . . . are involved in fewer accidents.” Pennsylvania Insurance Department Opinion.²

The above excerpt from the Rate Act shows that even the insurance department can not produce the evidence it demands from consumer-plaintiffs in the opinion quoted in the second paragraph.

The insurance department’s opinion was published as a discrimination “Counterpoint”³ to the earlier anti-discrimination article titled

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1. § 13(a), 40 P.S. § 1193(a). Because this wording is identical to that in § 13(a) of the Model Act approved by the NAIC in 1946, a number of states share this same provision.

2. Foster, Pa Ins. Comm., Opinion: Pennsylvania National Organization for Women v. State Farm Mutual Auto Insurance Company, 7 J. INS REG., 5 (1988) at 7, 10.

3. Editor’s Note *The Case for Discrimination in Insurance Revisited*, 7 J. INS. REG., 4 (1988). The opinion is not the usual defense of sex discriminatory pricing by insurers, but rather a denial that such sex discrimination exists.

*Sex-Divided Mileage, Accident, and Insurance Cost Data Show That Auto Insurers Overcharge Most Women.*⁴ Much of the evidence presented in the article is from the trial record addressed by this opinion. The opinion, however, uses the demand cited above to exclude all non-insurance evidence from consideration.

The purpose of this Note is to analyze the evidentiary implications of the standard of proof cited in the insurance department's opinion, and its general implications for consumers and the public.

The first paragraph means that insurers need not produce claim-cost information on any basis other than that actually used for pricing.⁵ Specifically, with respect to the situation the opinion addresses, the insurance department can not require insurers to provide claim costs referenced to car-miles as a measure of exposure rather than car-years—even under current classifications. Similarly, claim costs can not be required separately for a subgroup within a class that is suspected of having lower claim costs than the class average.

The second paragraph is the insurance department's requirement that consumer-plaintiffs provide claim cost information that even the department can not obtain in order to prove price discrimination against owners of cars driven low mileages and against women as a class of low-mileage drivers. The information is unobtainable because the pricing system filed by insurers does not collect claim costs referenced to an exposure base of verified odometer miles,⁶ and because 80 per cent of cars are in the unisex class which

4. Butler, Butler & Williams, 6 J. OF INS. REG., Part I, 243 and Part II, 372 (1988). Reprints combining the two parts are available from the first author, National Organization for Women, 1000 16th St., N.W., Washington, DC 20036, telephone (202) 331-0066.

5. Insurers have good reason not to report claim costs on a classification or exposure basis other than the one in actual use. Inevitably such an alternative system would show lower costs for some consumers and higher ones for others than the costs on which their prices are based and would open the insurers to price discrimination challenges. This threat appears to be great enough that when insurers do investigate any changes in the pricing system, data on claim costs are likely to be closely guarded and probably not retained after analysis of the results, as testimony in *Pennsylvania NOW* indicated. See Note 8, *infra*, for discussion of this point with respect to unisex pricing.

6. The opinion refers to insurers' "estimated future mileage" discount classes as "mileage," implying the existence of claim costs related to actual mileage exposure as recorded by odometer or even as estimated at the conclusion of a specified time period. In fact, insurers' "mileage" is an estimate of future driving to qualify for a discount. The discount classes it represents fail miserably to meet published actuarial standards of definition, verifiability, and objectivity. (See Note 4, *supra*, at 392 for the evidence and quotation of the necessary characteristics for classification standards.) As consumer confusion about the current "mileage" pricing demonstrates, it is intentionally deceptive for an expert to use or permit use of the term "mileage" to describe classifications which involve neither measured odometer mileage nor even disinterested estimates of miles already driven as used in government surveys.

produces no accident or claim data associated with the sex of a driver designated as "sole" or "principal" on the policy.

The regulator's demand for nonexistent claim-cost data as the decisive standard of proof knowingly creates an insurmountable barrier to any consumer charge of within-class price discrimination. If uncollected data are required for proof, any challenge to discrimination must fail.

This interpretation renders the rate act meaningless, leaving auto insurers free to combine high cost and low cost risks in any manner they choose in response to sales needs,⁷ and immunizing them from charges of price discrimination evidenced by external data.⁸ This freedom has resulted in an asymmetrical, gerrymandered system of selective sex pricing defined by interaction of driver age, sex and marital status that is restricted illogically to about 20 per cent of cars.

The insurance department used this regulatory barrier for two purposes in blocking evidence provided by the *Pennsylvania NOW* plaintiffs: to deny the correlation of mileage to individual costs, and to deny that women whose cars are in the adult unisex classes are overcharged as a group.

Applying its exclusionary standard, the insurance department rejected the following types of evidence:

- 1) The same government mileage and accident data used by insurers to defend sex pricing where they choose to do it.⁹
- 2) Tests of the responsiveness of insurers' prices to a large range in on-the-road exposure to risk as measured by car-miles¹⁰
- 3) Use of the distribution of insurers' unisex class cars across use and discount price classes to demonstrate that the ranges in prices

7. The trial record contains a 1982 Pennsylvania rate hearing transcript in which State Farm Insurance Cos. received regulatory permission to reduce prices 36% for a class of cars with men drivers, already underpriced, and merge them with the unisex adult class, with no justification offered except that the insurer wanted to compete for business from these men by undercharging them. Note 4, *supra*, at 409.

8. The "Catch-22" is used by industry actuaries. In the face of government accident statistics showing that men's to women's accident involvement is 2:1, insurers' actuaries deny knowing that it is cheaper to insure women's cars than men's because, under unisex pricing of adult cars, the relative claim costs are unknown. These same actuaries testified as experts that overcharging does not exist unless claim costs are known.

9. Pretrial dismissal of the plaintiffs' allegation of facial sex discrimination as harmful to women allowed the insurance department to exclude evidence demonstrating agreement of government accident data by driver sex and age with claim-cost differences defined by the same driver sex and age characteristics. The section "Calibration of Sex-/Unisex-Priced Auto Insurance with Public Accident Data", Note 4, *supra*, at 250, presents the evidence.

10. Note 4, *supra*, at 384.

are too flat to correspond to the 100 per cent difference between women's and men's accident involvement and mileage averages.¹¹

4) Tests of the logical discriminatory consequences of the current car-year pricing system.¹²

5) Rate hearing testimony by company actuaries that prices are set below costs to benefit men: *i.e.*, "to compete for their business."¹³

The insurance department's exclusion of external data does not apply to insurers. To defend sex-rating of cars, for example, auto insurers and regulators cite state and nationwide accident statistics.¹⁴ Similarly, in 1979 auto insurers cited to the NAIC annual mileage distributions by driver sex and age to justify sex-pricing.¹⁵ Appeals for rate increases are routinely supported by references to government data on changes in average driving.¹⁶

Occupying a position of trust as the state's designated expert on insurance for the protection of the public, the insurance department is obligated to examine critically insurers' practices in the light of objective external data.¹⁷ By imposing on consumer-plaintiffs an impossible burden

11. *Id.* at 380.

12. Tests of logic are easily devised to demonstrate the gross price discrimination possible and probable under the car-year exposure base. Examples are given in Note 4, *supra*, at 276 (discriminatory distribution of cost savings from a decrease in driving) and 389 (range in premium charged for identical exposure).

Such a test can be applied to the insurance department opinion. In an obvious political call-to-arms for above-average mileage drivers to defend the present system, the opinion emphasizes that plaintiffs did not prove that "a vehicle operated 20,000 miles annually presents twice the risk of loss to an insurer than that of a vehicle operated 10,000 miles annually." Opinion, Note 2, *supra*, at 6. A logic test demonstrates the probability of gross discrimination at these two annual mileages under the present system. Since insurers make no price distinction between cars in the same class driven 10,000 miles and 20,000 miles in a year, they are collecting exactly double the premium for the identical 20,000 miles driven when those miles are driven in two cars rather than when they are driven in one. Similarly, if the two cars are on the same policy, insurers collect double the one-car premium less the 15% multicar discount.

13. Note 4, *supra*, at 405.

14. A recent example appears in the affidavits of industry experts submitted by the Pennsylvania Insurance Department to the Commonwealth Court in *Bartholomew* as an actuarial justification of the basis claim costs for prices tied to the sex of a driver. [Ed. Note: *Bartholomew* refers to the decision of a Pennsylvania Commonwealth Court, noted also in the September, 1988, *Journal* (Issue No. 1 at p. 11) that the Pennsylvania Equal Rights Amendment applies to automobile insurance.]

15. Note 4, *supra*, at note 131.

16. *Id.* at 272.

17. The insurance department not only knowingly demands non-existent and unobtainable claim costs as evidence, it also taunts the consumer-plaintiffs for daring to use as the alternative to the non-existent data the same driver data that it accepts from insurers

of proof which precludes use of external data, the regulator has devised a regulatory "Catch-22", an impenetrable defense to shield insurers from charges of discrimination. The last thing the public intends from a tax-supported regulatory agency is that the agency serve as protector and apologist for the industry it was created to regulate.

to justify price classification of insured cars by the sex of one of the drivers. In a contrived effort to discredit plaintiffs, the insurance department opinion falsely accuses plaintiffs of "refus[ing] to recognize that *vehicles, not drivers*, are insured" (emphasis in original). Note 2 at 10.

Plaintiffs' original complaint defines "As used herein, the term 'mileage' means the mileage an insured automobile travels as recorded by its odometer." Further, throughout the nearly 3,000 page trial record, plaintiffs make clear their understanding. For example:

On the road mileage of an insured vehicle is a measure of insurance consumption and, as such, is a relevant factor, entitled pursuant to the Rate Regulatory Act to 'due consideration.'

Proposed finding of fact, Plaintiffs' post-hearing brief, August, 1987.