REPORT OF THE
STATE CORPORATION COMMISSION'S
BUREAU OF INSURANCE ON

EXCLUSIVE AGREEMENTS BETWEEN INSURANCE COMPANIES AND REPAIR OR REPLACEMENT FACILITIES OR CLAIMS PROCESSING CENTERS

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

HOUSE DOCUMENT NO. 23

COMMONWEALTH OF VIRGINIA
RICHMOND
1998

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STATE CORPORATION COMMISSION

December 4, 1997

To: The Honorable George Allen
Governor of Virginia
and
The General Assembly of Virginia

We are pleased to transmit this Report of the State Corporation Commission's Bureau of Insurance on Exclusive Agreements Between Insurance Companies and Repair or Replacement Facilities or Claims Processing Centers.

Respectfully submitted,

Hullihen Williams Moore
Chairman

Clinton Miller
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Executive Summary

Purpose of Study

The State Corporation Commission's Bureau of Insurance (Bureau) was requested by the 1997 General Assembly, pursuant to House Joint Resolution No. 542, to study exclusive agreements between insurance companies and repair or replacement facilities or claims processing centers (networks) and the effect these arrangements have on the ability of an insured or claimant to choose a repair or replacement facility.

Findings

In order to comply with the study request, the Bureau sent surveys to consumers, repair facilities, and insurance companies. The Bureau sent 110 surveys to insurance companies representing 95% of the automobile physical damage insurance marketplace in Virginia. The purpose of the survey was to determine the extent of the companies' use of exclusive agreements and claims processing centers or networks. The insurance company survey also gathered general information on claims settlement practices, especially those practices relating to a claimant's right to choose a repairer. Based on the insurance company surveys, most companies will provide claimants with the names of repair shops at the time the claim is made. Scripts and training materials provided by the companies indicate that companies are aware of the provisions of § 38.2-517 of the Code of Virginia and attempt to comply with the law. All of the scripts which were reviewed ask claimants, at some point in the process, if they have a shop they prefer to use. A large number of the scripts also describe the insurance companies' direct repair or network programs and the benefits these programs provide to the claimant. None of the scripts forbid the claimant from choosing a shop not in the insurance company's direct repair program or network. Furthermore, based on a review of the contracts between the networks and the insurance companies, there are no provisions requiring the use of the networks' affiliated shops by an insurance company's claimant.

The Bureau also surveyed 400 repair or replacement facilities to determine how many facilities participate in exclusive agreements with insurance companies and the effect of the insurance companies' exclusive agreements on the facilities' business. Based on the shop surveys, it is apparent that the independent glass shops are almost unanimously opposed to direct repair or network claims facilities. The body shops seem to be divided in their opposition. It is also apparent that both the glass shops and the body shops believe that the repair climate is more competitive today than it was one, five, or even 10 years ago.

The Bureau also sent surveys to 500 consumers to determine whether or not the use of exclusive agreements or networks denied them the right to choose a repairer. A special telephone survey was also conducted consisting of a random sample of 80 consumers selected from a list provided by members of the Virginia Glass Association. The purpose of this telephone survey

was to obtain participation from consumers using independent repair or replacement facilities. The consumer surveys indicated that most insurance claimants are not dissatisfied with the insurance repair process in general. In addition, the vast majority of insurance claimants indicated on the survey that they had no feelings of pressure, coercion, or intimidation during the claims process. However, 2% of the respondents indicated on the survey that they would not have selected the repairer recommended by their insurer. These consumers indicated that they would have selected a different repairer had they been allowed to choose.

A review of the other states' laws shows that Virginia takes a middle-of-the-road approach to regulating repair referrals. Most states, including Virginia, allow insurance companies to make referrals or recommend specific repairers, and Virginia is one of 13 states that prohibits insurance companies from engaging in acts of coercion or intimidation. In addition, a law in one state which prohibited insurance companies from recommending specific repairers was declared unconstitutional by a federal district court in 1994, and the laws in another state which prohibited or placed restrictions on networks were declared unconstitutional by a federal district court in 1996. Furthermore, Virginia's comprehensive and collision premiums are among the lowest in the country. According to the latest report published by the National Association of Insurance Commissioners (NAIC), Virginia ranked 50th and 45th respectively for comprehensive and collision premiums in 1995.

Based on a review of the consumer complaints received by the Bureau's Consumer Services Section of the Property and Casualty Division, there does not appear to be an indication that insurance companies are violating the provisions of § 38.2-517 by either requiring claimants or insureds to use certain repair or replacement facilities or by engaging in acts of coercion or intimidation to require such use.

Conclusion

Based on the results of the surveys and based on information received from the Consumer Services Section, most consumers do not appear to be dissatisfied with the insurance repair process nor do most consumers feel that they have been coerced or intimidated into using a specific repair or replacement facility. However, the General Assembly may be concerned about a perception on the part of some consumers that they do not have the right to select the repairer of their choice. Two percent of the consumer survey respondents did indicate that they would not have selected the repairer recommended by their insurer. Therefore, the General Assembly may wish to recommend that § 38.2-517 be amended to add a requirement that claimants be advised of their right to choose when any recommendation of a repairer is given (see Appendix 6 for possible language). This measure, combined with increased advertising efforts by glass and body shops, could allow repairers the opportunity to reach a larger market. The Bureau believes that through advertising, glass and body shops may be able to influence more consumers into selecting a specific repairer at the time a claim is made. This should help preserve the existence of small, independent businesses.

Furthermore, it is the Bureau's recommendation that, along with advertising, claimants need to be educated as to their rights regarding the repair of their vehicles. To assist with this effort, the Bureau produces the Virginia Auto Insurance Consumer's Guide in an attempt to educate consumers regarding coverages, shopping techniques, and claims settlements. The Bureau recommends that all body and glass shops obtain a supply of the free insurance consumer guides and make them available for their customers. Not only do the pamphlets outline the consumer's rights regarding insurance repairs, they also provide a complaint resolution procedure and a complaint form for the consumer to use when aggrieved by the claims settlement practices of an insurance company. By making more of these guides available at repair shops, more consumers will be aware of their right to select a repair or replacement facility of their choice. This should also help encourage consumers to advise the Bureau if they believe that they have been coerced or intimidated into selecting a specific repairer.

GENERAL ASSEMBLY OF VIRGINIA -- 1997 SESSION

HOUSE JOINT RESOLUTION NO. 542

Requesting the Bureau of Insurance to study exclusive agreements between insurance companies and repair or replacement facilities or claims processing centers (networks) and the effect these arrangements have on the ability of an insured or a claimant to choose a repair or replacement facility.

Agreed to by the House of Delegates, January 31, 1997
Agreed to by the Senate, February 19, 1997

WHEREAS, exclusive agreements between insurance companies and repair or replacement facilities or claims processing centers (networks) have been adopted by a growing number of insurance companies within the Commonwealth; and

WHEREAS, the existence of such exclusive arrangements systematically results in consumers being denied the right to use the repair or replacement facility of their choice; and

WHEREAS, allowing consumers the right to choose the repair or replacement facility helps preserve the existence of small, independent businesses; and

WHEREAS, preventing insurance companies from implementing exclusive repair or replacement facilities arrangements reduces the potential for pressure, intimidation, and coercion against the insured or claimant and promotes competition; and

WHEREAS, the Bureau of Insurance can use its resources and data to analyze the scope of the problems associated with exclusive arrangements and can provide timely and effective recommendations to prevent the erosion of competition; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Bureau of Insurance be requested to study exclusive agreements between insurance companies and repair or replacement facilities or claims processing centers (networks) and the effect these arrangements have on the ability of an insured or a claimant to choose a repair or replacement facility. The Bureau of Insurance should examine available information to determine the scope of the problem within the Commonwealth and develop recommendations designed to prevent a coercive and anti-competitive environment in the repair and replacement market. The Bureau of Insurance is requested to include and encourage participation by consumers, repair facilities, and insurance companies while conducting this study.

All agencies of the Commonwealth shall provide assistance to the Bureau of Insurance for this study, upon request.

The Bureau of Insurance shall complete its work in time to submit its findings and recommendations to the Governor and the 1998 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

Introduction

Legislative Request

The State Corporation Commission's Bureau of Insurance (Bureau) was requested by the 1997 General Assembly, pursuant to House Joint Resolution No. 542, to study exclusive agreements between insurance companies and repair or replacement facilities or claims processing centers (networks) and the effect these arrangements have on the ability of an insured or claimant to choose a repair or replacement facility.

As stated in the resolution, this study was requested because:

(1) exclusive agreements between insurance companies and repair or replacement facilities or claims processing centers (networks) have been adopted by a growing number of insurance companies within the Commonwealth;

(2) the existence of such exclusive arrangements systematically results in consumers being denied the right to use the repair or replacement facility of their choice;

(3) allowing consumers the right to choose the repair or replacement facility helps preserve the existence of small, independent businesses; and

(4) preventing insurance companies from implementing exclusive repair or replacement facilities arrangements reduces the potential for pressure, intimidation, and coercion against the insured or claimant and promotes competition.

The resolution requested the Bureau to include and encourage participation by consumers, repair facilities, and insurance companies while conducting the study. The resolution also directed the Bureau to develop recommendations designed to prevent a coercive and anti-competitive environment in the repair and replacement market.

Background

Section 38.2-517 of the Code of Virginia was originally proposed in the 1992 General Assembly and passed as follows:

> **§ 38.2-517. Unfair settlement practices; replacement and repair; penalty.** -
> A. No person shall:
> 1. Require an insured or claimant to utilize designated replacement or repair facilities or services, or the products of designated manufacturers, as a prerequisite to settling or paying any claim arising under a policy or policies of insurance; or
> 2. Engage in any act of coercion or intimidation causing or intended to cause an insured or claimant to utilize designated replacement or repair facilities or services, or the products of designated manufacturers, in connection with settling or paying any claim arising under a policy or policies of insurance.
> B. Any person violating this section shall be subject to the injunctive, penalty, and enforcement provisions of Chapter 2 (§ 38.2-200 et seq.) of this title.

The law, which became effective July 1, 1992, was originally drafted to apply only to *glass* repair or replacement but was changed by the Governor's office to apply to *all* repairs or replacements. It is important to note that the law does not require an insurer to disclose the consumer's right to choose a repair facility or service. This law served to codify the position taken by the Bureau of Insurance in Administrative Letter 1991-12, issued on October 31, 1991 (see Appendix 1). This administrative letter stated that insurers could not require policyholders to utilize the services of certain glass repairers or network of repair shops.

Study Methodology

In order to comply with the study request, the Bureau sent surveys to consumers, repair facilities, and insurance companies. The Bureau sent 110 surveys to insurance companies representing 95% of the automobile physical damage marketplace in Virginia. The purpose of the survey was to determine the extent of the companies' use of exclusive agreements and claims processing centers or networks. The insurance company survey also gathered general information on claims settlement practices, especially those practices relating to a claimant's right to choose a repairer. The Bureau also surveyed 400 repair or replacement facilities to determine how many facilities participate in exclusive agreements with insurance companies and the effect of the insurance companies' exclusive agreements on the facilities' business. The Bureau also sent surveys to 500 consumers to determine whether or not the use of exclusive agreements or networks denied them the right to choose a repairer. A special telephone survey was also conducted consisting of a random sample of 80 consumers selected from a list provided by members of the Virginia Glass Association. The purpose of this survey was to obtain participation from consumers using independent repair or replacement facilities.

Totals for some of the survey percentages may be greater than 100% because respondents could respond to more than one answer for certain questions.

Definitions

For the purposes of this study, the following terms and their corresponding meanings are used in the report and in the surveys:

- *Approved shop lists* are lists maintained by an insurance company which consist of repair or replacement facilities that have agreed to provide services based on the insurance companies' performance criteria at a negotiated rate of payment.

- *Claims processing centers*, or *networks*, are repair or replacement facilities that have contracted with an insurance company to process the payments and administer all aspects of the claims adjustment process for that specific insurance company. Claims processing centers or networks may or may not perform the actual repair. The term "exclusive agreement" as used in this report refers to claims processing centers or networks. The terms "claims processing center" or "network" generally refer to glass repair programs.

- *Collision Coverage* provides protection in the event of physical damage to the insured's own vehicle resulting from a collision with another inanimate object. For example, colliding with another vehicle, or colliding with a wall would be covered under the collision section of an automobile insurance policy.

- *Comprehensive Coverage* provides protection in the event of physical damage to the insured's own vehicle caused by a loss other than by a collision with another inanimate object. For

example, fire damage or glass breakage would be covered under the comprehensive section of an automobile insurance policy.

- *Direct repair program* or *agreement* means a program where a repair or replacement facility has contracted with an insurance company to perform repair work on behalf of that insurance company for policyholders. Repair or replacement facilities may contract with direct repair programs for more than one insurance company. The term "direct repair program" generally refers to collision repair.

- *First-party coverage* means insurance purchased by policyholders for their own benefit. First-party coverages refer to (i) comprehensive coverage, which includes coverage for glass breakage, fire, falling objects, and theft; and (ii) collision damage coverage, which covers damage to the body of the insured automobile caused by colliding with another vehicle or some other inanimate object.

- *Independent repairer or replacement facility* means a non-franchised or non-national repair or replacement facility.

- *Marketplace* means the automobile physical damage (comprehensive and collision coverage) insurance market based on premiums written in Virginia.

- *Shop* means a repair or replacement facility.

- *Third-party administrator* means a person or entity other than an insurance company who assumes the claims payment and settlement responsibilities from the insurance company.

Surveys

Insurance Company Surveys

The insurance company survey was sent to 62 groups consisting of 110 companies whose 1996 written premiums represented 95% of the automobile physical damage insurance market in Virginia (see a copy of the survey in Appendix 2). The groups could respond on an individual insurer basis, or they could respond on a group basis for all insurers under common ownership if the individual insurer practices were the same for all insurers in the group. Responses were received from 48 groups consisting of 93 insurers representing 89% of the automobile physical damage insurance market in Virginia.

Insurers were asked to describe the methods under which the company settled first-party glass and collision claims in Virginia. Insurers were asked to answer separately for glass and collision practices.

Insurers' Responses Regarding Glass Repair or Replacement Practices

Insurers representing 33.8% of the insurance marketplace in Virginia indicated that they use a direct repair program or network to adjust glass claims. Insurers representing 34.6% of the marketplace indicated that they use an approved shop list, and 32.9% indicated that they use another method, such as independent adjusters, or have no formal program.

Insurers were asked how their glass programs were administered. Insurers representing 42.9% of the marketplace indicated that they contracted with a third party for the administration of their glass claims. Insurers representing 50.7% of the marketplace indicated that they administer glass claims themselves.

Insurers were asked whether or not they have contractual agreements with their repairers, including those in their direct repair programs, in their networks, or on their approved shop lists. Insurers representing 52.2% of the marketplace indicated that they execute contracts with the repairers in their programs, while insurers representing 27.2% of the marketplace indicated that they do not execute contracts with repairers. Of the respondents that indicated that they execute contracts with repairers in their glass programs, insurers representing 31.6% of the marketplace indicated that they bid the contracts, while insurers representing 21.3% of the marketplace do not bid the contracts.

Insurers' Responses Regarding Collision Repair Practices

Insurers representing 52.3% of the marketplace indicated that they use a direct repair or similar program to adjust collision claims. Insurers representing 1.6% of the marketplace indicated that they use an approved shop list, and 56.8% use another method, such as independent adjusters.

Insurers were asked how their collision adjustment programs were administered. Respondents representing less than one percent of the marketplace indicated that they contracted with a third party for the administration of their collision claims. Insurers representing 87.2% of the marketplace indicated that they administer collision claims themselves.

Insurers were asked whether or not they have contractual agreements with the repairers in their direct repair or similar programs or with those on their approved shop lists. Insurers representing 30.7% of the marketplace execute contracts with the repairers in their programs, while insurers representing 46.5% of the written premiums indicated that they do not execute contracts with repairers in their programs. Of the respondents that indicated that they execute contracts with repairers in their collision repair programs, none of the companies bid the contracts.

Insurers' Contractual Agreements

A review was conducted of the insurers' contracts with repair and replacement facilities to determine if there were any provisions which would violate § 38.2-517. The review did not yield any information which would indicate a violation of the provisions of § 38.2-517. It should be noted, however, that the Bureau does not have regulatory authority over the contracts between an insurance company and a repair or replacement facility. Furthermore, the Bureau is not aware of any law in any other state which gives the insurance department regulatory authority over the content of these contracts.

The Bureau's review revealed one common aspect in the contracts executed between insurers and glass shops and glass networks. The insurance companies negotiate or pay glass claims based upon a book price called NAGS. NAGS is an acronym for National Auto Glass Specifications. NAGS is a wholly owned subsidiary of Mitchell's, a major computer-estimating software provider. It appears to be common practice in the glass replacement industry for a repairer to base estimates and bids for work on a percentage of the NAGS list price. These prices are set by Mitchell's and are the industry standard prices. The percentages listed in the contract vary by company and by geographic area. It is important to note that the Bureau does not have regulatory authority over the use of a national pricing structure such as NAGS. As noted above, the Bureau was unable to find such regulatory authority existing with any other state insurance department.

Insurers' Claims Adjusting Scripts, Training Materials, and Written Notices to Claimants

An additional review was conducted by the Bureau of the claims adjusting scripts, training materials, and written notices to claimants provided by the insurance companies to check for provisions which may violate § 38.2-517. Scripts and training materials were reviewed for insurers writing 52% of the automobile physical damage marketplace in Virginia, as were the written notices given to claimants by insurers representing 27% of the marketplace in Virginia. This review found that all of the materials either (i) asked the claimants if they had a preference of a repairer; (ii) advised the claimants that they were under no obligation to use a repairer in a direct repair program; or (iii) advised the claimants that they could choose their own repairer. It is important to note that § 38.2-517 contains no requirement that claimants be notified that they have a right to choose a repairer. Therefore, even though insurance companies are prohibited from requiring claimants to use certain repairers or manufacturers or from coercing or intimidating the claimants into using certain repairers or manufacturers, there is no statutory obligation imposed on insurers to notify claimants that they have a right to choose a repairer.

Repair Shop Surveys

The repair shop sample was drawn from a comprehensive listing of all employers in Virginia obtained from the Virginia Employment Commission's employer database. This list was sorted by Standard Industrial Classification (SIC) codes.[1] The list was separated into four geographical regions: Northern Virginia, Tidewater, Central Virginia, and the rest of the state. Using SIC codes to identify glass and collision repairers, the list was sorted by zip code in each region, and a random sample of 75 collision repairers and 25 glass shops was selected for each of the four geographical regions, giving a total sample size of 300 collision (body shop) repairers and 100 glass repairers. The breakdown between the two types of shops was based on the ratio of body shops to glass shops for the whole state (see copies of the surveys in Appendix 3).

Glass Shop Surveys

The glass shop sample size of 100 was adjusted to 90 after the Bureau was notified that 10 glass shops had undeliverable addresses, were no longer in business, or had merged. Surveys were received from 51 glass shops for an adjusted response rate of 56%.

Shops were asked to comment on whether the glass market was more competitive, less competitive, or at the same level of competitiveness as compared to one year ago, five years ago, and 10 years ago. The majority of the glass shops indicated that the market today is more competitive than it was one year ago, five years ago, and 10 years ago. Sixty-one percent of the shops indicated that the market today is more competitive than one year ago, 22% indicated that the market is less competitive, and 16% said that competition is the same today as it was one year ago. Sixty-four percent of the shops said that it is more competitive today than five years ago, 32% said that it is less competitive, and 4% said that competition is the same today as it was five years ago. Compared to 10 years ago, 63% said that it is more competitive today, 31% said that it is less competitive, and 6% said that competition is the same today as it was 10 years ago. Glass shops were asked to name their three largest competitors. Based on the number of times national franchise shops were named, there appears to be a large part of the glass market dominated by these franchises. These are the same franchises which operate as third party administrators for insurance companies.

Shops were asked if they currently participate in any direct repair or approved shop list agreements with insurance companies. Respondents were able to check more than one response. Forty-five percent indicated that they currently participate in direct repair agreements, 78% indicated that they currently participate in approved shop list agreements, and 14% indicated that

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[1] Standard Industrial Classification (SIC) codes are a statistical classification standard underlying all establishment-based federal economic statistics classified by industry. The SIC codes for automobile glass replacement and repair shops and collision repair shops were taken from the Standard Industrial Classification Manual, Executive Office of the President, Office of Management and Budget. 1987.

they do not participate in either direct repair or approved shop list agreements. Of the seven that indicated that they do not participate, four indicated that they are small shops (less than $250,000 in annual gross receipts), and three indicated that they are medium-sized shops (between $250,000 and $1,000,000 in annual gross receipts).

Shops were asked to provide the number of direct repair or approved shop list agreements in which they participated. Of the shops that indicated that they participated in direct repair agreements, on average, each participated in four agreements. Of the shops that indicated that they participated in approved shop list agreements, on average, each participated in 3.3 agreements. Respondents indicated that, on average, 52.6% of their gross sales are derived from work paid for by insurance companies. Of this insurance work, shops that participate in direct repair agreements indicated that, on average, 38.3% of their gross sales are derived from these agreements. The shops that participate in approved shop list agreements indicated that 39% of their gross sales are derived from these agreements.

Shops were asked whether or not they had requested to be added to insurers' direct repair networks or approved shop lists in the last 18 months. Eighty percent of the shops indicated that they had made such a request, and 83% of these were successful in receiving agreements. Shops were also asked if they had been removed from any direct repair networks or approved shop lists in the last 18 months. Thirty-six percent of the shops indicated that they had been removed from the lists, with only one having been removed at its own request.

Shops that participated in the direct repair agreements or approved shop lists were asked if they were generally satisfied with the process. Eleven percent of the shops indicated that they were generally satisfied, while 89% indicated that they were not generally satisfied with the process. Respondents answering this question were asked to provide a reason for their dissatisfaction. The reasons mentioned most frequently were (i) prices paid under the agreements were too low to make a profit, and (ii) the agreements take away the customer's right to choose. The next most frequently mentioned reason for dissatisfaction was that the shops dislike being told how to conduct their business.

Body Shop Surveys

The body shop sample size of 300 was adjusted to 268 after the Bureau was notified that 32 body shops had undeliverable addresses, were no longer in business, or had merged. Surveys were received from 115 body shops for an adjusted response rate of 43%.

Shops were asked to comment on whether or not the automobile body repair market was more competitive, less competitive, or at the same level of competitiveness compared to one year ago, five years ago, and 10 years ago. The majority of the body shops indicated that the market today is more competitive than it was one year ago, five years ago, and 10 years ago. Sixty-six percent of the shops said that the market today is more competitive than one year ago, 10% said that the market is less competitive, and 24% said that competition is the same today as it was one year ago. Sixty-seven percent of the shops indicated that it is more competitive today than five

years ago, 17% said that it is less competitive, and 17% said that competition is the same today as it was five years ago. Compared to 10 years ago, 65 percent said that it is more competitive today, 26% said that it is less competitive, and 9% said that competition is the same today as it was 10 years ago. Body shops were asked to name their three largest competitors. Based on the large number of different competitors named by the shops, there appears to be a great deal of competition in the body shop market.

Shops were asked if they currently participate in any direct repair or approved shop list agreements with insurance companies. Respondents were able to check more than one response. Thirty-one percent indicated that they currently participate in direct repair agreements, 54% indicated that they currently participate in approved shop list agreements, and 37% indicate that they do not participate in either direct repair or approved shop list agreements with insurance companies. Of the 37% that indicated that they do not participate, 52% indicated that they are small shops (less than $250,000 in annual gross receipts), 40% indicated that they are medium-sized shops (between $250,000 and $1,000,000 in annual gross receipts), and 7% indicated that they are large shops (greater than $1,000,000 in annual gross receipts).

Shops were asked to provide the number of direct repair or approved shop list agreements in which they participated. Of the shops that indicated that they participated in direct repair agreements, on average, each participated in 3.7 agreements. Of the shops that indicated that they participated in approved shop list agreements, on average, each participated in 2.7 agreements. Respondents indicated that, on average, 70.5% of their gross sales are derived from insurance work. Of this insurance work, shops that participate in direct repair agreements indicated that, on average, 32.9% of their gross sales are derived from these agreements. The shops that participate in approved shop list agreements indicated that 24.4% of their gross sales are derived from these agreements.

Shops were asked whether or not they had requested to be added to insurers' direct repair networks or approved shop lists in the last 18 months. Sixty-nine percent of the shops indicated that they had made such a request, and 77% of these were successful in receiving agreements. Shops were also asked if they had been removed from any direct repair networks or approved shop lists in the last 18 months. Ten percent of the shops indicated that they had been removed from the lists, with six percent having been removed at their own request.

Shops that participated in the direct repair agreements or approved shop lists were asked if they were generally satisfied with the process. Fifty-six percent indicated that they were generally satisfied, while 44% indicated that they were not generally satisfied with the process. Respondents answering this question were asked to provide a reason for their dissatisfaction. The reasons mentioned most frequently were (i) insurance companies control parts and labor costs; (ii) the direct repair agreements and approved shop lists steer customers; and (iii) customers are mislead by the insurance companies.

Meetings with Repair Associations

At the request of the study's co-patron, Delegate I. Vincent Behm, the Bureau met with representatives of the Virginia Glass Association to solicit input from its members. The association requested the Bureau to survey its members' customers and assisted the Bureau by developing a permission form to be signed by the customers willing to participate in a special telephone survey conducted by the Bureau.

Additionally, staff from the Bureau spoke at regional meetings of the Virginia Glass Association in Northern Virginia, Roanoke, and Richmond and provided information on the status of the surveys. Additional discussion topics included information on how complaints are handled by the Bureau of Insurance, business practices of both insurance companies and repairers, and the need for increased educational and advertising efforts to help the independent shops compete with the national chains. There were also significant concerns expressed by the VGA members concerning anti-trust violations in the insurers' network agreements and the appearance of monopolistic practices because of these agreements. It was explained that questions of this nature are more properly addressed with the Department of Justice's Anti-Trust Division, the Federal Trade Commission, or the Office of the Attorney General.

Staff from the Bureau also met with the Virginia Auto Body Association Board of Directors to solicit input from the collision repairers. The Bureau offered to perform the same telephone survey of body shop customers as it did for the glass shop customers.

Staff also met with members of the Greater Washington Auto Body Repairers Association to discuss their concerns with the insurance industry's practices and to provide information on the study and surveys. The association was given a large supply of the Virginia Auto Consumer's Guides to distribute at its members' locations.

Consumer Surveys

Mail Survey

Two consumer surveys were conducted. For the first survey, the top five writers of automobile physical damage insurance in Virginia (comprising 62.3% of the market) were asked to provide a list of the names of recent automobile physical damage claimants A claims population covering the period April 1, 1997 to August 1, 1997 was used. One hundred names and addresses were selected from each of the insurers, for a total sample size of 500 names. Surveys were sent to 255 consumers who had glass claims paid, and 245 surveys were sent to consumers who had collision claims paid (see copies of the surveys in Appendix 4). The sample of 500 claimants was adjusted to 487 surveys due to mail returns. A total of 216 surveys were received, for an adjusted mail survey response rate of 43.4%.

Telephone Survey

Additionally, as a result of meetings with the glass and auto body associations, the Bureau agreed to conduct a telephone survey of the customers of glass and body shops. The shops handed out permission forms to their customers which asked the customer to participate in a random sample phone survey conducted by the Bureau of Insurance. The glass and body shops collected these forms and sent them to the Bureau of Insurance. These forms provided the pool for the phone survey.

A total of 215 permission forms were submitted by the glass shops for the period June 1, 1997 to September 15, 1997, with 160 indicating a willingness to participate in the survey. The Bureau selected a random sample of 80 names from the glass shop forms. The Bureau made three attempts to contact each participant. A total of 32 participants were actually contacted. The respondents were asked the same questions as those who received the mail survey.

A total of seven permission forms were submitted by the body shops. The Bureau did not consider this enough of a response to allow any survey credibility and did not contact any of the seven body shop customers. The results of the phone survey have been combined with the results of the mail survey in this section.

Results of Consumer Surveys

Respondents were asked to identify the person to whom they initially reported their accident or glass breakage. Fifty-nine percent of the respondents indicated that they reported their claim directly to the insurance company, 36% indicated that they reported their claim to their insurance agent, 4% indicated that they reported their claim to their repairer, less than 1% indicated that they could not recall, and 3% indicated more than one response.

Respondents were asked to indicate if, at any time during the claims process, they were advised that they could select their own repairer, and if so, by whom. Eighty percent of the respondents indicated that they were advised by their insurance company, agent, or repairer that they could choose their own repairer. Twenty-seven percent of the respondents indicated that they were told they had to select a repairer from a list, while 10% of the respondents were told that they could only go to one specific repairer. However, of the respondents who either took their vehicles to a shop from a list provided by the insurance company or to a specific shop they were told to use, only 7% (five respondents) indicated that they would not have selected that shop, while 90% indicated that they had no real preference or that they would have selected that shop anyway, and 3% did not answer the question. Of the five respondents who would not have selected the same shop, four selected a shop from a list, and one was told to use a specific shop. Only the one person who was told to use a specific shop felt he was coerced by his agent. Specifically, this person commented that he felt he could only use the insurance agent's specified repairer. When compared to the total number of consumer survey respondents, only five respondents in 248 (2%) were denied the right to choose a repairer, and only one (less than one percent) felt that he was coerced by the insurer or its representative.

Respondents were asked whether they had taken their vehicle to a shop of their choice. Seventy percent of the respondents took the vehicle to the shop of their choice. Twenty percent of the respondents took their vehicle to a shop from a list of repairers provided by the insurance company, while 10% took their vehicle to a specific shop they were told to use.

Of the respondents who took the vehicles to the shop of their choice, 59% indicated that the shop was also on the insurance company's approved list, 3% indicated that it was not on the approved list, and 38% did not know.

Respondents were asked whether they were told that they would have to pay more than their deductible if they chose their own repairer. Nine percent of the respondents indicated that they were told (either by their insurance company, agent, or repairer) that they might have to pay more than their deductible if they selected their own repairer. Five percent of the respondents indicated that they were told that their insurance company would not guarantee the repairs if they selected their own repairer, and 35% of the respondents were told that either an adjuster would have to inspect their vehicle, or that they would have to take the vehicle elsewhere for inspection if they selected their own repairer. (The insurance policy gives the insurer the right to inspect the vehicle, so this is not an unusual request.)

Respondents were asked to rate their concerns when having repairs made. On average, quality of work performed was rated as the most important item to the respondents, convenience of having the work performed was the second most important item of concern, speed of delivery of the repair service was the third most important concern, warranty provided for the work performed was the next to the least important, and cost of the work performed was the least important of the respondents' concerns.

When asked if they were satisfied with the work performed, 94% of the respondents indicated that they were satisfied, 5% were not satisfied, and 1% had no opinion.

When asked if they were required to pay more than their deductible for the repair, 92% were not required to pay more, while 6% were required to pay more than their deductible, and 2% could not recall.

When asked if they were satisfied with the treatment that they received from their insurance agent, 70% indicated that they were very satisfied or satisfied, 1% indicated that they were not satisfied, and 29% either had no opinion or indicated that the question was not applicable.

When asked if they were satisfied with the treatment they received from their insurance company, 93% indicated that they were very satisfied or satisfied, 2% were not satisfied, and 5% either had no opinion or indicated that the question was not applicable.

When asked if they were satisfied with the treatment they received from their claims adjuster, 55% indicated that they were very satisfied or satisfied, 4% indicated that they were not satisfied, and 41% either had no opinion or indicated that the question was not applicable.

When asked if they were satisfied with the treatment they received from their repairer, 93% indicated that they were very satisfied or satisfied, 5% indicated that they were not satisfied, and 2% either had no opinion or indicated that the question was not applicable.

Respondents were asked to indicate if, at any time in the claims process, they felt pressured, coerced, or intimidated by their agent, company, adjuster, or repairer. Ninety-seven percent of the respondents did not feel pressured, coerced, or intimidated by their agent, 96% did not feel pressured, coerced or intimidated by their insurance company, 96% did not feel pressured, coerced, or intimidated by their adjuster, and 97% did not feel pressured, coerced, or intimidated by their repairer.

Only 1% of the respondents indicated on the survey that they felt pressured by their agent, 3% felt pressured by their insurance company, 2% felt pressured by their adjuster, and 1% felt pressured by their repairer. (There is no prohibition in § 38.2-517 against "pressuring" someone to use a specific repair or replacement facility.) Of the respondents who felt coerced, which is a violation of § 38.2-517, 1% felt coerced by their agent, 1% felt coerced by their insurance company, less than one percent felt coerced by their adjuster, and less than one percent felt coerced by their repairer. Of the respondents who felt intimidated, which is also a violation of § 38.2-517, 2% felt intimidated by their agent, 1% felt intimidated by their insurance company, 2% felt intimidated by their adjuster, and 2% felt intimidated by their repairer.

Other States' Laws

The Bureau researched the referral and repair choice laws of the other states to compare Virginia's current law to these other states. Twenty-five states, in addition to Virginia, were found to have laws relating to insurance repairs. The following table provides an overview of these other states' laws:

State	Forbids Coercion or Intimidation	Cannot Require Insured or Claimant to Utilize Designated Replacement or Repair Facilities	Forbids Referral or Recommendation to Repairer by Company or Representative	Requires Oral Or Written Notification of Right to Choose Repairer	Defines Fair Competitive Price, Prevailing Market Value or Similar Term	Additional Provisions	Relative Collision Insurance Premium Ranking	Relative Comprehensive Insurance Premium Ranking
CA	No	Yes	Yes, unless requested by insured	Yes, if company makes a referral	No	Cannot make claimant travel unreasonable distance	7th	5th
CO	Yes, adds Threat	Yes	No	No	No	May pay full cost of glass repair, notwith-standing applicable deductible	32nd	3rd
CT	No	Yes	No	No	No	Can require specific shop if agreed to in writing by insured	10th	28th
DE	No	Yes	No	No	No		25th	46th
IL	Yes, adds Threat	No	No	Yes	Yes	May not restrict access; may enter into agreements to contain costs	21st	27th
KS	Yes, adds Threat, Infer, or Mislead	Yes	No, allows list	Insured may use nonlisted company at sole discretion	Yes	If nonlisted repairer used, no more than three competitive bids required	42nd	8th
KY	Yes, adds Threat	Yes	No	No	Yes		20th	41st
LA	No	Yes	No	No	No	A related anti-network law was declared unconstitutional in 1996	17th	15th
ME	No	Yes	No	No	No	Prohibits compensation to 3rd party based on a portion of the difference between glass list prices and the amount paid to the person performing the work	36th	49th
MD	Yes, adds Threat	Yes	Yes, unless right of choice notice given	Yes, if recommen-dation made	Yes	Allows insurer to use drive-in inspections	23rd	31st
MA	No	Yes	No	No	No		18th	23rd

State	Forbids Coercion or Intimidation	Cannot Require Insured or Claimant to Utilize Designated Replacement or Repair Facilities	Forbids Referral or Recommendation to Repairer by Company or Representative	Requires Oral Or Written Notification of Right to Choose Repairer	Defines Fair Competitive Price, Prevailing Market Value or Similar Term	Additional Provisions	Relative Collision Insurance Premium Ranking	Relative Comprehensive Insurance Premium Ranking
MN	Yes, adds Threat, Incentive, and Inducement	Yes	No	Yes, if any shop recommen-dation made	No		48th	24th
MS	No	Yes	No	No	Yes		12th	19th
MT	Yes, adds Threat, Incentive, and Inducement	Yes	No, allows list but insured may use nonlisted company at insured's sole discretion	No, allows list but insured may use nonlisted company at insured's sole discretion	Yes	If nonlisted repairer used, no more than three competitive bids required. Also prohibits auto glass companies from acting as a third-party administrator for the insurer	40th	11th
NE	No	Yes	No	No	Yes		47th	13th
NH	Yes, adds Threat	Yes	No, allows list	Yes, if any shop recommen-dation made	Yes		14th	48th
NY	No	Yes	Yes, unless requested by insured	No	No		8th	1st
NC	No	No	Yes, unless notice given to insured	Yes, must give notice to insured if referral given	No	Policy must allow claimant to select repairer	46th	51st
OK	No	Yes	No	No	Yes		39th	7th
PA	No	Yes	No	No	No	Major Changes proposed - currently in legislative hearing	26th	38th
SD	Yes, adds Threat, Incentive, and Inducement	Yes	Yes, but allows list	Yes, oral and written if any list provided	Yes	Declared Unconsti-tutional in 1994	50th	9th
TX	Yes, adds Threatening	Yes	Yes, but allowed if full disclosure provided to insured	Yes- must be in Policy and given when a claim is made	No		34th	10th
VA	Yes	Yes	No	No	No		45th	50th
VT	Yes, adds Threatening and Misinforming	No	No	Yes, must notify at time claim is made	No		22nd	45th
WV	Yes, adds Threat	No	No	Yes, if list provided	Yes		11th	26th
WI	No	Yes	No	No	No		44th	32nd

Summary of Table

Twenty-six states (including Virginia) have laws relating to insurance repairs. Of these, 13 (including Virginia) have a specific prohibition against coercion or intimidation. Twelve states

use the same wording as Virginia's prohibition against coercion or intimidation but prohibit other activities as well, such as misleading or threatening the consumer or offering incentives. Twenty-two of the 26 states, including Virginia, have language which prevents companies from requiring an insured or claimant to utilize a designated replacement or repair facility. Seventeen of the 26 states, including Virginia, have no prohibition against insurers making referrals or recommending specific repairers. Twelve states require oral or written notification of an insured or claimant's right to choose a repairer. Eleven states define fair competitive price, prevailing market value, or similar terms. In one state (South Dakota), the law prohibiting insurers from recommending a specific repairer or advising insureds of the existence of networks was declared unconstitutional by a federal district court in 1994 (see Appendix 5). In another state (Louisiana), the statutes prohibiting or limiting networks were declared unconstitutional by a federal district court in 1996 (also see Appendix 5). Two states (Montana and Maine) have laws which either forbid or place restrictions on the agreements between insurance companies and third-party administrators for automobile glass claims. The Montana law, which prohibits exclusive agreements, is very similar to one of the Louisiana statutes which was declared unconstitutional. Maine's law, which is similar to the other Louisiana statute which was declared unconstitutional, prohibits insurers from compensating third-party administrators based on a portion of the difference between the list price of the product or services provided and the amount paid to the person providing the repair or replacement service. Compensation based on a flat fee is allowed in Maine. In Pennsylvania, there are significant changes being proposed which would forbid referral or recommendations completely. These changes have been the subject of extensive legislative hearings, but no decision has yet been reached.

The table above also shows the states' relative premium rankings for comprehensive and collision coverage[2]. As shown in the table, Virginia ranks 45th among all states in terms of collision premiums and 50th among all states in terms of comprehensive premiums. These are among the lowest in the country.

[2] State Average Expenditures & Premiums For Personal Automobile Insurance in 1995, National Association of Insurance Commissioners, 1997.

Consumer Complaints

The Consumer Services Section of the Bureau's Property and Casualty Division was questioned to determine how many complaints had been received regarding possible violations of § 38.2-517. The Consumer Services Section received 4,165 insurance-related complaints in fiscal year 1995-1996 (July 1, 1995 to June 30, 1996). Of these complaints, less than one half of one percent were related to § 38.2-517. For fiscal year 1996-1997, there were 4,629 complaints received, of which less than two-tenths of one percent were related to § 38.2-517. For the current fiscal year beginning July 1, 1997, there have been 1,115 complaints received, of which less than one percent were related to § 38.2-517. Based on a random sample of the complaints related to § 38.2-517, the Bureau could not find any violations of § 38.2-517 indicating that the consumer had been coerced or intimidated into selecting a specific repairer.

It is very important to note that the Bureau's attempts to contact the consumers listed in the repairers' complaints are usually unsuccessful. In those cases where the Bureau has been successful in contacting the consumer, the consumers have indicated that they did not feel coerced or intimidated by their insurance company when selecting a repair or replacement facility. The Bureau cannot take action when the consumer has not been coerced or intimidated or forced into using a specific repairer as a condition of settling the insurance claim. Repairer-originated complaints are investigated by the Consumer Services Section, but no action can be taken on behalf of the repairer as they are not a party to the insurance contract. If the consumer has been coerced or intimidated, the Bureau can take specific action. If the consumer has not been coerced or intimidated, the Bureau cannot take action under § 38.2-517.

Conclusion

Based on the insurance company surveys, most companies will provide claimants with the names of repair shops at the time the claim is made. Scripts and training materials provided by the companies indicate that companies are aware of the provisions of § 38.2-517 of the Code of Virginia and attempt to comply with the law. All of the scripts that were reviewed ask claimants, at some point in the process, if they have a shop they prefer to use. A large number of the scripts also describe the insurance companies' direct repair or network programs and the benefits these programs provide to the claimant. None of the scripts forbid the claimant from choosing a shop not in the insurance company's direct repair program or network. Furthermore, based on a review of the contracts between the networks and the insurance companies, there are no provisions requiring the use of the networks' affiliated shops by an insurance company's claimant.

Based on the shop surveys, it is apparent that the independent glass shops are almost unanimously opposed to direct repair or network claims facilities. The body shops seem to be divided in their opposition. It is also apparent that both the glass shops and the body shops believe that the repair climate is more competitive today than it was one, five, or even ten years ago.

The consumer surveys indicated that 2% of the respondents would not have selected the repairer recommended by their insurer. These consumers indicated that they would have selected a different repairer had they been allowed to choose. However, the vast majority of insurance claimants indicated on the survey that they had no feelings of pressure, coercion, or intimidation during the claims process. In addition, based on the responses to the consumer survey, most consumers do not appear to be dissatisfied with the insurance repair process in general.

A review of the other states' laws shows that Virginia takes a middle-of-the-road approach to regulating repair referrals. Most states, including Virginia, allow insurance companies to make referrals or recommend specific repairers, and Virginia is one of 13 states that prohibit insurance companies from engaging in acts of coercion or intimidation. In addition, a law in one state which prohibited insurance companies from recommending specific repairers was declared unconstitutional by a federal district court in 1994, and the laws in another state which prohibited or placed restrictions on networks were declared unconstitutional by a federal district court in 1996. Furthermore, Virginia's comprehensive and collision premiums are among the lowest in the country. According to the latest report published by the NAIC, Virginia ranked 50th and 45th respectively for comprehensive and collision premiums in 1995.

Based on a review of the consumer complaints received by the Bureau, there does not appear to be an indication that insurance companies are violating the provisions of § 38.2-517 by either requiring claimants or insureds to use certain repair or replacement facilities or by engaging in acts of coercion or intimidation to require such use.

Recommendations

Based on the results of the surveys and based on information received from the Consumer Services Section, most consumers do not appear to be dissatisfied with the insurance repair process nor do most consumers feel that they have been coerced or intimidated into using a specific repair or replacement facility. However, the General Assembly may be concerned about a perception on the part of some consumers that they do not have the right to select the repairer of their choice. Two percent of the consumer survey respondents did indicate that they would not have selected the repairer recommended by their insurer. Therefore, the General Assembly may wish to recommend that § 38.2-517 be amended to add a requirement that claimants be advised of their right to choose when any recommendation of a repairer is given (see Appendix 6 for possible language). This measure, combined with increased advertising efforts by glass and body shops, could allow repairers the opportunity to reach a larger market. The Bureau believes that through advertising, glass and body shops may be able to influence more consumers into selecting a specific repairer at the time a claim is made. This should help preserve the existence of small, independent businesses.

Furthermore, it is the Bureau's recommendation that, along with advertising, claimants need to be educated as to their rights regarding the repair of their vehicles. To assist with this effort, the Bureau produces the Virginia Auto Insurance Consumer's Guide in an attempt to educate consumers regarding coverages, shopping techniques, and claims settlements. The Bureau recommends that all body and glass shops obtain a supply of the free insurance consumer guides and make them available for their customers. Not only do the pamphlets outline the consumer's rights regarding insurance repairs, they also provide a complaint resolution procedure and a complaint form for the consumer to use when aggrieved by the claims settlement practices of an insurance company. By making more of these guides available at repair shops, more consumers will be aware of their right to select a repair or replacement facility of their choice. This should also help encourage consumers to advise the Bureau if they believe that they have been coerced or intimidated into selecting a specific repairer.

Appendices

COMMONWEALTH OF VIRGINIA

STEVEN T. FOSTER
COMMISSIONER OF INSURANCE

Box 1157
RICHMOND, VA 23209
TELEPHONE: (804) 786-3741
TDD/VOICE: (804) 225-3506

Appendix 1

STATE CORPORATION COMMISSION

BUREAU OF INSURANCE

ADMINISTRATIVE LETTER
1991 - 12

October 31, 1991

TO: ALL PROPERTY AND CASUALTY INSURERS

RE: UNFAIR TRADE PRACTICES CONCERNING AUTOMOBILE GLASS CLAIMS

It has recently come to the attention of the Bureau of Insurance that many insurers are directing insureds with glass claims to particular glass shops or glass networks for repairs or glass replacement. Some insurers have instructed their agents and adjusters to require policyholders to use certain glass shops or networks.

Discounts historically have been given by glass shops on insurance claims, but recently closer affiliations have developed between insurance companies and certain glass repairers or glass networks to reduce claim costs. Reductions in claim costs are reflected in premiums and obviously benefit policyholders.

Insurers should not, however, overlook the fact that policyholders cannot be required to utilize the services of a certain glass repairer or network of repair shops. Automobile standard forms approved for use in Virginia by the State Corporation Commission do not contain provisions which allow the insurer to select the repair facility. Policy provisions only address the cost of repair or replacement. If a policyholder chooses a glass repairer whose charges are competitive, the insurer may not refuse to pay for the repairs solely because the repairer is not on the insurer's list of preferred shops or a member of a certain glass network.

Insurers who take reasonable steps to reduce claim costs by arrangements with preferred shops or glass networks will not be subjected to criticism. Those insurers unreasonably refusing to honor competitive repair bills, however, may be considered in violation of Virginia Code Section 38.2-510 relating to unfair claim settlement practices.

Sincerely,

Steven T. Foster
Commissioner of Insurance

STF:dw

1. Enter your NAIC group code number:	1. ___ ___ ___ or: _____
2. Enter your NAIC company code number:	2. ___ ___ ___ ___ ___
3. Company or Group Name:	3. _____
4. Which of the following best describes the methods your company uses to adjust ***first party collision*** or ***first party glass*** claims in Virginia? (Please check the appropriate box for both glass claims and collision claims.)	4. Glass Claims / Collision Claims ☐ ☐ a. Direct Repair Facility (or similar arrangement) ☐ ☐ b. Approved Shop List (or similar arrangement) ☐ ☐ c. Other - Please explain _____ _____
5. How is your program administered?	5. Glass Claims / Collision Claims ☐ ☐ a. Contracted out to a third party administrator ☐ ☐ b. Administered by your company from a central location ☐ ☐ c. Administered by your company from your regional or branch offices ☐ ☐ d. Other - Please explain _____ _____
6. Does your company execute contracts with the repairers in your program?	6. Glass Claims / Collision Claims ☐ ☐ a. Yes ☐ ☐ b. No ***If "YES," please attach sample copies of the contractual agreements.***

7. If #6 is "Yes", do you : Bid the contracts?	7. Glass Claims / Collision Claims ☐ ☐ a. Yes If yes, how often?_____ ☐ ☐ a. No ***If "YES," please attach copies of the Bid Specs, or criteria for submitting a bid, as well as any material used to solicit bids from repair facilities.***
8. What procedure does your company use to advise your claimants that they may select the repairer of their choice?	8. Glass Claims / Collision Claims ☐ ☐ a. Written Procedure for the adjuster or agent ☐ ☐ b. Script for adjuster or agent to deliver verbal notice to the claimant ☐ ☐ c. Written notice to claimant ☐ ☐ d. Other - Please explain _____ _____ ***Please attach copies of all written information used in above answers***
9. Do you provide any of the following incentives to claimants who use your repair facilities or facilities you recommend?	9. Glass Claims / Collision Claims ☐ ☐ a. Inspection requirement waived ☐ ☐ b. Lifetime-of-vehicle guarantees on work performed ☐ ☐ c. Automatic approval of supplemental payments without inspection by adjuster ☐ ☐ d. Waiver or reduction of deductible ☐ ☐ e. Other - Please explain _____ _____

10. Approximately what percent of physical damage claims that were made in Virginia last year were handled by a repair facility in your program or by a completely independent repair facility?	10. Glass Claims / Collision Claims %____ %____ Repair facility in your program %____ %____ Independent repair facility
11. Person Completing Survey: Phone Number:	11. _____ _____

Please return this survey by June 27, 1997 to:

Eric Lowe
Senior Insurance Analyst
Bureau of Insurance
State Corporation Commission
P. O. Box 1157
Richmond, Virginia 23218

1. Based on annual gross sales, what is the size of your repair facility?

_____ Small (less than $250,000)
_____ Medium ($250,000 to $1,000,000)
_____ Large (greater than $1,000,000)

2. In your opinion, is Virginia's auto body repair market today more or less competitive than it was:

	More	Less	Same
a. *1 year ago?*	☐	☐	☐
b. *5 years ago?*	☐	☐	☐
c. *10 years ago?*	☐	☐	☐

3. Who do you consider to be your three biggest competitors? (Please list)

#1: _____
#2: _____
#3: _____

4. Does your business currently participate in any direct repair or approved shop list agreements with insurance companies? (Check all that apply)

_____ Yes, we are currently participating in direct repair agreements.
_____ Yes, we are currently participating in approved shop list agreements.
_____ No, we are currently not participating in direct repair or approved shop list agreements.

*If you answered "**Yes**" to any part of question 4, please fill out **Section B only** on the rest of this survey.*
*If you answered "**No**" to question 4, please fill out **Section C only** on the rest of this survey.*

SECTION B: *(If you answered "**Yes**" to any part of **Question 4**)*

5. How many direct repair agreements or approved shop lists does your facility currently participate in? (Please provide a number)

_____ Direct Repair _____ Approved Shop Lists

6. a. At your estimation, how much of your business, *as a percentage of gross sales*, is from insurance work?

_____%

b. At your estimation, how much of your *insurance business* is from direct repair contracts or approved shop lists?

_____% Direct Repair _____% Approved Shop Lists

7. a. In the past 18 months, has your facility applied to be added to any insurers' direct repair networks or approved shop lists? Yes ☐ No ☐

   b. If yes, was your facility added? Yes ☐ No ☐

8. a. In the past 18 months, has your business been removed from any insurers' direct repair networks or approved shop lists? Yes ☐ No ☐

   b. If yes, was the decision to remove your business of your own choosing? Yes ☐ No ☐

9. a. Are you generally satisfied with the direct repair or approved list process? Yes ☐ No ☐

   b. If no, why not?

_____

_____

_____

SECTION C: *(If you answered "**No**" to **Question 4**)*

10. Have you ever participated in any agreements with insurance companies? Direct Repair ☐ Approved List ☐ No ☐

11. What is your reason for currently not participating in a network?

_____

_____

_____

12. What is your overall impression of the insurance network process? Favorable ☐ Unfavorable ☐ Indifferent ☐

COMMENTS:

1. Based on annual gross sales, what is the size of your repair facility?

_____ Small (less than $250,000)
_____ Medium ($250,000 to $1,000,000)
_____ Large (greater than $1,000,000)

2. In your opinion, is Virginia's auto glass repair market today more or less competitive than it was:

	More	Less	Same
a. *1 year ago?*	☐	☐	☐
b. *5 years ago?*	☐	☐	☐
c. *10 years ago?*	☐	☐	☐

3. Who do you consider to be your three biggest competitors? (Please list)

#1: _____
#2: _____
#3: _____

4. Does your business currently participate in any direct repair or approved shop list agreements with insurance companies? (Check all that apply)

_____ Yes, we are currently participating in direct repair agreements.
_____ Yes, we are currently participating in approved shop list agreements.
_____ No, we are currently not participating in direct repair or approved shop list agreements.

*If you answered "**Yes**" to any part of question 4, please fill out **Section B only** on the rest of this survey.*
*If you answered "**No**" to question 4, please fill out **Section C only** on the rest of this survey.*

SECTION B: *(If you answered "**Yes**" to any part of **Question 4**)*

5. How many direct repair agreements or approved shop lists does your facility currently participate in? (Please provide a number)

_____ Direct Repair _____ Approved Shop Lists

6. a. At your estimation, how much of your business, *as a percentage of gross sales*, is from insurance work?

_____%

b. At your estimation, how much of your *insurance business* is from direct repair contracts or approved shop lists?

_____% Direct Repair _____% Approved Shop Lists

7. a. In the past 18 months, has your facility applied to be added into additional insurance company agreements? Yes ☐ No ☐

   b. If yes, was your facility accepted into these addtional agreements? Yes ☐ No ☐

8. a. In the past 18 months, has your business been removed from any insurers' direct repair networks or approved shop lists? Yes ☐ No ☐

   b. If yes, was the decision to remove your business of your own choosing? Yes ☐ No ☐

9. a. Are you generally satisfied with the direct repair or approved list process? Yes ☐ No ☐

   b. If no, why not?

_____

_____

_____

SECTION C: *(If you answered "**No**" to **Question 4**)*

10. Have you ever participated in any agreements with insurance companies? Direct Repair ☐ Approved List ☐ No ☐

11. What is your reason for currently not participating in a network?

_____

_____

_____

12. What is your overall impression of the insurance network process? Favorable ☐ Unfavorable ☐ Indifferent ☐

Appendix 4

1. After your accident, to whom did you initially report your claim?

_____ Insurance Company

_____ Insurance Agent

_____ Repairer

_____ Don't recall

2. When you reported your claim, by whom were you told the following (check all that apply):

	Insurance Company	Insurance Agent	Repairer	Not Told
a. you could select your own repairer?	☐	☐	☐	☐
b. you had to select a repairer from a list?	☐	☐	☐	☐
c. you could only go to one specific repairer?	☐	☐	☐	☐

3. By whom were you told the following: (check all that apply)

	Insurance Company	Insurance Agent	Repairer	Not Told
a. that if you selected your own repairer, you might have to pay more than your deductible?	☐	☐	☐	☐
b. that your insurance company would not guarantee the repairs?	☐	☐	☐	☐
c. that either an adjuster would inspect your vehicle, or that you would have to take it elsewhere for inspection?	☐	☐	☐	☐

4. a. Did you take your vehicle to:

_____ the shop of your choice?

_____ a shop from the list provided to you by your insurance company?

_____ a specific shop you were told to use?

b. If you took your vehicle to the shop of your choice, was it also on the insurance company's approved list?

_____ Yes, the shop was on the list.

_____ No, the shop was not on the list.

_____ I do not know if the shop was on the list.

c. If you took your vehicle to the specific repairer your adjuster instructed you to or to one that was on the insurance company's approved list, was it the same shop you would have selected if allowed to make a choice?

_____ Yes, I would have selected the same shop.

_____ No, I would not have selected the same shop.

_____ I had no real preference.

5. What was your most important concern when having your repairs done?

1 = Most Concerned 5 = Least Concerned
(Please circle the appropriate number)

1 2 3 4 5	Speed of delivery of repair service
1 2 3 4 5	Quality of work performed
1 2 3 4 5	Cost of work performed
1 2 3 4 5	Convenience of having work performed
1 2 3 4 5	Warranty provided for work performed

6. Were you satisfied with the work performed by the repair facility?

_____ Yes, I was satisfied.

_____ No, I was not satisfied.

_____ I have no opinion.

7. Were you required to pay more than your deductible for the repair?

_____ Yes, I was required to pay more.

_____ No, I was not required to pay more.

_____ I do not recall.

8. Were you satisfied with the treatment you received from your:

	Very Satisfied	Satisfied	Not Satisfied	N/A
Insurance agent?	☐	☐	☐	☐
Insurance company?	☐	☐	☐	☐
Adjuster?	☐	☐	☐	☐
Repairer?	☐	☐	☐	☐

9. At anytime in the process, did you feel pressured, coerced, or intimidated by any of the following?

	Pressured	Coerced	Intimidated	None of these
Your insurance agent?	☐	☐	☐	☐
Your insurance company?	☐	☐	☐	☐
Your adjuster?	☐	☐	☐	☐
Your repairer?	☐	☐	☐	☐

Please return this survey by September 8, 1997, to Eric Lowe at the Bureau of Insurance using the postage paid envelope enclosed. Please feel free to call him at (804) 371-9628 if you have any questions.

1. After your glass breakage, to whom did you initially report your claim?

_____ Insurance Company

_____ Insurance Agent

_____ Repairer

_____ Don't recall

2. When you reported your claim, by whom were you told the following (check all that apply):

	Insurance Company	Insurance Agent	Repairer	Not Told
a. you could select your own repairer?	☐	☐	☐	☐
b. you had to select a repairer from a list?	☐	☐	☐	☐
c. you could only go to one specific repairer?	☐	☐	☐	☐

3. By whom were you told the following: (check all that apply)

	Insurance Company	Insurance Agent	Repairer	Not Told
a. that if you selected your own repairer, you might have to pay more than your deductible?	☐	☐	☐	☐
b. that your insurance company would not guarantee the repairs?	☐	☐	☐	☐
c. that either an adjuster would inspect your vehicle, or that you would have to take it elsewhere for inspection?	☐	☐	☐	☐

4. a. Did you take your vehicle to:

_____ the shop of your choice?

_____ a shop from the list provided to you by your insurance company?

_____ a specific shop you were told to use?

b. If you took your vehicle to the shop of your choice, was it also on the insurance company's approved list?

_____ Yes, the shop was on the list.

_____ No, the shop was not on the list.

_____ I do not know if the shop was on the list.

c. If you took your vehicle to the specific repairer your adjuster instructed you to or to one that was on the insurance company's approved list, was it the same shop you would have selected if allowed to make a choice?

_____ Yes, I would have selected the same shop.

_____ No, I would not have selected the same shop.

_____ I had no real preference.

5. What was your most important concern when having your repairs done?

1 = Most Concerned 5 = Least Concerned
(Please circle the appropriate number)

1 2 3 4 5 Speed of delivery of repair service

1 2 3 4 5 Quality of work performed

1 2 3 4 5 Cost of work performed

1 2 3 4 5 Convenience of having work performed

1 2 3 4 5 Warranty provided for work performed

6. Were you satisfied with the work performed by the repair facility?

_____ Yes, I was satisfied.

_____ No, I was not satisfied.

_____ I have no opinion.

7. Were you required to pay more than your deductible for the repair?

_____ Yes, I was required to pay more.

_____ No, I was not required to pay more.

_____ I do not recall.

8. Were you satisfied with the treatment you received from your:

	Very Satisfied	Satisfied	Not Satisfied	N/A
Insurance agent?	☐	☐	☐	☐
Insurance company?	☐	☐	☐	☐
Adjuster?	☐	☐	☐	☐
Repairer?	☐	☐	☐	☐

9. At anytime in the process, did you feel pressured, coerced, or intimidated by any of the following?

	Pressured	Coerced	Intimidated	None of these
Your insurance agent?	☐	☐	☐	☐
Your insurance company?	☐	☐	☐	☐
Your adjuster?	☐	☐	☐	☐
Your repairer?	☐	☐	☐	☐

Please return this survey by September 8, 1997, to Eric Lowe at the Bureau of Insurance using the postage paid envelope enclosed. Please feel free to call him at (804) 371-9628 if you have any questions.

871 F.Supp. 355
1995-1 Trade Cases P 70,999
(Cite as: 871 F.Supp. 355)

ALLSTATE INSURANCE COMPANY, Plaintiff,
v.
STATE OF SOUTH DAKOTA; Jeff Stingley in his official capacity as Secretary of Commerce; and Darla Lyon in her official capacity as Director of the Division of Insurance, Defendants,
and
Dakotaland Autoglass, Inc., and Norm Feldman's Glass Company, Inc., Intervenors.

Civ. 93-3006.

United States District Court,
D. South Dakota,
Central Division.

Oct. 11, 1994.

Automobile insurer brought action challenging constitutionality of statutes that prohibit insurer from recommending insured's use of particular company or location for automobile glass replacement or repair services and prohibit insurer from advising insureds of existence of network. Insurer moved for summary judgment. The District Court, John B. Jones, J., held that: (1) statutes were unconstitutional restriction on commercial speech, and (2) statutes violated commerce clause.

Motion granted.

[1] CONSTITUTIONAL LAW ⚖90.2
92k90.2
Statutes that prohibit automobile insurer from recommending insured's use of particular company or location for glass replacement or repair and prohibit insurer from advising insureds of existence of network for repair are unconstitutional restriction on commercial speech; the speech is not deceptive or misleading, and restrictions were not shown to serve substantial state interest since another statute prohibits insurer from requiring use of particular auto glass repair or replacement business and other laws protect local businesses from antitrust violations. U.S.C.A. Const.Amend. 1; SDCL 58-33-67(5), 58-33-72, 58-33-73.

[1] INSURANCE ⚖4(2)
217k4(2)
Statutes that prohibit automobile insurer from recommending insured's use of particular company or location for glass replacement or repair and prohibit insurer from advising insureds of existence of network for repair are unconstitutional restriction on commercial speech; the speech is not deceptive or misleading, and restrictions were not shown to serve substantial state interest since another statute prohibits insurer from requiring use of particular auto glass repair or replacement business and other laws protect local businesses from antitrust violations. U.S.C.A. Const.Amend. 1; SDCL 58-33-67(5), 58-33-72, 58-33-73.

[2] CONSTITUTIONAL LAW ⚖90.2
92k90.2
Only false, deceptive, or misleading commercial speech may be banned by state without further justification. U.S.C.A. Const.Amend. 1.

[3] CONSTITUTIONAL LAW ⚖90.2
92k90.2
State has burden to demonstrate that its restrictions on commercial speech are tailored in reasonable manner to

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serve substantial state interest. U.S.C.A. Const.Amend. 1.

[4] COMMERCE ⚖62.3
83k62.3
South Dakota statutes that prohibit automobile insurer from recommending insured's use of particular company or location for automobile glass replacement or repair and prohibit insurer from advising insured of existence of network for repair violate commerce clause by imposing excessive burden on interstate trade when considered in relation to local benefits conferred; antitrust laws would serve purpose of protecting state auto glass businesses from effects of unfair acts and practices by insurers and networks, and another statute already requires that insurers maintain policyholder choice of automobile repair services. U.S.C.A. Const. Art. 1, § 8, cl. 3; SDCL 58-33-67(5), 58-33-72, 58-33-73.

[4] INSURANCE ⚖4(2)
217k4(2)
South Dakota statutes that prohibit automobile insurer from recommending insured's use of particular company or location for automobile glass replacement or repair and prohibit insurer from advising insured of existence of network for repair violate commerce clause by imposing excessive burden on interstate trade when considered in relation to local benefits conferred; antitrust laws would serve purpose of protecting state auto glass businesses from effects of unfair acts and practices by insurers and networks, and another statute already requires that insurers maintain policyholder choice of automobile repair services. U.S.C.A. Const. Art. 1, § 8, cl. 3; SDCL 58-33-67(5), 58-33-72, 58-33-73.

[5] INSURANCE ⚖4(2)
217k4(2)
South Dakota statutes that prohibit automobile insurer from recommending insured's use of particular company or location for automobile glass replacement or repair and prohibit insurer from advising insureds of existence of repair network does not have effect of transferring or spreading policyholder's risk, and, thus, McCarran-Ferguson Act does not exempt statutes from preemption by antitrust laws. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.; McCarran-Ferguson Act, §§ 1-3, 15 U.S.C.A. §§ 1011- 1013; SDCL 58-33-72, 58-33-73.

[5] MONOPOLIES ⚖18
265k18
South Dakota statutes that prohibit automobile insurer from recommending insured's use of particular company or location for automobile glass replacement or repair and prohibit insurer from advising insureds of existence of repair network does not have effect of transferring or spreading policyholder's risk, and, thus, McCarran-Ferguson Act does not exempt statutes from preemption by antitrust laws. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.; McCarran-Ferguson Act, §§ 1-3, 15 U.S.C.A. §§ 1011-1013; SDCL 58-33-72, 58-33-73.

[5] STATES ⚖18.41
360k18.41
South Dakota statutes that prohibit automobile insurer from recommending insured's use of particular company or location for automobile glass replacement or repair and prohibit insurer from advising insureds of existence of repair network does not have effect of transferring or spreading policyholder's risk, and, thus, McCarran-Ferguson Act does not exempt statutes from preemption by antitrust laws. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.; McCarran-Ferguson Act, §§ 1-3, 15 U.S.C.A. §§ 1011-1013; SDCL 58-33-72, 58-33-73.

[6] STATUTES ⚖107(1)
361k107(1)
Title of South Dakota statute prohibiting motor vehicle insurance companies from directing insureds to specific auto glass companies for repair of their vehicles complies with single-subject rule of State Constitution. S.D. Const. Art. 3, § 21; SDCL 58-33-72, 58-33-73.

***356** David A. Gerdes, Pierre, SD, for plaintiff.

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Jeffrey P. Hallem, Asst. Atty. Gen., Pierre, SD, for defendants.

John L. Brown, Pierre, SD, for intervenors.

MEMORANDUM OPINION AND ORDER

JOHN B. JONES, District Judge.

Plaintiff Allstate Insurance Company (Allstate) brought this action attacking the constitutionality of Senate Bill 220 ("SB 220") adopted in the 1992 South Dakota Legislative Session, and which is now codified at SDCL §§ 58-33-72 and 58-33-73. Plaintiff Allstate has moved for summary judgment on its claims. The defendants, the State of South Dakota and its officials and intervenors (State) have filed a joint motion for summary judgment. Oral argument was heard on the motion on May 24, 1994, and the Court took the matter under advisement. Summary judgment will be granted to Allstate for the reasons below.

Background

Allstate sells automobile insurance policies throughout most of the United States. Allstate has an agreement with USA-GLAS Network, which was formed by Globe Glass and Mirror Company, relating to automobile glass repair and replacement for their policyholders. In addition to Globe Glass outlets, USA- GLAS enters into contracts with independent glass repair businesses for the provision of services to Allstate policyholders. Allstate refers its policyholders to USA-GLAS by supplying them with the network's toll-free phone number. Policyholders are *357 informed that USA-GLAS can do the repair or replacement work and bill Allstate directly. The policyholder is only responsible for paying any deductible applicable under the policy. USA-GLAS and Allstate guarantee the glass work for as long as the policyholder owns the car. USA-GLAS requires all of its contracting businesses to meet its standard terms.

These terms include providing service meeting state and federal safety standards and USA-GLAS quality standards, and negotiated prices less than the contracting businesses would normally charge.

Allstate is able to save transactional costs by utilizing computerized electronic billing and payments with the network. The network charges Allstate less than independent businesses, under a price cap and guarantee not to be charged more than any competing insurance company within the preceding thirty days. The total cost of services provided by the networks is therefore lower for Allstate. Allstate also receives "Globe Appreciation Units" and monetary payments from USA-GLAS based upon the amount of business Allstate sends to the network.

Concern from independent glass businesses over the loss of revenue caused by such network arrangements led to the introduction of SB 220 in the 1992 South Dakota Legislative Session. SB 220 was passed by the legislature over Governor George Mickelson's veto in March of 1992.

SDCL § 58-33-72 prohibits an insurance company from requiring or recommending that an automobile insurance policyholder "use a particular company or location for the providing of automobile glass replacement or repair services or products insured in whole or in part by that policy."

SDCL § 58-33-73 prohibits an insurer from advising its insureds of the existence of networks such as USA-GLAS and contains other restrictions effectively barring any insurance company from using such networks in South Dakota.

Allstate filed this action challenging the validity of SDCL §§ 58-33- 72 and 58-33-73 on four separate grounds as shown in the issues set forth below. Other facts pertinent to the issues will be presented in the discussion and analysis. For convenience, the statutes will be collectively referred to as SB 220 throughout the remainder of this opinion.

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Issues

I. Is SB 220 an unconstitutional restriction on commercial speech?

II. Is SB 220 an unconstitutional restriction on interstate commerce?

III. Is SB 220 preempted by federal anti-trust statutes?

IV. Is SB 220 in violation of the Article III, § 21 of the South Dakota Constitution?

Discussion

The parties have moved for summary judgment. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The Court must view the facts in the light most favorable to the non-moving party. A presumption of constitutionality attaches to legislative enactments, and the party challenging a statute bears the burden of overcoming this presumption. Schilb v. Kuebel, 404 U.S. 357, 92 S.Ct. 479, 30 L.Ed.2d 502 (1971).

I. Freedom of Commercial Speech.

[1] Allstate argues that the restrictions placed upon it by SB 220 constitute a restriction of commercial speech beyond that allowed under the First Amendment of the United States Constitution. The communication at issue is the dissemination of information regarding automobile glass repair businesses and services between insurers and their automobile insurance policyholders. All the parties acknowledge that this communication is commercial speech subject to the protections of the First Amendment's "Free Speech" clause. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976).

[2] Only false, deceptive, or misleading commercial speech may be banned by the State without further justification. Ibanez v. Florida Dep't of Business & Prof. Reg., Bd. *358 of Accountancy, 512 U.S. 136, ----, 114 S.Ct. 2084, 2088, 129 L.Ed.2d 118 (1994). The State argues that only supplying a policyholder with information about automobile glass businesses that are under a network contract with the insurer, and no others, is deceptive and misleading because it fails to disclose the network business relationship and advantages to the insurer (with detriment to independent businesses) if they are used. Allstate is clearly gaining reduced costs at the expense of independent glass businesses who would clearly charge it more than USA-GLAS. But policyholders are not harmed by using a network-affiliated glass business since they would only pay the policy deductible, if applicable, no matter which company did the work. Because recommending USA-GLAS causes no harm to the policyholder, the speech is not deceptive or misleading so as to be subject to a ban.

The state argues that it has a substantial state interest in (a) maintaining policyholder choice of glass replacement services, (b) preventing local business closures, and (c) protecting consumer safety. "Commercial speech that is not false, deceptive, or misleading can be restricted, but only if the State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." Ibanez, 512 U.S. at ----, 114 S.Ct. at 2088.

[3] The burden is on the State to demonstrate that its restrictions are tailored in a reasonable manner to serve a substantial state interest. Edenfield v. Fane, 507 U.S. 761, ----, 113 S.Ct. 1792, 1798, 123 L.Ed.2d 543 (1993). The State has failed to meet its burden.

With regard to (a) choice, the State has, since 1986, had legislation in place preventing an insurer from requiring the use of a particular auto glass repair or replacement business. SDCL § 58-33-67(5), effective July 1, 1986 (SL 1986, ch. 422, § 2).

As to (b) preventing local businesses from closing, the State cannot properly protect them from the networks who

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will charge a lower price and thereby help the local businesses maintain their profit margins. As Governor Mickelson stated in his veto message, this statute constitutes mandated price-fixing, and that is not a proper means of helping local glass dealers. Further, the local companies are free to join the USA-GLAS network, and intervenor Norm Feldman's Glass Company, Inc. has done so. The state also has anti-trust laws in place, which would protect local business from anti-trust violations.

As to (c) protecting consumer safety, no showing has been made that USA-GLAS work is inherently defective and SB 220 simply contains no consumer safety provisions.

SB 220 is clearly an unconstitutional restriction on commercial speech and therefore, this Court must declare it to be unconstitutional. Although that issue would be dispositive, the other issues will also be addressed so they can be given appellate review if desired.

II. Commerce Clause Violation.

[4] Allstate also argues that SB 220 unduly burdens interstate commerce because of its restrictions on the automobile glass networks like USA-GLAS to the advantage of independent local auto glass businesses. SB 220 effectively prevents Allstate from getting any advantage in contracting with USA-GLAS by prohibiting it from telling its insureds about the network. The networks are by their nature interstate in nature. The effect of SB 220 is to deprive interstate networks of any benefits in contracting with insurance companies to decrease price competition for local glass businesses.

The State argues that SB 220 regulates out-of-state and in-state insurers and networks evenhandedly to further three local purposes: (1) protecting South Dakota auto glass businesses from the effects of unfair acts and practices by the insurers and networks; (2) maintaining policyholder choice of businesses; and (3) protecting consumer safety by assuring prices sufficient to provide quality products and services.

SB 220 must be struck down if its burden on interstate commerce is excessive compared to the State's legitimate local purposes in enacting the statute. Pike v. Bruce *359 Church, Inc., 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). A statute burdening interstate commerce cannot be tolerated where the legitimate local purposes of the statute can be "promoted as well with a lesser impact on interstate activities." Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 37, 100 S.Ct. 2009, 2016, 64 L.Ed.2d 702 (1980).

State anti-trust laws would serve the first of the State's purposes equally well. SDCL § 58-33-67(5) already requires that insurers maintain policyholder choice of automobile repair services, which meets the State's second purpose. Finally, there is nothing in this record indicating that USA- GLAS with its lesser prices to Allstate is providing auto glass of lesser quality or safety than that provided by local glass businesses. In addition, consumer safety laws would more effectively promote consumer safety than providing price protection to local businesses.

SB 220 does not directly discriminate against interstate commerce but it clearly "impose[s] an excessive burden on interstate trade when considered in relation to the local benefits conferred." C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, ---, 114 S.Ct. 1677, 1687, 128 L.Ed.2d 399 (1994) (O'Connor, J., concurring) (applying Pike standard). The statute is therefore also unconstitutional under the Commerce Clause.

III. Anti-Trust Preemption.

[5] Allstate also argues that SB 220 is preempted by the Sherman Anti Trust Act, 15 U.S.C. § 1, et seq. and must yield to this federal legislation under the Supremacy Clause of the Constitution.

The State argues that there is no preemption involved because the McCarran- Ferguson Act, 15 U.S.C. §§ 1011-1013, would exempt this insurance regulation from the federal anti-trust laws. The Court must respectfully disagree, as the insurance practice regulated in SB 220 does not have "the effect of transferring or spreading a

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policyholder's risk." Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982).

The State also argues that SB 220 is not preempted because the regulations do not constitute a per se violation of the anti-trust laws in all cases. Both sides have presented affidavits from experts witnesses contesting the insurers' market power and the effect of automobile insurers contracting with auto glass repair service networks. The parties disagree over the effect of the SB 220's price limitations and whether the result constitutes price fixing.

The market consolidation possible under network automobile glass repair networks, and the so-called "kickbacks" to insurers based on referrals to the network, raise substantial anti-trust concerns for the State. Given the unique nature of the business relationships at issue, and the particular facts involved in the state of South Dakota, several factual issues must be decided before preemption can be found. Rice v. Norman Williams Co., 458 U.S. 654, 659, 102 S.Ct. 3294, 3298-99, 73 L.Ed.2d 1042 (1982). Therefore anti-trust preemption cannot be decided on the motions for summary judgment, and the Court declines to do so.

IV. S.D. Constitution Art. III, § 21.

[6] The title of SB 220 is "An Act to Prohibit Motor Vehicle Insurance Companies from Directing Insureds to Specific Autoglass Companies for Repair of Their Vehicles." Article III, § 21 of the South Dakota Constitution states: "No law shall embrace more than one subject, which shall be expressed in its title." The title expresses a general subject, restrictions on insurers in "directing" their policyholders to a specific automobile glass repair business, and is sufficient to put all interested persons on notice of the regulated subject. Accounts Management v. Williams, 484 N.W.2d 297, 302- 303 (S.D.1992). SB 220 does not violate Article III, § 21 of the South Dakota Constitution.

Conclusion

SB 220, codified at SDCL §§ 58-33-72 and 58-33-73, is unconstitutional because it imposes excessive restrictions on commercial speech and the statutes in question impose an undue burden on interstate commerce. The State's concerns about the automobile glass repair or replacement networks are legitimate concerns. They must be addressed ***360** in ways that are less restrictive of commercial speech and interstate commerce.

Therefore, upon the record herein,

IT IS ORDERED:

(1) That Plaintiff's Motion for Summary Judgment, Doc. 36, is granted.

(2) That Defendant and Intervener's Joint Motion for Summary Judgment, Doc. 47, is denied.

(3) That Plaintiff's requested relief is granted in that Senate Bill 220 of the 1992 South Dakota State Legislature, now codified at SDCL §§ 58-33-72 and 58-33-73, is declared unconstitutional and the State of South Dakota is henceforth permanently enjoined from enforcing those statutes.

(4) That the Clerk of Courts shall enter a Judgment consistent herewith.

END OF DOCUMENT

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917 F.Supp. 447
64 USLW 2610, 1996-1 Trade Cases P 71,371
(Cite as: 917 F.Supp. 447)

GLOBE GLASS & MIRROR COMPANY,

v.

James H. "Jim" BROWN, in His Official Capacity as the Commissioner of Insurance for the State of Louisiana.

Civil A. No. 94-4033.

United States District Court,
E.D. Louisiana.

March 4, 1996.

Automobile glass repair company that had established interstate glass repair network challenged constitutionality of Louisiana unfair trade practices statutes which imposed limitations on contractual arrangements for certain kinds of automobile insurance repair work. On cross-motions for summary judgment, the District Court, Charles Schwartz, Jr., J., held that statutes violated commerce clause.

Motion granted in part and dismissed as moot in part; cross-motion denied.

See also, 888 F.Supp. 768.

[1] COMMERCE ⚿56
83k56
Commerce clause not only bestows powers upon Congress to regulate interstate commerce, but also limits powers of states to erect barriers against interstate trade, although states retain authority under their general police powers to regulate matters of legitimate local concern even though interstate commerce may be affected. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[2] COMMERCE ⚿56
83k56
Under Pike analysis, state statutes which regulate evenhandedly and have only incidental affect on interstate commerce violate commerce clause only if burdens imposed on interstate trade are clearly excessive in relation to putative local benefits, with acceptability of burden depending on nature of local interest and whether that interest can be promoted as well with lesser impact on interstate activities. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[3] COMMERCE ⚿13.5
83k13.5
Under Hughes test, state statutes which affirmatively discriminate against interstate transactions violate commerce clause unless state demonstrates that such statutes serve legitimate local purpose, and that such purpose could not be served adequately by available nondiscriminatory means. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[4] COMMERCE ⚿62.3
83k62.3
Louisiana statutes making it unfair trade practices for automobile insurer generally to contract for handling of insurance repair work with any company that sets fixed price to be satisfied by repair shops and retains percentage of claim paid by insurer, and specifically to contract for handling of motor vehicle glass repair or replacement work, violated commerce clause, under either Pike or Hughes tests, by clearly having effect of impermissibly burdening interstate commerce by discriminating against out-of-state auto glass repair networks in favor of local auto glass repair businesses and by eliminating competition. U.S.C.A. Const. Art. 1, § 8, cl. 3; LSA-R.S. 22:1214.1, 22:1214.2.

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[4] INSURANCE ⚷4(2)
217k4(2)
Louisiana statutes making it unfair trade practices for automobile insurer generally to contract for handling of insurance repair work with any company that sets fixed price to be satisfied by repair shops and retains percentage of claim paid by insurer, and specifically to contract for handling of motor vehicle glass repair or replacement work, violated commerce clause, under either Pike or Hughes tests, by clearly having effect of impermissibly burdening interstate commerce by discriminating against out-of-state auto glass repair networks in favor of local auto glass repair businesses and by eliminating competition. U.S.C.A. Const. Art. 1, § 8, cl. 3; LSA-R.S. 22:1214.1, 22:1214.2.

*448 David L. Stone and Robert Evans Harrington, Stone, Pigman, Walther, Wittmann & Hutchinson, L.L.P., New Orleans, Louisiana, Joel G. Chefitz and Robert K. Niewijk, Katten, Muchin & Zavis, Chicago, Illinois, for plaintiff.

David Charles Kimmel, Louisiana Department of Justice, Public Protection Division, Baton Rouge, Louisiana, for defendant.

ORDER AND REASONS

CHARLES SCHWARTZ, Jr., District Judge.

This case presents a two-pronged constitutional challenge to recently enacted Louisiana statutes, LSA-R.S. 22:1214.1 [FN1] and LSA-R.S. 22:1214.2, [FN2] which statutes defendant submits are designed to promote a competitive market in the glass replacement industry by regulating the practices of insurers in the servicing of automobile claims. Plaintiff, Globe Glass & Mirror Company (Globe) moved for summary judgment asserting no genuine issues of material fact exist and under the applicable law summary judgment is warranted as to Count One of its Complaint declaring the Louisiana statutes unconstitutional in violation of the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. [FN3]

FN1. Section 1214.1, entitled, "Automobile insurance; unfair trade practice" provides:
It shall be an unfair method of competition and unfair or deceptive act or practice for any insurer to establish a contract or agreement with any company to manage, handle or arrange insurance repair work or to act as an agent for the insurer in any manner, where the company establishes a price which must be satisfied by a repair shop as a condition of doing claims repair work for the insurer, and then retains a percentage of the claim paid by the insurer.

FN2. Section 1214.2, also entitled "Automobile insurance; unfair trade practice" provides:
It shall be an unfair method of competition and unfair or deceptive act or practice for any insurer to establish a contract or agreement with any individual or company to manage, handle, subcontract, broker or arrange insurance repair work for any glass repair or replacement on a motor vehicle.

FN3. The pertinent portion of which provides that "The Congress shall have power ... To regulate Commerce with foreign Nations, and among the several States...."

Defendant, Louisiana State Commissioner of Insurance, Jim Brown (the State), filed a cross motion for summary judgment seeking a declaration that the statutes are constitutional both under both the commerce clause (Count I) and contract clause (Count II). The cross motions of the parties were noticed for hearing on February 28, 1996, but were deemed submitted on the briefs and the documents of record without oral argument. There being no genuine issue of material fact, for the reasons hereinafter stated *449 Globe's Motion for Summary Judgment as to Count I is GRANTED, Count II is DISMISSED AS MOOT, and the State's Cross Motion for Summary Judgment is DENIED.

I. UNDISPUTED FACTS.

Globe established the USA-GLAS network to provide automobile glass repair and replacement services to

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insurance companies' policyholders and to the general public throughout the United States. [FN4] Like all networks operating in the state of Louisiana, USA-GLAS is an out-of-state business. Globe or USA-GLAS enters into contracts with insurance companies to offer their policyholders quality auto glass services at competitive prices. USA-GLAS in turn negotiates contracts with independent glass shops for the provision of auto glass repair and replacement services. Glass shops who enter into such an agreement become members of the network. The USA-GLAS network also includes auto glass shops owned and operated by Globe, but Globe does not own or operate any shops in Louisiana. [FN5]

FN4. See, Plaintiff's Statement of Undisputed Material Facts, at para. 1. ULLR 2.10E requires that each copy of the papers opposing a motion for summary judgment shall include a separate, concise statement of the material facts as to which there exists a genuine issue to be tried. All material facts set forth in the statement required to be served by the moving party are deemed admitted, unless controverted as required by ULLR 2.10E. The State did not controvert any of the factual submissions set forth in plaintiff's statement of undisputed facts as required by this rule.

FN5. Id. at para. 2.

Policyholders in Louisiana who need auto glass work and choose to use USA-GLAS can make arrangements directly with USA-GLAS by calling an "800" number. The policy holder can bring his car to a USA-GLAS affiliated shop or have the network's mobile repair service perform the repairs at his home, place of work, or any other convenient location. [FN6]

FN6. Id. at para. 3.

The policyholder's only obligation is to pay the deductible specified in his insurance policy; USA-GLAS pays the remainder of the bill directly to the glass shop, under the terms of USA-GLAS' contract with the glass shop. The policyholder's insurance company then pays USA-GLAS for the work under the terms of the insurer's agreement with USA-GLAS or Globe. [FN7]

FN7. Id. at para. 4.

USA-GLAS and many insurers guarantee the work that any USA-GLASS outlet performs on a policyholder's car for as long as he owns the car. If a network member performs unsatisfactory work in one state and the policyholder needs compensatory work performed in another state, any other network member can perform the compensatory work, and USA-GLAS will bear the cost. [FN8] Allstate's customer satisfaction surveys show that USA-GLAS regularly achieves satisfaction rates exceeding 95% and in Louisiana it has achieved rates as high as 99.4%. [FN9]

FN8. Id. at para. 5. USA-GLAS is not a "broker", rather, the insurer's only relationship is with USA-GLAS. The insurer pays only USA-GLAS, and USA-GLAS bears full responsibility for the service, its quality, and cost overruns. See, Prigge Deposition [Plaintiff's Exhibit "A"] at 13, 28-32; Rogers Deposition [Plaintiff's Exhibit "C"] at 7-8; Strange Deposition [Plaintiff's Exhibit "D"] at 14-18.

FN9. Plaintiff's Statement of Undisputed Facts, at para. 6.

The network reduces costs for both the insurers and policyholder. As a result of their nationwide agreements with USA-GLAS, insurers are guaranteed a competitive price in Louisiana. The cost savings are passed on to policyholders in the form of lower premiums. [FN10] Insurers must pay more to local glass shops than they pay to networks. [FN11] Simply stated, local auto glass repair businesses compete directly with out-of-state networks such as USA-GLAS/Globe for insurance company claims business.

FN10. Id. at para. 7.

FN11. Id. at para. 9.

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Policyholders are free to forego the benefits of USA-GLAS and deal directly with any auto glass shop they choose. Only 34% of Allstate's auto glass claims in Louisiana are *450 handled by USA-GLAS. [FN12] Glass shops in Louisiana charge insurers higher prices than they charge cash customers or glass networks because they do not have to compete on price for insured business. [FN13]

FN12. Id. at para. 8.

FN13. Id. at para. 10.

The complaint against Allstate or with the networks originated with the Louisiana Glass Association industry. Many of its members expressed their concerns about losing business to the networks and their inability to compete on the networks. [FN14] The Louisiana Glass Association Legislative Committee made efforts to lobby their legislators in favor of the anti-network statutes. [FN15]

FN14. Id. at paras. 11 and 12.

FN15. Id. at para. 14.

The Louisiana legislature passed the "unfair trade practice"/anti-network statutes which provide:

> It shall be an unfair method of competition and unfair or deceptive act or practice for any insurer to establish a contract or agreement with any company to manage, handle or arrange insurance repair work or to act as an agent for the insurer in any manner, where the company establishes a price which must be satisfied by a repair shop as a condition of doing claims repair work for the insurer, and then retains a percentage of the claim paid by the insurer.
>
> It shall be an unfair method of competition and unfair or deceptive act or practice for any insurer to establish a contract or agreement with any individual or company to manage, handle, subcontract, broker or arrange insurance repair work for any glass repair or replacement on a motor vehicle. LSA-R.S. 22:1214.1-.2

Another Louisiana statute LSA-R.S. 22:658(D)(1), which plaintiff does not challenge, is specifically aimed at protecting Louisiana policyholders' freedom to forego the network route and deal directly with any auto glass shop they may choose. Section 658(D)(1) reads: "When making payment incident to a claim, no insurer shall require that as a condition to such payment, repairs be made to a motor vehicle, including window glass repairs or replacement, in a particular place or shop or by a particular entity."

After the anti-network statutes' passage, the Louisiana Glass Association pressured the Department of Insurance to enforce them against Allstate. [FN16] The Louisiana Commissioner of Insurance, charged with the enforcement of the subject statutes, has in fact commenced administrative proceedings against Allstate Insurance Company to enforce their provisions. [FN17]

FN16. Id. at para. 15.

FN17. See, Defendant's Statement of Facts in its Memorandum in Support of Cross-Motion, at p. 2.

On their face, the statutes outlaw agreements that networks have with insurance companies doing business in Louisiana for the provision of auto repair services. USA-GLAS has lost some of its former business, and in the event that the Louisiana Insurance Commissioner's administrative action against Allstate is successful, USA-GLAS's business in Louisiana with all insurance providers in the state will be eliminated. Without such business, USA-GLAS would cease to operate in Louisiana. [FN18]

FN18. Plaintiff's Statement of Undisputed Facts, at para. 17.

Globe and USA-GLAS are interstate businesses operating throughout the United States. The auto glass networks

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operating in Louisiana that have arrangements in Louisiana are all interstate networks based outside of Louisiana. [FN19] The effect of LSA-R.S. 22:1214.1 and LSA-R.S. 22:1214.2 is to reduce and/or eliminate competition between in-state local glass businesses and out- of-state networks, such as Globe and USA-GLAS.

FN19. Id. at para. 18.

II. CONTENTIONS OF THE PARTIES.

The thrust of plaintiff's motion is that the true purpose and effect of the statutes is to protect the local glass shops in Louisiana *451 from the competition for insured auto owners' business posed by the auto glass networks, which are all out of state businesses. It submits that LSA-R.S. 22:1214.1-.2 (the anti-network statutes) are naked "economic protectionism" subject to the strictest scrutiny as set forth by the Supreme Court in Hughes v. Oklahoma, 441 U.S. 322, 336, 99 S.Ct. 1727, 1736, 60 L.Ed.2d 250 (1979). Globe further argues that either under the "Hughes test" or the relatively deferential "Pike analysis", [FN20] the Louisiana statutes fail to pass muster as both require the State to prove that the legislation furthers a legitimate interest unrelated to protectionism, and the State has failed to do so here.

FN20. See, Discussion at pp. 10-12 of this Order and Reasons.

In its cross-motion/opposition, the State admits the statutes' purpose and effect are to protect local independent glass shops from competition from interstate Glass networks. [FN21] Nonetheless, it contends that the "Louisiana legislature enacted the unfair the trade practice statutes as a response to a retail market structure that threatened competition, consumer choice and possibly consumer safety," [FN22] and thus, it is entitled to summary judgment in its favor as to Count One. As to Count II, the State argues that if by the enactment of the subject statutes Louisiana has impaired the contractual rights of any private parties, it has done so in pursuit of important state interests, and thus, the statutes are not unconstitutional impairments of such existing contracts.

FN21. The State, borrowing language from the Supreme Court's decision Parker v. Brown, 317 U.S. 341, 362-63, 63 S.Ct. 307, 319, 87 L.Ed. 315 (1943) argues: "The interests in this case 'present a problem local in character and urgently demanding state action for the economic protection of those engaged in one its important industries.' " See, Memorandum In Support of Cross Motion, at p. 6 (emphasis supplied by this Court). It is undisputed that the legislation at issue provides economic protection to local glass shops by effectively eliminating their competition--out-of- state networks. The State appears to be likening its local automobile glass repair industry to the raisin industry in California. The passage quoted from Parker appears in a paragraph which reads:

Examination of the evidence in this case and available data of the raisin industry in California, of which we may take judicial notice, leaves no room to doubt that the evils attending the production and marketing of raisins in that state present a problem local in character and urgently demanding state action for the economic protection of those engaged in one of its important industries. Between 1914 and 1920 there was a spectacular rise in price of all types of California grapes, including raisin grapes....

317 U.S. at 362-65, 63 S.Ct. at 319-20. Moreover, the regulation at issue in the Parker decision applied only to transactions wholly intrastate before the raisins were ready for shipment in interstate commerce. Id. at 360-61, 63 S.Ct. at 318. Placing the State's quotation from Parker in context, it is evident to the Court that this case and Parker are miles apart.

FN22. See, Defendant's Memorandum in Support of Cross Motion for Summary Judgment, at p. 5.

Globe filed a formal reply brief first noting that should the Court find in favor of Globe on its motion for summary judgment as to Count I, Count II will be entirely moot. It further argues that the State fails identify any purposes which would not be better served through other means without discriminating against interstate commerce. Plaintiff further highlights the State failure to address, much less distinguish, Allstate Ins. Co. v. South Dakota, 871 F.Supp. 355, 359 (D.S.D.1994), wherein a district court struck down a South Dakota statute with precisely the same effect as the presently challenged Louisiana statutes holding the South Dakota statute unconstitutional under the Commerce Clause. Globe further argued in opposition to the State's motion as to Count II (the Contract Clause claim) that: (1) the statutes' plain language applies only to contracts executed after their enactment; and otherwise, (2) the statutes clearly violate the Contract Clause since the resulting impairment of contracts cannot be

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justified as reasonable or necessary.

III. ANALYSIS.

[1] The "dormant" Commerce Clause, Article I, Section 8, Clause 3 of the Constitution, grants Congress the power "to regulate Commerce ... among the several States...." In Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 669, 101 S.Ct. 1309, 1315, 67 L.Ed.2d 580 (1981), the *452 Supreme Court outlined the evolution of the Commerce Clause as follows:

> The Clause is both a 'prolific sourc[e] of national power and an equally prolific source of conflict with legislation of the state[s].' H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 534, 69 S.Ct. 657, 663, 93 L.Ed. 865 (1949). The Clause permits Congress to legislate when it perceives that the national welfare is not furthered by the independent actions of the States. It is now well established, also, that the Clause itself is 'a limitation upon state power even without congressional implementation.' Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 350, 97 S.Ct. 2434, 2445, 53 L.Ed.2d 383 (1977). The Clause requires that some aspects of trade generally must remain free from interference by the States. When a State ventures excessively into the regulation of these aspects of commerce, it 'trespasses upon the national interests,' Great A & P Tea Co. v. Cottrell, 424 U.S. 366, 373, 96 S.Ct. 923, 928, 47 L.Ed.2d 55 (1976), and the courts will hold the regulation invalid under the Clause alone.

Id. In summary, the clause not only bestows powers upon Congress to regulate interstate commerce, but also limits the powers of the states to "erect barriers against interstate trade." Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35, 100 S.Ct. 2009, 2015, 64 L.Ed.2d 702 (1980). However, the limitation on state regulation is not "absolute." Id. at 36, 100 S.Ct. at 2015. The states "retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." Id.

[2] In scrutinizing state regulations under the Commerce Clause, courts inquire whether the regulations have only an "incidental" effect on interstate transactions, or whether they "affirmatively discriminate" against such transactions. Maine v. Taylor, 477 U.S. 131, 138-39, 106 S.Ct. 2440, 2447- 48, 91 L.Ed.2d 110 (1986). Statutes which regulate "even-handedly" and which have only incidental affect on interstate commerce violate the clause only if the burdens they impose on interstate trade are "clearly excessive in relation to the putative local benefits." Id., at 138, 106 S.Ct. at 2447 (citing, Pike v. Bruce Church, Inc., 397 U.S. 137, 141, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970). In such cases, the extent of the burden which the Commerce Clause will accept depends on the nature of the local interest, and whether that interest can "be promoted as well with a lesser impact on interstate activities." Pike, 397 U.S. at 142, 90 S.Ct. at 847. This relatively deferential standard has been dubbed the "Pike analysis."

[3] On the other hand, statutes which affirmatively discriminate against interstate transactions are the subject of stricter scrutiny. Id. They are invalid unless the state demonstrates that such statutes: (1) serve a legitimate local purpose; and (2) that such purpose could not be served adequately by available non-discriminatory means. Maine v. Taylor, 477 U.S. at 153, 106 S.Ct. at 2455. This test was formulated by the Supreme Court in Hughes v. Oklahoma, 441 U.S. 322, 336, 99 S.Ct. 1727, 1736, 60 L.Ed.2d 250 (1979).

Both the Hughes test analysis and the Pike analysis focus on the burdens on interstate commerce in light of local purposes and available alternatives. Under either approach the critical consideration is the overall effect of the statute on both local and interstate activity. [FN23] The difference obtains in that a closer means-end relationship is required of a statute that is discriminatory on its face than one which has only an incidental effect on interstate commerce.

FN23. Brown-Forman Distillers v. N.Y. State, 476 U.S. 573, 106 S.Ct. 2080, 2084, 90 L.Ed.2d 552 (1986).

The Supreme Court in Philadelphia v. New Jersey, 437 U.S. 617, 623, 624, 98 S.Ct. 2531, 2535-36, 57 L.Ed.2d 475 (1978) explained the difference between the two levels of scrutiny as follows:

> The opinions of the Court through the years have reflected an alertness to the evils of "economic isolation" and

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protectionism, while at the same time recognizing ***453** that incidental burdens on interstate commerce may be unavoidable when a state legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected.... The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a state's borders.... But where other legislative objectives are credibly advanced and there is not patent discrimination against interstate trade, the Court has adopted a much more flexible approach, the general contours of which were outlined in Pike v. Bruce Church Inc.....
Id.

In Brown-Forman Distillers v. N.Y. State, 476 U.S. 573, 582, 579, 106 S.Ct. 2080, 2084, 90 L.Ed.2d 552 (1986), the Supreme Court observed: "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." Id. (citing, Philadelphia v. New Jersey, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978) (New Jersey statute prohibiting importation of waste originating or collected outside the state struck down under the Commerce Clause); Shafer v. Farmers' Grain Co., 268 U.S. 189, 45 S.Ct. 481, 69 L.Ed. 909 (1925) (state regulatory scheme which had the effect of regulating interstate commerce in grain purchasing barred by Commerce Clause); and Edgar v. MITE Corp., 457 U.S. 624, 642-44, 102 S.Ct. 2629, 2641, 73 L.Ed.2d 269 (1982) (Illinois anti-takeover act violated Commerce Clause where it sought to regulate securities transactions having no connection with the state)). [FN24]

FN24. See also, C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, —, 114 S.Ct. 1677, 1684, 128 L.Ed.2d 399 (1994) (striking down a trash flow control ordinance that did not in explicit terms seek to regulate interstate commerce, but did nonetheless by its practical effect and design); Healy v. Beer Institute, Inc., 491 U.S. 324, 340-41, 109 S.Ct. 2491, 2501, 105 L.Ed.2d 275 (1989) (holding Connecticut's beer price affirmation statute violative of Commerce Clause and noting that the Supreme Court has "followed a consistent practice of striking down state statutes that clearly discriminate against interstate commerce ... unless that discrimination is justified by a valid factor unrelated to economic protectionism."). Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980) (holding Florida statute prohibiting out- of-state banks and others from owning or controlling Florida investment advisory businesses and another statute prohibiting certain out-of-state corporations from performing certain trust and fiduciary functions, violative of the Commerce Clause).

[4] In the case at bar, plaintiff argues that the undisputed purpose and effect of LSA-R.S. 22:1412.1-.2 (the anti-network statutes) is to increase the profits of local auto glass shops by decreasing and/or eliminating competition from the interstate networks. It is undisputed that the auto glass networks that have arrangements with insurers in Louisiana are all interstate networks. The anti network statutes outlaw such arrangements. These networks, which are all out-of-state entities, compete with local glass shops for insurance companies' dollars, and such interstate competition has reduced the local glass shops' profits. Louisiana's statutes at issue in this case effectively put an end to that competition.

The State argues that the "unfair trade practice" statutes were enacted to guarantee consumer choice in the selection of glass shops, and to create an open and free market in which glass shops, both interstate and intrastate, [FN25] can operate without the artificial control of supply created by brokering agreements. The State cites Exxon Corp. v. Maryland, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978) in support of its position. It submits that the Exxon decision is squarely on point and determined that a state may regulate the operations of its retail markets if in doing so it does not discriminate against interstate firms. Id., at 126-27, 98 S.Ct. at 2214. However, the Exxon Court buttressed its decision with the finding that the challenged regulation did not discriminate against several prominent interstate oil companies. Id.

FN25. The Court here notes that it is undisputed that there are no intrastate networks.

***454** The present case is factually distinguishable from the Exxon decision since the Louisiana statutes indisputably have the effect of discriminating in favor of the local glass auto shops and shifting all the glass repair business back from interstate networks to the local auto glass repair businesses. It is of no moment that the anti-network statutes apply regardless of state citizenship, since all of the networks operating in Louisiana are out-of-

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state businesses and by definition all local glass shops are in-state businesses. The Louisiana statutes at issue clearly have a discriminatory effect on interstate commerce, a situation which was not present in Exxon.

The State's argument that the statutes purpose is to protect consumer choice is transparent, at best. Louisiana already has in effect yet another statute, LSA-R.S. 22:658(D)(1) which requires that insurers maintain policyholder's choice of automobile repair services, and thus, guarantees policyholders' choice.

As to the State's argument that in addition to consumer choice, artificially low prices also endanger quality and safety, as shops will be forced to cut corners to make up for lost revenue, the Supreme Court has already nixed precisely the same argument. In Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 769, 96 S.Ct. 1817, 1829, 48 L.Ed.2d 346 (1976) the Court recognized that the "cutting corners" argument is nothing more than an after-the-fact rationalization for protectionist laws stating:

> There is no claim that the [legislation] in any way prevents the cutting of corners by the [retailer] who is so inclined. That [retailer] is likely to cut corners in any event. The only effect the [legislation] has on him is to insulate him from price competition and to open the way for him to make a substantial, and perhaps even excessive, profit in addition to providing an inferior service.

Id.

Here too, there is no claim that the challenged legislation prevents auto glass service businesses from cutting corners if they are so inclined. The challenged legislation addresses neither safety nor quality control. No studies or other evidence were submitted which would tend to suggest that the statutes would effect either of these worthy goals. Moreover, there is nothing in the record to suggest that the Globe/USA-GLAS, with its lesser prices to insurance companies such as Allstate, is providing auto glass of lesser quality or safety than that provided by local glass businesses. The challenged statutes address insurers' agreements with companies to manage or arrange insurance repair work and consequent price negotiation. It appears singularly aimed at preventing that practice. The undisputable effect of the challenged legislation in this case is to insulate local auto glass repair businesses from price competition with out-of-state networks.

The State argues that networks "artificially decrease the market price of glass repair" and "threaten[ ] the financial stability of the retail glass industry." [FN26] Viewed in light of the undisputed facts, [FN27] the State's argument is tantamount to an admission that the statutes' purpose is to protect local glass shops against competition from the networks. Borrowing language from the court in Allstate Insurance Company v. South Dakota, 871 F.Supp. 355 (D.S.D.1994), [FN28] "the State cannot *455 properly protect [local businesses] from the networks who will charge a lower price and thereby help the local businesses maintain their profit margins." Id. at 358. There is no question but that direct price regulation, subsidies, and tax benefits would all be much more direct and less restrictive means of "stabilizing the glass industry."

FN26. See, Defendant's Memorandum In Support of its Cross Motion for Summary Judgment, at p. 5.

FN27. It is undisputed that local auto glass repair businesses charge insurers and their insureds higher prices than they charge cash customers or glass networks because they do not have to compete on price for insured business. Essentially, competition from out-of-state networks prevents the local auto glass repair shops from overcharging insurance companies and their policyholders. The networks offer lower prices by doing the information gathering and the price shopping for the insurance company and their insureds.

FN28. In Allstate Ins. Co. v. South Dakota, 871 F.Supp. 355 (D.S.D.1994), the district court considered a South Dakota statute which effectively prevented Allstate from getting any advantage in contracting with USA-GLAS by prohibiting it from telling its insureds about the network. The court held that the effect of the South Dakota's statute was to deprive interstate networks of any benefits in contracting with insurance companies to decrease price competition for local glass businesses. As to the state's purpose of protecting South Dakota auto glass businesses from the effects of unfair acts by the insurers and networks, the court held that state anti-trust laws would serve the State's interests equally well. The court noted South Dakota law already requires that insurers maintain policyholder choice of automobile repair services. The court further found nothing in the record indicating that USA with its lesser prices to Allstate is providing auto glass of lesser quality or safety than that provided by local glass businesses. The court also found that consumer safety laws would more effectively promote consumer safety than

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providing price protection to local businesses. Id. at 358.

Whether scrutinized under the Hughes test or the more lenient Pike analysis, LSA-R.S. 22:1214.1 and LSA-R.S. 22:1214.2 are violative of the Commerce Clause. Although the State has offered several justifications noted above, the challenged legislation clearly has the effect of impermissibly burdening interstate commerce by discriminating against the out-of-state networks in favor of local auto glass repair businesses. Simply stated, their effect is the elimination of the local auto glass repair shops' out-of-state competition--the networks. Such cannot be tolerated where as here, even if there are legitimate local purposes for the statutes, such can be "promoted as well [and perhaps more effectively] with a lesser impact on interstate activities." Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 100 S.Ct. 2009, 2016, 64 L.Ed.2d 702 (1980). [FN29]

FN29. "The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. at ----, 114 S.Ct. at 1682.

The Louisiana statutes at issue here squelch out-of-state (the network's) competition in the auto-glass repair service. They are per se invalid. Moreover, the instant case does not fall into that narrow class of cases in which the State can demonstrate, under either rigorous scrutiny or the more lenient Pike analysis, that no other means exist which may advance any legitimate local interests the State may have.

Accordingly, and for all of the above and foregoing reasons,

IT IS ORDERED that Plaintiff's Motion for Summary Judgment is hereby GRANTED.

IT IS FURTHER ORDERED that Count II of plaintiff's complaint is DISMISSED AS MOOT.

IT IS FURTHER ORDERED that Defendant's Cross Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED that counsel for plaintiff shall submit the proposed form of judgment consistent with the Court's written reasons.

END OF DOCUMENT

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§ 38.2-517. Unfair settlement practices; replacement and repair; penalty. -

A. No person shall:

1. Require an insured or claimant to utilize designated replacement or repair facilities or services, or the products of designated manufacturers, as a prerequisite to settling or paying any claim arising under a policy or policies of insurance; ~~or~~

2. Engage in any act of coercion or intimidation causing or intended to cause an insured or claimant to utilize designated replacement or repair facilities or services, or the products of designated manufacturers, in connection with settling or paying any claim arising under a policy or policies of insurance~~.~~ ; or

3. Recommend the use of a designated replacement or repair facility or service, or the products of a designated manufacturer, in connection with settling or paying any claim arising under a policy or policies of insurance without first advising the insured or claimant, either orally or in writing, that the insured or claimant is not obligated to use the replacement or repair facility or service or the products of the manufacturer recommended by the insurer or by a representative of the insurer. However, the use of a replacement or repair facility or service or the products of a manufacturer chosen by the insured or claimant in no way alters the company's liability under any portion of an insurance policy and in no way alters the insured's or claimant's obligations under the policy or under law. For purposes of this section, a recommended replacement or repair facility or service includes any shop or service on an insurer's network or preferred vendor list.

B. Any person violating this section shall be subject to the injunctive, penalty, and enforcement provisions of Chapter 2 (§ 38.2-200 et seq.) of this title.