STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: September 10, 2014)

PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, Plaintiff,	:	
v.	:	**C.A. No. PB 14-1983**
PAUL MCGREEVY, in his official capacity as Director of the Department of Business Regulation for the State of Rhode Island and in his official capacity as Insurance Commissioner for the State of Rhode Island; and PETER F. KILMARTIN, in his official capacity as Attorney General for the State of Rhode Island, Defendants.	:	

DECISION

SILVERSTEIN, J. Property Casualty Insurers Association of America (Plaintiff)[1] brings this suit against Paul McGreevy, in his official capacity as Director of the Department of Business Regulation for the State of Rhode Island and in his official capacity as Insurance Commissioner for the State of Rhode Island (Defendant), and Peter F. Kilmartin, in his official capacity as Attorney General for the State of Rhode Island (Attorney General), seeking a determination that § 8A(4)(a) of Insurance Regulation 73 (the Regulation) unlawfully extends the definition of "fair market value." Plaintiff asserts that the Regulation as promulgated by Defendant violates both the Administrative Procedures Act (APA) and the Contracts Clause of the United States and Rhode Island Constitutions. Currently before the Court is Plaintiff's Motion for Temporary and

[1] Plaintiff brings this suit in a representational capacity on behalf of its member insurers who are licensed property and casualty insurers authorized to sell motor vehicle insurance in Rhode Island.

Permanent Injunctive Relief pursuant to Super. R. Civ. P. 65 (Motion). Defendant opposes Plaintiff's Motion.

I

Facts and Travel

Plaintiff is a trade association representing 328 insurers licensed in Rhode Island to write property and/or casualty insurance, including motor vehicle insurance.[2] Plaintiff's members write 50.7% of property and/or casualty insurance issued in Rhode Island. Among the standard insurance contracts issued by Plaintiff's members are the standardized forms developed by the Insurance Services Office, Inc. (ISO) and approved by the state insurance commissioner. On total loss claims, Plaintiff is required to indemnify policyholders and other third-party claimants by paying an amount equal to the "[a]ctual cash value of the stolen or damaged property" at the time of loss. See Auto Policy, Pl.'s Ex. B, at 11. The ISO standard policies do not define the term "actual cash value."

On July 17, 2013, G.L. 1956 § 27-9.1-4(a)(25) became effective, establishing it as an unfair claims practice to designate "a motor vehicle a total loss if the cost to rebuild or reconstruct the motor vehicle to its pre-accident condition is less than seventy-five percent (75%) of the 'fair market value' of the motor vehicle immediately preceding the time it was damaged[.]" Furthermore, § 27-9.1-4(a)(25)(i) provides that "[f]or the purposes of this subdivision, 'fair market value' means the retail value of a motor vehicle as set forth in a current edition of a nationally recognized compilation of retail values commonly used by the automotive industry to establish values of motor vehicles[.]" (emphasis added).

[2] For ease of reference, the Court will not distinguish between Plaintiff and Plaintiff's members, unless necessary.

On January 28, 2014, Defendant issued a "Concise Explanatory Statement" that accompanied the most recent amendment of the Regulation. In the statement, Defendant stated that the Regulation was amended:

> "to address the recent enactment of R.I. Gen. Laws 27-9.1-4(25) regarding total loss vehicles; to bring the remaining portions of the regulation into conformance with the [National Association of Insurance Commissioners] model . . . , to address issues that have arisen since the last amendment of this regulation and to incorporate the substance of bulletins previously issued by the Department into the regulation." Pl.'s Ex. C.

Section 8(A)(1) of the Regulation states that:

> "[p]ursuant to R.I. Gen. Laws § 27-9.1-4(25) an insurer may not designate a vehicle a total loss if the cost to rebuild or reconstruct the motor vehicle to pre accident condition is less than 75% of the fair market value of the motor vehicle immediately preceding the time it was damaged unless the requirements of subsection (3) below are met." Pl.'s Ex. D.

Section 8(A)(2) of the Regulation mirrors the language of § 27-9.1-4(a)(25)(i), which provides that "fair market value" determinations are to be determined by consulting a nationally recognized compilation of automotive retail values. Furthermore, § 8(A)(4)(a) of the Regulation directs that "[a] cash settlement shall be based upon the fair market value of the motor vehicle less any deductible provided in the policy." Additionally, § 8(A)(4)(b) of the Regulation states that in calculating the cash settlement amount, "[d]eduction shall not be made for reconditioning or dealer preparation." However, the Regulation does allow insurers to adjust for "betterment or depreciation," so long as any deviation can be supported with "documentation in the claim file by giving particulars of the automobile condition that warrant said deviation. Any deductions . . . must be measurable, discernible, itemized and specified as to dollar amount and shall be appropriate in amount." Regulation § 8(A)(4)(b).

In order to qualify as a "nationally recognized compilation," a valuation service applicant had to apply to Defendant within ten days of the effective date of the Regulation. Defendant was then to "review the filings and determine whether it will hold a hearing on those entities that have made such application[,]" and then "publish a bulletin identifying those entities that qualify[.]" Regulation § 8(A)(2)(b)-(c). On March 24, 2014, Defendant published "Insurance Bulletin 2014-2" which approved the National Automobile Dealers Association (NADA) and Kelley Bluebook (KBB) as the "nationally recognized compilation[s]." See Pl.'s Ex. E.

Prior to the amendment of the Regulation, Defendant required insurers to base total loss valuations on NADA or "substantially similar" valuation services. ("In determining the actual cash value of a motor vehicle to settle motor vehicle property damage liability and collision damage claims, Insurers shall use as a guide, the average retail values indicated by the [NADA] official User Car Guide (Guide) or some service substantially similar (with appropriate adjustment for such factors as vehicle condition, high and low mileage, accessory options)."). Operating under this framework, Plaintiff would determine actual cash value by considering the year, make and model of the vehicle, condition, mileage, wear and tear, prior damage, location and other factors. See Compl. ¶ 26.

Plaintiff seeks a preliminary injunction restraining Defendant from implementing or enforcing the Regulation as amended until this Court reaches the merits of Plaintiff's claims. Defendant objects to Plaintiff's motion. Additionally, by agreement of the parties, the Attorney General was previously dismissed as a defendant from the case.

II

Standard of Review

"In deciding whether to issue a preliminary injunction, the hearing justice must consider whether the moving party: (1) has a reasonable likelihood of success on the merits; (2) will suffer irreparable harm without the requested relief; (3) has the balance of equities in his or her favor; and (4) has shown that the requested injunction will maintain the status quo." Pucino v. Uttley, 785 A.2d 183, 186 (R.I. 2001) (citations omitted). In determining the reasonable likelihood of success on the merits, it is only required that the moving party make out a prima facie case. DiDonato v. Kennedy, 822 A.2d 179, 181 (R.I. 2003) (citing and quoting Fund for Cmty. Progress v. United Way of Se. New England, 695 A.2d 517, 521 (R.I. 1997)). Furthermore, irreparable harm is considered an injury "presently threatened or imminent and for which no adequate legal remedy exists to restore that plaintiff to its rightful position." Fund for Cmty. Progress, 695 A.2d at 521 (citations omitted). The equities are determined by "examining the hardship to the moving party if the injunction is denied, the hardship to the opposing party if the injunction is granted and the public interest in denying or granting the requested relief." Id. (citing In re State Emps.' Unions, 587 A.2d 919, 925 (R.I. 1991)). In total, "a preliminary injunction is not ordinarily to achieve a final and formal determination of the rights of the parties or of the merits of the controversy, but is merely to hold matters approximately in status quo." Fund for Cmty. Progress, 695 A.2d at 521 (quoting Coolbeth v. Berberian, 112 R.I. 558, 564, 313 A.2d 656, 659 (1974)).

III

Discussion

A

Likelihood of Success

To determine whether the moving party has met its burden to warrant injunctive relief, the Court must first assess whether the moving party has shown a reasonable likelihood of success on the merits. See Fund for Cmty. Progress, 695 A.2d at 521; see also Iggy's Doughboys v. Giroux, 729 A.2d 701, 705 (R.I. 1999); Pawtucket Teachers Alliance Local No. 920 v. Brady, 556 A.2d 556, 557 (R.I. 1989). This showing need not rise to the level of a certainty of success, but instead the moving party is only required to make out a prima facie case. See Coolbeth, 112 R.I. at 566, 313 A.2d at 660.

1

APA Appeal

Plaintiff argues that Defendant exceeded their legislative authority when adopting the Regulation. Specifically, Plaintiff argues that the unambiguous language of § 27-9.1-4(a)(25)(i) makes it evident that the General Assembly intended that the definition of "fair market value"—to be determined by reference to approved compilations—was limited to "total loss determinations" and not "total loss valuations" because of the phrase "[f]or the purposes of this subdivision[.]" Plaintiff asserts that if the General Assembly had intended broader use of approved compilations, then the General Assembly would have used different language to make the definition applicable to either the entire title, chapter, or section. See e.g., G.L. 1956 § 9-26-4.1(b) ("For the purposes of this section . . ."); G.L. 1956 § 11-41-32(c) ("For the purposes of this chapter . . ."); G.L. 1956 § 17-1-2 ("For the purposes this title . . ."). Additionally,

Plaintiff argues that Defendant has exceeded its authority because "actual cash value" is the proper legal measure of damages in Rhode Island and not "fair market value."

Defendant responds by arguing that, unless its interpretation is either clearly erroneous or unauthorized, then it must be given deference by this Court and found to be lawful. Defendant cites § 27-9.1-8, which provides that "[t]he director may, after notice and a hearing, promulgate reasonable rules, regulations, and orders as are necessary or proper to carry out and effectuate the provisions of this chapter." Defendant asserts that the General Assembly failed to define "fair and equitable settlement of claims" or "reasonable standards" for the "settlement of claims" within §§ 27-9.1-1, et seq. (the Unfair Claims Settlement Practices Act), and accordingly, it is within Defendant's authority to supply meaning to those terms. Defendant claims that the Regulation provides the standards by which those undefined terms will be implemented. Furthermore, Defendant contends that it was within its authority of extending the use of "fair market value" as defined in § 27-9.1-4(a)(25) to "total loss valuations" because, according to Defendant, the definition applies to the whole chapter, 9.1 of title 27. Defendant posits that the term "subdivision" is not the same as "title," "chapter," "section," or "sub-section"—the recognized classifications into which our General Laws generally are divided—and thus, it was up to Defendant to determine the breadth of the definitions' application. Furthermore, Defendant argues that utilizing "fair market value" for "total loss determinations" but not "total loss valuations" would lead to absurd results where consumers would have their vehicles declared a total loss but not be fully compensated. Finally, Defendant asserts that while "actual cash value" and "fair market value" do differ in the context of homeowner insurance, they are actually the same for the purpose of automobile insurance determinations.

Our General Assembly does not recognize "subdivision" as one of the enumerated parts of the General Laws. Rather, our General Laws are divided into "titles," "chapters," "sections," and "sub-sections." Without a clear intention by the General Assembly as to what it intended by including the phrase "[f]or the purposes of this subdivision[,]" it is left up to Defendant to interpret the statute in a reasonable manner. While Plaintiff cites two cases where other courts determined that use of the limiting phrase "for purposes of this subdivision" confined the use of the term at issue to the specific subdivision, these decisions were based in states where "subdivision" is commonly used within the specific state's general laws. In Thomas v. W. Nat'l Ins. Grp., 562 N.W.2d 289, 290 (Minn. 1997), the Minnesota Supreme Court found that the word "disability" was confined to the subdivision it was set forth in because of the use of "for purposes of this subdivision[.]" However, Minnesota statutes are actually divided into "titles," "chapters," and "subdivisions." See Minn. Stat. § 72A.201.6 (Standards for automobile insurance claims handling, settlement offers, and agreements). Furthermore, in Small v. Going Forward Inc., 879 A.2d 911, 914 (Conn. App. Ct. 2005), the Appellate Court of Connecticut found that "legislature's use of the terms '[f]or the purposes of this subdivision' and 'means' reflects that the statement that follows, concerning the two types of fees, is intended to assign meaning to terms used in the subdivision." Connecticut statutes are subdivided into "titles" and "chapters," and then both into "sections" and "subdivisions." Compare Conn. Gen. Stat. Ann. § 38a-363 ("As used in sections 38a-17, 38a-19 and 38a-363 to 38a-388, inclusive . . .") with Conn. Gen. Stat. Ann. § 38a-336a ("Such description of coverage shall be included in a conspicuous manner with the informed consent form specified in subdivision (2) of subsection (a) of section 38a-336.") (emphasis added).

Here, without a common usage of the term "subdivision" in our General Laws, this Court determines that Defendant's interpretation to apply "fair market value" to all of § 27-9.1, et seq. is a "'reasonable construction by the agency charged with its implementation.'" Labor Ready Ne., Inc. v. McConaghy, 849 A.2d 340, 346 (R.I. 2004) (quoting Barnhart v. Thomas, 540 U.S. 20, 26 (2003)). A court must give deference to an agency interpretation that is neither clearly erroneous nor unauthorized when a statutory provision is susceptible to more than one reasonable interpretation. Labor Ready, 849 A.2d at 345-46. See also Pawtucket Power Assocs. Ltd. P'ship v. City of Pawtucket, 622 A.2d 452, 456-57 (R.I. 1993) ("Deference is accorded even when the agency's interpretation is not the only permissible interpretation that could be applied."). Therefore, because Defendant has not exceeded their authority, and Defendant's interpretation is entitled to due deference, the Court finds that Plaintiff does not have a reasonable likelihood of success on the merits with regard to their challenge of the Regulation under the APA.

2

Contracts Clause Claim

Plaintiff argues that the Regulation requiring payment based on "fair market value" violates established insurance contracts that Plaintiff has with customers which obligate it to pay "actual cash value." Plaintiff asserts that the difference between the two calculations is more than incidental, but rather has actual economic consequences. Plaintiff contends that the Regulation does not allow for adjustments such as "take price,"[3] and therefore, it ensures that the price to be paid will not be "actual cash value." Finally, Plaintiff claims that no legitimate public purpose can be served by implementing the Regulation.

[3] "Take price" is the price that a dealer would "take" for a vehicle, as opposed to the asking price.

Defendant counters by arguing that any alleged interference occurred with a contract previously in existence because insurance contracts typically last for a term of either six or twelve months. Furthermore, Defendant contends that the term "actual cash value" is not defined in the insurance policies, including the standard ISO policy. Thus, Defendant asserts that the Regulation does not impair any obligation of Plaintiff under the contract. Moreover, Defendant claims that, if an impairment did exist, it would be minimal and hardly burdensome to Plaintiff. Further, Defendant states that any impairment is not substantial, but rather, was actually foreseeable since the insurance industry is highly regulated. Finally, Defendant suggests that the Regulation serves the legitimate public purpose of protecting customers from inadequate total loss cash settlements.

Our Supreme Court has adopted a three-part test announced by the United State Supreme Court when deciding Contracts Clause violations. R.I. Depositors Econ. Prot. Corp. v. Brown, 659 A.2d 95, 106 (R.I. 1995).

> "First, has the state law in fact substantially impaired a contractual relationship? Second, if the law constitutes a substantial impairment, can the state show a legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem? Third, is the legitimate public purpose sufficient to justify the impairment of the contractual rights?" Id. (internal quotations and citations omitted).

Here, a prerequisite to finding a potential violation of the Contract Clause is the existence of an unchanged contractual relationship before the Regulation was enacted. It can at least be argued by Plaintiff that, even though the contracts may have been renewed since the Regulation was enacted, the parties intended to enter into a single policy with multiple renewals. See Montague v. Dixie Nat. Life Ins. Co., C/A 3:09-687-JFA, 2010 WL 2428805 (D.S.C. June 11, 2010) ("The court finds these provisions incompatible with a policy term of thirty days and that

the intent of the parties as manifested by the Policy language reflects an intent to form a 'continuous contract of insurance for life subject to forfeiture for nonpayment of premiums.'").

Having found that Plaintiff could potentially get past the burden of proving a contractual relationship, the Court next turns to whether the Regulation substantially impairs the contracts. Here, the Regulation sets forth standards for how Plaintiff must calculate settlement offers on total loss claims. Previously, Plaintiff made these calculations based upon an undefined term in the policies it has with consumers. Operating under this paradigm, Plaintiff would base these calculations upon mileage, condition, options, location, and other factors. However, because of the Regulation, Plaintiff may now only make adjustments for condition, mileage, and options. Thus, effectively, the only impairment is that Plaintiff may not adjust for location or other factors.[4] Such a minimal alteration will not constitute a substantial impairment, especially in light of the fact that such an alteration should have been foreseeable. See City of El Paso v. Simmons, 379 U.S. 497, 516-17 (1965).

"In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past." Energy Reserves Grp., Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411 (1983). Here, the industry of Plaintiff, the automobile insurance industry, is without a doubt a highly-regulated industry in Rhode Island. See G.L. tit. 27.; see also Maine Educ. Ass'n Benefits Trust v. Cioppa, 842 F. Supp. 2d 373, 383 (D. Me. 2012) ("[E]xpectations are necessarily adjusted when the parties are operating in a heavily regulated industry, such as insurance, when the parties can readily foresee future regulation involving the subject matter of their contract."). Further, as this Court stated previously, "[i]n Energy Reserves the United State Supreme Court noted that 'at the time of the

[4] Other factors presumably being something like "take price."

execution of these contracts, Kansas did not regulate natural gas prices specifically, but its supervision of the industry was extensive and intrusive.'" Blue Cross/Blue Shield of R.I. v. State Dep't of Bus. Regulation, PB-04-5769, 2005 WL 1530449 (R.I. Super. June 23, 2005) (quoting Energy Reserves, 459 U.S. at 414). Thus, it could have been expected by Plaintiff that the calculation of total loss settlement offers would be regulated by Defendant because of the prior extensive and intrusive supervision and regulation of the automobile insurance industry.

Furthermore, this Court finds that the essential purpose of Plaintiff's insurance policies have not been impaired. See In re GTE Reinsurance Co., PB-10-3777, 2011 WL 7144917, at *15 (R.I. Super. Apr. 25, 2011) (In re GTE) (citing 1 Steven Plitt, et al., Couch on Insurance 3d § 1:6, at 1-16 (2009)). In In re GTE, this Court stated that "[w]hile the Court acknowledges that the 'essence' of insurance is the transfer of risk, the Court is of the opinion that at its most basic level, the risk involved is essentially about the right to receive, and the obligation to make, a monetary payment when a claim arises." Id. After making this determination, this Court found that the essential purpose of the contract at issue in In re GTE was not interfered with despite the fact that a change in the law resulted in a different method for calculating the monetary payment. Id. at *16 (citing Faitoute Iron & Steel Co. v. City of Asbury Park, 316 U.S. 502, 511 (1942) (holding that under a Contract Clause analysis, the state statute should be designed to permit performance of contractual obligations, even if it entails some modification, because "[i]mpairment of an obligation means refusal to pay an honest debt; it does not mean contriving ways and means for paying it")). Similarly, here the Regulation does not interfere with the purpose of the insurance contracts at issue, but rather the Regulation only affects the "ways and means for paying it," and thus, the minor modification still permits compliance with the essential purpose of the insurance contracts. In re GTE, 2011 WL 7144917, at *15-16.

Moreover, the In re GTE decision cited the fact that no evidence had been produced that established that an actual injury would result from the change in computation methods. See id. at *16-17 ("This is particularly true where, as here, Hudson has failed to establish beyond a reasonable doubt that the actuarial-based payout will, as a matter of fact, be less than its recovery if GTE RE remained in run-off. Frankly, the evidence before the Court is simply insufficient to establish with any certainty that Hudson indemnification rights would be substantially impaired by the Commutation Plan."). Here too, Plaintiff has absolutely failed to produce any actual evidence that the use of NADA or KBB will result in substantial impairment to Plaintiff's contractual rights. Rather, Plaintiff relies on the argument that the NADA and KBB valuations are based on "asking prices" that automobile dealers use in negotiations with customers and, thus, different than "actual cash value." Plaintiff even cites to NADA's website for the proposition that "[a]ll values and related content contained within this NADAguides product are the opinions of NADAguides' editorial staff and may vary from vehicle to vehicle." See Pl.'s Ex. G. Yet, the NADA website also states, "vehicles sell for both higher and lower than the guide value." See Pl.'s Ex. F, at 2. At best, all that Plaintiff has established is that the method of calculating "fair market value," as required by the Regulation, may not always be consistent with the prior calculation method used by Plaintiff in determining "actual cash value." However, as Plaintiff recognized through the citation to the NADA website, the "fair market value" may be more or less than vehicles actually sell for. Thus, without actual evidence of impairment, this Court declines to suppose one based on a mere difference in calculation methods. See Nonnenmacher v. City of Warwick, 722 A.2d 1199, 1203 (R.I. 1999) (holding that plaintiff had failed to establish that the ordinance would necessarily impair or reduce the pension benefits that plaintiff ordinarily would receive); Retired Adjunct Professors of the State of R.I. v. Almond,

690 A.2d 1342, 1347 (R.I. 1997) (finding it was not clear "as a factual matter" that the statutory enactment would "actually have" an adverse impact, and therefore, declined to find substantial impairment); In re Advisory Op. to the Governor (DEPCO), 593 A.2d 943, 949 (R.I. 1991) (finding that the statute merely affected timing of payments and did not substantially impair the contractual relationship).

Finally, even assuming arguendo that Plaintiff was able to prove substantial impairment, there has not been a showing that the legitimate public purpose is not reasonable and appropriate. Plaintiff argues that Defendant's stated public purpose of protecting consumers is at odds with Defendant's suggestion that Plaintiff could have sought a rate increase to offset any increased costs. However, Defendant's stated public purpose is a legitimate one, in line with the overall purpose of §§ 27-9.1-1, et seq. Plaintiff's assertion that Defendant's stated public purpose is negated by the suggestion of seeking a rate increase is mere supposition. Any requested rate increase would need to be supported properly by Plaintiff with documented evidence. Defendant's suggestion was only an alternative remedy that Defendant proposed Plaintiff may be able to seek to set off an alleged, but unproven, harm. Based on the foregoing, Plaintiff has not set forth a reasonable likelihood of success on the merits for its Contracts Clause claim.

B

Irreparable Harm and Balancing of the Equities

Even assuming arguendo that Plaintiff could succeed on the merits of its claim, the "irreparable harm" requirement that is critical to granting injunctive relief cannot be adequately demonstrated. Plaintiff claims that any amounts that it has to pay out based on "fair market value" over "actual cash value" constitute irreparable harm because it will not be able to recoup those payments. However, as noted above, the Court does not even see a substantial harm facing

Plaintiff. Furthermore, if Plaintiff does believe they face the loss of potential payments, they are able to heed Defendant's suggestion of filing for a rate increase with evidence supporting such increased payments. This rate increase would presumably offset any alleged irreparable harm Plaintiff claims it imminently faces.

With respect to balancing the equities, this Court adopts the reasoning set forth above when it essentially weighed the public purpose as stated by Defendant against the alleged harm to Plaintiff. The Court finds that any minimal impact that enforcement of the Regulation may have is outweighed by Defendant's protection of insurance consumers.

IV

Conclusion

Based on the foregoing analysis, the Court finds that Plaintiff has failed on the first three prongs of the standard for granting a preliminary injunction.[5] Accordingly, the Court denies the Plaintiff's request to grant a preliminary injunction. Prevailing counsel may present an order consistent herewith, to be settled after due notice to counsel of record.

[5] As Plaintiff failed on the first three prongs, the Court declines to address the fourth prong, maintaining the status quo.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Property Casualty Insurers Association of America v. McGreevy, et al.**
CASE NO:	**PB 14-1983**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**September 10, 2014**
JUSTICE/MAGISTRATE:	**Silverstein, J.**
ATTORNEYS:	
For Plaintiff:	**Mark W. Freel, Esq.** **Jon M. Anderson, Esq.** **Mackenzie Mango, Esq.**
For Defendant:	**Elizabeth Kelleher Dwyer, Esq.** **Jenna R. Algee, Esq.**