

**STATE OF MAINE  
BUREAU OF INSURANCE**

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IN RE: )  
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APPEAL OF DISAPPROVED RATE )  
FILINGS BY PROGRESSIVE )  
CASUALTY INSURANCE COMPANY, )  
PROGRESSIVE NORTHWESTERN )  
INSURANCE COMPANY, )  
PROGRESSIVE NORTHERN )  
INSURANCE COMPANY, AND UNITED )  
FINANCIAL CASUALTY COMPANY )  
)  
)  
Docket No. INS-15-1001 )

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**APPELLANTS' BRIEF IN RESPONSE TO  
SUPERINTENDENT'S ORDER  
SPECIFYING COURSE OF FURTHER  
PROCEEDINGS**

24-A M.R.S. §2916 is a very narrow statute which places a single restriction on an insurer's ability to increase premiums: premiums may not increase "for the sole reason that" the policyholder has aged. This statute does not place any other limitations on when, how, or why rates may increase and it certainly does not prevent rates from increasing as a result of increased loss expectations. Progressive Casualty Insurance Company, Progressive Northwestern Insurance Company, Progressive Northern Insurance Company and United Financial Casualty Company (collectively, "Progressive") respectfully submit that section 2916 is inapplicable to and provides no grounds for disapproval of the Filing, because rate increases in the Filing are purely the result of increased loss expectation.

**I. The prohibition on rate increases caused by increased policyholder age in 24-A M.R.S. §2916 is unambiguously narrow and inapplicable to rates which increase with expected losses.**

24-A M.R.S. §2916 prohibits rate increases "for the sole reason that" the policyholder has aged:

"No insurance company authorized to transact business in this State shall cancel, reduce liability limits, refuse to renew or increase the premium of any automobile insurance policy of any kind whatsoever for the sole reason that the person to whom such policy has been issued has reached a certain age."

This single, narrow limitation is the only one contained in the plain language of section 2916 and, therefore, if an increase in age does not, by itself, cause an increase in premiums, the Bureau has no authority under this statute to disapprove a filing. Section 2916's scope and application should not be extended beyond its plain language. *See Marsella v. Bath Iron Works Corp.*, 585 A.2d 802, 803 (Me. 1991) ("[w]here the statutory language is plain and unambiguous, there is no occasion for resort to rules of statutory interpretation to seek or impose another meaning"). *See*,

also, 73 Am. Jur. 2d Statutes §104 (“[a]s a rule, where the language of a statute is clear and unambiguous, its clear meaning may not be evaded by an administrative body or a court under the guise of construction”).<sup>1</sup>

The key phrase in this statute is “for the sole reason that.” When applying section 2916, the Bureau must give this phrase its ordinary meaning. *See, e.g., Toomey v. Town of Frye Island*, 2008 ME 44, ¶ 10, 943 A.2d 563 (citing the general proposition that “[a]s there is no ambiguity in the plain language of the statute, its ordinary meaning governs”). With the help of Oxford Dictionary, this phrase is easily broken down:

First, the use of the word ‘reason’ means that section 2916 only applies when a policyholder’s increased age causes a rate increase. Mere correlation does not suffice. Oxford Dictionary defines ‘reason’, in relevant part, as “[a] cause, explanation, or justification for an action or event.” The use of ‘reason’ in section 2916 would be without meaning if the Bureau chose to apply the statute even when a policyholder’s increased age merely correlated with a higher rate but did not cause it. *Carrier v. Sec’y of State*, 2012 ME 142, ¶12, 60 A.3d 1241 (a statute should be interpreted to “give all of its words meaning”).

Second, the use of the word ‘sole’ in the statute must be read to further limit the prohibition on rate increases to those instances where increased age is the one and only cause of the higher premium. ‘Sole’ is defined in the Oxford Dictionary as “[o]ne and only”. If there is any other reason in addition to or to the exclusion of increased age for a rate increase, then section 2916 does not apply.

Read together, ‘sole reason’ requires that age, and age alone, cause the premium increase. This is consistent with the way courts of multiple jurisdictions have interpreted this phrase.<sup>2</sup> The Texas Supreme Court has explained that an employee in a wrongful termination suit must prove he was discharged “for the sole reason that the employee refused to perform an illegal act” and that this requires “that his discharge was for no reason other than his refusal to perform” that act. *Sabine Pilot Service, Inc v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985)(underline added). The U.S. District Court in Oregon has equated “but for” causation with a “sole reason” requirement. *Blikas v. Rests. Unlimited*, 2011 U.S. Dist. LEXIS 129485, \*35 (D. Or. Aug. 18, 2011) (evidence that an employee would not have been terminated but for his age “requires a showing that age was the sole reason for the termination”). *See, also, Maesta v. Segura*, 416 F.3d 1182, 1188 (10th Cir. 2005)(noting that it is far more burdensome to prove that speech was the sole reason

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<sup>1</sup> The language of section 2916 is not ambiguous. “An ambiguous statute has language that is reasonably susceptible of different interpretation.” *Dep’t of Corr. V. Pub. Utils. Comm’n*, 2009 ME 40, ¶¶8-9, 968 A.2d 1047 (the term “legal entity” is ambiguous). Section 2916 does not contain words which are vague or prone to multiple competing and commonplace definitions. *Cf. Anthem Health Plans of Me., Inc. v. Superintendent of Ins.*, 2011 ME 48, ¶ 12, 18 A.3d 824 (statutory requirement that rates ‘not be excessive, inadequate, or unfairly discriminatory’ is ambiguous, but ambiguity could be cured “through the simple insertion of the definition of the phrase ‘not...inadequate’”).

<sup>2</sup> This phrase seems to appear frequently in wrongful termination actions.

for termination from employment than to prove that speech played a substantial part in termination).

The Superintendent's first question in his Order Specifying the Course of Further Proceedings asks if "there are any circumstances in which 24-A M.R.S. §2916 permits an insurer to increase the premium of an automobile insurance policy in Maine...for operators that have reached a certain age." Order at 2. This question mischaracterizes the statute, and flips the applicable presumption on its head. Section 2916 does not "permit" an insurer to do anything, in the sense that it does not establish a universe of scenarios where rate increases are permissible. Instead, the statute plainly establishes a single narrow circumstance where an insurer cannot increase rates, and thereby implies that increased rates are otherwise allowed. *See* 73 Am. Jur. 2d Statutes § 120 (the expression of particular matters in a statute implies exclusion of others). A rate increase is not prohibited by §2916 if age is not a cause of the increase, or if age is one of multiple causes of the increase.

**II. Section 2916 does not provide any authority for the Bureau to disallow rates that increase with expected losses, even if the rate increase correlates to an increase in age.**

The key legal issue for purposes of this appeal is whether 24-A M.R.S. §2916 prohibits a rate increase for insured who have reached a certain age if that increase is caused by an actuarially justified multivariate analysis of loss expectation. More broadly, if expected losses increase with age, can rates increase with expected losses? The short answer is 'yes', based on the Insurance Code's requirement that rates relate to loss expectations, and based on the Bureau's prior approval of a Travelers Filing with rates that increase when an insured turns 65.

Section 2916 does not address, and therefore does not prohibit, rates caused by an increase in expected losses. Presumably for this reason, and because tying rates to expected losses is commonplace, the Bureau's own Bulletin 334 rightly<sup>3</sup> distinguishes between premiums that increase "solely due to the advancement in age" (this "may not" happen) and those that increase as "part of a multivariate analysis of loss expectation."

Elsewhere, Maine's Insurance Code encourages—even requires—rates tied to actuarially-justified multivariate analysis of loss expectation. Rates must reflect "past and prospective loss experience" (24-A M.R.S. §2303(1)(C)) and can be tied to risk classifications which "measure any differences among risks that may have a probable effect upon losses or expenses." 24-A M.R.S. §2303(1)(G). To comply with Maine's Code, insurers employ actuaries who determine past and prospective loss experience and establish valid risk classifications. In the process of creating justified rates, these actuaries are bound to consider relevant variables and if age is related to expected outcomes either causally or by correlation, the Actuarial Standards of

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<sup>3</sup> Because 24-A M.R.S. §2916 is unambiguous, Bulletin 334 must (and does) comport with the statute. *See Cobb v. Bd. Of Counseling Prof'ls Licensure*, 2006 ME 48, ¶13, 896 A.2d 271 (agency's construction of an unambiguous statute does not affect the statute's effect or interpretation)

Practice demand that it be included in the analysis. *See* Actuarial Standard of Practice No. 12, §3.2.1 (“[t]he actuary should select risk characteristics that are related to expected outcomes”).

Maine law requires that insurance rates reflect actual and expected loss experience and section 2916 does not contain any language which changes this requirement. Section 2916 does not say that age must be excluded from any multivariate analysis of loss expectation, nor does it say that an increase in expected losses must not correlate to an increase in age. Section 2916 says very narrowly that an increase in age cannot, by itself, cause an increase in rates. From the narrow scope of this statute, and the Insurance Code’s broader demand that rates link to loss expectations, it is clear that rates can and even must increase with expected losses regardless of whether expected losses correlate with an increase in policyholder age.

The Bureau’s disapproval of The Filing is not only inconsistent with Maine law, but also inconsistent with the Bureau’s treatment of at least one other similar filing. The Bureau disapproved The Filing as violating section 2916 because its rating factors increase when insured reach certain ages. But the Bureau approved a Travelers Filing on July 22, 2014 which similarly increases rates for entire classes of insured who turn 65. The ‘Household Composition Table’ contained within this Travelers Filing is attached here as **Exhibit A**, and contains, for example, BI rating factors which increase for all insured within ‘Ins. Score Tier Group 1, Driver Ratio A’ and ‘Ins. Score Tier Group 1, Driver Ratio B’ when the oldest driver in the household turns 65, all other factors remaining unchanged. There are a number of other examples within this table which also show rating factors increasing as drivers turn 65 with no other changes to the driver profile.

Presumably the Bureau approved the Travelers Filing because the increased policyholder age merely correlated to, and did not cause, increased rating factors. There is no discernable material difference in this respect between the Travelers and Progressive filings, and the Bureau has not offered any explanation for its inconsistent treatment of the two rating schemes. Just like The Travelers Filing, the Progressive Filing complies with Maine law and should be approved.

### **III. There appear to be several disputed issues of material fact in this proceeding.**

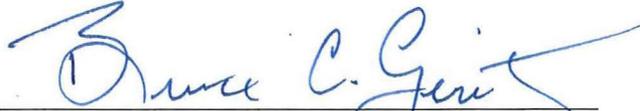
There are several disputed issues of material fact which warrant a hearing, unless the advocacy panel and hearing panel are prepared to accept Progressive’s contentions without formal presentation of evidence.

- The largest disputed issue of material fact seems to be the role that age plays in the Filing. As argued at length *infra*, section 2916 as a matter of law prohibits increased rates only when the increases are caused by increased age and nothing else. Progressive will introduce evidence at a hearing that section 2916 does not apply because age has no causal relationship to the Filing’s rates.
- Progressive is also entitled to explore the Bureau’s application of section 2916 and argue deprivation of due process on grounds including the Bureau’s selective application of section 2916 among different insurers such as Travelers and Progressive.

## Conclusion

As a matter of law, Progressive is permitted to increase rates based on an increase in expected losses. Progressive respectfully requests that the Superintendent either rule that rate increases in The Filing are caused by an increase in expected losses and therefore The Filing should be approved, or provide Progressive the opportunity in a testimonial hearing to present evidence that loss expectation, and not age, causes rate increases in The Filing.

Dated at Augusta, Maine this 22nd day of January, 2016.



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