STATE OF MAINE
DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION
BUREAU OF INSURANCE

IN RE:

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

AMENDED DECISION AND ORDER

I. INTRODUCTION

Eric A. Cioppa, Superintendent of Insurance ("Superintendent"), issues this Amended Decision and Order in the above-captioned matter after consideration of the "appeal" by Progressive Casualty Insurance Company, Progressive Northwestern Insurance Company, Progressive Northern Insurance Company, and United Financial Casualty Company (collectively, the "Insurers") of Bureau of Insurance staff's disapproval of their private passenger automobile insurance rate filings affecting over 65,000 Maine policyholders.[1]

Bureau staff disapproved each of the rate filings on the basis that the proposed "driver classification factors" for drivers over the age of 65 appearing in Exhibit 1C of the filings violated Section 2916 of the Insurance Code, which states:

> 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

[1] One filing was for the Progressive Companies—Progressive Casualty Insurance Company, Progressive Northwestern Insurance Company, and Progressive Northern Insurance Company—that affected over 38,000 policyholders; the other filing, for United Financial Casualty Company, affected over 27,000 policyholders. The legal issues presented were identical for each of the filings.

> 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.

24-A M.R.S. § 2916.

For the reasons discussed below, the Superintendent disapproves the Insurers' rate filings.

II. NATURE AND PURPOSE OF THE PROCEEDING

As explained in the Notice of Pending Proceeding, the purpose of this proceeding is for the Superintendent to consider the Insurers' "appeal" of the disapproved rate filings on the basis that the proposed rates violated the provisions of 24-A M.R.S. § 2916. Notice at Part IV, p. 2. Later the Superintendent elaborated:

> To clarify the nature and purpose of the current proceeding, Bureau staff's July 10, 2015, disapproval of the Insurers' rate filings was not "final agency action." *See* 5 M.R.S. § 8002(4). Thus, although the Insurers framed their hearing request as an "appeal," this is an adjudicatory proceeding that is being conducted *de novo* with no deference provided to Bureau staff's rate disapprovals. *See, e.g.*, 5 M.R.S. §§ 9051–9064. The Superintendent is the decision-maker in this matter.

Order Specifying Further Course of Proceedings at n1.

The burden of proof was on the Insurers to demonstrate that their filings complied with the law. Although the Superintendent established a Bureau Staff Advocacy Panel to participate independently in the proceeding, they had no burden of proof in this matter.[2] *See, e.g.*, 5 M.R.S. § 9054(5), Bureau of Insurance Rule Chapter 350, § 13(D).

III. PROCEDURAL HISTORY

On June 15, 2015, the Insurers submitted their rate filings to the Bureau of Insurance; they were disapproved by Bureau staff on July 10, 2015.

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[2] As an independent participant in the proceeding, the Bureau Staff Advocacy Panel was subject to, and complied with, the *ex parte* communication restrictions under 9 M.R.S. § 9055.

On August 3, 2015, as amended on August 4, the Insurers filed a timely request for hearing under 24-A M.R.S. § 229, framed as an "appeal."

On August 28, 2015, the Superintendent issued a Notice of Pending Proceeding in this matter, designating the Insurers as parties and appointing a Bureau Staff Advocacy Panel to participate pursuant to 5 M.R.S. § 9054(5) and Bureau of Insurance Rule Chapter 350, § 13(D).

On September 28, 2015, a telephonic conference of counsel was held with the Insurers and the Bureau Staff Advocacy Panel for the purpose of discussing the future scope of proceedings. As confirmed in an e-mail that same day from the Superintendent's counsel, agreement was reached on discovery deadlines. Also identified in the e-mail were the specific rate filings under appeal, including related company correspondence. The Superintendent's counsel issued a follow-up e-mail on September 29 correcting the agreed upon discovery deadlines.

By correspondence dated September 28, 2015, the Insurers requested confidentiality for all materials in their rate filings and the proceeding. The Insurers further provided a copy of April 24, 2015 company correspondence as requested during the conference of counsel.

On September 29, 2015, the Bureau Staff Advocacy Panel filed the company correspondence identified at the September 28 conference, being an April 24, 2015 letter to Benjamin Yardley, Esq. from Jeffrey Palmer, Esq., and a June 15, 2015 e-mail from Mr. Yardley to Michael F. Mayette, which forwarded a June 15, 2015 e-mail from Mr. Palmer to Mr. Yardley following up on the April 24, 2015 correspondence.

On October 6, 2015, the Insurers issued their First Information Request upon the Bureau Staff Advocacy Panel.

Also on October 6, 2015, the Superintendent issued guidance regarding filing procedures by e-mail.

On October 8, 2015, the Bureau Staff Advocacy Panel asked the Superintendent for clarification of the discovery procedures. That same day, in response, the Superintendent issued a supplemental procedural order by e-mail.

On October 16, 2015, the Bureau Staff Advocacy Panel filed an unopposed motion for enlargement of the deadline for responding to the Insurers' First Information Request, which the Superintendent granted that same day.

On October 20, 2015, the Bureau Staff Advocacy Panel filed responses to the Insurers' First Information Request, also incorporating objections to certain of the discovery.

Also on October 20, 2015, the Bureau Staff Advocacy Panel issued their First Information Request (as corrected) upon the Insurers.

On October 23, 2015, the Insurers filed an unopposed motion for enlargement of the deadlines to file (a) responses and objections to the Bureau Staff Advocacy Panel's Information Request; and (b) responses to the Bureau Staff Advocacy Panel's objections to the Insurers' First Information Request; which the Superintendent granted that same day.

On October 28, 2015, the Bureau Staff Advocacy Panel filed a response to the Insurers' September 28 request for confidentiality, opposing the request. By correspondence dated that same day, the Insurers filed a reply in objection to the Bureau Staff Advocacy Panel's position.

On November 2, 2015, the Superintendent issued an Order on Confidentiality that denied the Insurers' request for blanket confidentiality for "all of the documents, exhibits, and other data or information produced or introduced in this proceeding." The Superintendent explained, instead, that he would undertake a balancing approach to evaluating confidentiality, as may be necessary from time to time throughout the proceeding. Specifically, however, the Superintendent determined that the Insurers' June 16, 2015 rate filings and supporting data, as filed electronically with the Bureau and designated SERFF Tracking #'s PRGS-130121409 and

PRGS-130121425, which are the disapproved filings that are the subject of this proceeding, are and continue to be confidential per 24-A M.R.S. § 2304(7), along with rating information or data derived from those filings, such as base rates and/or rating factors and premium information.

On November 3, 2015, the Insurers filed responses to the Bureau Staff Advocacy Panel's First Information Request.

Also on November 3, 2015, the Insurers filed an opposition to the Bureau Staff Advocacy Panel's objections to the Insurers' First Information Request, thereby seeking a ruling by the Superintendent on the discovery dispute.

On November 4, 2015, the Bureau Staff Advocacy Panel advised the Superintendent that they would be filing a response to the Insurers' November 3 opposition filing on the discovery dispute.

On November 6, 2015, the Superintendent issued First Information Requests to both the Insurers and the Bureau Staff Advocacy Panel.

On November 9, 2015, the Bureau Staff Advocacy Panel requested an enlargement of the deadline to respond to the Superintendent's First Information Request, with no objection by the Insurers; and on November 10 the Insurers requested a comparable enlargement of their deadline to respond to the Superintendent's First Information Request, with no objection by the Bureau Staff Advocacy Panel. On November 10 the Superintendent granted both requests.

On November 16, 2015, the Bureau Staff Advocacy Panel filed a response to the Insurers' November 3 opposition filing on the discovery dispute.

On November 18, 2015, the Insurers requested oral argument before the Superintendent regarding the outstanding discovery dispute; to which the Bureau Staff Advocacy Panel objected on November 23 and the Insurers filed a reply that same date.

On November 24, 2015, the Bureau Staff Advocacy Panel filed responses to the Superintendent's First Information Request.

On November 25, 2015, the Insurers filed responses to the Superintendent's First Information Request.

On December 4, 2015, the Superintendent issued an Order Specifying Further Course of Proceedings which stayed discovery until the Superintendent determined whether this matter could be decided as a pure question of law based on the undisputed facts and the responses to discovery to date. Accordingly, the Superintendent requested briefing on specified questions that appeared likely to be dispositive to the outcome of this proceeding.

On December 16, 2015, the Bureau Staff Advocacy Panel notified the Superintendent of the briefing schedule and process agreed upon with the Insurers, which the Superintendent accepted and memorialized on December 17.

On January 12, 2016, the Insurers provided a proposed rate filing in compromise of the pending dispute.

On January 22, 2016, the Insurers and the Bureau Staff Advocacy Panel filed briefs in response to the Superintendent's December 14 Order.

On February 5, 2016, the Insurers and the Bureau Staff Advocacy Panel filed reply briefs in response to the Superintendent's December 14 Order.

On February 12, 2016, the Insurers requested oral argument regarding the briefing provided under the Superintendent's December 14 Order.

On March 1, 2016, the Bureau Staff Advocacy Panel opposed the Insurers' request for oral argument.

On or about March 4, 2016, the Superintendent's docket clerk coordinated with counsel for the Insurers and the Bureau Staff Advocacy Panel to schedule the oral argument requested by the Insurers.

On April 11, 2016, oral argument was held before the Superintendent. Counsel for the Insurers and the Bureau Staff Advocacy Panel were provided full opportunity to argue their cases. At the conclusion of the argument the Superintendent moved for admission into the record all of the Insurers' and the Bureau Staff Advocacy Panel's responses to discovery, including all filings in the proceeding, ultimately with no objection by either. The responses to discovery were thereupon admitted as evidence in the record of the proceeding.

On June 10, 2016, the Superintendent issued his initial Decision and Order in the proceeding (the "Initial Decision").

On July 1, 2016, the Insurers filed a Motion to Reopen the proceeding, limited to obtaining clarification from the Superintendent regarding the meaning of one of his statements made in footnote 11 of the Initial Decision.

By Order on Insurers' Motion to Reopen, issued July 6, 2016, the Superintendent denied the motion as untimely but, on his own motion, reopened the proceeding solely for the purpose of addressing footnote 11, and for no other reason. Accordingly, per Insurance Rule Chapter 350, § 19(A), the running of the appeal period for the Initial Decision was terminated until further action by the Superintendent.

Upon mutual agreement of the Insurers and the Bureau Staff Advocacy Panel, the Superintendent scheduled a conference for August 16, 2016, in furtherance of his July 6 Order.

On July 27, 2016, counsel for the Insurers advised counsel for the Superintendent and the Bureau Staff Advocacy Panel that the Insurers no longer desired the August 16 conference

because they had decided to end their request for clarification of footnote 11 of the Initial Decision.

IV. INSURANCE STATUTES; BULLETIN 334; ACTUARIAL STANDARDS

The following insurance statutes, agency guidance under Bulletin 334, and actuarial standards are relevant to the Superintendent's analysis in this proceeding.

A. Insurance Statutes

Under longstanding Maine law, the Superintendent has been granted the authority to regulate rates for motor vehicle insurance on risks in this State to the end that they shall not be excessive, inadequate, or unfairly discriminatory. 24-A M.R.S. §§ 2301, 2302(1)(A), 2303(1)(B). In making such rates insurers must give due consideration to specified statutory factors (such as loss experience, expenses, and a reasonable profit margin); and risks may be grouped by classifications for the establishment of rates (provided that "[n]o risk classification may be based upon race, creed, national origin or the religion of the insured."). *Id.* §§ 2303(1)(C), 2303(1)(G).

Despite these rating law requirements generally applicable to numerous kinds of insurance products (*e.g.*, automobile, property and marine, title, surety), other subsequently adopted provisions of the Insurance Code specifically applicable to private passenger automobile products prohibit an insurer from "increas[ing] 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." 24-A M.R.S. § 2916.

Per 24-A M.R.S. § 11: "Provisions of [Title 24-A] as to a particular kind of insurance, type of insurer or matter shall prevail over provisions relating to insurance, insurers or matters in general."

B. Bulletin 334

In 2005, a prior Superintendent of Insurance issued Bulletin 334, *Automobile Insurance Rating and Underwriting of Insureds Based on Advancing Age Prohibited.* Bulletin 334 was specifically intended to clarify the application of 24-A M.R.S. § 2916 and to provide guidance to insurers regarding rating based on the age of the insured. In relevant part, the Bulletin states as follows:

> The Bureau has received personal automobile insurance rate and rule filings that contain higher rates or rate factors for older drivers. Examples include increased classification rate factors for operators over age 70 or 75. Often the increase in rates with increasing age is part of a multivariate analysis of loss expectation. Insurers are reminded that all automobile insurance rating plans are subject to the provisions of Section 2916 and that an insured's premium may not increase solely due to the advancement in age or the movement to another age group. It is the Bureau's position that an insured's premium may not increase if the only change is the change in the age of the insured.

Bulletin 334 (August 5, 2005). As with all Bureau bulletins, as conspicuously noted in Bulletin 334, bulletins are intended solely for informational purposes and are not legally binding. Therefore, while the Bulletin sheds light on the Superintendent's historic interpretation of this statute, the question of statutory interpretation must be decided *de novo*, with no presumption that Bulletin 334 interpreted the statute correctly.

C. Actuarial Standards

Actuarial standard of practice (ASOP) No. 12, *Risk Classification (for all practice areas)*,[3] adopted by the Actuarial Standards Board, provides guidance to actuaries with respect to designing risk classification systems,[4] including classifications used to set rates, based on an

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[3] The Insurers reviewed and consulted this Standard in preparing their rate filings. *See* Insurers' Response to Bureau Staff Advocacy Panel's First Information Request, item 3.

[4] A "risk classification system" is defined to be a "system used to assign risks to groups based upon the expected cost or benefit of the coverage or services provided." ASOP No. 12, § 2.10.

insurer's choice of risk characteristics. Risk characteristics are defined to be "[m]easurable or observable factors or characteristics that are used to assign each risk to one of the risk classes of a risk classification system."[5] ASOP No. 12, § 2.8; *see also id.* § 2.9 for related definition.

The Standard calls for the actuary to develop fair and equitable risk classification systems, in which the differences in rates reflect material differences in expected cost for the risk characteristic(s) (*see* ASOP No. 12, § 3.2.1), while also "consider[ing] whether compliance with applicable law creates significant limitations on the choice of risk characteristics." ASOP No. 12, § 3.2.5. When such limitations are present, the Standard explains:

> The actuary should satisfy the requirements of applicable law (statutes, regulations, case law, and other legally binding authority) and this standard. However, to the extent applicable law conflicts with this standard, compliance with such applicable law shall not be deemed a deviation from this standard, provided the actuary discloses that the actuarial assignment was performed in accordance with the requirements of such applicable law.

ASOP No. 12, § 1.2. *See also id.* §§ 3.3.3, 3.4.4(a), 4.1(a), 4.3.

V. UNDISPUTED FACTS

In order to understand at least one concrete example of the relationship between increasing age and policyholder premium under the Insurers' proposed rating plans, the Superintendent presented the Insurers the following hypothetical (thereby isolating age as the only change in rating factors):

> Consider a female, single, 64 year-old policyholder who buys bodily injury (BI), property damage (PD), and uninsured/underinsured (UM/UIM) coverages from one of the Insurers. Her coverage levels and actuarial characteristics make her subject to the base rates under Exhibit 1A (applying Rate Plan 1 if she obtains coverage from one of the three Progressive companies), with no multipliers other

[5] In their filings, the Insurers proposed a risk classification system based on the "gender," "marital status," and "age" of the driver. Rate Filing Exhibit 1C. Under the Insurers' filings, a separate premium rate is determined for each type of coverage using this three-part classification system (*i.e.*, rates can be derived for a married 22-year-old woman, a single 68-year-old man, and every other three-part combination of the relevant driver characteristics). Each of these three-part combinations constitutes a separate risk class.

than the applicable rating factors from Exhibit 1C. She then renews the identical coverage the following year, at age 65, with no changes to any rating characteristic except age. What are her issue and renewal premiums under Progressive Product 201502 ME PCIC PNWIC PNIC and under United Financial Product 201502 ME UFCC?

Superintendent First Information Request, item 4 (Table omitted). The Insurers responded by confirming an increase in premium as follows:

COMPANY	PREMIUM AT ISSUE: AGE 64	PREMIUM AT RENEWAL: AGE 65
Progressive	$242	$257
United Financial	$335	$351

Insurers' Response to Superintendent First Information Request, item 4. As the Table above shows, any policyholder with these characteristics would receive a premium increase when she turns 65. The filings also show a number of other rating classes where the premium would increase with age in the same fashion,[6] when no rating factor other than age changes (*i.e.*, gender or marital status—recall that the Insurers employ a three-part rating classification system).

VI. ADJUDICATION AS A MATTER OF LAW

Having reviewed the whole record, which includes the narrative and documentary responses to information requests that were admitted without objection as evidence in the proceeding, and also the briefing by the parties, I find that there is no genuine issue as to any material fact. Because no prejudice will result, it is proper for me to decide the matter without a testimonial hearing and without conducting further discovery. *See* 5 M.R.S. § 9053(4) (authorizing limitation of the issues to be heard or variation from statutory procedures "if no

[6] The Insurers specifically identified the following additional rate classes where premium would increase as the driver ages: single males, married males, single females, and married females who turn 65; married females who turn 35 and 40; single females who turn 62; married males who turn 63; and single males who turn 64. Insurers' Response to Superintendent First Information Request, item 3. All four demographic groups would also receive multiple further rate increases between ages 65 and 85. *See* Rate Filing Exhibit 1C.

prejudice to any party will result.").[7] *See also* Bureau of Insurance Rule Chapter 350, § 2(B) (requiring liberal construction of the Bureau's rules "to secure just, speedy and economic determination" of matters pending before the Superintendent). An administrative proceeding is appropriately resolved by summary adjudication in the same circumstances that would result in summary judgment in a judicial proceeding: when the record shows "that there is no genuine issue as to any material fact ... and that any party is entitled to a judgment as a matter of law." M.R. Civ. P. 56(c).

The Insurers are not prejudiced by the adjudication of this proceeding as a matter of law because there is no possible set of facts that could reconcile these filings with the requirements of Section 2916, and no way to amend the filings to bring them into compliance short of removing the rating factor that the Insurers initiated this proceeding to defend. As a court would do in deciding a summary judgment motion, I will evaluate the filing assuming that any allegations by the Insurers that raise a triable issue of fact are true. Thus, I will accept as true the facts the Insurers have sought the opportunity to investigate and to prove through additional discovery and testimony: that the Insurers seek to use age as a rating factor because of strong actuarial evidence that it indicates a material risk of loss; and that the Bureau has in the past approved other personal automobile rate filings that increase premiums when a driver's age increases. However, even if these facts were in dispute to any significant degree, they are not material to the outcome of this proceeding. For the reasons discussed below, the undisputed facts are sufficient to

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[7] At the initiation of the proceeding I alerted the Insurers that the adjudication might be resolved without a public hearing. *See* Hearing Notice at Part III, p. 2, ("Unless disposed of in an alternate manner (*see* 5 M.R.S. § 9053(4)), the Superintendent will hold a public hearing in this matter. The date, time, and location of such hearing, if any, will be set by separate notice of the Superintendent."). Thereafter, on December 4, 2015, in an Order Specifying Further Course of Proceedings, I again alerted the Insurers that the matter could be decided as a pure question of law based on the undisputed facts and the responses to discovery to date. Accordingly, I requested briefing on specified questions that appeared likely to be dispositive to the outcome of this proceeding, and followed up by hearing oral argument in furtherance of the briefing as requested by the Insurers.

establish conclusively that the filings do not comply with 24-A M.R.S. § 2916, and the filings must therefore be disapproved as a matter of law.

VII. ANALYSIS, FINDINGS, AND CONCLUSIONS

For the reasons discussed, I find and conclude that the private passenger automobile rate filings made by Progressive Casualty Insurance Company, Progressive Northwestern Insurance Company, Progressive Northern Insurance Company, and United Financial Casualty Company, designated SERFF Tracking #'s PRGS-130121409 and PRGS-130121425, violate the provisions of 24-A M.R.S. § 2916.

A. The Insurers are not procedurally barred from pursuing approval of their filings.

As a threshold matter, the Bureau Staff Advocacy Panel contends that it is not necessary to reach the merits of these filings because they have been superseded by subsequent filings, and because they violate the terms of a Consent Agreement entered into by one of the Insurers. Neither argument is persuasive.

First, the Bureau Staff Advocacy Panel argues that because the Insurers filed revised rates on August 8, 2016, four days after their Amended Request for Hearing, the new filings rendered the earlier filings moot in the same manner as the health insurance rate filing at issue in *Anthem Health Plans of Maine, Inc. v. Superintendent of Insurance*, 2011 ME 48, ¶7, 18 A.3d 824. However, the history of the Anthem filing illustrates precisely why the Insurers' Petition is not moot. The Anthem case involved three rate filings, not two. The first two filings were an exact parallel to the two sets of filings the Insurers have made: after Anthem's initial filing was disapproved, Anthem promptly submitted a second filing that complied with the terms of the Superintendent's disapproval order, which was accepted without prejudice to Anthem's right to pursue the appeal. On appeal, the relief Anthem requested was the ability to implement its

original filing in place of the interim rates that had been approved pending appeal—the same relief the Insurers are requesting in this proceeding. There was no question that Anthem had the right to seek that relief on appeal, and there should be no question that the Insurers have the same right here. The filing that mooted Anthem's appeal was submitted the following year. It superseded the original filing at Anthem's own request, and Anthem no longer sought to implement the rates the Superintendent had disapproved.[8] The Insurers here have made no such request, and their Petition is not moot.

Second, Progressive Northwestern agreed in 2011, after admitting several violations of the Insurance Code, "that it will not adopt any procedures or impose any conditions for issuing motor vehicle liability insurance that have the effect of excluding or discouraging persons of 65 years of age or older from obtaining coverage."[9] However, even if this covenant also implicitly binds the other three affiliated Insurers, it does not act to bar the Insurers from seeking the relief they have requested. Had they been able to prevail on the merits of their Petition, there would be no reason to deny them the right to request clarification that a rating practice they claim to be generally permissible does not "have the effect of excluding or discouraging" older consumers, or to request modification of the Consent Agreement to allow them to use this practice on a level playing field with their competitors.

B. <u>The Bureau is not estopped from disapproving these filings</u>.

The Insurers, on the other hand, contend that the Bureau has already approved competitors' filings that use age rating, and that the disapproval of the Insurers' filings is an

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[8] Once the 2010 rate increase was implemented, reinstating the 2009 filing would have cut rates, not increased them.

[9] *In re Progressive Northwestern Insurance Company*, Docket No. INS-10-236, ¶ 15 (August 29, 2011).

impermissible "selective application" of Section 2916. They argue further that Bulletin 334 demonstrates that the Bureau historically has permitted age rating when "the increase in rates with increasing age is part of a multivariate analysis of loss expectation."

To the contrary, the competitors' filings in question were approved in error and the approval of each of those filings has been rescinded. Those erroneous approvals were the result of oversights by Bureau form reviewers, not of any alternative interpretation of Section 2916. Furthermore, the Insurers' interpretation of Bulletin 334 is nonsensical. The Bulletin's title is "Automobile Insurance Rating and Underwriting of Insureds Based on Advancing Age Prohibited," and its conclusion is that regardless of the justification an insurer might offer, "an insured's premium may not increase if the only change is the change in the age of the insured." Nothing in the Bulletin remotely suggests that the reference to multivariate analysis was intended as an exception to that principle—it appears in a description of filings the Bureau had received that violate Section 2916. The Bureau is acting to correct any errors in applying Section 2916 as soon as they are discovered. The Insurers and all their competitors must be—and will be—held to the same standards.

C. The filings provide that reaching a certain age would be the sole reason that some insureds' premiums increase.

The determinative question in this proceeding is whether the Insurers' filings violate 24-A M.R.S. § 2916, which states that an insured's premium may not increase "for the sole reason that the person to whom such policy has been issued has reached a certain age."

The undisputed facts demonstrate that for numerous risk classifications under the Insurers' rating system, all drivers turning certain ages would receive premium increases on their next policy renewals, if no other rating factor changed (*e.g.*, all drivers who turn 65; married females who turn 35 and 40; single females who turn 62; married males who turn 63; and single

males who turn 64). *See* Section V, above.[10] These increases would apply uniformly to all policyholders in these rating classifications, regardless of whether their personal risk of loss increased, remained the same, or decreased. They would be imposed automatically whenever the policyholder reached one of the specified ages, and they would be imposed for no other reason.

A case from Maryland's highest court, *GEICO v. Insurance Commissioner*, 630 A.2d 713 (Md. 1993), is instructive on this issue and demonstrates the fallacy of the Insurers' contention. In *GEICO,* the insurer made similar arguments in defense of its filing, and the Court reached the same conclusion I reach here. The Maryland insurance code prohibited increasing an automobile insurance premium "exclusively for the reason of age beyond 65 years of an insured." *Id.*, 630 A.2d at 716. GEICO admitted that its rating plan provided for an automatic premium increase when an insured turned 65 (*id.*, 630 A.2d at 715), but contended that it was in compliance with the statute because age was only one factor in a multivariate rating plan and because the statute did not prohibit increases that were based on actuarial data. *Id.*, 630 A.2d at 714–715. The Court, however, held that undefined terms in statutes must be given their "natural and usual meaning, not a strained or subtle one, in light, however, of the goal the statute seeks to achieve," (*id.*, 630 A.2d at 719, internal quotation omitted) and that "Section 240F is straightforward, clear and unambiguous. Because it does not provide an exception for increases that are actuarially justified, it prohibits, absolutely, an insurer from increasing premiums of drivers sixty-five and older based solely on their age" (*id.*, 630 A.2d at 718).

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[10] This analysis refers to drivers who have clean driving records and no other characteristics that would result in rates higher or lower than the applicable "base rates," adjusted for age, gender, and marital status. The record is silent as to whether any other factors might affect the premium charged by the Insurers, such as an insured's driving record, or the accident prevention course discount mandated by 24-A M.R.S. § 2902-G. The Superintendent's question (First Information Request, item 4) and the Insurers' response apply to those insureds who have no discounts or surcharges other than age, gender, or marital status, so that their "coverage levels and actuarial characteristics make [them] subject to the base rates under Exhibit 1A."

The Court acknowledged that age was not the only reason GEICO might raise a policyholder's premium, but concluded that:

> if driver X, who is sixty-three, and driver A, who is sixty-four, are both born on the same day and have the same driving record, driver A will experience a rate increase when he or she turns sixty-five, while driver X will not. Since, but for aging, neither will have done anything to warrant the increase, the only conceivable basis for A's rate increase is that A has become subject to a different rating factor. But that rating factor's applicability is, as the Insurance Commissioner found, dependent on the driver's age. Age may be but a factor, *albeit*, perhaps, a significant one, used to actuarially test rates and, so, it may not be, as GEICO argues, the exclusive basis for a group rating decision. On the other hand, the effect of the rating decision on a particular driver becomes apparent only when that driver becomes subject to the rating factor on the basis of which his or her rates are determined. As the Insurance Commissioner noted, upon review of GEICO's rate filings, that effect is triggered solely by that driver's age. Consequently, age is exclusively the basis for the rate increase.

Id., 630 A.2d at 719–720. The same conclusion is warranted here. The increase in an insured's age is the exclusive basis for any increase in the insured's premium under the Insurers' rating plans, unless the insured experiences a divorce, death of a spouse, or gender transition. Therefore, the proposed rating plans violate 24-A M.R.S. § 2916 and must be disapproved.

D. The Insurers' efforts to reinterpret the statute to accommodate their rate filings are not persuasive.

Nevertheless, despite the clear and unambiguous statutory prohibition, the Insurers argue that if the statutory language is read carefully, it can be reconciled with the use of increased age as a basis for increasing premium. For the reasons discussed below, the Insurers' arguments are baseless.

1. *Under the filings, age would cause premium increases, not merely "correlate" with them.*

First, the Insurers contend that age would not be a "reason" for any premium increase, as that term is used in 24-A M.R.S. § 2916. According to the Insurers, "Because rate increases in

The Filing are caused by increased loss expectation, which merely correlate to increased age of an insured, The Filing does not violate Section 2916." (Insurers' Reply Br. at 2.)

The Insurers misstate the difference between correlation and causation. It is the other way round: it is increased age that would cause rate increases, and increased loss expectation that merely correlates. The insured's 65th birthday (and various other birthdays specified in the filings, depending on gender and marital status) will directly and inevitably trigger a rate increase if no other rating factors change. That is causation. Most insureds receiving those rate increases would probably have increased loss expectation, but others would not. That is correlation. Some insureds would have improved their driving habits, some would have moved to a less risky location, some would have recovered from a health problem that impaired their driving. All would receive the same rate increase, regardless of their own personal loss expectation. The reason—the sole reason—would be their increased age.

2. ***If some insureds would receive unlawful premium increases, the filing is unlawful even though other insureds would not receive unlawful increases.***

The Insurers argue further that even if a rating factor is considered to be a "reason" for a premium increase, age would not be the "sole" reason for a premium increase under their filings because it is "one of multiple causes of the increase." (Insurers' Br. at 3.) While it is true that many insureds would not receive premium increases in a given year, and some insureds' increases would, in whole or part, "result from factors other than age" (Insurers' Reply Br. at 4), an insurer may not "increase the premium of any automobile insurance policy" due solely to age. 24-A M.R.S. § 2916 (emphasis added). The filing cannot comply with 24-A M.R.S. § 2916

unless it is modified so that no insured receives a premium increase if the only triggering event is reaching a specified age.[11]

3. *The statutory phrase "sole reason" does not mean "unexplained reason."*

The Insurers respond that such an analysis is too narrow because it fails to consider the reasons behind the reasons. According to the Insurers, the "reasons" for a premium increase include not only the three rating factors used to calculate the insured's premium, but also the underlying multivariate actuarial analysis, generating "volumes of underlying analysis and data," that led the Insurers to choose these particular rating variables and set these particular factors. (Insurers' Reply Br. at 2.) They argue that when the Superintendent evaluates whether age is the "sole reason" for a premium increase, he must look not only at the changes in rating factors that are the direct causes of the premium increase, but also at all the reasons the insurer chose to use those rating factors, since those reasons all contributed to causing the premium increase.

By the Insurers' logic, no rate filing could ever violate Section 2916 because any age-based rate increase would necessarily result from multiple reasons, including: (1) the insured's increased age; (2) the insurer's decision to make a rate filing; and (3) all the reasons that led the insurer to make a rate filing that makes age the reason for a premium increase. However, the Legislature cannot have intended to muddle different levels of causation in that manner when it used that term. A statute must not be construed so as to render the statutory language a nullity. *See, e.g., Kimball v. Land Use Regulation Commission*, 2000 ME 20, ¶ 22, 745 A.2d 387. (*See also* Insurers' Reply Br. at 4.) Giving the phrase "sole reason" its ordinary meaning, age is the sole reason for the insured's premium increase when it is the only element that has changed in

[11] The statute does not categorically prohibit all forms of "age rating." For example, it is a permitted and universally followed rating practice to set higher initial premiums for youthful drivers, so that the premium decreases as the driver's age increases.

the formula (*i.e.*, rating system) used to calculate the insured's premium. The reasons why the insurer chose to make age the sole reason do not count as additional reasons.[12]

4. *Neither the Insurance Code nor the Actuarial Standards mandate the use of age rating.*

Finally, the Insurers contend that age rating is required in order to ensure that rates fairly reflect the relative risk of loss. That argument misconstrues both the Insurance Code and the relevant Actuarial Standards of Practice.

As the Insurers correctly observe, rates should be based on past and prospective loss experience. (Insurers' Br. at 3–4; Insurers' Reply Br. at 2.) Any risk classifications an insurer chooses to use must be defined and rated in a manner that fairly reflects the risk of loss. *See generally* 24-A M.R.S. § 2303. In particular, these classifications may not be used to charge different rates for insureds with similar risk characteristics. *See, e.g.*, 24-A M.R.S. §§ 2303(2) (property and casualty rates generally), 2159(1) (life insurance), 2159(2) (health insurance), 2382(4) (workers' compensation).

Thus, insurers may use any actuarially supported risk classifications, unless the Legislature has specifically prohibited them. However, the use of any particular risk classification, and the choice of how many classifications to use are permissive, not mandatory.[13] 24-A M.R.S. § 2303(1)(G). Furthermore, the Legislature has enacted a number of laws that

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[12] Indeed, the case the Insurers cite to support their argument is actually the *reductio ad absurdum* of that argument. In *Sabine Pilot Service v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985), the court held that under Texas law, an employee alleging wrongful termination for refusal to perform an illegal act must prove that he was discharged "for the sole reason that the employee refused to perform an illegal act." But under the Insurers' reasoning, an employer caught red-handed ordering an employer to commit a crime or be fired could get away with it merely by explaining that the employee was fired for two reasons: (1) the employee refused to commit a crime; and (2) employees who will not break the law when asked are insufficiently loyal.

[13] Curiously, the Insurers suggest that their own rating plans might be unlawful because they use only three elements to classify risks. (Insurers' Reply Br. at 2.) However, that is not what makes the filings unlawful.

specifically prohibit risk classifications based on certain protected characteristics. For example, insurers may not classify risks on the basis of race, creed, national origin, or religion. 24-A M.R.S. § 2303(1)(G).

Such prohibitions may be legislatively imposed even when the prohibited classifications can be actuarially supported. In the individual and small-group health insurance markets, insurers are restricted in their ability to rate on the basis of age or geography, and may not classify at all on the basis of health status or medical history, even if the insured has a chronic condition that will inevitably result in benefit payments far in excess of the premium the insurer is allowed to collect. 24-A M.R.S. §§ 2736-C(2), 2808-B(2). Most relevant to this matter, in the personal automobile insurance market, as discussed above, the Legislature has prohibited insurers from using rating classification systems that increase insureds' premiums as they age. In some circumstances, these legislative restrictions clearly prevent insurers from charging the actuarially indicated rates. However, such restrictions do not run counter to the Actuarial Standards of Practice, as those standards expressly provide that when there is a conflict between actuarially indicated pricing and applicable law, the law must control. *See* ASOP No. 12, §§ 1.2 & 3.2.5. Therefore, prohibiting an insurer from increasing an insured's premium for the sole reason that the insured has aged is required by Section 2916 of the Insurance Code and consistent with the relevant Actuarial Standards of Practice.

VIII. "ISSUE AGE" RATING

As generally understood, an "issue age" rated policy is one where the rate (or premium) is dependent on the age of the individual *who purchases it* (*i.e.*, the age of the person at the time of policy acquisition) and, once purchased, the premium remains flat (or decreases) but does not increase during the policy period. Conversely, "attained age" rated policies are priced based on a

person's age at specified points in time (both at initial policy purchase and throughout successive policy renewals).

In this proceeding, the Insurers' filings were based on an attained age rating plan. In discussing the Insurers' filings in his Initial Decision, the Superintendent stated: "Additionally, it is possible that an 'issue age rating' plan (as opposed to the 'attained age rating' plan proposed by the Insurers) could, if structured properly, be found to comply with Section 2916." Initial Decision, n.11. This is the language that is the subject of the Insurers' July 1 Motion to Reopen and the Superintendent's July 6 Order. The Insurers have not made a rate filing that would present this issue for consideration. If such a plan were presented, any future analysis of whether that plan could be found to comply with Maine law would necessarily have to involve not only an analysis of Section 2916 but, additionally, the anti-discrimination provisions under 24-A M.R.S. § 2303 and all other applicable requirements of the Insurance Code.

IX. ORDER

Because the rate filings by Progressive Casualty Insurance Company, Progressive Northwestern Insurance Company, Progressive Northern Insurance Company, and United Financial Casualty Company—designated SERFF Tracking #'s PRGS-130121409 and PRGS-130121425—violate the provisions of 24-A M.R.S. § 2916, they are hereby DISAPPROVED.

X. NOTICE OF APPEAL RIGHTS

This Amended Decision and Order is final agency action of the Superintendent of Insurance, within the meaning of the Maine Administrative Procedure Act, 5 M.R.S. § 8002(4). It may be appealed to the Superior Court in the manner provided for by 24-A M.R.S. § 236, 5 M.R.S. §§ 11001 through 11008, and M.R. Civ. P. 80C. Any party to the proceeding may initiate an appeal within thirty days after receiving this notice. Any aggrieved non-party whose

interests are substantially and directly affected by this Decision and Order may initiate an appeal within forty days after the issuance of this Decision and Order. There is no automatic stay pending appeal. Application for stay may be made in the manner provided in 5 M.R.S. § 11004.

PER ORDER OF THE SUPERINTENDENT OF INSURANCE

August 10, 2016

ERIC A. CIOPPA
Superintendent of Insurance