BUCKLEY & WYNNE
ATTORNEYS AT LAW
685 STATE STREET
NEW HAVEN, CONNECTICUT 06511
(203) 776-2278
FAX (203) 776-3368
WWW.BUCKLEYANDWYNNE.COM

JOHN F. BUCKLEY, JR.
JOHN F. WYNNE, JR.
JOHN M. PARESE

JOHN F. WYNNE
(1951-2008)

HARTFORD OFFICE
100 PEARL STREET, 14TH FLOOR
HARTFORD, CONNECTICUT 06103
(860) 560-2278

PLEASE REPLY TO NEW HAVEN

October 22, 2009

Joshua H. Sovin, Esq.
United States Department of Justice
450 Fifth Street, NW, Suite 4100
Washington DC 20530

Re: Antitrust Violations in the Auto Body Repair Industry & The 1963 Consent Decree

Dear Attorney Sovin:

Introduction

On behalf of the auto body repair industry and its representatives who attended our meeting on September 25, 2009,[1] I would like to thank you and your colleagues, Dean Williamson and Joseph Miller. We were impressed with your preparation and understanding of the issues. This is a complex problem; and we appreciate the challenges of fixing a systemic injustice of this nature. With that said, much can be accomplished through enforcement of existing antitrust laws and the 1963 Consent Decree. Legal enforcement is imperative for consumer safety and restoration of a competitive and fair market. While enforcement of the 1963 Consent Decree may be limited to specific organizations, companies, and individuals, the prohibitions set forth in the Decree reflect the D.O.J.'s recognition of the anticompetitive nature of the conduct at issue.

You asked us to address certain issues and to attach supporting documentation with the caveat that we keep the correspondence and attachments within reason. In accordance with this guidance, we are enclosing a small fraction of our documents, which will serve to highlight the relevant antitrust violations at issue.

The remainder of this letter will serve to summarize core issues, discuss the applicability of the 1963 Consent Decree and address economic implications of antitrust enforcement. Supporting documents and exhibits are attached hereto for your reference and consideration.

[1] A list of Attendees is attached hereto as Exhibit 1.

Core Issues

A. How Insurer Control and Manipulation Through Direct Repair Contracts (i.e. Institutionalized Steering) Violates Antitrust Laws and Harms Consumer Safety

Antitrust law is designed to establish a "competitive business economy."[2] When agreements for restraint of trade become unreasonable and harmful, prohibition is required. "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[3] In the auto body repair market, competition has been stifled, but more importantly, consumer safety has been compromised.

Insurer control and manipulation of the auto body repair industry comes in many forms. Arrangements between and among insurers, appraisers, direct repair program facilities (hereinafter "DRPs") and software providers have created an environment in which insurers are controlling collision repair decisions and costs at the expense of consumer safety and fair competition. Furthermore, the control has allowed for the insurance industry to specifically utilize their closed agreements to intentionally impact businesses operating outside of these agreements, and have allowed these agreements to negatively impact their contractual obligations to the motoring public.

Steering occurs when an insurance company directs, intimidates or impresses upon a claimant to have their vehicle repaired at the insurance company's preferred repair shop (or DRP shop). The preferred shop is contractually obligated to protect the insurer's economic interest, often at the expense of the consumer.[4] Steering is premised on the idea that: in exchange for the insurer's promise to send a repair shop a lot of work, the shop will make various concessions (including concessions on labor charges, repair decisions, expedited repair times, mandated use of specific business service vendors, mandated use of used or aftermarket parts, all while also offering full indemnification to the insurance carrier for resulting harm from the agreed terms).[5] Steering prevents competition by manipulating a captive consumer market and by dividing up territories among participant repair shops. Steering further deprives consumers of genuine choice[6] and

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[2] United States v. South-Eastern Underwriters Ass'n, et al., 322 U.S. 533, 559 (1944).
[3] Board of Trade of City of Chicago et al. v. United States, 246 U.S. 231, 238, (1918).
[4] See *Direct Repair Programs and Repair Guarantees: Steering In Disguise*, By E.L. Eversman, Esq. (November 30, 2004) (Exhibit 2); Sample Progressive DRP Contract (Exhibit 3); Sample Allstate DRP Contract (Exhibit 4); Sample State Farm DRP Contract (Exhibit 5); Sample Farmers DRP Contract (Exhibit 6).
[5] See Exhibit 7 (Affidavit of former Progressive Insurance employee, John Nobile, discussing contests and incentives given to appraisers for steering work to DRP shops).
[6] While insurers argue that DRP model gives consumers "choice", the opposite is true. Take Progressive's Concierge Program for example. As advertised by Progressive, all a consumer has to do is bring her car to a claims center. Once there, a Progressive representative will "select a repair shop", have the vehicle transferred to that shop and returned to the Progressive claims center when the vehicle is done. According to its advertisement, Progressive "Takes Care of

compromises their safety by funneling consumers into repair facilities that agree to insurer mandates on aftermarket parts[7] and other cost cutting measures.[8]

The DRP model is premised on the false assumption that, in this context, insurers' costs can be dramatically reduced without affecting consumer quality or safety. This is patently untrue. Safety is necessarily compromised; and more concerning is that insurer contracts and repairer concessions are often imposed without the consumer's consent or knowledge. Given the nature of vehicle repair, most inferior and unsafe repairs are never detected unless the vehicle is involved in a subsequent accident or if the vehicle is taken to a different repair facility for inspection by an experienced repair professional. This has certainly happened and numerous unsafe vehicles have been uncovered,[9] but most unsafe repairs will go undetected until it is too late.

What we are seeing in the auto body repair industry is market failure. Auto body repairers are no longer able to compete with one another on innovation, quality or reputation. Instead, competition is now premised on who will do the cheapest and fastest repair at the behest of the insurance company, while accepting all fault and indemnifying the referring insurer against any claims.

What is more, insurers establish DRP territories then limit the number of DRP repair facilities for a given territory. Based on information and belief, insurers seek to control 15%-20% of the market through DRP contracts. This is significant for two reasons. First, participation in the DRP network is only available if the insurer has not yet fulfilled its target percentage for that territory. Thus, many shops wishing to get on the DRP program as a defensive mechanism or otherwise are denied access. Second, insurers unfairly take advantage of DRP shops and non-DRP shops by allowing only 15%-20% of the repairers to utilize DRP contracts. Insurers take advantage of the 80%-85% of non-DRP shops by telling them (and their customers): "If you won't or can't do it our way at our price, we'll send it to the DRP shop." At the same time, the insurer takes advantage of the 15%-20% of the DRP shops by telling them: "If you won't or can't do it our way at our price, we'll take you off the program and cut you out of our referral network." Basically, all DRPs operate this way. The object is both to artificially manipulate repair rates and pressure non-

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Everything." The consumer does not know who fixed the car or what types of parts were used. The consumer is not consulted on repair decisions. Instead, Progressive handles everything. (See Exhibit 8).

[7] Many DRP agreements require repairs to be made with used, refurbished or aftermarket parts. These parts are much cheaper than OEM parts, but they are cheaper for a reason. Vehicle manufacturers caution against the use of these parts. Most of these parts have never been crash tested. Further, using these parts can, and often does, void certain warrantees. See for example Exhibit 9 (Consumer Watchdog Floor Alert) and Exhibit 10 (GAO Report Motor Vehicle Safety, *NHTSA's Ability to Detect and Recall Defective Replacement Crash Parts Is Limited*, January 2001).

[8] See Exhibit 11 (Fox Collision Center's Letter to the Industry, *We "Step Down" in Order to "Step Up"*).

[9] See for example three case studies of previously repaired vehicles. These studies are attached hereto as Exhibits 12, 13 and 14. These studies highlight the danger of expediting repairs in favor of insurer cost savings.

DRP shops into doing jobs at the insurer's price and specifications, which most likely results in substandard repairs. Again, everyone loses – except the insurance company.

The unlawful practices at issue today mirror the unlawful practices that plagued the auto body repair industry in the 1960s. The D.O.J. has jurisdiction to prohibit these practices by seeking an order from the United States District Court for the Southern District of New York to enforce the terms of the 1963 Consent Decree.[10] The D.O.J. likewise has jurisdiction to prevent violations of the Sherman Act pursuant to 15 U.S.C. § 4.

B. How Insurer-Based Price Discrimination, Price Fixing & Boycott Affect Antitrust and Consumer Safety

In order to reduce claim costs, insurers use monopsony power, buyers' cartels and other anticompetitive practices to steer customers, divide markets, boycott independent facilities, and establish elaborate relationships outside the business of insurance. Many insurer arrangements are premised on unlawful pricing discrimination as they substantially lessen competition in the auto body market and injure, destroy or prevent competition between independent shops and DRP shops (which receive the benefit of the pricing discrimination). Insurers systematically conspire with one another, with appraisers, and with software providers to artificially drive down repair costs and boycott independent repair facilities.

Each of these parties communicates extensively with the others over repair costs and processes. Insurer-to-insurer communication occurs in various ways, including through subrogation. In subrogation, insurers share information on labor rates, cost cutting measures and tactics for dealing with non-DRP repair facilities. Subrogation has become a tool in which insurers conspire with one another to artificially suppress labor rates and repair procedures. Insurer decisions to, for example, refuse payment for particular repairs or refuse to pay above a certain labor rate, are shared with other insurers and with the software providers. Insurers learning of this information through first hand communications or through reports generated by the software providers, then implement these cost-cutting measures. Eventually, the adopted practices become "usual and customary". And, ultimately, the entire market is compromised in favor of insurer savings at the expense of consumer safety and quality.

Anticompetitive insurer behavior is evident by practice, but not always direct evidence. Attached, however, for example, is an e-mail from Gery Mentzel, a New Jersey Field Claims Supervisor for MetLife.[11] The e-mail is significant because it evidences MetLife's efforts to set auto body labor rates for independent repair facilities. According to the e-mail, MetLife has not

[10] See Consent Decree, section VIII. Copy attached hereto as Exhibit 15.
[11] See Exhibit 16.

increased its labor rate in three years. Moreover, MetLife is deliberately manipulating evidence of collision repair labor cost increases by mischaracterizing labor rate increases paid by the insurer as line item "concessions". This is also noteworthy because "concessions" will not be reflected in the data collected by the information/software providers regarding increases in labor rates. This is a deliberate effort to artificially suppress labor rates. In addition, according to the e-mail, MetLife is communicating with other insurers (including Allstate, GEICO and Liberty Mutual) on collision repair labor rates. Finally, it is evident that MetLife is apparently very much concerned with controlling its auto body claims severity (estimated value of an average sized claim), even if that means "holding tight" against known necessary and reasonable inflation of repair costs and fabricating evidence to maintain the perception of a lower labor rate.

It is apparent that most major insurers offering DRP services engage in practices of this nature. Vertical and horizontal agreements designed to control claim severity and artificially suppress rates ultimately harms consumers by compromising quality. Insurers systematically abuse their exceptional buying power to distort the market and gain unfair advantage. These problems have existed for some time. Indeed, as you know, the D.O.J. recognized the unlawful nature of this conduct as far back as 1963. In addition, in 1975, Congressmen Thomas J. Downey of New York offered testimony on this issue in front of the Ad Hoc Subcommittee on Antitrust. A copy of Congressmen Downey's testimony is attached hereto as Exhibit 17. These comments ring as true today as they did in 1975.

C. How Insurer Control over Appraisers Contributes to Antitrust Violations and Harms Consumer Safety

Appraisers are supposed to be the middleman between the insurance company and the auto body repair shop. In Connecticut, for example, appraisers are independently licensed, required by law to exercise independent judgment and to "disregard any efforts on the part of others [including insurance companies] to influence [their] judgment."[12] In Connecticut and across the country, however, appraisers are not independent at all. To the contrary, many appraisers work directly for insurance companies. They maintain offices with the insurer or have offices on the premises of the insurer's direct repair facility. These appraisers are sponsored, endorsed and employed exclusively at the insurer's discretion and act so as to further their own financial interest and the financial interest of the insurer. Appraisers have become simply an arm of the insurer.

Attached for your consideration is a whistleblower letter from four independently licensed appraisers to Connecticut's Attorney General, Richard Blumenthal.[13] The letter highlights insurer control and efforts to suppress labor rates and keep costs down, regardless of safety or laws to the

[12] See Connecticut Regulations § 38a-790-8, Exhibit 18.
[13] See Exhibit 19.

contrary. Two class action lawsuits have been filed in Connecticut regarding the issues of appraiser control, steering and labor rate suppression.[14]

Insurer-appraiser relationships further the ability of insurers to abuse monopsony power to restrain trade, establish buyers' cartels, manipulate the market and impose insurer will on the auto body repair industry. These relationships violate our antitrust laws by unreasonably restraining trade, fixing prices, dividing markets and artificially suppressing labor rates. Again, when an omnipresent force is controlling the entire market by driving down cost and quality from every aspect and angle of the process, consumer rights and safety are undoubtedly compromised.

D. How Software Providers Conspire with Insurers to Violate Antitrust Laws and Establish Unlawful Tying Arrangements

Through the years, technological advancements have made way into the collision repair process as in every other arena of our lives. The vast majority of collision repair facilities in today's market utilize one or more electronic estimating system platforms as a means to swiftly price repair services. There are only three significant estimating, information and software providers in the auto body repair industry: Audatex, CCC and Mitchell. These companies provide these resources under the premise that the systems are "guides" intended to provide a basis for the collision estimating process. They each acknowledge that their systems are inherently flawed as they premise their analyses on only the use of new, original equipment parts for the removal and replacement on new, undamaged motor vehicles. Accordingly, each system provider admonishes the user that the estimate produced is only an approximation of the time and cost necessary to properly repair a given vehicle.

1. Insurer Mandated Use of Estimating Database and Software Provider

A tying arrangement is an agreement to sell a product on the condition that the buyer also purchase a different (or tied) product or at least agrees that he will not purchase that product from any other supplier. Two providers responsible for authoring collision repair guidelines, Audatex (Solera Holdings, Inc.) and CCC Information Services Group, Inc., have violated tying laws by conspiring with insurers who mandate the use of their product. These relationships corrupt the damage analysis and estimating part of the business and impose insurer interest where it has no place. Audatex[15] and CCC[16] both boasted to the SEC about their ability to force their product on auto repair shops pursuant to exclusive contractual agreements.

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[14] Artie's Auto Body, Inc. v. Hartford Fire Ins. Co., Connecticut Superior Court, Docket No. X08CV030196141S (Case Commenced July 2003); and A & R Body Specialty et al v. Progressive Ins Group Co et al, United States District Court, District of Connecticut, Docket No. 3:07-cv-00929-WWE (Case Commenced June 2007).

[15] Audatex (Solera Holdings, Inc.), reported the following to the SEC in its 2008 annual report.

The FTC recently brought suit in the United States District Court for the District of Colombia in order to prohibit the merger of Mitchell and CCC. See FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26 (D.D.C. 2009) (Copy attached hereto as Exhibit 20). In relevant part, the court reasoned:

> *Indeed, partially as a result of product integration and connectivity between repair facilities and insurance companies, CCC has achieved "[d]eep integration with customers [that] supports a 95% retention rate." PX 99-011(CCC). This "stickiness" affects both insurance companies and repair facilities because if an insurance company is unwilling to switch, the repair shops that are part of its DRP typically will not switch either. This is because insurance companies either "mandate" that members of its DRP use the same Estimatics product used in-house or recommend (issue a "soft mandate") that they use the same product. PX 531-002 ("Insurance DRP Mandates continue to drive market."); PX554-036 (Mitchell). Thus, relationships with large insurance carriers are an important dynamic in the industry because such relationships are:*
>
> > *the leading driver of revenue as carriers are not only the estimatics vendors' largest customers in terms of direct revenue, but also generate secondary revenue streams through repair shops that are*

Moreover, many insurance companies have historically entered into agreements with automobile insurance claims processing service providers like us and our competitors whereby the insurance company agrees to use that provider on an exclusive or preferred basis for particular products and services and agrees to require collision repair facilities, independent assessors and other vendors to use that provider. If our competitors are more successful than we are at negotiating these exclusive or preferential arrangements, we may lose market share even in markets where we retain other competitive advantages.

[16] CCC reported the following in its 2008 annual report to the SEC:

> *Some insurance companies have entered into agreements with CCC or our competitors that provide that the insurance companies will use either CCC's or the competitor's product or service exclusively or designate CCC or a competitor as its preferred provider of that product or service. If the agreement is exclusive, the insurance company requires that collision repair facilities, independent appraisers and regional offices use the particular product or service. If the company is simply a preferred provider, the collision repair facilities, independent appraisers and regional offices are encouraged to use one of the approved products, but may choose any other vendor's product or service. Being included on the approved list of an insurance company or having a product that is endorsed by the insurance company provides certain benefits, including immediate customer availability and an advantage over competitors who may not have such approval. To the extent an insurance company has endorsed ADP, Mitchell or another competitor, but not us, we may experience a competitive disadvantage.*

> *affiliated with the insurance carriers' DRP programs. These insurance carrier relationships are generally longstanding and difficult to break once established as the switching costs associated with retooling internal systems and forcing system turnover at the repair shop level are steep. In addition, the service provided by estimatics vendors are critical to the operation of insurance carriers' claims resolution process and any disruption would have negative ramifications for the carrier's operations.*

Id., 54.

Mitchell is likewise defending a lawsuit that alleges insurers require the use of the Mitchell software for their direct repair programs.[17]

This tying arrangement enables insurers to obtain changes to the provider's database and estimating software by guaranteeing thousands of body shop customers for the estimating provider. It also allows the estimating provider to set its prices uncompetitively high for the entire market because it is guaranteed a significant market share courtesy of its insurer contracts. Thus, the information provider has every incentive to grant concessions and insurer-desired changes to its products that ultimately harm all collision repair providers and consumers. It also allows the providers to squelch protest of the decreases in time allowances and necessary procedures by direct repair shops by holding the shop's DRP relationships hostage. Any dispute or problem the network shop has with the information provider that results in the information provider's refusal to continue allowing the use of its estimating program causes the repair shop's immediate removal from the contracted insurers' networks.[18]

Independent appraisers are also required to use the insurer's mandated estimating provider, thus, removing any suggestion of impartiality, as required by some state's laws.

2. Specially Formulated Software Versions

The estimating database and software providers also conspire with insurers to reduce times for operations and eliminate necessary repairs from estimates and to artificially suppress by formulating special versions of their estimating software for particular insurer's use.[19]

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[17] Paramount Auto Body Shop, Inc. v. Mitchell International, Inc., Case No. 37-2009-00084102, (Superior Ct., San Diego, Cty. CA). This action is currently pending. A copy of the Amended Complaint is attached hereto as Exhibit 21.
[18] Id. (Second Amended Complaint, ¶¶ 55-60).
[19] FTC v. CCC Holdings, Inc., Case No. 1:08cv2043 (D.D.C, February 11, 2009), Doc. #80, Defendants' Post Trial Brief at 17 (Attached hereto as Exhibit 22).

Ostensibly, an insurance company field staff appraiser in the claims adjustment process will use the same estimating information and software programs as the repair facility. Nevertheless, despite using the "same" software, an independent collision repair facility can get entirely different results from the software. This occurs because insurers have demanded and obtained from the estimating providers the ability to change defaults and initial assumptions in the software programs to prevent procedures from being automatically included in a resulting estimate.[20]

3. Estimating Providers Substantiate an Artificial Market

Insurers also use the estimating database and software providers to substantiate an artificial market upon which insurers rely for determining "necessary repairs" and "prevailing labor rates". Insurers require their direct repair shops to electronically upload their estimates to the insurer through the information provider. Independent shops typically do not electronically upload their estimates. They do this, in part, because it enables the information provider to collect data that it can then sell or provide to other insurers. By requiring their direct repair shops to purchase and use the specially formulated versions of the software, and upload the information electronically, insurers are systematically creating a universe of information that only reflects the procedures and prices charged by their direct repair shops – that have agreed to specific contract terms and prices with the insurers. These are not fair market values. They are contract rates offered at a discount in exchange for repair work. Accordingly, insurers conspire with the information providers to offer, as an ostensibly independent source, data as to necessary repair procedures and rates that have been deliberately manipulated.

E. How Insurer Bid Rigging Destroys Competition And Harms Consumers

Insurers and DRP program shops are employing a big rigging scheme to systematically underpay legitimate claims and destroy competition in the auto body repair market. This is how it works. After a vehicle is damaged in an accident, the insurance company inspects the vehicle and writes an initial estimate. More often than not, that estimate is less than the actual cost to restore the vehicle to pre-loss condition. Insurers do this on purpose.

Intentionally underwriting estimates benefits insurers in two ways. First, some consumers opt to take a cash payment rather than have their vehicle repaired. When this happens, the cash payment is premised on the estimate. Thus, a low estimate means a low cash payment. Again, insurers save money at the expense of the unwitting consumer.

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[20] Smith v. American Family Mutual Ins. Co., 289 S.W.3d 675 (Mo. App. 2009) (plaintiffs successfully identified that estimating software systematically excluded certain repairs deemed necessary by industry standards).

Second, insurers benefit by destroying competition through fake bids. This happens as follows. On the front end of the claim, insurers attempt to persuade consumers to use the DRP program shop (rather than an independent shop) by advising them that the DRP shop will fix the vehicle in accordance with the insurer's initial underwritten estimate, and that an independent shop may not. On the back end of the claim, when the cost to repair exceeds the initial estimate, insurers refuse payment on the grounds that the DRP shop would have fixed the car per the insurance company's estimate. Insurers use an intentionally underwritten estimate to mislead consumers and repairers. This is a scheme of fake bid rigging (in this case fake repair estimates) designed to destroy competition between repair facilities. The bids or estimates are fake in the sense that DRP shops are not truly repairing vehicles per the artificially underwritten estimates. To the contrary, DRP shops are routinely paid additional monies for the actual cost to repair the vehicle, less, of course, the concessions on labor rates, parts discounts, etc.

The bid rigging at issue is monopsonistic in that prices are kept artificially low by market purchasers in order to stifle competition. Independent repair shops are unable to fairly compete for repair jobs. Consumers are deprived of genuine choice. And, while it may appear that these anticompetitive practices eventually trickle down to consumers in the form of reduced premiums, historical data suggests otherwise. As demonstrated in Exhibit 33, insurer premiums have far exceeded the Consumer Price Index and the actual cost of repair. Savings generated through illegal bid rigging and market manipulation are not being passed on to consumers.

F. Brief Legal Analysis

To begin, it is helpful to understand the parameters of the "business of insurance". In order for a practice to be considered the "business of insurance" it must: (1) have the effect of transferring or spreading a policyholder's risk; (2) be an integral part of the policy relationship between insurer and the insured; and (3) be limited to entities within the insurance industry.[21] These requirements are significant in the context of anticompetitive practices in the auto body repair market.

First, seeing as the business of insurance has nothing to do with auto body repairs, it is curious that insurers would be so extensively involved in affairs outside the scope of core duties and responsibilities. What is more, insurance incursion compromises consumer rights and benefits. As discussed by the Fifth Circuit Court of Appeals in Allstate Ins. v. Abbott, 495 F.3d 151, 161 (2007) (copy attached as Exhibit 24), vertical integration of the business of an insurance company with an auto body repair business creates an "inherent conflict of interest" and an "irresistible opportunity for insurers to engage in predatory practices." The Court further recognized that an alignment of this nature "would eliminate the traditional checks and balances in the industry, meaning that the insurer's interest in keeping repair costs as low as possible would become the overriding interest."

[21] Union Labor Life Insurance Co. v. Pireno, 458 U.S. 119, 129 (1982), copy attached as Exhibit 23.

Id. Thus, the courts have recognized that teaming up insurance companies and auto body repairers is bad for consumers.

Second, understanding what the "business of insurance" is and is not is instructive in the context of the McCarran-Ferguson Act (which applies only to the "business of insurance"). Insurer endeavors in the auto body repair market are not the "business of insurance" and thus not protected by antitrust exemption pursuant to McCarran-Ferguson. See Group Life & Health Insurance Co. v. Royal Drug Co., Inc., 440 U.S. 205, 232, (1979) (finding that agreements between insurers and automobile body repair shops are not the business of insurance).

What is happening in the auto body repair market is similar in many ways to the anticompetitive practices discussed in International Outsourcing Services, LLC v. Blistex, Inc., 420 F.Supp.2d 860 (2006) (copy attached hereto as Exhibit 25). In that case, the plaintiff, a coupon processing company, filed an action against the defendant manufacturer alleging that it violated the Sherman Act by conspiring with competitors to change the rate that was paid for coupon redemption-related shipping costs. The court analyzed the case in three steps: conspiracy, conduct in violation of the Sherman Act and injury.

First, the court reiterated the longstanding principle that "conspiracy" in the antitrust context is broadly interpreted. "[I]t is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." Id., 863-64. In the auto body repair context, the vertical contractual relationships between insurers and DRP facilities and vendors as well as the insurer-to-insurer horizontal agreements constitute unlawful conspiracies as the effect of their arrangements are to restrain commerce and violate antitrust laws.

Second, there must be conduct that is per se illegal or constitutes an unreasonable restraint of trade. "[A]ny combination which tampers with price structures is engaged in an unlawful activity." Id., 864. There is a broad prohibition on price fixing. The more common type of price fixing involves sellers. The less common type of price fixing involves buyers, which is known as a "buyers' cartel". This occurs "when a group of buyers band together in order to fix a maximum price (below competitive levels) that they will pay for an item. Buyers' cartels engaged in price fixing have been held to be illegal under the Sherman Act even though their goal is to lower the price of the input. . . . [B]uyer cartels, the object of which is to force the prices that suppliers charge the members of the cartel below the competitive level, are illegal per se. . . . just as a sellers' cartel enables the charging of monopoly prices, a buyers' cartel enables the charging of monopsony prices; and monopoly and monopsony are symmetrical distortions of competition from an economic standpoint." (Citations omitted; internal quotation marks omitted) Id., 864-65.

Just as the parties in Blistex conspired to keep shipping costs down below competitive costs for retailers and coupon processors, so have the insurers conspired to keep auto body repair cost below competitive rates. The most useful analogy in appreciating the disparity in auto body repair work is the comparison with automobile mechanical repair costs. *To wit*: while an auto body repairer with similar overhead, equipment, training, and tooling as a mechanic may be paid in the range of $35 to $45 per hour, a mechanic may charge as much as $85-$100 per hour. The only real difference between these industries is the auto body repairers reliance on third-party insurance payment.

Unlike Blistex, the damages in this case are far more extensive and detrimental to consumers. This brings us to the third step in the court's analysis: injury. In Blistex, the plaintiff sought injunctive relief. Injury in this context includes a "threatened loss or damage of the type the antitrust laws were designed to prevent and flows from that which makes defendants' acts unlawful. . . . In an action brought against a buyers' cartel, a seller's injury from lowered prices constitutes an antitrust injury." (Citations omitted; quotation marks omitted) Id., 865. In the auto body repair context, independent auto body repairers have undoubtedly suffered "injury" as contemplated by the antitrust laws. What is more, and what uniquely distinguishes the auto body repair market, is the harm to consumers.

There are certain theoretical principles that guide an analysis of market interference. "Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow . . . . Those who controlled the prices would control or effectively dominate the market. And those who were in that strategic position would have it in their power to destroy or drastically impair the competitive system."[22] The thrust of the Sherman Act is deeper and reaches more than monopoly power. "Any combination which tampers with price structures is engaged in an unlawful activity." Id. The Sherman Act "protects that vital part of our economy against any degree of interference." Id.

Three cases involving similar claims by auto body repair shops were litigated in the early 1980s.[23] The cases discuss vertical and horizontal conspiracies pursuant to the Sherman Act and the applicability of the McCarran-Ferguson Act. The courts examining these related issues were reluctant to find antitrust violations premised on horizontal conspiracy theories. Nevertheless, as articulated by Dissenting Judge Skelly Wright in Proctor v. State Farm, 675 F.2d 308 (1982), the type of vertical agreements at issue (i.e. between insurers and DRPs and appraisers and software providers), if anticompetitive in purpose and effect, would be illegal:

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[22] U. S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940).

[23] Proctor v. State Farm, 675 F.2d 308 (1982); Workman v. State Farm Mut. Auto. Ins. Co., 520 F. Supp. 610 (1981); and Quality Auto Body, Inc. v. Allstate Ins. Co., 660 F.2d 1195, 1203 (1981). (Exhibits 26, 27 and 28)

> *While vertical agreements are not illegal per se, they would be illegal if anticompetitive in purpose and effect. . . . Here, the vertical agreements were a necessary concomitance to the alleged price-fixing agreement. They advanced a horizontal agreement that was inherently anticompetitive and that was per se illegal. . . . Seen in this light, the vertical agreements themselves were necessarily anticompetitive. Accordingly, given the existence of the illegal horizontal agreement, a finding that the vertical agreements violated the law seems inescapable.*[24]

These cases are helpful as they highlight similar issues brought before the courts. Neither of the cases addressed the 1963 Consent Decree or considered the issues of illegal monopsony or buyers' cartel problems, or considered the issues of consumer safety. What is more, all of the decisions at issue erroneously assumed that the insurance company (not the consumer) was the customer or purchaser of service. They, likewise, erroneously assume that the quality of goods or repairs produced in the face of the vertical agreement was equal to the quality produced outside the vertical agreement. Ultimately, these cases are attached for your review and consideration as the issues addressed are similar to those advanced herein. These cases are nonetheless distinguishable for all of the aforesaid reasons, and because they inevitably lacked the evidence and resources necessary to advance claims of this nature – all of which we now have available. And, as articulated in Proctor, it is apparent that vertical arrangements of the kind discussed herein can and do violate our antitrust laws.

Applicability of the 1963 Consent Decree

A. The 1963 Consent Decree is Relevant and Applicable Today

The 1963 Consent Decree specifically prohibited certain activities that violated the Sherman Act. Those prohibited activities included any plan, program or practice which has the purpose or effect of:

(1) Sponsoring, endorsing or otherwise recommending any appraiser . . .;

(2) Directing, advising or otherwise suggesting that any person or firm do business or refuse to do business with (a) any appraiser . . . or (b) any independent or dealer franchised automotive repair shop . . .;

(3) Exercising any control over the activities of any appraiser . . . ;

(4) Allocating or dividing customers, territories, markets or business among any appraisers . . .; or

(5) Fixing, establishing, maintaining or otherwise controlling the prices to be paid for the appraisal of damage to automotive vehicles, or to be charged by independent or dealer

[24] Proctor v. State Farm, 675 F.2d 308, 436 (1982).

franchised automotive repair shops for the repair of damage to automotive vehicles or for replacement parts or labor in connection therewith, whether by coercion, boycott or intimidation or by the use of flat rate or parts manuals or otherwise.

Insurers, in concert with one another, with DRP facilities and with software providers are systematically violating every one of the aforementioned prohibited activities, which were previously held by the D.O.J. to be illegal. Insurers are violating antitrust laws in all the aforementioned ways and in the ways hereinafter summarized.

(1) Today, appraisers often work directly for insurance companies. They maintain offices with the insurer or have offices on the premises of the insurer's captured repair facility. These appraisers are sponsored, endorsed and employed exclusively at the insurer's discretion and act so as to further their own financial interest and the financial interest of the insurer and its coconspirators.

(2) Today, insurers direct consumers where to do business and where not to do business. This is done by steering work to insurer-controlled repair facilities. Steering is an extremely effective way for insurers to control the flow of auto repair work. This process enables insurers and their coconspirators to enrich themselves at the expense of consumers and independent facilities.

(3) Today, appraisers are not "independent" at all. To the contrary, appraisers have become simply an arm of the insurer. Appraisers are controlled through the mandated use of appraisal software programs, insurer directives and profit driven incentives and penalties.

(4) Today, insurers and their coconspirators control the allocation of customers, territories, markets and business. Again, this is designed to increase insurer profits and the profits of the coconspirators at the direct expense of consumers and independent facilities.

(5) Today, insurers conspire with one another and with their coconspirators to fix, establish, maintain and control the prices to be paid for repair work. Insurers and their coconspirators conspire to suppress auto body labor rates through coercion, boycott, intimidation, flat rate mandates, appraisal and estimating software and otherwise.

B. Original Signatories to the Petition

A list of the original parties is attached hereto as Exhibit 29. This list was completed by Phil Rack, a retired GM executive and editor of Beyond Parts and Equipment (an auto body trade publication) and his wife, Carolyn Rack, a journalist focused on consumer protection.

C. The D.O.J. has Jurisdiction to Enforce the Consent Decree

The D.O.J. has jurisdiction to enforce the terms of the Consent Decree pursuant to Section VIII of the Court Ordered Consent Decree. The D.O.J. can apply to the United State District Court for the Southern District of New York for an appropriate order from the court seeking enforcement, compliance and penalties. In addition, for persons and entities not specifically bound by the Consent Decree, the D.O.J has jurisdiction to open an investigation into existing market practices, which, for all intents and purposes, violate the letter and spirit of our antitrust laws.

Economic Implications

A. Market Share Data

Attached as Exhibit 30 is the requested market share data for insurers on the national level. Also, attached as Exhibit 31 is the requested market share data for insurers on a state-by-state basis.[25]

B. Likely Impact on Consumers

Enforcing the 1963 Consent Decree and/or federal antitrust laws will break up harmful arrangements that have the effect of promoting poor repairs in exchange for insurer savings. While insurer profits and premiums have continued to rise, repair quality has seen a constant decline.[26] In other words, insurers have enjoyed bigger profits at the expense of consumer safety.[27]

If there is an economic impact to breaking up inappropriate insurer relationships, that impact can be absorbed in inflated insurer profits. The additional cost to improve basic quality does not

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[25] See, e.g. *Analyst Sees Gains for Big Auto Insurers From Tough Economy*, P&C National Underwriter (April 6, 2009) (Exhibit 32).

[26] See for example, Exhibit 33, which includes historical data on insurer rates in relationship with the consumer price index.

[27] For a similar discussion on economic affects of insurer abuses in the auto body repair industry see: *The Economics of the Rhode Island Auto Body Repair Industry*, By Fredric B. Jennings Jr., Ph.D. (March 10, 2004) (Exhibit 34).

need to come from premiums. With that said, even if basic quality standards were to result in a modest rise of insurer premiums, we believe the same would be warranted and necessary.

Conclusion

The purpose of antitrust law is establishing a "competitive business economy."[28] Antitrust laws are designed to protect consumer prices, effective competition, improvement of the quality of services and products, greater innovation and the ability of tradesmen and producers to benefit from a competitive economy. When restraint of trade becomes unreasonable and harmful, prohibition is required. "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[29] In other words, "The purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns, but out of concern for the public interest."[30]

Insurer control and manipulation of the auto body repair market does not create competition or drive innovation. Rather, it stifles competition, punishes innovation, rewards poor quality and leaves auto body repair shops with an unfair decision: team up with an insurance company or risk going out of business. Poor quality repairs result in unsafe vehicles and accelerated depreciation.

Consumers are particularly vulnerable when insurance companies team up with repairers. For a host of reasons, state insurance departments have not enforced state regulations or evidenced a willingness to protect consumers from these types of practices. The practices at issue are affecting consumers throughout the entire United States, as evidenced, in part, by the overwhelming support for the 1963 Consent Decree petition drive. The following are some reasons why enforcement of antitrust law is necessary to protect consumer protection.

(1) The nature of auto body repair work is such that most consumers have no idea if their vehicle was repaired correctly and safely.

(2) Insurers put enormous pressure on auto body repairers to fix cars as cheaply as possible, even if that means compromising safety. Many repairers accede to these directives in order to stay in business.

(3) Consumers are generally unaware of the contractual agreement between insurers and the repairer. Consumer are then led to believe they are the "customer" and

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[28] United States v. South-Eastern Underwriters Ass'n, et al., 322 U.S. 533, 559 (1944).
[29] Board of Trade of City of Chicago et al. v. United States, 246 U.S. 231, 238, (1918).
[30] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1992).

their rights and safety are of primary concern, which is not true. Thus, most consumers are not even cognizant enough to protect their own interest.

(4) Insurers engage in practices on behalf of their DRP shops that violate consumer protection laws. If auto body repair shops engaged in the same practices some insurers utilize as "innovative" methods of customer services, the repair facility would be in direct violation of state and federal consumer protection laws.[31]

(5) An absence of consumer protection at the local and state level and a history of ignoring insurer incursion into the auto body repair market has created an incredibly dangerous environment in which insurance companies now exercise unbridled control over almost every aspect of the auto body repair business.

Our antitrust law is "designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."[32]

Consumers should be safe to assume that their auto body repair technicians are protecting their interests and not the economic interests of an insurance company. They should likewise be able to rely on their government to protect them from anticompetitive behavior, especially when that behavior is putting them at risk of harm, and by virtue of the problem, they are powerless to protect themselves. Breaking up the illegal arrangements between insurers, software providers, appraisers and captured auto body repair facilities is necessary to restore unfettered competition in the auto body repair market and to restore appropriate incentives that reward quality and professional reputation.

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[31] E.g. Progressive requires every consumer desiring to avail herself of Progressive's "Concierge Level of Service" to waiver her right to receive an estimate in advance of the vehicle being permitted entry into the program. (Progressive's Waiver is attached hereto as Exhibit 35). Under Ohio law, however, it is a deceptive act or practice in a consumer transaction for motor vehicle repairs to condition performance of any repair or service upon the consumer's waiver of any rights provided in the regulation. Ohio Administrative Code § 109:4-3-13(C)(1).

[32] Northern Pacific Rail Co. v. United States, 356 U.S. 1, 4 (1958).

On behalf of auto body repair technicians and small business owners from across the country, thank you for your time and consideration of these very important issues.

Very truly yours,

John M. Parese

JMP/efk
Enclosures

c: Attorney General Richard Blumenthal (w/ enclosures)
Mr. Aaron Schulenburg, SCRS, (DE) (w/ enclosures)
Mr. Barry Dorn, SCRS, (VA) (w/o enclosures)
Mr. Stephen Regan, MABA, (MA) (w/o enclosures)
Mr. Edward Kizenberger, NYSACT, (NY) (w/o enclosures)
Mr. Charles Bryant, AASP/NJ, (NJ) (w/o enclosures)
Mr. Robert Skrip, ABAC, (CT) (w/o enclosures)
Mr. Anthony Lombardozzi, CCRE, (NH) (w/o enclosures)
Mr. Stephen Behrndt , PCTG, (PA) (w/ enclosures)
Ms. Rene Ratchek, WACTAL, (WI) (w/o enclosures)
Mr. Robert Carmack, (MI) (w/o enclosures)
Attorney Erica Eversman, (OH) (w/o enclosures)