Consumer Watchdog

Formerly The Foundation for Taxpayer & Consumer Rights
1750 Ocean Park Boulevard, #200, Santa Monica, CA 90405-4938 • Tel: 310-392-0522 • Fax: 310-392-8874 • www.consumerwatchdog.org

April 23, 2008

Honorable Assemblyman Jared Huffman
State Capitol, Room 4139
Sacramento, CA 95814

Re: AB 2800 – OPPOSE

Dear Assemblyman Huffman:

We write to express our opposition to your attempt to amend the good driver requirements enacted by the voters through Proposition 103. We urge you to take a different approach to the laudable goal of creating insurance incentives for people who reduce their driving.

Consumer Watchdog[1] pioneered the law that requires that motorists pay lower insurance premiums if they drive less, and spent years seeking its implementation in the courts. Our organization then worked with the insurance industry and the Department of Insurance in the regulatory arena to develop new rules that give insurers increased ability to verify the miles that policyholders drive in order to meet Prop 103's mileage requirement. Those regulations, discussed in more detail below, specifically allow insurers to require odometer readings to verify mileage.

Unfortunately, your bill will not serve the objective of enhancing incentives for policyholders to drive less, because it improperly amends a voter-approved initiative and will, we are confident, be rejected by the courts

Because companies were given until this summer to come into full compliance with the 2006 rules governing the structure for insurance rates, this bill is premature even if it did not violate Proposition 103.

We have, for more than a year, expressed these concerns to some of the people involved with supporting this bill. We have urged them to focus their resources on moving insurers to "green" their insurance policies under the new regulations that dramatically increased the value placed on a driver's mileage and substantially increased insurance companies' ability to verify the actual mileage driven by policyholders. This opportunity to influence insurance companies' rating plans still exists.

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AB 2800 illegally amends Prop 103 and would be rejected by the courts

AB 2800 proposes to amend the mandatory insurance rating factors in Insurance Code Section 1861.02 , which was approved by the voters in 1988 as part of Proposition 103. This section of the initiative provides a clear and systematic methodology for the use of rating factors in the setting of auto insurance premiums and delegates the authority to set optional rating factors to the Insurance Commissioner.

Amendments that do not further the purpose of Proposition 103 are illegal. In our successful challenge of the 2003 law SB 841 (Perata) which also sought to amend 1861.02 – *FTCR v. Garamendi* (132 Cal.App.4th 1354) – we argued that the bill invaded the Commissioner's delegated authority to set optional rating factors under Section 1861.02(a)(4), and the Second District Court of Appeal agreed.

> In enacting Sen. Bill 841, the Legislature sought to override the Insurance Commissioner's authority to set rates and premiums for automobile insurance.
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> …Substantively, the Insurance Commissioner may adopt only those optional rating factors having a "substantial relationship to the risk of loss." Procedurally, the Insurance Commissioner may do so only in the context of a formal rulemaking proceeding with established rights of public participation and judicial review. Under Proposition 103, therefore, it is the Insurance Commissioner rather than the Legislature that is vested with ratemaking authority subject to the appropriate ratemaking process. [*FTCR v. Garamendi* (132 Cal.App.4th 1354)]

Your bill purports to amend one of Proposition 103's mandatory rating factors by creating multiple mileage factors – an optional factor that falls under the same prohibition that caused the court to declare SB 841 an invalid amendment to Proposition 103.

Also worth noting is that, like SB 841, where the bill sought to invalidate the Commissioner's regulations on persistency, AB 2800 would trump the Commissioner's regulations on mileage verification, which are Proposition 103 authorized rules that are within the purview of the Commissioner.

The bill is doubly illegal because it would allow a system of unfair discrimination in which similarly situated insureds would pay different prices. Insurance Code 1861.05 provides that: "No rate shall be approved or remain in effect which is excessive, inadequate, unfairly discriminatory… ." Consider two people who drive 4,000 miles a year. One chooses to participate in the optional "green" plan of Company A, the other, also insured by Company A, does not. If everything else about them is the same, the mere fact that they are not participants in a program (perhaps it was never marketed to them) would have them paying a different premium under your plan. That is unfair discrimination and should not be the public cost of the effort to reduce mileage.

Moreover, an effort to amend Proposition 103 to authorize such discrimination would be invalidated by the courts.

This is not to say that incentives to lower mileage are necessarily unfairly discriminatory; they are not. It is the creation of two classes of insurance customers who offer no different risk to an insurer that is the problem. Proposition 103 mandates that every insurer provide an incentive for mileage reduction, as miles driven is the second most important determinant of premium. It is our view that the effort that is needed to address AB 32 goals is to ensure that insurers fulfill Prop 103's mileage reduction incentives much more aggressively than they have to date shown a willingness to do.

Current regulations allow, and should lead to, greener insurance offerings

As we have discussed, Proposition 103, enacted by voters in 1988, requires insurance companies to base the auto insurance rates charged in California primarily on a motorist's 1) driving safety record, 2) annual miles driven and 3) years of driving experience.

In 2006, then-Insurance Commissioner John Garamendi enacted new regulations to enforce this part of Proposition 103 and require insurance companies to restructure their auto insurance rates (by Summer 2008) to fully comply with the voters' mandate. At the same time, Commissioner Garamendi promulgated new rules to make it easier for insurers to verify the actual miles driven by their policyholders.

In fact, nothing has ever prohibited insurers from providing incentives for mileage reduction. Even prior to the 2006 rule changes, insurers have been allowed (for about 15 years) to offer rebates to customers who drive less than they originally estimated. Companies have not utilized this option because they prefer not to also enforce the necessary obverse, in which they retroactively surcharge high-mileage drivers. Insurers understand that as they increase the incentives for low mileage drivers they will find themselves having to return to some customers for additional premiums if the drivers do not meet the low mileage goals, a prospect that they fear is bad for business. Insurers have long ignored the fact that by providing real mileage reduction incentives to customers the overall mileage of a company's book of business would decline and the risk exposure with it, thus allowing across the board reductions.

Under the current rules, insurers can offer real incentives for realistic mileage reductions. Such a rating plan would have a substantial number of tiers for drivers' mileage so that a policyholder who carpooled one day a week and thereby reduced their mileage by 1,000 miles would move to a cheaper rate. Carpool once a week and telecommute once a week and move down to yet a lower price. So long as the insurer continues to prioritize the impact of a driver's safety record (as the law requires), nothing would stop an insurer from offering their insurance product as a legitimately Green Auto Insurance policy.

In order to facilitate insurers' ability to confidently assess the risk associated with a customers mileage, insurers were given the authority to require customers to provide an odometer reading when the mileage verification rules were revised. Despite some claims

we have heard that insurers cannot get odometer readings from policyholders, the regulations are clear:

> *An insurer may require an applicant or policyholder to provide the following information…The current odometer reading of the vehicle to be insured.* [10 CCR § 2632.5(c)(2)(C)(6)]

Insurance companies were also given [at 10 CCR § 2632.5(c)(2)(D)] the authority to request, but not mandate, that customers comply with certain mileage verification requirements including the technological GPS devices contemplated in your bill. (It should be noted that allowing the use of GPS devices in the regulations and here in your bill creates privacy concerns that deserve further consideration.)

The commissioner is empowered to address concerns about mileage verification

At the time the new mileage regulations were enacted, it was our understanding that insurers were generally satisfied that their ability to verify customers' mileage under the new rules was sufficient. However, if insurers' assessment has since changed, they can request a rulemaking proceeding to alter those regulations. If it is your view that changes to the verification rules are needed to ensure that companies can effectively implement mileage reduction incentives, you can also petition the Department of Insurance for a rulemaking hearing. A regulatory setting, and not the legislature, is the proper forum for altering Commissioner-approved regulations. *In that effort, we will gladly work with you.*

Consumer Watchdog opposes AB 2800. As it will eventually be struck down by the courts, even moving it through the legislative process is a waste of taxpayer resources. However, it is our belief that insurers *should* be "greening" their product and that the rules set out by Proposition 103 create the opportunity for insurers to show environmental responsibility and leadership. We would be pleased to work with you and the sponsors of this bill in the regulatory setting to reach those mutual goals.

Thank you for considering our views.

Sincerely,

Douglas Heller

Carmen Balber