UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LIBERTY MUTUAL INSURANCE CO.
Petitioner

v.

PROGRESSIVE CASUALTY INSURANCE CO.
Patent Owner

Case CBM2012-00002
Patent 6,064,970

Before the Honorable JAMESON LEE, JONI Y. CHANG, and MICHAEL R. ZECHER, *Administrative Patent Judges*.

REBUTTAL DECLARATION OF MARY L. O'NEIL ON BEHALF OF PETITIONER LIBERTY MUTUAL INSURANCE CO. REGARDING U.S. PATENT NO. 6,064,970

I, Mary L. O'Neil, hereby declare under penalty of perjury:

I have previously been asked by Liberty Mutual Insurance Co. ("Liberty Mutual") to testify as an expert witness in this action. For purposes of this rebuttal declaration, I have been asked by Liberty Mutual to respond to certain assertions and opinions offered by Michael Miller and Progressive Casualty Insurance Co. ("Progressive") concerning U.S. Patent No. 6,064,970 ("the '970 patent") in this matter.

1. I am the same Mary L. O'Neil who provided a Declaration in this matter executed on September 14, 2012 as Exhibit 1009.

2. My information regarding experience, qualifications, and compensation are provided along with my prior Declaration and *Curriculum Vitae* and case list (Exhibit 1010).

I. Scope of Rebuttal Declaration

3. I have been asked to respond to certain assertions and opinions of Mr. Michael Miller expressed in his declaration of May 1, 2013 as Exhibit 2010, his supplemental declaration of May 22, 2013 as Exhibit 2020, and certain assertions of Progressive in its Patent Owner's Response of May 1, 2013.

4. In developing my opinions below, and in addition to the materials identified in my prior declaration at paragraph 14, I have considered the following materials:

- Herrod Reference, GB2286369 (Ex. 1007);
- Declaration of Michael Miller (Ex. 2010);
- Supplemental Declaration of Michael Miller, including a document entitled "Actuarial Standard of Practice No. 12" (Ex. 2020);
- Document entitled "Risk Classification Statement of Principles" (Ex. 2012);
- Patent Owner's Response (Paper 27) ("Opposition" or "Opp.");

- Board's Decision on Institution of Covered Business Method Review (Paper 10);
- All other materials referenced as exhibits herein.

II. Analysis and Opinions

A. Mr. Miller's Opinions and Progressive's Assertions Regarding "Actuarial Classes" and Determining Auto Insurance Premiums

5. In providing a definition of "actuarial class," Mr. Miller states:

> In the field of motor vehicle insurance as of 1996, a person or ordinary skill in the art would have understood that "actuarial class" had the same meaning as risk class. . . . This definition is consistent with the definition in the Risk Classification Statement of Principles of the American Academy of Actuaries. A person of ordinary skill in the art in 1996 would have *adhered* to this Statement of Principles."

Ex. 2010 ¶ 16 (Emphasis added).

6. Mr. Miller has presented the Risk Classification Statement of Principles (Ex. 2012) as if it were a binding verbatim requirement to be followed. That is incorrect. The guidance provided by the Statement of Principles and its usage is explained by Interpretative Opinion 4: Actuarial Principles and Practices (1982) of the American Academy of Actuaries (AAA, the umbrella organization for all actuaries), which would have been in effect through 1996. In fact, Interpretative Opinion 4: Actuarial Principles and Practices (Ex. 1023)[1] states in essence that the

[1] Exhibit 1023 is a true and correct copy of "Interpretative Opinion 3: Professional Communications of Actuaries and Interpretive Opinion 4: Actuarial Principles and

Statement of Principles cited by Mr. Miller is only a *guideline*—one possible reference out of a large body of material that form the bases of Generally Accepted Actuarial Principles and Practices (which are a broad overview of how actuarial practice should be done):

> (a) Generally Accepted Actuarial Principles and Practices.
>
> Guide 4(b) requires the actuary to "exercise due diligence to ensure . . . that the methods employed are consistent with the sound actuarial principles and practices established by precedents or common usage within the profession. . ." Such "sound actuarial principles and practices" constitute Generally Accepted Actuarial Principles and Practices.
>
> (b) Sources of Generally Accepted Actuarial Principles and Practices.
>
> Sources of Generally Accepted Actuarial Principles and Practices emerge from the utilization and adoption of concepts described in actuarial literature. *Such literature includes, but is not limited to, the Actuarial standards and Actuarial Compliance Guidelines adopted by the Actuarial Standards Board, the Recommendations and Interpretations published under the auspices of the American Academy of Actuaries; the professional journals of recognized professional actuarial organizations (including the Statements of Principles promulgated by the Society of Actuaries and the Casualty Actuarial Society); recognized actuarial textbooks and study materials; and applicable provisions of law and regulations; and may include standard textbooks or other professional publications in related fields such as mathematics, statistics, accounting, economics and law.*

Ex. 1023 at 6 (emphasis added, footnote omitted).

7. Mr. Miller further incorrectly argues that a POSITA would have strictly adhered to the Statement of Principles in making "statistical considerations such as

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Practices," adopted 1970-1982 by the American Academy of Actuaries and republished in 1992 by the Actuarial Standards Board, which I obtained online at

the homogeneity, credibility, and predictive reliability of the claims data that will be gathered for each actuarial class." Ex. 2010 ¶ 34. Rather, Opinion 4 again rebuts this assertion, stating ultimately in subsection (d) that "In all cases the professional judgment of the actuary should prevail" and provides Standards of Practice and Compliance Guidelines:

> (c) Standards of Practice and Compliance Guidelines.
>
> An actuary working in a specialized field *should take into consideration any published Standard of Practice* or Compliance Guideline of the Actuarial Standards Board. An actuary who uses principles or practices which differ materially from any published Standard of Practice or Compliance Guideline must be prepared to support the particular use of such principles or practices and should include in an actuarial communication appropriate and explicit information with respect to such principles and practices. . . . *When dealing with a specific situation not covered by a published Standard of Practice or Compliance Guideline, the actuary should be aware of relevant precedent and generally available literature in deciding what constitutes Generally Accepted Actuarial Principles and Practices.*

Ex. 1023 at 6-7 (emphasis added); *cf. also* Ex. 2012 at 12.[2]

8. Indeed, one such Standard of Practice—No. 12, attached to Mr. Miller's supplemental declaration Ex. 2020—further belies Mr. Miller's strict adherence to the

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http://www.actuarialstandardsboard.org/pdf/superseded/intopinion.PDF.

[2] "These statistical considerations—homogeneity, credibility and predictive stability—are somewhat conflicting" and "there is no one statistically correct risk classification system. . . . The decision as to relative weights to be applied will, in turn, be influenced by the nature of the risks, the management philosophy of the organization assuming the risk and the judgment of the designer of the system."

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