



# Automotive Recyclers Of Massachusetts, Inc.

P. O. Box 1030

Southbridge, MA 01550

774-402-4176

Email: info@armmass.com

June 28, 2018

Gilbert W. Cox, Jr.

Chairman

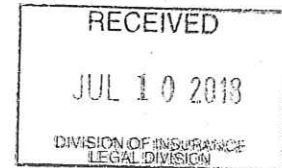
Auto Damage Appraiser Licensing Board

Division of Insurance

1000 Washington Street, Suite 810

Boston, MA 02118-6000

 **COPY**



Dear Mr. Cox:

The Automotive Recyclers Association of Massachusetts (ARM) represents 300 professional automotive recyclers across the state of Massachusetts. It was brought to our attention that at a June 20, 2018 meeting of the Auto Damage Appraiser Licensing Board (ADALB), the topic of recycled original equipment manufactured (OEM) automotive parts was discussed. Specifically, that the Alliance of Automotive Service Providers of Massachusetts is encouraging repair facilities in the state to file complaints with the ADALB if an insurer estimate includes recycled parts and the recycled part purchased by the repair facility is damaged in some way.

ARM has long been an advocate for consumer choice, and as such supports a robust automotive parts supply chain. Genuine recycled, OEM parts sold by ARM member facilities play a critical economic and environmental role in the market, providing consumers with an important alternative to expensive "new" OEM parts. It goes without question that our members want only safe, quality recycled OEM parts to be utilized in vehicle repairs. This is a goal that automotive recyclers share with repair facilities, insurance companies, and the ADALB.

What may not have been discussed at your June 20 meeting was that professional automotive recycling operations have robust product assurance and quality control procedures in place to ensure that only the best quality recycled, OEM parts enter the insurance repair market. Each day over 500,000 recycled OEM parts that were designed and built to meet the automakers original requirements for fit, finish, durability and safety are sold directly to consumers as well as to repair shops and automobile dealers. I would be happy to provide members of the Board more information about these quality control procedures.



## Automotive Recyclers Of Massachusetts, Inc.

P. O. Box 1030

Southbridge, MA 01550

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Email: [info@armmass.com](mailto:info@armmass.com)

ARM is very concerned about what appears to be serious mischaracterizations about the genuine, quality recycled OEM parts that our members sell. Given the complexity of issues involved in the automotive insurance and repair marketplace, I urge the ADALB to ensure that quality OEM recycled parts are not mischaracterized in a way that diminishes their utilization in the professional repair process. If there is more education that needs to be done on the part of our industry, to work with repair facilities in the state to address quality concerns, we are happy to do so and welcome the opportunity to discuss this matter further.

Sincerely

Dave Petrillo

President

More Than Just Insurance.

**Plymouth Rock**  
Assurance.

Plymouth Rock Assurance Corporation

695 Atlantic Avenue  
Boston, Massachusetts 02111

tel: 617-720-1620

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plymouthrock.com

July 18, 2018

Commonwealth of Massachusetts  
Auto Damage Appraiser Licensing Board  
1000 Washington Street, Suite 810  
Boston, MA 02118-6200

Re: Proposed Advisory Ruling by the ADALB

Dear Chairman Cox and Members of the ADALB:

Plymouth Rock Assurance Corporation ("Plymouth Rock") would like to comment on the proposed advisory ruling that was discussed at the June 20, 2018 meeting of the Auto Damage Appraiser Licensing Board ("ADALB"). We received notice of the proposed ruling via letter from Michael D. Powers dated June 26, 2018 addressed to our former General Counsel, Kathleen C. Henry. We are not taking a position on the substance of the proposed ruling at this time, but would like to address the proper procedure for pursuing such changes.

All Massachusetts state agencies are governed by the Administrative Procedure Act (Chapter 30A of the General Laws), which has specific requirements that must be followed prior to the adoption, amendment or repeal of regulations. Among those requirements, agencies must provide at least twenty-one days' public notice and an opportunity for the public to be heard in advance of taking such action. Under circumstances where violation of a regulation is punishable by fine or imprisonment, a public hearing is required and notice of the public hearing must be published in the newspaper and filed with the Secretary of State. A small business impact statement must accompany the notice of the public hearing and be filed with the Secretary of State. It is very important for the operation of state government that these procedures be followed and that the public have the opportunity to be heard prior to any regulatory changes.

The Administrative Procedure Act allows agencies to issue advisory rulings without following the same process that is required for the adoption, amendment or repeal of regulations. Under Chapter 30A, Section 8, "*on request of any person, an agency may make an advisory ruling with respect to the applicability to any person, property, or state of facts of any statute or regulation enforced or administered by that agency.*" An advisory ruling is limited to providing an interpretation of a statute or regulation; it is not a method by which an agency may amend an existing regulation.

With that background, we request that the ADALB reconsider its approach to the proposed ruling, as it would go beyond the scope of what may be done by an advisory ruling. The ruling being considered by the ADALB would, in effect, amend the regulation at 212 CMR 2.04(1)(e) and not just provide guidance on the "applicability" of the regulation to any person, property or state of facts.

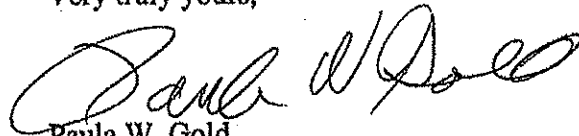
The ruling would amend 212 CMR 2.04(1)(e) by requiring under certain circumstances that "*the manufacturer warranty I-Car, Tec Cor (or similar recognized industry resource) repair procedures shall be followed.*" Currently that regulation provides that "*Manufacturer warranty repair procedures, I-Car, Tec Cor and paint manufacturer procedures may also apply.*" The change from "*may also apply*" to "*shall be followed*" effectively amends the regulation. Therefore, the public has a right under the Administrative Procedure Act to receive notice of this proposed change and an opportunity to be heard, and because violations of the ruling would be punishable by fines and penalties, a public hearing is required. The letter to our former General Counsel and to such other parties who have submitted comments to the ADALB in the past does not satisfy the notice requirement. The Administrative Procedure Act requires that all of the public receive notice and not just a select few, and as noted, in this case a public hearing is required.

Pursuing this specific change via an advisory ruling would also be inappropriate given that the same concept is addressed in proposed amendments to 212 CMR 2.04(1)(e) that are pending before the Division of Insurance. The ADALB submitted those amendments to the Division of Insurance for review in October 2016. We understand that the Division of Insurance has not yet taken action on the proposed amendments. The October 2016 proposed amendments would make the following change to 212 CMR 2.04(1)(e): "*Manufacturers [recommended] warranty repair procedures, I-Car, Tec Cor and paint manufacturer procedures [shall] may also apply.*"

We suggest that the ADALB allow the Commissioner to continue his review of the amendments that are already before him or withdraw those amendments and submit new proposed amendments to the Commissioner, after following the proper procedural requirements under the Administrative Procedure Act.

Thank you for your consideration of these comments.

Very truly yours,



Paula W. Gold  
Chief Regulatory Counsel

cc: Michael D. Powers, Counsel to the Commissioner and the ADALB



# Mass Insurance Federation

Two Center Plaza, 8th Floor • Boston, MA 02108 • 617.557.5538

July 27, 2018

Mr. Gilbert W. Cox, Jr.  
Chairman  
Auto Damage Appraiser Licensing Board  
1000 Washington Street  
Suite 810  
Boston, MA 02118-6200

 COPY

**RE: Proposed Advisory Ruling by the Auto Damage Appraiser Licensing Board**

Dear Chairman Cox:

Thank you for your letter of June 20, 2018 inviting the Massachusetts Insurance Federation (the "Federation") to comment on the proposed Advisory Ruling 2018-XXXX regarding the required use of manufacturers' warranty repair procedures under certain circumstances. The Federation strongly recommends that the proposed Advisory Ruling not be approved as the ADALB lacks the requisite legal authority to issue an advisory ruling that addresses matters beyond the licensing of auto damage appraisers.

The enabling statute (MGL c. 26, §8G) created the ADALB for the sole purpose of licensing individuals to appraise motor vehicle damage. The Legislature further authorized the ADALB to adopt "rules and regulations governing *licenses* under this section in order to promote the public welfare and safety." (emphasis added) The focus of any rules and regulations adopted by the ADALB must be on the licensing of appraisers, By having qualified individuals licensed as appraisers the public good would be served.

The proposed Advisory Ruling has no connection with the licensing of appraisers. It delves into substantive matters beyond the purview of the ADALB and impinges on claims procedures and repair standards that are the exclusive province of the Division of Insurance. Accordingly, the Board should not approve the proposed Advisory Ruling.

Very truly yours,

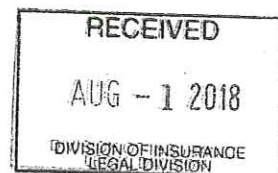


John P. Murphy  
Executive Director

cc: Michael D. Powers, Esq., Counsel to the Commissioner and the ADALB  
Gary Anderson, Commissioner of Insurance  
Rachel Davison, Esq., Division of Insurance Deputy Commissioner & General Counsel



**AUTOMOBILE INSURERS BUREAU  
OF MASSACHUSETTS  
SINCE 1925**



July 30, 2018

Gilbert W. Cox, Jr., Chairman  
Auto Damage Appraiser Licensing Board  
Division of Insurance  
1000 Washington Street, Suite 810  
Boston, MA 02118-6200



Re: Proposed Advisory Ruling 2018-XXXX

Dear Chairman Cox:

Please take notice that the Automobile Insurers Bureau of Massachusetts objects to Advisory Ruling 2018-XXXX proposed by the Auto Damage Appraiser Licensing Board (board) in its letter to interested parties dated June 20, 2018. Advisory Ruling 2018-XXXX purports to construe the board's regulation 212 CMR 2.04(1)(e) as requiring the exclusive use of manufacturer warranty or other private party recommended repair procedures in all appraisals of structural damage; and it warns that failure to comply may result in fines and penalties. The proposed advisory ruling exceeds the board's legal authority, conflicts with statutes and regulations governing automobile insurance claims, and constitutes unlawful price fixing.

Board Authority

By the terms of G. L. c. 26, § 8G, the board has the authority "to license individuals to appraise damage" and "to adopt rules and regulations governing licenses." The statute does not grant the board the power to "regulate the manner of conducting motor vehicle damage appraisals" as stated in the introduction to the ruling. Rather, the board's regulatory authority is expressly confined to appraiser "licenses" and does not include the conduct of appraisers, the performance of repair shops, or the payment of automobile insurance claims.

Neither the regulation, 212 CMR 2.04(1)(e), nor the proposed advisory ruling concern appraiser licensing. Instead, the operative provisions regulate appraiser conduct by requiring strict compliance with particular repair procedures recommended by vehicle manufacturers and other private entities in the preparation of an appraisal. Such matters of appraiser practice are well outside the board's limited powers under G.L. c. 26, § 8G. Furthermore, the warning of fines and penalties for failure to comply is erroneous because the board does not have the legal authority to impose civil penalties (other than license suspension) for violation of its enabling statute or regulations. A state agency can assess penalties only with an express legislative delegation and within statutorily prescribed limits. Opinion of the Justices, 375 Mass. 795, 820 (1978);

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Commonwealth v. Racine, 326 Mass 525, 528-530 (1950). The board lacks that power under the terms of G. L. c. 26, § 8G.

Under no circumstances can the board's limited regulatory authority be lawfully used to grant the force of law to manufacturer or other private repair procedures, labor times, and costs for vehicle repairs. These private publications are prepared for a variety of commercial reasons unrelated to the repair of insured vehicles damaged in an accident. The board cannot delegate its power to private entities or compel the use of manuals that replace the duties of appraisers and the discretion of auto insurers. Under G. L. c. 30A, the board cannot simply incorporate by reference unspecified provisions of private publications which may be subject to unknown bias, accuracy, and reasonableness.

Since developed for unrelated purposes, the repair procedures and labor times established by vehicle manufacturers and private entities are generally higher than comparable estimates of the automobile insurance appraisers using conventional appraisal systems, guides, expertise, and judgment. The board's mandated use of manufacturer recommended procedures will necessarily increase the costs of auto damage repairs and claim payments, because the higher repair time, when multiplied by the applicable labor rate in the standard computation, establishes the labor costs of repair. The board has no statutory power to establish directly the fees for auto damage repairs; and it cannot produce that same result indirectly by compelling the use of private publications that determine total repair costs.

The board also lacks authority to amend its regulation by the simple expedient of purporting to construe certain terms of 212 CMR 2.04(1)(e). Chapter 30A contains precise procedures for amending agency regulations, but it does not permit a material change in the terms with an advisory ruling. The opportunity provided by § 8 to offer guidance and interpretation is not license to alter the scope or meaning of an existing regulation.

### Statutory Conflicts

A state agency's regulations and advisory rulings cannot be validly promulgated when "in conflict with the statutes or exceed the authority conferred by the statutes by which [it] was created." Telles v. Commissioner of Insurance, 410 Mass. 560, 563 (1991). The board's proposed ruling and the provisions of 212 CMR 2.04(1)(e) exceed the authority granted by G. L. c. 26, § 8G, and conflict with the statutes and regulations governing automobile insurance claims within the exclusive jurisdiction of the Commissioner of Insurance.

The board's requirements for strict compliance with private repair manual procedures conflict with the direct payment and referral shop program established by G.L. c. 90, § 34O, c. 175, § 113O, and 211 CMR 123.00. Under the direct payment system, insurers are authorized to file plans for the Commissioner's approval for direct payment to the insured for motor vehicle repairs and a list of referral shops that will perform the work as appraised by the insurer. The direct payment is the amount paid by the insurer before the repair is completed and is based on the initial appraisal made by a licensed appraiser employed or designated by the insurer. Mass. Auto Body Ass'n v. Commissioner of Insurance, 409 Mass. 770, 772 (1991). In the event of a dispute over the initial appraisal, the claimant may seek resolution through a sequential process of

further inspection, supplemental payments, and arbitration, in accordance with 211 CMR 123.05(4) and G. L. c. 175 § 191A.

The compulsory use of the procedures and labor times recommended by vehicle manufacturers and other private entities will increase the amounts paid by insurers for vehicle damage repairs and the premiums charged to Massachusetts insureds. The board's action effectively governs insurers' claim handling practices and payments and usurp the authority granted the Commissioner to regulate such matters. The ruling will interfere with the operation of the insurers' approved direct payment plans and established claim adjustment procedures. In doing so, the board will displace the Commissioner's control of insurance practices, claim payments, and premiums. The terms of G. L. c. 26, § 8G, cannot warrant that outcome.


### Antitrust Violations

The board's enforcement of the use of the repair procedures specified by vehicle manufacturers and other private entities constitutes price fixing in violation of the antitrust laws. These sources establish procedures and corresponding labor times for a particular repair which, when multiplied by the applicable labor rate, determines the labor cost of a vehicle damage repair. The board, however, does not have statutory authority to determine the costs of repairs or to create a fee schedule for repairs. It cannot achieve that result indirectly by requiring the exclusive use of repair procedures which have the effect of fixing the labor costs of auto repairs. That approach is still a de facto fee schedule and unlawful price fixing.

The courts have consistently found that a fee schedule (minimum or maximum) enforced by a state agency is the classic illustration of a price fixing arrangement which is a per se violation of the antitrust prohibitions of the Sherman Act. Arizona v. Maricopa County Medical Society, 457 U.S. 332, 345 (1982); Goldfarb v. Virginia State Bar, 421 U.S. 773, 781 (1975). As with any unlawful restraint of trade, price fixing deprives consumers of the advantages of competition by providing the same economic rewards to all practitioners regardless of skill, experience, training, or willingness to innovate. Maricopa County Medical Society, 457 U.S. at 348. The members of the board are not immune from liability under the antitrust laws because it is a "nonsovereign actor controlled by active market participants" and the compulsory use of private manuals to create a de facto fee schedule is not a clearly articulated, affirmatively expressed, and actively supervised state policy. North Carolina State Board of Dental Examiners v. Federal Trade Commission, 135 S. Ct. 1101, 1110 (2015). As such, the board's requirements for licensed appraisers to use exclusively vehicle manufacturer and other privately published manuals to establish the procedures and labor time for insured auto damage repairs violates antitrust laws.

For these reasons, the board should reject proposed Advisory Ruling 2018-XXXX and also correct the invalidity of the provisions of 211 CMR 2.04(1)(e) which compel the exclusive use of privately published repair manuals in the appraisal of insured vehicle damage.

Sincerely,

Handwritten signature of E. Michael Stoman in black ink.

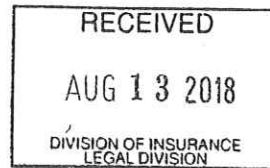
E. Michael Stoman  
Counsel

cc: Gary D. Anderson, Commissioner of Insurance  
Michael D. Powers, Legal Counsel to the Board

 COPY

August 1, 2018

Gilbert W. Cox, Jr., Chairman  
Auto Damage Appraiser Licensing Board  
c/o Massachusetts Division of Insurance  
1000 Washington Street, Suite 810  
Boston, Massachusetts 02118-6200



Re: Proposed Advisory Ruling

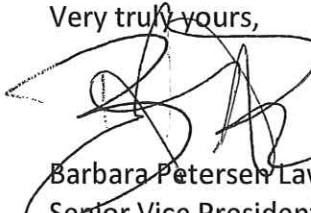
Dear Chairman Cox:

I am writing this letter on behalf of MAPFRE Insurance in response to the Auto Damage Appraiser Licensing Board's (ADALB) recent invitation to interested parties to submit comments on a proposed advisory ruling threatening the imposition of penalties for the failure to appraise motor vehicle repairs in strict adherence to manufacturer warranty or other private party recommended repair procedures.

MAPFRE Insurance, which is a member of the Automobile Insurance Bureau (AIB) and the Massachusetts Insurance Federation (MIF), concurs with the comments provided by the AIB and MIF related to the proposed advisory rulings. Specifically, MAPFRE agrees that the ADALB, for the reasons noted, lacks the authority to prescribe the manner in which motor vehicle are appraised and repaired.

Members of the ADALB have not been tasked with broad policymaking responsibilities in the area of automobile material damage, and must therefore resist the temptation towards regulatory overreach. The ADALB must keep to its statutory mission related to appraiser licenses and halt all other efforts, including the proposed advisory ruling, that seek to unlawfully expand its authority.

Very truly yours,

  
Barbara Petersen Law, CPCU, AIAF, ARC  
Senior Vice President,  
Chief Compliance Officer and  
Chief Regulatory Counsel

PASTER, RICE & CASTLEMAN, LLC

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RECEIVED

AUG 14 2018

DIVISION OF INSURANCE  
LEGAL DIVISION

RICHARD D. PASTER  
RONALD W. RICE  
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August 6, 2018



Commonwealth of Massachusetts  
Auto Damage Appraiser Licensing Board  
1000 Washington Street  
Suite 810  
Boston, MA 02118-6200

**Re: Proposed Advisory Ruling by the Auto Damage Appraiser Licensing Board**

Gentlemen:

We represent the Alliance of Automotive Service Providers of Massachusetts, Inc. ("AASP/MA") regarding your June 20, 2018 solicitation of comments for a proposed Advisory Ruling relating to what procedures and parts should be utilized when licensed Auto Damage Appraisers are negotiating and writing appraisals under 212 CMR 2.01(1)(e). **Because of the matters addressed in this letter, we respectfully request that you consider and act upon the issues raised herein prior to reviewing or considering other submissions that you may receive.**

On behalf of our client we are hereby objecting to your solicitation of comments on the proposed Advisory Ruling, and are objecting to the potential issuance by your Board of the proposed Ruling or any similarly worded Advisory Ruling (with or without obtaining industry comment), and hereby demand that you reconsider doing so.

The basis of our objection is that what you are proposing goes well beyond the scope of an allowed Advisory Ruling. Instead, you are attempting to craft a new Regulation or amend your existing Regulation without following statutory requirements for doing so. We suggest that issuance of your proposed Advisory Ruling would violate applicable law, would cause significant confusion in both the insurance and collision repair industries, and would put licensed Appraisers in the difficult position of choosing to comply with your Advisory Ruling, or to violate a potentially conflicting regulation (211 CMR 123.04(1)), or to possibly subject themselves to tort liability for damages that may arise from what they write or negotiate.

In stating our objection, we note that, legally, there is a significant difference between an allowed Advisory Ruling and a Regulation, each requiring very different procedures for issuance:

The Administrative Procedures Act, M.G.L., c. 30A, §8 governs issuance of Advisory Rulings, and states: “On request of any interested person, **an agency may make an advisory ruling with respect to the applicability to any person, property or state of facts of any statute or regulation enforced or administered by that agency.** In issuing the advisory ruling, the agency need not comply with the requirements of this chapter with respect to regulations.” [emphasis added] *These are the only circumstances under which an Advisory Ruling legally may be issued.*

With regard to your proposed Advisory Ruling, we are unaware of any interested person having sought your opinion as to the applicability of your governing statute or your existing Regulation to “any person, property or state of facts”. Further, what you are proposing is not advice regarding a particular situation or interpretation of the applicability of ambiguous statutory or regulatory language, but is a broad policy change, requiring (and also limiting) what a licensed Appraiser should consider when writing or negotiating an appraisal.<sup>1</sup> What you are proposing also significantly changes your existing regulation, rather than advising under what circumstances the regulation applies. Further, your proposed language would inappropriately state that: “Failure to comply with this ruling could result in fines and penalties as provided by law” - essentially putting Appraisers on notice that they may be penalized for following a new set of rules that have not been properly adopted.

By contrast, under M.G.L., c. 30A §1(5), “Regulation” includes the whole or any part of every rule, regulation, standard or other requirement of general application and future effect, including the amendment or repeal thereof, adopted by an agency to implement or interpret the law enforced or administered by it . . . .” Admittedly, Advisory Rulings are specifically excluded from the definition (as are adoption of certain internal agency procedures and other exceptions not pertinent here); but, in order to be excluded, an Advisory Ruling must meet the applicable statutory requirements, cited above.

As one source notes: “The Massachusetts Administrative Procedure Act, unlike its federal counterpart, does not distinguish among and between substantive, procedural, and interpretative rules or regulations. Under the Massachusetts Administrative Procedure Act, all such rules and regulations are encompassed within the definition of regulation in M.G.L. c. 30A, § 1 (5). **Accordingly, the requirements of rulemaking established by M.G.L. c. 30A, § 2 and M.G.L.**

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<sup>1</sup> Two examples of these policy changes are (i) your proposed approval of consideration of IIHS and HLDI or other similar insurance industry sources when negotiating an appraisal; and (ii) your proposed language mandating that, if repair of a structural damage requires replacement of a part, then I-Car, Tec Cor or similar sources be considered, but excluding this requirement for parts that are bolted to a vehicle. Both of these items constitute change to your existing regulation and go well beyond providing advice as to the applicability of the regulation to specific facts. Further, if your Advisory Ruling is issued, both changes would be adopted without input being solicited from the broad public base required to be given notice prior to adoption of a regulation.

Commonwealth of Massachusetts  
Auto Damage Appraiser Licensing Board  
August 6, 2018  
Page 3

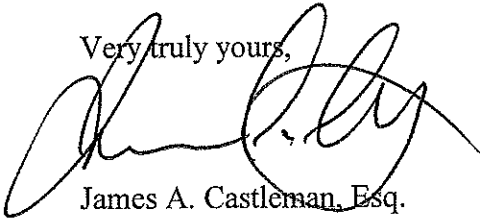
**c. 30A, § 3 apply to the promulgation of any and all rules and regulations by state administrative agencies subject to the provisions of the statute, regardless of whether such rules and regulations would properly be characterized as substantive, procedural, or interpretive . . . .”** [emphasis added] *Definition of regulation under M.G.L. c. 30A, § 1(5)*, 39 Mass. Prac., Administrative Law & Practice § 12:3.

As opined further in the same section of the cited source: “Permitting an agency to interpret its governing statute by memorandum rather than regulation, without any opportunity for public input or debate by persons affected, is a troubling development, inimical to both sound public policy and democratic governance.”

While you apparently are seeking industry input, you are doing so informally, with notice to only a limited set of affected parties, and without the significant procedural protections of M.G.L., c. 30A, §2 and §3, including required publication, notice, hearing, and further governmental approval. In other words, you are attempting to circumvent statutory procedural protections in order to issue a new set of rules governing licensed Appraisers.

We thank you for your consideration of the points raised herein. Please also be advised that our client has requested us to take whatever actions may be appropriate or necessary to protect their statutorily guaranteed rights.

Very truly yours,

A handwritten signature in black ink, appearing to read 'James A. Castleman', written over a circular stamp or seal.

James A. Castleman, Esq.

JAC/blh

cc: AASP/MA