

STATE OF RHODE ISLAND
DEPARTMENT OF BUSINESS REGULATION
PASTORE COMPLEX
1511 PONTIAC AVENUE
CRANSTON, RHODE ISLAND 02920

IN THE MATTER OF: :

Carfax, Inc. and CARFAX Total Loss Valuation : 2020-IN-001
Service Application under :

R.I. Gen. Laws § 27-9.1-4(25) and :
230-RICR-20-40-2.8(A)(2)(c), :

RESPONDENT. :
_____ :

DECISION

I. INTRODUCTION

This matter arose pursuant to the Department of Business Regulation's ("Department") Order Appointing Hearing Officer and Notice of Solicitation of Public Comment and Hearing ("Notice") issued on February 25, 2020 in relation to Carfax, Inc. ("Respondent") and its CARFAX Total Loss Product's application ("Application") to qualify as a "nationally recognized compilation of retail values commonly used by the automotive industry." See R.I. Gen. Laws § 27-9.1-4(25) and 230 RICR-20-40-2, *Unfair Property/Casualty Claims Settlement Practices* ("Regulation"), Section 2.8(A)(2).¹ A pre-hearing conference was held on March 27, 2020. Written comments by interested parties were to be submitted by April 27, 2020. A public hearing for comment was held on May 4, 2020 with any final written comments due by May 18, 2020.²

¹ The Department and the Respondent agreed that the Application was filed on January 31, 2020. The documents that made up the Application were attached to the Notice. The Regulation refers to the one in effect on that date which was in effect from December 24, 2019 to February 15, 2020 on which day it was amended to its current form. The current changes made to the Regulation were not relevant to the issues in this matter. For the concise explanation of changes made, see https://risos-apa-production-public.s3.amazonaws.com/DBR/10958/CON_10958_20200221112851.pdf.

² It is noted that both the prehearing conference and the hearing were held by telephone due to the COVID19 pandemic and the interested parties were all notified by the Department.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant R.I. Gen. Laws § 27-1-1 *et seq.*, R.I. Gen. Laws § 27-9.1-1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, R.I. Gen. Laws § 42-35-1 *et seq.*, and 230-RICR-100-00-2 *Rules of Procedure for Administrative Hearing*.

III. ISSUE

Whether the Respondent's Application filed pursuant to R.I. Gen. Laws § 27-9.1-4(25) and Section 2.8(A)(2)(a) of the Regulation should be granted.

IV. MATERIAL FACTS

The purpose of these proceedings was to gather input from all interested persons in order to determine whether the Application should be approved or rejected.

V. DISCUSSION

A. **Legislative Intent**

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining a statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047 (R.I. 1994). If a statute is clear and unambiguous, "the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (citation omitted). The Supreme Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. DEM*, 553 A.2d 541 (R.I. 1989) (citation omitted). In cases where a statute may contain ambiguous language, the Supreme Court has consistently held that legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131 (R.I. 1998).

B. Relevant Statutes and Regulation³

R.I. Gen. Laws § 27-9.1-4 provides in part as follows:

"Unfair claims practices" defined.

(25) Designating a motor vehicle a total loss if the cost to rebuild or reconstruct the motor vehicle to its pre-accident condition is less than seventy-five percent (75%) of the "fair-market value" of the motor vehicle immediately preceding the time it was damaged:

(i) For the purposes of this subdivision, "fair-market value" means the retail value of a motor vehicle as set forth in a current edition of a nationally recognized compilation of retail values commonly used by the automotive industry to establish values of motor vehicles;

(iv) If condition adjustments are made to the retail value of a motor vehicle designated a total loss, all such adjustments must be in accordance with the standards set forth in the current edition of a nationally recognized compilation of retail values, commonly used by the automotive industry, used by the insurer to determine the retail value of the vehicle; and all such adjustments, including prior damage deductions, must be itemized, fair, and reasonable.

Section 2.8 of the Regulation provides in part as follows:

A. Total Loss Vehicles

1. Pursuant to R.I. Gen. Laws § 27-9.1-4(25) an insurer may not designate a vehicle a total loss if the cost to rebuild or reconstruct the motor vehicle to pre accident condition is less than 75% of the fair market value of the motor vehicle immediately preceding the time it was damaged unless the requirements of § 2.8(A)(3) of this Part are met.

2. Fair market value means the retail value of the motor vehicle as set forth in a current edition of a nationally recognized compilation of retail values commonly used by the automotive industry to establish values of motor vehicles.

a. To qualify as "nationally recognized compilation of retail values commonly used by the automotive industry," a filing must be made with the Department requesting that the entity be deemed to qualify under R.I. Gen. Laws § 27-9.1-4(25). The filing may be made by the entity itself or any person seeking qualification of an entity for this purpose.

b. The Department reviewed the initial filings and published a bulletin in 2014 identifying two entities that initially qualified. The bulletin will be updated as entities are added or removed due to changes in circumstances.

³ See *Mitchell International, Inc. and its WorkCenter Total Loss Product's Application under R.I. Gen. Laws § 27-9.1-4(25) and Insurance Regulation 73, Section 8(A)(2) (6/21/18)* for a history of the statute.

c. Applications requesting to add entities may be filed at any time and will be addressed by the Department in due course. The Department will publish information relating to future filings on its website.

5. Cash Settlements

a. A cash settlement shall be based upon the fair market value of the motor vehicle less any deductible provided in the policy, if applicable, including all applicable taxes, title, registration and other fees incident to transfer of evidence of ownership of a comparable automobile.

b. When the cash settlement amount is affected by betterment or depreciation, the insurer must support the deviation by documentation in the claim file by giving particulars of the automobile condition that warrant said deviation. Any deductions or betterment from fair market value, including deduction for salvage, must be measurable, discernible, itemized and specified as to dollar amount and shall be appropriate in amount. Deduction shall not be made for reconditioning or dealer preparation. The basis for determining fair market value shall be fully explained to the claimant. All information that is the basis for such reduction shall be contained in the claim file and a copy of the valuation shall be provided to the claimant.

Insurance Bulletin 2014-2 *Total Loss Valuation Services* ("Bulletin")⁴ provides as follows:

Pursuant to R.I. Gen. Laws § 27-9.1-4(25) insurers must pay the "fair market value" for a vehicle that is declared a total loss. The statute defines "fair market value" as "... the retail value of the motor vehicle as set forth in a current edition of a nationally recognized compilation of retail values commonly used by the automotive industry to establish values of motor vehicles." Over the past decade the Department has been presented with numerous consumer complaints concerning the amount consumers are offered by insurers for total loss vehicles. In virtually every situation, the conflict results from arbitrary deductions taken from comparable vehicle values when calculating the total loss value.

In implementing R.I. Gen. Laws § 27-9.1-4(25) the Department amended Insurance Regulation 73 and required that a filing be made by or on behalf of any entity that advocated that it had a program that qualified under the statute. Filings were made by or on behalf of eight entities (National Automobile Dealers Association (NADA); Kelly Blue Book (KBB); Price Digests, Vehicle Valuations Service, Inc., Audatex, Auto Bid LLC, CCC Information Services Inc. and Mitchell International Inc.) Following review of the filings the Department concludes that the minimum "fair market value" can be derived from the compilation of values provided by NADA and KBB. The remaining applicants have not established that they are "used by the automotive industry" which is a necessary criteria under the statute. The Department interprets the term automotive industry to be those entities that actually sell automobiles.

⁴ <http://www.dbr.ri.gov/documents/news/insurance/InsuranceBulletin2014-2.pdf>.

Insurers may not pay less than the NADA or KBB value adjusted pursuant to Insurance Regulation 73(8)(A)(4). Insurers may not, under any circumstance, utilize valuations that reduce the minimum value for items such as dealer preparation, reconditioning or an amount that a dealer might accept in sale of a comparable vehicle (i.e. "take price".) Insurers are, however, required to pay the actual loss and if that amount exceeds the minimum value the insurer must pay the higher amount. In cases where NADA or KBB do not have a listing for a particular vehicle, insurers may use services that provide comparable vehicles, however, insurers may not vary those comparable vehicle listings other than by mileage, options and condition.

Insurers are not required to obtain the valuations directly from NADA or KBB. A number of the valuation services that filed indicated that they either currently provide or are able to provide the NADA or KBB valuations along with other data about comparable vehicles. Insurers may utilize valuations from any of the applicants, however, insurers may not offer less than NADA or KBB in settlement of the claim.

C. The Application

The Application indicated that the CARFAX Total Valuation Service ("Total Valuation") is used by over 300 automobile insurance claims organizations, and insurers access Total Valuation via a website, CarfaxForClaims.com. The Application stated that to create a Total Valuation report, the insurance adjuster enters the loss vehicle's license plate or VIN (vehicle identification number) at CarfaxForClaims.com along with the owner's zip code and the vehicle's current odometer reading, if available, which generates the CARFAX history-based value and identifies up to ten (10) in-market comparable vehicles currently listed for sale on the CARFAX used car listing website and pre-selects three (3) vehicles deemed to be the most similar according to proprietary matching technology. It stated that CARFAX has over 22 billion records from more than 112,000 data sources.

The Application indicated that CARFAX offers a variety of vehicle validation and valuation services and believes it can extend its product offerings to the insurance industry. Total Valuation draws from the same databases, values, and methodology used in other CARFAX products. It stated that Total Valuation is only available to insurers with a subscription to CarfaxForClaims.com and utilizes the CARFAX value history, a VIN specific value based on the

current local market. The Application stated that Total Valuation uses the CARFAX value history to produce a retail value for the loss vehicle and CARFAX value history is used by automobile dealers and consumers, and consumers entering their vehicle information for CARFAX value history would get the same value as Total Valuation.

D. Submissions

a. Division of Insurance, Department of Business Regulation

In its submission, the Department indicated that it neither supported nor opposed the Application but supported the Respondent's due process right to a hearing on its Application. The Department indicated that the analysis in the 2018 *Mitchell* decision is relevant to the Application because the Application is very similar to the *Mitchell* application, and the Department's submission in *Mitchell* was still relevant (still on the Department's website⁵) to this Application.

b. The Respondent

The Respondent argued it met the three-part test in *Mitchell*. The Respondent argued that Total Valuation is a nationally recognized compilation of motor vehicle values and it uses CARFAX history-based value which is a nationally recognized compilation of retail values commonly used by the automotive industry. It argued that Total Valuation is calculated on each vehicle based on a statistical regression model so the value is the same whether viewed by insurance companies, automobile dealers, or consumers. The Respondent argued that Total Valuation does not apply arbitrary deductions taken from comparable vehicles. The Respondent disputed ABARI's (*infra*) claim based on its automobile body shop survey that the automotive industry does not use CARFAX, but rather argued that CARFAX history values are used by various dealer groups.

⁵ https://dbr.ri.gov/documents/rules/hearing_notices/2018-04-02_RI_DOI_Public_Comments_Mitchells.pdf.

c. **Auto Body Association of Rhode Island (“ABARI”)**

ABARI argued that R.I. Gen. Laws § 27-9.1-1 was amended in 2013 to remove insurer based valuation products that resulted in lower vehicle values for consumers and such protections were strengthened by a 2019 amendment.⁶ ABARI argued that Total Valuation is for insurers and is not a current edition since its database is updated weekly and it is not a nationally recognized compilation of retail values and cannot be because it is a software program that accesses a constantly changing database to determine individual vehicle values on a case by case basis. It pointed out that NADA and KBB are nationally recognized publicly available sources for motor vehicle values that are updated quarterly and divided geographically and can be accessed by consumers. It argued that NADA and KBB values are not snapshots of three (3) comparable vehicles in a particular market which cannot be statistically representative of a retail value. ABARI surveyed the Rhode Island automotive industry and argued it does not use Total Valuation, and that Total Valuation includes arbitrary deductions since its metrics cannot be determined on its loss reports. ABARI argued the Total Valuation does not comply with the 2019 amendment, R.I. Gen. Laws § 27-9.1-4(25)(iv).

d. **Ernest Shaghalian, Inc. d/b/a Alpine Insurance Agency**

This submission argued against approving the Application since the Respondent’s adjustments are not itemized in relation to the value of the deductions and the deductions are not transparent since they are not standards set forth in the current edition of a nationally recognized compilation of retail value and vary based on the CARFAX history value. Mr. Shaghalian pointed out that the Respondent spoke of incorporating deductions rather than itemizing the deductions which contrasts with NADA and KBB which delineate deductions that can be seen by consumers.

⁶ P.L. 2019, ch. 84, § 1; P.L. 2019, ch. 85, § 1.

e. **Robert Godfrey (a Rhode Island Motor Vehicle Damage Appraiser)**

Mr. Godfrey argued that the Total Valuation service was just released on June 25, 2019 so it is impossible to already be a nationally recognized compilation of retail values commonly used by the automotive industry. He argued that the consumer does not have direct access to Total Valuation since it is only available to insurers with a subscription to the website. He further argued that a consumer can find the basic information about the value of a vehicle online but to find how the vehicle's history impacts the value, a consumer has to buy the report at \$39.95.

f. **Mitchell International**

Mitchell argued its total loss product as well as other web-based valuation services (including presumably the Respondent's) should be approved and *Mitchell* was wrongly decided.

E. Whether the Respondent's Application Should Granted

R.I. Gen. Laws § 27-9.1-4(25) provides when a vehicle is a total loss in relation to the cost to repair and its "fair market value." The statute provides that "fair market value" is the "retail value of a motor vehicle as set forth in a current edition of a nationally recognized compilation of retail values commonly used by the automotive industry to establish values of motor vehicles." Thus, the value must be found in a national compilation and must be a current edition and be nationally recognized and usually used by the automotive industry to establish motor vehicles values. The Regulation requires that if the settlement is affected by betterment or depreciation, such deviation in value must be supported by documentation. See *Mitchell*.⁷

⁷ As explained in the Bulletin, the Department received numerous consumer complaints concerning the total loss values offered by insurers and in most situations, the conflict (between the consumer and insurer) resulted from arbitrary deductions taken from comparable values when calculating the total loss value. The statutory amendment was geared to prevent these type of valuation disputes.

The Department issued the Bulletin as required by the Regulation and it provides guidance in term of the methodology and definitions used for the statutory terms. The Bulletin is an interpretative rule and was issued for guidance so does not have the full force and effect of law as would a regulation. See *Allard v. Department of Transportation*, 609 A.2d 930 (R.I. 1992).

a. **The Statute: its Definitions and applying it to the Application**

As set forth above, the words of a statute are to be given their plain and ordinary meaning. In *Roadway Express, Inc. v. RI Commission for Human Rights*, 416 A.2d 673, 674 (R.I. 1980), the Court relied on a dictionary definition in applying the “ordinary meaning” of “must.” As the Court has found, “[i]n a situation in which a statute does not define a word, courts often apply the common meaning given, as given by a recognized dictionary.” *Defenders of Animals, Inc.*, at 543.

As analyzed in *Mitchell*, the statute speaks of a compilation of retail values used by the automotive industry. The Bulletin defined the term automotive industry to be “those entities that actually sell automobiles.” Automotive clearly relates to automobiles. Industry is commonly thought of as related to manufacturing or business. Indeed, *Miriam-Webster’s* definitions of industry include “systematic labor especially for some useful purpose or the creation of something of value” or “a department or branch of a craft, art, business, or manufacture; *especially*: one that employs a large personnel and capital especially in manufacturing” or “a distinct group of productive or profit-making enterprises.”⁸ The use of automotive industry would not commonly include insurance. Insurance could be referred to the insurance industry in terms of the business of insurance writing and selling, but insurance is not part of the automotive industry. This common understanding of the automotive industry is supported by the explanation of the automotive industry in the *Encyclopedia Britannica* which describes the automotive industry as the manufacturing of motor vehicles.⁹ The Department’s definition of automotive industry in the

⁸ <https://www.merriam-webster.com/dictionary/industry>.

⁹ Automotive industry is described in part as follows:

Automotive industry, all those companies and activities involved in the manufacture of motor vehicles, including most components, such as engines and bodies, but excluding tires, batteries, and fuel. The industry’s principal products are passenger automobiles and light trucks, including pickups, vans, and sport utility vehicles. Commercial vehicles (i.e., delivery trucks and large transport trucks, often called semis), though important to the industry, are secondary.

<https://global.britannica.com/technology/automotive-industry>.

Bulletin is consistent with the common usage of the term which applies to the manufacturing of automobiles. Car manufacturers sell automobiles.

As previously discussed in *Mitchell*, the Bulletin did not define “national compilation,” but the Department accepted an electronic or paper form compilation. At the time of *Mitchell*, both NADA and KBB were in book format as well as online.¹⁰ Since *Mitchell*, it appears that KBB is no longer printed as the most recent KBB available on www.amazon.com is from 2017 and printed versions are not available at www.kbb.com. NADA is still in print form and offers used car guides by region for sale online.¹¹ Compilation is defined as “the act or process of compiling [e.g.] the annual compilation of data” or “something compiled [e.g.] a *compilation* of hit songs . . . a *compilation* of vehicular accident reports.”¹² Compile is defined as “to compose out of materials from other documents” or “to collect and edit into a volume.”¹³ In terms of the compilation of values, the compilation is to be set forth in a “current edition.” The common usage of current (in this context) would be that a current edition shows there are continuous editions with older versions and that there are updated versions. Thus, a current edition indicates that there are various (continuous) editions with the current edition being the most recent version of the compilation. There are various definitions of current with the “most recent” as in “the magazine’s current issue” or “the current survey” reflecting how the word is being used in the statute.¹⁴ Edition is “the form or version in which a text is published [e.g.] “paperback edition” or “the whole number of copies published at one time.”¹⁵

¹⁰ See *Mitchell* for a finding of administrative notice with citations for book form editions of KBB and NADA.

¹¹ <https://www.nadaguidesstore.com/Store/official-used-car-guide>.

¹² <https://www.merriam-webster.com/dictionary/compilation>.

¹³ <https://www.merriam-webster.com/dictionary/compile>.

¹⁴ See <https://www.merriam-webster.com/dictionary/current>. Current can also refer to running or flowing (the ocean’s current) or “generally accepted, used, practiced, or prevalent at the moment” such as “current fashions.”

¹⁵ <https://www.merriam-webster.com/dictionary/edition>.

The national compilation can be published electronically, but it needs to be a current edition. A current edition could refer to a yearly, quarterly, monthly, weekly or even a daily edition. However, Total Valuation is not that kind of edition since it is per car and is not an updated compilation as envisioned by the statutory term “edition.” It is an online computer program that is available for a fee electronically for insurers for a specific car but is not available in an updated edition for the make, model, year, and condition (etc.) of a car.

Total Valuation is not used by automotive dealers. It is specifically for the insurance industry for insurance adjusters. While the Respondent also offers other well known products related to vehicles that are used by Total Valuation, the statute is not concerned with an applicant’s other products but rather who uses the applicant’s service to determine retail values for vehicles. The fact that a consumer could get a value for his or her vehicle from another of Respondent’s products does not make the Application statutory compliant.

By its very nature – irrespective of what price sources Total Valuation uses and deductions it makes – it cannot be a national compilation since it is for a specific car and is not in edition form. The requirement for an edition by its very nature requires that the information be publicly accessed, and the edition must be used by automotive dealers.

b. Conclusion

The statute is clear and unambiguous. It requires that total loss values be determined by values contained in a current (updated) edition of a nationally recognized compilation of retail values commonly used by the automotive industry.

Based on the foregoing, the following findings are made-

1. The insurance industry is not part of the automotive industry.
2. Total Valuation is not used by the automotive industry.

3. While its publication may be online, Total Valuation is not a current edition.

On the bases of those findings – individually or collectively - the Application would fail. Therefore, based on the foregoing, the Application does not meet the statutory requirements of R.I. Gen. Laws § 27-9.1-4(25).¹⁶

VI. FINDINGS OF FACT

1. This matter arose pursuant to the Notice issued to the Respondent by the Department on February 25, 2020.

2. Pursuant to R.I. Gen. Laws § 27-9.1-4(25) and Section 2.8(2)(a) of the Regulation, the Respondent applied to qualify its Total Valuation as a “nationally recognized compilation of retail values commonly used by the automotive industry.”

3. A pre-hearing conference was held on March 27, 2020 with written comments due by April 27, 2020. A hearing for public comment was held on May 4, 2020 with any further written comments to be filed by May 18, 2018.

4. All other facts stated in Sections IV and V are fully incorporated herein as findings of fact.

¹⁶ It was noted in *Mitchell* that the statutory language is clear and unambiguous, but if intent was to be considered, the intent of the statute is to ensure that total loss values are determined by a nationally known and accessible standard publication used by the automotive industry in order to avoid disparities in values. Such an intent supports the findings in this decision as evidenced by the statutory language used.

Furthermore, the statute clearly is ensuring that the standard is not an individual per car value that while may be of use and/or used by an insurance company and/or the insurance adjuster is not a retail value used by the automotive industry and accessible in edition form. By mandating that the retail value be nationally recognized and compiled and in editions and used by the automotive industry, the statute clearly expects the product to be accessible by the public.

Since Total Valuation is not a nationally recognized compilation of retail values that is used by the automotive industry to establish values of motor vehicles, it is not necessary to discuss the issue of whether it is only using retail values for vehicles and the issue of itemized deductions.

VII. CONCLUSIONS OF LAW

1. The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 27-9.1-1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*

2. The Respondent’s Application did not meet the requirements of R.I. Gen. Laws § 27-9.1-4(25) and the Regulation.

VIII. RECOMMENDATION

Based on the foregoing, the Hearing Officer recommends that the Respondent’s Application be denied.

July 01, 2020
Date: _____

/s/ Catherine R. Warren

Catherine R. Warren
Hearing Officer

ORDER

I have read the Hearing Officer's Decision and Recommendation in this matter, and I hereby take the following action with regard to the Decision and Recommendation:

 X ADOPT
 REJECT
 MODIFY

Dated: 06/29/2020

Elizabeth M. Tanner

Elizabeth M. Tanner, Esquire
Director

NOTICE OF APPELLATE RIGHTS

THIS DECISION CONSTITUTES A FINAL DECISION OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-12. PURSUANT TO R.I. GEN. LAWS § 42-35-15, THIS ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF THE COMPLAINT DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER. THE AGENCY MAY GRANT, OR THE REVIEWING COURT MAY ORDER, A STAY UPON THE APPROPRIATE TERMS.

CERTIFICATION

I hereby certify that on this 15th day of July, 2020, a copy of this Decision was sent by first class mail postage prepaid or by email to the following:

Carfax Applicants via Local Counsel Robert D. Fine Chace Ruttenberg & Freedman, LLP Robert Fine rfine@crflp.com	Carfax Applicants Jon-Erik Valetti, Director of Marketing JonErikValetti@carfax.com TomScheffer@carfax.com
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and by electronic mail to following at the Department of Business Regulation, Elizabeth Kelleher Dwyer, Esquire, Deputy Director; Rachel Chester, Insurance Chief Consumer and Licensing Services; Beth Vollucci, Insurance Chief Consumer and Filing Services; and Matthew Gendron, Esquire.


