

Issues Relating to the Emergency Rules Banning Credit Scoring Court Decision

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Impact of the Ruling on the Emergency Rule

The October 8 ruling by Thurston County Superior Court Judge Mary Sue Wilson invalidated Insurance Commissioner Kreidler's emergency rules banning credit-based insurance scoring for personal lines of p/c insurance (auto, homeowners, rental) in Washington state. The court found that the emergency rules were not adopted with the "good cause" necessary to bypass the requirements of normal rule making which include public notice, public comments, and a public hearing. Normally, agency rules require notice to the public of what the rule will do, including specific language for the proposed rule, and an opportunity for the public to provide input and testimony on the proposal before it is adopted. Emergency rules in Washington are allowed to be adopted on a temporary basis—only for up to 120 days—and only when the agency can show "good cause" for why the normal rule-making process shouldn't be used. The Court found that the OIC failed to show "good cause" for using an emergency rule, rather than going through the normal rulemaking process. The court did not deal with other challenges to the rule, because "good cause" is a basic requirement for all emergency rules, and when the OIC failed to show "good cause" the OIC's emergency rules were fatally-flawed, resulting in the court granting APCIA's and NAMIC's Motions for Summary Judgment in the case.

Impact of the Ruling on the Proposed 3 Year Credit Scoring Ban

The October 8 decision only relates to the OIC's emergency rule banning credit-based insurance scoring. It does not impact the OIC's proposed rules that will be considered at a hearing next month for a three-year ban on credit-based insurance scoring. So, while the decision is important, it is expected that the OIC will continue with the CR-102 hearing (on 11/23) on the permanent rules for a three-year ban, and the possible adoption of that rule after the hearing.

Possible Next Moves by the OIC

The OIC has released a statement indicating that Commissioner Kreidler is weighing his options. He has not stated what he may do, but it's possible that the OIC could ask the Court to "stay" the Summary Judgment ruling pending an appeal, which if granted, might permit the emergency rule to remain in place during the pendency of an appeal. If the OIC does ask for a "stay" of the ruling, the process would

allow for APCIA and the other industry stakeholders to object to the request. Argument and briefing of the issue could be requested on an expedited basis, which is at the court's discretion. All of that remains to be seen, but for now, the October 8 ruling remains fully intact, and the OIC's Emergency Rule has been invalidated.

Other Industry Arguments Not Yet Ruled on by the Court

Although the October 8 decision only applies to the OIC's emergency rules, many of the arguments against the emergency rules are still applicable to the OIC's proposed permanent rules for a three-year ban on credit-based insurance scoring. For example, APCIA's motion for Summary Judgment included an argument that the OIC violated the Washington state constitution by adopting rules to overturn or suspend existing statutes in the Insurance Code that directly authorize insurers to use credit-based insurance scoring. The basic law related to administrative rules is that statutes enacted by the Legislature and signed by the Governor set the policy of the state, and agency rules only implement that policy. Agency rules cannot overturn or suspend a current statute. The court chose not to address the constitutional challenge or the arbitrary and capricious challenge because it needed only one of the multiple grounds we asserted to overturn the emergency rule and she chose failing to show "good cause". This doesn't mean that the other arguments are weak (in fact, they are very strong), and most of those challenges could easily be brought against the OIC's proposed permanent rule for a three-year ban.

How will the Ruling Impact our Customers Immediately?

What does this mean for auto, homeowners, and renters insurance customers right now? The OIC's Emergency Rules banning credit-based insurance scoring resulted in premium increases for many senior citizens and other customers who have benefited from a "good credit" discount or other favorable factors related to their favorable credit scores. The October 8 court ruling invalidated the OIC's emergency rules which triggered these increases, and for the confusion and turmoil imposed on insurance consumers, insurers, and licensed insurance producers. It now falls on Insurance Commissioner Kreidler to explain whether, how and when he will attempt to undo the harm that has resulted from his unauthorized and unlawful emergency rules. Insurance consumers and stakeholders will be closely following the legal and regulatory issues that come in the wake of the October 8 ruling.