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OFFICIAL OPINION 2004-8

Representative Michael Ripley
Indiana House of Representatives
2990 S. 650 E
Monroe, Indiana 46772

Re: Department of Insurance Bulletin 123

Dear Representative Ripley:

This letter is in response to your correspondence of December 19, 2003. You raised a concern about how the Commissioner of the Department of Insurance ("Commissioner") interprets **Indiana Code section 27-2-21-16**. The statute provides in pertinent part that an insurer shall not "[d]eny, cancel, or decline to renew a personal insurance policy *solely* on the basis of credit information" or "[b]ase an insured's renewal rate for a personal insurance policy *solely* on credit information." Ind. Code § 27-2-21-16(2) & (3) (2003) (emphasis added). The Commissioner reads this language to mean that "an insurer may not deny, cancel, decline to renew or increase a renewal rate due to a credit score *unless at least one other rating factor has changed* to indicate a denial, cancellation, declination to renew or increase in the premium rate." Ind. Dep't of Ins., Use of Credit Information by Insurance Companies, Bull. 123 (Dec. 5, 2003) (emphasis added) (hereinafter Bulletin 123).¹ You contend that Bulletin 123 places restrictions on insurers that were not intended by the General Assembly when it adopted Public Law Number 201-2003 (Ind. Code ch. 27-2-21). Although the Commissioner's interpretation of Public Law Number 201-2003 is entitled to great deference, Bulletin 123 does place constraints on insurers that were not imposed by the Legislature.

¹ Available at <http://www.in.gov/idoi/bulletins/Bulletin123.html>.

BACKGROUND

In recent years insurers have used a customer's credit information to derive credit scores. They then use the credit scores to assist them in calculating premiums and making underwriting decisions for personal insurance. Insurers maintain that credit scores are an accurate predictor of loss frequency and severity.² But, "[q]uestions have been raised not only about the validity of credit history as a predictor of risk, but also its fundamental fairness, and the impact of credit scoring on minority and low income groups."³ Numerous state legislatures have recently considered the use of credit scores. Last year several states, including Indiana, adopted legislation based on the National Conference of Insurance Legislators (NCOIL) "Model Act Regarding Use of Credit Information In Personal Insurance." According to NCOIL at least sixteen states have adopted the Model Act.⁴ The Commissioner's interpretation of the "sole basis" language in the Model Act is not unique,⁵ although NCOIL has taken the position that such an analysis is incorrect.⁶

ANALYSIS

An insurance score (credit score) is "a number or rating that is derived from an algorithm, computer application, model, or other process that is based on credit information for the purpose of predicting the future insurance loss exposure of an individual consumer." Ind. Code § 27-2-21-1-1 (2003). When underwriting or rating a risk, an insurer may not base its decisions "solely" on credit information. Ind. Code § 27-2-21-16(2), (3) (2003). In other words, an insurer may consider credit information but only along with other traditional rating factors such as age or driving record.

The Commissioner is charged with regulating the insurance industry in this state. Ind. Code § 27-1-1-1 (1985). She issued Bulletin 123 which interprets the phrase "solely on the basis" to mean "that an insurer may not deny, cancel, decline to renew or increase a renewal rate due to a credit score *unless at least one other rating factor has changed* to indicate a denial, cancellation, declination to renew or increase in the premium rate." Bull. 123 (emphasis added). The question becomes whether the Commissioner, by interpreting the statute in such a manner, has expanded the scope of the legislation beyond that envisioned by the General Assembly.

² Brent Kabler, Mo. Statistics Section, Mo. Dep't of Ins., Insurance-Based Credit Scores: Impact on Minority and Low Income Populations in Missouri (2004).

³ Testimony of the Nat'l Assoc. of Ins. Comm'rs before the Subcomm. on Fin. Inst. and Consumer Credit on the Fair Credit Reporting Act (June 4, 2003) (available at <http://www.ins.state.ny.us/acrobat/ty030610.pdf>).

⁴ NCOIL Clarifies Insurance Scoring "Sole Use" Provisions, NCOILetter (Nat'l Conference of Ins. Legislators, Albany N.Y.) Jan. 2004, at 1.

⁵ Me. Bureau of Ins., Implementation of the Act to Ensure Fairness Regarding Use of Consumer Credit Reports in Insurance Underwriting, Bull. 321 (2003) (available at <http://www.state.me.us/pfi/ins/bulletin.htm>).

⁶ Letter from Representative George Keiser, ND, Chair, NCOIL Property-Casualty Insurance Committee to the Co-chairs of the Credit Scoring Working Group of the National Association of Insurance Commissioners (Dec. 22, 2003) (available at <http://www.namic.org/pdf/031222NCOILCreditScoring.pdf>).

The Commissioner's interpretation of the legislative enactment is entitled to great weight because she is charged with the duty of enforcing it. However, the interpretation must be consistent with the statute. *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000). When a law is clear and unambiguous on its face, interpretation is not required and the statute will be held to its clear and plain meaning. *Cotton v. Ellsworth*, 788 N.E.2d 867, 869-70 (Ind. Ct. App. 2003). In adopting Public Law Number 201-2003 the General Assembly clearly mandated insurers who consider credit information in making underwriting decisions to also use other rating factors. Bulletin 123 instructs insurers how the factors are to be used in that one of the rating factors used by an insurer, other than credit information, *must* change to justify denying, canceling, declining to renew or increasing a renewal rate. The General Assembly, however, did not mandate *how* the amalgam of rating factors is to be used and the statute is silent on what action the insurer may take after considering the rating factors. After a review of at least one other rating factor, the insurer may make the business decision it deems appropriate whether the credit score is the only demonstrable change in the calculation or not.

CONCLUSION

Bulletin 123 places restrictions on insurers that were not intended by the General Assembly when it adopted Public Law Number 201-2003.

Sincerely,



Stephen Carter
Attorney General

Gordon White
Deputy Attorney General