MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M

ROLL NUMBER

DESCRIPTION

1335

2005 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1335

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB1335

House Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date 1-18-05

Tape Number	Side A	Side B	Meter #
2		x	46.4 ---- End
3	x		.0 ---- End
		x	.0 ----- End
Committee Clerk Signature Diane Haan			

Minutes:

Chairman Keiser: (46.4) opened the hearing on HB1335. We will open now, adjourn & reconvene after session because Commissioner Poolman will not be available this afternoon.

Rep Koppelman, Dist 13, West Fargo: (46.9) HB1335 is a carryover from a bill I sponsored last session. I've talked with the Commissioner b/4 the session last time regarding my concern about insurance companies use of credit scores relative to rating their insurers. It is just a bill that the Insurance Commissioner had input in last time. It was a good bill, but there were questions because we are venturing into new territory & this time he has indicated there are some gaps that need to be addressed & some applications of last legislation that needs to be clarified. I'm pleased to introduce this bill on his behalf & I'll defer your questions to the him. I would just say; however, that I think it's unfair for insurance underwriters to look at an area that is unrelated to someone's worthiness for insurance. If a customer has had some credit problems but has had a wonderful track record, paying their premiums on time & with no claims, but have a higher rate

because of the credit issue. The insurance industry will tell you that there are standards & statistics that show that if someone has bad credit, they're likely to be a poor insurance risk. I don't deny that's true, but how far do we go in applying facets of people's lives that are unrelated to the issue at hand.

Rep Kroeber: *Tape 3, Side A,* presented HB1335 as one of the sponsors. I've been told there's a difference between bad credit & low credit scores. Establishing a credit score can be changed by the industry as each creditor insurer may use it's credit scoring. This number is affected by having too many credit cards or not enough (insufficient credit history), your age & how many & what kind of credit accounts you have & only the creditor can explain what might improve your score under the particular model they use to evaluate your credit application. Insurers use of credit history to determine rates is under scrutiny nationwide & many states are passing acts restricting this practice. I will leave a copy of how credit scores work with your clerk.

Jim Poolman, Insurance Commissioner: appeared in support of HB1335. Larry Maslowski will here to answer any technical questions you have & he & his staff are the ones who look at the models. Two yrs ago we started to regulated how insurance companies utilize credit & I won't dispute that, with insurance credit scores there can be a correlation between someone's credit & the likelihood of having a claim. We started to regulate how we did it last time & then we got complaints from consumers that there was the potential of not being in compliance of the law the way we had anticipated from the last session. We did a survey of companies as to how they were utilizing & implementing the credit scoring legislation from the last session & that's how we have HB1335 here which we think, among other things, gives the definition of adverse action. We feel the customer deserves to know if they've been adversely affected in their rate &

the tier they've been provided because of their credit score. Regarding adverse action, we have companies complying now & others that don't. Credit scoring is an issue all over & since the legislature has come to town, I've gotten more questions, complaints & comments from legislators with insurance than any other. Another thing this bill does, is we think there are extenuating circumstances (life altering) that can affect someone's credit that may or may not be out of their control that we list within the bill. Also look at HB1401.

Chairman Keiser: (6.7) Does your dept have documentation on the number of complaints & the sources?

Poolman: We track telephone calls differently than complaints; many of the calls question how we can let them do that & we have to tell them that by law they're allowed to do so. We probably should, but we don't tract those calls.

Rep Kasper: (6.2) Have you had any knowledge of complaints of adverse credit scoring in this way?

Poolman: If it's a piece of information that effects the number that goes along with that, they can use it. There are things they are not allowed to use.

Chairman Keiser: If insurance scoring has actuarially validity (the companies that use it believe strongly that it does) that helps them underwrite; therefore it has to benefit the people with very good credit. Does your dept have any data on that?

Poolman: We get very few calls from people who have gotten a break on their insurance, although I do believe it happens & that's why we're not walking in here with a ban on the use of credit. We do feel we need accurate parameters that are not open for interpretation for different use by the company.

Larry Maslowski, Director/Sr Analyst, ND Ins Dept: appeared in support of HB1335. **(See attached testimony)**

Chairman Keiser: Hearing adjourned to reconvene after session.

Chairman Keiser: **reopened the session** & continued hearing on HB1335.

Dennis Prindiville, Pres of Dak Fire Ins Co: appeared in opposition to HB1335. **(see attached testimony)** In addition to my written testimony, previously, age had been eluded to as a reason why an insurance score may be impacted. That is not true, it falls into the Fair Credit Reporting Act & you can't use as a reason. Also, we do business in Idaho & their law is no more restrictive then ND's is. The number of complaints the dept receives will escalate if this bill is passed due to the number of adverse action notices it will require. Copies of court decisions have been distributed.

Rep Kasper: On P.2 of your testimony you say that all studies have shown that there's a direct correlation between insurance scores & loss ratios. Can you provide us with those studies?

Prindiville: Yes, I'd be happy to.

Rep Kasper: It appears by your testimony that you use credit scores only to reduce the rates, is that correct?

Prindiville: Yes

Rep Kasper: If you chose not to use credit scores, your company would actually make more money?

Prindiville: If scoring was to be abolished, yes, we there would be no credit. Apparently, we're filed to give up to a 10% discount. We have a filing into the dept to increase that up to 20% & yes, if insurance scoring were abolished, rates would go up.

Rep Kasper: When you set your rates, without looking at any discounting, are you setting your rates in such a manner that, if you never give a discount, those rates are just fine, or are you loading them for your credit score reduction?

Prindiville: The actuaries look at the book of business & look at correlation of the insurance scores, as I understand it, & the rates will be based accordingly.

Rep Kasper: What I was trying to get to is if this your range of rate, if you loaded those rates because you're assuming you're going to give credits or discounts to 67% of your policy holders so the rates are here, but if you weren't giving credit scoring you might actually be up here or down here. Is the assumption that you're going to give credit on credit scoring, loading your rates b/4 you have your final rates discount?

Prindiville: If I'm understanding you correctly, yes.

Rep Kasper: Let me clarify; you go through & you underwrite it, then you look at the credit score; if it's a negative you raise the rate & if it's a positive score, you lower the rate?

Prindiville: No, we look at the credit score as the last component in the process & if the score falls within certain ranges, it may give them a discount; if it doesn't, the rate we worked up prior to looking at the insurance score is the rate that would be quoted.

Rep Kasper: I want to get this straight, if you're loading your rates in advance because you know you're going to give a discount on 67%, so actually if your rate top would have been here, it would be higher because you know you're going to give a discount, so therefore, theoretically, people are paying a higher rate right out of the shoot because you're going to discount the good ones with your credit scores. Is that correct?

Prindiville: Yes.

Rep Ekstrom: (8.6) In watching a TV show, it said I could actually increase my credit score by paying off all of my credit cards (making it worse) & that would actually mess me up by doing the right thing.

Prindiville: We're not involved in that so I can't answer that

Chairman Keiser: If you have a bunch of credit cards right now & you pay them off, it will not effect your credit. On the other hand, you pay them all off & a yr from now you have no credit cards, that could conceivably effect your credit ... not that you would pay them off today, that is not true. If you pd them off, you would have an available line on every card.

Rep Thorpe: (10.5) My wife & I never use credit; we have 1 credit for convenience with a $5,000 balance ...we choose that because of identity theft. I'm assuming that my credit rating on the insurance wouldn't be very good.

Prindiville: Besides your credit card, they look at personal finances or whatever else is available with the credit bureaus they search; however, the more lines of credit you have out there can negatively effect your credit.

Rep Ruby: (12.2) There are good things with the credit scores. Your group has a problem with some of the provisions in subsection 3, with a history of perfect credit & then due to changes in their life that it adversely effects it. Is there any problem with that aspect of it?

Prindiville: Medical bills are already excluded from any kind of insurance score calculation so that one doesn't need to be on there. My personal problems with this section is that it almost gets into a privacy issue.

Rep Ruby: Another point of contention that you have is that it's used on new quotes for insurance rather then an existing customer, who maybe you're doing an adjustment for, because

you're already using credit scores to determine if they should get a discount in the next cycle. Is there a problem with that part or is it on new policies?

Prindiville: The problem we have is the front end for writing new business. If you look at the wording on the court decision, you can't have an adverse action if you weren't insured with someone before, how can we adversely impact you if we've never provided you with a quote?.

Rep Kasper: Are you familiar with how they develop their credit scores?

Prindiville: I've never seen their formulas.

Chairman Keiser: It is proprietary information, but what they do have data that supports the actuarial validity & that's really all they care about.

Rep Kasper: I'd like to see their data that verifies the fact that they're developing something that's really accurate, because if it is proprietary information, no one really knows for sure.

Prindiville: I will get some information for the committee.

Rep Keiser: (18.2) You said that you're using credit scoring so you can show a relationship between their risk & the use of it for your company; what's the correlation for your company?

Prindiville: The lower the insurance score the higher the loss ratio.

Dale Henke, Nodak Mutual Ins Co: (20.3) appeared in opposition to HB1335. **(See attached testimony)**

Rep Kasper: (30.5) You're saying you're really not learning about those circumstances in a persons life when you get an insurance score, you're just given a score that does not does not disclose this information, is that correct?

Henke: Yes

Rep Kasper: You don't do a credit report so you wouldn't have that information on a credit report because you haven't looked at that.

Henke: Due to the codes & explanations, there is certain information (major influences) that you are made aware of, such as high debt, etc. I don't think they would spell out something like the death of a parent.

Rep Kasper: Are you saying in addition to this number, you might get some letters under that number to give you some type of a code to tell you how that number was arrived at?

Henke: We do receive a certain amount of information with an insurance score that indicates the 4 primary things that have influenced that score, but no specifics. Our suggestion is that we define extraordinary life circumstance so it's limited to the things they didn't cause.

Rep Ruby: (35.0) When you look at the credit scores, is there anytime that you make an exception for a long time customer who has a good claims history but for some reason has a low credit score ... would they get a discount?

Henke: In our company, if they're an existing customer whether their insurance score is low or not, we don't sir charge them. What they've come in at is where they stay.

Rep Ruby: By rewarding them, it's not necessarily based on credit scores, but also by claims. If they have a good credit score, we'll actually give them a little discount, but lets say the credit score isn't good but the claims history is, will you still give them a discount?

Henke: Yes there are discounts & there are many things that come into rating an insurance policy, scoring is not the one & only criteria.

Rep Thorpe: (38.2) In reference to your testimony, what percentage of homes burning down are set?

Henke: I wish I knew, there's a significant difference between arson & someone who is careless. What I was referring to was, maybe someone, because of their housekeeping habits & the way they maintain their home & the loss has occurred, it is an issue of personal negligence on the part of the homeowner versus the person whose home burned, not based upon an action of their own.

Rep Thorpe: I feel that the vast majority of home fires in ND are accidental & due to no negligence, isn't that what you find?

Henke: I'm not qualified to answer that. I will say that the vast majority of home fires don't have arson charges that go along with it.

Rep Thorpe: (40.7) You're asking us to make the assumption that there's been negligence in most cases; therefore, the people that lose their homes would be subject to a higher insurance rate.

Henke: I'm sorry that you were given that impression. What we're saying is, a situation where a consumer is not pleased with the insurance score they had nor the rates we offered them based on that score & they're asking us to reconsider our offer to them. This section allows them to bring evidence that they weren't the cause of the problems they had in their lives & these are the effects that the problem had upon their lives. That's all this section is doing.

Tape 3, Side B

Chairman Keiser: Insurance is discriminatory by it's very nature & is sometimes hard to accept.

Joel Gilbertson: appeared in opposition to HB1335 on behalf of American Insurance Assoc. AIA is a national association of 435 property & casualty companies. The objections that AIA has to the bill are: 1. We already have a consumer bill credit score bill that was passed last session. 2.

The adverse action, including quotes, where you have people that are not clients, or don't have insurance premiums & that creates problems & obligations. 3. Going to the extraordinary life & circumstances (that exception) their position on public policy & termination; if companies want to use that & go into that, they should be able to, but they shouldn't be mandated to do it. By the way, I'm told by AIA's, that the adverse action including quotes, there's not any state in the nations that has that right now.

Rep Kasper: (22.0) For my review, could you redo the current limitations under the ND law for insurance scoring as it sets today without this bill?

Gilbertson: I'd have to get the code out. I can tell you that when we were debating last session when I was here supporting that bill & now we're saying it's gone too far. I can take the code out & we can go through it.

Chairman Keiser: Isn't this the section, it reads: extract all the new language & all the *(?)* language, isn't this the section that deals with credit scores?

Gilbertson: This is including that in this bill, but there are some others.

Chairman Keiser: Should we pass this bill as it is; do we need to change on P. 3., L 12? As I read this language, it seems that what's being requested, is that you provide notice that the insurer will reconsider it's decision if the consumer has suffered an extraordinary circumstance in life. I reconsidered, the answer is no.

Gilbertson: I agree, what does reconsider mean? What we're looking at is the "will" could change to "may" & would read "may reconsider".

John Michael, Farmers Ins Group: Discounts narrow people, we have discounts for multi-car, for having home & auto with us, or for students having good grades. Someone in high

school can have a 2.9 grade point, with 3.0 point needed, so you could make an exception. These discounts treat individuals as best as we can. I think the adverse action issue is just going to create more phone calls & complaints to the dept of insurance.

Chairman Keiser: What percent of your customers receive a discount & or an increase from credit scoring .... or a negative impact from a bad credit report?

Michael: Off the top of my head, I'd say 1/3 would be negatively impacted.

Kent Olson, Director of ?UIA: We're the agents that sell the auto insurance that uses the credit scoring in the underwriting process. We accept credit scoring, we punch in the info from your car, etc & get a ?code back or deliver the renewal or whatever. There are 2 things that concern us. 1. The code thing, we don't want to give disclosure after disclosure on each of these codes. 2. Are we moving towards a best pricing system; if I get 4 quotes & don't offer the cheapest one, is that adverse disclosure? ... the cheapest one may have the lowest limits & highest deductible, we don't know how we're going to disclose which is best & we don't want to get into that. There are no 2 policies alike.

Chairman Keiser: (7.9) When you read this, it's talking about the underwriting from an insurance company, not from 5 separate quotes from 5 separate companies, am I reading that incorrectly?

Michael: If you turn to P. 2, the initial notification has to be the insurers agent. That's the initial notification, we don't want to do it on 4 different quotes, but initially, we can do it.

Dwayne Richter, State Farm Insurance: appeared in opposition to HB1335. The new adverse action language will lead to greater consumer & agent frustration; higher cost for insurers & their customers with virtually no benefit in exchange. This is especially true for quotes; one of the

most valuable benefits to the consumer of credit scoring is the ability to get fast & accurate price quotes, making it possible for them to shop around until they find the best price. They don't need to then be barraged by adverse action notices telling them they don't have a perfect insurance score.

Rep Dosch: (10.3) Is this another tool you have to establish a price ... if I don't like your price, I can walk across the street & get a quote from someone else. Is this legislation going to make it easier or harder for you to do business in the state of ND?

Richter: It will make it harder for us to comply with the law & more costly (we believe) to our consumers.

Rep Ruby: On Sect 2, where it talks about insurer may not decline policy if the credit score is low, was there a time when someone was denied based on their credit score or is it usually other factors?

Richter: With our company, we don't deny a company solely because of a credit score. Sect 2 would have no bearing on the way we currently underwrite our policy.

Rep Kasper: To clarify, if I went to you at 11:00 & applied for a policy & at 11:30 went to John & applied for a similar policy ... you've both checked my insurance scores, would they be the same?

Richter: We don't use the same 3rd party carriers as some of the other companies in the room use. We insure 40 M drivers in the US & we've created our own data to create our own insurance score. We do use a credit score so I'd go out on a limb & say if we purchased that credit score from Choice Point & another company purchases it from the same place, we'd be using the same credit score, but not the same insurance score.

Rep Vigesaa: Assuming that insurance companies use the same carrier & credit score ... do companies vary how much weight they put on the credit score & thereby set a premium. Is it across the board?

Richter: I would say no, they would choose different criteria within what they choose to purchase from these companies & based on their market share, what the size of the company is, if they want to go on a particular market, they could choose to differentiate.

Rep Kasper: What I think I heard you say is (focusing on the insurance score & assuming you're using ?__) State Farm, you could come up with a criteria that you would say to ?___ these are the criteria we wish you to use & you would give that to them for a guideline & they'd develop an insurance score for you. Is that right or do they develop the insurance score, regardless of your guidelines?

Richter: Since we don't use that methodology, I'm not able to answer that.

Rep Thorpe: (16.0) What percentage of your applicants would receive the top score?

Richter: I don't have that data, but can get it.

Pat ?: I think you should kill this bill. I'll try to answer some of the questions I heard. If you look at the code section of what we did last; all this bill is doing is addressing certain parts of it. The 1st section addresses the adverse action definition. Section 03 26.1 25.1, that we adopted last time has 7 things that insurance companies can't do in using credit information. What we did the last time was, the industry came in here & we didn't want this to be applied but it was passed & we tailored back Commissioner Poolman's bill to get as close to the end coil model as possible & basically what we adopted in ND was the end coil model & now this again would be a deviation on that. I want to clarify that we don't hear a huge public outcry, they're not here today.

This is really the industry vs the commissioner's ofc on a couple points on this bill. We're talking about insurance scores, not credit scores, a credit score is used in calculating insurance scores but it's not the same thing as when you go to buy a car or go to the bank to get a loan ... that's a credit score, an insurance score doesn't use all the same factors. There are others that I represent that are not able to be here today; Allstate has sent a letter **(see attached letter)** with their concerns. Credit scoring is just a tool, they're statistical probabilities. We know that people are learning how to manage their credit better, because it's being used in all walks in their financial life. I think this bill will cause more problems for the insurance dept then it will solve.

Chairman Keiser: (22.3) If no further questions or testimony, we'll close the hearing on HB1335.

Date: 2-2-05

Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1335

House **INDUSTRY, BUSINESS AND LABOR** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken DoNotPass

Motion Made By Rep Kasper Seconded By Rep. Dosch

Representatives	Yes	No	Representatives	Yes	No
G. Keiser-Chairman	X		Rep. B. Amerman		X
N. Johnson-Vice Chairman	X		Rep. T. Boe	X	
Rep. D. Clark	X		Rep. M. Ekstrom		
Rep. D. Dietrich	X		Rep. E. Thorpe		X
Rep. M. Dosch	X				
Rep. G. Froseth	X				
Rep. J. Kasper	X				
Rep. D. Nottestad	X				
Rep. D. Ruby	X				
Rep. D. Vigesaa	Y				

Total (Yes) 11 No 2

Absent (1) Rep. Ekstrom

Floor Assignment Rep.

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1335: Industry, Business and Labor Committee (Rep. Keiser, Chairman) recommends **DO NOT PASS** (11 YEAS, 2 NAYS, 1 ABSENT AND NOT VOTING). HB 1335 was placed on the Eleventh order on the calendar.

2005 TESTIMONY

HB 1335

January 28, 2005

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1335 Commissioner Poolman

Page 1, line 11, replace "provides a quote or an offer for insurance" with "binds coverage"

Page 1, line 12, replace "quoted or offered an applicant or insured" with "bound coverage"

Page 1, line 23, replace "credit score is below" with "insurance score is less favorable than"

Page 2, line 11, after "telephone" insert ", internet,"

Page 3, line 5, replace ", including:" with "."

Page 3, remove lines 6 through 11

Page 3, line 14, after the semicolon insert "and"

Page 3, remove lines 16 through 19

Page 3, line 21, remove "and the direct effect of the event on"

Page 3, line 22, remove "the consumer's credit"

Renumber accordingly

Testimony of Dale Haake in Opposition to HB 1335, as Drafted, with Recommended Changes

I represent Nodak Mutual Insurance Company in opposition to HB 1335, as drafted.

It is our opinion that Chapter 26.1-25.1-06 of the North Dakota Century Code adequately addresses the use of personal credit in insurance. We feel no further changes or clarifications are warranted. However, to the extent that we can not have this bill withdrawn, we would suggest the implementation of several changes, as listed below.

Section 4 amends NDCC 26.1-25.1-06 dealing with "Adverse action notifications" to provide a process for reconsideration by a carrier if the consumer can demonstrate that they have suffered an extraordinary event in their life, the result of which has caused a change in the consumer's credit.

Paragraph 3 of that section reads:

Provide notice that the insurer will reconsider its decision if the consumer has suffered an extraordinary life circumstance, including:
a. A catastrophic illness or injury;
b. Total or other loss that makes a home uninhabitable;
c. The death of a spouse, child, or parent;
d. Loss of employment for more than three months;
e. Identity theft; or
f. Divorce.

The requirement of a carrier to give reconsideration to a previous decision due to the existence of various circumstances, as listed above, without any qualifications as to how and why those circumstances arose, is not reasonable. For instance, one of the qualifying circumstances is the total loss of a home. However, if the home was lost due to the careless actions of the consumer, it seems rather inconsistent to require the insurer to again reconsider the desirability of the consumer. The same would hold true for a consumer who lost their employment because of poor work performance.

We would suggest lines a. through f. be removed, leaving only the initial statement "Provide notice that the insurer will reconsider its decision if the consumer has suffered an extraordinary life circumstance". We would then suggest that "extraordinary life circumstance" be defined as; "an event, not caused by or the result of the conduct of the consumer, and which is beyond the control of the consumer, the result of which has caused significant changes in the consumer's financial situation".

By implementing the above, we would allow the consumer to request a review for any event, not of their own doing, which has resulted in a negative impact on the financial well being of the consumer. At the same time, we would remove the requirement of an insurer to reconsider decisions which were based on events and circumstances which were caused by and the fault of the consumer who is making the application for insurance coverage.

Paragraph 4 of this same section outlines the process for notification to the consumer of the opportunity for reconsideration and how to apply for it. We feel that lines a., b., and c., dealing with the extraordinary life circumstance exception, the process for applying for the exception, and the information required for consideration of the exception are reasonable, and need not be revised.

Though we are in agreement with paragraph 4, lines a. through c., we have totally different feelings about lines d. through f.

The circumstances which are being referred to in this bill are of a highly unique and individualized nature. To ask an insurer to capture in paragraph form what guidelines they would use for granting an exception is not realistic. The carrier is being asked to consider very unique information, consider how that unique information relates to or affects this one individual consumer, and then further relate how those affects have had an influence on this one persons credit. This is beyond the scope of reasonableness. We feel this requirement should be removed because it is impossible to comply with in any meaningful fashion.

Line e. requires an insurer to advise what the effect would be on the consumer's credit-based insurance score if an exception is granted. The fact is, there would be no effect on the score. The score is not given by the carrier, and can not be changed by the carrier. The carrier can grant exceptions in spite of what the score is, but the score will remain the same. This line needs to be removed, as it creates a requirement which can not be met.

Line f. requires notice to the consumer as to the duration of the exception, in the event the exception is granted. This is asking for a definitive duration on an exception, the basis and nature of which is totally unknown, and undoubtedly will have great variation from consumer to consumer. This simply can not be answered with any type of sound response. To require an answer will only serve to force the carrier into stating a defensively short duration, due to the great unknowns which exist. This requirement simply is not workable, and should be removed.

Paragraph 5 of this section is found to be acceptable, as written.

It is felt that this bill is not needed, as the issues being dealt with are already properly addressed in our current statutes. However, in the event this bill does go forward, this bill, as currently drafted, contains several weaknesses. The adoption of the above listed revisions will remove those weaknesses, and it is urged that these changes be implemented. With these changes, we feel we would be able to support the passage of this bill.

TESTIMONY FOR HOUSE BILL 1335

My name is Dennis Prindiville, and I am the President of Dakota Fire Insurance Company here in Bismarck. We are a domestic property/casualty company that is owned by EMC Insurance Companies. We operate in four states, with North Dakota being our largest. We write $17 million in personal lines premiums in North Dakota, so any change in the regulation of this line is concerning to us.

The current statute which you passed in the last session has been in place less than one year due to a delayed implementation date and really hasn't had a chance to work. I don't understand why we're already looking at changing it. This bill goes too far and is an attempt to clean up problems that don't exist in North Dakota. The notice of adverse action language that is being added on Lines 10-13 on Page 1 seeks to impose a duty upon agents at the point of sale for new business or quotations. This requirement may not be problematic for agents that represent just one company, but it is a concern for independent agents that represent a number of companies. It is not unusual for these agents to obtain two, three or four quotes in order to obtain the best price for the customer. According to the North Dakota Insurance Department's interpretation, they expect the agent to provide a notice of adverse action for each carrier that does not give the best price or coverage. In addition, it is necessary to give up to four reasons as to why the insurance score impacted the quotation. Not surprisingly, every other state that has an adverse action notice requirement (to my knowledge) only applies it to existing policyholders – not to potential policyholders. In fact, both times it has been challenged in court, the courts ruled that by its very definition adverse action cannot occur to someone unless they are currently a policyholder. I gave the Insurance Department copies of these court decisions, and their response in a subsequent meeting was that we will make it law in North Dakota with this legislation. I question why we want to make it law if the courts have already ruled against it.

Lines 14-17 of this bill are what others in the industry are referring to as the Dakota Fire clause. I say this because it was added in response to the way we use insurance scoring. As a company we were late getting into insurance scoring and, after seeing what other carriers had been through, we decided to do it a little different. We underwrite each account, we rate the account and, at the end of the process, check the insured's insurance score and either apply a discount or leave the rate where it is at. Because of this, the Department is seeking this change to include us within the definition. This puzzles me, as we have not received one complaint from the Department since the April implementation date of this legislation.

On Page 3, the bill creates a new section dealing with extraordinary life circumstances. We oppose this addition because the whole process seems arbitrary, subjective and time consuming. It will undoubtedly result in inconsistency and more complaints. There are others here that intend to speak in greater detail on this section.

Finally, Line 20 Item 5 on Page 3 is in conflict with the beginning of the section. On Page 2 Line 22 it states the "insurer shall". When you go to Item 5 on Line 20 of Page 3, it states the "insurer may".

Insurance scoring is not an evil practice as some would have you believe. All studies have shown that there is a direct correlation between insurance scores and loss ratios. The problem is you don't hear from the majority of consumers who benefit or get a discount because of their insurance score. You only hear from the ones who get less of a benefit. With our company, 67.5% of our homeowner customers and 64% of our auto customers receive a discount.

In addition to my testimony, I have provided you copies of the court decisions I alluded to earlier in my testimony. Our lobbyist, Pat Ward, will provide amendments as well.

I urge a do not pass of House Bill 1335.

HOUSE BILL NO. 1335

Presented by: Larry Maslowski
Director/Senior Analyst
North Dakota Insurance Department

Before: House Industry, Business and Labor Committee
Representative George Keiser, Chairman

Date: January 18, 2005

TESTIMONY

Mr. Chairman and members of the committee:

My name is Larry Maslowski. I am the Director/Senior Analyst of the Consumer Protection Property and Casualty Unit within the North Dakota Insurance Department.

The last Legislative Assembly passed House Bill No. 1260 that set forth guidelines for the use of credit information in underwriting and rating of personal insurance. The law took effect on April 30, 2004.

The law was based upon a Model Act developed by the National Council of Insurance Legislators (NCOIL) with some minor adaptations.

Around the time of the implementation of the new law, the Insurance Department began to receive calls from consumers and agents with questions and concerns regarding company implementation of the new law. This in turn raised some concern within the Department that perhaps some companies were not following the new law. To get a better understanding of how insurance companies were following the new law, the Department sent a questionnaire to those companies about which we had received calls.

We found that some companies were interpreting the law in ways that were felt to be inconsistent with the law. Because of the inconsistencies, the Department concluded that the best way to make sure all companies interpreted the law the same was to make amendments to the law.

Section 1 – Amendment – Page 1, lines 10-14 and page 2, lines 1-3

Clarifies the definition of "adverse action" to include a company's use of credit information at the time it quotes insurance, and includes a company's use of a discount rating program that fails to provide a discounted rate because of poor credit information.

Section 2 – Amendment – Page 2, lines 9-12

Prohibits the use of a credit score alone as a basis for denial, cancellation or nonrenewal if an insurance company's rating program is designed to consider multiple factors.

Section 3 – Amendment – Page 2, lines 16-23 and page 3, line 1

Requires that the company's disclosure of the use of credit information must be made at the time the agent or company requests the information needed to generate the credit score from the consumer.

Section 4 – Amendment – Page 3, lines 22-23 and page 4, lines 1-20

Requires companies to notify consumers of the company's reconsideration process if the consumer's credit history has been negatively impacted by an extraordinary life circumstance such as a catastrophic illness, loss of home, death of spouse, loss of employment, identity theft, or divorce.

Allstate.
You're in good hands.

ALLSTATE INSURANCE COMPANY
LAW AND REGULATION
5500 S. Quebec St. Suite 250
Denver, CO. 80111

Richard D. Turano
Regional Counsel

Law & Regulation

January 14, 2005

The Honorable James Poolman
Commissioner of Insurance
ND Insurance Department
600 E. Boulevard
Bismarck, ND 58505

Re: Allstate comments regarding House Bill 1335

Dear Commissioner Poolman:

On behalf of Allstate Insurance Company, (Allstate) allow me to share significant concerns Allstate has with HB1335, amending the recently effective Personal Insurance Credit Information Act As you know, Allstate supported the passage of the NCOIL model act regarding the use of credit information in personal insurance in North Dakota as a reasonable measure of regulating the use of this important underwriting and rating took. Allstate uses insurance scoring because it allows us to write more insurance, it increases the accuracy of our risk evaluation and because it helps us reward people less likely to incur losses with lower premiums. It is a positive step in addressing issues of insurance affordability and availability. However, we believe that the amendments proposed to this statute, in particular the proposed changes to the definition of "adverse action" present unnecessary burdens to an insurer, and unintended consequences to the consumers of North Dakota. We oppose a requirement that an insurer would be required to provide notice of adverse action as set forth in ND Century Code 26.1-25.1-06 when simply providing quotes that do not reflect the lowest possible premium to be charged. Since the insurer is offering a quote, it is clearly not denying or canceling coverage; there are no changes in the terms or amount of coverage and there has been no increase in any charge for insurance, since the parties have not entered into an insurance contract. Of course, if the consumer accepts the quote, and if the insurer then charges the consumer more than it otherwise would charge based even in part on a credit report, then notice of adverse action is required.

We believe that the determination made at the quoting stage can only be unfavorable if the insurer determines that a quote is not possible because, based on information contained in a credit report, the consumer would not qualify and thus there is no price to quote. If a quote can be made, the determination is positive: Insurance is available. The final premium determination is only reached when the consumer accepts the offer of insurance.

Further, a consumer shopping around for insurance does not expect to get a notice of adverse action simply as a result of asking for an estimate of how much insurance might cost. Independent agents might check with eight or ten insurers to find the best price for that consumer. It would be overly burdensome and confusing for any consumer applying to an independent agent to get one insurance policy and following such transaction, receive multiple notices of adverse action from companies they had only briefly considered or were not even aware of, as insurance was quoted on their behalf. This is especially confusing to consumers when they likely qualified for coverage with most or all of the companies.

At this point in the potential insurance transaction, the consumer is shopping for the best combination of company, premium and protection or coverage. There is nothing adverse if the consumer walks away from

the as-yet incomplete transaction on his or her own and decides not to apply for insurance. The issuance of notices of adverse decision would inhibit shopping for the best premium. Consumers would have to go through a more time consuming, costlier application process rather than shopping for coverage with different companies and getting information to comparison shop. Sending legally required adverse action notices at this point may inhibit competition and discourage shopping around for insurance that fits their needs.

Additionally, by using the information contained in credit reports as part of the quoting process, insurers provide a benefit to consumers by providing more accurate indications of what is likely to happen if they apply for insurance with that particular company. The consumer is not harmed. Rather, the consumer is better able to make an educated choice. Once the consumer decides which insurer to apply to, to the extent any determination made, or action taken, by that insurer is adverse to the interests of the consumer, the consumer will get the required notice of adverse action.

Moreover, to accommodate the process of providing notices of adverse actions following certain insurance quotes would require a great deal of unnecessary expense and reprogramming of systems. It would undermine the benefits from having essentially a uniform law on the use of credit information in personal insurance with other states and thus affect the attractiveness of the North Dakota insurance marketplace. Even with the additional burdens from a systems standpoint, a cost that gets passed on to the North Dakota consumers, insurers would be required to create a process that ultimately places the burden of compliance on the agent. If a consumer simply seeks to obtain a quote, insurers at this point are not able to mechanically generate a notice of adverse action, since the consumer is not in our policyholder database, and may never be a customer. We would thus have to create a process where the agent has to provide such notice, if warranted, at the point of sale. This would add significant administrative time to the job of an insurance agent or his/her support staff. They would then likely have to explain the purpose and content of the notice.

With respect to other portions of HB1335, Allstate would recommend some minor changes in the proposed language of the bill for the reasons stated below. In Section 2, we would suggest that the phrase "if the credit score is below a specific value" be changed to "if the insurance score is less favorable than a specific value". Some insurance scoring models, like those developed and used by Allstate generate scores in which ~~the lower the score, the better~~. In Section 4, number 3 (f) should be changed to "dissolution of marriage" to properly reflect that the intention of such a provision is to address situations in which an actual dissolution of marriage caused someone with good credit to see a deterioration in their credit potentially caused by a former spouse's accounts showing up on the credit report - or a spouse who had little credit in their own name now showing up as a poor risk after a divorce. As you know, the intention of the exception process would be thwarted if insurers gave exceptions to people who have had bad credit all along and just happened to also get divorced. The term "dissolution of marriage" may be better in terms of managing this distinction. Additionally, number 4, c. and d. should be deleted as it would be difficult for insurers to provide notice of the information required or the guidelines for granting the exception. By the very nature of this provision these are unusual events, and it is difficult to identify everything that might be considered or required. It also seems problematic to require all this information be put in a notice if every time we encounter a new basis for consideration of an exception, we have to modify or update our notices. It would be equally difficult to provide such notice of the guidelines for an exception. Also, as a protection for insurers and agents with the exception process, should be included to reflect that the insurer shall not be in violation of rate filings by adjusting an insured's rate through this process.

For these reasons, we strongly oppose the proposed amendments to alter the definition of "adverse action" set forth in HB1335 and request that in addition to deleting this expanded definition, you consider the other suggested changes as well. Thank you for allowing Allstate the opportunity to comment on this type of legislation. If you have any questions on this issue, or desire greater detail, please do not hesitate to contact me at any time.

Rick Turano
Allstate Insurance Company

HB1335

LEXSEE 275 F. SUPP. 2D 1307

ELENA MARK and PAUL GUSTAFSON, Plaintiffs, v. VALLEY INSURANCE COMPANY and VALLEY PROPERTY AND CASUALTY, Defendants.

CV 01-1575-BR

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

275 F. Supp. 2d 1307; 2003 U.S. Dist. LEXIS 13355

July 17, 2003, Decided

DISPOSITION: Defendant's motion for summary judgment granted; dismissed with prejudice.

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Summary Judgment Standard

[HN1] Fed. R. Civ. P. 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show the absence of an issue of material fact. In response to a properly-supported motion for summary judgment, the nonmoving party must go beyond the pleadings and show there is a genuine issue of material fact for trial.

Civil Procedure > Summary Judgment > Summary Judgment Standard

[HN2] An issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. The court must draw all reasonable inferences in favor of the nonmoving party. A mere disagreement about a material issue of fact, however, does not preclude summary judgment. When the nonmoving party's claims are factually implausible, that party must come forward with more persuasive evidence than otherwise would be required.

Civil Procedure > Summary Judgment > Summary Judgment Standard

[HN3] The substantive law governing a claim or a defense determines whether a fact is material. If the resolution of a factual dispute would not affect the outcome of the claim, the court may grant summary judgment.

Governments > Legislation > Interpretation

[HN4] When a district court interprets a federal statute, it must apply a two-part analysis. The first and most important step in construing a statute is the statutory language itself. The court must look to the text of the statute to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The meaning - or ambiguity - of certain words or phrases may only become evident when placed in context. Accordingly, it is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court, therefore, must interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole.

Governments > Legislation > Interpretation

[HN5] If congressional intent is clear from the plain meaning of the statute, the court need not look further for guidance. If a statute is unambiguous on its face, there is ordinarily no reason to resort to legislative history to illuminate the language. Courts look at legislative history when the plain language is unambiguous only if the legislative history clearly indicates that Congress meant something other than what it said. When the language of the statute is not dispositive, however, the courts look to the congressional intent revealed in the legislative history and purposes of the statutory scheme.

Governments > Legislation > Interpretation
Administrative Law > Agency Rulemaking > Rule Application & Interpretation

[HN6] If the statute is ambiguous as to the question at issue, the court must determine whether an agency interpretation of the statutory provision exists and is owed some degree of deference. When Congress expressly delegates authority or responsibility to an agency to implement a particular provision or to fill a

particular gap in a statute, any ensuing regulation is binding on the courts unless it is procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute. When it is apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, a reviewing court must accept the agency's interpretation as long as it is reasonable. The court, however, generally owes this degree of deference, commonly referred to as Chevron deference, only to formal agency interpretations such as those that follow notice-and-comment rulemakings or formal adjudications.

Administrative Law > Judicial Review > Standards of Review > Standards Generally
Governments > Legislation > Interpretation
[HN7] The well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance even if they do not have the force of law and are not entitled to Chevron deference. Such an agency interpretation is entitled to a respect proportional to its power to persuade.

Banking Law > Bank Activities > Consumer Protection > Fair Credit Reporting
[HN8] Although Fair Credit Reporting Act generally regulates credit reporting agencies, it also creates obligations for certain users of consumer credit information.

Banking Law > Bank Activities > Consumer Protection > Fair Credit Reporting
[HN9] See 15 U.S.C.S. § 1681m(a).

Banking Law > Bank Activities > Consumer Protection > Fair Credit Reporting
[HN10] See 15 U.S.C.S. § 1681a(k)(1).

Banking Law > Bank Activities > Consumer Protection > Equal Credit Opportunity
[HN11] See 15 U.S.C.S. § 1691(d)(6).

Governments > Legislation > Interpretation
[HN12] The first and most important step in construing a statute is the statutory language itself. If the statute has a plain and unambiguous meaning, the court generally need look no further for guidance.

Banking Law > Bank Activities > Consumer Protection > Fair Credit Reporting
[HN13] 15 U.S.C.S. § 1681a(k)(1)(A), by its own terms, applies to credit transactions rather than insurance transactions. Moreover, 15 U.S.C.S. § 1681a(k)(1)(B)(i) provides a definition of adverse action that specifically applies to decisions made "in connection with the underwriting of insurance."

Banking Law > Bank Activities > Consumer Protection > Fair Credit Reporting
[HN14] The catchall provision under 15 U.S.C.S. § 1681a(k)(1)(B)(iv) provides a general definition of adverse action that applies on its face to any decisions made in connection with any transaction initiated or application made by a consumer.

Governments > Legislation > Interpretation
[HN15] It is a well-settled canon of statutory interpretation that specific provisions prevail over general provisions. It is an, equally well-settled canon of statutory interpretation that in construing a statute the court is obliged to give effect, if possible, to every word Congress used. A court, therefore, must not read a catchall section so broadly as to swallow up the more specific sections of a statute or to render them superfluous.

Banking Law > Bank Activities > Consumer Protection > Fair Credit Reporting
Governments > Legislation > Interpretation
[HN16] Pursuant to 15 U.S.C.S. § 1681a(k)(1)(B)(i), an adverse action means only one of four things: a denial of coverage, a cancellation of coverage, an increase in any charge for insurance, and an adverse or unfavorable change in the terms or amount of insurance coverage. By using the verb "means," Congress indicated this list is exclusive, and no other actions constitute adverse actions in. the insurance context.

Banking Law > Bank Activities > Consumer Protection > Fair Credit Reporting
[HN17] The Fair Credit Reporting Act does not define the term "increase." The plain and ordinary meaning of the verb "to increase" is to make something greater or larger. The "something" that is increased in 15 U.S.C.S. § 1681a(k)(1)(B)(i) is the "charge for any insurance." The plain and common meaning of the noun "charge" is the price demanded for something. Thus, the statute plainly means an insurer takes adverse action if the insurer makes greater (i.e., larger) the price demanded for insurance. An insurer cannot "make greater" something that did not exist previously. The statutory definition of adverse action, therefore, clearly anticipates an insurer must have made an initial charge or demand for payment before the insurer can increase that charge. In other words, an insurer cannot increase the charge for

insurance unless the insurer previously set and demanded payment of the premium for that insured's insurance coverage at a lower price.

Banking Law > Bank Activities > Consumer Protection > Fair Credit Reporting
[HN18] The Fair Credit Reporting Act's notice requirements are triggered when an insurer "takes" an adverse action. Thus, although 15 U.S.C.S. § 1681a(k)(1)(B)(i) uses the term "increase" as a noun, it is logical to treat "increase" as an active verb also.

Banking Law > Bank Activities > Consumer Protection > Fair Credit Reporting
[HN19] The common and ordinary meaning of 15 U.S.C.S. § 1681a(k)(1)(B)(i) is that an insurer takes an adverse action when it "makes greater," i.e., "increases," the price previously demanded of the insured for insurance. Section 1681a(k)(1)(B)(i) reasonably cannot be read to mean an insurer takes adverse action if it initially charges an insured more than its optimal rate based on information in the insured's consumer credit report. The statute unambiguously means an insurer does not increase a charge for insurance unless the insurer charges an insured one price for insurance and then subsequently increases that charge based on information in the insured's consumer credit report.

Governments > Legislation > Interpretation
[HN20] If the plain meaning of a statute is unambiguous, the court need look no further for guidance as to the interpretation of the statute. The court is obligated to look beyond the statutory language if the legislative history of the provision clearly indicates that Congress meant something other than what it said.

Administrative Law > Judicial Review > Standards of Review > Standards Generally
Governments > Legislation > Interpretation
[HN21] The court need not defer to an agency interpretation that is contrary to the plain meaning of an unambiguous statute. In any event, the court does not owe Chevron deference to informal agency decisions. An informal agency interpretation deserves from the court only the degree of respect that the underlying analysis demands.

Banking Law > Bank Activities > Consumer Protection > Fair Credit Reporting
[HN22] 15 U.S.C.S. § 1681a(k)(1) is unambiguous and plainly means an insurer does not "increase any charge for insurance" and, therefore, does not take any adverse action against an insured when the insurer merely issues a single, initial charge to an insured. An insurer cannot increase a charge for insurance unless the insurer makes an initial demand for payment to the insured and subsequently increases the amount of that demand.

COUNSEL: [**1] N. ROBERT STOLL, STEVE D. LARSON, DAVID F. REES, Stoll Stoll Berne Lokting & Schlacter P.C., Portland, OR. CHARLES A. RINGO, Beaverton, OR, Attorneys for Plaintiffs.

DOUGLAS G. HOUSER, LOREN D. PODWILL, Portland, OR, Attorneys for Defendants.

JUDGES: ANNA J. BROWN, United States District Judge.

OPINIONBY: ANNA J. BROWN

OPINION:

[*1308] OPINION AND ORDER

BROWN, Judge.

The following is a redacted version of the Court's Opinion and Order (# 135) issued [*1309] under seal on July 10, 2003. The redacted form of the Opinion and Order omits factual material of a proprietary and confidential nature. The legal analysis has not been redacted.

This matter comes before the Court on Defendant Valley Insurance Company's Motion for Summary Judgment (# 59) as to the claims of Plaintiff Paul Gustafson and all others similarly situated.

On June 18, 2002, Plaintiffs Elena Mark and Paul Gustafson filed their Second Amended Complaint alleging Defendants Valley Insurance Company and Valley Property and Casualty violated the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681, when they took adverse actions with respect to the underwriting of the automobile insurance policies of Plaintiffs [**2] and others similarly situated on the basis of information contained in their consumer credit reports and then failed to notify them of those adverse actions.

On January 10, 2003, Defendants filed their Motions for Summary Judgment. During oral argument heard on May 21, 2003, the Court denied Valley Property's Motion for Summary Judgment as to the claims of Mark and all others similarly situated to the extent Valley Property contended no reasonable juror could conclude Valley Property failed to institute reasonable procedures to ensure FCRA compliance or willfully violated FCRA. The Court also denied Defendants' Motions to the extent Defendants argued they were entitled to judgment as a matter of law because they complied with FCRA's notice requirements when they mailed notices to Plaintiffs

several months after they allegedly took the adverse actions.

The Court took under advisement Valley Insurance's Motion for Summary Judgment as to the claim of Gustafson and all others similarly situated to the extent Valley Insurance argued it had no duty to provide notice to Gustafson or other insureds like him because it did not take an adverse action against them. The Court also took under [**3] advisement Valley Insurance's Motion for Summary Judgment as to the claims of Gustafson and all others similarly situated to the extent Valley Insurance contended no reasonable juror could conclude Valley Insurance willfully failed to comply with its obligations under FCRA. n1

> n1 In a single paragraph in their Reply Memorandum, Defendants raise for the first time several constitutional arguments regarding Plaintiffs' damages claims. Although the Court gave Defendants leave to file two supplemental memoranda and heard oral argument on this matter, Defendants did not discuss these constitutional arguments again. Because Defendants failed to raise these grounds properly in their Motions for Summary Judgment or the original Memorandum in Support of their Motions and failed to brief these arguments adequately, the Court, in the exercise of its discretion, declines to consider these untimely arguments. Accordingly, the Court denies Defendants' Motions to the extent they are based on these grounds.

For the following [**4] reasons, the Court **GRANTS** Valley Insurance's Motion for Summary Judgment as to the FCRA claims of Gustafson and all others similarly situated and, therefore, **DISMISSES with prejudice** those claims against Valley Insurance.

FACTUAL BACKGROUND

The following facts are undisputed unless otherwise noted:

A. Valley Insurance's FCRA Procedures for New Business Customers

During 1999, some of Defendants' employees went to a conference presented by [*1310] Fair, Isaac and Company, a company in the business of providing statistically-based decision support tools. The topic of the conference was the correlation between poor credit history and increased likelihood of claims. After Defendants reviewed Fair Isaac's information, they looked at their own books of business and found the same correlation.

In July 1999, Valley Insurance began using a Household Financial Stability factor to rate and to set the premiums it charged for automobile insurance policies. Because Valley Insurance was not in operation before this time, all of Valley Insurance's customers were "new business customers" whom Valley Insurance did not insure previously.

Pursuant to Valley Insurance's [**5] program, when a potential insured requested a quote on automobile insurance, one of Valley Insurance's agents first determined the customer's Household Financial Stability factor by contacting ChoicePoint Services, Inc., a company that compiles and maintains databases of information regarding consumers. ChoicePoint then provided Valley Insurance with a national credit file report. The national credit file report contained the Fair Isaac Casualty Loss Score, a numerical score that was calculated by applying an analytical model that predicts the likelihood of future claims based on certain information in a consumer's credit history. The Fair Isaac Casualty Loss Score model analyzed the comprehensive information available in the potential insured's credit report and then synthesized it into a single numerical score ranging from approximately 300 to 900. Individuals with higher scores were less likely to produce a loss or a claims file than individuals with lower scores.

Valley Insurance's computer system automatically converted the Fair Isaac Casualty Loss Score into one of four insurance scores: Significantly Above Average (750+), Above Average (675-749), Average (575-674), and Below [**6] Average (Below 575). n2 Valley Insurance then used the new insured's insurance score in conjunction with the insured driver's age and driving activity to determine the insured's premium tier rating and insurance premium. Valley Insurance's automobile insurance program consisted of four premium tiers or levels: Ultra, Preferred, Standard, and Non-Standard. Each of the four insurance scores corresponded to one of the premium rates:

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Significantly above average     =   Ultra Rate
Above average                   =   Preferred Rate
```

Average	=	Standard Rate
Below Average	=	Non-Standard Rate

n2 It is unclear from the record whether Valley Insurance uses a fifth insurance score: Significantly Below Average. Some of Valley Insurance's documentation indicates a person with a Significantly Below Average insurance score is not eligible for any coverage. Other documents, however, indicate the Below Average and Significantly Below Average tiers, in fact, constitute a single tier.

To qualify for Valley [**7] Insurance's optimal rate, the Ultra Rate, an insured had to meet the following requirements: 1) be over age 21, 2) have an incident-free driving record during the three prior years, and 3) have a Significantly Above Average insurance score. Thus, an insured with a Significantly Above Average insurance score did not necessarily qualify for Valley Insurance's best rate available, the Ultra Rate. An insured, however, could not qualify for Valley Insurance's best rate available unless the insured had a Significantly Above Average insurance score.

Valley Insurance considered, the Standard Rate to be its baseline rate. The [*1311] Non-Standard Rate was [REDACTED] higher than the Standard rate [REDACTED]. The Preferred Rate was [REDACTED] less than the Standard Rate. The Ultra Rate was [REDACTED] less than the Standard Rate [REDACTED]. In other words, an insured whose credit, age, and activity scores resulted in his placement in the Non-Standard tier paid nearly twice as much for his car insurance as an. Ultra customer. Moreover, an insured with a Below Average insurance score paid almost twice as much for insurance as a. similarly-situated insured with a Significantly Above Average insurance [**8] score.

B. Gustafson's Policy

On July 24, 2001, Valley Insurance issued an automobile insurance policy to Gustafson. Valley Insurance rated Gustafson's insurance score as Average. As a result, Valley Insurance charged Gustafson its Standard Rate, which was a higher insurance premium than it would have charged him if his insurance score had been rated Above Average or Significantly Above Average. In fact, if Gustafson's insurance score had been Significantly Above Average, his annual premium would have been [REDACTED] less than Valley Insurance charged him.

Valley Insurance did not provide Gustafson with a FCRA adverse action notice when it issued his policy. Valley Insurance, however, sent Gustafson a FCRA notice in January 2001, which was approximately six months after his insurance policy became effective and three months after Mark originally filed this action against Valley Property.

STANDARDS

A. Summary Judgment Standards

[HN1] Fed. R. Civ. P. 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show the absence of an issue of material [**9] fact. *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002). In response to a properly-supported motion for summary judgment, the nonmoving party must go beyond the pleadings and show there is a genuine issue of material fact for trial. *Id.*

[HN2] An issue of fact is genuine "'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Villiarmo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)). The Court must draw all reasonable inferences in favor of the nonmoving party. *Id.* A mere disagreement about a material issue of fact, however, does not preclude summary judgment. *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1389 (9th Cir. 1990) . When the nonmoving party's claims are factually implausible, that party must come forward with more persuasive evidence than otherwise would be required. *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1147 (9th Cir. 1998) (citation omitted).

[HN3] The substantive law governing a claim or a defense determines whether a fact is material. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). [**10] If the resolution of a factual dispute would not affect the outcome of the claim, the court may grant summary judgment. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001).

B. Statutory Construction Standards

[HN4] When a district court interprets a federal statute, it must apply a two-part analysis. [*1312] "The first and most important step in construing a statute is the statutory language itself." *Royal Foods Co. v. RJR Holdings, Inc.*, 252 F.3d 1102, 1106 (9th Cir. 2001)

(citing *Chevron USA v. Natural Res. Def. Council,* 467 U.S. 837, 842-44, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)). The court must look to the text of the statute to "'determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Id.* (quoting *Robinson v. Shell Oil Co.,* 519 U.S. 337, 340, 136 L. Ed. 2d 808, 117 S. Ct. 843 (1997)). "The meaning - or ambiguity - of certain words or phrases may only become evident when placed in context." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132, 146 L. Ed. 2d 121, 120 S. Ct. 1291 (2000). Accordingly, it is a "'fundamental canon of statutory construction that the words of a statute [**11] must be read in their context and with a view to their place in the overall statutory scheme.'" *Id.* (quoting *Davis v. Mich. Dept. of Treasury,* 489 U.S. 803, 809 (1989)). A court, therefore, must "interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." *Id.* (internal quotations and citations omitted)

[HN5] If congressional intent is clear from the plain meaning of the statute, the court need not look further for guidance.*Id.* If a statute is unambiguous on its face, "there is ordinarily no reason to resort to legislative history to illuminate the language." *State of Cal. Dep't of Soc. Servs. v. Thompson,* 321 F.3d 835, 853 (9th Cir. 2003). Courts look at legislative history when the plain language is unambiguous only if "the legislative history clearly indicates that Congress meant something other than what it said." *Carson Harbor Village Ltd. v. Unocal Corp.,* 270 F.3d 863, 877 (9th Cir.2001), *cert. dismissed,* 535 U.S. 971 (2002) (quoting *Perlman v. Catapult Entertainment, Inc.,* 165 F.3d 747, 753 (9th Cir.), *cert. dism'd,* [**12] 528 U.S. 924 (1999)). When the language of the statute is not dispositive, however, the courts look to the congressional intent revealed in the legislative history and "purposes of the statutory scheme." *United States v. Buckland,* 289 F.3d 558, 564 (9th Cir.), *cert. denied,* 35 U.S. 1105 (2002).

[HN6] In addition, if the statute is ambiguous as to the question at issue, the court must determine whether an agency interpretation of the statutory provision exists and is owed some degree of deference. *Brown & Williamson,* 529 U.S. at 132. When Congress expressly delegates authority or responsibility to an agency to implement a particular provision or to fill a particular gap in a statute, any ensuing regulation is binding on the courts unless it is procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute. *United States v. Mead Corp.,* 533 U.S. 218, 227, 150 L. Ed. 2d 292, 121 S. Ct. 2164 (2001). When it is "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in [**13] the statute or fills a space in the enacted law," a reviewing court must accept the agency's interpretation as long as it is reasonable. *Id.* at 2172. The court, however, generally owes this degree of deference, commonly referred to as *Chevron* deference, only to formal agency interpretations such as those that follow notice-and-comment rulemakings or formal adjudications. [*1313] *Chevron, 467 U.S. 837(Chevron* deference is warranted only if the agency interpretation follows a "relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."). *Id.* Nonetheless, [HN7] the "well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance'" even if they do not have the force of law and are not entitled to *Chevron* deference. *Bragdon v. Abbott,* 524 U.S. 624, 642, 141 L. Ed. 2d 540, 118 S. Ct. 2196 (1998) (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 139-40, 89 L. Ed. 124, 65 S. Ct. 161 (1944)). Such an agency interpretation is entitled to "a respect proportional to its 'power to persuade.'" *Mead,* 533 U.S. at 218 (quoting *Skidmore,* 323 U.S. at 140). [**14]

DISCUSSION

I. Adverse Action

Congress enacted FCRA for the stated purpose of requiring credit reporting agencies to adopt "reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." 15 U.S.C. § 1681(b). [HN8] Although FCRA generally regulates credit reporting agencies, it also creates obligations for certain users of consumer credit information. In particular, 15 U.S.C. § 1681m(a) provides: [HN9] "If a person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report," the person shill provide "notice of the adverse action to the consumer."

[HN10] FCRA defines "adverse action" as follows:

> The term "adverse action" -
>
> (A) has the same meaning as in section 1691(d)(6) n3 of this title; and
>
> (B) means -

> (i) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable [**15] change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance.
>
> (ii) a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee;
>
> (iii)a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit described in section 1681b(a)(3)(D) of this title; and
>
> (iv) an action taken or determination that is
>
> [*1314] (I) made in connection with an application the was made by, or a transaction that was initiated by, any consumer, or in
>
> connection with a review of an account under section 1681b(a)(3)(F)(ii) of this title; and
>
> (II) adverse to the interests of the consumer.

15 U.S.C. § 1681a(k)(1).

> n3 15 U.S.C. § 1691(d)(6) is part of the Equal Credit Opportunity Act (ECOA). That section provides:
>
> > [HN11] The term 'adverse action' means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.

[**16]

Valley Insurance argues it had no obligation to provide a FCRA notice to Gustafson because it did not take an "adverse action" with respect to the underwriting of his automobile insurance policy when it charged him more than the optimal rate based on information contained in his consumer credit report. Valley Insurance contends setting the initial premium rate for a new customer cannot constitute an increase in the charge for insurance. Gustafson, on the other hand, contends an insurer takes adverse action against anew applicant if the insurer "quotes and/or offers" to the potential insured a premium rate that is less than optimal or that is higher than the rate offered to similarly-situated customers with better credit histories.

A. Precedent

Congress added § 1681a(k) to FCRA when it passed the Consumer Credit Reporting Reform Act of 1996. As a result, few courts have had the opportunity to interpret FCRA's adverse action provision. The parties have not cited and the Court has been unable to find any controlling authority regarding the proper interpretation of FCRA's adverse action definition in § 1681a(k)(1). Gustafson, however, urges the Court to adopt the reasoning [**17] of the District Court for the Southern District of Ohio in *Mick v. Level Propane Gases, Inc.*, 203 F.R.D. 324, No. 98-CV-959, 1999 WL 33453772 (S.D. Ohio, Sept. 29, 1999), and to conclude an adverse action occurs whenever a potential insured is offered terms, including premium rates, less favorable than those offered to or currently enjoyed by other insureds.

In *Mick*, the court overruled the defendant's objection to class certification based on a lack of numerosity. The court concluded the class was larger than the defendant contended because the class "may include" those persons who were charged a higher price than other customers. The court, however, did not actually decide the issue and instead explicitly stated one of the common issues of law to be decided by the court at a later date was whether charging a customer more than the best possible rate constitutes an adverse action

under FCRA. Accordingly, this Court does not find the court's conclusion in *Mick* to be helpful. In the absence of any controlling or persuasive authority, the Court is faced with an issue of first impression. The Court, therefore, must apply the traditional principles of statutory construction to [**18] determine whether Valley Insurance's conduct constituted an adverse action that obligated Valley Insurance to provide a FCRA adverse action notice to Plaintiff Gustafson and others similarly situated.

B. Plain Meaning

As noted, [HN12] "the first and most important step in construing a statute is the statutory language itself." *Royal Foods,* 252 F.3d at 1106. If the statute has a plain and unambiguous meaning, the court generally need look no further for guidance. *Id.*

Each party contends the plain meaning of § 1681a(k)(1) supports its position. [*1315] The parties, however, dispute which subsection of § 1681a(k)(1) applies to Valley Insurance's actions with respect to the pricing of Gustafson's insurance policy.

Valley Insurance argues § 1681a(k)(1)(A) applies here. Subsection (A) provides adverse action has the same meaning as in § 1691(d)(6) of ECOA. As noted, ECOA defines adverse action as "a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested."

The Court finds § 1681a(k)(1)(A) plainly does not govern Gustafson's claim against [**19] Valley Insurance. [HN13] That statutory provision, by its own terms, applies to credit transactions rather than insurance transactions. Moreover, § 1681a(k)(1)(B)(i) provides a definition of adverse action that specifically applies to decisions made "in connection with the underwriting of insurance." Because FCRA's adverse action statute contains an insurance-specific definition, the Court concludes the alternate credit-specific definition is not applicable to a decision made in the insurance context.

Although Gustafson acknowledges § 1681a(k)(1)(B)(i) provides an insurance-specific definition of adverse action, he contends the definition that governs the facts of this matter is the more general "catchall" definition contained in § 1681a(k)(1)(B)(iv). [HN14] The catchall provision provides a general definition of adverse action that applies on its face to any decisions made in connection with any transaction initiated or application made by a consumer.

[HN15] "It is a well-settled canon of statutory interpretation that specific provisions prevail over general provisions." *Nat'l Labor Relations Bd. v. A-Plus Roofing, Inc.,* 39 F.3d 1410, 1415 (9th Cir. 1994). "It is an, equally well-settled [**20] canon of statutory interpretation that 'in construing a statute we are obliged to give effect, if possible, to every word Congress used.'" *Id.* (quoting *Reiter v. Sonotone Corp.,* 442 U.S. 330, 339, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979)). A court, therefore, must not read a catchall section so broadly as to swallow up the more specific sections of a statute or to render them superfluous. *Id.* See also *United States v. Colacurio,* 84 F.3d 326, 333 (9th Cir. 1996).

Applying these standards, the Court notes the insurance-specific provision in § 1681a(k)(1)(B)(i) explicitly applies to both existing insurance policies and to applications for insurance. If the Court were to adopt Gustafson's definition of adverse action, however, the more general language in the catchall provision of subsection (B)(iv) would subsume the insurance-specific provision with respect to all applications for insurance as well as any consumer-initiated insurance transactions involving existing policies. To give meaning to all of the words used by Congress, including its reference to applications for insurance in § 1681a(k)(1)(B)(i), the Court cannot read the catchall provision so broadly that it encompasses [**21] activities clearly falling under the auspices of the insurance-specific provision. The Court, therefore, concludes the insurance-specific provision of subsection (B)(i) rather than the general catchall provision of subsection (B)(iv) applies in the insurance context and governs Gustafson's claim against Valley Insurance.

[HN16] Pursuant to § 1681a(k)(1)(B)(i), an adverse action means only one of four things: a denial of coverage, a cancellation [*1316] of coverage, an increase in any charge for insurance, and an adverse or unfavorable change in the terms or amount of insurance coverage. By using the verb "means," Congress indicated this list is exclusive, and no other actions constitute adverse actions in. the insurance context.

Gustafson, nonetheless, argues Valley Insurance's conduct constituted an increase in the charge for his insurance. Gustafson contends § 1681a(k)(1)(B)(i) plainly means an insurer increases the charge for insurance if it charges one of its insured more than another insured based on information in a consumer credit report.

[HN17] FCRA does not define the term "increase." The plain and ordinary meaning of the verb "to increase" is to make something greater or larger. n4 *Merriam-Webster's* [**22] *Collegiate Dictionary* 589 (10th ed. 1998). The "something" that is increased in the statute is the "charge for any insurance." The plain and common meaning of the noun "charge" is "the price demanded for something." *Id.* at 192. Thus, the statute plainly means an

insurer takes adverse action if the insurer makes greater (i.e., larger) the price demanded for insurance.

> n4 [HN18] FCRA's notice requirements are triggered when an insurer "takes" an adverse action. Thus, although § 1681a(k)(1)(B)(i) uses the term "increase" as a noun, it is logical to treat "increase" as an active verb also.

An insurer cannot "make greater" something that did not exist previously. The statutory definition of adverse action, therefore, clearly anticipates an insurer must have made an initial charge or demand for payment before the insurer can increase that charge. In other words, an insurer cannot increase the charge for insurance unless the insurer previously set and demanded payment of the premium for that insured's insurance [**23] coverage at a lower price.

Gustafson argues Valley Insurance increased the charge for his insurance because it charged him a rate that was higher than the best possible rate available, to persons with Significantly Above Average insurance scores. The Court finds Gustafson's interpretation of the statute stretches the meaning of "charge" too far. The fact that a rate exists does not constitute a charge or demand for payment. Although an insurer's optimal rate may exist in a vacuum if no customer is asked to pay or does pay that rate, the ordinary meaning of "charge" requires an actual demand to an insured for the price of insurance coverage. Thus, an increase in the price demanded of an insured ordinarily and plainly means an increase in the price previously demanded of that insured rather than a rate that could be issued to a hypothetical customer.

Moreover, the Court finds Gustafson's interpretation of the phrase "increase in any charge" would require the Court to read into the statute words that Congress did not include and is contrary to the plain meaning of the language Congress chose to employ. The statute does not refer to the insurer's "optimal" or "best possible" rate available [**24] to similarly situated persons nor, in fact, does it mention the insurer's "standard" or "basic" rate. If the Court were to agree with Gustafson and conclude § 1681a(k)(1)(B)(i) requires the Court to compare an insured's premium rate to the rates charged to other hypothetical customers when determining whether an insurer has increased the insured's charge for insurance, any of these various rates [*1317] could serve as a potential comparison point. The Court, however, finds it would be improper to read these comparison points into § 1681a(k)(1)(B)(i) absent a specific reference by Congress.

Nonetheless, Gustafson argues Valley Insurance took an adverse action and "increased" the price demanded from him for his car insurance when it applied a "multiplier" to its Standard Rate to calculate Gustafson's premium rate as part of its initial underwriting process. First, the Court notes Valley Insurance applied a multiplier [REDACTED] in this case and, therefore, charged Gustafson only its Standard Rate. In other words, Valley Insurance did not "make greater" Gustafson's premium rate when it applied its multiplier because Gustafson's rate was the Standard Rate before and after the multiplier [**25] was applied.

More importantly, the Court finds Valley Insurance's application of an internal formula cannot constitute a "charge" as that term ordinarily is understood. The Court finds the application of the formula is merely the process by which Valley Insurance calculates a. charge or demand for payment and is not a charge itself. Valley Insurance did not quote or offer insurance to Gustafson at one price and then raise that price after it reviewed his credit report: Gustafson received a single bill, and Valley Insurance issued a single charge to him.

Based on the foregoing, the Court finds [HN19] the common and ordinary meaning of § 1681a(k)(1)(B)(i) is that an insurer takes an adverse action when it "makes greater," i.e., "increases," the price previously demanded of the insured for insurance. The Court also finds § 1681a(k)(1)(B)(i) reasonably cannot be read to mean an insurer takes adverse action if it initially charges an insured more than its optimal rate based on information in the insured's consumer credit report. The Court, therefore, concludes the statute unambiguously means an insurer does not increase a charge for insurance unless the insurer charges an insured one price [**26] for insurance and then subsequently increases that charge based on information in the insured's consumer credit report. Accordingly, the Court concludes Valley Insurance did not increase the charge for Gustafson's car insurance because it issued a single charge for that insurance coverage.

C. Legislative History

As noted, [HN20] if the plain meaning of a statute is unambiguous, the Court need look no further for guidance as to the interpretation of the statute. *Brown & Williamson,* 529 U.S. at 132. The Court is obligated to look beyond the statutory language if the legislative history of the provision "clearly indicates that Congress meant something other than what it said." *See Thompson;* 321 F.3d at 853.

Gustafson argues the Court must consider the legislative history because the Court's literal interpretation of the statutory language would produce a result contrary to the intent of Congress. Gustafson urges

the Court to consider various House and Senate Reports that preceded Congress's enactment of the Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208 (1996), which added the adverse action definition contained in § 1681a(k)(1). [**27] In particular, Gustafson refers the Court to H.R. Rep. No. 102-692, S. Rep. No. 103-209, and H.R. Rep. No. 103-486. The legislative reports on which Gustafson relies, however, were associated with previous versions of the amendments. n5 [*1318] Each of the prior versions of the bill defined adverse action more broadly to "include" specifically enumerated actions; i.e., the prior versions of the bill did not limit adverse actions to those enumerated actions. As noted, Congress actually enacted a more restrictive definition of adverse action in that the statute defines adverse action to "mean" only the actions that are listed in § 1681a(k)(1) As a result, the Court concludes the legislative history relied on by Gustafson does not indicate clearly that Congress meant something other than the plain meaning of the statutory language in § 1681a(k)(1). or that the Courts's literal interpretation of that plain meaning is contrary to Congressional intent.

n5 H.R. Rep. No. 102-692 accompanied H.R. 3596, Sen. R. No. 103-209 accompanied S. 783, and H.R. Rep. No. 103-486 accompanied H.R. 1015.

[**28]

D. FTC Interpretations

Again, [HN21] the Court need not defer to an agency interpretation that is contrary to the plain meaning of an unambiguous statute. *Brown & Williamson*, 529 U.S. at 132. In any event, the Court does not owe *Chevron* deference to informal agency decisions. *Mead*, 533 U.S. at 227. An informal agency interpretation deserves from the Court only the degree of respect that the underlying analysis demands. *Id.*

Gustafson has not identified any FTC regulations or FTC decisions following formal adjudications that address the meaning of adverse action pursuant to § 1681a(k)(1). Gustafson instead refers the Court to various guidelines issued by the FTC and an informal opinion letter written by a staff attorney that specifically provided it was not binding on the FTC itself. Although Gustafson acknowledges this Court does not owe *Chevron* deference to the agency interpretations in any of these documents even if the Court determines § 1681a(k)(1) is ambiguous, Gustafson, nonetheless, argues these informal interpretations of the adverse action definition are entitled to a certain degree of respect.

As noted, agency interpretations [**29] that are clearly contrary to the plain meaning of the statute are not entitled to any degree of deference. To the extent the FTC has interpreted FCRA to require insurers to provide FCRA adverse action notice to an insured when it issues an initial charge to the insured that is higher than the charge demanded of similarly-situated insureds with better credit histories, the Court finds the FTC's interpretation is contrary to the plain meaning of the statute. Moreover, the FTC staff attorney who drafted the informal opinion letter on which Gustafson relies based her conclusions on the legislative history of the FCRA amendments that contained language much broader language of the amendments actually adopted.

Based on the foregoing, the Court concludes the FTC's informal interpretations of § 1681a(k)(1) are not entitled to any degree of deference or respect, and those interpretations do not change the Court's plain meaning analysis of the statute.

E. Conclusion

Based on the foregoing, the Court concludes [HN22] § 1681a(k)(1) is unambiguous and plainly means an insurer does not "increase any charge for insurance" and, therefore, does not take any adverse action against an insured when [**30] the insurer merely issues a single, initial charge to an insured. The Court further concludes an insurer cannot increase a charge for insurance [*1319] unless the insurer makes an initial demand for payment to the insured and subsequently increases the amount of that demand. Although Valley Insurance charged Gustafson a higher premium than it would have charged him if his credit history had been better, the undisputed evidence establishes Valley Insurance issued only a single charge to Gustafson. Gustafson, therefore, has failed to raise a genuine issue of fact regarding whether Valley Insurance took an adverse action with respect to the underwriting of Gustafson's insurance. Accordingly, the Court grants Valley Insurance's Motion for Summary Judgment as to the claim of Gustafson and all others similarly situated and dismisses with prejudice those claims against Valley Insurance.

II. Willfulness

Valley Insurance also moves for summary judgment on the ground that Gustafson has failed to provide sufficient evidence for a reasonable juror to conclude Valley Insurance willfully violated FCRA. Because the Court has granted summary judgment to Valley Insurance as to the claims of Gustafson [**31] and all others similarly situated on the ground that Valley Insurance did not violate FCRA, the Court denies as

moot Valley Insurance's Motion to the extent it is based on Gustafson's failure to show willfulness.

CONCLUSION

For these reasons, the Court **GRANTS** Valley Insurance's Motion for Summary Judgment (# 59) as to the claim of Gustafson and all others similarly situated and, therefore, **DISMISSES with prejudice** those claims against Valley Insurance.

IT IS SO ORDERED.

Dated this 17th day of July, 2003.

/s/Anna J. Brown

ANNA J. BROWN

United States District Judge

1 of 1 DOCUMENT

MATTHEW RAUSCH and JASON REYNOLDS, Plaintiffs, V. THE HARTFORD FINANCIAL SERVICES GROUP, INC., and HARTFORD FIRE INSURANCE COMPANY, Defendants.

CV 01-1529-BR

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

2003 U.S. Dist. LEXIS 25892

July 31, 2003, Decided

COUNSEL: [*1] Attorneys for Plaintiffs: N. ROBERT STOLL, STEVE D. LARSON, MARK A. FRIEL, Stoll Stoll Berne Lokting & Schlacter P.C., Portland, OR. CHARLES A. RINGO, Attorney at Law, Beaverton, OR.

For Attorneys for Defendants: DOUGLAS G. HOUSER, LOREN D. PODWILL, Bullivant Houser Bailey P.C., Portland, OR.

JUDGES: ANNA J. BROWN, United States District Judge.

OPINIONBY: ANNA J. BROWN

OPINION:

OPINION AND ORDER

BROWN, Judge.

This matter comes before the Court on Defendants' Motion for Summary Judgment (# 96), Defendants' Motion to Strike the Declarations of Michael S. Wogalter and Birny Birnbaum (# 128), and Plaintiffs' Motion for Leave to File a Second Amended Complaint (# 106). The Court heard oral argument on July 29, 2003.

For the following reasons, the Court **GRANTS** Defendants' Motion for Summary Judgment and, therefore, **DISMISSES** with prejudice Plaintiffs' claims against Defendants. The Court also **DENIES** as moot Defendants' Motion to Strike. Finally, the Court **DENIES** Plaintiffs' Motion to amend.

DISCUSSION

A. Defendants' Motion for Summary Judgment

In their First Amended Complaint, Plaintiffs allege Defendants took or participated in the taking of [*2] adverse actions with respect to Plaintiffs and all those similarly situated based on information contained in consumer reports and failed to provide them with adequate notification of those adverse actions as required by the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681. In particular, Plaintiffs assert Defendants increased the charge for or adversely changed the terms of insurance because Plaintiffs did not receive the best available premium for their insurance policies based on information contained in their credit reports. Defendants move for summary judgment as to Plaintiffs' FCRA claims on several grounds, including: 1) Defendants are not the proper parties because Defendants did not issue insurance policies to Plaintiffs, and 2) no adverse action was taken against Plaintiffs by any entity when Plaintiffs' premiums were set because an initial setting of a premium does not constitute an increase in the charge for insurance.

It is undisputed that Defendants did not enter into any insurance contracts with Plaintiffs, did not issue Plaintiffs' policies, did not acquire the corresponding right to receive Plaintiffs' premiums, and did not maintain the obligation to pay Plaintiffs' [*3] claims of loss. The companies that issued Plaintiffs' policies are the defendants that Plaintiffs seek to add in their pending Motion to amend: Hartford Fire Insurance Company of the Midwest, Property & Casualty Insurance Company of Hartford, and Omni Insurance Company. This Court previously has held the entity contracting with the policyholder is the only possible statutory taker of adverse action because only the contracting entity is capable of increasing the premium for or changing the terms of the insurance contract with the insured. *See Ashby v. Farmers Group, Inc.*, CV 01-1446-BR (J. Brown) (issued Feb. 20, 2003). *See also Spano v. SAFECO Ins. Co. of Am.*, CV 01-1464-BR (J. Brown) (issued Apr. 21, 2003); *Razilov v. Nationwide Mutual Ins. Co.*, CV 01-1466-BR (J. Brown) (issued Jan. 21,

2003). Consistent with the Court's previous decisions and analyses in these cases, the Court concludes Defendants could not have increased Plaintiffs' premiums or adversely changed the terms of their insurance because Defendants were not the parties that entered into the insurance contracts with Plaintiffs. The Court, therefore, concludes Defendants are entitled to summary judgment as [*4] to Plaintiffs' FCRA claims because the undisputed facts establish Defendants could not have taken the alleged adverse actions against Plaintiffs.

In addition, it is undisputed that information from Plaintiffs' credit reports was used only for the purpose of setting the initial premiums for Plaintiffs' insurance. Plaintiffs assert the initial settings of their premiums at rates higher than the best rates available to persons with more favorable credit histories were adverse actions. This Court previously concluded an insurer cannot "increase" a charge for insurance unless the insurer makes an initial demand for payment to the insured and subsequently increases the amount of that demand based on information in the insured's credit report. *See Mark v. Valley Ins. Co.*, CV 01-1575-BR (J. Brown) (issued July 10, 2003). The Court similarly concludes an insurer cannot "reduce" or "unfavorably or adversely change" the terms of insurance unless such terms previously existed and the insurer subsequently alters those terms in an unfavorable manner. Based on this Court's decision and analysis in Mark, the Court concludes Defendants also are entitled to summary judgment as to Plaintiffs' FCRA [*5] claims because the initial setting of their insurance premiums did not constitute "adverse actions" under FCRA. n1

n1 The Court does not reach the additional arguments in support of Defendants' Motions for Summary Judgment.

B. Defendants' Motion to Strike Declarations of Michael S. Wogalter and Birny Birnbaum

In support of their Opposition to Defendants' Motion for Summary Judgment, Plaintiffs filed the Declarations of proposed expert witnesses Michael S. Wogalter and Birny Birnbaum. To the extent the declarations contain legal arguments or suggest interpretations of the plain meaning of FCRA, the Court concludes the proposed expert affidavits do not contain material that is the proper subject of expert testimony. The Court, therefore, did not consider that testimony. To the extent the declarations contain any factual information, none of that information is relevant to the two issues previously decided by the Court, and, therefore, the Court did not consider that material either.

C. Plaintiffs' Motion [*6] for Leave to File Second Amended Complaint

After this Court issued its Opinion and Order in the *Ashby* matter, Plaintiffs filed a Motion for Leave to File a Second Amended Complaint that sought leave to add claims against the entities that issued Plaintiffs' insurance policies. The Court, however, has concluded the actions taken by the proposed defendants against Plaintiffs (i.e., the setting of their initial premiums) do not constitute adverse actions pursuant to FCRA. As a result, the Court finds Plaintiffs cannot state viable FCRA claims against the proposed defendants. Accordingly, the Court concludes it would be futile for the Court to grant Plaintiffs' Motion to amend and, therefore, denies that Motion.

CONCLUSION

For these reasons, the Court **GRANTS** Defendants' Motion for Summary Judgment (# 96) and, therefore, **DISMISSES with prejudice** Plaintiffs' claims against Defendants. The Court also **DENIES** as moot Defendants' Motion to Strike the Declarations of Michael S.

Wogalter and Birny Birnbaum (# 128). Finally, the Court **DENIES**

Plaintiffs' Motion for Leave to File a Second Amended Complaint (# 106).

IT IS SO ORDERED.

DATED this [*7] 31st day of July, 2003.

ANNA J. BROWN

United States District Judge

Based on the Court's Opinion and Order issued July 31, 2003,

IT IS ADJUDGED Plaintiffs' Complaint is hereby **DISMISSED with prejudice.**

IT IS SO ORDERED.

DATED this 31st day of July, 2003.

ANNA J. BROWN

United States District Judge

Credit Scoring

Ever wonder how a creditor decides whether to grant you credit? For years, creditors have been using credit scoring systems to determine if you'd be a good risk for credit cards and auto loans. More recently, credit scoring has been used to help creditors evaluate your ability to repay home mortgage loans. Here's how credit scoring works in helping decide who gets credit -- and why.

What is credit scoring?

Credit scoring is a system creditors use to help determine whether to give you credit.

Information about you and your credit experiences, such as your bill-paying history, the number and type of accounts you have, late payments, collection actions, outstanding debt, and the age of your accounts, is collected from your credit application and your credit report. Using a statistical program, creditors compare this information to the credit performance of consumers with similar profiles. A credit scoring system awards points for each factor that helps predict who is most likely to repay a debt. A total number of points -- a credit score -- helps predict how creditworthy you are, that is, how likely it is that you will repay a loan and make the payments when due.

Because your credit report is an important part of many credit scoring systems, it is very important to make sure it's accurate before you submit a credit application. To get copies of your report, contact the three major credit reporting agencies:

- Equifax: (800) 685-1111
- Experian (formerly TRW): (888) EXPERIAN (397-3742)
- Trans Union: (800) 916-8800

These agencies may charge you up to $9.00 for your credit report.

Why is credit scoring used?

Credit scoring is based on real data and statistics, so it usually is more reliable than subjective or judgmental methods. It treats all applicants objectively. Judgmental methods typically rely on criteria that are not systematically tested and can vary when applied by different individuals.

How is a credit scoring model developed?

To develop a model, a creditor selects a random sample of its customers, or a sample of similar customers if their sample is not large enough, and analyzes it statistically to identify characteristics that relate to creditworthiness. Then, each of these factors is assigned a weight based on how strong a predictor it is of who would be a good credit risk. Each creditor may use its own credit scoring model, different scoring models for different types of credit, or a generic model developed by a credit scoring company.

Under the Equal Credit Opportunity Act, a credit scoring system may not use certain characteristics like -- race, sex, marital status, national origin, or religion -- as factors. However, creditors are allowed to use age in properly designed scoring systems. But any scoring system that includes age must give equal treatment to elderly applicants.

What can I do to improve my score?

Credit scoring models are complex and often vary among creditors and for different types of credit. If one factor changes, your score may change -- but improvement generally depends on how that factor relates to other factors considered by the model. Only the creditor can explain what might improve your score under the particular model used to evaluate your credit application.

Nevertheless, scoring models generally evaluate the following types of information in your credit report:

- *Have you paid your bills on time?* Payment history typically is a significant factor. It is likely that your score will be affected negatively if you have paid bills late, had an account referred to

collections, or declared bankruptcy, if that history is reflected on your credit report.

- *What is your outstanding debt?* Many scoring models evaluate the amount of debt you have compared to your credit limits. If the amount you owe is close to your credit limit, that is likely to have a negative effect on your score.
- *How long is your credit history?* Generally, models consider the length of your credit track record. An insufficient credit history may have an effect on your score, but that can be offset by other factors, such as timely payments and low balances.
- *Have you applied for new credit recently?* Many scoring models consider whether you have applied for credit recently by looking at "inquiries" on your credit report when you apply for credit. If you have applied for too many new accounts recently, that may negatively affect your score. However, not all inquiries are counted. Inquiries by creditors who are monitoring your account or looking at credit reports to make "prescreened" credit offers are not counted.
- *How many and what types of credit accounts do you have?* Although it is generally good to have established credit accounts, too many credit card accounts may have a negative effect on your score. In addition, many models consider the type of credit accounts you have. For example, under some scoring models, loans from finance companies may negatively affect your credit score.

Scoring models may be based on more than just information in your credit report. For example, the model may consider information from your credit application as well: your job or occupation, length of employment, or whether you own a home.

To improve your credit score under most models, concentrate on paying your bills on time, paying down outstanding balances, and not taking on new debt. It's likely to take some time to improve your score significantly.

How reliable is the credit scoring system?

Credit scoring systems enable creditors to evaluate millions of applicants consistently and impartially on many different characteristics. But to be statistically valid, credit scoring systems must be based on a big enough sample. Remember that these systems generally vary from creditor to creditor.

Although you may think such a system is arbitrary or impersonal, it can help make decisions faster, more accurately, and more impartially than individuals when it is properly designed. And many creditors design their systems so that in marginal cases, applicants whose scores are not high enough to pass easily or are low enough to fail absolutely are referred to a credit manager who decides whether the company or lender will extend credit. This may allow for discussion and negotiation between the credit manager and the consumer.

What happens if you are denied credit or don't get the terms you want?

If you are denied credit, the Equal Credit Opportunity Act requires that the creditor give you a notice that tells you the specific reasons your application was rejected or the fact that you have the right to learn the reasons if you ask within 60 days. Indefinite and vague reasons for denial are illegal, so ask the creditor to be specific. Acceptable reasons include: "Your income was low" or "You haven't been employed long enough." Unacceptable reasons include: "You didn't meet our minimum standards" or "You didn't receive enough points on our credit scoring system."

If a creditor says you were denied credit because you are too near your credit limits on your charge cards or you have too many credit card accounts, you may want to reapply after paying down your balances or closing some accounts. Credit scoring systems consider updated information and change over time.

Sometimes you can be denied credit because of information from a credit report. If so, the Fair Credit Reporting Act requires the creditor to give you the name, address and phone number of the credit reporting agency that supplied the information. You should contact that agency to find out what your report said. This information is free if you request it within 60 days of being turned down for credit. The credit reporting agency can tell you what's in your report, but only the creditor can tell you why your application was denied.

If you've been denied credit, or didn't get the rate or credit terms you want, ask the creditor if a credit scoring system was used. If so, ask what characteristics or factors were used in that system, and the best ways to improve your application. If you get credit, ask the creditor whether you are getting the best rate

and terms available and, if not, why. If you are not offered the best rate available because of inaccuracies in your credit report, be sure to dispute the inaccurate information in your credit report.

Where can you get more information?

The FTC works for the consumer to prevent fraudulent, deceptive and unfair business practices in the marketplace and to provide information to help consumers spot, stop and avoid them. To file a complaint or to get free information on consumer issues, visit www.ftc.gov or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. The FTC enters Internet, telemarketing, identity theft and other fraud-related complaints into Consumer Sentinel, a secure, online database available to hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.

FEDERAL TRADE COMMISSION	FOR THE CONSUMER
1-877-FTC-HELP	www.ftc.gov

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How Credit Scores Work

by Lee Ann Obringer

We apply for credit for many reasons -- maybe it's to buy a new car, house, computer, or get a student loan. Did you know, however, that there is a special number that can determine whether you can do these things, or at least how much it will cost you? Your credit score is a three-digit number that can do just that.

How can a single number be meaningful enough to determine whether you can buy a house or car? If you've read How Credit Reports Work, you know that your credit report contains a history of how you've paid your bills, how much open credit you have, and anything else that would affect your creditworthiness. Your credit score boils down all of that information into a three-digit number.

In this article, we'll find out how this formerly secret number is used and how it affects how much you pay for credit, insurance and other life necessities.

What is a Credit Score?

A credit score is a number that is calculated based on your credit history to give lenders a simpler "lend/don't lend" answer for people who are applying for credit or loans. This number helps the lender identify the level of risk they may be taking if they lend to someone. While the same end result can come through reviewing the actual credit report (which lenders usually do), the credit score is quicker and less subjective. The system awards **points** based on information in the credit report, and the resulting score is compared to that of other consumers with similar profiles. With this information, lenders can predict how likely someone is to repay a loan and make payments on time. It's the credit score that makes it possible to get instant credit at places like electronics stores and department stores.

Although there are several scoring methods, the score most commonly used by lenders is known as a ***FICO*** because of its origins with Fair Isaac and Company. Fair Isaac is an independent company that came up with the scoring method and software used by banks and lenders, insurers and other businesses. Each of the three major credit bureaus (Experian, Equifax and TransUnion) worked with Fair Isaac in the early 1980's to come up with the scoring method.

The three national credit bureaus each have their own version of the FICO score with their own names. Equifax has the Beacon system, TransUnion has the Empirica system, and Experian has the Experian/Fair Isaac system. Each is based on the original Fair Isaac FICO scoring method and produces equivalent numerical results for any given credit report. Some lenders also have their own scoring methods. Other scoring methods may include information such as your income or how long you've been at the same job.

Accessing Your Score

Until recently, your credit score was not available to you. Only lenders and other businesses who used the score could access it. Fair Isaac and Company felt that the score would only confuse consumers since there was nothing to tell them what it meant or what the lenders were looking for.

In 2001, however, all of this changed due to pressure from the U.S. Congress, industry, and consumer groups. Now you can get your credit score at a number of Web sites, including the big three credit bureaus, and at Fair Isaac's Web site. You can also ask your lender for access to your score when you apply for a loan.

Calculating the Score

Think of your credit score like you would a grade in school. A teacher calculates grades by taking scores from tests, homework, attendance and anything else they want to use, weighting each one according to importance in order to come up with a final single number (or letter) score. Your credit score is calculated in a very similar manner. Instead of using the scores from pop quizzes and reports you wrote, it uses the information in your credit report.

The number itself can range from **300 to 900**. The formula for exactly how the score is calculated is proprietary information and owned by Fair Isaac. Here, however, is an approximate breakdown of how it is determined:

- **35% of the score is based on your payment history.** This makes sense since one of the primary reasons a lender wants to see the score is to find out if (and how timely) you pay your bills. The score is affected by how many bills have been paid late, how many were sent out for collection, any bankruptcies, etc. *When* these things happened also comes into play. The more recent, the worse it will be for your overall score.

- **30% of the score is based on outstanding debt.** How much do you owe on car or home loans? How many credit cards do you have that are at their credit limits? The more cards you have at their limits, the lower your score will be. The rule of thumb is to keep your card balances at 30% or less of their limits.

- **15% of the score is based on the length of time you've had credit.** The longer you've had established credit, the better it is for your overall credit score. Why? Because more information about your past payment history gives a more accurate prediction of your future actions.

- **10% of the score is based on the number of inquiries on your report.** If you've applied for a lot of credit cards or loans, you will have a lot of inquiries on your credit report. These are bad for your score because they indicate that you may be in some kind of financial trouble or may be taking on a lot of debt (even if you haven't used the cards or gotten the loans). The more recent these inquiries are, the worse for your credit score. FICO scores only count inquiries from the past year.

- **10% of the score is based on the types of credit you currently have.** The number of loans and available credit from credit cards you have makes a difference. There is no magic number or combination of types of accounts that you shouldn't have. These actually come more into play if there isn't as much other information on your credit report on which to base the score.

This information is **compared** to the credit performance of other consumers with similar histories and profiles.

Your Score Affects...

Your credit score doesn't just affect whether or not you get a loan; it also affects how much that loan is going to cost you. As your credit score increases, your credit risk decreases. This means your interest rate decreases.

This chart shows an example of how interest rates for a car loan can vary based on your credit score:

	FICO® Score					
Auto Loans	500-589	590-624	625-659	660-689	690-719	720-850
36-month new auto loan	18.597	16.206	12.225	9.498	7.386	6.674
48-month new auto loan	18.598	16.206	12.226	9.500	7.390	6.678
Source: myFICO.com						

- How Mortgages Work
- How Pawnshops Work
- How Identity Theft Works
- What are the differences between the various "chapters" of bankruptcy?

More Great Links

Credit Score Information

- The Credit Scoring Site

General Credit Reporting

- Fair Credit Reporting Act
- Free Credit Report Service
- myFICO.com
- E-Loan: Get copies of your credit report
- Credit InfoCenter
- NOLO Law Center: Credit repair

National Credit Bureaus

- Equifax
- Experian
- TransUnion