☐ Expedite

☐ No hearing set

X Hearing is set

Date April 16, 2021:
Time: 9:00 A.M.
Judge/Calendar: Mary Sue Wilson

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF THURSTON

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION,

Petitioner,

v.

OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON,

Respondents.

NO. 21-2-00542-34

PETITIONER'S MOTION FOR A PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

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CARNEY BADLEY SPELLMAN, P.S.
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I. INTRODUCTION AND REQUESTED RELIEF

In this action for declaratory and injunctive relief, petitioner, the American Property Casualty Insurance Association ("APCIA"), moves for a preliminary injunction to enjoin the respondents, the Office of the Insurance Commissioner of the State of Washington ("OIC") and Insurance Commissioner Mike Kreidler, from implementing and enforcing an emergency rule that the Commissioner recently adopted. The purpose of the motion is to maintain the status quo to permit this Court's orderly evaluation of the Emergency Rule's validity. An injunction is warranted because APCIA's members have a clear legal right that is subject to imminent invasion by the Emergency Rule, which will result in substantial harm to APCIA's members.

The Emergency Rule prohibits insurers from using consumers' credit histories to determine rates, premiums, or eligibility for coverage (sometimes called "credit scoring") with respect to all private passenger automobile, renters, and homeowners insurance issued in Washington. The Commissioner adopted the Emergency Rule about one year after the federal and state measures which he asserts gave rise to the emergency necessitating the Rule, but only two weeks after his effort to convince the Washington Legislature to ban the use of credit histories failed. The Commissioner has created an artificial emergency to do that which he failed to convince the Legislature to do.

In so doing, the Commissioner acted unlawfully. The Commissioner lacked authority to adopt the Emergency Rule. Washington law permits the use of credit histories as a factor to determine rates, premiums, and eligibility for coverage, and the Emergency Rule is invalid as a result. The Commissioner has no authority to repeal legislative enactments, as he has purported to do here. Nor did the Commissioner have the requisite statutory good cause to adopt the Rule, as no actual emergency exists. In addition, the Emergency Rule effectively violates the statutory durational limit imposed on emergency agency action. And finally, as if all those fatal defects were not enough, the Emergency Rule is arbitrary and capricious, as it lacks any evidentiary basis.

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The Commissioner has long opposed the use of credit histories in insurance and has attempted three times to convince the Legislature to ban it. Having failed to prevail through the democratic process, the Commissioner has sought to circumvent that process by creating an illusory emergency as a pretext for banning use of credit histories by regulatory fiat. Such flouting of the legislative will should not be countenanced. This Court should grant APCIA's motion for a preliminary injunction.

II. STATEMENT OF FACTS

A. Credit scoring is an important and valuable tool for the insurance industry and is nondiscriminatory.

Insurers that choose to use credit history as a factor to determine insurance rates, premiums, and eligibility for coverage do so because credit history correlates strongly with actual claims made by insureds, is predictive of future claims and materially contributes to accuracy in pricing. *See* Declaration of Russell Kenneth Ward in Support of Petitioner's Motion for Preliminary Injunction ("Ward Dec.") ¶¶ 6-7;[1] Declaration of Christopher Cashman in Support of Petitioner's Motion for Preliminary Injunction ("Cashman Dec.") ¶¶ 6-7;[2] Declaration of Andrew G. Davies in Support of Petitioner's Motion for Preliminary Injunction ("Davies Dec.") ¶¶ 6-7;[3] Declaration of Amanda Mezerewski in Support of Petitioner's Motion for Preliminary Injunction ("Mezerewski Dec.") ¶ 5;[4] Declaration of Norman Niami in Support

[1] Mr. Ward is Assistant Vice President of Underwriting and Product Management of Government Employees Insurance Company and its affiliates, which write private passenger automobile insurance in Washington. Ward Dec. ¶¶ 1-2.

[2] Mr. Cashman is the Washington and Kansas Personal Auto Product Manager of Progressive Casualty Insurance Company and Progressive Direct Insurance Company, which write personal automobile insurance in Washington. Cashman Dec. ¶¶ 1-2.

[3] Mr. Davies is the Vice President of Actuary and Finance, Corporate Treasurer, and Chief Financial Officer of Oregon Mutual Insurance Company, which writes private passenger automobile insurance and homeowners insurance in Washington. Davies Dec. ¶¶ 1-2.

[4] Ms. Mezerewski is a Vice President, Product Management for The Travelers Indemnity Company, which writes private passenger automobile insurance, homeowners insurance, and renters insurance in Washington. Mezerewski Dec. ¶¶ 1, 3.

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of Petitioner's Motion for Preliminary Injunction ("Niami Dec.") ¶ 2;[5] Declaration of Erin Collins in Support of Petitioner's Motion for Preliminary Injunction ("Collins Dec.") ¶¶ 5-6.[6] Credit histories are not used to ascertain a consumer's race or ethnicity as a basis for determining premium rates or eligibility for coverage. In fact, insurers do not collect information about consumers' race or ethnicity. Niami Dec. ¶ 2. Use of credit history as a factor in determining premiums and eligibility for coverage is actuarially sound precisely because credit history strongly correlates with actual claims and is predictive of future claims. Ward Dec. ¶¶ 6-7; Cashman Dec. ¶¶ 6-7; Davies Dec. ¶¶ 6-7; Mezerewski Dec. ¶ 5; Niami Dec. ¶ 2.

B. The Legislature authorized credit scoring for insurance underwriting and rating purposes in 2002, rejecting the Commissioner's request to ban it.

The Commissioner has sought to ban the use of credit history since shortly after he came into office in 2001. In January 2002, he supported a bill (House Bill 2544) that would have totally banned credit scoring as a basis to deny, cancel, or refuse to renew a policy for personal insurance such as auto or homeowners.[7] The Legislature rejected that bill and instead passed Engrossed Substitute House Bill 2544, which enacted RCW 48.18.545 and RCW 48.19.035—statutes that authorize credit scoring in underwriting and setting rates, subject to certain requirements and restrictions. LAWS OF 2002, ch. 360.[8]

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[5] Mr. Niami is Vice President, Actuary of the Policy, Research and International Division of APCIA. Niami Dec. ¶ 1.

[6] Ms. Collins is the Vice President of National Association of Mutual Insurance Companies ("NAMIC"), a private non-profit property-casualty trade association. NAMIC'S membership is composed of over 1,400 local, regional, and national member companies, including seven of the top 10 property/casualty insurers in the United States. NAMIC's members represent 66% of the national homeowners insurance market and 53% of the auto market. Collins Dec. ¶¶ 1-2. NAMIC has members that use credit-based insurance scores in their insurance underwriting or insurance rating for private passenger automobile and/or homeowners insurance in Washington. Collins Dec. ¶ 3.

[7] HB 2544, 2002 Reg. Sess., http://lawfilesext.leg.wa.gov/biennium/2001-02/Pdf/Bills/House%20Bills/2544.pdf?q=20210403082512.

[8] ESHB 2544 required the Commissioner to report to the Legislature by 2004 about issues such as "how [the act] has impacted consumers" and "[w]hich types of consumers, based on demographic factors, benefit from or are harmed by the use of credit history in personal insurance rating and underwriting," and "[w]hether insurance scoring results in discrimination against a protected class of people or the poor." LAWS OF 2002, ch. 360, § 4.

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(206) 622-8020

Both statutes created by ESHB 2544 provide that the Commissioner "may adopt rules to *implement*" this section. RCW 48.18.545(7) & RCW 48.19.035(5) (emphasis added). And the Commissioner has in fact done so. *See* WAC 284-24A-001, *et seq*. Among his adopted rules are WAC 284-24A-010 and 284-24A-011 (specifying what an insurer must tell a consumer about significant factors that adversely affect the consumer's credit history as well as significant factors that led to a decision to charge a higher premium or to reject coverage) and WAC 284-24A-045, 284-24A-050 and 284-24A-055 (detailing how an insurer using credit history as a factor to determine insurance rates can show that its rating plan results in premium rates that are not excessive, inadequate, or unfairly discriminatory).

C. The Commissioner again tried unsuccessfully to get the Legislature to ban credit scoring in 2010.

In 2010, the Commissioner supported Senate Bill 6252, which would have totally banned the use of credit history for any purposes, including underwriting or rating.[9] The bill failed, never making it out of committee hearings.[10]

D. The Legislature rejected yet another attempt by the Commissioner to ban credit scoring earlier this year.

On January 11, 2021, at the behest of the Commissioner and the Governor, two senators introduced Senate Bill 5010 which, if passed, would have prohibited insurers that issue personal lines insurance policies (such as private passenger automobile, renters and homeowners insurance), from refusing to issue or renew a private insurance policy based upon an individual's credit history or credit information. Senate Bill 5010 also would have prohibited insurers from filing rates with the OIC for personal lines that incorporated credit information. Section 1 of the bill contained a sort of preamble asserting that "[t]he use of credit scoring to calculate rates for personal lines of insurance is unfair and has a disproportionate economic

[9] SB 6252, 2010 Reg. Sess., http://lawfilesext.leg.wa.gov/biennium/2009-10/Pdf/Bills/Senate%20Bills/6252.pdf?q=20210403132302. *See* Mike Kreidler, "Washington Legislature must ban the insurance industry's use of credit scoring," *The Seattle Times* (January 21, 2010)

[10] https://app.leg.wa.gov/billsummary?BillNumber=6252&Year=2009&Initiative=false.

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impact on the poor and communities of color in our state." *See* Declaration of Jason W. Anderson in Support of Petitioner's Motion for a Preliminary Injunction ("Anderson Dec.") ¶ 3, Ex. 1 at 1. This theme of claimed disproportionate economic impact was recited repeatedly in support of the bill.

On January 14, 2021, a public hearing was held on Senate Bill 5010 before the Senate Committee on Business, Financial Services & Trade. Anderson Dec. ¶ 4, Ex. 2. Two representatives of the Insurance Commissioner spoke at the hearing—John Noski, the legislative liaison for the OIC and Eric Slavich, the OIC's lead actuary for property and casualty insurance. Anderson Dec. ¶ 5, Ex. 3 at 8. Mr. Slavich testified that he understood why insurers use credit history and aptly described the choice confronting the Legislature:

> As an actuary, I understand why insurers use credit to help set their premium rates. Actuarially, there is a correlation between credit scores and insurance claims. But as legislators, you must decide if the rating factor is justified. Does the correlation matter more than its impact on society?

Anderson Dec. Ex. 3 at 11. As Mr. Slavich recognized, this is an archetypal example of the kind of policy judgments that are the province of elected legislatures. Ultimately, the Legislature rejected the policy rationale that the Commissioner urged, and the Commissioner's bill failed to pass.[11]

E. Shortly after the 2021 bill failed, and without notice, the Commissioner adopted an emergency rule banning credit scoring.

With no prior notice, and less than two weeks after expiration of the March 9 deadline for the Senate to pass Senate Bill 5010, the Commissioner adopted the Emergency Rule. Anderson Dec. ¶ 8, Ex. 6. Unusually for an emergency action, the Rule creates two new provisions: WAC 284-24A-088 and 284-24A-089 (Anderson Dec. Ex. 6 at 1).

[11] A proposed compromise bill was substituted for the Commissioner's version. Anderson Dec. ¶ 6, Ex. 4. It would have banned for three years the use of credit history to increase rates or premiums at renewal for any personal insurance policy. There would have been no ban on use of credit history to lower rates or premiums at renewal. *Id.* at 1-2. The Commissioner chose not to support the substituted bill, and it, too, did not pass. Anderson Dec. ¶ 7, Ex. 5 at 1.

CARNEY BADLEY SPELLMAN, P.S.
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The first provision contains the Commissioner's "Findings" in support of the Emergency Rule. In it, the Commissioner notes that insurers that use credit-based insurance scores claim that such scoring is a predictive tool to identify risk of loss from a specific consumer (*see* WAC 284-24A-088(2)), a proposition that neither the Commissioner nor his lead actuary in testimony regarding Senate Bill 5010 disputes. The Emergency Rule (without citation to actuarial studies or other evidence) states, however, that pandemic-related emergency measures first promulgated in February, March and April *2020* by the President, Congress and the Governor (in particular, the federal CARES Act) limiting or suspending the occurrence and/or reporting of certain negative credit events, have caused the credit histories that credit bureaus are collecting and reporting to be "objectively inaccurate" for some consumers. According to the Commissioner, this results in unreliable credit scores being assigned to those consumers. As a result, says the Commissioner, the predictive value of a consumer's credit-based insurance score is no longer trustworthy, and currently-filed, credit-based insurance scoring models are therefore unfairly discriminatory under RCW 48.19.020 (providing that premium rates for insurance shall not be excessive, inadequate, or unfairly discriminatory). WAC 284-24A-088(3)-(7). Anderson Dec. Ex. 6 at 4-5.

The first provision of the Emergency Rule also asserts that once the year-old CARES Act consumer protections expire, a "flood" of negative credit history will be reported that has not been accounted for in current credit-based insurance scoring models. The Emergency Rule states that the negative economic impact of the pandemic has disproportionately fallen on people of color, and therefore, when the limitations are lifted, the credit histories for people of color will have been disproportionately eroded by the pandemic. WAC 284-24A-088(8)-(9). Anderson Dec. Ex. 6 at 5.

The first provision of the Emergency Rule also asserts that without data to demonstrate that the predictive ability of scoring models based on pre-pandemic credit and claim histories is unchanged, the continued predictive ability of those models cannot be assumed. The

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Commissioner says that this means that use of currently-filed, credit-based insurance scoring models is unfairly discriminatory under RCW 48.19.020. The Commissioner further says that because it is impossible to know precisely when the year-old, pandemic-caused state and federal states of emergency will end, insurance companies must now develop an alternative to the currently unreliable credit scoring models before the protections of the CARES Act expire. Therefore, says the Commissioner, with no suggestion that an end to the year-long states of emergency is imminent, it nevertheless is now necessary to *immediately* implement changes to the use of credit scoring. WAC 284-24A-088(9)-(10). Anderson Dec. Ex. 6 at 5.

In the second provision of the Emergency Rule, the Commissioner "finds" that as a result of the broad negative economic impact of the pandemic, the disproportionate negative economic impact of the pandemic on communities of color, and the purported disruption to credit reporting resulting from federal and state consumer protection measures, use of credit-based insurance scores for private passenger automobile coverage, renter's coverage and homeowner's coverage results in premiums that are excessive, inadequate, or unfairly discriminatory under RCW 48.19.020 and 48.18.480 (broadly prohibiting unfair discrimination in the business of insurance). WAC 284-24A-089(2). On these grounds, for all policies effective or processed for renewal on or after June 20, 2021, the Emergency Rule prohibits the use of credit history as a factor to determine personal insurance rates or eligibility for coverage for private passenger automobile coverage, renters coverage, and homeowners coverage. The Emergency Rule further requires that, by May 6, 2021, each insurer must file amendments to their current rate plans for all insurance policies covered by the Rule to comply with the Rule's prohibition. WAC 284-24A-089(3), (7). The Emergency Rule took effect immediately and provides that, to the extent it is adopted as a permanent rule, it shall remain in effect for three years following the day the National Emergency declared by the President on March 13, 2020 or the State Emergency declared by the Governor on February 29, 2020 ends, whichever is later. WAC 284-24A-089(8). Anderson Dec. Ex. 6 at 5-6.

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By the Emergency Rule, then, the Commissioner has initiated what he hopes will be an indefinite, three-plus year repeal of RCW 48.19.035.[12] Acting under the guise of a claimed emergency, he has taken this dramatic action (which is beyond the scope of his authority), in the face of the Legislature's rejection, based upon: 1) Unsupported conjecture about the impact of federal and state consumer protection measures (in particular, the CARES Act) on the reliability of credit histories as a factor to determine insurance rates, premiums, and eligibility for coverage; and 2) his policy judgment regarding both the overall impact and the claimed disproportionate negative economic impact of credit-based scoring on consumers, a judgment that the Legislature could have made, but did not make, and that he had no authority to make. In sum, the Emergency Rule flouts the will of the Legislature, greatly exceeds the Commissioner's statutory authority, and lacks an evidentiary basis.

III. AUTHORITY AND ARGUMENT

A. The requirements for a preliminary injunction are met.

To obtain either a temporary or permanent injunction, a party must show that (1) it has a clear legal or equitable right, (2) it has a well-grounded fear of immediate invasion of that right, and (3) the acts complained of are either resulting in or will result in actual and substantial injury. *Kucera v. State, Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000). If a preliminary injunction is sought, the first element requires the Court to evaluate the likelihood that the moving party will prevail on the merits of its claims. *Id*. at 216. In addition, the court should balance the interests of the parties and, if appropriate, the public. Injunctive relief is available if the moving party lacks an adequate remedy at law. *Id*. at 209-10.[13]

[12] Indeed, although emergency regulations can remain in effect only for 120 days, in his press release announcing adoption of the Emergency Rule, the Commissioner boasted that, by the Rule, he already had banned the use of credit-based scoring for three years. Anderson Dec. ¶ 9, Ex. 7 at 1. Moreover, there can be little doubt that the Commissioner intends for the ban ultimately to become permanent.

[13] Because neither APCIA nor its members have a right to recover damages from the Commissioner, they plainly lack an adequate remedy at law.

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As demonstrated below, APCIA's motion satisfies all requirements, and the motion should, therefore, be granted.

B. APCIA is likely to prevail on the merits of its claims.

1. A rule is invalid if it exceeds the agency's authority, is arbitrary and capricious, or was adopted in violation of rule-making procedures.

This Court has the inherent and statutory authority to declare the Emergency Rule invalid if it determines that the Rule is unconstitutional, contrary to law, exceeds the Commissioner's authority, is arbitrary and capricious, or was adopted without complying with applicable rule-making procedures. RCW 34.05.570(2)(c); *Lake Union Drydock Co. v. State, Dep't of Nat. Res.*, 143 Wn. App. 644, 651-52, 179 P.3d 844 (2008).

An administrative action is contrary to law when it exceeds the agency's authority or violates rules governing its exercise of discretion. *Lake Union*, 143 Wn. App. at 651-52. An administrative rule cannot amend or change statutory requirements. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 97, 11 P.3d 726 (2000). Any such rule should be invalidated. *Swinomish Indian Tribal Comm. v. Wash. State Dep't of Ecology*, 178 Wn.2d 571, 580-81, 311 P.3d 6 (2013); *see also Ctr. for Biological Diversity v. Dep't of Fish and Wildlife*, 14 Wn. App. 2d 945, 968-74, 474 P.3d 1107 (2020) (finding agency exceeded statutory authority). A regulation is also invalid if it is inconsistent with the statute under which it was promulgated. *Postema*, 142 Wn.2d at 83. The court should determine a statutory conflict on its own without deference to the respondent agency. *Id*. at 77 ("[A]n agency's view of a statute will not be accorded deference if it conflicts with the statute. Ultimately, it is for the court to determine the meaning and purpose of a statute.") (citations omitted).

Agency action is arbitrary and capricious when the evidence on which the agency based its decision leaves room for two opinions even though the court may believe that the agency reached an erroneous conclusion. *Floating Homes Ass'n v. WA Dep't of Fish and Wildlife*, 115 Wn. App. 780, 789 64 P.3d 29 (2003).

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2. The Emergency Rule is contrary to law and exceeds the Commissioner's authority.

Determining the Commissioner's rule-making authority is a matter of statutory interpretation. The court's fundamental objective when interpreting a statute is to "ascertain and carry out the Legislature's intent[.]" *State, Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Washington follows the plain-meaning rule for interpreting statutes: "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Id.* at 9-10. The plain meaning is discerned from "all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Id*. at 11. The court should also consider legislative purposes appearing on the face of the statute and background facts of which judicial notice can be taken. *Id*. "[I]f, after this inquiry, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to aids to construction, including legislative history." *Id*. at 12.

There is no ambiguity here. Indeed, it is more than a little ironic that among the provisions the Commissioner cites as statutory authority for adopting the Emergency Rule (*see* Anderson Dec. Ex. 6 at 1) is RCW 48.19.035, which, of course, *authorizes* the use of credit histories in determining personal insurance rates, premiums and eligibility for coverage. It also authorizes the Commissioner to "adopt rules to *implement* this section." RCW 48.19.035(5) (emphasis added). To determine the plain meaning of an undefined term, the court may look to the dictionary. *Home Street, Inc. v. State, Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009). To "implement" means to "carry out" or "accomplish."[14] Thus, under the plain meaning of RCW 48.19.035(5), that provision authorizes the Commissioner only to adopt rules that would "carry out" or "accomplish" the specific requirements and restrictions set forth in the statute. The Emergency Rule does no such thing. Rather, it effects a *repeal* of the statute. Not

[14] *Implement*, MERRIAM WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/implement (last visited April 5, 2021).

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only, then, does RCW 48.19.035(5) not authorize the Emergency Rule, the Rule is inconsistent with, indeed completely contrary to, the statute. The Rule is, therefore, invalid. *See Postema*, 142 Wn.2d at 83 (any regulation that is inconsistent with the statute under which it is promulgated is invalid); *Lake Union*, 143 Wn. App. at 651-52 (an administrative action is contrary to law when it violates statutory authority).

This conclusion is hardly surprising. The Commissioner's enduring goal has been to eliminate use of credit histories in insurance despite longstanding legislative support for use of this reliable, predictive tool, which helps to ensure accuracy in pricing. While it was entirely proper for the Commissioner to try to persuade the Legislature to change course, he failed. Somehow, he has interpreted that failure as permission to accomplish through gross regulatory overreach that which the Legislature unambiguously refused to do. But the law simply does not permit this, and the Emergency Rule is invalid.

The Commissioner's citation to RCW 48.02.060 (see Anderson Dec. Ex. 6 at 1) as authority for adopting the Emergency Rule is equally unavailing. To begin, nothing in RCW 48.02.060 authorizes the Commissioner to repeal laws duly enacted by the Legislature. For instance, RCW 48.02.060(3)(a) authorizes the Commissioner to "make reasonable rules for *effectuating*" any provision of the Insurance Code. (Emphasis added.) "Effectuate" means "to put (something) into effect or operation."[15] The Commissioner's authority to "put…into effect" the Insurance Code—which includes statutes that authorize credit scoring—certainly does not allow him to ban credit scoring. Moreover, RCW 48.02.060 limits the Commissioner's emergency authority to four discrete topics: 1) reporting requirements for claims; 2) grace periods for payment of insurance premiums and performance of other duties by insureds; 3) temporary postponement of cancellations and nonrenewals; and 4) medical coverage to ensure

[15] *Effectuate*, MERRIAM WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/effectuate (last visited April 5, 2021).

CARNEY BADLEY SPELLMAN, P.S.
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Seattle, WA 98104-7010
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access to care. RCW 48.02.060(4). The Emergency Rule plainly does not pertain to any of these topics, and RCW 48.02.060 does not authorize the Rule.

The Commissioner also cites RCW 48.19.020 and 48.18.480 as statutory authority for the Emergency Rule. Anderson Dec. Ex. 6 at 1.[16] The former provision merely recites the universal standard that insurance premium rates shall not be excessive, inadequate, or unfairly discriminatory. By no stretch of the imagination could this general pronouncement reasonably be interpreted as authorizing the Commissioner to wholly nullify by emergency edict a specific statute (RCW 48.19.035) that *expressly authorizes* the use of credit histories in determining rates, premiums and eligibility for coverage for personal lines of insurance, a statute that the Legislature refused to repeal just two weeks before the Commissioner announced the Emergency Rule. If such a general statement were sufficient to nullify a statute and defy legislative intent, the Commissioner would have virtually unfettered regulatory power.

The final provision the Commissioner cites is RCW 48.18.480. Anderson Dec. Ex. 6 at 1. It prohibits unfair discrimination "between insureds or subjects of insurance having substantially like insuring, risk, and exposure factors, and expense elements, in the terms or conditions of any insurance contract, or in the rate or amount of premium charged therefor . . . ." This statutory description of unfair discrimination is consistent with the long-standing understanding of the concept in the context of property and casualty insurance. Indeed, perhaps the most common definition of unfair discrimination in insurance states:

> An insurance rate structure will be considered to be unfairly discriminatory . . ., if allowing for practical limitations, there are premium differences that do not correspond to expected losses and average expenses or if there are expected average cost differences that are not reflected in premium differences.

Williams, Arthur C., *Insurance, Government, and Social Policy*, The S.S. Hubner Foundation for Insurance Education, Chapter 11, 209-242; *see also Ritter v. Shotwell*, 63 Wn.2d 601, 605,

[16] The Commissioner's citation to RCW 48.19.080 (waiver of filing) (*see* Anderson Dec. Ex. 6 at 1) is of no consequence here. This procedural provision merely permits the Commissioner to suspend or modify filing requirements, but authorizes no substantive action by the Commissioner and certainly none beyond whatever such action, if any, is authorized by RCW 48.19.020.

CARNEY BADLEY SPELLMAN, P.S.
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Seattle, WA 98104-7010
(206) 622-8020

388 P.2d 527 (1964) (insurance rates are unfairly discriminatory if they treat equals unequally). The Commissioner himself has implicitly recognized, in the particular context of evaluating credit-based insurance scoring models, the correct meaning of unfair discrimination, through his adoption of WAC 284-24A-035. That provision provides that "*actuarial analysts*" of the OIC will review insurers' credit-based insurance scoring models for "[a]ttributes that may result in unfair discrimination." But the Commissioner nowhere refers to this provision in the Emergency Rule.

Indeed, in attempting to justify the Emergency Rule and its total ban on the use of credit histories, the Insurance Commissioner makes no attempt to demonstrate that all use of credit histories as a factor to determine rates, premiums, or eligibility for coverage is unfairly discriminatory within the proper meaning of that term in the context of property and casualty insurance. Instead, in perhaps the most egregious example of regulatory overreach here, the Commissioner seeks to unilaterally redefine unfair discrimination to include concerns far beyond the concept's meaning in insurance, which is a policy prerogative to be exercised by the Legislature. *See* WAC 284-24A-088(8). Anderson Dec. Ex. 6 at 5.

This effort can only be characterized as surreptitious because there is no statutory basis, none, for so dramatic an expansion of the concept of unfair discrimination by the Commissioner. Indeed, such an expansion effectively was what the Commissioner attempted to accomplish through Senate Bill 5010. Having failed in that endeavor, the Commissioner now attempts to do it on his own. But no statute remotely authorizes him to effect so profound a change to a fundamental concept of insurance. The Emergency Rule is patently invalid.

APCIA and its members deplore the use of characteristics such as race to determine insurance rates, premiums and eligibility for coverage. But that is not the issue here. Rather, the Commissioner is attempting to eliminate a legislatively permitted, actuarially sound, facially neutral factor for determining rates, premiums and eligibility. The Legislature has the power to do this, but the Commissioner does not. The Legislature declined to exercise that power. The

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Commissioner cannot exercise it. The Emergency Rule is inconsistent with the statute authorizing use of credit history and beyond any statutory authority conferred on the Commissioner. It is, therefore, invalid, and the Court should enjoin the Commissioner and OIC from implementing and enforcing it.[17]

3. The Commissioner lacked good cause for declaring that an emergency exists.

RCW 34.05.350(1)(a) of Washington's Administrative Procedure Act (the "APA") permits an agency to adopt an emergency rule only if the agency for "good cause" finds "[t]hat immediate adoption . . . of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest." The Commissioner cites to this provision to justify his declaration of good cause. Anderson Dec. Ex. 6 at 1. But that declaration is unfounded, and no good cause exists.

No Washington case comprehensively discusses RCW 34.05.350's good cause requirement and the level of scrutiny that should be applied to an agency's declaration of good cause. In the absence of such case law, federal precedent may serve as persuasive authority. *See King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.2d 161, 179, 979 P.2d 374 (1999).

In *California v. Azar*, 911 F.3d 558 (9th Cir. 2018), the Ninth Circuit Court of Appeals discussed how the federal APA counterpart to RCW 34.05.350's "good cause" requirement is "narrowly construed":

> Exceptions to notice and comment rulemaking are not lightly to be presumed. [I]t is antithetical to the structure and purpose of the APA for an agency to implement a rule first, and then seek comment later. Failure to follow notice and comment rulemaking may be excused when good cause exists . . . .
>
> An agency may for good cause find[ ] . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public

[17] The discussion in this Section III.B.2 of APCIA's brief demonstrates that the Commissioner has no more authority to adopt the Emergency Rule permanently as he has to do so temporarily.

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> interest. [T]he good cause exception goes only so far as its name implies: It authorizes departures from the APA's requirements only when compliance would interfere with the agency's ability to carry out its mission. Good cause is to be narrowly construed and only reluctantly countenanced. As such, the good cause exception is usually invoked in emergencies, and an agency must overcome a high bar to do so. . . .
>
> In the past, we have acknowledged good cause where the agency cannot both follow [notice and comment rulemaking] and execute its statutory duties. We have also acknowledged good cause where delay would do real harm to life, property or public safety.

Id. at 575-76 (citations and quotation marks omitted).

As *Azar* suggests, the Commissioner's declaration of good cause should be viewed with a skeptical eye and sustained only if the Commissioner has demonstrated that adoption of the Emergency Rule was necessary to enable the Commissioner to fulfill his statutory duties or to prevent real harm to life, property or public safety.

The Commissioner has failed to make either showing. Nor could he, as he has not demonstrated that an emergency of any kind exists, much less one justifying invocation of RCW 34.05.350. The Commissioner cites to certain actions taken by the President, Congress, and the Governor that he says have disrupted credit reporting and thereby made credit-based insurance scoring unreliable. Anderson Dec. ¶¶ 10-14, Exs. 8-12. These are the Governor's Proclamations 20-05 (declaring a state of emergency in Washington) (Anderson Dec. Ex. 8); 20-19 (placing a moratorium on evictions) (Anderson Dec. Ex. 9); 20-49 (placing a moratorium on garnishments) (Anderson Dec. Ex. 10); the President's declaration of a National Emergency (Anderson Dec. Ex. 11); and the federal CARES Act (Anderson Dec. Ex. 12). The original dates of enactment of these measures were February 29, 2020 (Anderson Dec. Ex. 8 at 2), March 18, 2020 (Anderson Dec. Ex. 9 at 3), April 14, 2020 (Anderson Dec. Ex. 10 at 3), March 13, 2020 (Anderson Dec. Ex. 11 at 1), and March 27, 2020 (Anderson Dec. Ex. 6 at 1), respectively. Of these, by far the most important to the Commissioner's rationale for declaring an emergency is the CARES Act's moratorium on credit reporting. *See* WAC 284-24A-088(4), (6), (8)-(9). Anderson Dec. Ex. 6 at 4-5.

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(206) 622-8020

The Commissioner has offered no reasonable explanation why now, all of a sudden, these measures, most over one year old, have abruptly caused an emergency justifying adoption of the enormously impactful Emergency Rule.[18] Indeed, if ever agency action cried out for notice and comment, the Emergency Rule surely does.

The Commissioner seems to suggest that his own prior inaction in addressing credit-based insurance scoring has caused the emergency because, now, it is uncertain when the federal and state measures (in particular the CARES Act) he relies upon will expire. Anderson Dec. Ex. 6 at 2. But the Commissioner has utterly failed to demonstrate that expiration of any of these measures (none of which has a specified expiration date) is imminent. To the contrary, the credit reporting moratorium in the CARES Act will not expire until 120 days after the President's March 13, 2020 declaration of a National Emergency expires. *See* CARES Act Section 4021 (Anderson Dec. Ex. 12 at 3). There simply is no excuse for the Commissioner's abrupt adoption of the Emergency Rule, and the Court should therefore enjoin the Commissioner and OIC from implementing and enforcing it.

4. The Emergency Rule violates applicable time limits.

RCW 34.05.350(2) provides that an emergency rule adopted pursuant to that provision may remain in effect for no longer than 120 days after the date of filing (here, March 22, 2021). Under the law, then, the Emergency Rule nominally will expire on July 20, 2021. But its requirements ensure that its effects will last well past that date, even if an identical or substantially similar new emergency rule is not adopted in sequence.

Specifically, the May 6 deadline for insurers to file amendments to their rating plans to comply with the Emergency Rule's prohibition on use of credit histories means that, for every line of insurance affected, new rating models must be developed and implemented by that date. It will require considerable time, effort and expense to make the required changes and

[18] Certainly, it is clear that credit-based insurance scoring has been on the Commissioner's mind for at least several months, as Senate Bill 5010 was pre-filed for introduction in the Washington Senate on December 10, 2020. Anderson Dec. Ex. 2.

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(206) 622-8020

considerable time, effort and expense after July 20, 2021 to unwind those changes. *See* Ward Dec. ¶ 13; Cashman Dec. ¶ 12; Davies Dec. ¶ 13; Mezerewski Dec. ¶¶ 8-10; Niami Dec. ¶ 4; Collins Dec. ¶ 6; *see also* Declaration of John R. Broadrick in Support of Petitioner's Motion for Preliminary Injunction ("Broadrick Dec.") ¶¶ 6-7, 9.[19] During the unwinding process, insurers will either have to suspend issuing and renewing insurance pending completion of the process or issue and renew policies using the less actuarially sound methods developed to comply with the Emergency Rule. In this important way, then, the Emergency Rule effectively will last well beyond the nominal July 20 expiration date.

Similarly, the Emergency Rule requires that insurers begin to employ non-credit-based rating models for all policies new and renewing on and after June 20, 2021. This means that, for approximately thirty days, insurers will be required to issue and renew policies using the inferior models with terms lasting well beyond the July 20, 2021 nominal deadline. This effect, too, then, will endure well past that deadline. Accordingly, the Emergency Rule effectively violates the 120-day deadline specified in RCW 34.05.350, and the Court should enjoin implementation and enforcement of it on that basis.

5. The Emergency Rule is arbitrary and capricious.

As noted previously, agency action is arbitrary and capricious when the evidence on which the agency based its decision leaves room for two opinions even though the court may believe that the agency reached an erroneous conclusion. *Floating Homes Ass'n*, 115 Wn. App. at 789.

For all the reasons discussed above, because the Emergency Rule conflicts with the statutes authorizing use of credit histories, is not authorized by any statute, is not based on good cause, and exceeds applicable statutory time limits, the Court need not address whether the Rule

[19] Mr. Broadrick is the National Ratemaking & Indications Leader for American Family Connect Property and Casualty Insurance Company. Broadrick Dec. ¶ 1.

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is arbitrary and capricious. But should the Court conclude otherwise, the Emergency Rule also fails this standard.

The Rule is arbitrary and capricious not because the Commissioner's supporting evidence fails to leave room for his purported justifications of the Rule, but because the Commissioner fails to proffer any supporting evidence at all. All the Commissioner offers is unsupported conjecture that the federal and state consumer protection measures he cites have so disrupted credit reporting that credit-based insurance scoring is no longer reliable and results in premium rates that currently are excessive, inadequate and unfairly discriminatory and will continue to be so after the protection measures are lifted. Additionally, the Commissioner has offered no evidence to support his assertion that, when the measures are lifted, there will be a negative economic impact that will be felt disproportionately by people of color. Anderson Dec. Ex. 6 at 1-2.

In fact, there is evidence that the Commissioner's unsupported assertions are incorrect. Adam Pichon is Vice President and General Manager, U.S. Auto Insurance, for LexisNexis Risk Solutions (*see* Declaration of Adam Pichon in Support of Petitioner's Motion for Preliminary Injunction ("Pichon Dec.") ¶ 1). LexisNexis Risk Solutions has developed a credit-based insurance scoring model for use by insurers. Pichon Dec. ¶ 3. In Lexis/Nexis's experience, credit scores that it has provided, on the aggregate, tend to be very stable over time and remain predictive of insurance losses. This was the case during and after the Financial Crisis and Great Recession of 2007-08, and it has continued to be the case during the Covid-19 pandemic. Pichon Dec. ¶ 4-5. Insurers that use credit-based insurance scores agree. Ward Dec. ¶ 11; Davies Dec. ¶ 11. And Lexis/Nexis has no information indicating that a downturn in credit-based insurance scores is imminent. Pichon Dec. ¶ 6. This evidence completely contradicts the Commissioner's baseless assertions about the supposed unreliability of credit-based insurance scores and the pending collapse of those scores.

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In the absence of any evidence to support his bare assertions, and in the face of the contrary evidence offered by APCIA, there can be no conclusion other than that the Emergency Rule is arbitrary and capricious.

The Commissioner's "good cause" determination that an emergency existed also is arbitrary and capricious. In *State v. MacKenzie*, 114 Wn. App. 687, 699, 60 P.3d 607 (2002), the court indicated that a claimed emergency that was "artificial" or "fabricated" would be considered arbitrary and capricious. As explained above, an artificial emergency is precisely what exists here. Indeed, one can only surmise that the "triggering event" for the Commissioner's adoption of the Emergency Rule was not any claimed emergency but his failure (less than two weeks earlier) to pass Senate Bill 5010. Regardless, his good cause determination was arbitrary and capricious.

Because the Emergency Rule is arbitrary and capricious, for this independent reason, the Court should enjoin the Commissioner and OIC from implementing and enforcing it.

C. APCIA's members have a well-grounded fear of immediate invasion of their rights, and the Emergency Rule is resulting and will result in actual and substantial injury to them.

There can be little doubt that APCIA's members have a well-grounded fear of immediate invasion of their rights. The Emergency Rule is already effective and the May 6 deadline by which insurers must amend their rate filings is bearing down.

It is equally clear that the Emergency Rule already is causing and will cause substantial injury to APCIA's members. Very soon, insurers will have to start undertaking the complex and difficult steps necessary to comply with the May 6 and June 20 deadlines. Insurers will have to reconfigure numerous IT systems and operational processes to remove credit-based risk score classifications, involving thousands of hours of employee time. These would include thousands of hours of programming IT changes, systems testing, changes to policy forms and documents, changes to rates and rules, changes to filing documentation, training for agents and employees handling customer service questions and endorsements, as well as the significant

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opportunity costs of not working on other planned items and implementations already in process. And if it is later determined following these massive efforts that credit history risk classifications may be utilized, the reconfigurations and process changes would have to be reversed, resulting in similar expenses and operational disruption to insurers to reinstate the IT systems and operational processes, once again involving thousands of hours of employee time. Ward Dec. ¶ 13; Cashman Dec. ¶ 12; Davies Dec. ¶ 13; *see also* Mezerewski Dec. ¶¶ 8-10; Broadrick Dec. ¶¶ 6-7, 9; Collins Dec. ¶ 6. It has been estimated that the potential aggregate direct expense for insurers to comply with the Emergency Rule is between $16 and $82 million. Niami Dec. ¶ 4. In addition, removal of credit history as a component of credit-based insurance scores would detract from pricing accuracy as well as insurers' ability to properly evaluate, select and rate policyholders resulting in market effects (discussed more fully below) that would harm both insurers and consumers. Niami Dec. ¶ 5; Ward Dec. ¶¶ 8-10; Cashman Dec. ¶¶ 8-10; Davies Dec. ¶¶ 8-10; Mezerewski Dec. ¶ 6; Broadrick Dec. ¶ 8.

D. A balancing of the parties' interests and consideration of the public interest support issuance of a preliminary injunction.

Finally, a balancing of the parties' interests and consideration of the public interest also support issuance of a preliminary injunction. APCIA's members have a clear interest in not being subjected to onerous dictates compliance with which (and reversing such compliance) will be expensive, time-consuming and difficult. Nor should they be required to price and offer insurance based upon the actuarially inferior models required by the invalid Emergency Rule. On the other hand, the Commissioner and OIC have little cognizable interest in proceeding by emergency order, which is the uncommon exception, not the rule, to the regular rule-making process and the many benefits that result from notice and public comment.

The public interest also strongly supports an injunction. The Emergency Rule runs the risk of fomenting great dislocation in Washington's personal insurance market as well as great

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(206) 622-8020

confusion among consumers, particularly if the Emergency Rule remains effective but ultimately is not extended or made permanent.

Two major auto insurers and one auto and homeowner insurer estimate that, if the Emergency Rule is implemented and enforced, approximately 50% or more of their policyholders in Washington would experience immediate rate increases for which there would be no actuarial justification other than the removal of credit-based insurance scores as risk classifications or rating factors. The insurers estimate that over a million Washington residents would face rate increases as a direct result of this development. Ward Dec. ¶ 9; Cashman Dec. ¶ 9; Davies Dec. ¶ 9.

For one auto insurer, these developments and their effect on rates would result in approximately 195,100 of its Washington policyholders with lower risk probabilities and who have 23.3% fewer accidents subsidizing policyholders with higher risk probabilities and higher accident frequencies. Ward Dec. ¶ 10. For the other auto insurer, approximately 217,000 of its Washington policyholders with lower risk probabilities and 28% fewer accidents would be subsidizing policyholders with higher risk probabilities and higher risk frequencies. Cashman Dec. ¶ 10. For the two insurers that write both personal auto and homeowners insurance, the effects would be similar. Mezerewski Dec. ¶ 6; Davies Dec. ¶ 10. This massive subsidization is the very essence of unfair discrimination and would result in less accurate rates, market inefficiencies and dislocation and likely would negatively impact the affordability and availability of personal auto insurance and homeowners insurance in Washington. Ward Dec. ¶ 10; Cashman Dec. ¶ 10; Davies Dec. ¶ 10.

More specifically, by removing an actuarially sound factor, the Emergency Rule would decrease pricing accuracy, which would result in the cost of risk not being equitably distributed among consumers according to expected claims costs. Disallowing the use of effective rating factors such as credit-based insurance scores would distort the link between price and risk. Specifically, if the price does not reflect the associated risk, various distortions are created by

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less accuracy in pricing, harming consumers. For instance, consumers with expected higher claims costs could purchase more insurance given the artificially low prices and potentially take more risks in view of their inflated insurance cushion, while those with lower expected claims costs may buy less insurance because of the unmerited higher prices. Aside from being unfairly discriminatory, such a cycle of more risky consumers purchasing more insurance at lower prices and less risky consumers purchasing less insurance likely would result in increasingly higher costs to all consumers. Niami Dec. ¶ 5.

Equally significant is the harm the Emergency Rule will inflict on insurance agents, which very often are small businesses, and their customers. Wayne Lunday, Carl Michaelman, and Matthew Rubin each own an insurance agency, in Castle Rock, Kenmore, and Issaquah, respectively. *See* Declaration of Wayne Lunday in Support of Petitioner's Motion for Preliminary Injunction ("Lunday Dec.") ¶ 2; Declaration of Carl Michaelman in Support of Petitioner's Motion for Preliminary Injunction ("Michaelman Dec.") ¶ 2; Declaration of Matthew Rubin in Support of Petitioner's Motion for Preliminary Injunction ("Rubin Dec.") ¶ 2. Their agencies have done business with insurance companies that have used credit-based insurance scoring for many years, and most of their customers have excellent credit scores. Lunday Dec. ¶ 3; Michaelman Dec. ¶ 3; Rubin Dec. ¶ 3. They anticipate that the Emergency Rule will raise their customers' insurance rates and damage their businesses, perhaps putting their entire books of business in jeopardy. Lunday Dec. ¶¶ 4-6; Michaelman Dec. ¶ 4; Rubin Dec. ¶ 4. Mr. Lunday, Mr. Michaelman, and Mr. Rubin are, presumably, unintended victims of the Emergency Rule, but they are victims nevertheless.

If such dramatic changes to personal insurance are to occur in Washington, it should be as the result of an orderly and thoughtful process, not a hastily-prepared edict issued without prior notice or any opportunity for public comment. The public interest clearly favors a preliminary injunction enjoining implementation and enforcement of the Emergency Rule.

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IV. CONCLUSION

For the foregoing reasons, APCIA's motion for a preliminary injunction should be granted.

DATED this 7th day of April, 2021.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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