

## MSC Opinion: Insurance Institute of Michigan v. Commissioner

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On July 8, 2010, the Michigan Supreme Court published its opinion in *Insurance Institute of Michigan v. Commissioner, Financial & Insurance Services, No. 137400*. The Office of Financial and Insurance Regulation (OFIR) issued rules banning the use of credit reports in calculating insurance premiums. The insurance industry challenged the rules, arguing that they were beyond the OFIR's authority. The Supreme Court agreed and reinstated the trial-court order declaring the rules invalid and enjoining their enforcement.

For sometime, insurance companies have used an insured's credit score to determine the insured's premium. On March 25, 2005, the OFIR filed rules with the Secretary of State banning the use of credit scores. Shortly thereafter, various members of the insurance industry filed suit to enjoin enforcement of the rules and to have them declared invalid. The trial court granted the relief requested. A divided Court of Appeals vacated the trial-court order, issuing three separate opinions and failing to agree on a rationale. The Michigan Supreme Court granted leave to appeal.

On appeal, the OFIR made two procedural arguments: (1) the plaintiffs had no right to bring an original declaratory-judgment action to challenge the rules because the Administrative Procedures Act requires a plaintiff to request a declaratory ruling from the agency before filing a declaratory-judgment action, MCL § 24.264, and the plaintiffs did not do so here; (2) the trial court improperly reviewed evidence outside of the administrative record, in violation of *Michigan Association of Home Builders v. Michigan Department of Labor & Economic Growth*, 750 N.W.2d 593 (Mich. 2008). The Court declined to address these questions, noting that the OFIR waived any procedural issues by requesting the Court to rule on the merits. The Court also stated that the trial court's review of non-administrative-record evidence was harmless error because the administrative record supported the trial court's holding.

Next, the Court considered whether the OFIR had authority to promulgate the no-credit-report rules. The rules are valid if they meet the following three-prong test: (1) the rules are within the matter covered by the enabling statute; (2) the rules comply with the underlying legislative intent; and (3) the rules are neither arbitrary nor capricious. The Court held that the rules failed the first prong of this test: they were outside the matter covered by the Insurance Code. This is because the relevant chapters of the Insurance Code (chapters 21, 24, and 26) permit the use of credit scores to determine an insured's premium.

Chapter 21 of the Code governs individual automobile and home insurance. It permits insurers to maintain premium-discount plans that are uniformly applied to all insureds, use factors "consistent with the purposes of this

act and reflect[] reasonably anticipated reductions in losses or expenses.” MCL § 500.2110a. The Court held that credit-score discounts met this test. The record contained evidence that an insured’s credit score was an accurate predictor of the insured’s risk.

Chapters 24 and 26 apply to group automobile and home insurance, and assorted other individual lines. These chapters authorize any rating plan that “measures any differences among risks that may have a probable effect upon losses or expenses.” MCL §§ 500.2403(1)(c), 500.2603(1)(c). Again, the Court noted that credit scores accurately predicted risk, and so the credit-score discounts were proper.

Justice Corrigan concurred, but she would have overruled *Home Builders*. *Home Builders* held that review of an agency rule is limited to the administrative record. Justice Corrigan would allow additional evidence to be presented in the trial court.

Chief Justice Kelly dissented, joined by Justices Cavanagh and Hathaway. Chief Justice Kelly argued that the broad authority given to the OFIR under MCL 500.210 to promulgate regulations to effect the purposes of the Insurance Code supported the rules.