Insurance Alliance of Michigan

September 24, 2020

Sarah Wohlford, Esq.
Senior Deputy Director
Director, Office of Research, Rules, and Appeals
Department of Insurance and Financial Services
530 W. Allegan St., 8th Floor
Lansing, Michigan 48933-7720

Re: DIFS Proposed Ruleset 2020-25 IF
Essential Insurance
Excessive, Inadequate, or Unfairly Discriminatory Rates, Complaint Resolution

Dear Ms. Wohlford:

The Insurance Alliance of Michigan (IAM) is the state trade association representing property and casualty insurers operating in Michigan, who collectively write approximately 75 percent of the automobile insurance market in the state. On behalf of the members of the IAM, I write to express our thoughts and suggestions regarding proposed Ruleset 2020-25 IF.

I. Definitions; Excessive, Inadequate, or Unfairly Discriminatory Rates:

A. The proposed definition of an "incorrect premium" as an improper premium or a premium contrary to law creates a definition inconsistent with the ordinary understanding of the reference, the text of the Essential Insurance Act, and longstanding practice in Michigan.

Under longstanding practice, an "incorrect premium" is a premium that should have been, but was not, charged to an insured by applying the insurer's approved rates on file with the Department to the particular factual circumstances of the insured. That is, a person's allegation that she has been charged an incorrect premium does not challenge the insurer's filed rate; rather, it is an allegation that the insurer has *misapplied* those rates based upon the insured's characteristics. But the proposed amendments to the Essential Insurance rules would undo this common understanding, defining "incorrect premium" much more broadly—as an improper premium or a premium contrary to law. *See* Proposed R500.1501(e).

To avoid confusion and inconsistency, we strongly suggest this proposed definition be deleted from the proposed rules, for two overarching reasons.

First, the proposed definition fails to give effect to the Legislature's choice of the term "incorrect premium" rather than "improper premium." The plain text of Subsection 2113(1) demonstrates that when the Legislature intended to proscribe "improper" behavior, it knew how to do so. *See* MCL 500.2113(1) (addressing improper denials of insurance, on the one hand, but only the charging of an

"incorrect premium," on the other). Similarly, Section 2114(2) shows that when the Legislature intended to proscribe behavior as contrary to law, it knew how to do so. *See* MCL 500.2114(2) (specifying remedies when a filing "does not meet" statutory requirements). The proposed definition of "incorrect premium" thus contradicts a core principle of statutory interpretation: "[w]hen the Legislature uses different words, the words are generally intended to connote different meanings." *United States Fidelity & Guar. Co. v. Mich. Catastrophic Claims Ass'n*, 484 Mich. 1, 14 (2009). If the Legislature had intended "incorrect" to mean "improper" or contrary to law, it would have specified as much. *See id.* More strongly, when the Legislature uses one phrase in one portion of a sentence and a different phrase later in the same sentence, the Legislature *must* be presumed "to draw a distinction between the two." *People v. Carter*, 503 Mich. 221, 227 (2019).

Second, the proposed definition serves to collapse Sections 2113 and 2114 of the Code, which the Legislature intended to provide separate, distinct grievance procedures with respect to premiums and rates, respectively. Section 2113 provides a procedure for a person who has reason to believe she has been charged "an incorrect premium." MCL 500.2113(1)[1]. Section 2114, by contrast, provides a procedure for a person "aggrieved with respect to any filing which is in effect," MCL 2114(1), and grants a remedy when the Director finds that "a filing does not meet the requirements of sections 2109 and 2111"—i.e. that the insurer's filed rates are excessive, inadequate, or unfairly discriminatory, or that the insurer's filed rates or rating classifications are based on impermissible factors. MCL 500.2114(2), 2109, 2111.

A House Substitute for Senate Bill 428 of 1979, would have collapsed Sections 2113 and 2114 into a single statutory section providing a grievance procedure for any "person aggrieved by an alleged violation of" the Essential Insurance Act. *See Allstate Ins. Co. v. Mich. Dep't of Ins.*, 195 Mich. App. 538, 546 (1992). The Legislature rejected this substitute, and kept the language limiting the availability of Section 2114 to persons "aggrieved with respect to any *filing which is in effect*." MCL 500.2114(1) (emphasis added). "The Legislature made its intent clear with the rejection of this substitute." *Allstate*, 195 Mich. App. at . (citing *People v. Adamowski*, 340 Mich. 422, 429 (1954)); *see also LaGuire v. Kain*, 440 Mich. 367, 396–97 & n. 21 (1992) ("where the Legislature has affirmatively rejected language that would support an interpretation of a statute, that rejection evidences a legislative intent toward a contrary construction") (citing cases).

The proposed definition of "incorrect premium" is contrary to this legislative intent. Under the definition, a person could invoke either the Section 2113 grievance procedures or the Section 2114 grievance procedures when her premium was calculated based on filed rates that she believes do not meet the requirements of the Essential Insurance Act.

By contrast, the generally accepted understanding of what constitutes an "incorrect premium" does not give rise to the same problem; instead, it fully comports with the Legislature's choice to distinguish between persons entitled to proceed under Section 2113 and persons entitled to proceed under Section 2114. When an insured has been charged a premium that she believes resulted from a misapplication of the insurer's filed rates to her factual circumstances, she is entitled to proceed under Section 2113. When an insured has been charged a premium that was correctly calculated by applying the insurer's

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[1] Section 2113(1) also provides a procedure for persons who have reason to believe that they have been improperly denied insurance coverage. Like persons who have reason to believe they have been charged an incorrect premium, these persons are not challenging the insurer's filed rates.

filed rates to her circumstances but she believes that these rates themselves are not consistent with the requirements of the Act, she is entitled to proceed under Section 2114.

B. The Department should delete provisions of the current rules that are already set forth in the text of the Essential Insurance Act itself.

IAM commends the Department on its many efforts in this ruleset to ensure that the Essential Insurance rules are consistent with the current statutory text. That goes especially for the rules governing excessive, inadequate, or unfairly discriminatory rates. For example, subrule 4(b) of the current rules, R 500.1504(b), is simply inconsistent with the provisions of MCL 500.2109(b), which provides that a rate is inadequate only if it is unreasonably low *and* has at least one of a number of other possible characteristics. The Department has justifiably proposed deleting subrule 4(b) entirely.

IAM recommends that the Department go further in the direction of simplifying the Essential Insurance rules and ensuring their consistency with the statutory text. At a minimum, that should include deleting provisions of the current rules that, because they are directly set forth in the statutory text, serve no function. Their deletion can also lead to greater certainty for all stakeholders. For example, proposed subrules 5(1) and 5(2) are apparently intended simply to mirror the language of MCL 500.2109(c). But unfortunately, those subrules do not mirror the statutory text absolutely verbatim. That could lead to unnecessary confusion about the relationship between the rules and the statute.

Such deletion of superfluous passages in the rules can also ensure that the rules do not become outdated and legally irrelevant. The Legislature has frequently amended the text of the Essential Insurance Act over the last 40-plus years, and there is no reason to put statutory language directly in the rules when the Legislature might amend the Act to eliminate that particular statutory language entirely.

Accordingly, IAM recommends that subrules 5(1) and 5(2) simply be deleted from the proposed rules. Alternatively, IAM recommends that the language in those subrules be edited to conform verbatim to MCL 500.2109(c).

<u>II. Complaint Resolution; Available Remedies</u>:

A. The Proposed Rules setting forth procedures for informal managerial-level conferences should add further detail regarding the initiation and conduct of the process, both to give certainty to stakeholders and to align with statutory requirements.

First and foremost, to the extent the proposed rules add structure around complaints of "incorrect premium," the language of Proposed R500.1508(2) should specify more precisely what constitutes a "person inform[ing] an insurer or producer that the person believes the insurer or producer has charged the person an incorrect premium...." In the sale of insurance, many consumers express surprise or otherwise react when the quoted premium does not match the amount they would prefer to pay for the coverage. It is not clear whether such a reaction would constitute a person *informing* an insurer that they believe an incorrect premium has been charged? In any case, such a slight trigger would be extremely difficult for insurers to operationalize, and prompt a highly inefficient use of the Department's time and attention.

We would suggest a more definitive initial step, such as the consumer informing an insurer <u>in writing</u> in order to trigger the complaint and process of private, informal managerial-level conference. In fact,

Proposed R500.1501(c) would define a "complaint" as (emphasis in original) a "**written** statement by a person to an insurer . . . claiming that an insurer . . . has charged an **incorrect** premium for **automobile insurance or home** insurance." Proposed Rule 500.1508(2), however, does not include the term "complaint."

We would also recommend that the consumer be required to allege, with some specificity, why they believe an incorrect premium has been charged. Absent such information, an insurer would have no understanding of where to begin the inquiry until much later in the process. Knowing up front would provide for a more timely and efficient process. It would also give effect to the statutory language that a consumer is entitled to an informal managerial-level conference not merely when the consumer "believes" he or she was charged an incorrect premium, but rather only when he or she "has reason to believe" so. MCL 500.2113(1). If the consumer is required by statute to have a reason, then it should not be burdensome for him or her to briefly articulate that reason.

Additionally, with respect to the private informal managerial-level conference itself, Proposed R500.1508(c)(ii) allows the consumer alone to decide the manner in which it occurs – telephone, video teleconference, in-person, etc. Currently, such decisions are made jointly by the consumer and insurer. That is only appropriate, given that the statute specifies that it is the insurer that is to establish its own "internal procedures" to provide a person with an informal managerial-level conference. MCL 500.2113(2). As well, the significant increase in cost and risk to require an in-person conference in light of the current pandemic is one example where this unilateral choice could present an absurd and unintended result.

Depending upon geography and other variables, in-person meetings can create significant time delays and unnecessary expense. Insurers are concerned that in-person formats may be invoked in certain circumstances for exactly those purposes, when other adequate means would be more efficient. Accordingly, we would suggest the manner of meeting continue to be a joint decision, based upon the circumstances involved.

Further, Proposed R500.1508(3)(i) states that the private informal managerial-level conference must occur within 30 days after the consumer makes a request for same. However, the rule does not state what is to happen if the consumer making the complaint does not respond to the insurer's written notice within 30 days?

B. The proposed rules giving the Director plenary authority to order "an appropriate remedy" are directly contrary to binding judicial construction of the Essential Insurance Act. See Proposed R500.1514(3).

Under binding judicial precedent from the Michigan Court of Appeals, violations of the Essential Insurance Act can be remedied *only* by prospectively terminating a rate filing. Refunds in particular are not an available remedy under the Act. Proposed Rule 1514 nonetheless purports to grant the Director the power to "order an appropriate remedy," expressly including a possible refund, in response to violations of the Act. Because an administrative rule contrary to the underlying statute is substantively invalid; because agencies have no power to contravene the courts' interpretation of a statute; and because the Legislature has never revised Sections 2113 and 2114 of the Act since they were first passed in 1979, the Department should delete Proposed R500.1514 in its entirety.

Violations of the Essential Insurance Act can be remedied only by the prospective relief of terminating the effectiveness of the insurer's rate filing. *Allstate*, 195 Mich. App. 538, 546. This limitation of

remedies applies to both Section 2113 and Section 2114. *See McLiechey v. Bristol West Ins. Co.*, 408 F. Supp. 2d 516, 520 (W.D. Mich. 2006) ("*Allstate* did not differentiate between actions under 2113 and actions under 2114. Instead, it used broad language limiting the Commissioner's remedial authority under Chapter 21"), *affirmed*, 474 F.3d 897 (6th Cir. 2007). No retroactive relief is available, because "such relief would affect contracts or policies made or issued before the [Director's] order." *Allstate*, 195 Mich. App. at 546. With respect to refunds in particular, "it is absolutely clear that the Legislature deliberately refused to vest the commissioner with power to order a refund for noncompliance with chapter 21." *Id.* at 547.

In fact, the Legislature in enacting the Essential Insurance Act directly rejected a proposed change to the Act that would have provided exactly what Proposed R500.1514(3) attempts to do here: authorizing the Director to "provide other appropriate relief, including refunds." *Allstate*, 195 Mich. App. At 546 (quoting the rejected House Substitute for Senate Bill 428 of 1979, which was enacted into law as 1979 Public Act 145).

The Department would exceed its authority by promulgating rules that are contrary to the Insurance Code. *Ins. Institute of Mich. V Commissioner*, 486 Mich. 370, 374 (2010). An agency cannot, through rulemaking, interpret a statute in a way that would "conflict with the plain meaning of the statute." *Id.* at 385 (citation omitted). Instead, an agency rule must comply with the underlying legislative intent as determined by the courts. See *Guardian Environmental Servs., Inc. v. Bureau of Construction Codes & Fire Safety, Dep't of Labor & Economic Growth*, 279 Mich. App. 1, 11 ("The judiciary alone is the final authority on questions of statutory interpretation and must overrule administrative interpretations that are contrary to clear legislative intent.") The Court of Appeals in Allstate determined the clear legislative intent concerning remedies under the Essential Insurance Act: the *only* available remedy is prospective relief in the form or terminating the effectiveness of an insurer's rate filing. Only the Legislature may make such an essential change to the Act, but the Legislature has not done so: despite the many other revisions to the Act since its 1979 passage, the Legislature has not changed a word of Sec. 2113 or 2114, neither in response to the *Allstate* decision nor otherwise.

The Department has existing tools to address a finding of a misapplied rate, including possible enforcement action against an insurer by the Department upon such a finding.

Thank you in advance for your attention to our suggestions regarding this ruleset. We look forward to continuing working with the Department on the further development and implementation of these rules.

Please let me know if you have any questions or comments.

Sincerely,

Dyck E. Van Koevering
General Counsel