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[OREGON LEGISLATIVE REPORT 10/13/04](#)

## **Oregon Legislative Report 10/13/04**

The Agents' Advocate

Oregon Government Relations News—Professional Insurance Agents of Oregon/Idaho

Prepared exclusively for PIAO/I Members by Lana Butterfield, CIC, PIAO/I Oregon Lobbyist

October 13, 2004

### Insurance Division Activity

#### Permanent Credit History/Insurance Score Rules Released

The Oregon Insurance Division has finally released the permanent rules on use of credit history and insurance scores on personal insurance by insurers and producers. PIAO/I encourages all our members to read the rules, copied below, or on the web at [http://www.oregoninsurance.org/docs/rules/recent\\_adopt/id07-2004\\_rule.pdf](http://www.oregoninsurance.org/docs/rules/recent_adopt/id07-2004_rule.pdf).

After a lengthy advisory committee and hearings process the proposed rules changed somewhat. PIAO/I presented testimony on the rules, including requesting clarification on phone quotes, and the rule language was changed to our satisfaction. Many other issues were addressed at the hearing, including extraordinary life circumstance exceptions that the Division subsequently deleted, and concerns about the definition of adverse underwriting decision, which was changed only slightly.

Rule changes specifically affecting producers: section 836-080-0430 requires notification to consumers by the producer before checking credit history or insurance score and covers type of medium and requires only one notice when checking multiple insurers. Producers will also want to understand how notification and distribution of written statements regarding use of credit histories or insurance scores will be handled by your insurers during the application process and producers' involvement in that process. Please read the entire rule, and remember that the italicized language is to be deleted and bolded/underlined language is to be added.

#### Proposed Rules on Producer Licensing Coming Soon

We expect proposed rules on last session's SB 253 regarding producer licensing, fees, disclosure, felony waivers, etc., to be released next week. PIAO/I participated in an advisory committee in September on this issue. We have been working with the Insurance Division over the past few years to seek the ability for producers to charge fees in certain circumstances, and our language has been included in the language of this proposed rule. We will send you copy as soon as the final proposal is released and ask for your involvement in the hearings process.

#### Other Division Releases of Interest

The Insurance Division has also released a proposed rule regarding privacy of personal information held by health insurers; go to <http://oregoninsurance.org/docs/rules/proposed/rulemake.htm>.

The Division's bulletin on commission rate practices pertaining to small employer health plans is found at [http://oregoninsurance.org/docs/bulletins/bulletins\\_active.htm](http://oregoninsurance.org/docs/bulletins/bulletins_active.htm)

### Legislative Activity

#### Auto Reform Proposals from Oregon Law Commission and OTLA

The Oregon Law Commission will be discussing seven bill drafts on auto insurance during its meeting on October 27. The bill drafts include: 1. LC 840 (regarding rental cars); 2. LC 841 (regarding matching limits and multiple claimants); 3. LC 842 (regarding stolen vehicles); 4. LC 843 (regarding overlapping UM/UIM coverage); 5. LC 844 (regarding bankrupt insurance companies); 6. LC 1050 (regarding general LC clean-up of various auto insurance provisions); 7. LC 1051 (regarding government cars). Please contact me if you would like copy of any or all of these proposals.

The Oregon Trial Lawyers Association will also be proposing four bills regarding auto insurance next legislative

session, and will present these to the Joint Judiciary Committee on October 15. I have copied their "fact sheets" below. Please let me know if you want a copy of the actual bill drafts.

#### Homeowners Insurance Proposal

The Insurance Division is continuing its discussion with the insurance industry on their homeowners proposal. They recently convened a technical working group that discussed weather loss prohibitions and several other subjects. The Division will refine the language and the full group will meet again this fall.

#### Political Involvement

PIAO/I thanks our members who have been involved in state legislative races either by contributing to our state level political action committee (PIA-Oregon!-PAC), delivering campaign contributions, or becoming involved in races. The PAC recently sent out the majority of its contributions to worthy candidates, and we've been pleased with the feedback. We are especially grateful to the many candidates who participated in the industry's Insurance Education Program.

Below is a list of PAC contributors for 2004 as of 10/12/04. Many are new contributors, and we are proud to welcome them to the ranks of those who make a difference. We have collected more money over this campaign cycle than in any previous cycle, and we grateful to our donors' generosity.

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## PERMANENT CREDIT HISTORY/INSURANCE SCORE RULES

OAR Chapter 836---Insurance Division  
DIVISION 80

## TRADE PRACTICES

Use of Insurance Scores and Credit History

836-080-0425

Applicability; Definitions

(1) OAR 836-080-0425 to 836-080-0440 apply to [the following kinds of] personal insurance as defined in ORS 746.600[.].

[(a) Private passenger automobile coverage; ]

[(b) Homeowner's coverage, including mobile homeowners, manufactured homeowners, condominium owners and renters coverage; ]

[(b) Personal dwelling property coverage; ]

[(c) Personal liability and theft coverage, including excess coverage; and]

[(d) Personal inland marine coverage.]

(2) OAR 836-080-0425 to 836-080-0440 are effective on and after June 1, 2003.

(3) As used in OAR 836-080-0425 to 836-080-0440[.].

[(a) "Adverse action" means a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance.]

[(b)] (a) "Application" means an action by a prospective insured that, if accepted by the

insurer, would establish a contract of insurance.

(b) "Consumer," "consumer reporting agency," "credit history" and "insurance score" have the meanings given those terms in ORS 746.600.

[(c) "Consumer" means an individual policyholder or applicant for insurance.]

[(d) "Consumer reporting agency" means any person that, for monetary fees or dues or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on individuals for the purpose of furnishing consumer reports to third parties.]

[(e) "Credit history" means any written or other communication of any information by a consumer reporting agency bearing on a consumer's creditworthiness, credit standing or credit capacity that is used or expected to be used, or collected in whole or in part, for the purpose of serving as a factor in determining insurance premiums or eligibility for coverage.]

[(f) "Insurance score" means a number or rating that is derived from an algorithm, computer application, model or other process that is based in whole or part on credit history.]

Stat. Auth.: ORS 731.244 40

Stats. Implemented: ORS 746.015, 746.240, 746.600

836-080-0430

Disclosure of use of Credit History or Insurance Scores

(1) Before an insurer or its [agent] insurance producer may obtain the credit history or insurance score of a consumer in response to a request by the consumer relating to insurance coverage, the insurer or [agent] insurance producer shall notify the consumer that the insurer or [agent] insurance producer will check the credit history or insurance score of the consumer.

The notice may be oral, in writing or in the same medium as the medium in which communication between the consumer and the insurer or [agent] insurance producer is conducted.

(2) An [agent] insurance producer need provide only one notice under section (1) of this rule to a consumer for the inquiry or inquiries that the [agent] insurance producer makes to one or more insurers in response to the request by the consumer.

(3) An insurer who uses credit histories or insurance scores for underwriting or rating coverage shall instruct each of its [agents] insurance producers that before an [agent] insurance producer may obtain a consumer's credit history or insurance score, the [agent] insurance producer must notify the consumer that the consumer's credit history or insurance score of the consumer will be checked.

(4) An insurer that uses the credit history or insurance score of a consumer when considering the consumer's application for insurance must notify the consumer during the application process that the consumer may request a written statement describing its use of credit histories or insurance scores. The notice to the consumer may be either in writing or in the same medium as the medium in which the application is made. The statement must address the following items:

(a) Why the insurer uses credit history or insurance scores.

(b) How the insurer uses credit histories or insurance scores.

[(c) How often the insurer reviews a consumer's credit information.]

[(d)] (c) What kinds of credit information are used by the insurer.

[(e)] (d) Whether a consumer's lack of credit history will affect the insurer's consideration of an application.

[(f)] (e) Where the consumer may go with questions.

[(5) An insurer that uses a credit history or insurance score of a consumer in connection with renewal of the consumer's policy shall notify the consumer of that use when the insurer makes a renewal offer to the consumer. The notice shall also inform the consumer that the consumer may request a statement referred to in section (4) of this rule, describing the insurer's use of credit histories or insurance scores, prior to renewal of the insurance. If the insurer does not at least annually update the credit information in its renewal process, the insurer shall also inform the consumer in the notice that the consumer has a right annually to request that the insurer use current credit information in the renewal process and that the insurer, upon

receiving such a request, will update the credit information used. This section does not apply when an insurer uses a credit history or insurance score of a consumer only at the inception of a policy.]

Stat. Auth.: ORS 731.244

Stats. Implemented: ORS 746.015 and 746.240

#### 836-080-0432 [TO BE REPEALED]

Adverse Action Grounded on use of Credit History or Insurance Score; Remedy

(1) When an insurer takes an adverse action against a consumer that is based in whole or in part upon a credit history or insurance score, the insurer shall provide the following to the consumer orally, in writing or electronically:

(a) A notice of the adverse action that summarizes the most significant reasons for the adverse action. The most significant reasons for purposes of this subsection need not exceed four, shall be in the order of decreasing importance and shall be specific. The notice shall be sufficiently clear and specific so that a consumer of reasonable intelligence can identify the basis for the insurer's decision. For the purpose of the summary, the use of a generalized term such as "poor credit history," "poor credit rating," or "poor credit score" does not meet the requirement of a sufficiently clear and specific summary.

(b) A notice that gives the name, address and telephone number of the consumer reporting agency, including a toll-free telephone number established by the consumer reporting agency that gathered the information for the consumer's credit report.

(c) A statement that the consumer reporting agency referred to in subsection (b) of this section did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken.

(d) A notice of the consumer's right:

(A) To obtain a free copy of a consumer report on the consumer from the consumer reporting agency referred to in subsection (b) of this section, including the deadline, if any, for obtaining the copy; and

(B) To dispute with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the consumer reporting agency.

(2) The requirement under section (1) of this rule with respect to an adverse action:

(a) Needs to be satisfied when the adverse action is initially taken; and

(b) Must be satisfied for any subsequent adverse action owing to a change in the credit history or insurance score of the consumer.

(3) When a consumer disputes the accuracy or completeness of information in a consumer report and the dispute results in a change in the credit history or insurance score of the consumer that determined eligibility for coverage or resulted in higher premiums for the consumer:

(a) The insurer, upon request of the consumer, shall re-rate or reissue the policy retroactive to the effective date of the current policy term; and

(b) The policy as re-rated or reissued shall provide premiums and policy terms the consumer would have been eligible for if an accurate credit history or insurance score had been used.

Stat. Auth.: ORS 731.244

Stats. Implemented: ORS 746.015 and 746.240

#### 836-080-0435

Policies Governing Credit Histories and Insurance Scores

[(1)] Each insurer that uses credit histories or insurance scores in the rating or underwriting, or both, of prospective applicants, applicants or policyholders for personal insurance shall establish a written policy that includes at least the following:

[(a)] (1) An explanation of credit histories or insurance scores, or an explanation of both if the insurer uses both, and the insurer's standards governing their use.

[(b)] (2) Rating and underwriting protocols, rules and instructions relating to credit histories or insurance scores. The protocols, rules and instructions shall include an explanation of

the insurer's consideration and treatment, for underwriting purposes and for rating purposes, of:

[(A)] (a) A consumer for whom the insurer or provider of credit scoring information has found no credit records (a "no hit"), and whether the insurer may make exceptions.

[(B)] (b) A consumer for whom the insurer or provider of credit history or insurance score information has found a credit record but insufficient credit activity for creating a credit score (a "no score"), and whether the insurer may make exceptions.

[(2) Except as provided in this section, an insurer may not cancel or refuse to renew a policy on the basis, in whole or part, of the credit history of the consumer or the credit factors of the insurance score of the consumer. The prohibition in this section:]

[(a) Does not preclude an insurer's consideration of credit history as part of its cancellation or renewal process as long as the reason for the cancellation or refusal to renew is a valid underwriting standard that is independent of credit history;]

[(b) Does not apply with respect to the authority of an insurer to cancel:]

[(A) An automobile insurance policy or coverage when cancellation of the policy or coverage is allowed under ORS 742.562(2); or]

[(B) Insurance other than insurance to which subsection (a) of this section applies, if the insurance is issued pursuant to a binder, if the underwriting occurs after issuance and if the insurer cancels the insurance not later than the 60th day after the date of the binder; and]

[(c) Does not apply to an offer of placement with an affiliate insurer.]

Stat. Auth.: ORS 731.244

Stats. Implemented: ORS 746.015 and 746.240

836-080-0436

Absence of or inability to determine credit history; relation to risk to insurer [NEW]

An insurer may use the category of absence of a credit history ("no hit") or the category of inability to determine a consumer's credit history ("no score") under ORS 746.661(1)(c) according to the separate risk profiles for the two categories, and any relevant subcategories, demonstrated by actuarial data that the insurer has submitted to the Director of the Department of Consumer and Business Services.

Stat. Auth.: ORS 731.244

Stats. Implemented: ORS 746.650

836-080-0438

Definition of adverse underwriting decision; notice [NEW]

(1) For the purpose of the notice required by ORS 746.650(5), an adverse underwriting decision as defined in ORS 746.600(1)(a)(E)(iii) occurs when an insurer accepting an application for insurance would have given the consumer a lower rate if the consumer's credit history or the credit factors in the consumer's insurance score were more favorable.

(2) An insurer shall include in a notice of adverse underwriting decision required by ORS 746.650(5) an explanation of the consumer's right to request, no more than once annually, that the insurer rerate the consumer, and of potential negative consequences of rerating, if any.

Stat. Auth.: ORS 731.244

Stats. Implemented: ORS 746.600, 746.650

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## OREGON TRIAL LAWYERS ASSOCIATION PROPOSALS ON AUTO INSURANCE

### (1) PIP STACKING

#### The Problem

Consumers currently pay for Personal Injury Protection coverage to cover medical expenses incurred in an automobile accident. Additionally, all consumers must purchase Uninsured (Underinsured) Motorist coverage in case they are hit by an uninsured or underinsured driver. However, under current law, the consumer's insurance company can avoid paying all compensation due to the consumer under both coverages because they are allowed to deduct

economic damages (PIP payments) from the available policy limits (Underinsured Motorist coverage). In other words, although consumers are paying premiums for two coverages (PIP & UM/UIM), in most cases they are only allowed to collect the difference between the Underinsured Motorist policy and the Personal Injury Protection policy.

#### Example

Consumer purchases an automobile policy that contains the standard, minimum bodily injury limits of \$25,000 for liability and uninsured motorist coverage. Consumer is hit by an intoxicated insured motorist with the same \$25,000 minimum liability limits. Consumer's medical bills are \$20,000 and her non-economic damages (pain & suffering) are valued at \$40,000. Consumer has also purchased standard Personal Injury Protection (PIP) coverage of \$15,000 for medical bills. The consumer's carrier pays \$15,000 PIP towards the medical bills. The intoxicated motorist's insurer (Liability carrier) is willing to pay its limits of \$25,000. Under current law, the Consumer's carrier gets to recover the PIP payment first from the Liability carrier's coverage limit of \$25,000. So, in this case, the consumer would end up receiving a total payment in the amount of \$5,000 (\$25,000 liability limit minus \$15,000 PIP reimbursement minus \$5,000 outstanding medical bills = \$5,000 to Consumer).

#### Solution

This bill would require that the Consumer's insurer only be reimbursed for its PIP payments if funds are available after the Consumer is fully compensated. So, in the example above, the consumer would be allowed to recover \$20,000, rather than \$5000. After all, the consumer has paid a distinct premium for the PIP coverage on her policy, and in this situation who should absorb the economic loss – the Consumer who has paid for the PIP or the insurer who received the premium payments but will actually end up being reimbursed for every penny it paid out. Obviously, the current law benefits the insurer to the detriment of the Consumer.

## (2) FAMILY MEMBERS AND GOVERNMENT VEHICLES

### FAMILY MEMBERS

#### The Problem

Insurance companies can now limit coverage to the mandatory minimum liability coverage (\$25,000) when a family member passenger is injured and a family member driver is at fault – even if the consumer has been paying higher premiums for a much larger policy.

#### Example

Consumer purchases policy with limits of \$250,000/\$500,000 (\$250,000 per person, \$500,000 per accident). If Consumer (father) is driving and runs into a telephone pole, sending his 9 year old daughter through the windshield, the insurance company can legally limit the daughter's coverage to the \$25,000 minimum – simply because she's a member of the same family. If a friend had been the passenger instead, the friend would be eligible for the \$250,000 policy limit purchased by the consumer, if damages of \$250,000 were sustained.

#### Solution

This bill would provide for full coverage for family members injured in an automobile accident – allowing consumers to benefit from the policy coverages they paid for. Consumers purchase insurance policies so that if they are in an accident, they will have adequate coverage. Very few, if any, consumers understand that although they purchase a \$250,000 policy (or any other policy over \$25,000), if a family member is injured in an accident, that family member's recovery will be limited to \$25,000.

The current law contains an exception for family members because it was feared that family members would collude and stage accidents to defraud insurance companies. However, consumers pay for such coverage and should be allowed to benefit from the coverage purchased regardless of the relationship of the injured party.

Additionally, there are safeguards in place to prevent collusion by family members. First, an insurance company is not going to be required to pay out on a claim by a family member unless medical evidence is presented to prove there were injuries sustained that resulted from the automobile accident. Second, insurance companies have Special Investigation Units trained to investigate suspected cases of fraud. If an insurance company suspects fraud, they can and currently do deploy these specially trained adjusters and attorneys to investigate such suspicions.

### GOVERNMENT VEHICLES

## Problem

Underinsured motorist coverage does not apply when the negligent vehicle is government owned or driven by a government employee.

## Example

Consumer purchases a \$1 million underinsured motorist policy. She has a \$1 million brain injury sustained in an automobile accident. However, because the at-fault motorist was a government employee, her underinsured motorist carrier pays nothing on her claim. This is because underinsured motorist coverage does not apply when the negligent vehicle is a government vehicle or is driven by a government employee. Even though she had paid premiums on a \$1 million underinsured motorist policy, she would be limited to the recovery allowed under the Oregon Tort Claims Act (\$200,000) and her underinsured motorist carrier would pay nothing.

## Solution

This proposal provides that consumers who purchase underinsured motorist coverage over \$200,000 (limits of the Oregon Tort Claims Act) can recover from their own underinsured motorist carrier these amounts when the driver is a governmental employee on duty, or is driving a government vehicle— just as would be the case with any other negligent driver. The purpose of underinsured motorist coverage is to ensure the consumer is placed in the position he/she would have been in if the negligent but underinsured motorist had purchased liability insurance in the amount of the consumer's underinsured motorist coverage. If a consumer purchases underinsured motorist coverage in the amount of \$1 million, she should be entitled to coverage of \$1 million, regardless of whether the negligent driver is a governmental employee or not.

## (3) MOTOR VEHICLE ARBITRATION

### What Does This Proposal Do?

- Mandates three-member arbitration panels and the method for selecting the panels
- Provides that arbitrations take place under local court rules currently in existence
- Provides that arbitration findings are not admissible in subsequent litigation

### Why Is This Bill Necessary?

#### THREE MEMBER ARBITRATION PANELS

In a dispute between a consumer and her insurance carrier, if the carrier agrees to pay some portion of the bills, but the consumer and carrier disagree on the amount, the insurer can effectively force the consumer to arbitrate the dispute through private arbitration (preventing the consumer from suing her insurance carrier). In cases where parties are required to arbitrate disputes, there is currently no standard regarding the make-up of the arbitration panel. Some insurance policies provide for a single arbitrator, while some provide for a three-member panel. This bill would mandate three-member arbitration panels and the method for selecting the panels. This would provide a uniform system for arbitrations across the state, regardless of the policy. Practice has shown that a three-member panel is a fairer arrangement for the consumer than a single arbitrator. In a three-member panel, each side to the dispute chooses an arbitrator and then those two arbitrators choose a third.

#### LOCAL TRIAL COURT RULES

This bill provides that arbitrations take place under the uniform trial court rules and local county court rules currently in existence rather than the more general Rules of Evidence (current practice). Local court rules allow consumers to submit doctor reports without actually having the doctors testify. The Rules of Evidence require the consumer to pay, often thousands of dollars, to have the treating physician testify at the proceeding, rather than simply allowing the consumer to submit the doctor's report (as is the case in all other disputes where mandatory court arbitration is used). Under local court rules, an insurance carrier or consumer can still call a doctor to testify and take a deposition if there are questions about his/her report – but the costs of doing so would be borne by the insurance company or the consumer who chose to have the doctor testify live.

## ARBITRATION FINDINGS INADMISSIBLE IN FUTURE LITIGATION

This bill provides that arbitration findings are not admissible in a subsequent lawsuit. This would reverse the results of a recent court decision holding that such arbitration findings are admissible in a later lawsuit even when the issues and parties are different. EXAMPLE: A consumer has a dispute with her carrier over a \$300 medical bill. She loses in the arbitration process and the carrier is not required to pay the bill. If the consumer decides to go after the negligent driver to recover that bill, the negligent driver can prevent the consumer from claiming the \$300 medical bill by using the results of the arbitration between the consumer and her own insurance carrier. So, in this example, a dispute with the consumer's own insurance carrier over a \$300 medical bill would prevent the consumer from pursuing that claim against the negligent driver who caused the accident.

### (4) Mandatory Reimbursement Election

If an insurance carrier pays a PIP (personal injury protection) claim, the carrier has three potential ways to recover the amount paid.

- 1) Insurance companies can enter into an agreement where two companies decide between themselves who is responsible for what bills.
- 2) The insurance company can have the consumer's attorney recover the amount for the insurance company. In such cases, the attorney is allowed a fee for recovering that money for the insurance company.
- 3) If the consumer chooses not to pursue her claim the insurance company can sue in the name of the insured to recover all amounts it has paid.

### What Does This Proposal Do?

This proposal would require the insurance carrier to decide 30 days from getting notice of a claim which method of recovery the carrier wants to use. If the carrier does not elect one of the methods of recovery within 30 days, the recovery would automatically take place under #2 above.

### Why is this Proposal Necessary?

Current statute requires insurance carriers to elect a manner of recovery. However, carriers are not doing so in a timely manner or are refusing to make an election. By simply not electing which method of recovery the carrier wants to use, insurance companies are getting around paying the consumer's attorney for recovering PIP amounts it has paid. Instead, insurance carriers are purposely waiting until the attorney negotiates a settlement for his/her consumer client. Then, the insurance carrier demands that it be repaid the full amount of PIP from the settlement, without having to pay the attorney a fee for the recovery made on its behalf. The attorney then gets paid nothing for recovering the PIP amounts paid by the insurance carrier. The attorney fee comes from the consumer's settlement even though part of the settlement went to the insurance carrier.

### Example

Consumer is in an automobile accident and gives notice (through her attorney) to her insurance carrier that she has a claim. Her insurance carrier pays \$15,000 in PIP benefits to cover a portion of her medical costs. Consumer's attorney contacts the carrier to find out which method of recovery they want you use to recover their \$15,000. The insurance carrier refuses disclose to the consumer's attorney which of the three methods of recovery it wants to use. In the meantime, the attorney negotiates a settlement for Consumer. Consumer and the at fault insurance carrier agree on a \$50,000 settlement. Now, the consumer's insurance carrier is allowed to take \$15,000 out of the Consumer's settlement to recover the \$15,000 paid. However, the insurance carrier is not required to pay the consumer's attorney for the recovery of its' \$15,000. So, the consumer pays the attorney fee for the recovery out of the Consumer's settlement. If the insurance company is benefiting, shouldn't it pay for that benefit?

NOTE: These "fact sheets" were written by the Oregon Trial Lawyers Association (OTLA).

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