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STUDENT ARTICLES

Credit Scoring in the Insurance Industry: Discrimination or Good Business?

J. Haakon Knutson *

I. Introduction

Insurance underwriting is based on gathering data about a risk and using it to evaluate that risk.¹ Evaluating risk is how insurance companies determine what price would adequately cover their potential risk.² Inherent in any evaluation scheme is risk discrimination, which, if not deemed unfairly discriminatory, is an accepted consequence of underwriting.³ For example, when evaluating an individual for life insurance, his or her age will significantly affect the amount of their premium—the older the client, the greater the risk.⁴ Similarly, when underwriting an auto insurance policy, a significant risk factor is whether the client lives in an urban area or a rural area—the more cars, the greater the risk of an accident.⁵

Over time, insurers developed complex methods for determining risk. In some instances, courts have found those methods to be unfair and highly discriminatory.⁶ Prior to the enactment of civil

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¹ Gary Hernandez et al., *Insurance Weblining and Unfair Discrimination in Cyberspace*, 54 SMU L. REV. 1953, 1953 (2001).

² *Id.*

³ See *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 290 (7th Cir. 1992) (“Risk discrimination is not race discrimination.”).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

rights laws such as the Fair Housing Act of 1968,⁷ insurance companies commonly drew red lines around poor or minority neighborhoods; anyone living within these lines would not qualify for various forms of personal insurance.⁸ The practice, known as “redlining,” is prohibited by various state and federal laws.⁹ Although redlining has been condemned, many regulators and consumer advocates believe the practice still continues, disguised as elaborate “risk evaluation formulas.”¹⁰

Pressure from state regulators forced many insurance providers to reexamine how they use an individual’s credit history for risk evaluation.¹¹ Numerous industry studies have searched for a compromise.¹² Many states have enacted legislation regarding credit scoring, either limiting the practice or prohibiting it altogether.¹³ In other states, however, insurers are allowed to use consumer credit information without constraint.¹⁴

Recently, there has been a surge in litigation regarding the use of credit scoring to evaluate risk. Plaintiffs typically allege that credit scoring is racially and economically discriminatory and therefore violates federal anti-discrimination laws. These cases raise two important questions: (1) whether plaintiffs can sue an insurance company in federal court in light of the McCarrin-Ferguson Act,¹⁵

⁷ Fair Housing Act, 42 U.S.C. § 3604 (2002).

⁸ Brian Grow & Pallavi Gogoi, *A New Way to Squeeze the Weak?*, BUS. WK., Jan. 28, 2002, at 92, available at 2002 WL 9359671.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² See, e.g., NAT’L ASS’N OF INS. COMM’RS, CREDIT REPORTS AND INSURANCE UNDERWRITING WHITE PAPER 1 (1996) (issuing recommendations regarding the use of credit reports and other indicators as underwriting tools) (available for purchase at http://www.naic.org/insprod/catalog_pub_whitepapers.htm) (on file with the *Loyola Consumer Law Review*).

¹³ See generally NAT’L ASS’N OF MUT. INS. COS., STATE INSURANCE SCORING LAWS—REGULATE, RESTRICT OR PROHIBIT (analyzing the laws of thirty-eight states that either regulate, restrict, or prohibit credit scoring), at <http://namic.org/state/credithistory.asp> (last updated Apr. 9, 2003).

¹⁴ See *id.*

¹⁵ See *Humana Inc. v. Forsyth*, 525 U.S. 299, 306 (1999) (holding that, under the McCarran-Ferguson Act, an insurance claim brought under a general federal statute must aid or enhance the state insurance regulation and not frustrate or disturb any state policy).

and (2) whether credit scoring discriminates against minorities.

This article explores the key issues surrounding the use of consumer credit records for insurance underwriting purposes. Part II outlines the practice of credit scoring and the reason some question it. It also introduces the structure of state insurance regulatory commissions and the application of the McCarrin-Ferguson Act. Part III discusses a current class action in Texas, alleging that credit-based risk analysis is a form of racial discrimination. Finally, Part IV of this article addresses the pros and cons of credit scoring and suggests possible solutions to ensure that consumers are not being penalized based on their race or low-income status.

II. Background

A. Insurance and Credit Scoring

Insurance companies that use credit scoring rely on consumer reports¹⁶ to evaluate risk.¹⁷ The insurance industry has long subscribed to the idea that there is a correlation not only between financial stability and risk but also between credit history and risk.¹⁸ In other words, people who have a favorable credit history are more stable and are, therefore, better risks.¹⁹ Proponents of credit scoring argue that a good credit history implies job stability and residential stability.²⁰ The belief that there is a significant correlation between credit history and risk has resulted in an increasing reliance on credit reports by insurance providers.²¹ In the automobile and homeowner insurance industries, for example, an estimated 92% of insurers use credit reports as a factor in calculating premiums.²²

¹⁶ See Fair Credit Reporting Act, 15 U.S.C. § 1681a(d) (2002) (defining “consumer report” to include “any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness . . . to be used in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for credit or insurance to be used primarily for personal, family, or household purposes . . .”).

¹⁷ NAT’L ASS’N OF INS. COMM’RS, *supra* note 12, at 2.

¹⁸ *Id.* at 4.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Grow & Gogoi, *supra* note 8, at 92.

Companies use the reports in different ways. Some assign significant weight to a credit report, while others use it as only one of many factors.²³

B. Credit Scoring and Discrimination

The growing trend of using credit reports to evaluate credit worthiness has recently caused concern among insurance regulators and consumer groups.²⁴ They believe that credit scoring could be used to discriminate against the poor, the elderly, and minorities.²⁵

The mounting debate begins with the complex algorithms insurance companies use to underwrite policies.²⁶ Opponents of credit scoring are concerned because most insurers refuse to disclose the mathematical formulas they use to evaluate a client's potential risk.²⁷ Opponents argue that it is impossible to determine whether these complex formulas really provide a way for insurance companies to determine the race of the insured.²⁸

Although the industry's enigmatic formulas raise concerns with critics, there are other discriminatory aspects of credit scoring. For example, many non-white immigrants and other minorities face discrimination due to their cultural biases against banks and other forms of credit.²⁹ Their financial portfolios may have distinctive traits that insurance companies use as a flag for denying them insurance or charging them a higher rate.³⁰

C. The McCarran-Ferguson Act

The insurance industry is regulated at the state level.³¹ Most

²³ Grow & Gogoi, *supra* note 8, at 92.

²⁴ *Id.*

²⁵ *Id.*

²⁶ MICHELLE MARTIN, *INSWEB, YOUR CREDIT AFFECTS YOUR INSURANCE*, at <http://www.insweb.com/learningcenter/articles/auto-credit.htm> (last visited May 22, 2003).

²⁷ Grow & Gogoi, *supra* note 8, at 92.

²⁸ See Kenneth R. Harney, *Is Computer Underwriting Fair to Minority Borrowers?*, CHI. TRIB., Dec. 8, 2002, at C1, available at 2002 WL 104021245.

²⁹ *Id.* at C2.

³⁰ *Id.*

³¹ MARTIN, *supra* note 26.

states regulate the use of credit reports in insurance underwriting in some way, but the laws vary.³² In Illinois, for example, although insurers are allowed to consider a client's credit, they "may not refuse to issue or renew a policy of insurance *solely* on the basis of a credit report."³³ Even if a credit report is used "in conjunction with other criteria," the report "may not include or be based upon the race, income, gender, religion, or national origin of the applicant or insured."³⁴ In Maryland, on the other hand, an insurer cannot "refuse to underwrite, cancel, or refuse to renew" a homeowner's insurance policy or automobile insurance policy based, "in whole or in part," on the credit history of the insured.³⁵

Prior to 1944, the United States Supreme Court consistently held that the business of insurance was not commerce and therefore was largely immune from federal regulation.³⁶ In 1944, however, the Court held that an insurance company doing business across state lines engages in interstate commerce, thus subjecting it to federal regulation.³⁷ The Court also decided that the Sherman Act applied to the business of insurance.³⁸ The ruling raised concerns that states were losing their grip on the regulation of the insurance industry and that the federal government was undermining state authority.³⁹

In response, Congress passed the McCarran-Ferguson Act in 1945,⁴⁰ which provided for state law primacy in the regulation of the insurance industry.⁴¹ It stated that, except for various antitrust laws,

³² See generally NAT'L ASS'N OF MUT. INS. COS., *supra* note 13.

³³ 215 ILL. COMP. STAT. 5/155.38(b) (2003).

³⁴ *Id.* at 5/155.38(c).

³⁵ MD. CODE ANN., INS. § 27-501(e-2) (2002).

³⁶ *Humana*, 525 U.S. at 306.

³⁷ *Id.* at 306 (citing *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944)).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ McCarran-Ferguson Act, Pub. L. No. , 59 Stat. 33-34 (codified at 15 U.S.C. §§ 1011-1015 (2002)).

⁴¹ The text of the McCarran-Ferguson Act provides the following:

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

“[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance”⁴²

D. The Supreme Court and Preemption

Federal action to prevent complained-of activities is precluded by McCarran-Ferguson if (1) the action is taken pursuant to a federal statute that does not specifically relate to the “business of insurance,” (2) the complained-of activities constitute the “business of insurance,” (3) the relevant state has enacted laws for the purpose of regulating the complained-of activities, and (4) the application of the federal statute would invalidate, impair, or supersede the state laws.⁴³

One year after Congress passed the McCarran-Ferguson Act, the Supreme Court noted in *Prudential Insurance Co. v. Benjamin* that, “[o]bviously Congress’ purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance.”⁴⁴ The Court concluded that state regulation of the insurance industry was in the best interest of the public and that Congress intended to “throw the whole weight of its power behind the state systems”⁴⁵

In 1999, the Supreme Court ruled in *Humana, Inc. v. Forsyth* that the McCarran-Ferguson Act did not preempt a plaintiff from bringing a claim under the federal RICO statute because the statute

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 U.S.C.A. 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State law. 15 U.S.C. § 1012 (2002).

⁴² *Id.*

⁴³ *Wexco Inc. v. IMC, Inc.*, 820 F. Supp. 194, 195 (M.D. Pa. 1993).

⁴⁴ *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946).

⁴⁵ *Id.* at 430.

complimented Nevada's insurance law.⁴⁶ The Court created a test for determining whether a general federal statute impairs a state insurance law, stating, "[w]hen federal law is applied in aid or enhancement of state regulation, and does not frustrate any declared state policy or disturb the State's administrative regime, the McCarran-Ferguson Act does not bar the federal action."⁴⁷

The Court supported its ruling by defining "impair" as "[t]o weaken, to make worse, to lessen power, diminish, or relax, or otherwise affect in an injurious manner."⁴⁸ Applying this definition to § 1012(b), the Court concluded that McCarran-Ferguson does not preempt a federal law that does not "directly conflict with state regulation," or "frustrate any declared state policy," or "interfere with a State's administrative regime."⁴⁹

Both *Humana* and *Prudential Insurance Co.* provide a basic foundation for courts to begin their interpretation and application of the McCarran-Ferguson Act. Circuit courts have reached conflicting conclusions, usually when they are faced with broad anti-discrimination statutes, such as the American with Disabilities Act of 1990 ("ADA"), the Civil Rights Act of 1968, or the Fair Housing Act ("FHA").⁵⁰ These statutes often overlap with state insurance laws and regulations prohibiting discriminatory practices, forcing courts to determine whether the federal statutes are preempted.

This question surfaced recently when the Seventh Circuit Court of Appeals held that the McCarran-Ferguson Act preempted claims against an insurer under the ADA.⁵¹ The court held that state

⁴⁶ *Humana*, 525 U.S. at 311-12.

⁴⁷ *Id.* at 303.

⁴⁸ *Id.* at 309-10 (quoting BLACK'S LAW DICTIONARY 752 (6th ed. 1990)) (alteration in original).

⁴⁹ *Id.* at 310.

⁵⁰ See Civil Rights Act of 1968, 42 U.S.C. §§ 1981-82 (2002) (prohibiting racial discrimination in contractual relations and the maintenance of property); Fair Housing Act, 42 U.S.C. § 3604 (2002) (prohibiting discrimination in the provision of services in connection with sale or purchase of a dwelling); Americans with Disabilities Act of 1990, 42 U.S.C. § 12182(a) (2002) (prohibiting disability discrimination in employment for qualified disabled individuals).

⁵¹ See *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 564 (7th Cir. 1999). The plaintiffs in *Doe* sued their medical insurer for violations of the ADA and a state law capping medical insurance policy benefits for medical care of Acquired Immune Deficiency Syndrome ("AIDS") or AIDS-related conditions. See *id.* at 557. The Seventh Circuit held that the caps for care of AIDS or AIDS-related conditions did not violate the ADA provision prohibiting discrimination in public

insurance commissioners, and not the federal government, should be responsible for determining whether health insurance providers should be able to set limits on the benefits provided to AIDS victims.⁵²

Similarly, in *Ford v. Schering-Plough Corp.*, the Third Circuit Court of Appeals dismissed part of an ADA claim, holding that the federal courts were “not equipped to become the watchdog of the insurance business”⁵³ In contrast, the Sixth Circuit Court of Appeals, in *Nationwide Mutual Insurance Co. v. Ciseros*, held that additional remedies provided by the FHA did not invalidate, impair, or supersede Ohio insurance law and were not preempted by McCarran-Ferguson.⁵⁴

III. Discussion

A. Current Class Action Suit in the Fifth Circuit

The McCarran-Ferguson Act is in a precarious position when challenged under federal anti-discrimination statutes. The Act allows states to regulate the insurance industry.⁵⁵ But, Congress also intended for the Equal Protection Clause and other federal legislation to prevent discriminatory practices in any business, even if regulated by a state agency.⁵⁶ Although it is unlikely for an insurance company to avoid federal anti-discrimination laws if its conduct is flagrantly discriminatory, the question becomes more difficult when its conduct is ambiguous, a situation that has surfaced in the Fifth Circuit Court of Appeals in Texas.

Recently, in *Dehoyos v. Allstate Corp.*, a class of plaintiffs from Texas and Florida sued Allstate Property and Casualty Insurers

accommodations. *See id.* at 561. Further, the court held that the interpretation of the ADA to prohibit such caps was barred by the McCarran-Ferguson Act. *See id.* at 564.

⁵² *Doe*, 179 F.3d at 564.

⁵³ *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612 (3rd Cir. 1998). In *Ford*, the plaintiff sued her former employer and insurance company alleging that the disparity between insurance disability benefits for mental and physical disabilities violated ADA. *Id.* at 603.

⁵⁴ *Nationwide Mut. Ins. Co. v. Ciseros*, 52 F.3d 1351, 1363 (6th Cir. 1995).

⁵⁵ *See* quotation *supra* note 41.

⁵⁶ *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 295 (7th Cir. 1992).

in the District Court for the Western District of Texas.⁵⁷ They alleged that Allstate uses credit scoring in a racially discriminatory manner that results in charging non-Caucasians higher rates.⁵⁸ The plaintiffs based their complaint on the theory that Allstate uses a secret credit-based formula to screen its applicants.⁵⁹ They contended that Allstate's credit scoring system places non-Caucasian applicants in higher rate policies and "target[s] non-Caucasians for the sale of more expensive policies than the policies sold to similarly situated Caucasians."⁶⁰ The complaint alleged⁶¹ that Allstate discriminated against non-Caucasians in violation of the right to be free of racial discrimination in entering into contracts,⁶² the right to be free of racial discrimination in buying real property,⁶³ and the FHA.⁶⁴

Allstate filed a motion to dismiss on three grounds: (1) that the McCarran-Ferguson Act preempted the plaintiffs' cause of action; (2) that the complaint was improper under the *Buford* abstention doctrine; and (3) that the complaint failed to establish that Allstate engaged in intentional discrimination.⁶⁵ After dismissing the defendant's second and third arguments, the district court confronted Allstate's McCarran-Ferguson argument.⁶⁶

The court began its McCarran-Ferguson analysis with the requirements outlined in *Humana*.⁶⁷ Because the federal statutes addressed were not specifically enacted for the purpose of regulating insurance, the issue turned on "whether the application of these federal anti-discrimination laws to plaintiffs' claims would 'invalidate, impair, or supersede' Texas and Florida state laws

⁵⁷ *Dehoyos v. Allstate Corp.*, No. 02-50721, 2002 WL 1491650, at *1 (W.D. Tex. Apr. 5, 2002).

⁵⁸ *Id.*

⁵⁹ *Id.* Allstate did not dispute that it refuses to disclose the credit algorithms it uses to factor an applicant's risk. *Id.*

⁶⁰ *Id.*

⁶¹ *Dehoyos*, 2002 WL 11491650, at *1.

⁶² *See* 42 U.S.C. § 1981.

⁶³ *See id.* § 1982.

⁶⁴ *See id.* § 3604.

⁶⁵ *Dehoyos*, 2002 WL 11491650, at *1.

⁶⁶ *Id.*

⁶⁷ *Id.* at *2.

regulating insurance.”⁶⁸

Allstate argued that the plaintiffs’ claims were preempted by McCarran-Ferguson for the following reasons: “(1) both states have comprehensive insurance regulatory schemes and laws prohibiting discrimination in insurance; (2) state discrimination in insurance laws provides no private right of action; (3) state choices about the proper conduct of the business of insurance would be displaced; and (4) Texas and Florida insurance departments are investigating the effect of credit scoring on insurance.”⁶⁹ In addition, Allstate contended that the Seventh Circuit’s decision in *Doe v. Mutual of Omaha* should be the standard used to decide its motion to dismiss.⁷⁰ In *Doe*, the issue was whether the plaintiffs were protected under the ADA from the defendant insurer’s plan to impose lifetime benefit caps on health insurance policies sold to individuals with AIDS.⁷¹ The court ruled that the McCarran-Ferguson Act preempted the plaintiff’s claims because, in general, federal courts have been reluctant to meddle with insurance rates or any matter related to the content of an insurance policy when state law clearly oversees that area of insurance regulation.⁷² The district court in *Dehoyos* disagreed with the defendant’s argument, distinguishing *Doe* because the issue before it was not about the contents of the actual policy, but rather the access to the insurance.⁷³

B. Effect of *Dehoyos*

To date, the Fifth Circuit Court of Appeals has not ruled on the motion to dismiss *Dehoyos*. Whatever the outcome, the decision will have a profound effect on the insurance industry and consumers. Due to the significance of the case, several *amicus curiae* briefs have been filed on behalf of both parties. Allstate’s position is endorsed by the Chamber of Commerce of the United States, and the plaintiffs received support from the National Rainbow/PUSH Coalition and

⁶⁸ *Dehoyos*, 2002 WL 11491650, at *2.

⁶⁹ *Id.*

⁷⁰ *Id.* at *4. See also *Doe*, 179 F.3d at 564, cert. denied, 528 U.S. 1106 (2000) (holding that an insurance policy with a cap on AIDS coverage did not violate Title III, the public accommodations provision of the ADA).

⁷¹ *Doe*, 179 F.3d at 560.

⁷² *Id.* at 564.

⁷³ *Dehoyos*, 2002 WL 1491650, at *4.

The League of United Latin American Citizens.⁷⁴

1. Undermining State Legislation

In its amicus brief, the Chamber of Commerce of the United States raises several concerns about the effect of a ruling against Allstate. The Chamber argues that, if it allows the class action to continue, the Fifth Circuit will be taking the teeth out of the McCarran-Ferguson Act.⁷⁵ If the plaintiffs are successful, the Chamber of Commerce argues, the entire insurance industry will be at the mercy of one lay jury's decision.⁷⁶ Since plaintiffs are a nationwide class, all fifty states would be subjected to new ratemaking requirements, including states that have already passed legislation authorizing insurance companies to use credit scoring to evaluate risk.⁷⁷

The Chamber of Commerce also expresses its concern that many states, like Texas and Florida, currently investigate credit scoring and its potential dangers.⁷⁸ Since some of the states have not reached a determination about the possible discriminatory consequences of credit scoring, it would be improper for the court to obviate their investigation.⁷⁹ In this instance, the Chamber of Commerce argues, federal courts appear to be treading near the boundaries of state legislative and regulatory provinces.⁸⁰

Last, Allstate and the Chamber of Commerce argue that the "procedural characteristics" of the *Dehoyos* complaint are substantially different than the "procedural characteristics" available in Texas and Florida.⁸¹ For example, neither state's insurance statutes permit a private right of action for policyholders to challenge unfair

⁷⁴ See Brief of *amicus curiae* in support of Appellants by the Chamber of Commerce of the United States at 1, *Dehoyos v. Allstate Corp.*, 2002 WL 1491650, 1 (W.D. Tex. Apr. 5, 2002) (No. 02-50721) [hereinafter Chamber of Commerce Brief].

⁷⁵ Chamber of Commerce Brief, *supra* note 74, at 2–3.

⁷⁶ *Id.* at 3.

⁷⁷ *Id.*

⁷⁸ *Id.* at 10–11.

⁷⁹ *Id.*

⁸⁰ Chamber of Commerce Brief, *supra* note 74, at 12.

⁸¹ *Id.* at 10–11.

discrimination in pricing or other ratemaking issues.⁸² Policyholders who have complaints regarding pricing must go through public administrative channels rather than pursue private judicial relief.⁸³ If, as the Chamber of Commerce argues, *Dehoyos* was about insurance pricing, then Texas and Florida insurance regulations prohibit the judiciary from interfering with those ratemaking decisions.⁸⁴

2. Pricing or Policy Issue?

The PUSH Coalition and the League of United Latin American Citizens agree with the plaintiffs that the real issue in *Dehoyos* is not how to determine insurance rate structures, but how to address race-based insurance policies and their seemingly inflated premiums.⁸⁵ In its brief, the PUSH Coalition contends that credit scoring is not simply a pricing tool used in the “business of insurance,” which would be protected under the McCarran-Ferguson Act.⁸⁶ The PUSH Coalition argues that “Allstate is using credit scoring as an insidious and systematic means of racial discrimination,” and therefore, Allstate cannot avoid the plaintiffs’ federal claims.⁸⁷

In its brief, Allstate repeatedly argues that federal courts are not equipped to handle the complex problem of insurance rate-making.⁸⁸ The PUSH Coalition countered Allstate’s conclusion, arguing that this is not an issue that dealing with pricing or specific

⁸² Chamber of Commerce Brief, *supra* note 74, at 11.

⁸³ *Id.*

⁸⁴ *Id.* at 11; *see also* Fla. Stat. §§ 624.310, 626.9571 to 626.9581; TEX. INS. CODE ANN. art. 21.21-6.

⁸⁵ *See* Brief of *amicus curiae* in support of Appellees by National Rainbow/Push Coalition and League of United Latin American Citizens at 2, *Dehoyos v. Allstate Corp.*, 2002 WL 1491650, at *1 (W.D. Tex. Apr. 5, 2002) (No. 02-50721).

⁸⁶ *Id.* at *3.

⁸⁷ *Id.*

⁸⁸ *See* Brief for the Appellant at 18, *Dehoyos v. Allstate Corp.*, 2002 WL 1491650, at *1 (W.D. Tex. Apr. 5, 2002) (No. 02-50721) (“State legislatures have expressly delegated the function of determining what is ‘unfair’ and policing discriminatory rate making practices to expert insurance regulators.” “Insurance rates, and their regulation, are well known topics of extensive legal, social and political debate, and require legislative or quasi-legislative judgments.”).

terms within an insurance policy.⁸⁹ Rather, the issue is discrimination, and “federal courts are well equipped to address racial discrimination in any form.”⁹⁰

IV. Analysis

Dehoyos is essentially a roadmap for the various issues raised by the widespread use of credit scoring. The threshold issue is whether the McCarran-Ferguson Act prohibits class action lawsuits alleging federal discrimination violations. After the court rules on the issue of forum, the focus shifts to the process of credit scoring and whether it promotes racial or economic discrimination.

A. The Courts Are Likely to Allow Federal Civil Rights Claims

Allstate, like other major insurers, faces a difficult battle in its attempt to invoke preemption protection in cases like *Dehoyos*. Because of their blatantly racist practices in the past, the insurance industry must overcome the public’s distrust.⁹¹ Arguments in favor of preemption focus on protecting states’ rights. But, in *Dehoyos*, that argument weakens because the federal statutes appear to supplement the state insurance statutes, rather than conflict with them. Also, the states do not seem to mind. Although state officials in Texas and Florida are investigating the practice of credit scoring, no state official filed an amicus brief on behalf of Allstate to argue that federal remedies would frustrate state policy.⁹²

Furthermore, the defendants in *Dehoyos* rely on the Seventh Circuit’s decision in *Doe* to support their request for preemption, but *Doe* can be distinguished. In *Doe*, the court ruled that a cap on health insurance benefits is a pricing issue, which should be determined by the state insurance commission.⁹³ The court carefully distinguished depriving individuals of insurance entirely and limiting the benefits they receive.⁹⁴ In *Dehoyos*, the Fifth Circuit has been asked to decide whether credit scoring is a pricing issue, which would be determined

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Grow & Gogoi, *supra* note 8, at 92.

⁹² *Dehoyos*, 2002 WL 1491650, at *3 (noting that state officials did not appear or submit arguments on behalf of the state or the defendants).

⁹³ *Doe*, 179 F.3d 557, 560 (7th Cir.1999), *cert. denied*, 528 U.S. 1106 (2000).

⁹⁴ *Id.*

by the state, or a discrimination issue, which would be governed by federal law. The plaintiffs' discrimination claims in *Dehoyos* "deal with discriminatory conduct that affects access to insurance rather than the content of the policies."⁹⁵ Unlike the claims in *Doe*, the plaintiffs in *Dehoyos* do not challenge any specific benefits or coverage of any Allstate insurance policy.⁹⁶

B. Effect on Consumers and the Insurance Industry

Credit scoring is being debated in various forums across the country. Insurance supporters argue that they have proved that there is a correlation between poor credit ratings and a higher percentage of claims. Consumers argue that a credit blemish, like a late car payment or bankruptcy, has no effect on their ability to safely operate a car or increase the odds of their home being damaged.⁹⁷ The lack of independent studies makes it difficult to confirm either position.⁹⁸ Further, the secrecy surrounding credit scoring makes an impartial study difficult—if the factors determining the outcome of a study are secret, then there can be little faith in the results.

The issue boils down to a balancing act—weighing anti-discrimination statutes against a potentially valuable underwriting tool. Some major insurance companies claim to have reduced rates for 63% of their policy holders by using credit information.⁹⁹ They argue that their credit rating systems reward financially responsible people, regardless of their income level.¹⁰⁰ Yet, what about the individual who is undergoing a divorce—an individual whose financials do not accurately reflect his situation? Is there any reason to charge this person more for home insurance? Is their home more likely to suffer storm damage or flooding due to a divorce?¹⁰¹ Questions like these will continue to arise until courts and state legislatures find a balance between fairness and value.

⁹⁵ Brief for Appellees at 21, *Dehoyos v. Allstate Corp.*, 2002 WL 1491650 (W.D. Tex. Apr. 5, 2002) (No. 02-50721).

⁹⁶ *Id.*

⁹⁷ Grow & Gogoi, *supra* note 8, at 92.

⁹⁸ NAT'L ASS'N OF INS. COMM'RS, *supra* note 12, at 12.

⁹⁹ Grow & Gogoi, *supra* note 8, at 92 (citing Progressive Casualty Insurance as the source of the 63% claim).

¹⁰⁰ *Id.*

¹⁰¹ FLA. STAT. ANN. § 626.9541(g)(2) (2003).

V. Conclusion

Credit scoring continues to be a hot topic in all areas of insurance. Consumers are pushing for information about how they are evaluated by underwriters. With pressure being applied in federal court and more litigation on the horizon, the insurance industry cannot afford to ignore the issue of credit scoring. Unfortunately, evaluating a potential customer is inherently discriminatory, to some extent, due to the nature of underwriting. But the divide should not be entrenched along racial or class lines. As more research is done and more consumer pressure is applied, various state legislatures will be called upon to address the issue to protect the interests of both consumers and their insurers.
