

STATE OF MICHIGAN
COURT OF APPEALS

INSURANCE INSTITUTE OF MICHIGAN,
HASTINGS MUTUAL INSURANCE
COMPANY, FARM BUREAU GENERAL
INSURANCE COMPANY, FRANKENMUTH
CASUALTY INSURANCE, WALTER
STAFFORD, JR., and MICHAEL FLOHR,

FOR PUBLICATION
August 21, 2008

Plaintiffs-Appellees,

and

MICHIGAN INSURANCE COALITION and
CITIZENS INSURANCE COMPANY OF
AMERICA,

Intervening Plaintiffs-Appellees,

v

COMMISSIONER, FINANCIAL & INSURANCE
SERVICES, DEPARTMENT OF LABOR &
ECONOMIC GROWTH,

No. 262385
Barry Circuit Court
LC No. 05-000156-CZ

Defendant-Appellant.

Advance Sheets Version

Before: White, P.J., and Zahra and Kelly, JJ.

ZAHRA, J. (*concurring in part and dissenting in part*).

This case presents challenging issues of administrative and insurance law over which this panel has struggled, as shown by the fact that we resolve this appeal by issuing three opinions—a very rare occurrence in this Court. I respectfully dissent from the decision to vacate the opinion and order of the lower court. I conclude that the lower court properly entertained plaintiffs’ original action challenging the legality of the Office of Financial and Insurance Services (OFIS) rules. While I agree that the lower court erred in rejecting the record created by the OFIS and by creating its own record, I nonetheless conclude that this error was harmless because the issue resolved by the lower court was a purely legal question—i.e., whether the OFIS exceeded its statutory authority in promulgating the rules that are the subject of this litigation. I conclude as a matter of law that the OFIS exceeded its statutory authority in promulgating its administrative

rules and, thus, the lower court properly concluded that these rules are illegal and invalid. I would affirm the opinion and order of the lower court.

I. Plaintiffs Properly Asserted an Original Action Pursuant to § 64 of Chapter 3 of the Administrative Procedures Act, MCL 24.264, to Contest the Validity of Rules Promulgated by the OFIS

A. MCL 500.244(1) Does Not Limit Plaintiffs' Remedy to an Action Under Chapter 6 of the APA

I agree with Judge White that MCL 500.244(1) does not bar plaintiffs from asserting a challenge to the validity of the OFIS rules under chapter 3 of the Administrative Procedures Act (APA). Section 244(1) of the Insurance Code, MCL 500.244(1), provides that “[a] person aggrieved by a final order, decision, finding, ruling, opinion, rule, action or inaction provided for under this act may seek judicial review in the manner provided for in chapter 6 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.301 to 24.306.”

Initially, I find that use of the word “may” to describe the availability of judicial review does not, in and of itself, compel the conclusion that the Legislature did not intend an action under chapter 6 of the APA be the exclusive remedy available to plaintiffs. A person aggrieved by a rule may elect to seek judicial review or may elect to not seek judicial review. The exclusivity of a review process is independent of an aggrieved party’s determination whether to pursue a remedy. See *Rinas v Mercer*, 259 Mich App 63, 69; 672 NW2d 542 (2003) (mandatory language cannot be used to address conduct that is elective). However, the absence of express language directing that this remedy be an exclusive one is, in my opinion, dispositive of this question. A plain reading of § 244(1) supports plaintiffs’ position. Had the Legislature intended § 244(1) to define an exclusive remedy, it would have expressly stated its conclusion. For example, the Legislature could have simply added the words “the exclusive remedy for” at the beginning of § 244(1) and replaced the words “may seek “ with the words “is limited to” and there would be no question that the Legislature intended this section to provide the exclusive remedy available to plaintiffs.

The Legislature has demonstrated in other areas of the law its willingness to use clear and unambiguous language to establish exclusive remedies. See MCL 418.131(1) (workers’ compensation exclusive remedy provision); MCL 211.78k (General Property Tax Act review provision). The Legislature’s choice of the permissive term “may,” coupled with its choice to exclude definitive and mandatory language expressly establishing the remedy provided in § 244(1) as an exclusive remedy, supports the conclusion that § 244(1) of the Insurance Code does not define the exclusive remedy available to a party challenging the validity of a rule promulgated by the OFIS.

Further, the language of chapter 6 of the APA indicates that it is the preferred vehicle for review of “contested cases,” as that term is defined in the APA. MCL 24.203(3); see also MCL 24.301 to MCL 24.306. A challenge to the validity of a rule, however, is not accomplished through contested case proceedings. *Michigan Ass’n of Home Builders v Dep’t of Labor & Economic Growth Director*, 481 Mich 496; 750 NW2d 593 (2008). Thus, the remedy provided

in § 244(1) of the Insurance Code does not define the exclusive remedy available to a party when challenging the validity of a rule promulgated by the OFIS.

Judge Kelly relies on *Northwestern Nat'l Cas Co v Comm'r of Ins*, 231 Mich App 483; 586 NW2d 563 (1998), to support the conclusion that § 244(1) of the Insurance Code limits challenges to the validity of administrative rules to a petition for review. In *Northwestern Nat'l Cas*, two insurance companies appealed an administrative ruling made by the insurance commissioner by filing both a petition for review under § 244(1) of the Insurance Code, MCL 500.244(1), and an original action in the circuit court. The circuit court dismissed the original action, concluding that the insurance companies were limited to a petition for review under § 244(1). This Court affirmed.

Northwestern Nat'l Cas is distinguishable primarily because it arose from the exercise of quasi-judicial adjudicative functions of the OFIS, i.e., an action addressing the OFIS commissioner's interpretation and application of administrative rules. By contrast, this case involves a challenge to the "legislative" powers of the OFIS, i.e., a challenge to the validity of the rules created by the OFIS.¹ This distinction is critical. Deference must be given to the adjudicative findings of administrative agencies. *VanZandt v State Employees Retirement Sys*, 266 Mich App 579, 588; 701 NW2d 214 (2005). However, the validity of an administrative rule is resolved as a matter of law by the courts. See LeDuc, Michigan Administrative Law, § 8.13, pp 576-577. Consistent with this notion, our Supreme Court recently held that "an agency's interpretation of a statute is entitled to 'respectful consideration,' but courts may not abdicate their judicial responsibility to interpret statutes by giving unfettered deference to an agency's interpretation. Courts must respect legislative decisions and interpret statutes according to their plain language." *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 93; 754 NW2d 259 (2008). Thus, in reviewing quasi-legislative actions of an administrative agency, there is no sound reason to implement the procedures dictated by chapter 6 of the APA. *Id.*²

I also see no merit in the argument that the lower court erred in accepting plaintiffs' original action because § 244(1) of the Insurance Code makes express reference to challenges to a "rule." Where a party contests the application of a rule, review is appropriate by the filing of a contested case under chapter 6 of the APA, as provided in § 244(1) of the Insurance Code. That is not the case here. Again, this action involves a challenge to the validity of the administrative rules, not a challenge to the applicability of them.

¹ In *Bio-Magnetic Resonance, Inc v Dep't of Pub Health*, 234 Mich App 225, 233 n 7; 593 NW2d 641 (1999), this Court noted that *Northwestern Nat'l Cas* involved a judicial or quasi-judicial agency action.

² Because *Northwestern Nat'l Cas* is procedurally and factually distinguishable from the present case, I am not troubled by the failure of the panel in *Northwestern Nat'l Cas* to indicate that an original action is proper where, as here, the action seeks to have administrative rules declared invalid, illegal, or unenforceable. The question simply was not before that panel.

B. Plaintiffs Were Not Required to Exhaust Administrative Remedies Before Seeking Review in the Circuit Court Pursuant to Chapter 3 of the APA

Section 64 of chapter 3 of the APA, MCL 24.264, addresses actions for a declaratory judgment to determine the validity of administrative rules, and provides:

Unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule may be determined in an action for declaratory judgment when the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The action shall be filed in the circuit court of the county where the plaintiff resides or has his principal place of business in this state or in the circuit court for Ingham County. The agency shall be made a party to the action. *An action for declaratory judgment may not be commenced under this section unless the plaintiff has first requested the agency for a declaratory ruling and the agency has denied the request or failed to act upon it expeditiously.* This section shall not be construed to prohibit the determination of the validity or applicability of the rule in any other action or proceeding in which its invalidity or inapplicability is asserted. [Emphasis added.]

Defendant maintains that plaintiffs cannot pursue this action because plaintiffs did not first request a declaratory ruling from the OFIS. Notwithstanding the express language calling for the exhaustion of administrative remedies before initiating an action for a declaratory judgment, this Court has long recognized an exception to the requirement that a party exhaust administrative remedies before filing suit in the circuit court. See *L & L Wine & Liquor Corp v Liquor Control Comm*, 274 Mich App 354, 358-359; 733 NW2d 107 (2007) (recognizing an exception to the exhaustion requirement where exhaustion before the administrative agency would be futile); *Nalbandian v Progressive Michigan Ins Co*, 267 Mich App 7, 10 n 2; 703 NW2d 474 (2005) (rejecting the insurer's claim that the plaintiff was required to exhaust administrative remedies because to do so would have been futile); *Susan R Bruley Trust v Birmingham*, 259 Mich App 619, 627; 675 NW2d 910 (2003) (holding litigants will not be made to pursue an administrative process when only the courts have the authority to resolve the controlling issue); *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 52-54; 620 NW2d 546 (2000) (recognizing the futility exception where exhaustion before the administrative agency would be futile); *Manor House Apartments v City of Warren*, 204 Mich App 603, 605; 516 NW2d 530 (1994) (holding that the taxpayer was not required to exhaust administrative remedies before the Tax Tribunal because such action would have been futile); *Turner v Lansing Twp*, 108 Mich App 103, 108; 310 NW2d 287 (1981) (holding exhaustion of administrative remedies is not required where it is clear that appeal to an administrative agency is "an exercise in futility and nothing more than a formal step on the way to the courthouse"); *Sterling Secret Service, Inc v Dep't of State Police*, 20 Mich App 502, 511; 174 NW2d 298 (1969) (holding that requiring the plaintiff to utilize the APA to have the defendant revoke its rules "would have been a vain and useless act"). Following this long line of cases, plaintiffs in this case were not required to ask the OFIS to declare its newly enacted rules illegal and invalid. Simply put, to do so would have been "a vain and useless act." *Id.*

I respectfully disagree with Judge Kelly's apparent conclusion that she may ignore the many cases recognizing the futility exception to the requirement that one must exhaust administrative remedies before initiating an action for judicial review under the APA. Many of these cases were decided after November 1, 1990. Thus, we are bound pursuant to MCR 7.215(J) to follow the many cases recognizing this exception. The inconsistency between the APA and the judicially created futility exception must be resolved, if at all, by a conflict panel of this Court or by our Supreme Court. It is simply beyond the power of this panel to reverse or ignore this well-established doctrine.

Here, the futility in attempting to seek administrative review from the OFIS is obvious. Plaintiffs are challenging the validity of the administrative rules and the OFIS is powerless to pass on the validity of its rules. As noted in *LeDuc*, Michigan Administrative Law, § 8:13, pp 576-577:

. . . Section 63 empowers an agency to issue a declaratory ruling only as to the applicability of a rule, not as to its validity. The reason for this is obvious, an agency is unlikely to find its own rules invalid and those rules are presumed to be valid anyway. Courts will ultimately determine the validity of a rule. Section 64 thus specifically empowers a court to hear an action for a declaratory judgment as to either the validity or applicability of a rule. *The exhaustion requirement of Section 64 (requiring resort first to the submission of a declaratory ruling) applies only when a plaintiff wishes to challenge the applicability of a rule to an actual set of facts. Section 63 does not authorize an agency to issue a ruling on the validity of rules, so there is nothing to exhaust.* [Emphasis added.]

Moreover, consistent with Judge White's observation that "[p]laintiffs are not aggrieved by the rules because the rules have not yet been applied to them," *ante* at 12, plaintiffs could not have sought a declaratory ruling from the OFIS. MCL 24.263 controls requests for declaratory rulings from agencies and provides that "[o]n request of an interested person, an agency may issue a declaratory ruling as to the applicability to *an actual state of facts* of a statute administered by the agency or of a rule or order of the agency." (Emphasis added.) In this regard, I agree with *Michigan Ass'n of Home Builders v Director of Dep't of Labor & Economic Growth*, 276 Mich App 467, 480-481; 741 NW2d 531 (2007), vacated in part on other grounds 481 Mich 496 (2008), in that

[a] plain reading of MCL 24.263 requires that an interested person have "an actual state of facts" to bring before the agency for its consideration. Here, plaintiff did not have an "actual state of facts" to bring before the [Department of Labor and Economic Growth]. Therefore, plaintiff could not seek a declaratory ruling before seeking judicial relief.

For these reasons, I conclude that plaintiffs were not required to seek review by the OFIS before initiating this action.

II. The Circuit Court Correctly Determined that the Rules Promulgated by the OFIS are Illegal and Invalid

A. *Michigan Ass'n of Home Builders v Director of Dep't of Labor & Economic Growth*

Preliminarily, I am compelled to address our Supreme Court's recent memorandum opinion in *Michigan Ass'n of Home Builders, supra*. There, our Supreme Court concluded that a circuit court reviewing the validity of rules created by an administrative agency must limit its review to the agency record. In the present case, the circuit court erred because it did not limit its review to the agency record. I nonetheless conclude that this error was harmless, because the circuit court made a purely legal ruling that was not based on any record. Rather, the circuit court's conclusions, as well as my own, are based exclusively on the statutes granting the OFIS its rulemaking authority and the statutes that permit insurers to file and use rates in Michigan. Here, plaintiffs are asserting a purely legal challenge to the process implemented by the OFIS. For this reason, I conclude that the lower court's error in expanding the record is harmless and does not require reversal.

B. Standard of Review

The standard of review applicable to this case is found in *Chesapeake & O R Co v Pub Service Comm*, 59 Mich App 88, 98-99; 228 NW2d 843 (1975), and adopted by our Supreme Court in *Luttrell v Dep't of Corrections*, 421 Mich 93, 100; 365 NW2d 74 (1984) (the "*Luttrell* standard"):³

Where an agency is empowered to make rules, courts employ a three-fold test to determine the validity of the rules it promulgates: (1) whether the rule is within the matter covered by the enabling statute; (2) if so, whether it complies with the underlying legislative intent; and (3) if it meets the first two requirements, when [sic] it is neither arbitrary nor capricious.

C. The Administrative Rules Promulgated by the OFIS

The OFIS enacted five administrative rules that, when applied together, prohibit insurers from using insurance scores as a rating factor for the issuance of personal insurance in Michigan. Mich Admin Code, R 500.2151 through 500.2155. The OFIS defined "insurance score" to mean "a number, rating, or grouping of risks that is based in whole or in part on credit information for the purposes of predicting the future loss exposure of an individual applicant or insured." R

³ As an ancillary matter, I agree with the observations of Justice Ryan in his concurring opinion in *Luttrell, supra*. There is no authority for the standard of review created in *Chesapeake & O R Co, supra*, and embraced by our Supreme Court in *Luttrell*. In my opinion, the validity of rules promulgated by administrative agencies presents a pure legal question that courts ought to review de novo as a matter of law. However, we are bound to accept *Luttrell* until the Supreme Court rules otherwise.

500.2151(1). The OFIS required all insurers to adjust their base rates on all personal insurance through the use of a formula that eliminated all insurance score discounts. R 500.2154.

As a result of the implementation of these rules, insurers are required to provide a rate discount to policyholders with lower insurance scores and increase the rates paid by policyholders who have higher insurance scores.

D. The Rules Promulgated by the OFIS Fail to Satisfy the *Luttrell* Standard

In the broadest sense, the rules under review do not offend the first prong of the *Luttrell* standard. MCL 500.210 provides that “[t]he commissioner shall promulgate rules and regulations in addition to those now specifically provided for by statute as [s]he may deem necessary to effectuate the purposes and to execute and enforce the provisions of the insurance laws of this state” To the extent that the rules challenged by the plaintiffs relate to matters the commissioner deemed necessary to effectuate the insurance laws of Michigan, the rules survive judicial review.

The rules fail the second prong of the *Luttrell* standard because they do not comply with the underlying legislative intent behind the statutes governing insurance rates in Michigan. Courts ascertain and give effect to the Legislature’s intent by reviewing the language of the statute under review. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). Courts “must look at the specific statutory language and, if it is “clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written.”” *Diamond v Witherspoon*, 265 Mich App 673, 684; 696 NW2d 770 (2005), quoting *Erb Lumber, Inc v Gidley*, 234 Mich App 387, 392; 594 NW2d 81 (1999), quoting *USAA Ins Co v Houston Gen Ins Co*, 220 Mich App 386, 389; 559 NW2d 98 (1996). “Furthermore, ‘a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.’” *Diamond, supra* at 685, quoting *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

The rules promulgated by the OFIS are inconsistent with the legislative intent as determined from the express language of the ratemaking and rate-review provisions of the Insurance Code because the Michigan Legislature has made it clear that the OFIS cannot (1) invalidate on an industry-wide basis rates that are deemed valid under the process provided in the Insurance Code, and (2) order through its rulemaking authority rate reductions without first finding through an administrative hearing that the insurer’s rates are excessive.

1. The OFIS Cannot Invalidate on an Industry-Wide Basis Rates that are Deemed Valid Under the Process Provided in the Insurance Code

The Michigan Legislature has enacted a system that permits Michigan insurance companies to implement their insurance rates without preapproval by the OFIS. For individual home and automobile insurance under chapter 21 of the Insurance Code, insurers may implement their rate plans immediately upon filing them with the OFIS. MCL 500.2106. For casualty and other insurance available under chapter 24 of the Insurance Code and property and other insurance available under chapter 26 of the Insurance Code, there is a 15-day waiting period between the date rate plans are filed and the date the rate plans may be implemented. MCL

500.2408; MCL 500.2608. If the OFIS fails to disapprove the rate plans or seek an extension of the waiting period within the initial 15-day waiting period, the rate plans are deemed approved and valid. For all rate plans filed under chapter 21 of the Insurance Code and all rate plans that are deemed approved after expiration of the applicable waiting periods under chapters 24 and 26 of the Insurance Code, the OFIS may challenge particular filings only through an administrative hearing against the individual insurer implementing the contested rates. MCL 500.2114, 500.2115, 500.2418, 500.2420, 500.2618, 500.2620. Thus, the Legislature limited the authority of the OFIS to challenge rates that are implemented pursuant to the legislative process. If the OFIS wants to challenge such rates it may do so only by initiating an administrative hearing against the insurer whose rate plan is being challenged.

Here, the OFIS has utilized its rulemaking authority to implement an industry-wide prohibition on the use of insurance scoring which, in effect, invalidates otherwise validly filed rate plans for insurers across Michigan. The OFIS lacks the authority to implement such rules because they are inconsistent with the express statutory ratemaking provisions duly enacted through the legislative process.

Recognizing its inability to reduce otherwise valid rates through the implementation of rules, the OFIS disingenuously argues that the rules do not invalidate existing approved rate filings. However, the OFIS cannot deny that the purpose, intent, or desired effect of the OFIS rules is to abolish the use of insurance scores (consideration of the insured's credit report) in the ratemaking process. However, pursuant to the ratemaking process provided under the Insurance Code, many rates on file with the OFIS permit an insurer to consider an insured's credit history to establish the insured's policy rate. In no uncertain terms, the OFIS rules, if deemed valid, would render invalid existing rate filings for all insurers who use insurance scoring to determine their rates.

The OFIS also argues that every aggrieved insurer can ignore the rules and thereby force the OFIS to conduct a contested case hearing. Thus, the OFIS concludes, it has not circumvented the process for establishing rates provided in the Insurance Code. There is no merit to this claim. Any hearing conducted by the OFIS would presume that the rules challenged by plaintiffs in this case are valid and enforceable. The sum and substance of the hearing would be a review of whether the insurer utilized insurance scoring as that term is defined in R 500.2151(1). If the answer is in the affirmative, the insurer loses and is subject to the penalties for violating the rules. To the extent the OFIS believes that insurance scoring is not a permissible ratemaking factor, the OFIS is obligated to initiate a contested case against an individual insurer, thereby allowing the insurer to establish whether its rates are excessive, inadequate, or unfairly discriminatory under the Insurance Code.

2. The OFIS Cannot Order Through its Rulemaking Authority Rate Reductions Without First Finding Through an Administrative Hearing that the Insurer's Rates are Excessive

As previously stated, the effect of the rules implemented by the OFIS is to order a rate reduction for certain policyholders with low insurance scores. The OFIS has no authority to order rate reductions without first determining that an insurer's rates are excessive. The term "excessive" is defined in the Insurance Code, which provides that a "rate shall not be held to be

excessive unless the rate is unreasonably high for the insurance coverage provided *and* a reasonable degree of competition does not exist for the insurance to which the rate is applicable.” MCL 500.2109(1)(a) (emphasis added); see also MCL 500.2403(1)(d) and MCL 500.2603(1)(d). Administrative hearings are required, again individual hearings for individual insurers, to determine whether a rate is excessive and whether there is a lack of competition. MCL 500.2114, 500.2115, 500.2418, 500.2618.

Here, no individual administrative hearings were held to address either the excessiveness of an individual insurer’s rates or the competition within the marketplace. Thus, the rules implemented by the OFIS are inconsistent with the scheme put in place by the Legislature.

For these reasons, I would affirm the opinion and order of the lower court.

/s/ Brian K. Zahra