B208402

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION ONE

THE ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES, et al.,
Plaintiffs and Appellants,

vs.

STEVEN POIZNER, et al.,
Defendants and Respondents.

APPEAL FROM LOS ANGELES COUNTY SUPERIOR COURT, CASE NO. BS 109154
JAMES C. CHALFANT, JUDGE

APPELLANTS' OPENING BRIEF

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Court of Appeal
State of California
Second Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: B208402

Case Name: The Association of California Ins Cos., et al. v. Steve Poizner, et al.

Please check the applicable box:

☐ There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 8.208 and 8.490(i).

☒ Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
1. The Association of California Insurance Companies	Trade association representing insurance industry.
2. The Personal Insurance Federation of California	Trade association representing insurance industry.
3. The American Insurance Association	Trade association representing insurance industry.
4.	

Please attach additional sheets with Entity or Person Information if necessary.

Signature of Attorney/Party Submitting Form

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TABLE OF CONTENTS

Page

Table of Authorities

Page(s)

CASES

STATUTES

REGULATIONS

Cal. Code of Regulations, title 10

OTHER AUTHORITIES

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APPELLANTS' OPENING BRIEF

INTRODUCTION

The "merits" appeal

Plaintiffs the Association of California Insurance Companies, the Personal Insurance Federation of California, and the American Insurance Association appeal from an adverse judgment following a hearing on their combined petition for writ of mandate and complaint for declaratory and injunctive relief.

On behalf of their member insurers, plaintiffs sought to enjoin defendant Insurance Commissioner from enforcing certain regulatory amendments, effective January 28, 2007, that essentially (1) altered the role consumer representatives may play in

administrative proceedings on insurers' applications to change rates and (2) relaxed the statutory limits on compensation for consumer representatives who participate in those proceedings, thereby expanding insurer applicants' liability for such compensation.

The issue on appeal is whether the January 2007 amended regulations are invalid and ineffective because they conflict with, and enlarge the scope of, Insurance Code sections 1861.05 and 1861.10, two statutes added to the Code in 1988 when the voters approved Proposition 103.[1]

Section 1861.05, subdivision (c), provides for *public hearings* on insurers' rate applications. Section 1861.10, subdivision (a), allows consumer representatives to "intervene in any proceeding permitted or established" by the chapter of the Insurance Code governing rates, which includes section 1861.05. A consumer representative who intervenes in a hearing on a rate application and makes "a substantial contribution to the adoption of any order, regulation or decision by the commissioner" is entitled to "reasonable advocacy and witness fees." (§ 1861.10, subd. (b).)

The amended regulations upset the statutory scheme by defining and establishing a new, nonpublic "rate proceeding," which commences when any person *requests* a public hearing on an insurer's rate application. Further, the amended regulations grant any consumer representative a right to "intervene" in the newly defined "rate proceeding" and then to seek "advocacy and witness

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[1] Unless otherwise indicated, all statutory citations in this brief refer to the Insurance Code.

fees," even if no hearing is held on the insurer's application. The insurer applicant is responsible for paying any fees awarded.

As we explain in Part I of this brief, the amended regulations improperly enlarge the scope of sections 1861.05 and 1861.10 in several major respects. The amended regulations: disregard the meaning of the terms "intervene" and "proceeding" as used in section 1861.10, subdivision (a); create a new off-the-record "proceeding," thereby defeating the statutory provisions ensuring *public* hearings and oversight of insurer rate applications; expand insurer applicants' liability for consumer representatives' "advocacy and witness fees" to include fees incurred where no hearing is held and thus no "advocacy" or "witnesses" are involved; and enlarge the meaning the terms "order" and "decision," which as used in section 1861.10, subdivision (b), mean *final* orders or decisions on the merits of an insurer's rate application.

Accordingly, the amended regulations should be declared invalid and ineffective, and the commissioner should be enjoined from enforcing them.

The "fees" appeal

Plaintiffs also appeal from the trial court's postjudgment order awarding $121,848.16 in "advocacy and witness fees" to intervenor Foundation for Taxpayer and Consumer Rights (FTCR) under section 1861.10, subdivision (b). The fee award should be reversed because section 1861.10 authorizes compensation only when a consumer representative has intervened in a proceeding

"permitted or established" by the chapter of the Insurance Code governing rates. (§ 1861.10, subd. (a).) The present action for a writ of mandate and declaratory and injunctive relief is not "permitted or established" by any chapter of the Insurance Code. It is permitted and established by the Government Code and the Code of Civil Procedure.

If this court does not reverse the fee award, it should modify the award to clarify that *plaintiffs* are not responsible for paying it. Section 1861.10, subdivision (b), does not specify who must pay the award and does not authorize the court to impose the cost on plaintiffs. Accordingly, like other costs incurred under Proposition 103, the cost of the fee award here should be borne initially by defendant Department of Insurance, which may then recoup the cost from insurers through fees.

STATEMENT OF THE CASE

A. The "merits" appeal.

In May 2007, plaintiffs filed in the superior court a combined petition for writ of mandate and complaint for declaratory and injunctive relief. (1 CT 6.)[2/] Plaintiffs sought to enjoin defendant Steve Poizner, Insurance Commissioner of the State of California

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[2/] Citations to "CT" refer to the four-volume clerk's transcript prepared for the June 6, 2008 appeal from the judgment, and citations to "CT (fees appeal)" refer to the one-volume clerk's transcript prepared for the September 5, 2008 appeal from the postjudgment attorney fee order.

(commissioner), from enforcing certain amendments to provisions of the California Code of Regulations (CCR) governing compensation for consumers who participate in administrative proceedings related to insurance rates. (1 CT 6-7, 9, 11-12, 19.) Plaintiffs alleged that the regulatory amendments were invalid because they were inconsistent with, and in conflict with, sections 1861.05 and 1861.10. (1 CT 13, 17.)

Commissioner along with defendant California Department of Insurance (department) filed an answer denying the substance of plaintiffs' allegations and denying that plaintiffs were entitled to any relief. (1 CT 95-100.)

FTCR, a self-described consumer representative (1 CT 104, 136; 3 CT 529; CT (fees appeal) 29-30, 41), filed an application for leave to intervene in the action and a proposed complaint-in-intervention. (1 CT 102, 131.) FTCR stressed its "direct pecuniary interest in the subject matter of the litigation." (1 CT 113; see 1 CT 114, 116.) Based on the parties' stipulation, the court granted FTCR's application and accepted for filing its complaint-in-intervention. (1 CT 177-178.)

The complaint-in-intervention alleged, in essence, that the challenged regulatory amendments were lawful and necessary and that plaintiffs therefore were not entitled to any relief. (1 CT 132-134, 149-150.) FTCR also prayed for attorney fees under section 1861.10, subdivision (b), and Code of Civil Procedure section 1021.5. (1 CT 150.)

Plaintiffs answered the complaint-in-intervention with a general denial. (1 CT 181-182.)

The parties filed briefs, declarations, exhibits and requests for judicial notice addressing the legal issues raised by the pleadings. (2 CT 193-284, 292-378; 3 CT 379-567; 4 CT 568-687.) On March 7, 2008, the court heard oral argument on the legal issues and denied all relief to plaintiffs. (4 CT 699-705 [tentative decision]; 3/7/08 RT 19 ["The tentative is adopted as order of the court"].)

On April 2, 2008, the court entered judgment for defendants and FTCR, denying the petition for writ of mandate and ordering that plaintiffs take nothing under their complaint for declaratory and injunctive relief. (4 CT 707.) Defendants served notice of entry of the judgment on April 9, 2008. (4 CT 712-718.)

On June 6, 2008, plaintiffs filed a timely notice of appeal from the April 2 judgment. (4 CT 719-720.)

B. The "fees" appeal.

On June 9, 2008, FTCR filed a motion for attorney fees under section 1861.10, subdivision (b), and Code of Civil Procedure section 1021.5. (CT (fees appeal) 18-105.) Plaintiffs opposed the motion. (CT (fees appeal) 106-152.) FTCR filed a reply to the opposition (CT (fees appeal) 153-179) and a request for judicial notice in further support of its motion (CT (fees appeal) 180-203).

On July 25, 2008, the court heard argument and entered an order awarding $121,848.16 in fees to FTCR under section 1861.10, subdivision (b), only. The court denied FTCR's request for fees under Code of Civil Procedure section 1021.5, finding that FTCR's own "financial stake" in defending and preserving the amended

regulations was its "main concern." (7/25/08 RT 14; see 7/25/08 RT 19, 22 [court: "I'm wiping out my [section] 1021.5 analysis"]; CT (fees appeal) 204-208 [tentative decision], 209 [minute order: "Court rules in accordance with [its] tentative which is orally modified"].) No party served notice of entry of the order.

On September 5, 2008, plaintiffs filed a timely notice of appeal from the July 25 order. (CT (fees appeal) 210-211.)

This court docketed plaintiffs' two appeals under the same case number, B208402.

STATEMENT OF APPEALABILITY

Plaintiffs appeal from a final judgment disposing of all claims between the parties on their merits. The judgment is appealable under Code of Civil Procedure section 904.1, subdivision (a)(1).

Plaintiffs also appeal from a postjudgment order awarding attorney fees to FTCR. The order is appealable under Code of Civil Procedure section 904.1, subdivision (a)(2). (See *P R Burke Corp. v. Victor Valley Wastewater Reclamation Authority* (2002) 98 Cal.App.4th 1047, 1053.)

LEGAL ARGUMENT

I. THE JUDGMENT SHOULD BE REVERSED BECAUSE THE AMENDED REGULATIONS ARE INVALID AND INEFFECTIVE.

A. A regulation is invalid and ineffective if it conflicts with or enlarges the scope of a statute.

A state agency may not adopt a regulation that conflicts with the authorizing statute or that enlarges the statute's scope. Such a regulation is invalid and ineffective. (Gov. Code, § 11342.2 ["no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute"]; see *Morris v. Williams* (1967) 67 Cal.2d 733, 748 ["Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations"]; *First Industrial Loan Co. v. Daugherty* (1945) 26 Cal.2d 545, 550 ["A ministerial officer may not . . . under the guise of a rule or regulation vary or enlarge the terms of a legislative enactment"].)

The question whether a regulation conflicts with or enlarges the scope of a statute is a legal question that this court reviews de novo, without deference to "the technical expertise of the agency." (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 108-109; see *Aguiar v. Superior Court* (Jan. 20, 2009, B208614) ___ Cal.App.4th ___ [2009 WL

117554, at p. *5] ["In deciding whether the regulation conflicts with its legislative mandate, the court does not defer to the agency's interpretation of the law under which the regulation issued, but rather exercises its own independent judgment"].)

B. Sections 1861.05 and 1861.10 allow consumers to intervene in *public hearings* on rate applications.

1. Overview of the statutory scheme governing rate applications.

Proposition 103, approved by the voters in 1988, forbids insurers from charging rates that are "excessive, inadequate, unfairly discriminatory or otherwise in violation of this chapter."[3] (§ 1861.05, subd. (a).) The commissioner is charged with responsibility for enforcing this prohibition. (See § 1861.01, subd. (c); *State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1041 (*State Farm*).)

An insurer's rate may come before the commissioner for review in one of two ways.

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[3] "[T]his chapter" refers to division 1, part 2, chapter 9 of the Insurance Code, commencing with section 1850.4. The chapter, which we refer to as "chapter 9," is titled "Rates and Rating and Other Organizations." Proposition 103 added article 10 (§§ 1861.01-1861.14) to chapter 9. (*Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 851 (*Farmers*).) Article 10 is titled "Reduction and Control of Insurance Rates."

First, any person aggrieved by an insurer's *existing* rate may file a complaint with the commissioner asking him to review the insurer's continuing use of that rate. (§ 1858, subd. (a); *Walker v. Allstate Indemnity Co.* (2000) 77 Cal.App.4th 750, 753 (*Walker*).) The commissioner must review and investigate the complaint and may conduct a public hearing. (§§ 1858, subd. (c), 1858.01, subds. (a) & (b), 1858.1, 1858.2.)

Second, insurers themselves must apply to the commissioner for approval before *changing* any existing rates. (§§ 1861.01, subd. (c), 1861.05, subd. (b).)

When the commissioner receives an insurer's application to change an existing rate, he must notify the public. (§ 1861.05, subd. (c).) Within 45 days after that notice, any consumer or consumer representative may petition the commissioner to hold a public hearing on the rate application. (*Ibid.*; 10 CCR §§ 2646.4, subd. (a)(1), 2653.1, subd. (a).)

The commissioner may, in his discretion, order a hearing on his own motion or in response to a consumer's petition for a hearing.[4] (§ 1861.05, subd. (c).) If the commissioner denies a consumer's petition for a hearing, the consumer may seek judicial review of that decision. (§§ 1858.6, 1861.09.)

If the commissioner orders a hearing, an administrative law judge presides. (§ 1861.08, subd. (a); *Fireman's Fund Ins.*

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[4] A hearing is mandatory, if requested, when the insurer's application seeks a rate increase exceeding seven percent for "personal lines" or fifteen percent for "commercial lines." (See § 1861.05, subd. (c); *California Auto. Assigned Risk Plan v. Garamendi* (1991) 232 Cal.App.3d 904, 910.)

Companies v. Quackenbush (1997) 52 Cal.App.4th 599, 606.) If the administrative law judge renders a decision, the commissioner may adopt, amend or reject that decision. (§ 1861.08, subd. (c).) The commissioner must base his decision solely on the record developed before the administrative law judge. (*Ibid.*; Gov. Code, § 11425.50, subd. (c); *Walker*, *supra*, 77 Cal.App.4th at p. 756; *Fireman's Fund*, at p. 605.)

The consumer may seek judicial review of the commissioner's decision by filing a petition for writ of administrative mandate. (§§ 1858.6, 1861.09; *Walker*, *supra*, 77 Cal.App.4th at p. 753.)

With the foregoing background in mind, we next focus on sections 1861.05 and 1861.10, which are at the heart of this appeal.

2. Sections 1861.05 and 1861.10.

This court "construe[s] a statute enacted by an initiative measure under the same principles of construction applicable to statutes enacted by the Legislature." (*Farmers*, *supra*, 137 Cal.App.4th at p. 851.) The court's "task is to ascertain the intent of the electorate so as to effectuate the purpose of the law." (*Ibid.*)

The court begins by examining "the statutory language, giving the words of the statute their ordinary and usual meaning and construing them in the context of the statute as a whole and the overall statutory scheme," so that the scheme ""'may be harmonized and retain effectiveness."'" (*Farmers*, *supra*, 137 Cal.App.4th at p. 851.) The court "'must also consider the consequences that will flow from a particular statutory interpretation'" and should prefer an

interpretation that "'will result in wise policy rather than mischief or absurdity.'" (*Andersen v. Workers' Comp. Appeals Bd.* (2007) 149 Cal.App.4th 1369, 1375.)

As noted, section 1861.05 allows, and in some cases requires, the commissioner to order a public hearing on a rate application. If *no* hearing is held, the rate application is deemed approved 60 days after the public is notified of the application. (§ 1861.05, subd. (c).) If a hearing is held, the rate application is still deemed approved 180 days after the commissioner receives it, unless the commissioner has disapproved the application in a final order or "extraordinary circumstances," as defined, exist. (*Ibid.*)

Thus, under section 1861.05, a rate application can and will be approved if no hearing is held, but a rate application cannot be *disapproved* absent a hearing.[5] Since the commissioner's decision to disapprove a rate application must be based on the record of the hearing (§ 1861.08, subd. (c)), the statutory scheme does not contemplate that the commissioner will entertain evidence or arguments against a rate application except in a *public* hearing. (See *English v. City of Long Beach* (1950) 35 Cal.2d 155, 158-159 ["Administrative tribunals which are required to make a determination after a hearing cannot act upon their own information, and nothing can be considered as evidence that was

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[5] There is one exception to this rule. The commissioner may disapprove a rate application absent a hearing "if a stay is in effect barring the commissioner from holding a hearing within the 180-day period." (§ 1861.05, subd. (d)(2).)

not introduced at a hearing of which the parties had notice or at which they were present"].)

Section 1861.10 permits "[a]ny person" to "initiate or intervene in any proceeding permitted or established pursuant to [chapter 9] . . . ." (§ 1861.10, subd. (a).) After a person has successfully initiated or intervened in a proceeding permitted or established by chapter 9, the person may obtain "advocacy and witness fees" by demonstrating that he or she "represents the interests of consumers, and, . . . has made a substantial contribution to the adoption of any order, regulation or decision by the commissioner or a court." (*Id.*, subd. (b).)[6]

Central to the meaning of section 1861.10, subdivision (a), are the terms "initiate" and "intervene."

To "initiate" means "[t]o cause to begin." (Webster's II New Riverside University Dictionary (1984) p. 629; see Merriam-Webster

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[6] Section 1861.10, subdivisions (a) and (b), provide in full:

> (a) Any person may initiate or intervene in any proceeding permitted or established pursuant to this chapter, challenge any action of the commissioner under this article, and enforce any provision of this article.
>
> (b) The commissioner or a court shall award reasonable advocacy and witness fees and expenses to any person who demonstrates that (1) the person represents the interests of consumers, and, (2) that he or she has made a substantial contribution to the adoption of any order, regulation or decision by the commissioner or a court. Where such advocacy occurs in response to a rate application, the award shall be paid by the applicant.

Online Dictionary (2009) [as of Jan. 20, 2009] <http://www.merriam-webster.com/dictionary/initiate> ["to cause or facilitate the beginning of : set going <*initiate* a program of reform>"].) Thus, a person "initiates" a proceeding when he or she causes it to begin.

The only proceedings permitted or established by chapter 9 that are within a consumer's power to *initiate* are (1) certain court actions (see *ante*, pp. 10-11) and (2) proceedings to review an insurer's continuing use of an *existing* rate, rating plan, rating system or underwriting rule (see §§ 1858, 1858.6; *Farmers*, *supra*, 137 Cal.App.4th at p. 854 [identifying proceedings "permitted or established" by chapter 9]). Under chapter 9, the consumer cannot *initiate* a rate application proceeding; the insurer initiates it by filing the application. (§ 1861.05, subd. (b).) Nor can the consumer *initiate* a hearing on the insurer's rate application; the commissioner initiates it by ordering the hearing. (§ 1861.05, subd. (c).)

Section 1861.10 also grants a consumer the right to "intervene" in a proceeding permitted or established by chapter 9. "Intervene" has a well settled meaning in the law. It means to make oneself a party to an ongoing action or proceeding involving other persons. (See *Estate of Ghio* (1910) 157 Cal. 552, 559-560; *Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 602-603; see generally Code Civ. Proc., § 387, subd. (a) [in civil actions, "[a]n intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons"].)

The Insurance Code consistently uses "intervene" in this sense, i.e., to make oneself a party to an ongoing action or

proceeding between other persons. The Code distinguishes "intervene" from "appear." A person who merely appears does not become a party to the proceeding. [7]

Thus, the provision for intervention in section 1861.10 means that any person may seek to become a party to an ongoing proceeding between other parties under chapter 9. Where there is no ongoing proceeding between other parties, of course, there is nothing in which to intervene.

The only proceedings between other parties permitted or established by chapter 9 into which a consumer could intervene (i.e., become a party) are (1) certain court actions and (2) public hearings

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[7] (See, e.g., §§ 791.15, subd. (b) [authorizing "any adversely affected person *to intervene, appear and be heard* at" any hearing ordered by the commissioner to investigate possible violations of the Insurance Information and Privacy Protection Act (emphasis added)], 1063, subd. (h) [granting the California Insurance Guarantee Association "the right *to intervene as a party* in any proceeding instituted pursuant to Section 1016," which authorizes commissioner to apply to the court for an order liquidating and winding up the business of an insolvent insurer (emphasis added)], 1067.07, subd. (*l*) [granting the California Life and Health Insurance Guarantee Association the right "*to appear or intervene before a court* in another state" under certain circumstances (emphasis added)], 1216.5 [authorizing commissioner to "bring a civil action or *intervene in an action* brought by or on behalf of" an insurer or policyholder injured by any violation of the Business Transacted with Producer Controlled Insurer Act (emphasis added)], 1871.7, subd. (e)(2) & (5) [authorizing local district attorney or commissioner "*to intervene and proceed with*" an action filed by any interested person alleging unlawful employment of runners, cappers, and steerers; "no person other than the district attorney or commissioner may *intervene* or bring a related action based on the facts underlying the pending action" (emphases added)].)

ordered by the commissioner. (See *Farmers, supra*, 137 Cal.App.4th at p. 854; §§ 1855.5, subds. (b) & (d) [hearings on proposed policy forms, bond forms and manuals], 1858.2, subds. (a) & (c) [hearings to review existing rates, rating plans, rating systems or underwriting rules], 1861.05, subd. (c), 1861.08 [hearings on rate applications].)

Thus, unless and until the commissioner orders a hearing, the only statutory role for a consumer in response to a rate application is to petition for a hearing. (§ 1861.05, subd. (c).) A person who petitions for a hearing, however, does not thereby become *a party* to any ongoing action or proceeding between other persons. That is, a person who petitions for a hearing does not thereby "intervene" in any proceeding. Under the statutory scheme, intervention must await the commissioner's decision to order a hearing into which intervention is possible.

This reading of sections 1861.05 and 1861.10 is consistent with the language of 1861.10, subdivision (b), which directs the commissioner to "award reasonable *advocacy and witness fees*" to a qualifying consumer representative. (Emphasis added.) Until the commissioner orders a hearing on a rate application and the consumer intervenes, there is no forum or proceeding in which to call a "witness" or to engage in "advocacy."

This reading of sections 1861.05 and 1861.10, subdivision (a), is also consistent with the sample petition for hearing that the commissioner himself has published. (See 10 CCR §§ 2653.1, 2660.2.) The commissioner's sample form includes the following statement: "If the Insurance Commissioner grants a hearing on

petitioner's request, petitioner will seek *to intervene in that hearing* pursuant to Insurance Code section 1861.10." (*Id.*, § 2660.2, emphasis added; see *id.*, § 2648.3 [after commissioner orders a hearing on a rate application, administrative law judge or commissioner "shall give written notice of a scheduling conference to all parties to the proceeding and to all persons having advised the Commissioner of *an interest in intervening in the proceeding*" (emphasis added)].)

C. The amended regulations conflict with and enlarge the scope of sections 1861.05 and 1861.10 by creating a nonpublic, prehearing "proceeding" not recognized by chapter 9 and granting consumer representatives a right to "intervene" in that "proceeding."

1. The former regulations.

Until January 2007, the implementing regulations interpreted the rate application and consumer compensation provisions of chapter 9 just as we have described them in Part I.B. above. The pre-2007 regulations allowed consumers to intervene in a public hearing on a rate application and then seek compensation for contributing to the commissioner's final decision on the

application. Absent intervention in a rate hearing, however, a consumer could not seek compensation under section 1861.10.[8]

Thus, former 10 CCR section 2661.3, titled "Procedure for intervention in a rate hearing," provided: "A person desiring to intervene and become a party to *a rate hearing* shall file a petition to intervene" (former 10 CCR § 2661.3, subd. (a), emphasis added; 2 CT 231) with the Administrative Hearing Bureau (former 10 CCR § 2661.3, subd. (e); 2 CT 231). The petition would be ruled on by the administrative law judge. (Former 10 CCR § 2661.3, subd. (g); 2 CT 232.) A "rate hearing" was a proceeding conducted pursuant to the statutes governing insurer rate applications. (Former 10 CCR § 2661.1, subd. (h); 2 CT 228.)

Under the pre-2007 regulations, only parties to the rate hearing could seek "advocacy fees" under section 1861.10, subdivision (b). (See former 10 CCR § 2661.1, subd. (a); 2 CT 228 ["'Advocacy Fees' means costs, incurred or billed, by *a party* for the services of an advocate in the proceeding" (emphasis added)].) If the administrative law judge granted a consumer's petition to intervene, the consumer became a party to the rate hearing (see former 10 CCR § 2651.1, subd. (f); 2 CT 226) and thus became eligible to seek compensation under section 1861.10, subdivision (b) (see former 10 CCR § 2662.3, subd. (a); 2 CT 236). On the other hand, if the judge denied the consumer's petition to intervene in the rate hearing, the consumer did not become a party and could not

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[8] All the former regulations discussed in this brief may be found at 1 CT 23-38 and 2 CT 226-241.

seek compensation. (See former 10 CCR § 2662.3, subd. (a); 2 CT 236.)

To determine whether the intervenor satisfied the "substantial contribution" requirement of section 1861.10, subdivision (b), the commissioner considered the intervenor's oral and written contributions to the hearing, including "the intervenor's direct testimony, cross-examination, legal arguments, briefs, motions, discovery, or any other appropriate evidence." (Former 10 CCR § 2662.5, subd. (a)(1).)

Neither chapter 9 nor the former regulations authorized a consumer to seek, or the commissioner to award, compensation absent a public hearing on a rate application in which the consumer intervened.

The Los Angeles Superior Court so ruled in a 2005 case, *American Healthcare Indemnity Co. v. Garamendi* (Super. Ct. L.A. County, 2005, No. BS094515) (*American Healthcare*).[9] There, SCPIE Indemnity Company applied to the commissioner to approve a rate increase. FTCR filed a petition for a hearing on the application and a petition to intervene in the hearing. SCPIE ultimately withdrew its application. The commissioner then denied FTCR's request for a hearing, explaining that the request was moot

[9] We recognize that this superior court ruling is not legal precedent. We discuss it because, as will appear, it formed the backdrop for the amended regulations at issue.

in light of SCPIE's decision to withdraw its application. (2 CT 252.)[10]

Though no hearing was held, FTCR requested compensation under section 1861.10, subdivision (b), for its "expenses relating to its objections to the rate application and filing its Petition for Hearing." (2 CT 252.) After initially denying the request, the commissioner reconsidered and granted the requested compensation. (*Ibid.*)

SCPIE then petitioned the court for a writ of mandate invalidating the compensation award. The court granted the writ petition, ruling that the award was improper under both section 1861.10, subdivision (b), and the regulations then in effect. (2 CT 254-255.) The court reasoned:

> [FTCR] failed to establish the elements for an award of advocacy and witness fees and expenses pursuant to § 1861.10(b). The Commissioner never adopted any order, regulation, or decision on the merits with respect to Petitioners' rate increase applications. Given that there was no hearing granted and [FTCR] was not even a party to the proceeding as its Petition to Intervene was not granted, there was no, and could not be a, substantial contribution made by [FTCR]. [Citation.] The Commissioner abused his discretion by awarding advocacy and witness fees and expenses to [FTCR].

(2 CT 255.)

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[10] The cited document, though titled "Tentative Decision," was adopted as the superior court's final decision. (See 2 CT 277.)

2. The amended regulations.

Eleven months after the superior court's decision in *American Healthcare*, defendant's predecessor, Commissioner John Garamendi, announced his intent to amend the governing regulations "to clarify" that consumers could seek "advocacy fees" so long as they filed a petition for hearing on an insurer's rate application, even if the commissioner did not order a hearing or the consumer did not intervene in the hearing. (See 2 CT 222.) Under the commissioner's new reading of section 1861.10, subdivision (b), a consumer did not need to intervene in a public hearing to qualify for compensation; the consumer merely had to *request* a hearing. Alluding to (without naming) the superior court's decision in *American Healthcare*, the commissioner explained that a consumer who requests a hearing should be entitled to seek compensation even when an insurer withdraws its rate application and thus obviates the need for a hearing:

> [T]he regulations must be amended to make clear that advocacy performed by a consumer representative (whether a 'petitioner,' 'intervenor,' or 'participant') prior to a decision by the Commissioner to grant or deny a petition for hearing pursuant to Section 1861.05(c) is to be compensated so long as a consumer has made a 'substantial contribution' to a decision or order ending the proceeding.

(2 CT 222, emphasis added.)

> [T]he Commissioner believes that the intervenor regulations should be amended to reflect the fact that *once a petition for hearing has been filed,* a proceeding

> has been established and that an insurer may not thereafter withdraw its rate application without approval of the Commissioner. Consumer representatives who make a substantial contribution to the outcome of that proceeding are entitled to compensation for their work, *even if the proceeding concludes without a hearing.*

(2 CT 223, emphasis added.)[11]

Accordingly, in late 2006, as his term in office wound to a close, Commissioner Garamendi submitted to the Office of Administrative Law a series of regulatory amendments designed to authorize compensation for consumers starting from the time they file a petition for hearing on an insurer's rate application, regardless whether the commissioner ultimately orders a hearing or the consumer intervenes in the hearing. (See 1 CT 152.) The amendments took effect on January 28, 2007. (Cal. Reg. Notice Register 2007, No. 2-Z, pp. 47-48 [<http://www.oal.ca.gov/pdfs/notice/2z-2007.pdf>].)[12]

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[11] We set forth the commissioner's stated reasons for amending the regulations to enable this court better to understand the background of the amended regulations and the context in which they were promulgated. The commissioner's reasons cannot save the amended regulations if they conflict with a statute. (See *Henning v. Division of Occupational Saf. & Health* (1990) 219 Cal.App.3d 747, 759 [when court finds a regulation "to be in conflict with the governing statutes, the reasons advanced by the [administrative agency] to justify its promulgation, while of interest, cannot save the conflicting regulation"].)

[12] All the amended regulations discussed in this brief may be found at 1 CT 39-50 and 2 CT 210-221. Redlined versions of the (continued...)

The commissioner accomplished his objective through the following specific amendments:

- He amended 10 CCR section 2661.1, subdivision (h), to define a new, prehearing "proceeding" called a "Rate Proceeding," which commenced "upon the submission of a petition for hearing" or "upon notice of hearing." (2 CT 212; see 2 CT 244 [redlined].) The amended regulations distinguished the newly defined "Rate Proceeding" from a "Rate Hearing," which was now defined to mean "a hearing noticed by the Commissioner on his own motion or in response to a petition for hearing pursuant to Insurance Code section 1861.05 . . . ." (10 CCR § 2661.1, subd. (i); 2 CT 212; see 2 CT 244-245 [redlined].)

- He changed the title of 10 CCR section 2661.3 from "Procedure for intervention in a *rate hearing*" (2 CT 231, emphasis added) to "Procedure for intervention in a *rate* or class plan *proceeding*" (2 CT 214, emphasis added; see 2 CT 246 [redlined]).

- He amended 10 CCR section 2661.3, subdivision (a), to permit consumers to "intervene" in the newly defined prehearing "Rate Proceeding": "A person desiring to intervene and become a party to a rate or class plan proceeding shall file a petition to intervene . . . . A person who petitions for a hearing may combine a petition to intervene with a petition for hearing in one pleading." (2 CT 214; see 2 CT 246 [redlined].)

(...continued)
regulations, detailing the January 2007 amendments, may be found at 1 CT 55-64 and 2 CT 242-251.

- He amended 10 CCR section 2661.3, subdivisions (e) and (g), which previously required that petitions to intervene be filed with the Administrative Hearing Bureau for consideration by the administrative law judge. (2 CT 231-232.) Under the amended regulations, consumers could file petitions to intervene with "the Rate Enforcement Bureau concurrently with a petition for hearing" (2 CT 214; see 2 CT 246-247 [redlined].) The Rate Enforcement Bureau was now authorized to grant a petition to intervene before the commissioner ordered any hearing. Indeed, if the consumer was otherwise qualified, the Rate Enforcement Bureau was *required* to grant the petition to intervene. (See 10 CCR § 2661.3, subd. (g); 2 CT 215.)

- He amended 10 CCR section 2661.1, subdivision (k), to state that a consumer could make a "substantial contribution," and thus qualify for compensation under section 1861.10, subdivision (b), even if the commissioner *denied* the consumer's petition for a hearing: "A substantial contribution may be demonstrated without regard to whether a petition for hearing is granted or denied."[13] (2 CT 213; see 2 CT 245 [redlined].)

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[13] In addition, the commissioner originally proposed to adopt a new regulation, 10 CCR section 2653.6 titled "Withdrawal of Application," that would have barred an insurer from withdrawing its rate application after a petition for hearing was submitted, unless the commissioner issued "an order of withdrawal." (1 CT 154.) The purpose of this proposal was to prevent an insurer from avoiding compensation under section 1861.10, subdivision (b), by unilaterally withdrawing its rate application before the commissioner issued any order on the application. (See 2 CT 224-225.) The commissioner, however, *withdrew* proposed 10 CCR (continued...)

To summarize, the amended regulations recognized a new, nonpublic, prehearing "rate proceeding," the beginning of which was marked by a petition for hearing. If otherwise qualified, the consumer had a right to "intervene" in this "rate proceeding" and then to seek compensation under section 1861.10, regardless of whether the commissioner ordered a public hearing on the rate application.

3. The amended regulations conflict with and enlarge the scope of sections 1861.05 and 1861.10.

The amended regulations are invalid and ineffective because they conflict with and enlarge the scope of sections 1861.05 and 1861.10 in several major respects.

1. *The amended regulations enlarge the scope of "initiate" and "intervene."* Section 1861.10 allows compensation to a consumer only after the consumer has "initiate[d]" or "intervene[d]" in a proceeding recognized by chapter 9. Setting aside court proceedings, which are not at issue here, the only proceedings recognized by chapter 9 that a consumer can *initiate* are proceedings to review an insurer's continuing use of an existing rate; and the only proceedings recognized by chapter 9 into which a consumer can *intervene* are public hearings ordered by the

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(...continued)
section 2653.6, so it never took effect. (See Cal. Reg. Notice Register, 2007, No. 2-Z, p. 48.)

commissioner. (See *ante*, pp. 14-16.) The newly created "rate hearing" does not fall into either category.

A petition for hearing on a rate application does not "initiate" any proceeding recognized by chapter 9, and a petition to "intervene" is inappropriate absent an ongoing proceeding between other parties to which the would-be intervenor can become a party—namely, a hearing. (See *ante*, pp. 15-16.) The commissioner cannot, by regulatory fiat, bestow on consumers the power to "initiate," or to "intervene" in, a new proceeding not recognized by chapter 9 but created out of whole cloth.

2. *The amended regulations enlarge the scope of "proceeding."* Section 1861.10 allows compensation to a consumer only after the consumer has initiated or intervened in a "proceeding" recognized by chapter 9. "An administrative proceeding has been characterized as 'an administrative process which presents an issue *for hearing and disposition* . . . .'" (*Gustafson v. Zolin* (1997) 57 Cal.App.4th 1361, 1367; see *Ferris v. Los Rios Community College Dist.* (1983) 146 Cal.App.3d 1, 11 [construing Government Code section 800, which allows limited attorney fee awards "[i]n any civil action to appeal or review the award, finding, or other determination of any *administrative proceeding*" (emphasis added); "Government Code section 800 is inapplicable except where review is sought of action taken as a result of *an administrative hearing* required or provided by law" (emphasis added)]; see also Evid. Code, § 901 [defining "proceeding" as "any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, *administrative agency*, hearing officer,

arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, *testimony can be compelled to be given*" (emphases added)].)

The court in *Farmers*, *supra*, 137 Cal.App.4th 842, explained that chapter 9 establishes "an administrative proceeding to review an application for a rate increase (§§ 1861.05, 1861.08) . . . ." (*Id.* at p. 854.) Section 1861.08, cited by the *Farmers* court, prescribes the rules governing *hearings* under chapter 9. Thus, the *Farmers* court used the phrase "administrative proceeding" to mean a *hearing* conducted pursuant to sections 1861.05 and 1861.08.

The "rate proceeding" defined in the amended regulations is not an administrative "proceeding" at all. It is simply a label for the commissioner's internal nonpublic review of a rate application before any hearing has been ordered. Chapter 9 does not permit a consumer to initiate, or to intervene in, the commissioner's review process for the purpose of, in FTCR's words, engaging in "informal discussion with the Department and the applicant."[14] (1 CT 143.)

3. *The amended regulations defeat the statutory provisions that ensure public hearings and oversight.* Under chapter 9, any proceeding that a consumer can initiate or into which the consumer can intervene will be a public proceeding—either a court action or an administrative hearing. (See *ante*, pp. 13-17.)

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[14] FTCR acknowledges that the prehearing "informal discussion" process is "not expressly set forth in the code" (3 CT 524) but has informally evolved over the years to "supplement[ ]" chapter 9 (3 CT 511). (See also 3 CT 525 [the "informal rate review process . . . occurs outside the context of the 'deemer' and 'hearing' provisions expressly set forth in section 1861.05"].)

With respect to rate applications in particular, section 1861.05 ensures that any opposition will be aired in a public setting. As explained above, a rate application can be *approved* without a hearing, but it cannot be *disapproved* without a hearing. (See *ante*, p. 12.) The hearing, then, is the administrative proceeding recognized by section 1861.05 in which consumers opposing the rate application can present their arguments and applicant insurers can formally reply. (See *State Farm, supra,* 32 Cal.4th at p. 1045 [to help ensure that insurance is fair, available and affordable for all Californians, "the drafters [of Proposition 103] established *a public hearing process* for reviewing insurance rate changes" (emphasis added)]; *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 836 [describing Proposition 103 as "a measure that provides for *public regulatory hearings with consumer participation*" (emphasis added)]; *Walker, supra,* 77 Cal.App.4th at p. 756 [under the scheme established by Proposition 103, "the *commissioner* is charged with setting rates after an extensive *hearing process* in which consumers and interested parties are encouraged to participate. . . . Interested parties may request that the commissioner hold a public hearing on the rate application. [Citation.] Interested parties may participate in *adjudicatory hearings* before an administrative law judge. [Citation.] The commissioner makes his final decision on the rate application based upon the weight of the evidence as reflected in the record developed *in the hearing*" (first emphasis in original, other emphases added)].)

Thus, the statutory scheme ensures that the public will not only have an opportunity to be heard but will also be able to

monitor the positions and arguments its representatives advance on its behalf, as well as the positions and arguments advanced by the applicant insurer. As FTCR puts it, "Proposition 103 . . . provides for full public scrutiny . . . in rate proceedings." (3 CT 511.)

The amended regulations defeat this system of public scrutiny and oversight by establishing a new, prehearing "proceeding" into which consumer representatives are entitled to intervene and to advance arguments—off the record and outside the public's view.

Chapter 9 does not authorize or contemplate that a consumer or consumer representative will respond to a rate application except in a public hearing. Chapter 9 does not authorize or contemplate private, prehearing "advocacy" by a consumer representative (or anyone else) against a rate application.

4. *The amended regulations enlarge the scope of "advocacy and witness fees" and thereby subject individual insurers to costs beyond those contemplated by the statutory scheme.* Section 1861.10 provides that a consumer representative may be compensated for "reasonable advocacy and witness fees and expenses." (§ 1861.10, subd. (b).) When those fees and expenses are incurred "in response to a rate application," the insurer applicant must pay them. (*Ibid.*)

"A *witness* is a person whose declaration under oath is received *as evidence* for any purpose, whether such declaration be made on oral examination, or by deposition or affidavit." (Code Civ. Proc., § 1878, emphases added.) Unless and until the commissioner orders a hearing, there is no forum or proceeding in which a consumer can present evidence or witnesses, so no possibility of incurring "witness fees."

Similarly, until the consumer intervenes in the hearing under section 1861.10, subdivision (a), there is no occasion for the consumer to engage in "advocacy" concerning the rate application. As noted, the statutes do not contemplate that the commissioner will entertain arguments or "advocacy" against a rate application except in a public hearing. (See *ante*, pp. 12-13.)

Thus, the language of section 1861.10, subdivision (b), plainly contemplates that the commissioner has ordered a public hearing on a rate application under section 1861.05 and that the consumer claiming fees has intervened in that hearing to present witnesses and to advocate the consumers' position.

The amended regulations conflict with and enlarge the scope of these statutes by allowing a consumer to seek "advocacy and witness fees" incurred in a "rate proceeding," even though no hearing has been held, no witnesses or evidence have been presented, and no advocacy has been required. As a result, the amended regulations subject insurers to expanded liability for "advocacy and witness fees" beyond the liability contemplated or permitted by section 1861.10, subdivision (b).

5. *The amended regulations enlarge the scope of "order, regulation or decision."* Section 1861.10 allows compensation to a consumer only if the consumer substantially contributes "to the adoption of any order, regulation or decision by the commissioner or a court." (§ 1861.10, subd. (b).) A consumer who merely "intervenes" in a "rate proceeding" as defined in the amended regulations, where no hearing is held, does not contribute to the adoption of any order, regulation or decision.

A "regulation" is a rule or standard of general application, not a decision on an individual insurer's rate application. (See Gov. Code, § 11342.600 [defining "regulation"].) A consumer who "intervenes" in a "rate proceeding" does not thereby contribute to the adoption of a regulation.

The terms "order" and "decision" in section 1861.10 refer "only to *final* orders or decisions *on the merits*." (*Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 689, emphases added; see § 1858.6 [in reviewing an "order" by commissioner, court must "exercise its independent judgment *on the evidence* and unless the weight *of the evidence* supports the . . . . order of the commissioner, the same shall be annulled" (emphases added)].) If the words "order" and "decision" referred to *interlocutory* orders or decisions, such as an order permitting an insurer to withdraw its rate application before a hearing is ordered (but see *ante*, p. 24, fn. 13), an intervenor could claim fees for interlocutory administrative or judicial orders or decisions that do not benefit or even affect consumers, which would be nonsensical and could not have been the voters' intent when they approved Proposition 103.

The amended regulations conflict with section 1861.10, subdivision (b), by allowing compensation for a consumer who merely files a petition for hearing, even if the commissioner denies the petition, holds no hearing, and never issues a decision or order on the merits of the insurer's rate application, e.g., because the insurer withdraws the application.

4. In other contexts, the commissioner reads section 1861.10 just as plaintiffs do—to permit consumers to intervene in *hearings*.

That the amended regulations conflict with section 1861.10 is further evident from the commissioner's *own* interpretation and application of section 1861.10 in contexts *other* than rate applications.

In other contexts under chapter 9, the commissioner continues properly to construe section 1861.10 (as his predecessor did in the context of rate applications before 2007) to mean that consumer representatives may intervene in public *hearings*, not in private, prehearing internal reviews. (See, e.g., 10 CCR §§ 2198.1 ["Intervention Right. Any consumer representative or other interested person may *intervene in any hearing* under this subchapter [governing approval of advisory organization's policy or bond form] unless it is determined by the hearing officer that granting the petition to intervene will unduly broaden the issues or would unduly burden resolution of the hearing" (emphasis added)], 2198.4 ["Procedures for Intervention. An interested party or consumer representative desiring *to intervene and become a party to the hearing* [on an advisory committee's policy or bond form] shall file a petition to intervene" (emphasis added)], 2198.5 [consumer representatives "who have not formally intervened may participate *in the hearing*" as the hearing officer deems appropriate (emphasis added)], 2614, 2614.10 [at conference before hearing on insurer's noncompliance with chapter 9, hearing officer may entertain

"[m]otions for intervention" under section 1861.10; if motion is granted, moving party becomes an "'[i]ntervenor'" *in the hearing*].)

D. The trial court's reasoning was flawed.

1. The court construed the words "any proceeding" out of context.

The trial court denied relief to plaintiffs, ruling that the amended regulations were not inconsistent or in conflict with section 1861.10. (4 CT 704-705.) The court explained: "Section 1861.10(a) broadly allows consumer participation in 'any proceeding' within the rate review process. As FTCR argues, the Amended Regulations merely define when a 'rate proceeding' begins, and that is when a petition for hearing is submitted." (4 CT 703.)

The court erred by reading the words "any proceeding" in isolation, removed from the specific context of section 1861.10 and the general context of chapter 9 as a whole.

The text of section 1861.10 qualifies the words "any proceeding" in two key respects: (1) the proceeding must be one that a person can "initiate" or into which a person can "intervene"; and (2) the proceeding must be one that is "permitted or established" by chapter 9. (§ 1861.10, subd. (a).) As previously explained, the "rate proceeding" defined in the amended regulations falls into neither category. (See *ante*, pp. 25-26.)

2. The statute could not have used the word "hearing."

The trial court also found significant the fact that section 1861.10, subdivision (a), uses "the term 'any proceeding' and not 'hearing' . . . ." (4 CT 703.) The court reasoned that the term "proceeding" is broader than "hearing" and "necessarily encompasses any act, step, or remedy, . . . in the rate review process." (4 CT 703; see 4 CT 704 ["had the Legislature [*sic* (the voters)] intended this narrow scope, it easily could have drawn the statute to limit consumer participation to 'formal hearings.' It chose instead the broad term 'proceeding' to define the setting in which consumers can participate"].)

But the statute *could not* have used the word "hearing" without unduly restricting the right of interested persons to initiate or intervene in *other* proceedings authorized by chapter 9, outside the context of a rate application. For example, chapter 9 authorizes certain court proceedings (see *ante*, pp. 10-11), and section 1861.10 permits any person to "initiate" an authorized court proceeding (see *ante*, p. 14). Had section 1861.10, subdivision (a), used the word "hearing" instead of "proceeding," it would have effectively denied consumers recourse to the courts, because consumers cannot initiate a judicial "hearing"; they can only initiate a judicial "proceeding", e.g., by filing a petition for writ of mandate.

Another statute in chapter 9 likewise uses the word "proceeding" to mean "hearing" in the context of a rate application under section 1861.05. (See § 1861.055, subd. (d) ["The

administrative law judge shall render a decision within 30 days of the closing of the record in the proceeding"].)

The trial court failed to recognize that, *in the context of a rate application*, the consumer cannot "initiate" any administrative proceeding, and the only administrative "proceeding" into which a consumer can "intervene" is a *hearing* under section 1861.05. (See *ante*, p. 16.)

3. The analogy to civil actions was flawed.

The trial court drew an analogy between civil actions and "rate proceedings" under the amended regulations. The court explained that just as a civil action consists of more than simply a trial, a "rate proceeding" may consist of more than simply a hearing. (4 CT 703.)

The trial court's analogy was faulty. Nothing in chapter 9 suggests that an insurer's rate application triggers a proceeding akin to a civil action. And nothing in chapter 9 suggests that a consumer has any role to play in the rate application process before a hearing is ordered—except to petition for a hearing.

Significantly, chapter 9 *does* provide for prehearing "informal conciliation" of consumer complaints challenging *existing* rates. (§§ 1858.01, subds. (a)-(c), 1858.02, 1858.1) But chapter 9 contains no comparable provisions for prehearing "informal conciliation" with consumers when an insurer files an application to *change* rates. Until the commissioner orders a hearing on the rate application and

the consumer intervenes in the hearing, the consumer is not a party.

The analogy to civil actions fails in other respects as well. An insurer's rate application does not name an adverse party,[15] does not need to be "served" on anyone other than the department,[16] does not call for an answer, does not trigger any right to discovery,[17] and (if the requested rate increase falls below certain percentages) does not entitle the applicant or anyone else to a hearing.[18]

Further, unlike in a civil action, the insurer's rate application is *deemed approved* unless the commissioner exercises his discretion to order a hearing and thereafter disapproves the application. (See *ante*, p. 12.) So there should not be anything to settle—and no occasion for "settlement negotiations" (4 CT 703)—until after a hearing has been ordered.

Indeed, the regulations themselves require that any proposed settlement be submitted to "the administrative law judge" for

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[15] Unless and until a petition to intervene is granted, the only "part[ies]" to a rate application are the applicant and the department. (10 CCR § 2651.1, subd. (f).)

[16] The commissioner notifies the public that the application has been filed. (See § 1861.05, subd. (c).) Petitions for hearing on a rate application, in contrast, must be served on each insurer named in the petition. (10 CCR § 2653.1, subd. (c).)

[17] Only "parties" are entitled to discovery. (10 CCR §§ 2614.7, 2614.8, subd. (a).) Motions to compel discovery are presented to the administrative law judge presiding over the hearing. (§ 1861.08, subd. (e); 10 CCR § 2614.9, subd. (c).)

[18] (See generally § 1861.05, subds. (b)-(c); 10 CCR §§ 2648.2, subd. (b), 2848.4.)

acceptance or rejection. (10 CCR § 2656.1, subd. (c).) The administrative law judge is the officer appointed to preside over the hearing. (§ 1861.08, subd. (a).) Thus, the regulations do not contemplate that any settlement can occur before a hearing has been ordered and an administrative law judge has been appointed.

4. The court misperceived the purpose of Proposition 103.

The trial court also commented that "a central purpose of Proposition 103 is to foster consumer participation in the rate review process" and that to read section 1861.10 as limiting consumer participation to "hearings" would be contrary to this statutory purpose. (4 CT 704.)

No authority holds that Proposition 103 was intended to foster consumer participation in *every aspect* of the rate review process, including the commissioner's internal, prehearing review of a rate application. In *State Farm, supra,* 32 Cal.4th 1029, the only authority cited by the trial court, the Supreme Court construed section 1861.07, which concerns public inspection of information provided to the commissioner. The Supreme Court explained that its construction of the statute "comports with the purpose behind Proposition 103." (*Id.* at p. 1045.) The court elaborated:

> Proposition 103 was enacted to "'ensure that insurance is fair, available, and affordable for all Californians.'" [Citation.] To achieve this goal, the drafters established *a public hearing process* for reviewing insurance rate changes. (See Ins.Code, §§ 1861.05,

> 1861.055, 1861.08.) In doing so, the drafters sought to "enable consumers to permanently unite to fight against insurance abuse . . . ." [Citation.] By giving the public access to all information provided to the Commissioner pursuant to article 10—which was enacted by Proposition 103—our construction of Insurance Code section 1861.07 is wholly consistent with Proposition 103's goal of fostering consumer participation in the rate-setting process.

(*Ibid.*, emphasis added.)

The trial court apparently misunderstood the final words in the above-quoted excerpt to mean that Proposition 103 was designed to "foster[ ] consumer participation in" *every aspect* of "the rate-setting process." (See 4 CT 704.) But in the context of the Supreme Court's discussion, the words "rate-setting process" were simply a shorthand reference to the "*public hearing process* for reviewing insurance rate changes," which the Supreme Court mentioned earlier in the same paragraph. (*State Farm*, *supra*, 32 Cal.4th at p. 1045, emphasis added.) Indeed, the Supreme Court employed the same pattern later in the opinion, where it used the words "rate-setting process" as a shorthand reference to "*the public hearing process* established by Proposition 103, pursuant to Insurance Code section 1861.08" and "*a public rate hearing*." (*Id.* at p. 1046, emphases added.)

Moreover, the court in *State Farm* was not considering the issues presented here, which concern the statutory limits on consumer participation in the rate application process and compensation for that participation. The opinion in *State Farm* is not authority on those issues. (*In re Marriage of Cornejo* (1996) 13

Cal.4th 381, 388 ["'It is axiomatic that cases are not authority for propositions not considered'"].)

5. The court exceeded its authority by basing its decision on its perception of "public policy."

In the end, the trial court relied on its view that the amended regulations promoted sound public policy. At the oral argument, the court told counsel for plaintiffs that their reading of the statutes was "not good policy" because it would inhibit the commissioner, consumer advocates and insurers from resolving disputes over rate applications short of a hearing. (3/7/08 RT pp. 3-4.)

A court has no power to uphold an otherwise unlawful regulation on the ground that, in the court's view, the regulation reflects "good policy." The court's proper role is to decide the legal question whether the regulation is "consistent and not in conflict with the statute . . . ." (Gov. Code, § 11342.2.)

We have explained that the amended regulations are inconsistent and in conflict with sections 1861.05 and 1861.10 to the extent the regulations create a new "rate proceeding" under chapter 9 and authorize consumers to "intervene" in that new proceeding and then to seek "advocacy and witness fees" incurred in that new proceeding. If respondents believe the amended regulations embody "good policy," they are free to present their views to the voters or the Legislature, which have the power to amend the statutes to accommodate the policy and procedures the commissioner

attempted to implement in the amended regulations. Until then, the regulations are invalid and ineffective.

II. THE ATTORNEY FEE AWARD UNDER SECTION 1861.10 SHOULD BE REVERSED OR MODIFIED.

A. If the judgment is reversed, the fee award should also be reversed.

FTCR filed a postjudgment motion for attorney fees under section 1861.10, subdivision (b), and Code of Civil Procedure section 1021.5. (CT (fees appeal) 18-105.) The trial court declined to award fees under Code of Civil Procedure section 1021.5, finding that FTCR's "financial stake in an attorneys fees regulation basically was their main concern." (7/25/08 RT p. 14.)

The court, however, awarded $121,848.16 in fees to FTCR under section 1861.10, subdivision (b) (7/25/08 RT 14, 22; CT (fees appeal) 204-209; see *ante*, pp. 6-7.) The court concluded that FTCR qualified for fees under subdivision (b) because it represented the interests of consumers and made a substantial contribution to the judgment denying relief to plaintiffs.[19] (7/25/08 RT 15-17.)

This court's reversal of the judgment would eliminate the basis for the fee award. Accordingly, if this court reverses the judgment, it should reverse the fee award as well.

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[19] Section 1861.10, subdivisions (a) and (b), are quoted in full at page 13, footnote 6 above.

B. The fee award should be reversed because this action is not "permitted or established" by chapter 9 but rather by the Government Code and the Code of Civil Procedure.

Section 1861.10, subdivision (a), states that a person may "intervene in any proceeding permitted or established pursuant to [chapter 9], challenge any action of the commissioner under this article, and enforce any provision of this article." (§ 1861.10, subd. (a).) The third clause of subdivision (a)—"enforce any provision of this article"—does not enlarge the scope of the first clause but simply "clarifies and emphasizes that a party to a proceeding referenced in the first clause can enforce any provision of article 10 in the proceeding." (*Farmers, supra*, 137 Cal.App.4th at p. 858.) Thus, subdivision (a) applies only to proceedings "permitted or established" by chapter 9, as stated in the first clause.

After intervening in a proceeding "permitted or established" by chapter 9, the intervenor may seek "reasonable advocacy and witness fees" under subdivision (b), provided the intervenor satisfies the two requirements specified in subdivision (b).

The trial court here awarded fees to FTCR solely under section 1861.10. The court erred. This is not an action "permitted or established" by chapter 9, so section 1861.10 does not apply.

In this action, plaintiffs sought a writ of mandate and declaratory and injunctive relief to block the commissioner from enforcing the amended regulations. Plaintiffs filed the action under Government Code section 11350, which permits interested persons

to "obtain a judicial declaration as to the validity of any regulation . . . by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure." (Gov. Code, § 11350, subd. (a).)

The caption page of plaintiffs' combined petition and complaint indicated that it was filed under Government Code section 11350 (1 CT 6), and plaintiffs so alleged (1 CT 11). Plaintiffs also alleged they sought a writ of mandate, declaratory relief, and injunctive relief under Code of Civil Procedure sections 1085, 1060 and 526, respectively. (*Ibid.*)

Plaintiffs did not allege jurisdiction or seek relief under any provision of chapter 9. (See 1 CT 11.) Indeed, chapter 9 does not permit or establish this court action. The court in *Farmers* enumerated the types of court actions that are "permitted or established" by chapter 9. (*Farmers*, *supra*, 137 Cal.App.4th at p. 854.) The *Farmers* court did not mention court actions challenging the legality of regulatory amendments.[20]

In sum, section 1861.10 allows intervention only in a proceeding "permitted or established" by chapter 9. This court action is not a proceeding "permitted or established" by chapter 9 but by the Government Code and the Code of Civil Procedure. Accordingly, the fee provisions of section 1861.10, subdivision (b), do

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[20] Though the parties here stipulated to allow FTCR to intervene in this action (1 CT 124-128), plaintiffs expressly reserved and did not waive their position that section 1861.10, subdivision (a), did not authorize intervention (see 1 CT 125-126 [¶¶ 5, 8]).

not apply. The trial court erred by awarding fees under that subdivision.

C. Alternatively, the fee award should be modified to clarify that *plaintiffs* are not responsible for paying it.

Even if this court decides that section 1861.10, subdivision (b), authorized the trial court to award fees to FTCR, this court should modify the award to make clear that *plaintiffs* are not responsible for paying the award. It should be paid by the department, which can recoup the cost, as it does other costs incurred under Proposition 103, through fees charged to insurers.

Proposition 103 required the commissioner to "establish a schedule of filing fees to be paid by insurers to cover *any administrative or operational costs* arising from the provisions of" Proposition 103. (§ 12979, emphasis added.) The Legislature has found that "ultimately, those fees are passed on to insurance purchasers in the form of higher insurance premiums." (Stats. 1994, ch. 965, § 2 [reprinted in Historical and Statutory Notes, 43A West's Ann. Ins. Code (2005 ed.) foll. § 12990, p. 479].)

Thus, the department generally recoups administrative and operational costs arising under Proposition 103 through fees charged to insurers, which in turn pass the costs along to insurance purchasers.

Section 1861.10, subdivision (b), authorizes the court to award "reasonable advocacy and witness fees" but, with one exception,

does not specify who must pay the award. The exception appears in the final sentence of section 1861.10, subdivision (b): "Where such advocacy [by a consumer representative] occurs in response to a rate application, the award shall be paid by the applicant." (§ 1861.10, subd. (b).)

The exception in the last sentence of section 1861.10, subdivision (b), does not apply here. This case does not involve a rate application. Plaintiffs are not "applicants" and FTCR did not engage in advocacy "in response to a rate application" but rather in response to plaintiffs' combined complaint and petition for writ of mandate.

In the trial court, counsel for FTCR conceded that FTCR was not responding to a rate application: "[A] rate application is something that is submitted to the Department of Insurance by an individual insurance company to request a rate increase or decrease. That's not what's happening in this proceeding." (7/25/08 RT 11.) The trial court agreed that FTCR did not incur fees "in response to a rate application" and therefore the exception embodied in the final sentence of subdivision (b) did not apply. (7/25/08 RT 12.)

Nevertheless, the trial court awarded $121,848.16 in fees to FTCR and apparently intended *plaintiffs* to pay the award.[21] (CT (fees appeal) 204-209.)

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[21] The trial court's fee order did not expressly state that plaintiffs must pay the award, but the court's intention appears from its ruling denying plaintiffs' "request for stay of payment of the fees." (CT (fees appeal) 209; see 7/25/08 RT 22-23.)

The court erred. Neither the last sentence of section 1861.10, subdivision (b), nor any other statute authorized the court to order *plaintiffs* to pay the fees FTCR incurred in this action. The fee award in this case, if proper at all, should be treated like all other administrative or operational costs under Proposition 103. It should be paid by the department, which can then recoup the cost through fees as permitted by section 12979.

CONCLUSION

For the foregoing reasons, the judgment should be reversed with directions that the trial court grant the relief plaintiffs requested in their combined complaint and petition for writ of mandate.

The trial court's postjudgment attorney fee award to FTCR should also be reversed or, at least, modified to clarify that *plaintiffs* are not responsible for paying it.

Dated: February 4, 2009

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 10,454 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: February 4, 2009

Mitchell C. Tilner

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On February 5, 2009, I served true copies of the following document(s) described as **APPELLANT'S OPENING BRIEF** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on February 5, at Encino, California.

Caryn Shields

Caryn Shields

SERVICE LIST
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Case No. B208402

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