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March 12, 2010

Honorable Ronald M. George, Chief Justice
And Associate Justices
California Supreme Court
350 McAllister Street
San Francisco CA 94102-4797

Re: **Association of California Insurance Companies et al. v. Poizner**
Supreme Court Case No. S180126
Letter Submitted by Amici Curiae State Farm Mutual Automobile Ins. Co. and State Farm General Insurance Company

Dear Chief Justice George and Associate Justices:

State Farm Mutual Automobile Insurance Company and State Farm General Insurance Company ("State Farm") submit this letter as *amici curiae* **in support** of the petition for review filed by Association of California Insurance Companies and Personal Insurance Federation of California. Specifically, State Farm submits that review is necessary to consider the question of **from what source** should advocacy awards be paid. This is Question No. 3 in the Petition. The Court of Appeal's decision on this question creates a conflict with the consistent practical application of the law for twenty years, without any consideration of that practice or its historical derivation.

STATE FARM'S INTEREST

State Farm writes numerous lines of insurance in California, many of which are subject to Proposition 103 rate regulation, including auto and homeowner's insurance. State Farm is the largest contributor to the Proposition 103 Fund, which is capitalized solely by fees assessed against insurers. Over the course of the 22 year history of Proposition 103 State Farm has been involved in several company-specific rate application hearings, and has paid consumer group advocacy awards related to those individual rate hearings. State Farm has also been involved in other cases not involving its individual rate applications. In those matters, intervenor advocacy awards were paid by the industry out of the Proposition 103 Fund. State Farm has a strong interest in maintaining the consistent practice that has been in place for twenty years, which was intended by Proposition 103 as adopted.

THE PROPOSITION 103 FUND

The 1988 voter initiative known as "Proposition 103" imposed a new system of prior approval rate regulation, including provision for public participation. Proposition 103 provided for the creation of a special fund set up to pay for the costs of administering the new regulatory system, funded by a fee levied on insurers. One expense created by Proposition 103 was the introduction of advocacy fee awards under Insurance Code § 1861.10(b). It was always contemplated that "[a]ssessments collected from insurers [per Ins. Code § 12979] will be used to fund this [consumer advocacy] program." Harvey Rosenfield, "Revolting the Insurance Crisis: The Voter Revolt Initiative", *Daily Journal Report*, July 15, 1988 (No. 88-13), p. 6 col. 1.

The fees the California Department of Insurance has historically assessed do *in fact* include amounts to pay advocacy awards, and advocacy awards are *in fact* paid out of the Proposition 103 Fund as part of the costs of administering Proposition 103. These facts are disclosed in a Department Report maintained on the Department's website. *See* http://www.insurance.ca.gov/250-insurers/0300-insurers/0200-bulletins/prop-103-recoup. The Report accounts for the Department's expenditures under the Proposition 103 Fund and projected expenditures under the Fund for the next fiscal year. *Id.* The Report also shows the fee to be levied on insurers for that year, basing that fee on projected expenditures. *Id.* Both the accounting for past expenditures and the projected expenditures specifically identify "Intervenors" as one expense. *Id.* Further, the Report contains a detailed accounting of intervenor fees awarded on an annual basis. *See* http://www.insurance.ca.gov/0250-insurers/0300-insurers/0200-bulletins/prop-103-recoup/report-on-intervenor-program.cfm. As shown in this detailed report, typically advocacy awards are paid out of the "Prop 103" Fund, unless they are made in the context of an individual insurer's rate case.

That is, since Proposition 103's inception, insurers have been assessed and have paid fees for the purpose of paying advocacy awards as part of the expenses of administering Proposition 103. In the general case not involving an individual insurer's rate application, advocacy awards have been paid from the Proposition 103 Fund.

THE COURT OF APPEAL'S OPINION AND INSURANCE CODE § 1861.10(b)

The Court of Appeal's opinion interprets Section 1861.10(b) based on mistaken assumptions about critical contextual facts. The key contextual facts are: (1) The *industry*, not the *Department*, pays advocacy awards defaulting to the general rule, through the Proposition 103 Fund; (2) Payment of advocacy awards is part of what is contemplated, budgeted, and paid for through the fees assessed on the industry for the administration of Proposition 103. The Court of Appeal thought that an award paid by the Fund would be paid by the Department, and that the fees assessed under Insurance Code § 12979 pay only for internal

Department operations. But, in fact, the Fund is paid for by the industry, and the fees collected are expressly calculated to cover advocacy awards. Further, Proposition 103 intended that advocacy awards be paid out of the Fund created by the fee assessment.

This context is necessary to rationally interpret the final sentence in Insurance Code § 1861.10(b), directing that "[w]here . . . advocacy occurs in response to a rate application, the award shall be paid by the applicant." In context, the plain meaning of this sentence is to state an exception to the general rule of funding out of the Proposition 103 Fund.

Without that context, the direction in the final sentence of Section 1861.10(b) serves no purpose. If the existence of the special Proposition 103 Fund as the general source of funding is ignored and the statute is read as a standard fee-shifting statute, then it would always be the case that an advocate would be awarded its fees *against* the other party – the "applicant" in an individual rate case. That is how fee shifting works. The specification that in individual rate cases the applicant shall pay the award would be superfluous. Inclusion of that sentence only makes sense as an exception to a general rule that awards will be paid from the Proposition 103 Fund.

The Court of Appeal read Section 1861.10(b) as a typical fee-shifting statute, holding that, except as directed in the final sentence of that statute, courts have discretion in making awards and properly shift fees to the "losing parties". The Court's analysis fails to account for the vagaries so often characteristic of statutes adopted by initiative. Section 1861.10(b) is not a fee-shifting statute, it is a consumer/intervenor funding statute. The *Spanish Speaking Citizens Foundation, Inc. v. Low* case (85 Cal. App. 4th 1179 (2000)) identified in the Department's detailed listing of awards (website cite *supra*) for the year 2001 is illustrative.

In *Spanish Speaking*, another iteration of the "Foundation for Taxpayer and Consumer Rights" known as the "Proposition 103 Enforcement Project", joined by three other groups, challenged regulations adopted by the Commissioner under Proposition 103. In that case, State Farm intervened to support the Commissioner and the regulations. On appeal, the Court of Appeal upheld the regulations. Proposition 103 Enforcement Project/Foundation for Taxpayer and Consumer Rights and its three co-plaintiffs were the "losing parties". That is, State Farm was in the very same position in that case as is FTCR here. Under the Court of Appeal's opinion herein treating Section 1861.10(b) as a standard fee shifting statute, State Farm – as an intervenor under Section 1861.10(a) – would be entitled to collect its advocacy expenses from the "losing parties". But that is not what happened. Rather, the "losing parties" were paid almost half a million dollars out of the Proposition 103 Fund.

As illustrated by the *Spanish Speaking* example, these initiative statutes must be read in light of their historical application, which in turn discloses a purpose and common understanding that existed at the time of adoption. An initiative statute is apt to assume rather than expressly articulate such a common understanding, creating interpretive risks two decades later. In this case, the Court of Appeal could not interpret Section 1861.10(b) in such a way as to achieve its purpose without due consideration of the historical facts concerning the

Proposition 103 Fund. These facts disclose that the statute is not a standard fee-shifting statute, but is a consumer funding statute, with the funding provided by the Proposition 103 Fund.

For twenty years, State Farm has operated under this system. State Farm has paid millions of dollars in "recoupment" fees calculated based in part on payment of intervenor awards out of the Proposition 103 Fund. State Farm has paid hundreds of thousands of dollars in intervenor awards in its own individual rate cases, as shown by the detailed listing included in the Department's report on the Proposition 103 Fund. But, in cases not involving State Farm's own rate applications, the advocacy awards have been paid from the Proposition 103 Fund, to which State Farm is the largest contributor.

The Court of Appeal's opinion conflicts with twenty years of practical application of Section 1861.10(b), as it pertains to the question of **who pays** advocacy fees awarded under that section. While this working law is not stated in an appellate opinion, it is solidly grounded in the intended purpose and actual capitalization of the Proposition 103 Fund, matters ignored by the summary treatment with which the Court of Appeal's opinion purports to reverse twenty years of working law. This Court should recognize the conflict created by the Court of Appeal's opinion, and should grant review in order to apply to its resolution the studied consideration appropriate to an issue of this importance.

Respectfully submitted,

Vanessa O. Wells
SEDGWICK, DETERT, MORAN & ARNOLD LLP

cc: *Parties listed on Proof of Service*

Re: *The Association of California Insurance Companies, et al. v. Steve Poizner, et al.*
California Supreme Court Case No. S180126

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Sedgwick, Detert, Moran & Arnold LLP, One Market Plaza, Steuart Tower, 8th Floor, San Francisco, California 94105.

On March 12, 2010, I served the attached **LETTER SUBMITTED BY AMICI CURIAE STATE FARM MUTUAL AUTOMOBILE INS. CO. AND STATE FARM GENERAL INSURANCE COMPANY** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California to the addressee(s) *set forth on the attached Service List.*

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 12, 2010, at San Francisco, California.

LAURA A. FLOOD

SEDGWICK
DETERT, MORAN & ARNOLD LLP

Re: *The Association of California Insurance Companies, et al. v. Steve Poizner, et al.*
California Supreme Court Case No. S180126

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