SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
Civil Complex Center
751 W. Santa Ana Blvd
Santa Ana, CA 92701

SHORT TITLE: Mercury Insurance Company vs. Dave Jones, in his Official Capacity as the Insurance Commissioner of the State of California

CLERK'S CERTIFICATE OF MAILING/ELECTRONIC SERVICE	CASE NUMBER: **30-2015-00770552-CU-JR-CXC**

I certify that I am not a party to this cause. I certify that a true copy of the above Minute Order dated 08/12/16 has been placed for collection and mailing so as to cause it to be mailed in a sealed envelope with postage fully prepaid pursuant to standard court practice and addressed as indicated below. This certification occurred at Santa Ana, California on 8/12/16. Following standard court practice the mailing will occur at Santa Ana, California on 8/12/16.

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Clerk of the Court, by: Mary L. White, Deputy

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SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CIVIL COMPLEX CENTER

MINUTE ORDER

DATE: 08/12/2016 TIME: 01:45:00 PM DEPT: CX101

JUDICIAL OFFICER PRESIDING: Gail A. Andler
CLERK: Mary White
REPORTER/ERM:
BAILIFF/COURT ATTENDANT:

CASE NO: **30-2015-00770552-CU-JR-CXC** CASE INIT.DATE: 02/09/2015
CASE TITLE: **Mercury Insurance Company vs. Dave Jones, in his Official Capacity as the Insurance Commissioner of the State of California**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Judicial Review - Other

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APPEARANCES

There are no appearances by any party.

The Court, having taken the above-entitled matter under submission and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

The Court DENIES the Petition in part, and GRANTS the Petition in part, as discussed below.

Factual and Procedural History: Proposition 103 ("Prop 103") created a regulatory regime under which, after 11/8/89, insurance rates "must be approved by the commissioner prior to their use" and could not be "unfairly discriminatory." (See Ins. Code § 1861.01(c), and 1861.05(a) and (b).) This action concerns alleged violations of these requirements by Mercury, based on "broker fees" that were charged by Auto Insurance Specialists ("AIS") for Mercury auto insurance policies purchased through AIS.

Before Prop. 103, Mercury sold auto insurance through appointed agents. In 1989, Mercury decided to shift to what became primarily a "broker force." Among those was AIS, which was owned by AON, a global insurance broker. AIS switched from an "agent" to a "broker" agreement with Mercury in 1989. Agents and brokers were both able to place insurance with other companies, but only brokers could charge a broker fee. Mercury did not track whether brokers charged a fee, or if so how much, nor did it receive any portion of such fees.

AIS provided comparison rate information services to customers, and after switching to a "broker" role, charged "broker fees" for that service. AIS would provide a broker fee disclosure, address selections of coverage types and payment plans, and get a separate check for the broker fees. Mercury was selected by AIS auto insurance customers about 75-80% of the time, but the fees were charged regardless of

what insurer was ultimately selected. Mercury's appointed agents also offered comparative ratings and products from other insurers, but did not charge a fee for those services.

On 2/18/99, CDI's Field Rating and Underwriting Bureau ("FRUB") issued a report which stated that Mercury's direction and control over brokers meant they were "operating as de facto agents," which violated Ins. Code §1861.05(a) as broker fees were being charged for "the same services and coverage to Mercury's insureds that the agents provide," so that insureds who purchased coverage through the brokers paid more. CDI then sent a draft Notice of Noncompliance ("NNC") to Mercury, charging that it was selling insurance through de facto agents who charged "broker" fees in violation of Ins. Code §§ 1861.01(c) and 1861.05(b).

Mercury and CDI agreed that Mercury would pursue legislation to clarify the broker/agent issue, would write a response to the draft NNC, and that CDI would "give Mercury ample notice if it determined that, after receiving Mercury's response to the draft NNC, other action needed to be taken."
Mercury then pursued proposed legislation (which became AB 2639) to amend the definition of broker. CDI opposed that legislation. The bill did not pass as Mercury had proposed - Ins. Code §1623 provided only that a licensed broker submitting applications for insurance as a broker is presumed for licensing purposes to be acting as a broker.

A 10/20/00 Addendum to the FRUB Report noted that CDI would follow up with Mercury, and during the next FRUB Exam would verify that Mercury implemented the resolutions described. It added that CDI had not received a written response from Mercury to the draft NNC, that Mercury had advised that it thought its written response had been fulfilled by passage of AB2639, and that Mercury would contact CDI's Legal Division to discuss the matter further. On 11/7/00, Mercury wrote to CDI's Bureau Chief stating its understanding that "enactment of AB2639 resolves the problem," and asking her to forward the letter to CDI's Legal Division "so that we can discuss the issues" as it had "tried to contact by telephone the CDI's Legal Division several times without success." Mercury evidently received no response from CDI.

CDI commenced another market conduct exam in 2002: the resulting report did not mention the broker/agent issue. One of the examiners testified he was instructed to ignore such issues as they had been resolved separately in an "informal arrangement. From 1999-2004, CDI approved more than 50 Mercury rate applications which did not list broker fees.

In the interim, Mercury had been sued in a civil action by a consumer asserting claims under B&P Code §§ 17200 & 17500 for using "brokers" who were really acting as agents without appointment and thus improperly charging broker fees. (*Krumme v. Mercury Insurance Company et al.* ("*Krumme*"), SF Sup. Court, Case No. 313367.) On 4/11/13, the trial judge held that Mercury had violated § 17200 by using "brokers" that transacted insurance for Mercury and were de facto Mercury "agents," that charging those "broker fees" thus violated the broker fee regulations in 10 C.C.R. § 2189.1 et seq., and the common law as interpreted by CDI under a 1980 CDI Bulletin, and that Mercury had violated B&P Code §§ 17200 and 17500 through rate comparisons with insurers that only used captive agents without disclosing that some Mercury brokers add broker fees. The trial court granted injunctive relief, but did not order restitution as although Mercury "constructively" received the broker fees, actual receipt was required to order restitution under B&PC §17203.4.

Mercury obtained a stay as to the use of brokers and broker fees, pending appeal. On 10/29/04 the appellate court affirmed. (*Krumme v. Mercury Ins. Co.* (2004) 123 Cal.App.4th 924.) On 1/29/05 the California Supreme Court denied review. Mercury replaced its broker contracts with AIS as of 11/1/05.

Mercury later acquired AIS and appointed it as an agent in 2009.

On 2/3/04 CDI issued its Notice of Non-Compliance ("NNC") under Ins. Code § 1858.1, incorporating most of the findings of fact and conclusions of law from *Krumme*, and including an Accusation under §704(a) and an OSC re same. Mercury and CDI then stipulated to stay the NCP.

In April 2006, CDI set the NCP for hearing. CW was granted leave to intervene as to the NNC, but not the accusation or OSC, on 5/16/07.

A dispute as to the application of "Prepared Direct Testimony" ("PDT") requirements followed. Under 10 CCR 2614.13(a) and (d), PDT "in narrative statement or question and answer format, of each direct witness expected to be called to testify by the applicant in a proceeding, shall be filed and served" before the evidentiary hearing, but each person whose PDT is offered shall be available for cross-examination. Administrative Law Judge ("ALJ") Owyang ruled that the PDT Rule applied in the NCP against Mercury, rejected a claim that it should not extend to adverse witnesses, and declined to certify the issue to the Commissioner.

The Commissioner then announced his intent to amend 10 CCR § 2614.13 to state that PDT is required only for party-affiliated witnesses and experts, noting that a recent ALJ ruling contra "creates the necessity for this rulemaking." CW and Mercury submitted comments on the proposed amendment. The amendment to §2614.13 was approved on 12/30/10. On 1/3/11, a new Commissioner (Comm. Jones) took office. In April 2011, CDI filed a Second Amended NNC (the "SANNC") asserting rate regulation violations under Ins. Code §1861.01(c), 1861.05(a), based on the broker fees AIS charged customers it placed with Mercury.

ALJ Owyang had declined to continue the deadline to file PDT based on the pending amendment. On 2/24/11, he ruled the amendment did not apply to the NCP, and ordered disclosure of any communications with the Commissioner regarding any issue in the NCP. On 4/26/11, CDI's General Counsel stated that he had "directed the initiation of that rulemaking to remedy" ALJ Owyang's ruling on the PDT issue, and that CDI's "Chief of Staff at the time, Jesse Huff, and Commissioner Poizner's Special Counsel at the time, Peter Conlin, were authorized to approve rulemaking files on Commissioner Poizner's behalf and did so in this case," but neither had spoken with Commissioner Poizner about the PDT rulemaking.

On 1/31/12 ALJ Owyang issued a proposed decision holding "CDI violated separation of function principles, had ex parte communications with the Commissioner, and denied Mercury due process and a fair hearing," and as such "loose practices constitute an abuse of its authority that cannot be condoned," ordered dismissal of the SANNC. Commissioner Jones rejected that proposed decision on 3/30/12, and ordered a hearing on the merits. Mercury then sought judicial review through a writ petition to require the Commissioner to adopt ALJ Owyang's Proposed Decision and dismiss the NCP. The trial court sustained a demurrer without leave to amend, holding that C.C.P. § 1094.5 applied, Mercury had not pled exhaustion of administrative remedies, its jurisdictional arguments "may be rendered moot if Petitioners prevail on the substantive merits of the case," and that "it does not necessarily follow that an administrative hearing will be tainted by improper ex parte communications on remand." Mercury appealed from that decision. The appellate court affirmed. (*Mercury Ins. Co. v. Jones*, 2013 WL 1777781 (Apr. 26, 2013, B244204).)

By that time, ALJ Owyang had retired; the case was assigned to ALJ Scarlett. He ruled that the pre-amendment PDT regulation should be applied, but that if PDT could not be obtained from adverse

witnesses after a good faith attempt to secure it, a party could subpoena an adverse witness to the hearing. The hearing commenced in April 2013 followed by post-hearing briefing, and stood submitted as of 4/30/14.

On 12/5/14, ALJ Scarlett issued his proposed decision. He concluded that the ex parte communications at issue did not rise to the level of a due process violation requiring the dismissal of the entire proceeding, and that disqualification of the decisionmaker had been effectuated as Commissioner Poizner had left office. On the merits, he ruled that Mercury "brokers" were de facto or ostensible agents from 7/1/96 to at least January 2009, that their "broker fees" were agent fees and therefore "premium," and so should have been reported in rate applications for prior approval. He also ruled that even if the broker fees were not premium, they should have been reported as "miscellaneous" fees on rate applications. He then ruled that the appropriate penalty was based on at $150/act for at least 183,957 violations, and that Mercury's conduct was willful, for a total civil penalty of $27,593,550. On 1/7/15 Commissioner Jones adopted ALJ Scarlett's Proposed Decision in full. This Petition followed.

Standard of Review: Under Ins. Code §1861.09, judicial review here is in accordance with § 1858.6. Ins. Code §1856 provides that in proceedings to review an administrative decision by the Commissioner, the trial court "is authorized and directed to exercise its independent judgment on the evidence and unless the weight of the evidence supports the findings, determination, rule, ruling or order of the commissioner, the same shall be annulled." (*State Farm v. Quackenbush* (1999) 77 Cal.App.4th 65, 71, quoting Ins. Code §1858.6.) This independent judgment standard requires the trial court to accord a strong presumption of correctness to the Commissioner's findings, but ultimately the trial court is free to reweigh the evidence and substitute its own findings. (*State Farm, supra* 77 Cal.App.4th at 71; *Norasingh v. Lightbourne* (2014) 229 Cal.App.4th 740, 753; *Deegan v. City of Mountain View* (1999) 72 Cal.App.4th 37, 45; *Yamaha Corp. of America v. State Bd. of Equalization*, (1998) 19 Cal.4th 1, 11.) The standard of review for the penalty is abuse of discretion. (*Barber v. State Personnel Bd.* (1976) 18 Cal.3d 395, 404.)

The RJN: Mercury's Request for Judicial Notice ("RJN") is GRANTED for Exs. A, B, and E-G, but DENIED for Exs. C & D. All of the documents are relevant, and are subject to judicial notice, as Exs. B, C, D, F & G are court records subject to judicial notice under Ev. Code §452(d), and Exs. A and E are official acts of a public entity subject to judicial notice under Ev. Code §452(c).

CDI objects that Exs. A, E & G contain matters in dispute that cannot be noticed for the truth of matters asserted therein. But judicial notice is proper as to the existence of these records and the legal effect thereof. (*Fontenot v. Wells Fargo Bank, NA* (2011) 198 Cal.App.4th 256, 264; *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471.)

CDI objects as to Exs. A-E and G under C.C.P. § 1094.5(e) as they are not in the Administrative Record. Mercury responds that courts in §1094.5 proceedings regularly take judicial notice of court records and official acts. But that does not obviate the need to show why evidence should be admitted which is not part of the administrative record. (See *Jefferson Street Ventures, LLC v. City of Indio* (2015) 236 Cal.App.4th 1175, 1190-1192.) Ex. A is part of the "legislative history" for the statutory scheme at issue, Ex. B is offered to address a collateral estoppel claim, Ex. E is relevant to the fairness claim, and Exs. F & G demonstrate the history of this action.

The RJN is thus **GRANTED** for Exs. A, B, and E – G, but **DENIED** as to Exs. C & D, as Mercury has not demonstrated a basis for admitting that evidence under C.C.P. § 1094.5(e).

Grounds for Relief: Mercury's Motion presents four grounds for relief, summarized as follows:
(1) Mercury contends that the Commissioner erred in his 3/30/12 Order, by rejecting the proposed decision of ALJ Owyang to dismiss the NCP against Mercury based on alleged ex parte communications within CDI during the NCP ("Issue 1");
(2) Mercury contends that the Commissioner erred in entering his 1/7/15 Order imposing a civil penalty on Mercury, as the "broker fees" at issue were not "premium," were not required to be included on rate applications or approved by CDI, and did not result in any violation of the Insurance Code rate regulation provisions by Mercury ("Issue 2");
(3) Mercury contends that the Commissioner abused his discretion in imposing a $27,593,550 civil penalty on Mercury ("Issue 3"); and
(4) Mercury contends that dismissal is compelled based on its affirmative defenses of equitable estoppel and laches compel ("Issue 4").

The Court **DENIES** the Petition on Issue 1, but **GRANTS** the Petition on Issue 2. Although not necessary to the determination, the Court also finds on Issue 3 that the imposition of the penalty at issue violated due process, and on Issue 4, that the NCP was barred by the doctrine of laches.

On Issue 1, Mercury contends that it was denied due process in the NCP, because CDI engaged in *ex parte* communications with the Commissioner, through his Chief of Staff and Special Counsel, during the proceedings, to effectuate a rule change made to assist CDI in presenting its case against Mercury, and that dismissal of the SANNC was thus compelled.

Mercury is correct that there *were* due process violations, as both ALJ Owyang and ALJ Scarlett concluded. The evidence establishes that CDI commenced rulemaking proceedings while the NCP was pending, in response to ALJ Owyang's rulings, through CDI's General Counsel, who communicated with the Commissioner's Chief of Staff and Special Counsel to obtain that result. The evidence also demonstrates that CDI prosecutors were aware of the rulemaking effort, stalled in the NCP to benefit from it, and then tried to use the amendment to push ALJ Owyang to change his ruling. CDI thus comingled its prosecutorial and adjudicatory functions by seeking and securing a rule change, through *ex parte* communications inside CDI, which would have substantive effects on the case while the case was pending. At a minimum, the result is a lack of the appearance of fairness.

That the communication was as to a procedural issue and concerned the rule-making process does not make the communication permissible, as PDT had been the subject of substantial dispute in the proceedings, and according to CW, was potentially outcome-determinative. (See Gov. Code §11430(a), ["While the proceeding is pending there shall be no communication, direct or indirect, regarding *any issue in the proceeding*, to the presiding officer from an employee or representative of an agency that is a party..."], and §11430.20(b) [exception for *noncontroversial* procedural matters, such as format of pleadings, number of copies, or manner of service].) The evidence thus demonstrates that CDI violated Gov. Code §11425.10 and §11430, by failing to keep the prosecutorial and adjudicatory function separate, and by engaging in *ex parte* communications with the Commissioner's staff concerning disputed and material issues in the NCP, and thereby denied Mercury due process in those proceedings.

Mercury is not estopped from raising those issues here. Respondents contend that they were addressed in the prior writ petition. But the trial court did not decide whether the *ex parte* communications were sufficient to compel dismissal: it held that the failure to exhaust administrative remedies precluded such a determination at that stage of the proceedings. The appellate court also found the claim premature, for failure to exhaust administrative remedies. (*Mercury Ins. Co. v. Jones*, 2013 WL 1777781 (4/26/13;

B244204), at * 5.) And it noted that Mercury's claims of due process and statutory violations "may be more fully developed for consideration on remand." (Id. at *7 ["Mercury's concerns about the fairness of the administrative proceeding may be addressed if and when there is a final decision on the merits."].)

However, Mercury has failed to demonstrate that dismissal is required as a result. Mercury points to *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal. App. 4th 81 for the proposition that a due process violation resulting in the "clear appearance of unfairness and bias" compels dismissal. But the remedy there was to remand with directions that a new hearing be conducted with a different judicial officer. (Id. at 98.) And here, that occurred.

Nor do *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1, *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board* (2007) 149 Cal.App.4th 116 or *Rondon v. Alcoholic Beverage Control Appeals Bd.* (2007) 151 Cal.App.4th 1274 compel dismissal here. In each of those cases, the *ex parte* communication was on the merits after a full hearing, while the communications here concerned procedural issues and occurred before a hearing on the merits had commenced. Nor do those cases demonstrate that dismissal is the only appropriate remedy for a due process violation. The other cases cited by Mercury also fail to establish that dismissal is the appropriate remedy for the violation here at issue. And while the reasoning in *Utica Packing Co. v. Block* (6th Cir. 1986) 781 F.2d 71, 78 may be analogous here, that case is not controlling, and also involved conduct which occurred after a full hearing.

Accordingly, while CDI's conduct constituted a due process violation, it was not sufficient to compel dismissal of the NNC.
And it appears that Mercury then received a fair hearing before ALJ Scarlett. ALJ Scarlett stated that he applied ALJ Owyang's ruling by using the pre-amendment PDT rule. Mercury argues that ALJ Owyang's ruling differed as he had not agreed that Respondents could call adverse witnesses who did not provide PDT. But ALJ Owyang had also specifically noted that he had not yet rejected the idea that an adverse witness who refused to sign PDT could still be required to testify at the hearing. (AR001802.) As a result, there was no demonstrated prejudice to Mercury in the manner in which ALJ Scarlett decided to apply the PDT Rule.

Nor does the evidence demonstrate that Commissioner Jones was involved in any improper communications. Mercury argues that he was "infected" because the same prosecutors and senior advisors to the Commissioner remained in place. But that is not apparent. In addition, as the Commissioner is an elected official vested with the authority to decide cases concerning compliance with ratemaking provisions, there would be no one else who could do so if he was disqualified. (See Gov. Code §11512.) And as he adopted ALJ Scarlett's proposed decision after the hearing was complete, if he had been disqualified at that time, the result would be the same. The Court thus **DENIES** the Petition on Issue 1.

On Issue 2, Mercury does not dispute for purposes of this Petition that AIS brokers were "de facto" agents of Mercury, as the *Krumme* court held. Instead, Mercury contends that even so, the fees at issue were not "premium," and that Mercury therefore did not violate Ins. Code §§1861.01(c), 1861.05(a), or 1861.05(b) by failing to seek rate approval for those fees, or because of any variance in the amount of fees charged.

Whether the fees at issue are "premium" is properly presented here, as it was not decided in *Krumme*: the *Krumme* court noted specifically that ratemaking was not at issue in the case. (*Krumme v. Mercury Ins.* (2004) 123 Cal.App.4th 924, 937.)

ALJ Scarlett's decision and the resulting Order of the Commissioner were based on the premise that all fees collected by an agent are premium and thus subject to the rate regulations embodied in Ins. Code §§1861.01 and 1861.05. But that conclusion is inconsistent with the applicable authorities.

Mercury correctly argues that the fees at issue were not premium. "It is commonly understood that a premium is the amount paid for certain insurance for a certain period of coverage." (*Interinsurance Exchange of Auto. Club v. Sup. Court* (2007) 148 Cal.App.4th 1218, 1230 ("*Auto Club*") [finding installment fees were not premium: rejecting broader interpretation proffered by CDI]; *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1324; *In re Insurance Installment Fee Cases* (2012) 211 Cal.App.4th 1395, 1405 ("*IIFC*"); see also *State Farm Mut. Auto. Ins. Co. v. Carpenter* (1939) 31 Cal. App. 2d 178, 180 [association membership fee charged by insurer not "premium" as not paid to obtain insurance].) "Premium" thus does not apply to any and all sums that a consumer pays to an insurer or its agent.

The "broker fees" charged by AIS were not "premium," as the evidence establishes that those fees were charged for a *separate* service provided by AIS, in giving customers comparative pricing, for multiple potential insurers. AIS charged those fees to place policies with *any* insurer, not just Mercury – and Mercury was not always chosen. Mercury did not collect those fees, require them, or control them. AIS' "broker" fees thus were not part of "the amount paid for certain insurance for a certain period of coverage."

Respondents argue that the installment fees in *Auto Club* and *IIFC* are distinguishable, as in both cases they were optional and offered a separate benefit to the consumer. However, comparative pricing services also provide an apparent benefit to consumers. In addition, Mercury has presented evidence demonstrating that AIS' broker fee was "negotiable" and that AIS did not always charge a broker fee.

Even if AIS charged a "broker fee" as a matter of course, that would not make such fees premium, as they were not "paid for certain insurance for a certain period of coverage." And although *Troyk* stated that the "cost of insurance" includes direct and indirect costs associated with providing coverage, the insurer in *Troyk required* its insureds to pay their stated premiums, plus service charges, to obtain one-month term policies. Here, Mercury did not require the "broker fee" as a condition for issuing its insurance, and did not collect any portion thereof. Moreover, as the AIS fee was charged separately, and without regard to what insurer was ultimately selected, even from the consumer's perspective the fee was not part of the cost of obtaining a policy from Mercury – it was part of the cost of using AIS to obtain insurance from any number of potential insurers. The interpretation of "premium" which was the basis for the decision at issue is thus incorrect.

The authorities cited by Respondents do not compel a contrary conclusion. CDI argues that premium includes all payments by the insured which are part of the cost of insurance, and is based on the total cost to the consumer, citing *Groves v. City of Los Angeles* (1953) 40 Cal.2d 751, *Metropolitan Life Ins. Co. v. State Bd. of Equalization* (1982) 32 Cal.3d 649, *Allstate Ins. Co. v. State Board of Equalization* (1959) 169 Cal.App.2d 165, 168 and *Spanish Speaking Citizens' Foundation, Inc. v. Low* (2000) 85 Cal.App.4th 1179. CW argues that premium refers to how much the policyholder is charged and includes "all costs paid by the insured for insurance, including fees charged by agents, citing the same cases.

However, *Groves, Metropolitan* & *Allstate* are all taxation cases. (See *Groves, supra* at 760-761; *Metropolitan, supra* at 661-662; and *Allstate, supra* at 168.) Cases interpreting "gross premium" for tax purposes do not serve to define "premium" in other contexts. (See *IIFC* at 1407, fn. 9 ["We do not rely on

Allstate and the cases approving or following it... because those cases...involve the interpretation of the term "gross premium" for purposes of insurance company *taxation,* which is a different context than that presented by this case."], and *Auto Club* at 1233-34 ["*Allstate* is distinguishable because it interpreted the term "gross premiums" for taxation purposes and, in any event, involved inapposite facts to this case ... we do not rely on taxation cases in interpreting the meaning of the term "premium" as used in section 381, subdivision (f)..."].) *Spanish Speaking Citizens' Foundation, Inc. v. Low* (2000) 85 Cal.App.4th 1179 and *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968 also fail to define "premium" in this context. And although 10 CCR §2189.3 prevents an appointed agent from charging a separate broker fee, that does not make such a fee into "premium" under the rate statutes.

Respondents also point to 10 CCR §2360.0(c), which provides that the term "premium" means "the final amount charged to an insured for insurance after applying all applicable rates, factors, modifiers, credits, debits, discounts, surcharges, fees charged by the insurer and all other items which change the amount the insurer charges to the insured." However, the regulation specifically pertains to "the final amount charged to an insured for insurance ..." and thus does not establish that fees charged for a separate service are "premium."

Respondents' citations to Bulletin 80-6 are also unavailing. CDI concedes that Bulletin 80-6 was not controlling authority, and as Mercury observes, a CDI representative, Mr. Tomashoff, stated in 1997 that fees could be charged by agents that would not be deemed premium if provided for services outside the scope of the agency. Mr. Tomashoff noted in that statement that it was not a statute or regulation - but neither was Bulletin 80-6. And as described in *Auto Club*, CDI conceded in 2006 that "premium" had different and sometimes conflicting meanings depending on context, and that it was *considering* efforts to clarify what charges must be disclosed as premium. (*Auto Club*, supra, at 1223.) That Mercury took a contrary position in *Krumme* also does not alter the analysis here, as it did so before *Auto Club* and *IIFC* were decided.

Respondents also argue that even if fees charged by AIS were not "premium," they were to be reported as miscellaneous fees under 10 CCR §2648.4(a), and that Mercury's failure to do so thus violated Ins. Code §1861.01(c), 1861.05(a) & 1861.05(b).
However, that theory of liability was not even alleged in the SANNC. Nor is that theory supported by the evidence.

Neither the rate application form in place from 1996-2006 nor CDI's filing instructions described what an insurer was to report as "miscellaneous fees." Nor did 10 CCR §2648.6 so state. CDI points to Ins. Code § 1857.7(11), which required that the application include "Expenses incurred including loss adjustment expense, commission and brokerage expense, other acquisition expense and general expense." But Mercury did not incur AIS's expenses. Nor do the fees at issue fall under "ancillary income," as that was described as income "derived from operations directly related to insurance (such as premium finance revenues and membership dues but not insurance premium)." The fees here at issue were not actual "income" to Mercury, and thus not ancillary income. Nor does the evidence suggest that Mercury should have thought to list the fees at issue, as they would not necessarily belong in rate applications which consider projected *actual* costs and revenue to assess rates.

In addition, CDI's own silence on the subject is significant. Although CDI was aware of the agent/broker fee issue from 1999 on, it CDI failed to note any requirement to list the resulting fees on rate applications in either the 1998 FRUB or the 2000 draft NNC, or in the forms used for such filings. Nor does it appear that CDI stated any objection to any of Mercury's subsequent rate applications for omitting the "broker fees" at issue. And even if CDI's rate examiners did not know of the issue, CDI as a whole certainly did.

However, Mercury is incorrect in arguing that it thus enjoys a safe harbor under Ins. Code §1858.07(b) for using those rates, as §1858.07(b) does not purport to provide a safe harbor for claims brought by CDI for failing to provide information therein. Mercury is also incorrect in claiming that it cannot be held liable here because AIS agents could not be liable for rate regulation violations. (*California Ass'n of Health Facilities, supra,* 16 Cal.4th at 295-296 [under rule of nondelegable duties, licensee is responsible to licensing authority for employee conduct in the exercise of his license, as the owner has a responsibility to see to it that the license is not used in violation of law.; *Ford Dealers Assn. v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, 360.)

Finally, because the Court does not find "premium" ambiguous in this context, the rule of lenity does not apply here. The Court thus **GRANTS** the Petition on Issue 2.

On Issue 3: The penalty imposed violates due process. Mercury was not given fair notice that it could be subjected to penalties for not treating AIS' broker fees as premium in rate applications, or for otherwise failing to list them therein, prior to the issuance of the NNC in 2004. (*FCC v. Fox Television Stations, Inc.* (2012) 132 S. Ct. 2307, 2317 [clarity in regulation is essential to due process, and requires invalidation of impermissibly vague laws].) The relevant law generally was unclear prior to the issuance of the NNC was issued, as Mr. Tomashoff's statements reflected. And CDI did not adequately inform Mercury of the potential for penalties for the conduct at issue. Among other things, it failed to respond to a letter from Mercury seeking confirmation that specific legislation had resolved CDI's concerns, failed to note any remaining concerns in the 2002 Report, and approved multiple rate applications which did not list the "broker fees" at issue.

CDI also unduly delayed in issuing the NNC while potentially vast penalties accrued. (See *Walsh v. Kirby* (1974) 13 Cal. 3d 95, 104-106 [allowing licensee's misconduct to continue while department accumulate evidence of multiple violations was arbitrary and capricious and a denial of due process].) Whether CDI's delay reflects a policy or practice is not determinative: it is sufficient that Mercury was subjected thereto.

Mercury is also correct that the applicable standard for evaluating willfulness in this context is Ins. Code §1850.5, which requires specific intent. No evidence of such specific intent has been demonstrated.

Finally, although the Commissioner has discretion under Ins. Code §1858.07(a) to define each "act" as charging an unlawful "broker fee," and could reasonably determine that each charging of an unlawful "broker fee" was such an "act," in light of the potential penalties at issue, applying that definition to assess a penalty of $5,000 - $10,000 per "act" would be an abuse of discretion here.

On Issue 4: Mercury's governmental estoppel claim fails, as it has not demonstrated that CDI misrepresented or concealed material facts with an intent to induce Mercury to rely thereon. However, the evidence establishes Mercury's affirmative defense based on laches. A trial court has the inherent power to dismiss administrative proceedings where there has been an unreasonable delay between discovery of the facts constituting the reason for the proceedings and commencement thereof, resulting in prejudice to the responding party. (*Gates v. Dep't of Motor Vehicles* (1979) 94 Cal.App.3d 921, 925.) CDI unreasonably delayed from at least late 2000 to early 2004, when it issued the actual NNC, in commencing these proceedings. That CDI found it efficient to do so does not justify that delay. And there is manifest injustice resulting from the delay, in light of the accrual of potential penalties in the interim, and the resulting penalty assessed.

The Petition is therefore **GRANTED**. The matter is remanded to the CDI with directions to vacate the

1/7/15 Order Adopting Proposed Decision and instead enter a new Order consistent with the decisions stated herein.

Court orders clerk to give notice.

It is so ordered.

Hon. Gail Andler