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The Association of California Insurance Companies, et al. v. Poizner, et al.
BS 109154

Tentative decision on petition for writ of mandate: denied

Petitioners The Association of California Insurance Companies, The Personal Insurance Federation of California, The American Insurance Association, and The Pacific Association of Domestic Insurance Companies seek a writ of mandate invalidating amendments to certain provisions of the California Code of Regulations adopted by the Commissioner (the "Commissioner") of the Department of Insurance (the "Department"). The court has read and considered the moving papers, oppositions and replies, and renders the following tentative decision.

A. Statement of the Case

Petitioners commenced this proceeding on May 25, 2007. They seek a writ of mandate that prevents the Commissioner and the Department of Insurance ("DOI") from enforcing Title 10 CCR sections 2651.1, 2661.1, 2661.3, 2662.1, 2662.3, and 2662.5 of, as recently amended, on the grounds that they violate Government Code section 11342.2. Petitioners contend that the challenged regulations (1) are inconsistent and in conflict with sections 1861.10 and 1861.05 of the Insurance Code and (2) are not reasonably necessary to effectuate the purpose of the underlying statutes. The regulations relate to the process of awarding consumer groups compensation for participating in certain administrative proceedings relating to insurance.

B. Applicable Law

A party may seek to set aside an agency decision by petitioning for either a writ of administrative mandamus (CCP §1094.5) or of traditional mandamus. CCP §1085.

A traditional writ of mandate under CCP section 1085 is the method of compelling the performance of a legal, ministerial duty. Pomona Police Officers' Assn. v. City of Pomona, (1997) 58 Cal.App.4th 578, 583-584. A petition for traditional mandamus is appropriate in all actions "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station...." CCP §1085. "Generally, a writ will lie when there is no plain, speedy, and adequate alternative remedy; the respondent has a duty to perform; and the petitioner has a clear and beneficial right to performance." Pomona Police Officers' Assn., 58 Cal.App.4th at 584 (internal citations omitted). No administrative record is required for traditional mandamus. The court must uphold the agency's action unless it is "arbitrary and capricious, lacking in evidentiary support, or made without due regard for the petitioner's rights." Sequoia Union High School District v. Aurora Charter High School, (2003) 112 Cal.App.4th 185, 195.

C. Background

1. Prop 103

In 1988, California voters enacted Proposition 103, which included Ins. Code sections 1861.05 and 1861.10.

Prior to the passage of Proposition 103, California was an "open rate" state, permitting insurers to set insurance rates without the Commissioner's prior or subsequent approval. California Auto. Assigned Risk Plan v. Garamendi, (1991) 232 Cal.App.3d 904, 909-910. Under

the open rate system, the Commissioner could prohibit an insurance rate only if a reasonable degree of competition did not exist in the area, and the rate was found to be excessive, inadequate or unfairly discriminatory. Id.

Proposition 103 protects California residents from excessive insurance rates by (1) mandating that all insurers seeking to raise insurance rates must obtain approval from the Commissioner and (2) prohibiting the Commissioner from approving any rates that are "excessive, inadequate, unfairly discriminatory or otherwise in violation of this chapter." Ins. Code §1861.05(a), (b).

Insurers must file a rate application with the Commissioner, who reviews the application to determine if the insurer meets its "burden of proving that the requested rate change is justified and meets the requirements of this article." Ins. Code §1861.05(b). When the Commissioner receives an application for a rate increase, he must notify the public of the insurer's application. Ins. Code §1861.05(b). The rate application is deemed approved unless (1) a consumer requests a hearing within 45 days of public notice and the commissioner grants a hearing, (2) the Commissioner *sua sponte* decides to hold a hearing, or (3) the proposed rate adjustment exceeds a certain percentage of existing rates, in which case the Commissioner must hold a hearing upon timely request. Id. The hearings are conducted under the Administrative Procedures Act and heard by an administrative law judge. Ins. Code §1861.08.

Ins. Code section 1861.10 ("section 1861.10") provides that "(a) Any person may initiate or intervene in a proceeding permitted or established [by the rate application provisions]... (b) The [C]ommissioner 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) the person substantially contributed to the adoption of any order regulation, or decision by the Commissioner or a court.

2. The 1995 Regulations

In 1995, the Department promulgated regulations (CCR §§2661.1 *et seq.*) to implement section 1861.10 ("1995 Regulations"). The 1995 Regulations set forth (1) the procedure to intervene in rate hearings pursuant to Ins. Code §1861.05(c); and (2) the basis for the payment by the insurer of advocacy and witness fees to the intervenor in connection with the adoption of a decision on the rate hearing pursuant to §1861.10. Pertinent portions of the 1995 Regulations are as follows.

Any person can intervene in any proceeding on any rate application or other pertinent proceeding if the issues are relevant to the proceeding. 10 CCR §2661.2. A person desiring to intervene and become a party to a rate hearing must file a petition to intervene with the Administrative Hearing Bureau, and shall be considered an "additional pleading" for purposes of initiating discovery under Gov. Code section 11507.6. 10 CCR §2661.3(e). Any other party may file a response to the petition to intervene to contend that the proposed intervenor does not represent the interests of consumers. 10 CCR §2661.3(f). The administrative law judge shall rule on the intervention. 10 CCR §2661.3(g). If granted, the consumer becomes a party to the rate proceeding. 10 CCR §2651.1(f).

To seek a compensation award, the intervenor must first file a request in conjunction with an ongoing proceeding for a finding of eligibility which establishes that the intervenor represents consumer interests. 10 CCR §§ 2662.2, 2662.3(a) The Commissioner shall rule on eligibility

within 15 days of the request. 10 CCR §2662.2(c). Those found eligible must then file a request for a compensation award detailing the intervenor's services and expenditures, and describing the intervenor's "substantial contribution" to the proceeding. 10 CCR §2662.2(a). The "substantial contribution" must be supported by specific citations to the intervenor's evidence, briefs, or discovery. 10 CCR §2662.5(a)(1). Compensation may be reduced to the extent that the intervenor's substantial contribution duplicated the efforts of another party. !0 CCR §2662.5(b). The request for an award may be submitted within 30 days of service of the "order, decision, regulation or other action of the Commissioner in the proceeding for which intervention was sought" or within 30 days after the conclusion of the entire proceeding. 10 CCR §2662.3(a).

3. The Amended Regulations

In 2006, effective January 28, 2007, the Commissioner amended the 1995 Regulations (the "Amended Regulations"). The Amended Regulations were proposed and adopted by the Commissioner's predecessor, John Garamendi, whose stated purpose was to "clarify that consumers, who participate in the approval process after having filed a petition for a hearing, may seek an award of reasonable advocacy fees." The Commissioner found that the Department endeavors to encourage interested consumer representatives and insurers who have filed rate applications to resolve rate challenges informally, which obviates the need for a lengthy formal hearing. After a settlement is reached, insurers often seek to withdraw their rate applications, after substantial time and effort had been devoted to challenging the rate application. There was no provision in the prior regulations to award costs to consumer representatives in those circumstances, even though their efforts resulted in reduced rate increases. The Commissioner determined that the amendments were necessary in order to properly implement the requirements, purposes and intent of the statutes.

The Amended Regulations implement these changes as follows. The definition of "Rate Proceeding" has been defined as including a proceeding established upon the submission of a petition for hearing pursuant to section 1861.05. 10 CCR §2661.1(h). A "Rate Hearing" is defined to mean a hearing noticed by the Commissioner or one in response to a petition for hearing pursuant to section 1861.05. A petition to intervene may be made with the Rate Enforcement Bureau concurrently with a petition for hearing, or filed with the Administrative hearing Bureau after a hearing has been granted, and shall be considered an "additional pleading" for purposes of initiating discovery under Gov. Code section 11507.6. 10 CCR §2661.3(e). The appropriate person of the Rate Enforcement Bureau (if before a hearing has been granted) or the administrative law judge (if after a hearing has been granted) shall rule on the intervention. 10 CCR §2661.3(h). The definition of a "substantial contribution" justifying an intervenor award has been amended to include "A substantial contribution may be demonstrated without regard to whether a petition for hearing is granted or denied." 10 CCR §2661.1(k).

D. Analysis

Petitioners contend that the Amended Regulations conflict with section 1861.10 in that a rate application is not a proceeding within the meaning of that statute, and because they permit

an award of compensation where there has been no decision or order by the Commissioner.[1]

1. Standard of Review

To prevail, Petitioners must demonstrate that the Amended Regulations are invalid. The pertinent standard of review is set forth in Government Code section 11342.2, which provides: "[w]henever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless (1) consistent and not in conflict with the statute and (2) reasonably necessary to effectuate the purpose of the statute."

"A regulation, like a statute, is presumed valid and a challenger bears the burden of pleading and proof of invalidity. Bell v. Board of Supervisors, (1994) 23 Cal.App.4th 1695, 1710. In reviewing an administrative agency's rulemaking, courts will interfere only where the agency has "clearly overstepped its statutory authority or violated a constitutional mandate." Ford Dealers Assn. v. Dept. of Motor Vehicles, (1982) 32 Cal.3d 347, 356. A challenge to a regulation as unauthorized by the governing statute presents a question of law that is subject to independent review by the court. Southern California Edison Co. v. Public Utilities Commission, (2000) 85 Cal.App.4th 1086, 1096.

To determine whether a regulation is consistent and not in conflict with the statute, the court must review the administrative regulation for consistency with the controlling law. Communities for a Better Environment v. California Resources Agency, (2002) 103 Cal.App.4th 98, 108-109. The court inquires whether the challenged regulation alters or amends the governing statute or case law, or enlarges or impairs its scope and is within the scope of the authority conferred. Id. The administrative agency's view of its governing legal authority is entitled to great weight and will be followed unless it is clearly erroneous or unauthorized. Id.

The court should take into account and respect the administrative agency's interpretation of its governing statutes. Yamaha Corporation of America v. State Board of Equalization, (1998) 19 Cal.4th 1, 7-8. Thus, while the court is ultimately responsibility for the interpreting the law, courts typically accord great weight and respect to the administrative construction. Yamaha Corporation of America v. State Board of Equalization, *supra*, 19 Cal.4th at 12.

The inquiry as to whether a regulation is reasonably necessary to effectuate the purpose of the statute implicates the agency's expertise and therefore receives a much more deferential standard of review. Communities for a Better Environment v. California Resources Agency, *supra*, 103 Cal.App.4th at 109. The question to consider is whether the agency's action was arbitrary, capricious, or without reasonable or rational basis. Id.

2. Merits

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[1]Petitioners argue that the Amended Regulations are the result of a decision in another writ of mandate case filed by American Healthcare Indemnity Company and SCPIE Indemnity Company, BS094515 and cite to that judge's decision and analysis under the 1995 Regulations. That decision is irrelevant to the issue of the Commissioner's authority to promulgate the Amended Regulations.

Petitioners contend that there is a conflict between the Amended Regulations and section 1861.10, which contemplates consumer participation in "any proceeding." They argue that the plain meaning of "proceeding" refers to a formal hearing that is adjudicatory in nature, not a rate application review process. This is supported by section 1861.05, which contemplates a rate hearing requested by a consumer and ordered by the Commissioner.

For a regulation to be valid, the court must find that it is consistent and not in conflict with the governing statute. Govt. Code §11342.2. Section 1861.10, applicable to "any proceeding"permitted or established pursuant to chapter 9, which includes the Department's rate review process under Insurance Code section 1861.05, creates a broad standing for consumer participation in proceedings. Farmers Ins. Exchange v. Superior Court, (2006) 137 Cal.App.4th 842, 854. When interpreting statutes, courts must adopt a literal interpretation unless it is repugnant to the obvious purpose of the statute. Lungren v. Deukmejian, (1988) 45 Cal.3d 727, 735. "If the meaning is without ambiguity, doubt, or uncertainty, then the language controls. Halbert's Lumber v. Lucky Stores, (1992) 6 Cal.App.4th 1233, 1239.

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. The civil parallel is an action or lawsuit, either of which is more than just a trial. Instead, it consists of an initial pleading, motions and discovery, potentially settlement negotiations and then trial. Just as a lawsuit is initiated by a complaint, the Amended Regulations define a rate proceeding as initiated by a consumer's petition for a hearing. Similar to a complaint, the petition constitutes an "additional pleading" for purposes of initiating discovery. Before a hearing is had or even granted, insurers and consumer representatives participate in pre-hearing settlement negotiations. The Amended Regulations simply allow consumer representatives to participate in those negotiations and seek an award after the Commissioner's decision. No compensation award will be made to a consumer unless the petition is granted. 10 CCR §2662.3(a). This is entirely in parallel with the timing of a lawsuit.

Whether or not the lawsuit analogy applies, section 1861.10's use of the term "any proceeding" and not "hearing" plainly supports the Amended Regulations as authorized. Although the statute does not define the term "proceeding," that term is commonly quite broad in scope. Black's Law Dictionary defines "proceeding" as "[a]ny procedural means for seeking redress from a tribunal or agency; [a]n act or step that is part of a larger action." Black's Law Dict. (8th ed. 2004). In the Code of Civil Procedure, a "special proceeding" is every remedy other than an action. CCP §23. In the Evidence Code, a proceeding is "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." Ev. Code §901.

Thus, as commonly used, the term "proceeding" necessarily encompasses any act, step, or remedy, including in the rate review process. Section 1861.05 permits consumer participation in "any" proceeding. No limit is placed on the type of proceeding in which consumers can participate, except that it must be one permitted pursuant to the statute.

Petitioners argue that "proceeding" refers only to a formal hearing under 1861.05. First, this narrow interpretation of"proceeding" is contrary to the broad scope of review expressly provided for under Proposition 103, which states, "[t]his act shall be liberally construed and

applied in order to fully promote its underlying purposes." Prop. 103 §8. Second, a central purpose of Proposition 103 is to foster consumer participation in the rate review process. State Farm Mut. Auto. Ins. Co. v. Garamendi, (2004)32 Cal.4th 1029, 1045. Any interpretation of the statute that cuts short this purpose is contrary to the desired effect of the statute. Third, had the Legislature 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.

The Commissioner reasonably interpreted this statutory mandate by adopting the Amended Regulations to aid the objective of Proposition 103 by encouraging consumer participation in the rate review process, and not just in formal hearings. Proposition 103's stated purpose is "to protect consumers from arbitrary insurance rates and practices, to encourage a competitive insurance marketplace, to provide for an accountable Insurance Commissioner, and to ensure that insurance is fair, available, and affordable for all Californians." Prop. 103 §2. Consumer participation in the rate review process is central to this objective. State Farm Mist. Auto. Ins. Co. v. Garamendi, *supra*, 32 Cal.4th 1029, 1045.

The Amended Regulations also are consistent with section 1861.10(b)'s provision for consumers and consumer representatives to collect advocacy fees. Proposition 103 encourages consumer participation in the rate-making process by allowing the Commissioner to award advocacy fees to consumer representatives. The Amended Regulations are consistent with this purpose because they permit consumer representatives to collect advocacy fees for work performed during the rate review process, specifically during pre-hearing negotiations, as long as the consumer or representative made "a substantial contribution" to the adoption of any order, regulation or decision.

Petitioners argue that an advocacy fee award cannot be made under section 1861.10(b) unless there is a "final" order or decision on the merits, and no decision can result from informal discussions during the rate review process.

Petitioners are wrong. When a settlement is reached during pre-hearing negotiations, insurers will withdraw their rate applications. Thereafter, the Commissioner will issue a decision denying the petition for hearing as moot. This decision nevertheless constitutes an "order" or "decision" for purposes of section 1861.10(b). An advocacy fee award for consumer advocates is appropriate for their work performed to achieve the settlement and resulting order denying petition for hearing.[2]

The Petition for Writ of Mandate is denied. Petitioners have failed to demonstrate that

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[2]Petitioners' reliance on Economic Empowerment Foundation v. Quackenbush, (1997) 57 Cal.App.4th 677, 684-690, is misplaced. That case dealt with a narrow jurisdictional issue concerning whether a court or the Commissioner would have jurisdiction to award advocacy fees. In analyzing section 1861.10(b) to reconcile competing interpretations, the Court of Appeal merely stated that the forum rendering the final decision would have jurisdiction to award fees, whether on a piecemeal or ultimate basis. Id. at 688-89, The court also recognized that the purpose of awarding fees to interveners was "to encourage consumers to participate in insurance rate proceedings by compensating them for their contribution," and that the statute should be interpreted in order to "facilitate[] compensation." Id. at 686.

the Amended Regulations are inconsistent and in conflict with section 1861.10, and not reasonably necessary to effectuate the purpose thereof.