127 Cal.App.4th 228, 24 Cal.Rptr.3d 905, 05 Cal. Daily Op. Serv. 1782, 2005 Daily Journal D.A.R. 2364
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(Cite as: 24 Cal.Rptr.3d 905)

Court of Appeal, Third District, California.
AMERICAN INSURANCE ASSOCIATION et al., Plaintiffs and Respondents,
v.
John **GARAMENDI**, as Insurance Commissioner, etc., et al., Defendants and Appellants.
No. C045000.

Feb. 28, 2005.
Ordered Not Officially Published Oct. 12, 2005.[FN*]

FN* The Supreme Court ordered that the opinion be not officially published. (See California Rules of Court-Rules 976, 977 and 979).

Background: Insurance industry trade groups petitioned for peremptory writ of mandate to set aside and stop enforcement of California Department of Insurance (CDI) emergency regulation which sought to regulate use of losses and loss exposure in residential property insurance rating and underwriting. The Superior Court, Sacramento County, No. 03CS00839,Raymond M. Cadei, J., granted petition. Insurance Commissioner and CDI appealed.

Holding: The Court of Appeal, Morrison, J., held that Insurance Commissioner exceeded his authority in promulgating regulation.

Affirmed.

***906** Bill Lockyer, Attorney General, Lawrence K. Keethe, Jeffrey A. Rich, Deputy ***907** Attorneys General; Donald P. Hilla, Senior Staff Counsel, for Defendants and Appellants.

Steven W. Murray, Encino, and Amy Bach, Mill Valley, for United Policyholders, as Amicus Curiae for Defendants and Appellants.

Livingston & Mattesich, Gene Livingston and Terry German, Sacramento, for Plaintiffs and Respondents.

MORRISON, J.

At issue in this case is the validity of an insurance regulation promulgated in response to a perceived crisis in the availability of homeowners insurance due to the adoption of underwriting guidelines known as "use it and lose it," under which insurance coverage was lost due to filing a claim or even making an inquiry about coverage. John **Garamendi**, in his capacity as Insurance Commission of the State of California (hereafter Commissioner), and the California Department of Insurance (hereafter CDI) first sought to address the crisis by an advisory notice. When that notice was challenged as an underground regulation, the Commissioner responded by adopting an emergency regulation.

Petitioners, three insurance industry trade groups, petitioned for a peremptory writ of mandate to set aside and stop enforcement of the emergency regulation which sought to regulate the use of losses and loss exposure in residential property insurance rating and underwriting. The trial court found the regulation conflicted with the Insurance Code and granted the petition.

The Commissioner and CDI appeal, contending the regulation was within the Commissioner's authority and consistent with various provisions of the Insurance Code. We disagree. The Insurance Code provides no express authority for regulating the underwriting of homeowners insurance, nor can such expansive authority be implied. Unlike automobile insurance, homeowners insurance is subject to only a few restrictions, all clearly set forth in the Insurance Code. Reading the Insurance Code to give the Commissioner broad authority to regulate underwriting beyond these specific provisions is inconsistent with the legislative scheme as a whole. Accordingly, the regulation is invalid.

FACTUAL AND PROCEDURAL BACKGROUND

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In 2003, the Commissioner perceived a crisis in the availability of homeowners insurance. The perceived crisis centered around the cancellation and nonrenewal of homeowners policies and the lack of availability of homeowners insurance due to previous claims or inquiries about coverage. CDI had experienced an increase in consumer complaints about cancellation, nonrenewal and availability of homeowners insurance. The Commissioner believed that many of these problems could be traced to the use of loss databases compiled by various insurance-support organizations. In the Commissioner's view much of this data was imperfect and flawed and therefore reliance on it resulted in unfair and discriminatory treatment of policyholders and applicants. Further, the Commissioner believed insurers were foregoing the underwriting evaluations in violation of California law requiring that underwriting decisions not be based solely on the content of these databases, but only after further information is gathered from other sources. California law also requires insurers to evaluate the risk of future loss in making underwriting decisions.

In particular, the Commissioner was concerned about the use of the Comprehensive Loss Underwriting Exchange (CLUE) database and credit scoring in ***908** underwriting decisions. Whenever an insured filed a claim or even made an inquiry, it was reported to the CLUE national database. The Commissioner's concern was twofold. First, the databases often contained inaccurate information. And second, insurance was denied due to prior claims when the prior claims had no substantial relationship to an increased risk of loss. Numerous news reports documented the crisis in homeowners insurance as insureds lost their coverage through cancellation or nonrenewal, and had difficulty in obtaining new homeowners insurance because they had made claims, particularly claims for water damage which raised the specter of mold problems.

The Commissioner originally sought to address this problem by issuing an advisory notice in April 2003. The advisory notice began: “The purpose of this advisory notice is to direct your attention to those laws concerning the appropriate use of loss history information in the rating and underwriting of residential property insurance in California. The CDI has received numerous complaints from homeowners and tenants who have been treated unfairly by insurance companies, particularly in the gathering and use of loss information in the underwriting process.”

The advisory notice warned that not every loss is related to the current loss exposure and that insurers choosing to include losses as an eligibility criterion must demonstrate that each loss bears a substantial relationship to risk of future loss. Each loss must be evaluated and losses that have been fully remedied or otherwise resolved so that they no longer present an increased risk of loss do not have a substantial relationship to the insured's loss exposure. Inquiries regarding coverage are not relevant to underwriting unless an actual loss or exposure to loss is identified and determined to have a substantial relationship to loss exposure.[FN1] Loss history data bases compiled by insurance-support organizations do not distinguish between losses that bear a substantial relationship to loss exposure and those that do not. Loss information must be evaluated before it can be used as a basis for an adverse underwriting decision. The advisory notice cautioned insurers to review their eligibility guidelines and practices to ensure compliance with all applicable laws. Complaints regarding these provisions would receive priority.

> FN1. The Legislature acted on the concern that homeowners were losing insurance based solely on inquiries about coverage. Insurance Code section 791.12 was amended to add subdivision (c) which prohibits an adverse underwriting decision being made in whole or in part on the fact the individual has previously inquired and received information about the scope and nature of coverage under a residential fire or property insurance policy, if the information is received from an insurance-support organization and the inquiry did not result in the filing of a claim. (Stats.2003, ch. 442, § 1.)

After the advisory notice was issued, CDI notified insurers that complaints against them for nonrenewal or denial of a policy due to prior claim activity or loss history were justified. Regulations required an insurer to maintain eligibility guidelines for each line of insurance that were specific and objective factors that have a substantial relationship to an insured's loss

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exposure. (Cal.Code Regs., tit. 10, §§ 2360.0, subd. (b); 2360.2.) CDI took the position that prior claims or a loss history did not necessarily have a substantial relationship to an insured's loss exposure.

Petitioners American Insurance Association, Association of California Insurance Companies, and Personal Insurance Federation of California (hereafter petitioners) petitioned for a peremptory writ of mandate***909** to invalidate the advisory notice, arguing it was an illegal underground regulation and it conflicted with existing law. Petitioners argued that loss history data was an objective factor related to the risk of future loss because statistical and actuarial analyzes using loss history indicated an applicant with prior losses presents an increased risk of loss, in terms of both frequency and size of loss. The trial court found the advisory notice was likely a regulation and stayed enforcement of it.

In July 2003, the Commissioner adopted, on an emergency basis, a new regulation. The parties stipulated that the regulation superseded the advisory notice. Petitioners filed an amended petition, which sought to invalidate the regulation on the basis there was no emergency, the regulation exceeded the scope of the Commissioner's authority, and the regulation was inconsistent with statutory law. The parties stipulated to the dismissal of the causes of action relating to the advisory notice.

The new regulation addressed the same issues as the advisory notice. It added section 2361 to title 10 of California Code of Regulations (Regulation 2361). Regulation 2361 is entitled "Consideration of Losses and Loss Exposure in Residential Property Insurance Rating and Underwriting" and provides as follows:

"(a) This section applies to residential property risks subject to California Insurance Code Section 675.

"(b) For purposes of this section, the following definitions apply when an insurer considers losses or loss exposure in residential property insurance rating and underwriting:

"(1) Substantial Relationship to Loss Exposure: A substantial relationship to loss exposure exists when a hazard, physical condition, or liability exposure creates a material and identifiable effect on the likelihood of a covered loss;

"(2) Increased Risk of Loss: An increased risk of loss exists when a property or liability hazard or physical condition is identified or discovered which both bears a substantial relationship to the loss exposure and presents a greater likelihood of future loss than if the hazard or condition did not exist;

"(3) Fully Remedied or Otherwise Resolved: A fully remedied or otherwise resolved loss or loss exposure exists when:

"(i) the property has been returned to a state of repair that is equal or superior to the condition existing prior to the occurrence or condition which created the increased risk of loss, or

"(ii) the liability hazard insured against has been reduced to equal or below the level existing prior to the loss or loss exposure, or

"(iii) the increased risk of loss has been entirely eliminated because the property is no longer owned by the insured, the liability hazard is no longer the responsibility of the insured, the policy no longer provides coverage for that exposure, or the condition that caused the increased risk of loss has been removed.

"(4) Adverse Underwriting Decision: An adverse underwriting decision is as defined in California Insurance Code Section 791.02.

"(c) An adverse underwriting decision based on losses or loss exposure, when otherwise allowed by law, shall be based upon conditions of the individual risk which bear a substantial relationship to the loss exposure and which present an increased risk of loss when compared to other risks eligible for coverage under the insurer's underwriting guidelines. An insurer shall not base, in whole or in part, an adverse underwriting decision on losses or ***910** loss exposures that have been fully remedied or otherwise resolved. Losses or loss exposures that have been fully remedied or otherwise resolved are no longer substantially related to the risk of loss.

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"(d) An insurer shall not base an adverse underwriting decision, in whole or in part, on an inquiry regarding coverage, unless a hazard or condition is identified which both bears a substantial relationship to loss exposure and presents an increased risk of loss.

"(e) An insurer shall gather adequate information to determine that an increased risk of loss exists before a loss, loss exposure, or an inquiry with respect to coverage can be used as grounds for an adverse underwriting decision. In accordance with California Insurance Code Section 791.12, an insurer cannot rely solely on information obtained from an insurance-support organization. If the information is from an insurance support-organization, the insurer shall obtain further relevant information in addition to the material obtained from the insurance-support organization. Sources for this information may include the insurance application or supplemental application, telephone inquiry, written inquiry, and physical inspection.

"(f) An insurer making an adverse underwriting decision shall maintain documentation detailing the hazards or physical conditions which created an increased risk of loss and how this information was considered in policy rating or underwriting. This documentation shall be maintained during the time in which the policy is in force and otherwise as required by law." (Cal.Code Regs., tit. 10, § 2361.)

Regulation 2361 cites to the following provisions of the Insurance Code as authority for the regulation: sections 679.71, 791.02, 791.12, 1857, 1857.2, 1857.3, 1857.7, 1857.9, 1861.05 and 12926. (Cal.Code Regs., tit. 10, § 2361.)

The trial court found the Commissioner exceeded his authority in promulgating this regulation because it is inconsistent with the governing statutes. The court issued a peremptory writ of mandate ordering the Commissioner and CDI to cease, desist, and decline from enforcing the regulation.

DISCUSSION

I

The Commissioner has broad discretion to adopt regulations as necessary to promote the public welfare. (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 824, 258 Cal.Rptr. 161, 771 P.2d 1247.) The Commissioner's powers are not limited to those expressly conferred by statute, but also include ... " 'such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as *may fairly BE implied* from the statute granting the powers.' [Citation.]" (*20th Century Ins. Co. v. **Garamendi*** (1994) 8 Cal.4th 216, 245, 32 Cal.Rptr.2d 807, 878 P.2d 566 (*20th Century*); italics in original.)

"Administrative agencies have only the powers conferred on them, either expressly or impliedly, by the Constitution or by statute, and administrative actions exceeding those powers are void. [Citation.] To be valid, administrative action must be within the scope of authority conferred by the enabling statutes. [Citation.] We recognize that the courts usually give great weight to the interpretation of an enabling statute by officials charged with its administration, including their interpretation of the authority vested in them to implement and carry out its provisions. [Citation.] But regardless of the force of administrative construction, final responsibility for interpretation of the law ***911** rests with courts. If the court determines that a challenged administrative action was not authorized by or is inconsistent with acts of the Legislature, that action is void. [Citation.]

"These principles apply to the rulemaking power of an administrative agency, which is limited by the substantive provisions of law governing that agency. [Citations.] To be valid, an administrative regulation must be within the scope of the authority conferred by the enabling statute or statutes. [Citations.] No matter how altruistic its motives, an administrative agency has no discretion to promulgate a regulation that is inconsistent with the governing statutes. [Citation.]" (*Terhune v. Superior Court* (1998) 65 Cal.App.4th 864, 872-873, 76 Cal.Rptr.2d 841.)

In reviewing the validity of a regulation, our function is to inquire into its legality, not its wisdom. (*Morris v. Williams* (1967) 67 Cal.2d 733, 737, 63 Cal.Rptr. 689,

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433 P.2d 697.) Our task "is limited to determining whether the regulation (1) is 'within the scope of the authority conferred' (Gov.Code, § 11373) and (2) is 'reasonably necessary to effectuate the purpose of the statute' (Gov.Code, § 11374)." (*Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 411, 128 Cal.Rptr. 183, 546 P.2d 687.) We conduct an independent examination (see *20th Century, supra*, 8 Cal.4th at pp. 271-272, 32 Cal.Rptr.2d 807, 878 P.2d 566) and determine whether in enacting the specific rule the Commissioner "reasonably interpreted the legislative mandate." (*Fox v. San Francisco Residential Rent etc. Bd.* (1985) 169 Cal.App.3d 651, 656, 215 Cal.Rptr. 565.)

II

The trial court found the Commissioner exceeded his authority in promulgating Regulation 2361 because the regulation is inconsistent with the Insurance Code. Specifically, the trial court found that Regulation 2361 conflicts with section 791.12. This section is part of the Insurance Information and Privacy Protection Act (§ 791 et seq.). "The purpose of this article is to establish standards for the collection, use and disclosure of information gathered in connection with insurance transactions by insurance institutions, agents or insurance-support organizations; to maintain a balance between the need for information by those conducting the business of insurance and the public's need for fairness in insurance information practices, including the need to minimize intrusiveness; to establish a regulatory mechanism to enable natural persons to ascertain what information is being or has been collected about them in connection with insurance transactions and to have access to such information for the purpose of verifying or disputing its accuracy; to limit the disclosure of information collected in connection with insurance transactions; and to enable insurance applicants and policyholders to obtain the reasons for any adverse underwriting decision." (§ 791.)

An "[a]dverse underwriting decision" includes the declination or termination of insurance coverage (§ 791.02, subd. (a)(1)), and thus includes an insurer's decision to refuse to insure or to renew due to the loss history of the applicant or insured. Section 791.12 sets forth prohibited grounds for an adverse underwriting decision. Subdivision (a) prohibits an adverse underwriting decision based on a previous adverse underwriting decision or the previous obtaining of insurance through a residual market mechanism, and new subdivision (c) prohibits an adverse underwriting decision based on an inquiry that does not lead to a claim. The most pertinent prohibition is subdivision (b), which prohibits basing an adverse***912** underwriting decision: "On personal information received from an insurance-support organization whose primary source of information is insurance institutions; provided, however, an insurance institution or agent may base an adverse underwriting decision on further personal information obtained as the result of information received from an insurance-support organization." (§ 791.12, subd. (b).)

Personal information is defined as "any individually identifiable information gathered in connection with an insurance transaction from which judgments can be made about an individual's character, habits, avocations, finances, occupation, general reputation, credit, health, or any other personal characteristics. 'Personal information' includes an individual's name and address and 'medical record information' but does not include 'privileged information.' " (§ 791.02, subd. (s).) Privileged information includes any individually identifiable information that relates to a claim for insurance benefits and is collected in connection with or in reasonable anticipation of a claim for insurance benefits. (§ 791.02, subd. (v).)

The parties dispute whether loss history information is personal information or privileged information under section 791.12. The Commissioner contends loss history information is personal information and therefore basing an adverse underwriting decision on loss history information from a CLUE report or similar data base is prohibited. He contends personal information does not become privileged information until the pendency of a lawsuit and urges that privileged information should be understood in the context of work product privilege. The Commissioner argues that if loss history information is classified as privileged information, then the provisions of the Insurance Information and Privacy Protection Act permitting an insured access to and the ability to correct information collected about him would not apply because such

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provisions apply only to "personal information." (§§ 791.08 & 791.09.) If prior claims information is classified as privileged information, an insured would have no statutory right to review and correct a CLUE report.

Below petitioners argued Regulation 2361 was unnecessary to prevent underwriting decisions based on inaccurate information because the insured had the right to review and correct such information. Petitioners do not explain how sections 791.08 and 791.09 apply to a CLUE report if the information is privileged information rather than personal information. In response to the amicus brief, petitioners suggest that loss history information may be corrected under the provisions of the federal Fair Credit Reporting Act (15 U.S.C. §§ 1681 et seq.). It seems odd that in an area as heavily subject to state regulation as insurance, a consumer's remedy would be limited to that provided by a federal statute.

Petitioners contend loss history information is privileged information because it directly relates to a claim. As privileged information, it may be disclosed to an insurance-support organization under section 791.13 and there are no restrictions on its use under section 791.12. Because Regulation 2361 restricts the use of this privileged information, petitioners contend, it conflicts with section 791.12.

The trial court found loss history information appeared to fall within the definition of privileged information and its use in making an adverse underwriting decision was not prohibited by section 791.12.

Categorizing loss history information as either personal information or privileged information does not itself answer whether the Commissioner had authority to promulgate Regulation 2361. Regulation 2361 ***913** goes far beyond the protection of personal information, which is the purpose of the Insurance Information and Privacy Protection Act. Regulation 2361 attempts to regulate the use of prior claims regardless of where the information came from, even if it was obtained from the insurer's own files. Further, Regulation 2361 prohibits a remedied or resolved claim from ever being used in adverse underwriting decisions. Thus, section 791.12 neither authorizes nor prohibits Regulation 2361. Indeed, on appeal the Commissioner does not rely on section 791.12 as authority for regulation 2361.

III

The Commissioner devotes much of his opening brief to arguing that the Commissioner has authority to regulate underwriting in the area of homeowners insurance. He bases his argument primarily on the provisions of Proposition 103 which added article 10 (§§ 1861.01-1861.14) to the Insurance Code. Prior to the passage of Proposition 103, California had a so-called "open competition" system of regulation, under which rates were set by insurers without prior or subsequent approval by the Commissioner. (***State Farm Mutual*** *Automobile Ins. Co. v.* ***Garamendi*** (**2004**) 32 Cal.4th 1029, 1035, 12 Cal.Rptr.3d 343, 88 P.3d 71.) Among other things, Proposition 103 requires that all rate increases be approved by the Commissioner and permits public participation in the administrative ratesetting process. (*Ibid.*)

Summarized, the Commissioner's argument is this: Proposition 103 gave the Commissioner authority over insurance rates. Under Insurance Code section 1861.05 no rate shall be approved if it is excessive, inadequate, unfairly discriminatory or otherwise in violation of this chapter. This provision applies to homeowners' insurance. (Ins.Code, §§ 1861.13, 1851; all further statutory references are to the Insurance Code unless otherwise specified.) Underwriting affects rates. " 'Underwriting' is a label commonly applied to the process, fundamental to the concept of insurance, of deciding which risks to insure and which to reject in order to spread losses over risks in an economically feasible way. [Citations.] ... [A]n underwriting rule is properly characterized as a rule followed or adopted by an insurer or a rating organization which either (1) *limits* the conditions under which a policy will be issued or (2) *impacts* the rates that will be charged for that policy." (*Smith v.* ***State Farm Mutual*** *Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 726, 113 Cal.Rptr.2d 399; italics in original.) If the underwriting is not actuarially sound, the rates may be unfairly discriminatory. Therefore, the Commissioner must have authority to regulate underwriting to avoid unfairly discriminatory rates.

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The authority to regulate underwriting is necessarily implied from the authority to regulate rates.

Petitioners contend this expansive reading of the Commissioner's power as to underwriting broadens and conflicts with the statutory scheme. They contend Proposition 103, and section 1861.05, is limited in application to rates and does not apply to underwriting. The California Supreme Court recently rejected such a narrow view of Proposition 103. "As part of Proposition 103, article 10's stated purpose was ' "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." ' [Citation.] To this end, article 10 gives the Commissioner broad authority over insurance rates [citation], and expressly precludes him from approving***914** rates that are 'excessive, inadequate, unfairly discriminatory or otherwise in violation of' chapter 9 of the Insurance Code [citation]. Through Insurance Code section 1861.03, subdivision (a), the article also subjects the business of insurance to laws prohibiting discriminatory and unfair business practices. Thus, article 10 is not limited in scope to rate regulation. It also addresses the underlying factors that may impermissibly affect rates charged by insurers and lead to insurance that is unfair, unavailable, and unaffordable." (***State Farm Mutual*** *Automobile Ins. Co. v.* ***Garamendi****, supra,* 32 Cal.4th 1029, 1041-1042, 12 Cal.Rptr.3d 343, 88 P.3d 71.)

The Commissioner contends that the use of loss history that has no substantial relationship to future risk "may impermissibly affect rates charged by insurers and lead to insurance that is unfair, unavailable, and unaffordable." The Commissioner believes he has the authority to determine, by regulation, when loss history has no substantial relationship to future risk. The Commissioner points to no express statutory authority for this regulatory power. In this regard, regulation 2361 is distinguishable from the rate regulations at issue in *20th Century, supra,* 8 Cal.4th 216, 32 Cal.Rptr.2d 807, 878 P.2d 566, which implemented the rate rollback provisions of section 1861.01. Instead, the Commissioner contends the authority to regulate underwriting in general and the use of loss history in particular is necessarily implied from the statutory scheme.

Petitioners contend Proposition 103 did not give the Commissioner authority to regulate the underwriting of homeowners insurance. At issue in ***State Farm Mutual*** *Automobile Ins. Co. v.* ***Garamendi****, supra,* 32 Cal.4th 1029, 12 Cal.Rptr.3d 343, 88 P.3d 71, was whether the Commissioner exceeded his authority in promulgating a regulation requiring disclosure of certain information concerning the insurer's business in California, organized by ZIP code. Noting the purpose of Proposition 103, quoted above, the Supreme Court concluded: "As such, the Commissioner undoubtedly has the authority under article 10 to gather any information necessary for determining whether these factors are impermissibly affecting the fairness, availability, and affordability of insurance." (*Id.* at p. 1042, 12 Cal.Rptr.3d 343, 88 P.3d 71.) Petitioners contend the authority to gather information does not include the authority to regulate underwriting.

Petitioners contend the Legislature placed few restrictions on an insured's ability to choose what risks to insure and there is no restriction on the use of loss history. They assert the only restrictions on underwriting for homeowners insurance are set forth in sections 676 and 791.12 and these restrictions are exclusive, and the Commissioner has no authority to expand them to include the use of loss history. Petitioners contend Regulation 2361 seeks to define the risks an insurer must insure and argue the Commissioner has no such authority. "An insurer does not have a duty to do business with or issue a policy of insurance to any applicant for insurance. Whether an insurer should be required to offer a particular class of insurance or insure particular risks are matters of complex economic policy entrusted to the Legislature. [Citation.]" *(Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 43, 77 Cal.Rptr.2d 709, 960 P.2d 513.) A review of pertinent provisions of the Insurance Code shows that the Legislature has not undertaken to determine what risks in the residential casualty market an insurer must insure where prior claims are present.

Chapter 11 of division 1, part 1 is entitled Cancellation and Failure to Renew Certain Property Insurance (§

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675 et seq.) ***915** and applies to homeowners' insurance and certain commercial property insurance. (§§ 675, 675.5.) Section 676 sets forth the valid bases for canceling a policy after it has been in effect 60 days. Cancellation is permitted after 60 days for nonpayment of premium, the insured's conviction of a crime that increases any hazard insured against, discovery of fraud or material misrepresentation, discovery of grossly negligent acts or omissions by the insured that substantially increases the hazards insured against, and physical changes in the property which result in the property becoming uninsurable. (§ 676.)

There are several provisions that limit an insurer's ability not to renew a policy. On and after January 1, 2000, an insurer may not refuse to renew a policy solely on the basis that a claim is pending. (§ 675, subd. (c).) An insurer may not refuse to renew, or accept an application, refuse to insure, cancel, restrict, terminate, or charge a different rate, on the basis the insured or applicant is, has been, or may be a victim of domestic violence. (§ 676.9.) An insurer may not refuse to renew a policy for a religious, educational, nonprofit, or reproductive health services facility due to a claim for loss due to a hate crime or an anti-reproductive-rights crime. (§ 676.10.) There are sanctions for the arbitrary cancellation of a homeowners policy where the insured has a day care license. (§ 676.1.) None of these provisions restrict an insurer from basing a decision to refuse to insure or to renew on the applicant's or insured's loss history.

Chapter 12 (§§ 679.70-679.73) prohibits certain discriminatory practices. Insurance cannot be denied or offered only on less favorable terms due solely to the applicant's marital status, sex, race, color, religion, national origin, or ancestry. (§ 679.71.) The birthplace of the applicant may be used only for identification, not to discriminate against the applicant. (§ 679.3.) Prior claims experience is not cited as a prohibited basis for discrimination.

The foregoing provisions reflect various policies the Legislature has adopted in regulating the insurance industry and the terms upon which homeowners insurance may be denied, cancelled or not renewed. None of them indicate any legislative concern with the use of claims or loss history, nor can they be read as providing implied authority for the Commissioner to regulate the use of loss history in homeowners insurance underwriting.

Petitioners contend section 676 permits an insurer to cancel a policy during the initial 60 days for any reason and that Regulation 2361 restricts this unfettered right of cancellation. The Commissioner responds that this incorrect statement of California law is the basis of petitioners' incorrect belief that Regulation 2361 is invalid. He asserts the right of cancellation in the first 60 days is not absolute. It is subject to other provisions of chapter 11 (§ 675 et seq.) and the implied covenant of good faith and fair dealing, which applies to insurance policies. (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658, 328 P.2d 198.) The Commissioner contends that requiring loss history to have a substantial relationship to future risk before it may be used in underwriting, as Regulation 2361 does, is simply a component of the implied covenant of good faith and fair dealing. He argues the Commissioner has authority to enforce this aspect of the covenant of good faith and fair dealing because the business of insurance is subject to the Unruh Civil Rights Act (Civ.Code, §§ 51-53) and the antitrust and unfair business practices law (Bus. & Prof.Code, § 16600 et seq.; § 17500 et seq.). (§ 1861.03, subd. (a).) To the extent the Commissioner relies on section 1861.03 ***916** for authority to promulgate Regulation 2361, his argument is bootstrapping. That the Commissioner may have authority to enforce laws designed to counter unfair or discriminatory business practices does not give him authority, without legislative approval, to determine whether certain business practices, in the form of underwriting rules, are unfair or discriminatory and to prohibit them.

The Commissioner asserts that several provisions of the Insurance Code provide authority for Regulation 2361. Section 1857, subdivision (a) requires every insurer to maintain records of its experience and "of the data, statistics, or information collected and used by it in connection with the rates, rating plans, rating systems, underwriting rules, policy or bond forms, surveys, or inspections made or used by it" and to make such records available to the Commissioner to determine whether "every rate, rating plan, and rating system made or used by it, complies with the provisions of this chapter applicable it." The Commissioner

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asserts this provision "makes clear the Commissioner has jurisdiction over 'underwriting rules' and provides authority for promulgation of the Regulation." He misreads the statute. It requires certain record keeping so the Commissioner can determine if the rates are in compliance with the law; it does not give the Commissioner authority over underwriting rules.

Sections 1857.2 and 1857.3 address the Commissioner's authority to examine admitted insurers and the persons and things subject to examination. Neither section mentions underwriting rules nor gives the Commissioner authority to regulate them.

Section 1857.7 sets forth the contents of a rate change application. The application must include the expenses incurred, including loss adjustment expense. (§ 1857.7, subd. (11).) The Commissioner asserts that loss adjustment expenses are expenses associated with losses or claims and are the expenses that would be impacted by changing the pool of risk. He argues that because the Commissioner has authority to review these expenses, he also has authority to promulgate Regulation 2361. The connection between section 1857.7 and Regulation 2361 is not clear; we find nothing in section 1857.7 to authorize Regulation 2361.

Returning to his main argument, the Commissioner contends section 1861.05, which mandates that no excessive, inadequate or unfairly discriminatory rate shall be approved or remain in effect, provides authority for Regulation 2361. The Commissioner contends that using loss history that is not substantially related to future risk, because the loss has been fully remedied, in underwriting may result in unfairly discriminatory rates. As discussed above, this overly broad reading of the Commissioner's authority-that because he regulates rates he also may regulate underwriting-finds no support in the provisions of the Insurance Code. The detailed provisions restricting an insurer's ability to deny, cancel, or not renew homeowners insurance make no mention of any restrictions based on prior claims.

In approving Proposition 103, which added section 1861.05 to the Insurance Code, the voters placed certain restrictions on automobile insurance. The factors used to determine rates and premiums are specified, and the Commissioner is expressly given authority to approve other factors and determine the weight to be accorded to each. (§ 1861.02.) A good driver discount is mandated. (§ 1861.025.) Nonrenewal or cancellation are permitted only for nonpayment of premium, fraud or material misrepresentation, or a substantial increase in the hazard insured against. (§ 1861.03, subd. (c)(1).) No similar restrictions***917** were placed on homeowners insurance by Proposition 103. Absent any statutory indication, we decline to find that the Commissioner has an implied wide-reaching authority to regulate underwriting based on his authority to approve rates.

IV

Amicus Curiae United Policyholders contends that section 1858 provides the Commissioner with implied authority to adopt Regulation 2361. Section 1858 provides in part: "Any person aggrieved by any rate charged, rating plan, rating system, or underwriting rule followed or adopted by an insurer or rating organization, may file a written complaint with the commissioner requesting that the commissioner review the manner in which the rate, plan, system, or rule has been applied with respect to the insurance afforded to that person." (§ 1858, subd. (a).)

We note first that the Commissioner did not rely on or cite section 1858 as authority for the adoption of regulation 2361. (Cal.Code Regs., tit. 10, § 2361.)

Amicus Curiae contends that because section 1858 gives the Commissioner the power to determine if a complainant is aggrieved by an underwriting rule, it gives him implied power to adopt substantive underwriting regulations to carry out his duty. Section 1858, however, gives the Commissioner the power only to review "the manner" in which the underwriting rule has been applied. Nothing in the provision allows the Commissioner to prohibit an underwriting rule that is fairly applied. The procedural protection offered by section 1858 does not grant the Commissioner a substantive power to regulate underwriting.

V

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Finally, petitioners contend the Legislature's rejection of SB 64 confirms that the Commissioner does not have authority to regulate underwriting for homeowners insurance.

In July **2004**, Senate Bill No. 64 (SB 64) was rejected by the Assembly Insurance Committee. (Complete bill information is available at http:www.leginf.ca.gov) The Commissioner adopted Regulation 2361 shortly thereafter. As it read when rejected, SB 64 proposed to amend sections 677.8, 678.12 and 791.12, and to add sections 677.8 and 678.12 to the Insurance Code relating to homeowners insurance.[FN2] The Legislative Counsel Digest described the bill as follows: "It would give the Insurance Commissioner the authority to approve or disapprove of any proposed eligibility or underwriting guidelines, in whole or in part, and would place specified limitations on the guidelines that the commissioner could approve for use by insurers." The digest also indicated SB 64 would change section 791.12 by adding privileged information to the existing prohibition that an insurer could not base an adverse underwriting decision on personal information obtained from an insurance-support organization.

> FN2. As currently amended, SB 64 provides for the establishment of a program for mediation of disputes between insureds and insurers over certain earthquake and insurance claims.

Petitioners contend that SB 64, although broader in scope than Regulation 2361, would have expressly granted the Commissioner the authority he asserts he has under regulation 2361. They contend that the Legislature's rejection of this authorizing statute shows the Commissioner's interpretation***918** of the Insurance Code as consistent with Regulation 2361 is faulty.

Petitioners rely on *California Court Reporters Assn. v. Judicial Council of California* (1995) 39 Cal.App.4th 15, 46 Cal.Rptr.2d 44 (*California Court Reporters Assn.*). In that case, the court, in determining the validity of Judicial Council rules that permitted electronic recording of superior court proceedings in light of a statutory scheme authorizing only official shorthand reporting, considered legislative rejection of legislation proposed by the Judicial Council that specifically authorized electronic recording.

The court first noted that the Legislature's failure to enact an amendment to a statutory scheme generally provided little guidance on the issue of legislative intent. (*California Court Reporters Assn., supra*, 39 Cal.App.4th at p. 32, 46 Cal.Rptr.2d 44.) That was because the Legislature's failure to amend the statute evoked conflicting inferences: the amendment could be supported to replace an existing prohibition or to clarify an existing permission; or it could be opposed to preserve an existing prohibition or because there was no need to clarify an existing permission. (*Ibid.*)

"However, when determining whether an administratively promulgated rule is consistent with controlling legislation, legislative rejection of an authorizing statute-for whatever reason-may prove more persuasive. In a case challenging an administrative regulation, the California Supreme Court noted that at the time the legislation was enacted, a provision identical to the regulation was proposed by the agency but rejected by the Legislature (*Cooper v. Swoap* (1974) 11 Cal.3d 856, 859, 864-865, 115 Cal.Rptr. 1, 524 P.2d 97, cert. den. 419 U.S. 1022, 95 S.Ct. 498, 42 L.Ed.2d 296.) The court held that '... the legislative history provides perhaps the clearest indication that the present regulation is inconsistent with legislative intent.' (*Cooper v. Swoap, supra*, at p. 859, 115 Cal.Rptr. 1, 524 P.2d 97.) As with Judicial Council rules, administrative regulations are only valid if they are consistent with statute." (*California Court Reporters Assn., supra*, 39 Cal.App.4th at p. 33, 46 Cal.Rptr.2d 44.)

The court found the Judicial Council's attempt to obtain legislative amendment of the existing statutory scheme was an implicit admission that legislative authorization was needed. (*California Court Reporters Assn., supra*, 39 Cal.App.4th at p. 33, 46 Cal.Rptr.2d 44.) Due to the difficulties in determining the meaning of the Legislature's rejection of a proposed amendment, the court believed it wiser to determine the validity of the rule at issue independently, but it could not ignore that the Legislature's rejection of the proposed amendment was in accord with its interpretation of the existing statutory scheme. (*Ibid.*)

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The same reasoning applies here. We have found the Insurance Code does not give the Commissioner authority to regulate underwriting for homeowners insurance. The rejection of SB 64 supports that conclusion.

DISPOSITION

The judgment is affirmed.

We concur: DAVIS, Acting P.J., and RAYE, J.
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