DEPARTMENT OF INSURANCE
Legal Division, Office of the Commissioner
45 Fremont Street, 23rd Floor
San Francisco, CA 94105

Adam M. Cole
General Counsel
TEL: 415-538-4010
FAX: 415-904-5889
E-Mail: colca@insurance.ca.gov
www.insurance.ca.gov

By Hand Delivery

November 19, 2010

The Honorable Chief Justice Ronald George
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: Request to Depublish *MacKay v. Superior Court*, Case Nos. B220469 & B223772, California Court of Appeal, Second Appellate District, Division 3, Decision Filed October 6, 2010

Dear Chief Justice George and Associate Justices:

The Insurance Commissioner of California respectfully requests that the Court depublish *MacKay v. Superior Court (21st Century Insurance Co.)*, Case Nos. B220469 & B223772, California Court of Appeal, Second Appellate District, Division 3, Decision Filed October 6, 2010. In the alternative, the Commissioner urges the Court *sua sponte* to review *MacKay* and issue a decision clarifying the law in this area.

I. The Commissioner's Interest

The Insurance Commissioner is the government official entrusted with administering the Insurance Code, including the provisions added by the people through the adoption of Proposition 103, a voter initiative enacted in 1988 and in effect in California since 1989. Proposition 103 and amendments to it are codified at Insurance Code Sections 1861.01 to 1861.16. In his official capacity, the Commissioner frequently has conveyed his views on the functioning of Proposition 103 to this Court and the Courts of Appeal in amicus briefs and other submissions. (See, e.g., *Farmers Ins. Exch. v. Superior Court* (1992) 2 Cal.4th 377; *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968; *Poirer v. State Farm Mut. Auto.Ins. Co.* (2004) 2004 Cal. App. Unpub. LEXIS 9365; *State Farm Mut. Auto. Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029; *Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th1354; *Association of Cal. Ins. Cos. v. Poizner* (2009) 180 Cal.App.4th 1029.)

II. Why the Court Should Depublish *MacKay* or Clarify the Interpretation of Proposition 103

MacKay is inconsistent with this Court's decision in *Farmers Insurance Co. v. Superior Court* (1992) 2 Cal.4th 377, which holds that consumers have an original right of action in court to assert violations of Proposition 103. *MacKay* also is at odds with the longstanding Department of Insurance ("Department") interpretation of Proposition 103 and associated practices implementing that initiative in place over nearly 20 years.

III. Discussion

The Holding in *MacKay*. The court in *MacKay* held that consumers may not file lawsuits to challenge the legality of rates, or the rating factors used to determine an individual motorist's premium, if the Commissioner approved the rate or rating factor. Rather, under *MacKay*, a consumer harmed by an illegal rate must file a complaint with the Commissioner. If the Commissioner finds the rate to be illegal, the Commissioner issues an order prohibiting the insurer from using the rate going forward. If the Commissioner finds the rate to be legal, the consumer may challenge the Commissioner's decision by filing a petition for a writ of mandate in superior court. If the court finds the rate to be illegal, the court prohibits the insurer from using the rate going forward.

Since its enactment, the Department has interpreted Proposition 103 to allow a consumer to go directly to court to challenge the legality of a rate regardless of whether the Commissioner approved the rate. That position is founded on two provisions of Proposition 103:

> "[A]ny person may initiate or intervene in any proceeding permitted or established pursuant to this chapter, challenge any action of the commissioner under this article, ***and enforce any provision of this article.***" (Ins. Code § 1861.10(a) [emphasis added].)
>
> "***The business of insurance shall be subject to the laws of California applicable to any other business, including, but not limited to, the Unruh Civil Rights Act (Sections 51 to 53, inclusive, of the Civil Code), and the antitrust and unfair business practices laws (Parts 2 (commencing with Section 16600) and 3 (commencing with Section 17500) of Division 7 of the Business and Professions Code).***" (Ins. Code § 1861.03(a) [emphasis added].)

MacKay's conclusion that consumers must pursue a complaint process at the Department in lieu of filing an original action in court conflicts with prior case law and previous interpretations by the Department of Sections 1861.10(a) and 1861.03(a).

The court in *MacKay* concluded that two provisions of the 1947 McBride-Grunsky Insurance Regulatory Act, ("McBride Act"), Ins. Code §§ 1860.1 and 1860.2, immunize insurers from lawsuits challenging components of approved rate filings. However, the Department consistently since enactment of Proposition 103 has taken the position that Sections 1860.1 and 1860.2 immunize insurers only for lawsuits alleging improper ***concerted*** activities authorized by

the Insurance Code; Sections 1860.1 and 1860.2 do not immunize insurers from lawsuits alleging that an ***individual insurer's*** rates or components of rates are illegal.

The court in *MacKay* referred to *Walker v. Allstate Indemnity Co.* (2000) 77 Cal.App.4th 750. *Walker* held that the interplay of Proposition 103 and the immunity sections of the McBride Act preclude a direct lawsuit in court to challenge a ***rate***, as distinct from a rating factor approved by the Department. By its terms, *Walker* does not cover the situation here: Department approval of a rating factor, as distinct from a rate.

This Court's Decision in *Farmers*. *MacKay* is inconsistent with *Farmers Insurance Co. v. Superior Court* (1992) 2 Cal.4th 377. In *Farmers*, the Attorney General, acting on behalf of the people, filed a lawsuit in Superior Court under Business and Professions Code Section 17200 alleging that Farmers violated Proposition 103 by (1) refusing to offer and sell good driver discount policies to all qualified drivers; (2) refusing to offer qualified drivers a 20% good driver discount; (3) using the absence of prior insurance as a criterion for determining eligibility for a good driver discount and for ratemaking and premium setting; and (4) unfairly discriminating against consumers in rates and premiums by not offering good driver discounts to all qualified customers. (*Farmers, supra*, 2 Cal.4th at p. 490.)

The Court held that the Attorney General was permitted to bring a lawsuit directly in court. The Court explained that the Attorney General's Section 17200 claim is "***originally cognizable in the courts***." (*Farmers, supra*, 2 Cal.4th at p. 496 [internal quotation marks omitted] [emphasis added].) However, because the complaint raised technical issues related to Proposition 103, *Farmers* held that the trial court must stay the case and refer those issues to the Department for consideration under the "primary jurisdiction" doctrine. (*Id.* at p. 503.)

The availability of a primary jurisdiction referral protects insurers' interests. If a superior court believes a case involves technical issues within the Commissioner's expertise, the court may stay the case and refer issues to the Commissioner for his input. On referral, the insurer may defend an approved rate as legal. If the Commissioner agrees, he will so notify the court. The court will have the benefit of the Commissioner's input when it decides the case on conclusion of the referral process.

The Insurance Commissioner's Longstanding Position. For nearly 20 years the Commissioner has advised this Court and the Courts of Appeal that consumers have a right to go directly to court to assert violations of Proposition 103. For example:

- In 1991, Commissioner Garamendi sent a letter to the Court in *Farmers, supra*, 2 Cal.4th 487, supporting the right of consumers and the Attorney General to go to court to assert violations of Proposition 103.

- In 2003, Commissioner Garamendi submitted an amicus brief to the Court of Appeal in *Donabedian v. Mercury Insurance Co.* (2004) 116 Cal.App.4th 968. The Court of Appeal quoted the Commissioner's amicus brief with approval: "In enacting Proposition 103, the voters vested the power to enforce the Insurance Code in the

public as well as the Commissioner. As the plain text of Insurance Code Sections 1861.03 and 1861.10 make[s] clear, Proposition 103 established a private right of action for [its] enforcement." (*Donabedian, supra*, 116 Cal.App.4th at p. 982.)

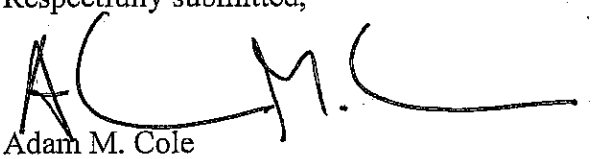
- Also in 2003, in an amicus brief filed in *Poirer v. State Farm Mutual Automobile Insurance Co.* (2004) 2004 Cal. App. Unpub. LEXIS 9365, Commissioner Garamendi explained that Insurance Code Sections 1860.1 and 1860.2 only immunize concerted activity among insurers, not action by individual insurers in the form of rate plans approved by the Commissioner. Commissioner Garamendi stated: "[A]n original private right of action exists for violations of the Insurance Code, whether or not the alleged violation concerns an insurer's rate or class plan approved by the Department." Attached is the portion of the Commissioner's brief conveying that position.

- In 1999, Commissioner Quackenbush sent a letter to this Court requesting depublication of *VPS Management Inc. v. Pacific Rim Assurance Co.*, Case No. B126145, California Court of Appeal, decision filed March 17, 1999. In *VPS*, the Court of Appeal relied on Section 11758 of the Insurance Code, which is in an article relating to workers compensation insurance rate making and is identical to Section 1860.1, to immunize a workers compensation insurer from a lawsuit alleging that it inflated expenses in developing rates, resulting in excessive premiums. In its letter requesting depublication, the Commissioner explained that Section 11758, like Section 1860.1, is designed solely to immunize against lawsuits alleging antitrust violations: "The *VPS* decision incorrectly stretches the immunity that is provided by Insurance Code Section 11758. The purpose of that section is to immunize insurers and rating organizations from anti-trust laws so that they can act in concert to make rates." Commissioner Quackenbush's 1999 letter is attached. The Court depublished the decision. (*VPS Mgmt. Inc. v. Pacific Rim Assur. Co.*, 1999 Cal. LEXIS 4209.)

IV. Conclusion

Because a conflict exists between *MacKay, Farmers* and other appellate decisions regarding the interpretation of Proposition 103, and because for nearly 20 years the Department has interpreted Proposition 103 in a manner inconsistent with *MacKay*, the Commissioner requests either depublication of *MacKay* or that the Court *sua sponte* accept review of *MacKay* and issue a decision clarifying the law in this area.

Respectfully submitted,



Adam M. Cole
General Counsel

Attachments

Case No. B165389

IN THE COURT OF APPEAL
FOR THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

STEVEN POIRER,
Individually and on behalf of the general public
Plaintiff and Appellant;

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
A Corporation, and DOES 1 through 100, inclusive
Defendants and Respondents.

Appeal from the Superior Court of the State of California in and for the
County of Los Angeles, Case No. BC249205
(The Honorable Wendell Mortimer, Jr., Judge)

Service on the Office of the Attorney General and L.A. County District Attorney required by Cal. Bus. & Prof. Code § 17209 and Cal. Rules of Court, rule 44.5

APPLICATION OF THE CALIFORNIA DEPARTMENT OF INSURANCE FOR PERMISSION TO FILE AMICUS CURIAE BRIEF
-and-
[PROPOSED] AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT STEVEN POIRER

GARY M. COHEN (SBN 117215)
BRYANT HENLEY (SBN 200507)
ELIZABETH MOHR (SBN 103033)
45 Fremont Street, 21st Floor
San Francisco, CA 94105
Telephone: 415-538-4111
Facsimile: 415-904-5490
Attorneys for Amicus Curiae
California Department of Insurance

ISSUE PRESENTED

Whether the Superior Court erred in failing to implement the protections afforded consumers by Proposition 103, when it sustained Respondent's demurrer without leave to amend and granted Respondent's motion to dismiss, thereby failing to allow a private right of action under the Unfair Business Practices Act of the Business and Professions Code?

INTRODUCTION

The California Department of Insurance (the "Department") urges this Court to affirm three principles. First, that Proposition 103, through California Insurance Code sections 1861.03(a) and 1861.10(a), establishes an original private right of action in Superior Court. Second, in those cases involving an alleged violation of the Insurance Code, that the Commissioner may be asked by the parties or the Superior Court to exercise his primary jurisdiction, but in those cases, the Commissioner does not have exclusive jurisdiction and the Commissioner's decision not to exercise that jurisdiction does not deprive the Court of jurisdiction to hear the matter. Third, that an original private right of action exists for violations of the Insurance

Code, whether or not the alleged violation concerns an insurer's rate or class plan approved by the Department. Based upon the principles stated above, the trial court incorrectly applied Insurance Code section 1860.2 to the facts of this case for the legal and public policy reasons that follow.

OVERVIEW

A. The Department 's Involvement in This Lawsuit.

On April 24, 2001, Appellant Steven Poirer (hereinafter "Appellant") filed a complaint against Respondent, alleging that Respondent was engaged in an unfair business practice, within the meaning of California Business and Professions Code, section 17200. (See Joint Appendix ("JA") at 1-36.) Appellant's complaint alleged that Respondent was engaging in a course of conduct that was depriving policyholders of Proposition 103 protections by surcharging policyholders who lacked a prior history of automobile insurance. (*Id.* at 4, para. 12.) Further, Appellant alleged that such a practice was in violation of California Insurance Code section 1861.02(c), prohibiting insurers from considering the absence of prior insurance, in and of itself, in the calculation of insurance rates or the determination of eligibility.

STATE OF CALIFORNIA CHUCK QUACKENBUSH, *Insurance Commissioner*

DEPARTMENT OF INSURANCE
OFFICE OF THE COMMISSIONER
45 FREMONT STREET, 21ST Floor
SAN FRANCISCO, CA 94105
415-538-4010

May 12, 1999
The Honorable Chief Justice Ronald M. George
and the Honorable Associate Justices
The Supreme Court of California
350 McAllister Street
San Francisco, California 94105

Subject: VPS Management Inc. vs. Pacific Rim Assurance Company
Civil Appeal No. B126145

Dear Chief Justice George and Associate Justices,

The purpose of this letter is to request the depublication of VPS Management vs. Pacific Rim Assurance Co. Court of Appeal Case No. B126145, filed March 17, 1999. This request is made on behalf of the California Department of Insurance, the government agency that is charged with enforcement of the laws of this state regulating the business of insurance. Those laws include the statutes relied upon by the court of appeal in VPS Management.

The Department of Insurance has been involved in closely supervising the business of workers' compensation insurance for many decades. The Department licenses workers' compensation insurers and a workers' compensation rating organization, currently the Workers' Compensation Insurance Rating Bureau of California (WCIRB). The Department promulgates regulations that require insurers to report specific information to the rating organization. These regulations, known during the time relevant to this case as the Unit Statistical Plan and the Experience Rating Plan, govern all aspects of insurer reporting of data to the rating organization. The WCIRB uses the data gathered pursuant to the Department's regulations to make proposed insurance rates. During the time relevant to this case, the Department used WCIRB proposed rates to make minimum premium rates for all workers' compensation insurers in California.

The court of appeal in the subject case held that the lawsuit alleging misreporting of medical-legal expenses was founded on "claimed wrongs concerning rate making and is, therefore, precluded by section 11758 as 'an act done' or 'an action taken' pursuant to the authority of Article 3." VPS Management Inc. vs. Pacific Rim Assurance Company.

The VPS decision incorrectly stretches the immunity that is provided by Insurance Code Section 11758. The purpose of that section is to immunize insurers and rating organizations from anti-trust laws so that they can act in concert to make rates. It has long been considered necessary to allow the insurance industry an exemption from the laws that prohibit other industries from actions done in concert that affect the price of their products. The extraordinary grant of immunity from prosecution or civil proceedings in Section 11758 must be seen in context—as a recognition of the unique status of the insurance industry within the framework of federal and state anti-trust law. That immunity is for the purpose of acting in concert pursuant to the authority granted by Article 3 (Insurance Code Sections 11750—11759.1) of Chapter 3, Part 3 of Division 2 of the Insurance Code.

The only two cases cited by the court as authority were Karlin vs. Zalta (1984) 154 Cal.App.3d 953 and Manufacturers Life Ins. Co. vs. Superior Court (1995) 10 Cal.4th 257. Neither case supports its decision. The factual allegations in both cases concern concert of action resulting in price fixing. In Karlin vs. Zalta, supra, it is alleged that defendants were engaged in a conspiracy to monopolize the market and restrain trade by unlawfully fixing the price of insurance. In Manufacturers Life Ins. Co. supra, the complaint asserted that the defendants' conduct constituted price fixing, concerted output restriction, and a boycott. These are allegations that fall squarely within the context of anti-trust law.

The allegations in VPS, however, do not involve price fixing. There is no allegation of concert of action of any kind. This is simply a matter of an insurer reporting or misreporting the experience of a policyholder. The plain language of Insurance Code Section 11758 does not immunize an insurer from misconduct in reporting data to the rating organization. Furthermore, the legislative history of that statute indicates that it was intended to allow insurers to act in concert to make rates. The actions of a single insurer in reporting data that is eventually used to make rates is not the same as a concert of action among entities in order to make rates. The VPS court has extended immunity from civil liability far beyond the intent of the legislature and far beyond what is prudent and necessary.

The Department also finds troubling the VPS court's dicta which appears to shift the responsibility to monitor the reporting of workers' compensation experience from the insurer to the policyholder. Case law in California has long held that insurers have a duty to policyholders that is akin to a fiduciary relationship. This includes the duty to report data correctly.

The decision in VPS Management vs. Pacific Rim Assurance Co. is particularly problematic because it is the first published opinion to construe Insurance Code Section 11758. As such it could have far reaching consequences. The Department believes that the decision is based on a faulty interpretation of the law and respectfully requests the Court to depublish it.

Very truly yours,

CHUCK QUACKENBUSH
INSURANCE COMMISSIONER

by_____
Brian Soublet
Chief Counsel

PROOF OF SERVICE

In Re *MacKay v. Superior Court*, Case Nos. B220469 & B223772, California Court of Appeal, Second Appellate District, Division 3, Decision Filed October 6, 2010

I am over the age of eighteen years and am not a party to this action. I am an employee of the Department of Insurance, State of California, employed at 45 Fremont Street, 19th Floor, San Francisco, California 94105. On November 19, 2010, I served the following document(s):

California Department of Insurance Letter to Superior Court of California Request to Depublish MacKay v. Superior Court, dated November 19, 2010

on all persons named on the attached Service List, by the method of service indicated, as follows:

If **U.S. MAIL** is indicated, by placing on this date, true copies in sealed envelopes, addressed to each person indicated, in this office's facility for collection of outgoing items to be sent by mail, pursuant to Code of Civil Procedure Section 1013. I am familiar with this office's practice of collecting and processing documents placed for mailing by U.S. Mail. Under that practice, outgoing items are deposited, in the ordinary course of business, with the U.S. Postal Service on that same day, with postage fully prepaid, in the city and county of San Francisco, California.

If **OVERNIGHT SERVICE** is indicated, by placing on this date, true copies in sealed envelopes, addressed to each person indicated, in this office's facility for collection of outgoing items for overnight delivery, pursuant to Code of Civil Procedure Section 1013. I am familiar with this office's practice of collecting and processing documents placed for overnight delivery. Under that practice, outgoing items are deposited, in the ordinary course of business, with an authorized courier or a facility regularly maintained by one of the following overnight services in the city and county of San Francisco, California: Express Mail, UPS, Federal Express, or Golden State overnight service, with an active account number shown for payment.

If **FAX SERVICE** is indicated, by facsimile transmission this date to the fax number stated for the person(s) so marked.

If **PERSONAL SERVICE** is indicated, by hand delivery this date.

If **EMAIL** is indicated, by electronic mail transmission this date to the email address(es) listed.

If **INTRA-AGENCY MAIL** is indicated, by placing this date in a place designated for collection for delivery by Department of Insurance intra-agency mail.

Executed this date at San Francisco, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Raquel Cano

SERVICE LIST

In Re *MacKay v. Superior Court*, Case Nos. B220469 & B223772, California Court of Appeal, Second Appellate District, Division 3, Decision Filed October 6, 2010

Party	Attorney	Method of Service
Mackay, Amber : Petitioner	Merak Eskigian, Esq. Mark Goshgarian, Esq. Goshgarian & Marshall 23901 Calabasas Road, #2073 Calabasas, CA 91302	U.S. MAIL U.S. MAIL
	Drew E. Pomerance, Esq. Roxborough, Pomerance & Nye 5820 Canoga Avenue, Suite 250 Woodland Hills, CA 91367	U.S. MAIL
Leacy, Jacqueline : Petitioner	Merak Eskigian, Esq. Mark Goshgarian, Esq. Goshgarian & Marshall 23901 Calabasas Road, #2073 Calabasas, CA 91302	U.S. MAIL U.S. MAIL
	Drew E. Pomerance, Esq. Roxborough, Pomerance & Nye 5820 Canoga Avenue, Suite 250 Woodland Hills, CA 91367	U.S. MAIL
21st Century Insurance Company : Real Party in Interest	Marina M. Karvelas, Esq. Pirapat Sadikali Sindhuphak, Esq. Steven H. Weinstein, Esq. Kent R. Keller, Esq. Bargen & Wolen 633 West Fifth Street, 47th Floor Los Angeles, CA 90071	U.S. MAIL U.S. MAIL U.S. MAIL U.S. MAIL
The Consumer Attorneys of California : Amicus curiae	Brian S. Kabateck, Esq. Kabateck Brown & Kellner, LLP 644 S. Figueroa Street Los Angeles, CA 90017	U.S. MAIL

Consumer Watchdog : Amicus curiae	Todd Michael Foreman, Esq. Pamela M. Pressley, Esq. Harvey J. Rosenfield, Esq. Consumer Watchdog 1750 Ocean Park Boulevard, Suite 200 Santa Monica, CA 90405	U.S. MAIL U.S. MAIL U.S. MAIL
The People : Overview party	Office of the District Attorney 320 W. Temple Street, #540 Los Angeles, CA 90012 Contact Name: Appellate Division	U.S. MAIL
	Office of the Attorney General Consumer Law Section 300 South Spring Street Fifth Floor, North Tower Los Angeles, CA 90013	U.S. MAIL
	The Honorable Presiding Justice Joan D. Klein Associate Justices H. Walter Croskey Patti S. Kitching California Court of Appeal, Clerk's Office Division 3 300 South Spring Street Room 2217 Los Angeles, CA 90013 Phone No: 213-830-7000	U.S. MAIL U.S. MAIL U.S. MAIL