2ND CIVIL NO. B220469
2ND CIVIL NO. B223772
LASC CASE NO. BC297438
RELATED CASE BC266219
HON. JOHN S. WILEY JR.
HON. ANTHONY J. MOHR

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION 3

AMBER MACKAY, an Individual, On Behalf of the General Public; and JACQUELINE LEACY, an Individual, On Behalf of the General Public,
Petitioners & Real Parties in Interest,
vs.
THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,
Respondent,

21ST CENTURY INSURANCE COMPANY,
Petitioner & Real Party in Interest.

APPLICATION FOR PERMISSION TO FILE AN AMICUS CURIAE PETITION FOR REHEARING AND PETITION FOR THE COURT TO DISMISS OR DECERTIFY THE OPINION FOR PUBLICATION, OR IN THE ALTERNATIVE TO ORDER REHEARING OR, IN THE ALTERNATIVE, REQUEST THAT THE COURT REHEAR CASE ON ITS OWN MOTION; PROPOSED ORDERS

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REQUEST FOR PERMISSION TO FILE PETITION FOR REHEARING AS AMICUS CURIAE

TO THE PRESIDING JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE SECOND DISTRICT COURT OF APPEAL, DIVISION THREE, IN AND FOR THE STATE OF CALIFORNIA:

Herein, Consumer Watchdog seeks relief from the Court's Opinion dated October 6, 2010, ("Opinion"). As explained below, the parties in this case have settled the matter, a fact that was communicated to the Court on September 29, 2010. (See Letters to the Court from attorneys Mark Goshgarian and Kent Keller, dated September 29, 2010.) Notwithstanding this settlement by the parties, the Court, without citing any authority or reasoning, proceeded to issue the Opinion. (See Court's Order, dated Oct. 5, 2010.) The Opinion itself fails to discuss or even mention the parties' settlement. Since the parties have settled, the matter is moot. The Court should withdraw or decertify the Opinion for publication.

In the event the Court does not withdraw or decertify the Opinion for publication, Consumer Watchdog[1] respectfully requests permission to file a Petition for Rehearing as amicus curiae.[2] If permission to file is granted, Consumer Watchdog requests that the Court accept its Petition for Rehearing for filing with the Court. While the Rules of Court appear to only permit "a party" to file a Petition for Rehearing, at least in one instance, a court of appeal has permitted amici curiae to file a Petition for Rehearing. (See e.g., *New York Life Ins. Co. v. Bank of Italy* (1923) 60 Cal.App. 602, 607 [denying request for rehearing by amici curiae, on substantive (not on procedural) grounds]; see also Eisenberg et al., *California Practice Guide: Civil Appeal and Writs* § 12:12, at 12-3.)

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[1] Formerly known as The Foundation for Taxpayer and Consumer Rights

[2] Consumer Watchdog has concurrently filed a Motion for Leave to Intervene, seeking to take up the Plaintiffs' role in vindicating the rights of consumers under Proposition 103. Should the Court grant Consumer Watchdog's Motion to Intervene, Consumer Watchdog requests that the Court accept its Petition for Rehearing as a party.

In the alternative, Consumer Watchdog requests that the Court order rehearing on its own motion. Finally, Consumer Watchdog notes that neither the Attorney General nor the local District Attorney was served with the briefs in this matter, in violation of Business and Professions Code § 17209. As a result, the Court should order rehearing to give these entities their statutory right to participate in this proceeding, which concerns allegations of a violation of the Unfair Competition Law.

Established in 1985, Consumer Watchdog is a California based, non-profit public benefit corporation. Consumer Watchdog's core mission is to defend, enforce, and monitor the implementation of Proposition 103, the insurance reform measure approved by the voters in 1988, and other provisions of the Insurance Code. Consumer Watchdog and its attorneys have participated in virtually every lawsuit concerning the interpretation and application of Proposition 103.[3] Consumer Watchdog has also initiated, or intervened in, numerous regulatory proceedings before the California Department of Insurance.

Consumer Watchdog's interest in this case is that it raises extremely important issues concerning the interpretation and enforcement of the Insurance Code. Important here is Proposition 103's requirement that "[t]he business of insurance shall be subject to the laws of California applicable to any other business" and provision empowering any person to "enforce" Proposition 103.

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[3] See, e.g., *Fogel v. Farmers Group, Inc.* (2008) 160 Cal.App.4th 1403; *Foundation for Taxpayer and Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354; *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968; *Spanish Speaking Citizens' Foundation v. Low* (2000) 85 Cal.App.4th 1179; *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473; *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th

Consumer Watchdog appears as amicus curiae to provide this Court with its views on the application of the statutes at issue here. This is particularly important since the parties appear to have reached a settlement in this matter. As a result, the parties likely have little, if any, incentive to continue to aggressively litigate this action. Consumer Watchdog respectfully believes that the appellate briefs filed by the parties do not fully inform the court of the proper construction of the statutes and interpretation of the applicable case law and that Consumer Watchdog can provide the Court with a unique and valuable perspective, based on years of experience in insurance matters and on the statutory issues raised in this litigation. On this basis, Consumer Watchdog respectfully requests permission to file its Petition for Rehearing as amicus curiae.

DATED: October 21, 2010

Harvey Rosenfield
Pamela Pressley
Todd Foreman
Consumer Watchdog

By: _____
Todd M. Foreman
Counsel for Amicus Curiae and Proposed Intervenor
CONSUMER WATCHDOG

1243; *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216; *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805.

[PROPOSED] ORDER GRANTING APPLICATION FOR LEAVE TO FILE PETITION FOR REHEARING AS AMICUS CURIAE

The Court having reviewed Consumer Watchdog's Application for Leave to File Petition for Rehearing as Amicus Curiae dated October 21, 2010, and papers filed in support thereof, and good cause appearing therefore, hereby GRANTS the application.

DATED: _____, 2010

_____
Justice of the Court of Appeal

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PETITION FOR REHEARING; PROPOSED ORDER

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I. CONSUMER WATCHDOG REQUESTS THAT THE COURT WITHDRAW OR DECERTIFY THE OPINION FOR PUBLICATION

A. When a Case Settles on Appeal, the Reviewing Court Should Ordinarily Dismiss the Appeal

The parties have settled this case, but instead of following the general policy of dismissing settled cases as moot, this Court has issued an opinion. The "courts exist primarily to afford a forum for the settlement of litigable matters between disputing parties." (*Vecki v. Sorensen* (1959) 171 Cal.App.2d 390, 393.) Indeed, due to the mooting effect of settlement, appellate litigants must advise the reviewing court "immediately" if they have resolved their dispute. (Cal. Rules of Court, rule 8.244(a)(1).)

When the controversy itself ceases, so normally does the judicial labor. (See, e.g., *Larner v. Los Angeles Doctors Hospital Associates, LP* (2008) 168 Cal.App.4th 1291, 1296.) As the Supreme Court has stated, "[t]he real value of the judicial pronouncement—what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion—is in the settling of some dispute ***which affects the behavior of the defendant towards the plaintiff.***" (*Neary v. Regents of the Univ. of Cal.* (1992) 3 Cal.4th 273, 282, emphasis added.)

B. The "Public Interest" Exception, Allowing an Appellate Decision Despite Mootness, Is Inapplicable

While the Court failed to invoke this exception in its opinion, much less discuss the fact that the case had settled, opinions are occasionally filed in moot cases when issues of continuing public importance that are likely to be evaded are presented. Even if that is the view of the panel, though, this exception does not apply here.

The public interest exception is invoked most often by the Supreme Court, whose work consists of addressing such questions. (See, e.g.,

Gordon v. Justice Court (1974) 12 Cal.3d 323, 326, fn. 1 [collecting cases]; Cal. Const., art. VI, § 12; Cal. Rules of Court, rule 8.500(b)(1).) It is typically invoked where the issues, by their nature, are likely to evade review. For example, notwithstanding mootness, appellate opinions are issued in juvenile dependency proceedings due to "the short time periods involved in adjudicating dependency issues" (*Tonya M. v. Superior Court* (2007) 42 Cal.4th 836, 843, fn. 2), and for similar reasons in election cases (see, e.g., *Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, 172). An advisory opinion may also be issued "when it is likely to affect the future rights of the parties." (*Chantiles v. Lake Forest II Master Homeowners Assn.* (1995) 37 Cal.App.4th 914, 921.) The exception may similarly apply where the parties "have *requested* that [the court] decide the issues in this case in the interest of public policy and clarification of the law." (*Burch v. George* (1994) 7 Cal.4th 246, 253, fn. 4 [emphasis added].)

Notably, the present case involves none of these circumstances. As explained above, the parties did not reach a settlement until after the Court of Appeal heard oral argument in this matter. Having settled, the parties notified the Court promptly, with counsel for plaintiff class requesting that the Court not issue the decision, or alternatively, to delay issuance of the opinion until after final approval of the settlement. (See Letters to the Court from attorneys Mark Goshgarian and Kent Keller, dated September 29, 2010.) The Court, without citing any authority or reasoning, reached out to decide this case.

Moreover, the issues herein are not inherently likely to evade review. It is better to consider them in the next dispute, with parties incentivized to litigate the issues to the fullest extent possible. This includes substantive review by the Supreme Court. Since the parties in this matter have settled, Consumer Watchdog is compelled to seek leave to intervene in order to seek rehearing and, if necessary, seek review in the

Supreme Court. The very fact that Consumer Watchdog seeks to intervene highlights the reason why this Court should have dismissed this case. Had the case not settled, one or both sides would have vigorously pursued rehearing and/or Supreme Court review, just as they had litigated the case aggressively for years until that point. Instead, the parties have decided to settle their differences, which, without Consumer Watchdog's intervention, guarantees that no one challenge the Court's, obviously disputed holdings.

For these reasons, Consumer Watchdog files the present Petition requesting that the Court withdraw the Opinion or decertify the Opinion for publication. If the Court does not withdraw or decertify the Opinion for publication, it should grant rehearing to correct errors in the Opinion and grant Consumer Watchdog's Motion for Leave to Intervene, so Consumer Watchdog can represent the interests of consumers in this action.

II. THE COURT SHOULD ORDER REHEARING TO CORRECT ERRORS IN THE OPINION

A. Introduction

The Opinion makes numerous statements that are factually incorrect or misstate California law. In doing so, it rewrites several provisions of the Insurance Code enacted by the voters, and virtually ignores a key Proposition 103 provision that explicitly and unconditionally authorizes civil suits against insurance companies for unlawful practices. Moreover, the Opinion t is inconsistent with multiple decisions of the California Supreme Court, careful analyses by two other Courts of Appeal, and the statutory interpretations of the Insurance Commissioner of California and the California Attorney General. Critically, if the Opinion is not corrected or withdrawn, it will denigrate and undermine the Commissioner's own efforts to obtain compliance with the laws he enforces.

The result will be to encourage insurance companies to engage in practices that are illegal and harmful to California consumers and destabilize the California insurance marketplace. As written, the Opinion:

(1) permits automobile insurance companies to evade the requirement that they utilize only those rating factors that are expressly approved by the Insurance Commissioner, such as driving safety record or annual mileage, after a hearing process that includes public notice and comment. Contrary to the explicit directive of Insurance Code section 1861.02(a), enacted by Proposition 103, the Opinion would allow insurance companies to utilize underwriting rules, underwriting guidelines and other underwriting criteria that are not submitted to the Commissioner, not available for public review, not substantially related to the risk of loss and not approved by the Commissioner.

(2) confers immunity upon insurance companies for conduct that is expressly barred by the Insurance Code, the Unfair Competition Law, and the Unruh Civil Rights Act, or other state laws. The Opinion strips consumers of their right to bring a lawsuit to challenge any violation of law or regulation so long as the insurance company defendant can claim that the illegal conduct was approved by the Insurance Commissioner, whether knowingly or unknowingly, or even when the practice is deceptively concealed from the Commissioner and the public.

(3) permits present or even former employees of the Department of Insurance to exercise, on an informal basis and without the public scrutiny required by law, the authority of the Commissioner to review the practices of individual insurance companies.

B. Contrary to the Opinion, This Lawsuit Does Not Challenge Approved "Rates"

The Opinion repeatedly conflates "rates," which are not at issue in this proceeding, with the "rating factors" that are the subject of this suit. "Rates" are the amount of revenue an insurance company may collect from *all* its policyholders for a given line of insurance (automobile, homeowner, etc). Pursuant to Insurance Code section 1861.05, Proposition 103 requires that rates for *all lines* of property-casualty insurance be submitted to the Commissioner for approval prior to their use. In submitting such applications, insurers must comply with a technical formula to ensure that the proposed rates are *within a range of reasonableness* bounded by the "excessive" and "inadequate" standards.[4]

At issue here is a different provision of Proposition 103: section 1861.02. Subdivision (a) requires that insurance companies set *premiums* based upon the application of those rating factors allowed by statute and adopted by the Insurance Commissioner by regulation. Subparagraph (a)(4) states that "[n]otwithstanding any other provision of law, the use of any criterion without such approval shall constitute unfair discrimination." Proposition 103 specifically bars one – and only one – rating factor: "the absence of prior automobile insurance." (Ins. Code § 1861.02, subd. (c).)

The Opinion cites and repeats the analysis in *Walker v. Allstate Indemnity Co.* (2000) 77 Cal.App.4th 750 (Slip Op. at 29-31), but that case involved a challenge to rates. This case is identical to *Donabedian v. Mercury Insurance Co.* ("*Donabedian*") (2004) 116 Cal.App.4th 968: there,

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[4] *See* Cal. Code Regs., tit. 10, § 2644.1 et seq. To justify an appropriate rate an insurer must, *inter alia,* estimate its current losses, project future losses and investment income, and determine a reasonable rate of return. (See *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 249-252.)

Mercury Insurance was charged with violating Insurance Code section 1861.02(c), which bars consideration of an insured's prior insurance status.

The distinction is "critical," as the *Donabedian* Court stated (116 Cal.App.4th at 993), because the Opinion bars any lawsuit challenging violation of provisions of black-letter law: here, the use of an unauthorized rating factor and the consideration of an applicant's prior insurance coverage.

C. Underwriting Guidelines are Not Rating Factors, and the Commissioner Does Not "Approve" Underwriting Guidelines

The Opinion states: "[W]e conclude that 21st Century's use of accident verification was, in fact, a rating factor approved by the DOI." (Slip Op. at 11.) This conclusion is incorrect. The Opinion erroneously conflates permissible optional "rating factors," which must be adopted by the Commissioner by regulation pursuant to Insurance Code section 1861.02(a), with internal underwriting guidelines (also known as underwriting rules), which insurance companies utilize to categorize policyholders. The guidelines utilized by 21st Century are not among the list of authorized rating factors set forth in section 2632.5 of title 10 of California Code of Regulations, so they *cannot* be an approved rating factor pursuant to section 1861.02(a).

Indeed, contrary to the Opinion, the Department does not approve underwriting guidelines. As the Department stated in an amicus curiae brief in a nearly identical case against State Farm:

> While insurers are required to submit underwriting guidelines, including guidelines such as Respondent's "accident verification" guideline, along with their class plan applications, the Department does not formally approve or disapprove such guidelines. (See Cal.Code Regs., tit. 10, §§ 2632.3, 2632.11(b), and 2648.4.)

(Plaintiff MacKay's RJN, Vol. I, Exh. 2, p. 64 [Amicus Curiae Brief of the California Department of Insurance in *Steven Poirer v. State Farm Mutual Automobile Insurance Company*, Case No. B165389 (unpublished), p. 25]).

Because the Department's policy is that it does not approve underwriting guidelines, the Department frequently permits insurers to file its underwriting guidelines under seal. The Opinion therefore immunizes practices that have specifically *not* been approved by the Commissioner and have *not* been subject to the public scrutiny mandated by Proposition 103. (See Ins. Code § 1861.07.)

D. The Opinion Fails to Address Insurance Code Section 1861.10, Which Authorizes Lawsuits For Violations of the Insurance Code and Contains No Restriction on That Right

Missing from the Opinion is an analysis of the dispositive provision of Proposition 103: Insurance Code section 1861.10, subdivision (a). As the Court of Appeal in *Donabedian* explained:

> Proposition 103 added three pertinent sections to the Insurance Code. First, section 1861.02, subdivision (c) prohibits insurers from using the absence of prior insurance, in and of itself, as a criterion in determining eligibility for the Good Driver Discount or generally for automobile rates, premiums, or insurability. Second, section 1861.03, subdivision (a) provides that "[t]he 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 ... and the antitrust and unfair business practices laws ...," which includes the UCL. Finally, section 1861.10, subdivision (a) states that "[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*" (italics added), which includes the statutory ban on using the lack of prior insurance as a rating criterion. These three sections, read together and liberally construed, provide the necessary procedure and substance to permit the present suit.

(*Donabedian, supra*, 116 Cal.App.4th at 977.)

As the *Donabedian* Court held, section 1861.10(a) contains a broad grant of authority for judicial recourse. It was enacted by the voters to provide an alternative to the pre-existing McBride-Grunsky Act's administrative complaint process (Ins. Code § 1858 et seq.), and in addition to the right of judicial review of decisions by the Commissioner under the prior approval process required by Section 1861.05 (Ins. Code §1861.09). Nothing in section 1861.10(a) addresses, much less limits its application in, situations in which the Department has acted. The Department itself has stated that under section 1861.10(a) and 1861.03(a), "a 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." (Plaintiff MacKay's RJN, Vol. I, Exh. 2, p. 6 [Amicus Curiae Brief of the California Department of Insurance in *Steven Poirer v. State Farm Mutual Automobile Insurance Company*, Case No. B165389 (unpublished), p. 3].)

The Opinion mentions section 1861.10(a) in a footnote (p. 26, fn. 14) and then only to state that it did not create a private right of action, citing this Court's opinion in *Farmers Insurance Exchange v. Superior* Court (2006) 137 Cal.App.4th 842. That is not the issue here. That decision itself concludes that section 1861.10(a) "confers standing" in proceedings that include "direct legal actions authorized by section 1861.03, subdivision (a)," such as the instant Unfair Competition Law case. (*Id.* at 853, fn. 8.)

E. The Opinion Improperly Construed a Provision of the McBride-Grunsky Provision

The failure to apply section 1861.10(a) is a fatal flaw in the Opinion, because the Opinion rests its holding upon a construction of a provision of

the McBride Act, Insurance Code section 1860.1, that is not considered in its proper statutory context. That provision states:

> No act done, action taken or agreement made pursuant to the authority conferred by this chapter [Chapter 9] shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this State heretofore or hereafter enacted which does not specifically refer to insurance.

The Opinion acknowledges what *State Compensation Insurance Fund v. Superior Court* (2001) 24 Cal.4th 930, *Donabedian*, and other courts have held: that section 1860.1 was enacted by the 1947 McBride-Grunsky Insurance Regulatory Act to immunize concerted action between two or more insurance companies. (Slip Op. pp. 21- 29.) But the Opinion then holds that section 1860.1 is no longer limited to the concerted conduct of *multiple* insurers, but extends as well to an *individual* insurer's unlawful practices. According to the Opinion, the passage of Proposition 103 mandated a radical change in the meaning of the McBride provision: an antitrust immunity that formerly attached to the concerted conduct of multiple insurers now attaches to an individual insurer's violation of the Proposition's consumer protections.

To reach this conclusion, the Opinion turns long-established principles of statutory construction on their head. Confronted with the analysis that section 1860.1 was retained by the voters to permit insurers to engage in certain joint action that is authorized by Proposition 103 (Ins. Code § 1861.03(b)) – an analysis endorsed by the *Donabedian* Court (116 Cal.App.4th at 990-991) – the Opinion in a footnote states that because section 1860.03(b) "immunizes from prosecution under other statutes the identified concerted acts, there is no need for Insurance Code section 1860.1 to do the same thing." (Slip Op. at p. 29, fn 16.) But section 1861.03(b) contains no such grant of immunity. Moreover, the judicial

branch has no business second-guessing what the voters "need" to say to accomplish their goals when they speak in plain language. (*State Farm Mut. Auto. Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043 [court must give language of Proposition 103 its usual and ordinary import, and accord significance to each word, phrase and sentence in pursuit of the legislative purpose].)

Further, the Opinion ignores the limitation on the immunity conferred by 1860.1 that is contained in the phrase "under any other law of this State heretofore or hereafter enacted which does not specifically refer to insurance." As the *Donabedian* Court explained, the code sections that "authorize this action are not 'other law' – they are part of the same chapter as section 1860.1." (*Donabedian*, *supra*, 116 Cal.App.4th at 977.) And, of course, every provision of Proposition 103 specifically refers to insurance, including the provision that authorizes private suits (section 1861.10(a)), as well as the provision that makes the insurance industry subject to the Unfair Competition Law and all other laws of general applicability. (Ins. Code § 1861.03(a).)

Finally, the Opinion's construction of section 1860.1 cannot survive a statutory analysis that includes section 1861.10(a). Nowhere in Proposition 103 is there any evidence that the voters intended to *sub silentio* expand a statute passed by state legislators in 1947, much less impose a partial immunity from suit that would undermine their own enactment of sections 1861.03(a) and 1861.10(a). No principle of statutory construction sanctions such a sweeping transformation of the plain meaning of forty year-old statutory language. To the contrary, if the McBride-Grunsky provision conflicts with the meaning of sections 1861.10(a) and 1861.03(a), then the proper result would be to hold the McBride-Grunsky provision repealed, to that extent, by implication. (*Burlington Northern and Santa Fe Railway Co v. Public Utilities Commission* (2003) 112

Cal.App.4th 881, 890; accord *People v. Bustamante* (1997) 57 Cal.App.4th 693, 700-701.)

It is noteworthy that the only case cited by the Opinion in support of its holding is *Walker v. Allstate Indemnity Co.* (2000) 77 Cal.App.4th 750; that decision also failed to properly construe section 1861.10(a).

F. The Court Ignores the Initiative's Requirement that Proposition 103 Be "Liberally Construed to Further Its Purposes"

The Opinion's holding limits the effect of section 1861.03's requirement that "the business of insurance shall be subject to" the Unfair Competition Law to those instances where the insurer does not, by deception or otherwise, obtain "approval" from the Insurance Commissioner for its illegal activities. This holding, based on a flawed construction of the operative statutes, contravenes the voters' instruction that "[t]his act shall be liberally construed and applied in order to fully promote its underlying purposes." (Historical and Statutory Notes, 42A West's Ann. Ins. Code (1993 ed.) foll. § 1861.01, p. 649.) One of Proposition 103's stated purposes is to "protect consumers from arbitrary insurance rates and practices." (*Ibid.*) It is inconsistent with the purpose of the Proposition 103 to place limitations on the lawsuits that the initiative specifically authorizes consumers to bring where the statute is unconditional. As discussed above, there is nothing in the legislative history to support a conclusion that the voters intended to confine UCL lawsuits to those actions that are not "approved" by an employee the Department of Insurance. Such an interpretation is exactly the antithesis of the "liberal construction" the voters commanded.

G. The "Filed Rate Doctrine" Does Not Apply

The Opinion asserts that the "filed rate doctrine" applies to California insurance rates. (Slip Op. at 30-31.) From its inception, the essential prerequisite to application of the "filed rate doctrine" has been a

statute that expressly provides an agency with "exclusive jurisdiction" over a regulated industry. (See, e.g., *Texas & Pac. Ry. v. Abilene Cotton Oil Co.* (1907) 204 U.S. 426, 448.) It is beyond dispute, as even this Court acknowledges, that under Proposition 103, the California Department of Insurance no longer exercises exclusive jurisdiction over rates. (*Donabedian, supra,* 116 Cal.App.4th at 983; Slip Op. at 20 [stating that "to the extent it is alleged that an act which violates the ratemaking chapter also violates another law applicable to business generally, such as Business and Professions Code section 17200, an action under the latter statute may proceed"], citing *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 382-383; *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 984-985.) Recognizing this, The California Supreme Court considered and declined to apply the "filed "rate doctrine" to Proposition 103 in *Farmers Insurance Exchange v. Superior Court* (1992) 2 Cal.4th 377, 386-387, holding that "'alternative' or 'cumulative' administrative and civil remedies are made available." (*Id.* at 393-394.)

The California Attorney General also considered and rejected the application of the "filed rate doctrine" in a lengthy and careful statutory analysis of Proposition 103's impact on antitrust law published in 1990:

> A line of federal antitrust cases has established a rule limiting antitrust treble damages recovery for conspiracies involving rates fixed and regulated under certain Congressional enactments. The Doctrine is based upon elaborate review of Congressional intent under the applicable regulatory statute and depends upon a Congressional intent to regulate rate competition under a statutory scheme other than the Sherman Act. The doctrine ... has no application under regulatory statutes that are not intended to supplant antitrust remedies.

(State of California, Department of Justice, *Antitrust Guidelines for the Insurance Industry*, March 1990, published in DiMugno & Glad, *California*

Insurance Laws Annotated (Thomson-West 2006) at 1707, 1716 [footnotes omitted].)

H. The Insurance Commissioner Cannot Approve Unlawful Conduct

The Opinion also fails to apply established precedent holding that an administrative agency simply does not have the authority to approve an action that violates a state law; such an approval would be *ultra vires*. (See, e.g., *Assoc. for Retarded Citizens v. Dept. of Development Svcs.* (1985) 38 Cal.3d 384, 391; *AICCO v. Insurance Company of North America* (2001) 90 Cal.App.4th 579.) By holding otherwise, the Opinion would authorize the Commissioner to ignore both governing statutes and his own regulations in violation of state law. (See Ins. Code § 12921 (a).)

I. Present or Former Employees of the Agency Cannot Authorize Unlawful Conduct

Even if the Commissioner were to have the authority to approve and hence immunize illegal conduct, the Opinion seems to confer the same authority upon present and former employees of the Department. This is both unlawful and a grave threat to the integrity and orderly operation of the agency, as this case readily illustrates. To support its finding that 21st Century's practices were approved, the Opinion relies on the following "evidence":

- A deposition of a former employee of the Department who now works for the insurance industry and who asserted in a deposition that, after internal discussions, the agency staff concluded "that accident verification was, in fact, approvable." (Slip Op. at 12, fn. 8.)

- A "vague[]" recollection by a Department employee that "direction from executive staff filtered down through to us that the accident verification process was allowable." (Slip Op. at 12, fn. 8.)

- A statement in a consent order in a Departmental proceeding against 21st Century that the practice had previously been approved, even though the same consent order agreed that the insurer no longer utilized the complained of practice. (Slip Op. at 14 & fn. 10.)

This "evidence" is hardly the indicia of Commissioner "approval" that would warrant immunity from civil suit for violations of state law. Moreover, absent a grant of intervention in a specific Departmental proceeding, the public is not privy to most informal discussions or enforcement actions at the agency. The public participation that Proposition 103 mandates is completely frustrated when that form of agency activity can serve to immunize unlawful conduct. Finally, by setting such a low evidentiary threshold, the Opinion will encourage insurance companies to solicit statements of "approval" from agency employees throughout the regulatory process and then, if necessary, depose agency employees during subsequent litigation in an attempt to unearth evidence from what should be confidential policy conversations. Or, if all else fails, hire a former agency employee to testify that the conduct was approved. Such tactics cannot be allowed to immunize insurers' illegal conduct.

J. Conclusion

As set forth in the Opinion, this case concerns the use by 21st Century of an underwriting guideline in a manner that violated Insurance Code section 1861.02(c), Proposition 103's ban on the consideration of prior insurance coverage for sales, rating, or underwriting purposes. 21st Century's underwriting criteria were not among the rating factors adopted

by the Commissioner by regulation, and were not properly disclosed either to the Commissioner or to the public. Indeed, once the Commissioner learned of these practices, he issued regulations that required insurers to cease their use. But 21st Century did not stop; rather the record shows it delayed compliance for years. According to the Opinion, 21st Century gets to keep the ill-gotten gains from years of unlawfully surcharging its customers.

But that is not the full measure of the danger posed by the Court's Opinion. Contrary to the Court's protestation (Slip Op. at 31, fn. 19), immunity is exactly what the Opinion grants insurers. Barring recourse to the courts for violations of 103, the Court leaves injured consumers with the option of an administrative complaint. This is exactly the discredited and failed statutory scheme that the Proposition 103 voters explicitly rejected in 1988. Turning back the clock by judicial fiat will expose California consumers to insurance abuses that have long been outlawed. For example, the Opinion would permit insurance companies to evade accountability for unlawful discrimination based on sex, religion or race so long as an employee of the Department – from the Commissioner to a rate analyst who has had no legal training – could be said to have "authorized" the practice, even if they were not specifically aware of it.

The Opinion also gravely undermines the ability of the Commissioner to keep the marketplace honest. It will bar legitimate private lawsuits challenging manifestly illegal practices, which successive Commissioners have embraced as an important complement to the agency's limited resources. Moreover, it will encourage insurers to play a cat-and-mouse game with the Commissioner and the staff of the Department of Insurance, with the knowledge that securing some form of "approval," defined by the Opinion to include virtually any kind of action by the agency, formal or informal, is a "get out of jail free card" for the insurer.

Since the industry first argued that it was entitled to immunity for "illegal procedures that are creatively stowed away in a voluminous regulatory filing" (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 990), the Department has responded by inserting the following notice in its approval letters:

> "If any portion of the application or related documentation conflicts with California law, that portion is specifically not approved. This approval does not constitute an approval of underwriting guidelines nor the specific language, coverages, terms, covenants and conditions contained in any forms, or of the forms themselves."

(Slip Op. at 9, fn. 6.)

The Opinion disregards and dismisses this important consumer protection out of hand.

This Court has no warrant to overturn the will of the voters; it ought not have forsaken the consumers of California. Rehearing should be granted to correct these grave mistakes of law.

III. THE COURT SHOULD ORDER REHEARING BECAUSE THE PARTIES FAILED TO SERVE THE ATTORNEY GENERAL AND DISTRICT ATTORNEY UNDER BUSINESS AND PROFESSIONS CODE SECTION 17209

Business and Professions Code section 17209 requires service on the Attorney General of California ("AG") and the District Attorney ("DA") of the county where the action was filed if "a violation of [Business and Professions Code section 17200 et seq. ("UCL")] is alleged or the application or construction of [the UCL] is in issue in any proceeding in the Court of Appeal. As stated in the Opinion, the violation of law alleged here in is a violation of the UCL. Thus, the parties should have served their briefs on the AG and DA. They did not, thus, the people of California were not given the opportunity to weigh in on the important matters in this case. As a result, the Court should order all briefs served on the AG and the DA

and order rehearing in order to give the people the opportunity to participate in this proceeding.

IV. IN THE ALTERNATIVE, CONSUMER WATCHDOG REQUESTS THAT THE COURT REHEAR THE MATTER ON ITS OWN MOTION

California Rule of Court, Rule 8.268 permits a court to order rehearing "on its own motion." Even if the Court does not grant Consumer Watchdog's Application for Leave to file a Petition for Rehearing as Amicus Curiae, the Court should order rehearing based upon the information contained herein.

V. CONCLUSION

For all the foregoing reasons, CWD requests that the Court grant it leave to file a Petition for Rehearing as Amicus Curiae and grant the Petition for Rehearing. In the alternative, the Court should rehear the matter on its own motion or withdraw or decertify the opinion for publication.

Dated: October 21, 2010

CONSUMER WATCHDOG
Harvey Rosenfield
Pamela Pressley
Todd M. Foreman

BY: _____
Harvey Rosenfield
Attorneys for Amicus Curiae and
Proposed Intervenor
CONSUMER WATCHDOG

CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies that pursuant to rule 8.204(c)(1) of the California Rules of Court, the enclosed **APPLICATION FOR PERMISSION TO FILE AN AMICUS CURIAE PETITION FOR REHEARING AND PETITION FOR REHEARING OR, IN THE ALTERNATIVE, REQUEST THAT THE COURT REHEAR CASE ON ITS OWN MOTION OR DISMISS OR DECERTIFY THE OPINION FOR PUBLICATION** is produced using 13-point Roman type, including footnotes, and contains approximately 4,708 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count provided by Microsoft Word word-processing software.

DATED: October 21, 2010

Todd M. Foreman
Counsel for Amicus Curiae and Proposed Intervenor
Consumer Watchdog

[PROPOSED] ORDER GRANTING
CONSUMER WATCHDOG'S PETITION FOR REHEARING

The Court having reviewed Consumer Watchdog's Petition for Rehearing dated October 21, 2010, and papers filed in support thereof, and good cause appearing therefore, hereby GRANTS the Petition.

DATED: _____, 2010

_____
Justice of the Court of Appeal

PROOF OF SERVICE
[BY OVERNIGHT OR U.S. MAIL, FAX TRANSMISSION, EMAIL TRANSMISSION AND/OR PERSONAL SERVICE]

Case Name: Mackay v. 21st Century Insurance
Court of Appeal Case No.: B220469
Superior Court Case No.: BC297438

I declare:

I am employed in the City of Santa Monica and County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 1750 Ocean Park Blvd., Suite #200, Santa Monica, California 90405, and I am employed in the city and county where this service is occurring.

On October 21, 2010, I caused service of true and correct copies of the documents entitled:

APPLICATION FOR PERMISSION TO FILE AN AMICUS CURIAE PETITION FOR REHEARING AND PETITION FOR REHEARING OR, IN THE ALTERNATIVE, REQUEST THAT THE COURT REHEAR CASE ON ITS OWN MOTION; PROPOSED ORDERS

upon the persons named in the attached service list, in the following manner:

1. If marked FAX SERVICE, by facsimile transmission this date to the FAX number stated to the person(s) named.

2. If marked EMAIL, by electronic mail transmission this date to the email address stated.

3. If marked U.S. MAIL or OVERNIGHT or HAND DELIVERED, by placing this date for collection for regular or overnight mailing true copies of the within document in sealed envelopes, addressed to each of the persons so listed. I am readily familiar with the regular practice of collection and processing of correspondence for mailing of U.S. Mail and for sending of Overnight mail. If mailed by U.S. Mail, these envelopes would be deposited this day in the ordinary course of business with the U.S. Postal Service. If mailed Overnight, these envelopes would be deposited this day in a box or other facility regularly maintained by the express

service carrier, or delivered this day to an authorized courier or driver authorized by the express service carrier to receive documents, in the ordinary course of business, fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on October 21, 2010, at Santa Monica, California.

Carmen Aguado

SERVICE LIST

Person Served	**Method of Service**
Mark Goshgarian Merak Eskigian Goshgarian & Marshall 23901 Calabasas Road, Suite 2073 Calabasas, CA 91302 *Counsel for Amber Mackay and Jacqueline Leacy*	_____ FAX ___X__ U.S. MAIL _____ OVERNIGHT MAIL _____ HAND DELIVERED _____ EMAIL
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Marina M. Karvelas Pirapat Sadikali Sindhuphak Steven H. Weinstein Kent R. Keller Barger & Wolen 633 West Fifth Street, 47th Floor Los Angeles, CA 90071 *Counsel for 21st Century Insurance Company*	_____ FAX ___X_ U.S. MAIL _____ OVERNIGHT MAIL _____ HAND DELIVERED _____ EMAIL
Hon. Anthony J. Mohr Superior Court Los Angeles 600 S. Commonwealth Avenue Dept. 309 Los Angeles, CA 90005	_____ FAX ___X_ U.S. MAIL _____ OVERNIGHT MAIL _____ HAND DELIVERED _____ EMAIL

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District Attorney's Office County of Los Angeles 210 West Temple Street Suite 18000 Los Angeles, CA 90012-3210	_____ FAX ___X_ U.S. MAIL _____ OVERNIGHT MAIL _____ HAND DELIVERED _____ EMAIL
Supreme Court of California 350 McAllister Street San Francisco, CA 94102-4797	_____ FAX ___X_ U.S. MAIL _____ OVERNIGHT MAIL _____ HAND DELIVERED _____ EMAIL