

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**

DATE: 07/22/03

DEPT. 322

HONORABLE PETER D. LICHTMAN

JUDGE M. FERRARA

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

P. REES,

CA

Deputy Sheriff

L. BREECH #9811

Reporter

9:30 am

BC298284

Plaintiff KENT KELLER ✓  
Counsel LARRY GOLUB ✓

PERSONAL INSURANCE FEDERATION  
OF CALIF, ET AL  
VS

Defendant ANTHONY CIGNARALE ✓  
Counsel MICHAEL WEISS ✓  
MARK RICHELSON ✓  
RAMON CINTRON ✓

V.  
JOHN GARAMENDI, INSURANCE  
COMMISSIONER OF THE STATE OF CA

**NATURE OF PROCEEDINGS:**

APPLICATION FOR PLAINTIFFS, PERSONAL INSURANCE  
FEDERATION OF CALIFORNIA, ASSOCIATION OF CALIFORNIA  
INSURANCE COMPANIES, AND THE SURETY ASSOCIATION OF  
AMERICA FOR PRELIMINARY INJUNCTION

Application is called for hearing, argued and taken  
under submission.

Counsel are informed to come by the courtroom around  
2:00 p.m. to pick up a copy of the Court's decision.

LATER AND OFF THE RECORD: The Court issues its  
"Ruling and Order Re: Application for Preliminary  
Injunction" filed this date and incorporated herein  
by reference to the case file.

Initial Status Conference is set 9/24/03 at 9:30 a.m.  
in this department.

Notice deemed given upon counsel picking up the  
decision and a copy of this minute order.

<p align="center"><b>MINUTES ENTERED</b> 07/22/03 <b>COUNTY CLERK</b></p>
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ORIGINAL FILED

JUL 22 2003

LOS ANGELES  
SUPERIOR COURT

Superior Court of the State of California  
For the County of Los Angeles

Personal Insurance Federation of  
California, Association of California  
Insurance Companies and The Surety  
Association of America,

Plaintiffs,

vs.

John Garamendi, Insurance Commissioner  
of the State of California,

Defendant

Case No.: BC298284

Assigned: Hon. Peter D. Lichtman

Court's Ruling and Order Re: Application  
for Preliminary Injunction

Hearing Held: July 22, 2003

Submitted: July 22, 2003

On July 22, 2003, this Court heard the oral arguments of counsel with respect to Plaintiffs' Application for Preliminary Injunction. This Court has read and considered all of the moving and opposing papers (inclusive of the reply) filed in support of the action as well as the complaint which details the claims with respect to each Regulation at issue. Accordingly, this Court now proceeds with its ruling.

1 **Court's Ruling**

2 **Background**

3  
4 Plaintiffs filed their complaint for declaratory and injunctive relief on July 1,  
5 2003. The complaint challenges the new ***Fair Claims Settlement Practices***  
6 ***Regulations***, found at California Code of Regulations, Title 10, Chapter 5, Subchapter  
7 7.5, Sections 2695.1 through 2695.14 (herein the "Regulations") scheduled to take  
8 effect on July 23, 2003. The Regulations (according to the Department of Insurance)  
9 are intended to implement and interpret Insurance Code § 790.03(h).

10  
11 The plaintiffs contend that the Regulations improperly expand the insurer's  
12 obligations beyond the scope of Insurance Code §790.03(h) in the following  
13 proscribed ways:

- 14 1. The Regulations mandate coverage benefits under California  
15 insurance policies by regulatory fiat without any statutory authorization;  
16 2. The Regulations impose duties upon insurers and dictate valuation  
17 methodologies that are inconsistent or in conflict with California law;  
18 3. The Regulations impose standards on insurers that are unreasonably  
19 burdensome without a showing of substantial evidence that the  
20 Regulations are necessary to effectuate the purpose of Insurance  
21 Code § 790.03(h); and  
22 4. The Regulations are unclear, creating uncertainty.

23  
24 The defendant's position, on the other hand, is adamant to the contrary. The  
25 Insurance Commissioner believes that the Regulations do not exceed his authority;  
26 the Regulations are perfectly clear; the Regulations are supported by substantial  
27 evidence; and the Regulations are completely consistent with California law.

1 The plaintiffs assert that throughout the public hearing process on the proposed  
2 changes to the Regulations, plaintiffs participated by submitting written comments  
3 regarding the proposed changes. The plaintiffs further assert that in January 2003, the  
4 Department of Insurance made additional changes to the Regulations and then  
5 without giving plaintiffs or the public an opportunity to comment, the Department of  
6 Insurance submitted the Regulations to the Office of Administrative Law (herein  
7 "OAL"). The OAL approved the Regulations on April 24, 2003 with the exception of  
8 one provision that was subsequently adopted.

9  
10 On May 20, 2003, plaintiffs requested a meeting with the Commissioner to  
11 discuss their concerns with the challenged Regulations and to determine whether the  
12 Commissioner was willing to reopen the public comment period and to revise the  
13 challenged Regulations. After two meetings with General Counsel for the Department  
14 of Insurance, plaintiffs were informed that the Department was unwilling to delay the  
15 effective date of the challenged Regulations or to consider making any further  
16 revisions. The plaintiffs filed the instant litigation seeking injunctive relief to block the  
17 effective date of the Regulations now scheduled for July 23, 2003. Plaintiffs seek to  
18 preserve the status quo until this matter can be fully resolved on the merits.

### 19 20 **Applicable Standard For Injunctive Relief**

21  
22 The decision to grant injunctive relief "*rests in the sound discretion of the trial*  
23 *court.*" ***Pillsbury, Madison & Sutro v. Schectman*** (1997) 55 Cal. App. 4<sup>th</sup> 1279;  
24 ***Ojavan Investors, Inc. v. California Coastal Commission*** (1997) 54 Cal. App. 4<sup>th</sup>  
25 373, 394 ("It is well established that the judiciary possesses broad discretion in  
26 deciding the type of equitable relief to fit a case's particular circumstances."); ***Pahl v.***  
27 ***Ribero*** (1961) 193 Cal. App. 2d 154, 161.

1 CCP § 526 empowers the court to issue a preliminary injunction in situations  
2 where “pecuniary compensation would not afford adequate relief” and “it would be  
3 extremely difficult to ascertain the amount of compensation which would afford  
4 adequate relief.” The purpose of a preliminary injunction is to preserve the status quo  
5 until a final determination is made on the merits. **People v. Pacific Land Res. Co.**  
6 (1997) 20 Cal. 3d 10, 21; **Grothe v. Corlandt Corp.** (1992) 11 Cal. App. 4<sup>th</sup> 1313,  
7 1316.

8  
9 This Court is not unmindful of the general premise that injunctive relief cannot  
10 be granted to prevent the execution of a public statute by officers of the law for the  
11 public benefit. CCP § 526(4). However, this rule does not apply to an invalid or  
12 unconstitutional statute. See **Conover v. Hall** (1974) 11 Cal. 3d 842, 849-50. Nor  
13 does it apply to Regulations adopted by a public agency that exceed statutory  
14 authority or are otherwise invalid. See **Morris v. Williams** (1967) 67 Cal. 2d 733;  
15 **California Welfare Rights Org v. Carleson** (1971) 4 Cal. 3d 445.

16  
17 In deciding whether to grant the preliminary injunction the court must weigh: (1)  
18 the likelihood that the moving party will ultimately prevail on the merits and (2) the  
19 relative interim harm to the parties from issuance or non-issuance of the injunction.  
20 **White v. Davis** (2003) 30 Cal. 4<sup>th</sup> 528, 554 and **Butt v. State of Cal.** (1992) 4 Cal. 4<sup>th</sup>  
21 669, 677-78. The proper standard for the first prong is reasonable likelihood of  
22 success on the merits. **14859 Moorpark Homeowner’s Assoc. v. VRT Corp.** (1998)  
23 63 Cal. App. 4<sup>th</sup> 1396, 1409. In considering the issue of irreparable harm, the court  
24 should look at the inadequacy of other remedies, the degree of irreparable harm and  
25 the necessity of preserving the status quo. **14859 Moorpark HOA, supra** at 1402.  
26 “The trial court’s determination must be guided by a ‘mix’ of the potential merit and  
27 potential harm factors; the greater the plaintiff’s showing on one, the less must be  
28 shown on the other to support an injunction.” **Butt, supra** at 678.

1  
2 **Relative Harm To The Parties That Is Likely To Result From The Granting Or**  
3 **Denial Of Interim Injunctive Relief**  
4

5 Where, as here, a preliminary injunction is sought against a public officer or  
6 agency, a significant showing of irreparable injury is required because there is a  
7 general rule against enjoining public officers or agencies from performing their duties.  
8 ***Tahoe Keys Prop. Owners Ass'n v. State Water Resources Control Board*** (1994)  
9 23 Cal. App. 4th 1459, 1471. Accordingly, the question presented is whether plaintiffs  
10 are likely to suffer greater injury from the denial of the injunction than defendants are  
11 likely to suffer if it is granted. See ***Shoemaker v. County of Los Angeles*** (1995) 37  
12 Cal. App. 4th 618.  
13

14 Based on the record before this Court, significant irreparable harm will befall  
15 the plaintiffs if the preliminary injunction requested is not granted. Specifically, in order  
16 for the plaintiffs to comply with the Regulations, plaintiffs' members will be forced to  
17 modify claims settlement procedures and standardized policies at enormous expense.  
18 If the Regulations are ultimately declared invalid, plaintiffs will not be able to obtain  
19 compensation for the changes and compliance procedures that would have had to be  
20 implemented. To support the record before this Court, the plaintiffs submit  
21 declarations from various insurers and a surety specifically detailing the cost  
22 increases that the companies will incur in attempting to comply with these  
23 Regulations. These declarations make a significant showing that irreparable injury will  
24 result if the injunction is not granted.  
25

26 Additionally, a sufficient showing has been made that the general public will be  
27 harmed by the inevitable rise in insurance rates. The defendant has acknowledged in  
28 its Notice of Proposed Action and Notice of Public Hearing that the Regulations "may

1 *have a significant, statewide adverse economic impact directly affecting the business,*  
2 *including the ability of California businesses to compete with business in other states.*  
3 *The types of businesses that may be affected are insurers and claims agents as*  
4 *defined under the current Regulations.”<sup>1</sup>*  
5

6 On the other hand, the harm the defendant will suffer (with an injunctive order in  
7 place) is the prohibition from performing his statutory duty to protect the public from  
8 unfair claims practices. However, if the Commissioner is acting in excess of his  
9 authority then that alleged harm does not exist and likewise never existed in the first  
10 place.

11  
12 Accordingly, this Court finds that plaintiffs have made a showing that the relative  
13 interim harm to the parties from the issuance or non-issuance of the injunction weighs  
14 in favor of the plaintiffs.

15  
16  
17 **Reasonable Probability of Success On the Merits.**  
18

19 Even where plaintiffs have shown that there are no adequate damage remedies  
20 available to them and that the plaintiffs will suffer irreparable harm if the court denies  
21 the injunction, the court must still determine whether there is a reasonable probability  
22

---

23  
24 <sup>1</sup> The defense counters this argument by proffering that the above quoted statement is language  
25 taken verbatim from Government Code § 11346.5 and is required pursuant to Government Code §  
26 11346.5(a)(7)(C) as part of the regulation rule making process and therefore should not be given any  
27 significance. This Court finds that argument to be disingenuous since it would require this Court to  
28 ignore statutory language and further conclude that the required language is to be given no meaning  
or effect whatsoever. Well-established principles of statutory construction preclude such a  
conclusion.

1 that the plaintiffs will prevail on the merits. See *Robbins v. Sup. Ct.* (1985) 38 Cal.  
2 3d 1999, 206.

3  
4 Once again, based on the record before this Court, it is concluded that the  
5 plaintiffs have a reasonable probability of prevailing on the merits. Specifically, that the  
6 Commissioner is acting in excess of his authority in that many of the Regulations  
7 amount to improper legislation of *mandating policy benefits*. The Court recognizes  
8 that the Commissioner has authority under § 790.10 and § 790.03(h) of the Insurance  
9 Code to promulgate Regulations. However, those Regulations must comport with the  
10 scope of the statute. At this juncture, pending a trial on the merits, this Court must  
11 conclude that the Regulations at issue do not.

12  
13 In that regard this Court quotes in haec verba the examples provided by the  
14 plaintiffs:

15  
16 Regulation section 2695.7(b)(5) prohibits insurers from depreciating the cost of  
17 labor in adjusting the value of a claim because of betterment or depreciation.  
18 The effect of this Regulation is to mandate that all insurance policies provide  
19 coverage for replacement value, as opposed to market value, extending  
20 coverage beyond the concept of indemnity.

21  
22 Regulation sections 2695.8(m) and 2695.85(c) require insurers to pay all  
23 reasonable vehicle towing and storage charges incurred by the insured. While  
24 insureds have a statutory right to be informed about coverage for towing  
25 services, these Regulations would require insurers who do not provide  
26 coverage for such expenses to alter current policy language so as to cover  
27 towing and storage costs.



1 Regulation section 2695.8(b)(1) requires that all cash settlements for total loss  
2 vehicles shall include all taxes and one-time fees incident to transfer of  
3 ownership, including license and other annual fees, computed based upon the  
4 remaining term of the loss vehicle's current registration – even if the insured  
5 does not purchase a replacement vehicle. It is argued that this section  
6 mandates compensation beyond the amount necessary to indemnify the  
7 claimant resulting in the extension of coverage.  
8

9 Regulation section 2695.8(b)(2) restricts an insurer's ability to account for the  
10 condition of a total loss vehicle and impairs the insurer's ability to determine the  
11 fair market value of the vehicle just prior to the loss. To the extent this  
12 Regulation requires an insurer to use valuations based on vehicles in better  
13 condition than the total loss vehicle, without adjustment or consideration of  
14 condition, the plaintiffs contend that it is an attempt to dictate increased  
15 coverage benefits under an insurer's policy.  
16

17 Regulation section 2695.8(g) provides that any insurer recommending that a  
18 vehicle be repaired in a particular repair shop is prohibited from limiting or  
19 discounting the reasonable repair costs actually incurred at another shop based  
20 on charges which would have been incurred had the vehicle been repaired by  
21 the insurer's recommended repair shop. Once again, the plaintiffs contend that  
22 this new Regulation has the effect of prohibiting insurers from offering PPO  
23 policy options for repairs, improving existing policy terms by regulatory fiat.  
24

25 Regulation section 2695.1(e) incorporates all of these Regulations and  
26 mandates that "[p]olicy provisions . . . shall be consistent with or more favorable  
27 to the insured than the provisions of these regulations."  
28

1 Plaintiffs point out to the court that nothing in Insurance Code § 790.03(h)  
2 authorizes such a mandate. More specifically, plaintiffs assert that § 790.06 of the  
3 Insurance Code contains a detailed, specific hearing process and the aforementioned  
4 Regulation could circumvent that process.

5  
6 In addition to the above this Court likewise believes that plaintiffs have a  
7 reasonable likelihood of prevailing on the merits with respect to their argument that the  
8 Regulations impose a higher standard on insurers than is imposed under California  
9 law.

10  
11 For example, § 2695.7(s) provides that “[i]nsurers choosing to use data from a  
12 computerized database source or any other source remain responsible for the  
13 accuracy of data they use, whether this data is derived in-house or through third  
14 parties.” This section prescribes a strict liability standard for any third party  
15 information used by an insurer to value an insured’s claim. By contrast, § 790.03(h)  
16 provides a good faith standard. See, e.g., Ins. Code § 790.03(h) (prohibiting  
17 “knowing” unfair settlement practices); § 790.03(h)(3) (requiring “reasonable  
18 standards for the prompt investigation and processing of claims”); § 790.03(h)(5)  
19 (requiring insurers to attempt “in good faith to effectuate prompt, fair, and equitable  
20 settlements of claims”). Despite this statutory good faith standard, the Commissioner  
21 rejected public comments advocating a less stringent standard, such as a requirement  
22 that insurers be required to secure statements of accuracy from third parties, along  
23 with supporting documentation.

24  
25 Along the same lines, the Commissioner has rewritten Regulation § 2695.12 to  
26 confer on the Department of Insurance the authority to impose penalties on insurers  
27 for a single act of noncompliance with the Regulations regardless of whether the act  
28 was the result of a “reasonable mistake.” Insurance Code §790.03(h) only prohibits

1 insurers from “[k]nowingly committing or performing” any of the listed acts “with such  
2 frequency as to indicate a general business practice.” This Court concurs with the  
3 arguments of the plaintiffs to the effect that the California Supreme Court has  
4 interpreted § 790.03(h) as requiring both “knowing” and “frequent.” See *Moradi-*  
5 *Shalal v. Fireman’s Fund Ins. Cos.* (1988). 46 Cal. 3d 287, 303

6  
7 Moreover, the Court finds that the plaintiffs’ complaint is replete with other  
8 examples of Regulations that are in excess of the Commissioner’s authority or simply  
9 unclear.

10  
11 ***Accordingly, this Court hereby orders:***

- 12 1. *Defendant John Garamendi, in his capacity as Commissioner of the*  
13 *California Department of Insurance*  
14 2. *The California Department of Insurance and all those acting in concert*  
15 *with them,*

16 ***Enjoined, pending a resolution of this action on the merits, from:***

- 17 (1) Implementing the new Fair Claims Settlement Practices Regulations,  
18 found at California Code of Regulations, Title 10 Chapter 5,  
19 Subchapter 7.5, Sections 2695.1 through 2695.14 scheduled to take  
20 effect on July 23, 2003; and  
21 (2) Taking any action to apply and/or enforce the Regulations identified  
22 in paragraph 1 directly above.

23  
24  
25 Dated: July 22, 2003

26 \_\_\_\_\_  
27 Peter D. Lichtman  
28 Judge of the Superior Court