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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

THE ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES, THE PERSONAL INSURANCE FEDERATION OF CALIFORNIA, THE AMERICAN INSURANCE ASSOCIATION, AND THE PACIFIC ASSOCIATION OF DOMESTIC INSURANCE COMPANIES

Insurance Association
Petitioners and Plaintiffs,

v.

STEVE POIZNER, in his capacity as Insurance Commissioner of the State of California; and CALIFORNIA DEPARTMENT OF INSURANCE,

Respondents and Defendants,

THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS,

Intervenor.

Case No. BS109154

THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS' OPPOSITION TO PETITION FOR WRIT OF MANDATE

Hearing Date: January 31, 2008
Time: 9:30 a.m.
Dept: 85
Judge: Hon. Dzintra Janavs

Date Action Filed: May 25, 2007

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INTRODUCTION AND SUMMARY OF ARGUMENT

Proposition 103 establishes a regulatory system under which insurance companies must apply for prior approval of their rates and underwriting factors by the Insurance Commissioner (Ins. Code §§ 1861.01(c), 1861.02, 1861.05) and provides for full public scrutiny and participation in rate proceedings. (Ins. Code §§ 1861.05(c); 1861.10(a).) To guarantee that the public's participation is conducted in a professional manner, the statute mandates compensation of advocacy fees and expenses for consumer representatives' substantial contribution to the outcome. (Ins. Code § 1861.10(b).) In the years since the passage of Proposition 103, this statutory system has been supplemented with an informal rate review and approval process. During this process, after an insurer files an application for a rate change and a consumer representative requests a formal hearing as is its statutory right, the California Department of Insurance (CDI) legal and rate review staff and the consumer representative continue their assessment of the rate application, additional data is exchanged, and discussions regarding an acceptable resolution often ensue. As a result, insurers often agree to a modified rate change, withdraw their application altogether, or infrequently, if no informal resolution is reached, the dispute proceeds to a formal administrative hearing. Whatever the result, the informal process is often extremely time and resource intensive for the consumer representative's attorneys, actuaries, and other experts.

To protect the ability of consumer organizations to effectively participate in the rate-setting process pursuant to Insurance Code sections 1861.05 and 1861.10,[1] the Commissioner promulgated amendments to the consumer participation and compensation regulations (hereafter "Intervenor Regulations"), which ensure that consumer representatives that make a "substantial contribution" to the result receive the required compensation.[2] The principal amendment at issue here clarifies that a "rate proceeding" is initiated upon the filing of a petition for hearing. (Cal. Code Regs., tit. 10 ("10 CCR") §§ 2651.1(h) and 2661.1(f), (h), (i), and (k).)

By their petition for writ of mandate, insurance trade association Petitioners seek to invalidate the Commissioner's duly adopted amendments. Petitioners do not and cannot dispute the

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[1] All statutory references are to the Insurance Code unless otherwise indicated.

[2] FTCR's Request for Judicial Notice ("FTCR's RJN"), Exh. 1 [Final Text of the amended regulations (10 CCR §§ 2651.1, 2661.1, 2661.3, 2662.1, 2662.2, 2662.3, and 2662.5) with amendments shown in strikethrough and underline. Note that section 2653.6 as submitted to OAL for adoption was ultimately withdrawn by the Commissioner. (Cal. Reg. Notice Register 2007, No. 2-Z, Jan. 12, 2007, page 48.) A "clean" version of the amended regulations is attached as Exhibit 2 to FTCR's RJN.

Commissioner's general rulemaking authority to adopt or amend the Intervenor Regulations pursuant to sections 1861.05, 1861.055, and 1861.10 and the "broad discretion . . . to promote the public welfare" accorded to him by Proposition 103 as acknowledged by the California Supreme Court. (*Calfarm Insurance Company v. Deukmejian* (1989) 48 Cal.3d 805, 824; *20th Century Insurance Company v. Garamendi* (1994) 8 Cal.4th 216, 245.) Indeed, Petitioners acknowledge that the Commissioner has established "a process" for review and approval of rate applications that is consistent with his statutory authority and argue in favor of maintaining the former Intervenor Regulations. (See e.g., Op. Br. at 1:13-14; 3:17-18; 7:7-15, 25-26; 10-17:19; 12:11-13.) Instead, they allege that the Intervenor Regulations *as amended* somehow conflict with the governing statutes.[3] Contrary to Petitioners' assertions which have no basis in statute or case law, the amended Intervenor Regulations are wholly consistent and not in conflict with sections 1861.05 and 1861.10 for all of the following reasons:

First, Petitioners argue that the Commissioner's "process" of review and approval of rate applications without a formal hearing is not a "proceeding" under section 1861.10(a). Petitioners never squarely address how the Commissioner's regulatory amendment clarifying that a "rate proceeding" commences upon the filing of a petition for hearing conflicts with the "any proceeding" language of section 1861.10. In fact, they offer no definition of "proceeding" whatsoever. Instead, they equate "proceeding" with "adjudicative process" or "hearing" even though those words do not appear anywhere in section 1861.10. As the California Supreme Court has made clear on several occasions, the plain language of Proposition 103 must be respected. (See Argument Sec. IIA.)

Second, even though the regulations do not amend the statutory definition of "decision," Petitioners argue that the amendments somehow conflict with section 1861.10(b), which they claim permits advocacy fees only for a substantial contribution to a "decision on the merits" after a formal hearing. The plain language of subdivision (b), however, ***requires*** the Commissioner to award such fees and expenses for a consumer representative's substantial contribution to "the adoption of ***any*** regulation, order, or decision by the commissioner or a court". Thus, as the statute provides and the amendments follow, ***any*** "order" or "decision" of the Commissioner includes an order or decision to

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[3] Petitioners' opening brief omits any discussion of the regulations' reasonable necessity to effectuate the purposes of the statute. The Commissioner's rulemaking file, including the initial statement of reasons (FTCR's RJN, Exh. 3), and the Summary and Response to Public Comments (FTCR's RJN, Exh. 4) manifestly establish the reasonable necessity of the regulations, and his determination shall not be disturbed unless wholly arbitrary or capricious. (*20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 272.)

approve or deny a rate application without holding a public hearing. No appellate court case has held to the contrary. (See Argument Sec. IIB.)

Petitioners also claim that the amendment conflicts with Proposition 103, but the only conflict before this court is between Petitioners' construction of Proposition 103 and its plain language and explicit purposes. The insurers allow that "consumer participation...is be encouraged" (Op. Br. at 11:15-16), but they never explain how a construction of the statutes that arbitrarily limits consumer participation to rate hearings and denies participation in other aspects of the rate-review process is consistent with this goal. Contrary to Petitioners' assertions, case law confirms that an interpretation of section 1861.10 in a manner that best facilitates compensation so as to encourage consumer participation in the rate-setting process is to be favored over undue restrictions. (See Argument Sec. IIC.)

Finally, in their zeal to escape responsibility under the amendments, the insurers invite this court to derail not just the amendments but also the informal rate review process itself. They acknowledge, and at least today do not contest, the Commissioner's authority to establish the informal process to review and approve rate applications outside of the statutorily defined "deemer" and "hearing" provisions of section 1861.05 (see, e.g., Op. Br. at 10-17:19, 12:11-13). Yet according to Petitioners, the Commissioner does not have the authority to allow consumers to be compensated for their advocacy when the same informal rate review process concludes without a rate hearing. Contrary to Petitioners' reasoning, however, the California Supreme Court has twice recognized the Commissioner's broad authority to implement Proposition 103, stating that "[i]t is well settled in this state that [administrative] officials may exercise 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." (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 824-825, italics in original; *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 245.) If the Commissioner has the authority to establish a rate review process pursuant to powers expressly granted by or fairly implied from section 1861.05, then he necessarily has the authority to award reasonable advocacy fees and expenses to persons who make substantial contributions to his decisions in such a process. (See Argument Section III below.)

BACKGROUND AND PROCEDURAL HISTORY[4]

A. Proposition 103's Rate Review and Approval Process.

The Commissioner is required to reject rates that are "excessive, inadequate, unfairly discriminatory, or otherwise in violation of [chapter 9]." (Ins. Code §§ 1861.01(c),1861.05(a) and (b).) Rate applications are publicly noticed and consumers and their representatives may request hearings on insurers' rate applications within 45 days of such notice. (Ins. Code § 1861.05(c).) The CDI may file a response, and the insurer may file an answer to the petition. (10 CCR §§ 2653.3 & 2653.4.) The petition, any response, and answer are considered "pleadings", which become part of the record in the rate proceeding. (10 CCR § 2653.5 ["The petition for hearing, any response, any answer, and the Commissioner's determination whether to grant or deny a hearing shall be part of the record in the proceeding..."].) If a hearing is requested on an application that seeks a rate change greater than 7% for personal lines of insurance (e.g., home or automobile) or 15% for commercial lines (e.g., medical malpractice), the Commissioner *must* grant the hearing; otherwise, the decision is within the Commissioner's discretion. (Ins. Code § 1861.05(c).) If no hearing is requested or noticed, the Commissioner must review and issue a decision on a rate application or notice a hearing within 60 days, or the application is deemed approved. (Ins. Code § 1861.01(c), 1861.05(c); 10 CCR § 2648.3(a).)

Pursuant to section 1861.05(c) and his inherent authority to "tak[e] whatever steps are necessary to reduce the job [of rate review and approval] to manageable size" (*20th Century Insurance Company v. Garamendi, supra*, 8 Cal.4th 216, 245), the Commissioner has established a Rate Regulation Bureau that conducts review and analysis of rate applications. (See 10 CCR §§ 2648.2.) If no notice of hearing is issued, the Commissioner's decision to approve a rate application is set forth in an "Approval of Application" that is issued by the Rate Regulation Bureau. (See, e.g., FTCR's RJN, Exh. 5.) If a hearing is granted, an Administrative Law Judge presides over discovery, an evidentiary hearing, and briefing, which typically consumes several months, and results in a proposed decision. (Gov. Code § 11517.) If the proposed rate is found excessive or inadequate, the Commissioner's decision adopting, rejecting or modifying the administrative law judge's proposed decision (Ins. Code § 1861.08) must either reject the filing or indicate the appropriate rate (10 CCR § 2644.1). If the Commissioner determines *not* to hold a hearing in response to a request, he must nonetheless "issue written findings in

[4] For a more extensive discussion of the background of Proposition 103 and the amended Intervenor

support of that decision" (Ins. Code § 1861.05(c)(1)), and that decision is considered "final" for purposes of seeking judicial review (Ins. Code § 1861.09); the Commissioner still must complete the rate review and approval process and determine to approve or reject the rate filing, or indicate the appropriate rate (10 CCR § 2644.1). Again, this takes the form of an "Approval of Application" issued by the Rate Regulation Bureau.

B. Consumer Participation in Proposition 103 Administrative Proceedings.

To ensure consumers' participation in Proposition 103 matters, the voters adopted section 1861.10. Subdivision (a) of that section provides as follows:

> Any 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).) By its plain language, subdivision (a) refers to "any proceeding permitted or established pursuant to this chapter", and not "an adjudicative proceeding" or "hearing".

Section 1861.10(b) establishes, *without any limitation*, as follows:

> The commissioner or a court ***shall*** award reasonable advocacy and witness fees and expenses to any person who demonstrates that (1) the person represents the interests of consumers, and, (2) that he or she has made a substantial contribution to the adoption of any order, regulation or decision by the commissioner or a court. Where such advocacy occurs in response to a rate application, the award shall be paid by the applicant.

(Ins. Code 1861.10(b), emphasis added.)

C. The Necessity of the 2006 Amendments to the Intervenor Regulations.

As set forth in detail in the accompanying declaration of Pamela Pressley ("Pressley Decl."), after a consumer representative petitions for a hearing, the CDI initiates informal discussions with the applicant and the petitioner regarding issues with the rate application. (Pressley Decl., ¶¶6-8, 10.) Because this informal process sometimes lasts longer than the 60 days that the Commissioner has to rule on the petition for hearing, applicants routinely waive the "deemed approved" date and the informal negotiations can continue for months at substantial expense to the consumer representative's attorneys and experts. (*Id.* at ¶¶6-8.) Despite the fact that the parties may reach a stipulation that is approved by order of the Commissioner, or the Commissioner may determine to approve a lower rate than requested by the insurer and issue a final decision with his findings, certain insurers have objected

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Regulations, see FTCR's Complaint in Intervention, pp. 6-19.

to compensation for the pre-hearing substantial contribution of the consumer representative. (*Id.* at ¶¶9, 11.)

In order to ensure that consumers would continue to be represented in rate proceedings on an equal footing with insurers regardless of whether there is a negotiated resolution or a full-blown hearing, the Commissioner determined to amend the Intervenor Regulations, and summarized their necessity as follows:

> It has been the Department's practice to encourage consumer representatives and applicants to resolve rate challenges informally so as to avoid engaging in lengthy formal hearings that benefit no one. Often during negotiations, insurers seek to withdraw their applications. In some instances, applicants have withdrawn their applications after a petition for hearing has been filed and after the petitioner has expended substantial time and effort advocating its position through its advocates and experts. In these instances, the result of the informal process has been either no rate change, or a substantial alteration in the rate ultimately approved by the Commissioner. Such results benefit the public without the necessity of conducting a formal hearing.

(FTCR's RJN, Exh. 3 [Initial Statement of Reasons, RH06092874, Sept. 22, 2006], p. 2.)

D. The Rulemaking Proceeding to Amend the Intervenor Regulations.

To address the problems that had been occurring in the intervenor process, the Commissioner noticed a public hearing to amend portions of the Intervenor Regulations, "***to clarify that consumers, who participate in the approval process after having filed a petition for a hearing, may seek an award of reasonable advocacy fees.***" (Initial Statement of Reasons, RH06092874, Sept. 22, 2006, p. 1, emphasis added.) FTCR and other consumer organizations, including Public Advocates and the Center for Public Interest Law, submitted written comments and testified in support of the Commissioner's proposed regulations. (FTCR's RJN, Exh. 4 [Summary and Response to Public Comments, RH06092874, Sept. 22, 2006, pp. 4-7, 10, 12, 13, 15].) Insurers were also well represented by individual companies and their trade associations, Petitioners here. Their comments, setting forth the same arguments as made in the instant writ petition, were rejected by the Commissioner. (*Id.* at 1-3; 8-15.) After approval by the Office of Administrative Law, the amendments became effective on January 28, 2007. (Cal. Reg. Notice Register 2007, No. 2-Z, Jan. 12, 2007, page 48.)

The primary amendments to the Intervenor Regulations, on which Petitioners stake their entire challenge merely clarify the point in time at which a rate proceeding begins as follows: "'a rate proceeding' is established upon the submission of a petition for hearing." (10 CCR §§ 2651.1(h) and 2661.1(h).) A sentence was added to section 2661.1(k) to clarify that "[a] substantial contribution may

be demonstrated without regard to whether a petition for hearing is granted or denied."[5] Thus, the amendments affirm what has been standard practice for many years: Whenever a rate case has proceeded to a hearing, the CDI has always required the insurer to reimburse the consumer organization for all its fees and expenses *from the point of initiation forward, including the pre-hearing process.* Moreover, a substantial contribution may be demonstrated even when the proceeding is resolved without a formal hearing.

ARGUMENT

I. Standard of Review.

The California Supreme Court has specifically set forth the standards for reviewing regulations adopted pursuant to Proposition 103. "[W]hether Proposition 103 authorizes the Insurance Commissioner to adopt [] regulations to implement the initiative is...examined independently." (*20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 271.) "Whether the [] regulations actually adopted . . . are consistent with Proposition 103--and with the law generally--is also examined independently." (*Id.* at 271-72.) "[W]hether the [] regulations actually adopted...are necessary and proper for the implementation of Proposition 103 is scrutinized for arbitrariness and/or capriciousness." (*Id.* at 272.)

"In general, an agency's interpretation of statutes within its administrative jurisdiction is given presumptive value as a consequence of the agency's special familiarity and presumed expertise with satellite legal and regulatory issues." (*PG&E Corp. v. Pub. Util. Comm.* (2004) 118 Cal.App.4th 1174, 1194, citing *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11.) Such administrative construction is entitled to "considerable deference" and "should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language." (*SCE Co. v. Pub. Util. Comm.*

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[5] Certain of the amendments to the Intervenor Regulations, which Petitioners do not seriously contest, merely make minor procedural changes to the requirements for petitions to intervene, requests for awards, and decisions awarding compensation. (See 10 CCR §§ 2661.3(a), (e)-(g) [shortening the timelines for responses, replies and decisions on a petition to intervene]; 2662.3(b) and 2662.5(a)(1) [specifying additional documentation that may support a "substantial contribution" showing in seeking an award of compensation]; and 2661.1(d), 2662.3(a) and (b)(3) [making clear that the Intervenor Regulations apply equally to persons who initiate proceedings, i.e. "petitioners", as well as "intervenors" and "participants" in Departmental proceedings].) Contrary to Petitioners assertion (Op. Br. at 8-14), however, ***the amendments leave unchanged the regulatory requirement that a petition to intervene must be granted as a condition precedent to applying for and being awarded compensation.*** (See 10 CCR §§ 2662.3(a), 2662.5(a) [requiring compliance with section 2662.3].)

(2004) 117 Cal.App.4th 1039, 1050 [upholding PUC's interpretation of intervenor compensation statute], quoting *SCE Co. v. Peevey* (2003) 31 Cal.4th 781, 796.)

II. The Commissioner's Regulations Are Consistent with and Compelled by the Plain Language of Insurance Code Section 1861.10 and Its Underlying Purpose.

"The plain language of the statute establishes what was intended by the Legislature." (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 735.) "Our first step in determining the Legislature's intent is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning." (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633, internal brackets omitted.) "If there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.)

Even if the plain meaning of the statutes were not clear, a court "must consider the consequences that might flow from a particular construction and should construe the statute so as to promote rather than defeat the statute's purpose and policy." (*Escobedo v. Estate of Snider* (1997) 14 Cal.4th 1214, 1223.)

A. The Commissioner's Regulations Are Consistent with the Plain and Commonsense Meaning of Section 1861.10(a).

Petitioners argue that the Commissioner's amendments to sections 2651.1(h) and 2661.1(h) of the Intervenor Regulations defining "proceeding" and "rate proceeding" are invalid because they conflict with Insurance Code section 1861.10(a), which governs, inter alia, the initiation of and intervention in "any proceeding permitted or established pursuant to this chapter." (Ins. Code § 1861.10(a).) Petitioners summarily conclude, without citation to any authority, that "the plain meaning of 'proceeding' itself denotes a more formal process than is afforded in the administrative review of an application." (Op. Br. at 7:24-26.) Inexplicably, Petitioners claim that the informal rate review and approval process in which intervenors substantially participate is "just a Department Review process" not a "proceeding". (*Id.* at 2:1-3.)

Under the Commissioner's regulations, "proceeding" has consistently been defined to mean, "any action conducted pursuant [Proposition 103]." (10 CCR § 2651.1(h).) The 2006 amendments retain this definition and clarify that such a proceeding includes "a rate proceeding established upon the submission of a petition for hearing pursuant to California Insurance Code section 1861.05 and section 2653.1 of this subchapter." (10 CCR § 2651.1(h); see also § 2661.1(h).) In other words, the Commissioner's amendments merely define when a "rate proceeding" begins: upon the submission of

a petition for hearing. ***Establishing the point in time at which a proceeding begins in no way conflicts with the consumer participation and compensation provisions of section 1861.10 because the statute itself does not specify when a "proceeding" begins.***

Moreover, the Commissioner's amendment defining when a proceeding begins is entirely consistent with ***unamended*** provisions of the regulations first adopted in 1995, which state that, "The petition for hearing, any response, any answer, and ***the Commissioner's determination whether to grant or deny a hearing shall be part of the record in the proceeding***... ." (10 CCR § 2653.5, emphasis added.) Insurance Code section 1861.09 in turn provides that "***a decision not to hold a hearing is final***" for purposes of seeking judicial review. (Ins. Code § 1861.09, emphasis added.) In other words, the Commissioner's amendment recognizes that a petition for hearing is the first pleading in the formal record of the proceeding, regardless of whether the Commissioner ultimately grants or denies a hearing, and any decision by the Commissioner to deny a hearing is "final" and subject to judicial review.

Petitioners' contentions fail for three additional reasons:

First, had the voters intended the term "proceeding" to be limited to "an adjudicatory proceeding", they would have used that term. Indeed, the Government Code contains a definition of "adjudicative proceeding" to mean "an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision." (Gov. Code § 11405.20.) In turn, Government Code section 11415.50 distinguishes "adjudicative proceeding" from non-adjudicatory proceedings, stating that "[a]n agency may provide for any appropriate procedure for a ***decision*** in which an adjudicative proceeding is not required" (subd. (a), emphasis added), such as for "informal factfinding or an informal investigatory hearing, or a decision to initiate or not to initiate an investigation, prosecution or other proceeding before the agency,...whether in response to an application for an agency decision or otherwise" (subd. (b), emphasis added). Had the voters intended consumer participation and compensation to only be allowed in any "adjudicative proceeding", they would have referred to that provision of the Government Code. (See *Prof. Engineers in Cal. Gov. v. Kempton* (2007) 40 Cal.4th 1016, 1048 ["The voters are presumed to have been aware of existing laws at the time the initiative was enacted"].)

Second, the fact that subdivision (b) requires awards of compensation for a substantial contribution to a "regulation" clearly indicates that "proceeding" in subdivision (a) is not restricted to an "adjudicatory proceeding".

Third, the plain and commonsense meaning of the term "proceeding" includes the synonyms "process", "procedure", and "transaction". (Webster's Online Dict. (2007).) In the legal context, a proceeding has been defined broadly as "an act or step that is part of a larger action." (Black's Law Dict. (8th ed. 2004).) Courts have similarly recognized the broad meaning of the term, stating that "the word 'proceeding' necessarily has different meanings according to the context and subject to which it relates." (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1370.) Proposition 103 itself requires that its terms be "***liberally construed and applied in order to fully promote its underlying purposes***." (Prop. 103, § 8 [uncodifed]; reprinted at Hist. and Stat. Notes, 42A West's Ann. Ins. Code (1993 ed.) foll. § 1861.01, p. 649.) Indeed, the California Supreme Court has stated that "[t]he term 'proceeding' may refer not only to a complete remedy but also to a mere procedural step that is part of a larger action or special proceeding." (*Rooney v. Vt. Investment Corp.* (1973) 10 Cal.3d 351, 367.) Under any of these plain and commonsense definitions, the portion of the rate review and approval process established by the Commissioner that occurs after the filing of a petition for hearing is clearly a "proceeding."[6]

B. The Commissioner's Regulations Are Consistent with the Plain and Commonsense Meaning of Section 1861.10(b) and Case Law Interpreting It.

Though the applicable statute and regulation specifically provide that a consumer representative is entitled to compensation for its advocacy fees and expenses after making a substantial contribution to "***any*** decision or order of the commissioner or a court" (section 1861.10(b), emphasis added), Petitioners claim that the terms "advocacy" and "decision" in subdivision (b) support their contention that a "'proceeding,' in which a consumer may intervene, is an adjudicatory process" (Op. Br. at 8:2-4.) and that a "decision" must be a "decision on the merits." (*Id.* at 10:6-19.) Contrary to Petitioners strained reading, "advocacy" means "active support; especially the act of pleading or arguing for something." (Webster's Online Dictionary (2007).) "Decision" means "a position or opinion or judgment reached after consideration." (*Ibid.*)[7] Petitioners cannot deny that consumer representatives

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[6] Petitioners also rely heavily on this Court's prior ruling in *American Healthcare Indemnity Company and SCPIE Indemnity Company v. Garamendi*, Super. Ct. L.A. County, 2005, No. BS094515, but that case did not determine the issue here – whether the Commissioner's duly adopted regulations defining when a rate proceeding begins are consistent with Proposition 103, and in any case, it cannot be relied upon. (See *Schachter v. Citigroup, Inc.* (2005) 126 Cal.App.4th 726, 738 [stating that "a written trial court ruling has no precedential value"].)

[7] The Government Code defines "decision" as "an agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person." (Gov. Code §

such as FTCR can and do engage in the act of pleading and arguing for lower rates in the pre-hearing stage of a rate proceeding. (See Pressley Decl., ¶¶6-7.) Moreover, even if no hearing is granted, the Commissioner does indeed take a position to "approve" or "disapprove" a rate application after consideration by the Rate Review staff. As explained in the Background section above, this decision typically takes the form of an "Approval of Application," which is clearly a determination of an applicant's legal right or interest in having its rates approved. (FTCR's RJN, Exh. 5.) The Commissioner also often sets forth his reasoning for approving a rate at a certain level in a final "decision" denying a petition for hearing, which includes references to arguments and positions taken by intervenors and their substantial contribution. (FTCR's RJN, Exh. 6a-d.) Such a "decision" becomes part of the record in the proceeding (10 CCR § 2653.5) and is considered "final" for purposes of judicial review (Ins. Code § 1861.09).

Instead of parsing the plain meaning of the statute, Petitioners rely upon an out-of-context quote from *Economic Empowerment Foundation v. Quackenbush* ("*EEF*") (1997) 57 Cal.App.4th 677 to support their argument that section 1861.10(b) only allows compensation to persons who substantially contribute to "a final decision 'on the merits,'" which Petitioners claim, without any supporting authority, cannot include a Commissioner's decision to approve a rate application "outside of a rate hearing" (Op. Br. at 10:4-19).

Petitioners reliance on *EEF* is misplaced. The sole issue before that court was which forum should determine an intervenor's request for fees. (*EEF*, *supra*, 57 Cal.App.4th at 680 [identifying issues before the court].) The court held that "fees must be sought in the forum in which the case or proceeding originated." (*Id.* at 689.) In reaching this conclusion, the court remarked that

> if "order" or "decision" means any order or decision along the way in a proceeding, then there could be proceedings,..., which would result in orders and decisions by both the Commissioner and a court. In the Commissioner's view, the intervener would be required in such a proceeding to seek separate awards in each forum for the portion of fees it incurred in obtaining orders or decisions from that forum. A more "sensibl[e]" result [citation] would obtain if the words "order" and "decision" in section 1861.10 are seen as referring only to final orders or decisions on the merits.

(*Id.* at 689.)

The court went on to reason:

11405.20(a).) This section makes no reference to a formal adjudicatory hearing, and indeed Government Code § 11415.50 allows agencies to determine the appropriate process for rendering such a decision outside the formal hearing context.

> Under this interpretation, accepting again that the statute grants separate and not overlapping powers to the Commissioner and the courts, the Commissioner would have exclusive original jurisdiction to award all fees incurred in any proceeding in which he renders ***the final order or decision, even if some of the fees are incurred in an ancillary court action***. The court, on the other hand, would have sole jurisdiction over fees in any case in which it renders ***the final order or decision***.

(*Ibid.*)

Significantly, the court confirmed that one can seek fees for a substantial contribution made "***at each stage of this process***" (*id.* at 688) and for fees that were incurred in ancillary actions (*id.* at 689), even though the award must be sought in the forum that renders the ***final order or decision***. Contrary to Petitioners logic, therefore, the *EEF* decision confirms that the Commissioner has the authority to award fees in any proceeding in which he renders ***a final order or decision*** approving or rejecting a rate application for a consumer representative's substantial contribution at each stage of the rate-setting process.

Moreover, even if Petitioners were correct that intervenors may only seek fees for their substantial contribution to a "decision on the merits" (which Intervenors do not concede), Petitioners entirely fail to explain why, as they contend, "a rate approval or disapproval by the Department staff outside the context of a rate hearing is not a 'decision on the merits.'" (Op. Br. at 10:17-19.) Undeniably, the rate review process conducted without a hearing necessarily involves a determination of the "merits" of an insurer's rate application, i.e., whether it complies with the relevant substantive statutes and regulations.[8]

C. The Amendments to the Intervenor Regulations Are Consistent with Section 1861.10's Underlying Purpose of Encouraging Consumer Participation in the Rate-Setting Process.

As the courts have recognized, "[t]he purpose of intervenor fees is evidently to encourage consumers to participate in insurance ***rate proceedings*** by compensating them for their contribution" and courts "should seek an interpretation of [§ 1861.10] ***which best facilitates compensation***." (*EEF*, *supra*, 57 Cal.App.4th 677, 686, emphasis added; see also *State Farm Mut. Auto. Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1045 [interpreting section 1861.07 in a manner "consistent with Proposition 103's goal of ***fostering consumer participation in the rate-setting process***"]; *Donabedian v. Mercury*

[8] See Black's Law Dictionary (8th ed. 2004) [defining "merits" as "the substantive considerations to be taken into account..., as opposed to extraneous or technical points, esp. of procedure"]; see also *Galland v. City of Clovis* (2001) 24 Cal.4th 1003, 1037.)

Ins. Co. (2004) 116 Cal.App.4th 968, 982 ["[t]he statutes and regulations provide for ***consumer participation in the administrative ratesetting process***", emphasis added].)

Rather than seeking a reading that promotes Proposition 103's policy of encouraging consumer participation in the rate-setting process, however, Petitioners admittedly seek to "circumscribe consumer intervention in rate application reviews." (Op. Br. at 11:23.) Citing another of Proposition 103's purposes, Petitioners correctly state that consumer participation "is to be encouraged to the extent that it achieves the goal of fair and affordable insurance." (*Id.* at 11:15-16.) They then go astray in implying that the Commissioner's regulations will somehow "encourag[e] the filing of frivolous challenges by opportunistic persons." (*Id.* at 12:8-9.) They never explain how this will come about when an intervenor must always show that it made a "substantial contribution" to a final decision or order of the Commissioner approving or rejecting a rate.

In enacting section 1861.10(b), the voters sought to ensure that insurance ratepayers would be represented in matters before the CDI and the courts on an equal basis with insurers by allowing consumer representatives to be compensated for their reasonable advocacy fees. (See *Donabedian v. Mercury Ins. Co.*, *supra*, 116 Cal.App.4th 968, 983 [quoting with approval from CDI's amicus brief stating that, "[i]n adopting Insurance Code sections 1861.03 and 1861.10, the voters envisioned that the Commissioner's ability to enforce the [specified] provisions of the Insurance Code would be supplemented by the use of private attorneys general"].) That is the purpose of any private attorney general statute.[9]

The Commissioner's amendments are entirely consistent with and seek to promote section 1861.10(b)'s underlying purpose. As stated by the Commissioner:

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[9] The California Supreme Court has aptly summarized the vital role of consumer intervenors:

> It is true that public interest interveners...speak for a substantial segment of the population that otherwise may go unheard. ...the commission staff cannot fully and adequately represent all facets of the public interest, and in some instances ... it may fail to discern the ratepayers' rights. Public interest interveners therefore fill a gap in the ratemaking process. [¶]...participation of the general public in ratemaking proceedings 'is to be commended, and even encouraged.' Effective participation in complex commission hearings, however, requires technical expertise and continuous scrutiny of various proposals and rulings. [Consumer] [g]roups...provide that expertise and scrutiny as a counterweight to the views expressed by the [industry].

(*Consumers Lobby Against Monopolies v. Public Utilities Commission* (1979) 25 Cal.3d 891, 911; see also *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 88; *EEF*, *supra*, 57 Cal.App.4th 677, 686, fn. 6.)

> Denying compensation for advocacy performed by a petitioner prior to an insurer's withdrawal of its application would ***thwart the statute's plain language and its underlying purpose of encouraging consumers to enforce Proposition 103, and disrupt the framework of public participation*** established by the Department through its regulations, in the following ways:
>
> - It would discourage consumer representatives from challenging rate applications... .
> - ...discourage efficient resolution of challenges.
> - It could effectively place the determination of whether intervenors are compensated within the sole control of an insurer, who may unilaterally withdraw, rather than with the Commissioner.
>
> In summary, ***the Commissioner believes that...if consumer representatives are denied the ability to seek compensation when they make a substantial contribution in pre-hearing proceedings, such scrutiny would be discouraged and curtailed.***

(FTCR's RJN, Exh. 3 [Initial Statement of Reasons], p. 3, emphasis added.)

Thus, the Commissioner's construction of section 1861.10(b) is consistent with Proposition 103's underlying purposes by upholding the framework of public participation in rate proceedings. His construction is entitled to "considerable deference," and "should not be disturbed unless it fails to bear a reasonable relation to [the] statutory purposes and language" of section 1861.10(b). (See *SCE Co. v. Pub. Util. Comm.*, *supra*, 117 Cal.App.4th 1039, 1050 [upholding PUC's interpretation of intervenor compensation statute as consistent with the legislative mandate "to encourage effective intervenor compensation"], quoting *SCE Co. v. Peevey*, *supra*, 31 Cal.4th 781, 796; see also *PG&E Corp. v. Pub. Util. Comm.*, *supra*, 118 Cal.App.4th 1174, 1194, citing *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11.)

III. The Amendments to the Intervenor Regulations Are Consistent with Insurance Code Section 1861.05.

Petitioners claim that section 1861.05 ***restricts*** consumers' participation in the Commissioner's review and approval of rate applications to a rate hearing. (Op. Br. at 8:15-23.) Petitioners have acknowledged elsewhere in their brief, however, that "a rate approval or disapproval [may be] made by the Department staff outside of a rate hearing." (Petitioners' Op. Br. at 10-17:19; see also *id.* at 12:11-13.) Petitioners have not and cannot reconcile their contention that the Commissioner *is* authorized to establish a rate application review and approval process that is conducted by Department staff outside the context of a rate hearing, a process not expressly set forth in the code, but at the same time is ***not*** authorized to allow consumers to participate in that review process. His authority to adopt regulations that allow for both, however, has been twice explained by the California Supreme Court as follows:

> Much is necessarily left to the Insurance Commissioner, who has broad discretion to adopt rules and regulations as necessary to promote the public welfare." *Ibid.* ...Thus there is nothing here which prevents the commissioner from taking whatever steps are necessary to reduce the job to manageable size. ... [His or her] powers are not limited to those expressly conferred by statute; rather, "[i]t is well settled in this state that [administrative] officials may exercise 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." [Citations.]

(*20th Century Insurance Company v. Garamendi, supra*, 8 Cal.4th 216, 245, italics in original.)

Recognizing that the Commissioner has established an informal rate review process that occurs outside the context of the "deemer" and "hearing" provisions expressly set forth in section 1861.05, Petitioners necessarily concede that the Commissioner has the authority to "tak[e] whatever steps are necessary to reduce the job [of rate application review and approval] to manageable size." (*Ibid.*) Certainly they would not contest the validity of the Commissioner's decisions approving their members' rates without holding a hearing. Thus, the Commissioner's rate review and approval process that is conducted without a hearing is properly "permitted" or "established" pursuant to section 1861.05 (or pursuant to the Commissioner's "powers as are necessary for the due and efficient administration" of his rate approval power "or as may fairly be implied from the statute[s] granting [that] power"). It necessarily follows therefore, that he has the authority, pursuant to sections 1861.05 and 1861.10, to clarify by regulation that the rate review process he has established is part of a "proceeding permitted or established by [Proposition 103]" for purposes of allowing consumer participation and compensation therein.

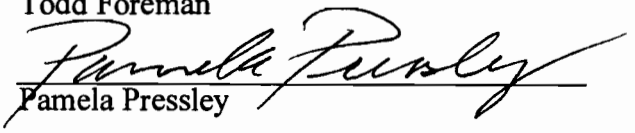
CONCLUSION

For all the foregoing reasons, the Commissioner's amendments defining a "proceeding" to include a "rate proceeding" that is initiated upon the procedural step of filing a petition for hearing, including any proceedings conducted during the rate application review and approval process outside the context of a rate hearing, are clearly consistent and do not conflict with sections 1861.10 and 1861.05. Accordingly, the petition for writ of mandate should be denied.

Dated: December 7, 2007

Respectfully Submitted

The Foundation for Taxpayer and Consumer Rights
Harvey Rosenfield
Pamela Pressley
Todd Foreman

BY: 
Pamela Pressley

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

State of California, City Santa Monica, County of Los Angeles

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 December 7, 2007, I caused service of true and correct copies of the following document:

THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS' OPPOSITION TO PETITION FOR WRIT OF MANDATE

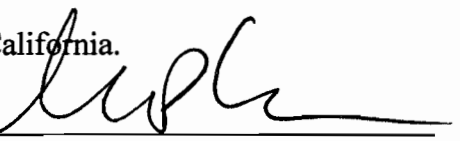
upon the persons named in the attached service list, in the following manner:

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

2. If marked 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.

Executed on December 7, 2007, at Santa Monica, California.



Mark Reback

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