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July 23, 2013

Via Electronic Mail & U.S. Mail

Adam M. Cole, General Counsel
Department of Insurance
Legal Division, Office of the Commissioner
45 Fremont Street, 23rd Floor
San Francisco, CA 94105
colea@insurance.ca.gov

Re: ***June 7, 2013 Notice to All Licensees Selling Homeowner's Insurance***

Dear Mr. Cole:

I am writing to urge you to withdraw your June 7, 2013 Notice To All Licensees Selling Homeowner's Insurance and to acknowledge that the Department may not and will not enforce Section 2695.183, Title 10, California Code of Regulations.

Your Notice acknowledges that the Los Angeles County Superior Court, in a May 7, 2013 judgment, declared Section 2695.183 to be invalid because the Commissioner lacks legal authority to adopt the regulation. Nevertheless, you state that the regulation remains in effect because the Notice of Appeal filed by the Commissioner stays the judgment. It doesn't.

The purpose of the stay rule in Code of Civil Procedure section 916 is "to protect the appellate courts' jurisdiction by preserving the status quo until the appeal is decided. The rule prevents the trial court from rendering an appeal futile by altering the appeal judgment or order by conducting other proceedings that may affect it. [Citation omitted.]" *Elsea v. Saberi* 4 Cal.App.4th 625, 629 (1992); *Dowling v. Zimmerman*, 85 Cal.Ap.4th 1400, 1428 (2001); *see also Chapala Management Corp. v. Stanton*, 196 Cal.App.4th 152, 1542 (2010).

"The rule has always been that '[i]f the judgment is self-executing and requires no process for enforcement, there is no statutory stay, and, as a general rule, supersedeas is equally inappropriate. [Citations omitted]' (9 *Witkin*, Cal.

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Procedure (4th ed. 1997) Appeal, § 301, p. 340)” *Venya v. Orange County Nursery, Inc.*, 170 Cal.App.4th, 146, 156 (2009).

The chief example of a self-executing judgment is a prohibitory injunction. *See Agriculture Labor Relations Bd. V. Tex-Cal Land Mgmt., Inc.* 43 Cal.3d 696, 709 (1987). As one court has put it, “it is settled that an injunction mandatory in character is automatically stayed on appeal and that a prohibitory injunction is not so stayed [citations], the object of the rule in both cases being to preserve the status quo. Otherwise the result of the final adjudication might often be a barren victory.” *City of Hollister v. Monterey Ins. Co.*, 165 Cal.App.4th 455, 482 (2008) (‘Hollister’) (internal citations omitted).

In fact, contempt proceedings have been initiated for violating prohibitory injunctions despite an appeal. In *Elysium Inc. v. Superior Court*, 266 Cal.App.2d 763 (1968), the trial court prohibited the appellant from using the word “Look” as part of its magazine title, and despite an appeal, the trial court issued an order to show cause re contempt against the appellant for violating the injunction. 266 Cal.App.2d at 764.

The court’s judgment in this case is akin to a prohibitory injunction which is not stayed on appeal. “To determine whether an injunction is mandatory or prohibitory, [courts] examine the terms and effect of the injunction in order to discover its character.” *People v. iMergent, Inc.*, 170 Cal.App.4th 333, 342 (2009). “The purpose of mandatory relief is to compel the performance of a substantive act or a change in the relative positions of the parties.” *Id.* “By contrast, the prohibitive order seeks to restrain a party from a course of conduct or to halt a particular condition.” *Id.*

In this instance, there can be no dispute that the effect of the court declaring Section 2695.183 invalid is to prohibit the Insurance Commissioner from enforcing it. No reasonable argument can be made that the declaration is mandatory; it does not compel the Commissioner to act. Accordingly, the Commissioner’s notice of appeal does not stay the Superior Court judgment, and Section 2695.183 cannot be enforced pending the appeal.

A new notice should be issued to all licensees withdrawing the June 7, 2013 Notice and informing the licensees that the Department will not enforce Section 2695.183 while the case is on appeal.

Sincerely,



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