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CITY AND COUNTY OF SAN FRANCISCO

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November 22, 2010

The Honorable Ronald M. George, Chief Justice,
and Associate Justices
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102-3600

Re: *MacKay v. Superior Court of Los Angeles County (21st Century Insurance)*
Case No. B220469; Request for Depublication (Rule 8.1125)
Other Depublication Requests Pending, (S 188184)

Dear Chief Justice George and Honorable Associate Justices:

The San Francisco City Attorney's Office respectfully requests the Supreme Court to order the depublication of the opinion in *MacKay v. Superior Court of Los Angeles County (21st Century Insurance)*, Case No. B 220469. As is set forth in the depublication request that was filed by the ACLU of Northern California and several other nonprofit advocacy groups on November 15, 2010, the *MacKay* opinion adopts an unwarranted and overbroad reading of the filed rate doctrine as applied to casualty insurance in California. If allowed to stand, *MacKay* may seriously impair the ability of consumers to remedy discriminatory auto insurance rating practices that are prohibited by Proposition 103. The San Francisco City Attorney's Office joins in the arguments for depublication submitted by the ACLU et al., and submits this depublication request from the perspective of a public agency with enforcement powers under California's Unfair Competition Law ("UCL") (Bus. & Prof. Code § 17200 et seq.).

Under *MacKay*, policy holders may no longer be able to bring effective challenges to unfair and unlawful casualty insurance company practices under Proposition 103, the UCL, and similar consumer protection laws. So long as an insurer can point to some provision in its voluminous filings with the California Department of Insurance (DOI) that arguably discloses the practice in question, the DOI's failure to reject that filing may immunize the insurer from consumer complaints. Such a regime is ripe with opportunities for mischief, and will create many adverse consequences for policy holders that were never contemplated or intended by DOI.

Even if *MacKay* is limited to apply only to suits brought by private parties, its implications for the proper enforcement of Proposition 103 and related consumer protection provisions are extremely troubling. While in theory DOI could protect such laws by striking offending language from insurance company filings, DOI's practical ability to do so is limited by DOI's resources and the sheer volume of casualty insurance filings. Moreover, under such a regime, DOI would always be playing catch-up, attempting to identify and invalidate offending

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provisions from rate plans after they were filed. Even when DOI eventually succeeded in doing so, casualty insurers very likely would receive a free pass under *MacKay* from providing any restitution to policy holders during the time between the filing of the offending language and its eventual invalidation by DOI. *MacKay* basically creates a "self-help" option for casualty insurers, who will be able to skirt compliance with Proposition 103 and other consumer protection laws by including inconsistent language in their rate plans. Even if such language is eventually discovered and invalidated, the insurers will have enjoyed an extended holiday from complying with the law in the interim.

Even if *MacKay* remains on the books, Proposition 103 and similar laws presumably could still be enforced by public prosecutors with standing to bring UCL actions on behalf of the People under Business and Professions Code section 17204, such as the San Francisco City Attorney's Office. Public prosecutors could seek to deter the worst abuses by bringing UCL actions for injunctive relief and civil penalties. But under *MacKay*, it is unclear whether restitutionary relief would remain available in such cases. Moreover, the resources available to public prosecutors to bring such actions are severely limited, especially in the current fiscal climate. The enforcement of Proposition 103 exclusively through public prosecutions would therefore be a poor substitute for the current system, which also allows for robust enforcement in actions brought by injured policy holders and the advocacy groups who represent their interests.

Finally, the *MacKay* opinion is a throwback to pre-Proposition 103 days, when casualty insurance companies could pretty much behave as they pleased. Before Proposition 103, they could do so overtly. After *MacKay*, they may once again be able to do so covertly, through the artifice of including improper language in obscure rate filings. *MacKay* is therefore out of step with more modern cases, which refuse to give such deference to the actions of insurance companies, or even to intentional actions taken by DOI when regulating insurance companies. (See e.g. *Blue Cross of California Inc. v. Superior Court (the People)* (2009) 180 Cal.App.4th 1237, 1258-1260, *review denied* 2010 Cal. LEXIS 3215 (March 30, 2010) [refusing to abstain from, and finding the doctrine of primary jurisdiction inapplicable to, a UCL claim brought by the Los Angeles City Attorney's Office against a life and disability insurance company, despite the fact that the DOI had already investigated and settled similar claims].)

For the foregoing reasons, and those expressed in the prior depublishation requests, the San Francisco City Attorney's Office respectfully requests that *MacKay* be depublished.

Very truly yours,

DENNIS J. HERRERA
City Attorney

Owen J. Clements / m H.
Owen J. Clements
Chief of Special Litigation

cc: Attached service list (by mail)

PROOF OF SERVICE

I, Martina Hassett, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Seventh Floor, San Francisco, CA 94102.

On November 22, 2010, I served the following document(s):

**LETTER TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE
AND ASSOCIATE JUSTICES**

on the following persons at the locations specified:

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in the manner indicated below:



BY UNITED STATES MAIL: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed November 22, 2010, at San Francisco, California.


MARTINA HASSETT