

November 29, 2010

**VIA OVERNIGHT DELIVERY**

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

Re: ***Mackay v. Superior Court*, Nos. B220469 & B223772  
Supreme Court No. S188184  
Response to Plaintiffs' Request for Depublication**

Honorable Chief Justice and Associate Justices:

As this Court is now well aware, my firm is counsel for 21st Century Insurance Company ("21st Century") in the above referenced appellate decision. In this letter we respond to the requests from Mr. Pomerance and Mr. Goshgarian, counsel for plaintiffs, to depublish the *Mackay*<sup>1</sup> decision.

Virtually all of the arguments advanced by plaintiffs as a basis for depublication are dealt with either in the well-reasoned *Mackay* opinion or in the letters we have previously sent the Court responding to requests for depublication or *sua sponte* review by other requestors. We do not repeat those responses in this letter and only deal with arguments not previously discussed.

**1. Plaintiffs' Attempt to Reconstruct the Purpose of Section 1860.1 is Clearly Wrong**

As they did below, plaintiffs argue that the *SCIF* opinion<sup>2</sup> establishes that section 1860.1, when enacted in 1947, had a single purpose: to permit concerted action by insurers in

---

<sup>1</sup> Throughout the trial and lower appellate proceedings, the plaintiff was "Amber Mackay." We notice that plaintiffs have now switched to "Amber MacKay." If we have been misspelling the plaintiff's name, we apologize.

<sup>2</sup> *State Compensation Ins. Fund v. Superior Court*, 24 Cal. 4<sup>th</sup> 930 (2001).

ratemaking. Plaintiffs' Letter, pp. 3-6. Not so, as we demonstrate below and the *Mackay* court so held.

In *SCIF* this Court looked at the purpose of another section of the Insurance Code (section 11750), part of the workers' compensation act, and found that it had a single purpose: permitting concerted action by insurers. Based on this purpose, this Court concluded that the equivalent section to section 1860.1 (section 11758) only "authorized cooperation in 'ratemaking and other related matters.'" *SCIF, supra* at 936. It does not follow, however, that the McBride Act had a single purpose or that the scope of section 1860.1 was limited to permitting concerted action.

The purpose section of the McBride Act is former section 1850, repealed when Proposition 103 was adopted. Unlike section 11750, section 1850 had a broader purpose than simply permitting concerted action in ratemaking. Specifically, former section 1850 began by stating that its purpose was "to promote the public welfare by regulating insurance rates . . . to the end that they shall not be excessive, inadequate or unfairly discriminatory . . ." To accomplish this purpose, the Commissioner could require an insurer to cease using a rate found to be "excessive or inadequate" within the meaning of former section 1852. Thus, unlike the single purpose of section 11750, the first stated purpose of former section 1850 was rate regulation.

The *Mackay* court correctly recognized this difference. It noted that, while section 1860.1 did protect insurers from antitrust laws, that was "the beginning of the analysis, not the end of it." *Slip Op.*, p. 24. The Court went on to explain that the McBride Act "did more than immunize insurers from antitrust laws," explaining that the legislative history of the Act "recognized that the language of the exemption was, in fact, broader" than just protection for concerted action. *Slip Op.*, pp. 24, 25.

With respect to the impact of Proposition 103 on the scope of section 1860.1, the *Mackay* court noted that Proposition 103 repealed section 1850 and many other sections of the original McBride Act, but left section 1860.1 "untouched." *Slip Op.*, p. 26. Combining the fact that section 1860.1 "was always understood to have a broader reach than simply an exemption from antitrust laws"<sup>3</sup> with the fact that Proposition 103 left section 1860.1 "untouched," the court concluded that section 1860.1 does preclude a civil action to challenge approved rates. *Slip Op.*, pp. 28-29.

In short, plaintiffs' claim that section 1860.1's "entire statutory scheme was to permit joint or concerted action" is clearly incorrect as the *Mackay* court so held. Further, plaintiffs' claim that section 1861.03(a) must be read to drain section 1860.1 of any present life was thoroughly considered by the *Mackay* court and properly rejected.

---

<sup>3</sup> Were it otherwise, *Walker v. Allstate Indemnity Co*, 77 Cal. App. 4<sup>th</sup> 750 (2000), and *Karlin v. Zalta*, 154 Cal. App. 3d 953 (1984), would have been wrongly decided since neither case involved concerted action by insurers.

## **2. Plaintiffs' Discussion of Approval of Purported Illegal Conduct Misses the Point**

Plaintiffs argue that the Commissioner cannot “decide what is legal.” Plaintiffs’ Letter, p. 6. Plaintiffs made the same argument below, and both there and here, the argument misses the point: the Commissioner is statutorily required to approve or disapprove rates and rating factors. Unfortunately, Proposition 103 is not a model of clarity and what does or does not comply with Proposition 103 may be unclear. Further, as in this case, interpretations by the Commissioner of what does comply with Proposition 103 may change over time. In *Spanish Speaking Citizens Foundation, Inc. v. Low*, 85 Cal. App. 4<sup>th</sup> 1179, 1186 (2001), the court observed with respect to section 1861.02(a) that there “may be no one single correct interpretation” of that section. The same is true with respect to section 1861.02(c).

Section 1861.02(c) does not preclude the use of prior insurance as a rating factor. What it precludes is the use of prior insurance, *in and of itself*, as a rating factor. The limitation raises the question of when is prior insurance appropriately used as a rating factor. One example is persistency. While there has been a long battle over the allowable scope of the use of persistency, its application to a company’s own insureds has never been questioned.

Given the ambiguity in the prior insurance restriction, someone has to determine whether factors used by insurers do or do not violate that provision. The person vested with that authority is the Commissioner, whose determinations are then subject to judicial review under chapter 9 of the Insurance Code. In this case, the undisputed facts are that the Commissioner approved both the accident verification and persistency factors used by 21st Century from 1997 to 2005. At the time, the Commissioner determined that the factors complied with Proposition 103. As the *Mackay* opinion explains, in such situations the Commissioner’s determination is final *unless it is successfully challenged pursuant to the remedies provided by the Insurance Code*. *Ins. Code*, §§ 1858.6, 1861.09.

Thus, the Commissioner does not make “legal” that which is “illegal.” The Commissioner approves rates and rating factors as compliant with Proposition 103, and subject to the right of any person to challenge that determination as provided in the Insurance Code. The *Mackay* opinion simply establishes that the provisions of the Insurance Code are the exclusive means of challenging the Commissioner’s determination.

## **3. Unapproved Ratemaking Conduct Is Subject to a Civil Action**

At page 4 of their letter, plaintiffs suggest that only approved rates can be the subject of a UCL action. To the contrary, following approval an insurer may purposely or accidentally use either a rate or rating factor that was not approved. In such a case, as the *Mackay* court explained, a UCL action to challenge the use of an unapproved rate or rating factor would lie. *Slip Op.*, p. 32.

The Honorable Ronald M. George  
Chief Justice, and Associate Justices

November 29, 2010

Page 4

All other arguments raised by plaintiffs have been dealt with either by the *Mackay* opinion itself and/or in our prior letters. The *Mackay* decision is well-reasoned and should remain published. Thank you for your consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kent R. Keller", with a long horizontal flourish extending to the right.

KENT R. KELLER

For the Firm

KRK:ppr

cc: Counsel of Record  
Consumer Watchdog  
Parties Submitting Requests for Depublication

i:\office2\22054\017\10\letters\Supreme Court\_Pomerance 1129.doc

**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: Barger & Wolen LLP, 633 West Fifth Street, 47<sup>th</sup> Floor, Los Angeles, California 90071-2043.

On **November 29, 2010**, I served the foregoing document(s) described as **RESPONSE TO PLAINTIFFS' REQUEST FOR DEPUBLICATION** on the interested parties in this action by placing [ ] the original [X] a true copy thereof enclosed in sealed envelope addressed as stated in the attached mailing list.

**[X] BY MAIL**

[X] I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

**[X] (STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed at Los Angeles, California on **November 29, 2010**.

NAME: PAMELA ROSENBERG

  
(Signature)

***Amber Mackay v. Superior Court of the State of California, et al.  
Court of Appeal Case Nos. B220469/B223772  
Los Angeles Sup. Court Case No. BC297438; Related Case BC266219  
Service List***

Drew E. Pomerance, Esq.  
Roxborough, Pomerance,  
Nye & Adreani, LLP  
5820 Canoga Avenue, Suite 250  
Woodland Hills, CA 91367

***Attorney for Petitioners,  
Amber Mackay, an  
Individual, and  
Jacqueline Leacy, an  
Individual, on Behalf of  
Herself and all others  
Similarly Situated***

Mark Goshgarian, Esq.  
Merak Eskigian, Esq.  
Goshgarian & Marshall, PLC  
23901 Calabasas Road, Suite 2073  
Calabasas, CA 91302-1542

***Attorney for Petitioners,  
Amber Mackay, an  
Individual, and  
Jacqueline Leacy, an  
Individual, on Behalf of  
Herself and all others  
Similarly Situated***

Honorable Anthony J. Mohr  
Superior Court of California,  
County of Los Angeles  
Central Civil West Courthouse  
600 S. Commonwealth Avenue  
Los Angeles, CA 90005

Appellate Coordinator,  
Consumer Law Section  
Office of the Attorney General  
300 S. Spring Street  
Los Angeles, CA 90013-1230

Office of the District Attorney  
County of Los Angeles  
210 W. Temple Street  
Los Angeles, CA 90012

Brian S. Kabateck, Esq.  
Kabateck, Brown & Kellner, LLP  
644 South Figueroa Street  
Los Angeles, CA 90017

Vanessa O. Wells, Esq.  
Sedgwick, Detert, Moran & Arnold, LLP  
One Market Plaza  
Steuart Tower, 8th Floor  
San Francisco, CA 94105

Leslie E. Hurst, Esq.  
Blood Hurst & O'Reardon LLP  
600 B Street, Suite 1550  
San Diego, CA 92101

Michael L. Cohen, Esq.  
Heather M. McKeon, Esq.  
Cohen McKeon LLP  
1910 West Sunset Boulevard, Suite 440  
Los Angeles, CA 90026

Richard A. Marcantonio, Esq.  
Public Advocates  
131 Steuart Street, Suite 300  
San Francisco, CA 94105-1241

Harvey Rosenfield, Esq.  
Consumer Watchdog  
1750 Ocean Park Boulevard, Suite 200  
Santa Monica, CA 90405-4938

Kathryn Trepinski, Esq.  
Law Offices of Kathryn Trepinski  
509 South Beverly Drive  
Beverly Hills, CA 90212

Amy Bach  
United Policyholders  
222 Columbus Avenue, Suite 412  
San Francisco, CA 94133

Steve Poizner, Insurance Commissioner  
c/o Adam M. Cole  
General Counsel  
Legal Division, Office of the Commissioner  
45 Fremont Street, 23rd Floor  
San Francisco, CA 94105