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November 15, 2010

**VIA Federal Express**

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

Re: Request for de-publication of the opinion in *MacKay v. Superior Court*  
(2010) 188 Cal.App.4th 1427, Nos. B220469 and B223772  
(Second District, Division Three)  
Ordered published: October 6, 2010

Dear Honorable Justices:

I am writing on behalf of the Consumer Federation of California (“Consumer Federation”) to request that this Court order the de-publication of the opinion in *MacKay v. Superior Court*. Consumer Federation is a non-profit advocacy organization that speaks on behalf of consumer rights. We generally focus our efforts on the California legislature and bills that affect consumers and also on state agencies and regulations that affect consumers.

Consumer Federation requests de-publication of the *MacKay* opinion because it obliterates the consumer protections enacted by Proposition 103. The Opinion misconstrues and conflates rates, rating factors, underwriting guidelines and premiums in a manner that allows 21st Century to use a consumer’s lack of prior insurance coverage in setting the premium, even though Proposition 103 explicitly *prohibits* consideration of prior insurance coverage in premium or rate determinations. The Opinion also misapplies the “filed rate doctrine” to prohibit consumers from challenging the 21<sup>st</sup> Century’s violation of Proposition 103, even though Proposition 103 explicitly permits private enforcement. This letter first addresses the “filed rate doctrine” and why the doctrine does not apply to insurance in California. The letter then considers why even if the filed rate doctrine were to apply, the lower court improperly applied the doctrine to this case because this case does not concern insurance “rates,” it concerns illegal underwriting practices, namely 21st Century’s use of a prohibited factor (the lack of prior insurance coverage) to determine premiums.

**I. The Opinion Incorrectly Establishes a Filed Rate Doctrine In California**

The court below holds that the “filed rate doctrine” applies to the California insurance industry. It does not. As an initial matter, application of the “filed rate doctrine” requires a statute that expressly provides an agency with exclusive jurisdiction

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over the regulated industry. (See, e.g., *Texas & Pac. Ry. v. Abilene Cotton Oil Co.* (1907) 204 U.S. 426, 448.) This Court made clear in *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, that the California Department of Insurance and the Insurance Commissioner do not have exclusive jurisdiction over Proposition 103 matters. (See also *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 983-985 [rejecting claim that commissioner has exclusive jurisdiction of Proposition 103]; *Fogel v. Farmers Group, Inc.* (2008) 160 Cal.App.4th 1403, 1418 [rejecting application of the filed rate doctrine to California's "prior approval" rate system].)

The Court of Appeal in *Donabedian, supra*, revisited the question of whether the commissioner retained exclusive jurisdiction under Proposition 103 by looking at the plain language of Proposition 103. After exhaustively analyzing section 1861.10(a), which establishes private enforcement authority, and section 1861.03(a), which applies the UCL to the insurance industry, the *Donabedian* Court concluded: "the commissioner does not have exclusive jurisdiction...." (*Donabedian, supra*, 116 Cal.App.4th at 983.)

The California Attorney General also considered and rejected the application of the "filed rate doctrine" in a lengthy analysis of Proposition 103's impact on antitrust law published in 1990. The AG concluded:

The [filed rate] doctrine ... has no application under regulatory statutes that are not intended to supplant antitrust remedies.

The "filed rate doctrine" does not apply to insurance rates in California. . . . [T]he Insurance Code cannot be said to reflect a legislative intent to supplant antitrust law or its remedies. To the contrary, Insurance Code section 1861.03 subdivision (a) expressly negates any such implication, applying the same antitrust rules to the insurance industry as apply "to any other business."

(California Attorney General, *Antitrust Guidelines for the Insurance Industry* (Mar. 1990, published in DiMugno & Glad, *California Insurance Laws Annotated* (Thomson-West 2010) at 1808 [footnotes omitted], reprinted at 58 *Antitrust & Trade Reg. Rep.* (BNA) No. 1463 (Spec. Supp.) (Apr. 23, 1990).)

Aside from the plain language of Proposition 103, which establishes private enforcement, judicially imposing the "filed rate doctrine" is contrary to Proposition 103's policy purposes. The language of the initiative makes clear that the voters were well aware of the practical realities that might frustrate the regulatory safeguards they were enacting to achieve their goals: that resource limitations would necessarily hamper the ability of the Commissioner to ensure that every insurance company's rate filings comply with applicable laws and regulations, and to police the marketplace. There are thousands of Proposition 103 filings in any given year, many of which are hundreds of pages long. Very few of these filings receive a thorough review and even less are subject to a public hearing. The *unavoidably* limited review of certain rate applications cannot be equated

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to formal agency decision-making, to which courts would obviously accord greater deference.

The Opinion should be de-published so the “filed rate doctrine” is not judicially imposed on a statute that permits private enforcement to supplement the rate review process conducted by the CDI. (Ins. Code §§ 1861.03, 1861.10.)

## **II. Even if the Filed Rate Doctrine Applied to “Rates,” It would Not Apply to the Practices Challenged Here Because the Challenged Practices are Not Rates**

The Opinion concludes that the “filed rate doctrine” applies to California insurance rates approved by the Department of Insurance and that the practice at issue (using prior insurance coverage to determine premium) is part of the approved “rate” or “rate plan.” (See, e.g., slip op. at 11, 29-34.) As explained above, the filed rate doctrine does not apply to Proposition 103 insurance rates. However even if it did, at most it applies to “rates” derived from the prior approval rate filing regulations, but *not* to the practice at issue here, which is used to determine the “premium” paid by an individual insured.

The Opinion conflates insurance “rates,” “rating factors,” “underwriting guidelines” and “premiums.” The proper distinction is important because the practice at issue is strictly prohibited by Proposition 103 and can be privately enforced when violated. The court below deemed the practice a “rate” that cannot be effectively challenged through private enforcement if it in any manner is included in a rate filing, even though the practice is not a rate, has nothing to do with factors used to determine rates, and receives no formal review or consideration by the Department.

### **A. The Prior Approval Rate Filing Procedures Determine “Rates”**

The “premium” stated on an insured’s policy declarations page is derived from a two-step process. In the first step, the insurance company determines its insurance “rates,” sometimes called the “base rate.” (*Spanish Speaking Citizens’ Foundation, Inc. v. State Farm Mutual Auto. Ins. Co.* (2000) 85 Cal.App.4th 1179, 1186.) A “rate” is the total revenue the company may collect from *all* its policyholders throughout California for a given line of insurance (automobile, homeowner, etc). Proposition 103 (Ins. Code §§1861.05 *et seq.*) requires that rates for all lines of property-casualty insurance be submitted to the Commissioner for approval prior to their use.

In submitting their prior approval rate applications, insurers must comply with a technical formula to ensure that the proposed rates are within a range of reasonableness. The rates cannot be “excessive” (the insurer cannot make an unreasonable profit), nor can they be “inadequate” (the insurer cannot undercut competitors or underfund anticipated claims). To justify the “rate” (the total revenue the company will collect from its California insureds) the insurer estimates its income, estimates its losses, and then adds on a reasonable profit. (Cal. Code of Regs., tit. 10, §§ 2644.1, *et seq.*; see also *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 807; *20th Century Ins. Co. v. Garamendi*

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(1994) 8 Cal.4th 216, 251; *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1489.)

This case is not about rates.

**B. The “Premium” is Determined by Applying the Proposition 103 Factors to the Rate**

In the second step (which applies only to automobile insurance), the company determines how much “premium” each individual policyholder will pay. The company essentially divides up the “rate” (the total amount it is permitted to collect in California) between its policyholders to determine the premium that each policyholder will pay. The determination of premium is not a simple division; instead “rating factors” are applied so that the premium varies in accordance with the approved public policy considerations and risk factors.

The factors approved by Proposition 103 (“rating factors”) each require, permit and prohibit insurance companies to treat its insureds differently when determining the premium amount each will pay. The Proposition 103 factors *mandate* distinctions between insureds on three criteria (driving safety record, annual miles driven, years of driving experience), *permit* distinctions on other preapproved criteria (e.g., type of vehicle, gender, marital status, academic standing), and explicitly *prohibit* distinctions based on just one factor: the absence of prior insurance coverage. (Ins. Code § 1861.02(c).)

The one prohibited factor (the absence of prior insurance coverage), had been the source of major abuse prior to Proposition 103, when many insurers offered policies “only [to] those who already had insurance.” (*King v. Meese* (1987) 43 Cal.3d 1217, 1225.) To promote their purpose of making insurance “available and affordable to all” (*Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 851 [quoting stated purpose of Proposition 103]), the voters expressly prohibited this exclusionary practice:

The absence of prior automobile insurance coverage, in and of itself, shall not be a criterion for determining . . . automobile rates, premiums, or insurability.

(Ins. Code § 1861.02(c).)

**C. The Opinion Obliterates the Proposition 103 Protections By Construing the Contested Practice as an Approved Rate**

In this case, 21st Century used the absence of prior insurance coverage (what it called “accident verification” used in its “underwriting guidelines”) to determine the premium an insured would have to pay. This is a manifest violation of Proposition 103,

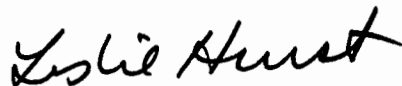
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which prohibits the determination of premium based on an absence of prior insurance coverage.

The Opinion holds that 21st Century's use of accident verification to determine premiums was permissible because, according to the Court of Appeal, it was a "rate" or "rating factor" and was submitted to the DOI in 21st Century's prior approval rate application in the form of "underwriting guidelines."<sup>1</sup> The Opinion hopelessly conflates "rates," "rating factors," and "premium" to the benefit of 21st Century and to erase Proposition 103's consumer protections. As explained above, prior insurance coverage has nothing to do with "rates" and is not part of the rate approval process; it is not a factor in the mathematical calculations used to approve rates. (See Cal. Code Regs., tit. 10, § 2644.1 *et seq.*) Nor can it become a "rate" or obtain approved, anointed status (unassailable because of the filed rate doctrine) simply by calling it a "rate" and submitting it in a voluminous rate filing. In violation of Proposition 103, the Opinion permits insurers to discriminate between insureds using the prohibited Proposition 103 factor, and then evade private enforcement of the violation.

In conclusion, *MacKay* incorrectly imposes the filed rate doctrine on both insurance rates and practices in California, despite this Court's refusal to do so. Consequently, in order to uphold the voters' will and maintain important consumer protections, Consumer Federation of California respectfully asks this Court to de-publish *MacKay v. Superior Court*.

Respectfully submitted,



LESLIE E. HURST

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<sup>1</sup> "Underwriting guidelines" are a company's internal tool for implementing the Proposition 103 factors. For instance, an underwriting guideline may say that in applying the approved factor of "marital status" to increase or decrease premium, the insured is married if he or she is legally married and lives in the same household with his or her spouse. Underwriting guidelines do not have anything to do with "rates." Further, underwriting guidelines cannot be used to get around the Proposition 103 prohibition of determining premium on consideration of prior insurance coverage, as the lower court held.

DECLARATION OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the State of California, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 600 B Street, Suite 1550, San Diego, California 92101.

2. That on November 15, 2010, declarant served the Request for de-publication from Leslie E. Hurst on behalf of the Consumer Federation of California to the Honorable Ronald M. George and Chief Justice and Honorable Associate Justices, Supreme Court dated November 15, 2010 by depositing a true copy thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

4. That there is regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 15th day of November, 2010, at San Diego, California.



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RUTH A. CAMERON

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