VSW

LAW OFFICES OF KATHRYN TREPINSKI
DORDICK LAW BUILDING
509 SOUTH BEVERLY DRIVE
BEVERLY HILLS, CALIFORNIA 90212
TEL (310) 201-0022 • FAX (310) 551-1644

November 15, 2010

Honorable Ronald M. George,
Chief Justice
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102-4797

Re: ***MacKay v. Superior Court of Los Angeles***
Nos. B220469and B223772
Request for Depublication (Rule 979(a))

Dear Honorable Justices of the California Supreme Court:

On behalf of Consumers for Auto Reliability and Safety ("CARS") and Consumer Action, request is hereby made for depublication of the Opinion in Nos. B220469 and B223772, MacKay v. Superior Court of Los Angeles, filed October 6, 2010 (and modified on October 20 and 22, 2010), and published at 188 Cal.App.4th 1427, 115 Cal.Rptr.3d 893 (2010).

CONSUMERS FOR AUTO RELIABILITY AND SAFETY'S INTEREST IN THIS MATTER

CARS is a national, award-winning, non-profit auto safety and consumer advocacy organization working to save lives, prevent injuries, and protect consumers from auto-related fraud and abuse. Historically, it has been one of the most consistently strong consumer groups focusing, among other areas, on lemon laws, air bags and safer vehicles.

CARS opposes the publication of the MacKay opinion because it opens the door to immunizing insurance companies from civil liability for unlawful conduct relative to their class plan regulatory filings, even if those filings have not been fully and meaningfully examined, analyzed, or approved by the California Department of Insurance.

If untouched, the opinion could be used by carriers as a means to avoid liability, and it would deprive consumers, as well as the Department of Insurance, of a necessary and effective enforcement tool: a civil action based on the California Unfair Competition Law.

CONSUMER ACTION'S INTEREST IN THIS MATTER

Consumer Action is a non-profit, membership-based organization that was founded in San Francisco in 1971. Through multilingual educational materials, community outreach, and grassroots advocacy, Consumer Action empowers underrepresented consumers to assert their rights with respect to insurance, credit card, banking and telephone services.

Consumer Action opposes publication of the MacKay Opinion because it will likely impact a vulnerable segment of the population that Proposition 103 was meant to serve: low income individuals who are often not fluent in English.

WHY DEPUBLICATION IS NECESSARY

Simply put, the Court of Appeal in MacKay v. Superior Court of Los Angeles held that the approval of an automobile rate factor by the California Department of Insurance precludes a civil action against the insurer challenging the use of that rating factor – ***even when that rating factor is unlawful.*** MacKay, 188 Cal.App.4th at 1431-32. The Court based its opinion, in part, on California Insurance Code §1858.07 (b), which provides that "no penalty shall be imposed by the Department of Insurance if a person has used any rate, rating plan, or rating system that has been ***approved for use by the Commissioner*** in accordance with the provisions of this chapter." (Emphasis added.) But this conclusion does not follow because §1858.07(b) is limited to penalties administered by the Department of Insurance. It does not in any way restrict a consumer's civil remedies, such as those provided by California Business and Professions Code §17200 [the California Unfair Competition Law or "UCL"]. See Donabedian v. Mercury Ins. Co., 116 Cal.App.4th 968, 987, 11 Cal.Rptr.3d 45 (2004).

The MacKay opinion is devastating for consumers because it effectively grants immunity from civil litigation for violations of California law if the carrier can claim that the Insurance Commissioner or any of his staff approve – directly, indirectly or even unknowingly – the regulatory filing, even if the Department insists it did not knowingly approve the violation.

Clearly, there are a number of troubling issues that follow from the MacKay opinion. This letter focuses on but one: what level or quantum of activity is needed by the Department of Insurance to constitute "approval" of a regulatory filing? The concern here is that the MacKay opinion does not specify or in any clear way define what constitutes approval -- a critical shortcoming given that its effect may be categorical civil immunity for a carrier that engages in unlawful conduct.

CARS and Consumer Action submit that because it lacks a discussion as to what level of regulatory activity, consideration, or examination is needed to "approve" filings, the MacKay opinion is an inherently faulty decision.

FACTUAL SUMMARY RE APPROVAL ISSUE

The regulatory filings submitted in this matter by 21st Century are chronicled in detail in the Opinion. Plaintiff Dana Poss challenged two rating factors known as "accident verification" and "persistency." Poss argued that the rating factors were improperly premised on the consideration of an applicant's prior insurance status, including the absence of prior auto insurance, which is a practice that is strictly prohibited under Insurance Code §1861.02.[1] 21st Century did not dispute that using accident verification or persistency as a means to consider the absence of prior insurance would constitute an unlawful practice.[2]

The central issue that developed in the case was whether 21st Century's accident verification factor had been approved by the Department of Insurance, thereby cloaking the company with immunity from civil liability. The trial court was uncertain if a "knowing" approval had occurred, or if the filing was simply "deemed" approved by default because it had not been completed by a set deadline.

In its review, the Court of Appeal set forth a number of facts, many of which are inconsistent or murky, on the question of whether the rate filing was formally approved. For example:

1. There were multiple rate filings over time by 21st Century, one of which was deemed approved by default. MacKay, 188 Cal.App.4th at 1434, 1439.

---

[1]Insurance Code §1861.02 prohibits a carrier from using "the absence of prior automobile coverage, in and of itself, [as] a criterion for determining ... automobile rates, premiums or insurability."

[2] The Department of Insurance has observed that carriers often attempt to use some rating factors, such as the accident verification factor in this case, as surrogates for the prohibited "absence of prior insurance" as a rating factor. Application of the California Department of Insurance for Permission to File Amicus Curiae Brief and [Proposed] Amicus Curiae Brief, Donabedian v. Mercury Insurance Company, p. 20.

2. The tainted accident verification factor, tucked in the class plan as an Exhibit, appeared in an *underwriting guideline* – a document that the Department is not authorized to formally approve or disapprove,[3] and often may not even review at all. MacKay, 188 Cal.App.4th at 1435-36.

3. The letter from the Department approving of 21st Century's rate application contained disclaimer language disapproving of any portion of a rate application that conflicted with California law. The plaintiff argued that the disclaimer was intended to disapprove of matters such as the tainted accident verification factor at issue here. MacKay, 188 Cal.App.4th at 1435-36.

4. The Examiner in at least two Market Conduct Examinations, conducted in 1998 and 2001, cited 21st Century for violating Insurance Code §1861.02 in its use of accident verification. MacKay, 188 Cal.App.4th at 1437-38.

5. Simultaneously, in a different area of the Department the question of whether to use accident verification was still under discussion, with management's views "filter[ing] down through to" the rank and file staff. MacKay, 188 Cal.App.4th at 1437-38, fn. 8.

6. Eventually, an enforcement action was filed by the Department against 21st Century in 2006, arising out of the 2001 Market Conduct Examination. The action identified 14 criticized rating and underwriting practices, including accident verification. The matter was resolved through a Consent Order, in which the Department stated, without any explanation that was evident from the MacKay Opinion, that "the practices and rates that were the subject of this criticism had been submitted to and approved by the Department of Insurance in rate filings." MacKay, 188 Cal.App.4th at 1438-39. Although unclear, it appears this may have been an attempt to retroactively approve the filing through the Consent Order itself.[4]

The Court of Appeal found that the accident verification practice was approved by the Department of Insurance, *although ample facts exist to support a finding that a clear, knowing and unqualified approval was* ***not*** *granted by the Department.*

---

[3] See Cal. Code Regs., tit. 10, §§2632.3, 2632.11(b), and 2648.4.

[4] It is equally unclear how the Consent Order can be relied on as authority that an approval occurred, when it expressly states that "no factual findings or legal conclusions have been made."

Given the conflicted and confusing factual record, the MacKay opinion raises a question as to the level, kind, and quality of activity that is required for a valid approval. Can a mid-level regulator, for example, give an okay on an improper practice? What if another mid-level regulator contemporaneously cites that practice as unlawful? Should a carrier be rewarded for burying a prohibited practice in a filing that is hundreds or even thousands of pages long, which the Department failed to spot? And what, exactly, can the Department say in a written approval letter to protect itself, in such an instance, by seeking to withdraw that approval if it is based on an undiscovered illegal practice?

These unanswered questions, among others, are why the MacKay opinion is so troubling and, at its core, in error.

QUANTUM OF ACTIVITY NECCESARY FOR APPROVAL

There is a dearth of California authority on what action is necessary to support approval of a regulatory filing. The Department of Insurance has grappled with the approval process itself, explaining:

> Despite the Department's best efforts, some class plans, which are inherently technical in nature, will be approved because the violations of law occur on an "as applied" basis and may be undiscovered in the review process. Still other violations may be found directly in the language of the class plan, but it may take time for the Department to fully appreciate the implications of the language and the manner in which such language violates State law.[5]

The Department has also stated that carriers cannot, and should not, be immunized "from civil liability for unlawful conduct that is based upon statements found in their voluminous regulatory filings."[6]

California opinions acknowledge that the Department's review process should "examine" and "determine" rates, as opposed to merely passing rate application forms through. See Fogel v. Farmers Group, Inc., 160 Cal.App.4th 1403, 1417, 74 Cal.Rptr.3d 61 (2008); 20th Century v. Garamendi, 878 P.2d 566 (1994). But little more is offered.

A case from Washington State, Blaylock v. First American Title Insurance Co., 504

[5] Application of the California Department of Insurance for Permission to File Amicus Curiae Brief and [Proposed] Amicus Curiae Brief, Donabedian v. Mercury Insurance Company, p. 22.
[6] Application of the California Department of Insurance for Permission to File Amicus Curiae Brief and [Proposed] Amicus Curiae Brief, Poirer v. State Farm Mutual Auto Insurance Company, p. 13.

F.Supp.2d 1091 (W.D. Wash. 2007), offers a more thorough discussion. Plaintiff Catherine Blaylock and others brought suit under Washington's Consumer Protection Act claiming that First American paid kickbacks to middlemen, such as developers and mortgage companies, in return for referrals. She argued that these expenditures were passed on to First American's customers in the form of inflated rates. First American responded that its rates had been submitted to the Insurance Commissioner and thus they were bound to charge those rates as filed.

The Court sided with Blaylock and rejected First American's argument. Washington courts had long held that only conduct that was affirmatively authorized by a government agency provided immunity, and that a mere acquiescence or superficial review was not enough. Approval required an "affirmative action" specific to the "actions or transactions" at issue. Because the Insurance Department lacked a rigorous review and approval process for title insurance, the Court ruled that the Commissioner had not given specific permission or executed an overt affirmative act sufficient to approve First American's rate filing. Blaylock, 504 F. Supp.2d at 1105.

CARS and Consumer Action submit that more than the conflicting factual record cited by the Court of Appeal is needed to fill in the gap in the MacKay Opinion as to what constitutes regulatory approval. Allowing this opinion to be a benchmark will allow carriers to exploit the regulatory filing process as a means for shielding themselves from the civil justice system.

CONCLUSION

If left standing, the MacKay opinion will be misapplied and overextended by the insurance industry. Carriers will have an incentive to trigger immunity by filing unwieldy applications, tucking improper factors in accompanying underwriting guidelines, and masquerading unlawful rating factors as approved rating factors – in the hope of slipping one by the Department.

Additionally, MacKay raises an extremely disturbing question not discussed here; namely, how a Commissioner can sanction unlawful practices or conduct by insurance companies.

And finally, MacKay lays to waste a powerful method for consumers and the Department of Insurance alike to hold the industry accountable: the Unfair Competition Law. Like all administrative agencies, the Department must balance its statutory responsibilities with the available resources when exercising its discretion to deploy its prosecutorial authority. It simply lacks the resources to pursue every allegation that appears reasonable

on its face when approved by the Department. It must, by necessity, look to the resources available through consumer-private attorney general actions.[7] By denying a private right of action in a civil lawsuit, MacKay swiftly and surely deprives California citizens and the Department of a right that was at the heart of Proposition 103. Such an outcome ought not stand.

Accordingly, CARS and Consume Action respectfully submit that the Opinion in the matter of MacKay v. Superior Court of Los Angeles be depublished.

Respectfully submitted,

Kathryn M. Trepinski
Attorney for Consumers for Auto Reliability & Safety and Consumer Action

[7] Application of the California Department of Insurance for Permission to File Amicus Curiae Brief and [Proposed] Amicus Curiae Brief, Donabedian v. Mercury Ins. Co., p. 19.

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

Case Name: MacKay v. 21st Century Insurance
Court of Appeal Case No.: B220469
Superior Court Case No.: BC297438

I declare:

I am a resident of the City 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 509 S. Beverly Drive, Beverly Hills, California 90212, and I am employed in the city and county where this service is occurring.

On November 15, 2010, I caused service of true and correct copies of the documents entitled:

REQUEST FOR DEPUBLICATION

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 EMAIL, by electronic mail transmission this date to the email address stated.

3. 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 and that this declaration was executed on November 15, 2010, at Beverly Hills, California.

/s/
Alexandra Munos

SERVICE LIST

Person Served	**Method of Service**
Mark Goshgarian Merak Eskigian Goshgarian & Marshall 23901 Calabasas Road, Suite 2073 Calabasas, CA 91302 *Counsel for Amber Mackay and Jacqueline Leacy*	_____ FAX ___X__ U.S. MAIL _____ OVERNIGHT MAIL _____ HAND DELIVERED _____ EMAIL
Drew E. Pomerance Roxborough, Pomerance & Nye 5820 Canoga Ave., Suite 250 Woodland Hills, CA 91367 *Counsel for Amber Mackay and Jacqueline Leacy*	_____ FAX ___X_ U.S. MAIL _____ OVERNIGHT MAIL _____ HAND DELIVERED _____ EMAIL
Marina M. Karvelas Pirapat Sadikali Sindhuphak Steven H. Weinstein Kent R. Keller Barger & Wolen 633 West Fifth Street, 47th Floor Los Angeles, CA 90071 *Counsel for 21st Century Insurance Company*	_____ FAX ___X_ U.S. MAIL _____ OVERNIGHT MAIL _____ HAND DELIVERED _____ EMAIL
Hon. Anthony J. Mohr Superior Court Los Angeles 600 S. Commonwealth Avenue Dept. 309 Los Angeles, CA 90005	_____ FAX ___X_ U.S. MAIL _____ OVERNIGHT MAIL _____ HAND DELIVERED _____ EMAIL

Brian S. Kabateck Kabateck Brown & Kellner, LLP 644 S. Figueroa St. Los Angeles, CA 90017	_____ FAX ___X_ U.S. MAIL _____ OVERNIGHT MAIL _____ HAND DELIVERED _____ EMAIL
Vanessa Wells Sedgwick, Detert, Moran & Arnold LLP One Market Plaza Steuart Tower, 8th Floor San Francisco, CA 94105	_____ FAX ___X_ U.S. MAIL _____ OVERNIGHT MAIL _____ HAND DELIVERED _____ EMAIL
Frederick Bennett S.C.L.A 111 North Hill Street, Room 546 Los Angeles, CA 90012	_____ FAX ___X_ U.S. MAIL _____ OVERNIGHT MAIL _____ HAND DELIVERED _____ EMAIL
Appellate Coordinator Office of the Attorney General Consumer Law Section 300 S. Spring Street Los Angeles, CA 90013-1230	_____ FAX ___X_ U.S. MAIL _____ OVERNIGHT MAIL _____ HAND DELIVERED _____ EMAIL
District Attorney's Office County of Los Angeles 210 West Temple Street Suite 18000 Los Angeles, CA 90012-3210	_____ FAX ___X_ U.S. MAIL _____ OVERNIGHT MAIL _____ HAND DELIVERED _____ EMAIL
Clerk of the Court of Appeal, Second District, Division 3 300 So. Spring St., 2nd Floor Los Angeles, CA 90013	_____ FAX ___X_ U.S. MAIL _____ OVERNIGHT MAIL _____ HAND DELIVERED _____ EMAIL

Clerk of the Supreme Court of California 350 McAllister Street San Francisco, CA 94102-4797 (415) 865-7000	_____ FAX _____ U.S. MAIL __X___ OVERNIGHT MAIL _____ HAND DELIVERED _____ EMAIL