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November 15, 2010

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

Re: MacKay, et al. v. Superior Court of Los Angeles County (21st Century Insurance Co.) Case No. B220469
<u>Request for Depublication (Rule 8.1125)</u>

Dear Chief Justice George and Honorable Associate Justices:

We respectfully urge the Court to depublish the decision in the above-referenced case. Issued after the parties had settled the case,[1] that decision effectively immunizes a wide range of unlawful insurer conduct from suit. It is contrary to express voter-enacted protections that provide judicial redress for unfair and discriminatory insurer conduct, and it conflicts with decisions of this Court and the Court of Appeal, and with long-standing interpretations of the Insurance Commissioner and Attorney General.

This request for depublication is filed on behalf of the ACLU of Northern California, the ACLU of Southern California, the ACLU of San Diego and Imperial Counties, Consumers Union of United States (the non-profit publisher of Consumer Reports), Disability Rights Education and Defense Fund (DREDF), the Equal Justice Society, the Impact Fund, Lambda Legal, Public Counsel, and Public Advocates, all non-profit advocacy organizations with a mission to promote equality, fairness and consumer and civil rights in California. When necessary, each of these organizations brings suit to challenge civil rights violations that harm a variety of protected classes, whether racial minorities, people with disabilities, LGBT individuals, or those with HIV.

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[1] The decision became final on October 25, 2010, when remittitur issued at the stipulation of the parties, who settled the case on October 15, 2010.

The decision in *MacKay* will both create new incentives for unfair and discriminatory insurance practices, and hinder the ability of these organizations to challenge those practices in court.

The protections at issue were put in place in 1988 by the voters in Proposition 103 to hold insurers accountable, by civil suit if need be, for redlining, unlawful business practices, and other unfair and discriminatory insurance industry practices that this Court had identified with concern in *King v. Meese*, 43 Cal.3d 1217 (1987). As the *King* Court noted, the public had no remedy for those practices under then-existing law. A year later, the voters expressly subjected insurers to private suit under the Unruh Act and other state statutes. They decreed that "[t]he business of insurance shall be subject to the laws of California applicable to any other business," including laws prohibiting discrimination and unfair business practices, and further decreed that "[a]ny person may initiate or intervene in any proceeding permitted or established pursuant to this chapter." (Ins. Code, §§ 1861.03 (a), 1861.10 (a).)[2] This Court enforced those provisions in *Farmers Insurance Exchange v. Superior Court*, 2 Cal.4th 377, 394 (1992).

Despite this and other clear authority to the contrary, the *MacKay* court has now immunized insurers from suit under the Unfair Competition Law ("UCL") and other laws against unfair and discriminatory conduct to which the Proposition expressly subjected them. The court reasoned that Section 1860.1, a remnant of the pre-Proposition 103 regime, was a more "specific provision" that trumped the voters' express intent. That provision, according to the court, immunizes from suit any unlawful practice that an insurer can hide in a dense filing approved by the Department of Insurance.

Like *American Ins. Assn. v. Garamendi* (depublished Oct. 12, 2005, S132820) 2005 Cal. Lexis 11188, *MacKay* presents an important exception to the general rule that disfavors depublication. It conflicts not only with the voters' intent, but with this Court's ruling in *Farmers, supra*, which held that Proposition 103 authorized original judicial remedies, rather than relegating the judicial role to reviewing agency decisions. It also conflicts with *Donabedian,* 116 Cal.App.4th 968 (2004). There, the court agreed with the Insurance Commissioner that

> Whatever limited force Insurance Code sections 1860.1 and 1860.2 can be said to have today, a fair reading of those provisions in context cannot immunize insurers from civil liability for illegal procedures that are creatively stowed away in a voluminous regulatory filing.

(*Id.* at 990-91.) *Donabedian* concluded that "[i]t would make little sense if Proposition 103 — which subjects insurers to the UCL — were interpreted to preclude a

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[2] Unless otherwise noted, all citations are to the Insurance Code.

civil action alleging a violation of that very Proposition." (*Id.* at 991.) Finally, *MacKay* conflicts with the view of both the Insurance Commissioner and the California Attorney General, neither of whom had an opportunity to participate in the briefing below.

For reasons that have nothing to do with the merits, the losing parties in the Court of Appeal did not file a petition for review. In fact, the case had already settled before the Court of Appeal issued its advisory opinion. Accordingly, this Court is unlikely to directly review the Court of Appeal's decision.

MacKay will close the courthouse doors to meritorious challenges to unfair and discriminatory conduct for which the People of California expressly provided a judicial remedy. It should be depublished.

The Opinion Should Be Depublished

I. *MacKay* Creates a *De Facto* Immunity of Insurers from Civil Suit.

On its facts, *MacKay* was virtually identical to *Donabedian*. Both cases were brought under the Unfair Competition Law, Bus. & Prof. Code section 17200 *et seq.* (the "UCL"), alleging that a premium-setting practice (known as "portable persistency") violated Proposition 103's prohibition against basing a driver's premium on "[t]he absence of prior automobile insurance coverage." (§ 1861.02 (c).) *See MacKay*, Slip Op. at 2-5; *Donabedian, supra*, 116 Cal.App.4th at 973. In both cases, the insurer argued that its practice was immune from legal challenge because it was part of a filing approved by the Commissioner. *See MacKay*, Slip Op. at 6; *Donabedian, supra*, 116 Cal.App.4th at 974.

The two courts, however, reached opposite conclusions. The *Donabedian* court, with the benefit of amicus briefing by the Commissioner, a consumer group and the industry, "conclude[d] that the commissioner does not have exclusive jurisdiction, nor does this case involve ratemaking." *Donabedian, supra*, 116 Cal.App.4th at 983.

The *MacKay* court, on the other hand, in an opinion issued nearly a week after the parties had settled their case, applied the "filed rate doctrine" (Slip Op. at 31, disagreeing with *Fogel v. Farmers Group, Inc.*, 160 Cal.App.4th 1403, 1418 (2008)), and "conclude[d] that the statutory provisions for an administrative process (and judicial review thereof) are the exclusive means of challenging an approved rate." (*Id.* at 3.) The court based its holding on § 1860.1, a provision of the Insurance Code that was part of the exclusive jurisdiction regime that Proposition 103 replaced, concluding that this vestigial provision was "more specific" than a provision of Proposition 103 that expressly subjects insurers "to the laws of California applicable to any other business" (§ 1861.03), including § 17200. The court ignored another express provision of Proposition 103, that authorizes original civil enforcement actions, including UCL actions, by "any person." (§ 1861.10.)

In reaching these conclusions, the court purported to distinguish both *Donabedian* and the opinion of this Court in *Farmers, supra.* (See Part II, below.)

While the *MacKay* court called its holding "limited" (Slip Op. at 32), the truth is that it is an invitation to widespread misconduct by unscrupulous insurers. Every year, the Department of Insurance receives 8,000 to 10,000 Proposition 103 filings,[3] many of them hundreds of pages in length. Insurers are well aware that the Department's limited resources[4] do not allow it to catch violations of law that are hidden like a needle in each one of these regulatory haystacks. The Commissioner told the *Donabedian* court as much, noting in his amicus brief that a "fair reading of [§ 1860.1] in context cannot immunize insurers from civil liability for illegal procedures that are creatively stowed away in a voluminous regulatory filing." (*Donabedian, supra,* 116 Cal.App.4th at 990.) As happened in this case, an insurer can easily sneak ambiguous language regarding an underwriting practice into one of these countless filings, and later claim Department approval.

The *MacKay* court has not only opened a massive loophole that contradicts the voters' plain intent, but has created a perverse incentive for unscrupulous insurers to "creatively stow away" in their filings. For instance, Proposition 103 requires insurers to set auto premiums based solely on those factors authorized by the statute or by the Commissioner pursuant to regulation. (§ 1861.02(a).) As *MacKay* and *Donabedian* demonstrate, some insurers have already been caught hiding an unlawful factor, the absence of prior insurance, in their regulatory filings. If *MacKay* is not depublished, insurers able to hide factors that discriminate by overcharging motorists based on race, religion, military status, medical condition marital status or sexual orientation, will rely on it to argue their immunity from a civil suit that Proposition 103 instead authorizes.

II. *MacKay* Conflicts with Proposition 103; with the Holding of This Court in *Farmers*; with Two Rulings of the Court of Appeal; and with Interpretations of the Insurance Commissioner and the Attorney General.

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[3] *See, e.g.,* Department of Insurance, "Yearly Public Notice Lists," at http://www.insurance.ca.gov/0250-insurers/0800-rate-filings/0100-rate-filing-lists/public-notices/yearly-pub-notice-2000-2004.cfm.

[4] The California Department of Insurance ("CDI") oversees roughly 800 property-casualty insurance companies with $51 billion in premium volume in 2009. (National Association of Insurance Commissioners, 2009 INSURANCE DEPARTMENT RESOURCES REPORT (2010) at pp. 40, 47-48.) To regulate this vast market, CDI has 16 actuaries on staff, who are responsible for oversight of all life and health insurance as well as property-casualty insurance (*id.* at 7), and 30 market conduct examiners (*id.* at 9). CDI's 51 complaint investigators contended with over 36,000 complaints and 212,000 inquiries in 2009 (*id.* at pp.11, 66). CDI completed only 207 market conduct and 60 financial examinations that year (*id.* at 49).

Proposition 103 "made numerous fundamental changes in the regulation of ... insurance in California." (*20th Century, supra*, 8 Cal.4th at 240.) Declaring that "the existing laws inadequately protect consumers and allow insurance companies to charge excessive, unjustified and arbitrary rates" (Prop. 103, §1), the initiative "replace[d] the former system for regulating insurance rates (which relied primarily upon competition between insurance companies) with a system in which the commissioner must approve such rates prior to their use." (*Amwest, supra*, 11 Cal.4th at 1259.)

That "former system," the McBride-Grunsky Act of 1947 ("McBride"),[5] established a scheme of insurer immunity based on the "exclusive jurisdiction" of the Commissioner. In Proposition 103, the voters replaced McBride's regime with one that subjected the industry to the full range of statutory obligations governing the business community generally – from the antitrust and unfair competition laws to the civil rights laws – and empowered the public to seek redress in court for violations of those laws.

The voters imposed reforms in five broad categories: (a) immediate rate reductions (§ 1861.01); (b) regulation of *rates* (§§ 1861.05-1861.09); (c) regulation of automobile *premium*-setting practices (§ 1861.02; *see also* § 1861.03(c));[6] (d) elimination of barriers to competition in the marketplace (§ 1861.03(b); *see also* §§ 1861.04, 1861.12); and, (e) public participation and insurer accountability (§§ 1861.03(a), 1861.10(a)).

Two specific provisions are dispositive of the issues here. Section 1861.03(a) provides:

> *The business of insurance shall be subject to the laws of California applicable to any other business,* including, but not limited to, the Unruh Civil Rights Act (Civil Code Sections 51 through 53), and the antitrust and unfair business practices laws (Parts 2 and 3, commencing with section

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[5] *See* former Ins. Code §§1850 *et seq.*, added by Stats.1947, c.805, §1.

[6] The *MacKay* court improperly conflated "rates" and "premiums." (See, e.g., Slip Op. at 22-23.) In fact, the two are entirely distinct, and are treated very differently under Proposition 103. A "rate" is the amount of aggregate revenue an insurance company may collect from *all* its policyholders for a given line of insurance (automobile, homeowner, etc.). (See *Spanish Speaking Citizens' Foundation v. Low* ("*SSCF*") (2000) 85 Cal.App.4th 1179, 1186-87.) Under section 1861.05 et seq., Proposition 103 requires insurers to submit proposed rates for *all lines* of property-casualty insurance (*see* § 1861.13) to the Commissioner for prior approval.

MacKay's suit was not about rates, but about premiums. Under requirements *applicable only to automobile insurance*, an insurer must also obtain approval for the method by which it determines how much *premium* it can collect from each insured motorist. The criteria that an insurer uses to establish a motorist's premium are known as "rating factors." (See §1861.02; see also *SSCF*, *supra*, 85 Cal.App.4th at 1187-88.)

> 16600 of Division 7, of the Business and Professions Code). (Emphasis added.)

And Section 1861.10(a) states:

> Any person may initiate or intervene in any proceeding permitted or established pursuant to this chapter, challenge any action of the commissioner under this article, and enforce any provision of this article.

This Court has repeatedly and consistently vindicated Proposition 103's purpose of holding the industry accountable to all Californians. *See Calfarm Ins. Co. v. Deukmejian*, 48 Cal.3d 805 (1989) (upholding key provisions against constitutional challenge); *Farmers, supra*, 2 Cal.4th 377 (action under the UCL may be brought for violation of Proposition 103); *20th Century Ins. Co. v. Garamendi*, 8 Cal.4th 216 (1994) (enforcing Proposition 103's prohibition against excessive or inadequate rates); *Amwest Surety Ins. Co. v. Wilson*, 11 Cal.4th 1243 (1995) (legislative amendment of Proposition 103 invalid because it did not further the voters' purposes); *State Farm Mutual Auto. Ins. Co. v. Garamendi*, 32 Cal.4th 1029 (2004) (upholding regulations requiring public disclosure of insurance redlining data submitted to the Commissioner under Proposition 103).

In *Farmers*, the Court affirmed the public's right to enforce Proposition 103 by bringing an original action in the courts under section 1861.10(a). The suit there including a UCL claim brought under the authority of sections 1861.03(a) and 1861.10(a). (*Farmers, supra,* 2 Cal.4th at 381-382.) Farmers argued that the vestigial McBride immunities barred suit under the UCL, framing its defense as a question of the Commissioner's "exclusive jurisdiction." (*Id.* at 394.)

This Court rejected Farmers' argument, looking to sections 1861.10(a) and 1861.03(a). Proposition 103, the Court explained, provides "'alternative' or 'cumulative' administrative *and civil* remedies." (*Id.* at 393-394, emphasis added.) And section 1861.03(a), the Court affirmed, "provides that the insurance industry is subject to, inter alia, Business and Professions Code § 17200, et seq." (*Id.* at 394.) That led the Court to conclude that insurers are unconditionally subject to original suit in the courts:

> [S]ection 1861.03 does not condition a suit under Business and Professions Code section 17200 on prior resort to the administrative process under the Insurance Code.

(*Farmers, supra*, 2 Cal.4th at 394.) While the Court endorsed the doctrine of "primary jurisdiction," it was careful to distinguish that discretionary doctrine from the doctrine of *exclusive* jurisdiction endorsed by the *MacKay* court. As the *Farmers* Court explained:

> Exhaustion applies where an agency alone has exclusive jurisdiction over a case; primary jurisdiction where both a court and an agency have the legal capacity to deal with the matter.

(*Id.* at 390-391, quoting Schwartz, Administrative Law (1984) § 8.23, p. 485.) Before Proposition 103, under the McBride-era doctrine of "exclusive jurisdiction," challenges to an insurer's rates, premiums or practices could only be brought by "exhaustion" of the administrative remedies provided by the section 1858 complaint process. Original civil suit was not an available remedy, and the only judicial remedy was to seek judicial review of the agency's determination.

By contrast, primary jurisdiction "applies where a claim is *originally cognizable in the courts*." (*Id.* at 390, italics in original.) Under a regime of primary jurisdiction, as a matter of comity, courts may *temporarily abstain* from deciding certain matters, if the circumstances indicate that considerations of uniformity in regulation and of technical expertise call for prior reference to the agency. (*Id.* at 391.)

The *MacKay* court grasped the breadth of the holding in *Farmers*, but purported to distinguish it. It noted that in the circumstances before it,

> The Supreme Court concluded that, under the doctrine of *primary* jurisdiction, the action should be *stayed* pending pursuit of the administrative remedy before the commissioner. (*Id.* at p. 381.)" (Slip Op. at 33, emphasis added.)

Yet *MacKay* went on to "conclude that the statutory provisions for an administrative process (and judicial review thereof) are the *exclusive* means of challenging an approved rate." (Slip Op. at 3, emphasis added.) To distinguish *Farmers*, *MacKay* stated that:

> There is nothing in the opinion in [*Farmers*] indicating that the challenged practices were part of an approved rate plan. Therefore, it has no bearing on our resolution of this appeal. (*Id.*)

Whether the practices challenged in *Farmers* were part of an approved plan, however, was irrelevant to this Court's analysis. That question must be reached in – and *only* in – a regime of *exclusive* jurisdiction, where the approval of a rate divests the judiciary of any power but that of reviewing the agency's action. In a regime of *concurrent* jurisdiction, on the other hand, the agency's prior approval is relevant, if at all, only to the *timing* of a judicial challenge, not to the court's original jurisdiction to entertain a civil suit. The *Farmers* Court held that the plain intent of the voters was to establish a system of *concurrent* jurisdiction. (2 Cal.4th at p. 394.)

MacKay relied on an equally flawed basis for distinguishing *Donabedian.*[7] The *MacKay* court distinguished *Donabedian* on the same grounds as it distinguished *Farmers*:

> Thus, cases which apparently reached a different result when the underlying conduct was *not* the charging of an approved rate are distinguishable on this basis. (See e.g., *Donabedian v. Mercury Ins. Co., supra,* 116 Cal.App.4th at p. 992 [expressly acknowledging that the plaintiff "contends the Insurance Commissioner did not approve Mercury's use of the lack of prior insurance to determine, for example, eligibility for the Good Driver Discount or insurability"].)" (Slip Op. at 32.)

In fact, however, the *insurer* in *Donabedian* argued that "the Insurance Commissioner not only approved its use of the lack of prior insurance as a rating criterion, but required it, notwithstanding the statutory prohibition." (*Donabedian, supra,* 116 Cal.App.4th at 993-94.) And the Court of Appeal there noted that:

> In its class plan applications, Mercury marked the appropriate boxes on the preprinted forms indicating that it uses persistency as a rating factor. In the applications, Mercury defined persistency as follows: "The Persistency discount is based on loss experience and the number of years the Named Insured has been continuously insured and no lapse of coverage in excess of 30 days. . . ." (*Id.* at 993.)

The *MacKay* opinion, in short, conflicts with both of these judicial interpretations. As noted earlier, it also expressly disagreed with *Fogel v. Farmers Group, Inc., supra,* 160 Cal.App.4th 1403, which held that the "filed rate" doctrine does not apply under Proposition 103. In addition to breaking with settled judicial interpretations, moreover, *MacKay* also conflicts both with the views of the Insurance Commissioner (as quoted in *Donabedian, supra,* 116 Cal.App.4th at 990-91), and with the long-held interpretation of the Attorney General, who considered the application of the "filed rate doctrine" in 1990 and concluded that it "does not apply to insurance rates in California."[8]

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7 There, the insurer "argue[d] that plaintiff's sole means of redress was to file a complaint with the Insurance Commissioner pursuant to the formal administrative process (§§ 1858–1858.7)." (*Donabedian, supra,* 116 Cal.App.4th at 987.) The court disagreed, holding that "*Farmers* indicates that a claim under the UCL, though predicated on a violation of the Insurance Code, is not so restricted. (See *Farmers, supra,* 2 Cal.4th at pp. 382, fn. 1, 391.) This conclusion follows from Proposition 103's plain language." (*Id.*)

8 State of California, Department of Justice, *Antitrust Guidelines for the Insurance Industry,* March 1990, published in DiMugno & Glad, *California Insurance Laws Annotated* (Thomson-West 2010) at 1808 [footnotes omitted].)

III. The Court of Appeal's Opinion Threatens to Bar Meritorious Civil Rights Enforcement.

Before November 8, 1988, California had "less regulation of insurance than any other state." (*20th Century, supra,* 8 Cal.4th at 240, quoting *King, supra,* 43 Cal.3d at 1240 (Broussard, J., concurring).) Under McBride, insurers were free to increase premiums without regulatory approval, and free to refuse to insure good drivers. (*Id.* at 1237-46.)

One result of McBride's inadequate regulatory scheme was that many drivers were excluded by redlining and other exclusionary practices. This Court noted in 1987 that "evidence tended to establish" that insurers were "refusing to write policies in that area [South Central Los Angeles], or would only insure those who already had insurance. (*King, supra*, 43 Cal.3d at 1225.) Drivers like the plaintiffs in *King* were caught between the risk of driving without insurance[9] and their inability to obtain it due to the neighborhood of their residence, or the lack of prior insurance. (*King*, *supra*, 43 Cal.3d at 1239.) The law then in effect, however, made no provision for those who were excluded from coverage on discriminatory grounds to obtain redress. Under the "exclusive jurisdiction" regime of McBride, "[c]omplaints charging that an insurer has unreasonably refused to insure are routinely rejected as raising an issue beyond the Commissioner's jurisdiction." (*Id.* at 1240-41.)

By reverting to the McBride-era regime of immunities that the voters decisively overturned with Proposition 103, the Court of Appeal has placed all legitimate enforcement of our civil rights and other protections at risk.

Before Proposition 103, civil rights violations in the insurance industry were a matter of serious concern, yet affected communities across California found no meaningful remedy. In 1968, the President's National Advisory Panel on Insurance concluded that insurance redlining was "a long-term, pervasive problem of center city areas," and the primary cause of economic deterioration in those areas.[10] Efforts under McBride to challenge insurance redlining are instructive. In the 1970s, the City and County of Los Angeles sued Farmers Insurance Company and the Auto Club of Southern California for their use of "territorial rating," a practice that often resulted in higher premiums for residents of lower-income and minority neighborhoods for no reason other than where they lived. (*County of L.A. v. Farmers Ins. Exchange* (1982) 132 Cal. App. 3d 77.) The plaintiffs were instructed to file their complaint before the Department of Insurance in

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9 *See* Financial Responsibility Act of 1984, Veh. Code §16028 *et. seq*., which imposed severe consequences on drivers without automobile insurance, who were liable to revocation of driving privileges, fines, and impoundment of their vehicles.

10 President's National Advisory Panel on Insurance in Riot-Affected Areas, MEETING THE INSURANCE CRISIS OF OUR CITIES at 1 (Jan. 1968).

1978. The Department failed to take action, and the petitioners returned to superior court. The superior court dismissed the case, and the Court of Appeal affirmed, ruling that the plaintiffs had failed to exhaust their administrative remedies. Several years later, the City of Compton, the Southern Christian Leadership Conference and others tried again, asking the court to declare territorial rating (the court described the practice as "redlining") a violation of the Unruh Civil Rights Act. The court's opinion – subsequently depublished – held that the Unruh Act was preempted by § 1860.1 – the vestigial McBride provision on which *MacKay* relied. (*City of Compton v. Bunner* (1988) 243 Cal.Rptr. 100, *cert. denied and ordered not to be officially published* July 21, 1988.)

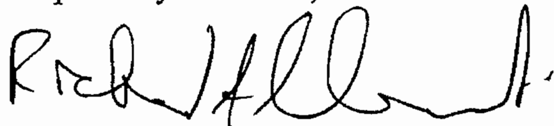
In response to such cases, the People of California enacted Proposition 103 which expressly authorizes any person to bring independent suit in the courts of California to enforce its protections. Those protections remain important today. For instance, complaints of insurance redlining are of grave concern in many communities. Also of grave concern are practices that discriminate against same-sex couples by basing premiums on marital status, or denying them coverage altogether. If *MacKay* is not depublished, the rights of many Californians could be violated with impunity.

CONCLUSION

The Court of Appeal's published opinion creates a new doctrine that threatens to overturn the open courthouse reforms that the People of California put in place over 20 years ago. That new doctrine conflicts with the plain intent of the voters, with this Court's holding in *Farmers*, and with the ruling of the Court of Appeal in *Donabedian*.

Because the settling plaintiffs have not filed a petition for review and consumers with a stake in the outcome were denied intervention, this Court can erase this aberrational Court of Appeal decision only by depublishing the decision or granting review on its own motion. We urge the Court to do so.

Respectfully submitted,



Richard A. Marcantonio, SBN 139619
Managing Attorney
Public Advocates, Inc.
Attorney for Requestors

Mark Savage, SBN 141621
Senior Attorney
Consumers Union of United States, Inc.
Attorney for Consumers Union of United States, Inc.

PROOF OF SERVICE
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Case Name: Mackay v. 21st Century Insurance
Court of Appeal Case No.: B220469
Superior Court Case No.: BC297438

I declare:

I am employed in the City and County of San Francisco, State of California. I am over the age of 18 years and not a party to the within action. My business address is 131 Steuart Street, Suite 300 San Francisco, CA 94105, 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.

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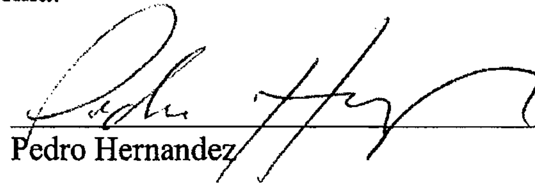
3. If marked U.S. MAIL or OVERNIGHT or HAND DELIVERED, by placing this date for collection for regular or overnight mailing true copies of the within document in sealed envelopes, addressed to each of the persons so listed. I am readily familiar with the regular practice of collection and processing 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 San Francisco, California.



Pedro Hernandez

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Counsel for Amber Mackay and Jacqueline Leacy	
Drew E. Pomerance Roxborough, Pomerance & Nye 5820 Canoga Ave., Suite 250 Woodland Hills, CA 91367	______ FAX ___X_ U.S. MAIL ______ OVERNIGHT MAIL ______ HAND DELIVERED ______ EMAIL
Counsel for Amber Mackay and Jacqueline Leacy	
Marina M. Karvelas Pirapat Sadikali Sindhuphak Steven H. Weinstein Kent R. Keller Barger & Wolen 633 West Fifth Street, 47th Floor Los Angeles, CA 90071	______ FAX ___X_ U.S. MAIL ______ OVERNIGHT MAIL ______ HAND DELIVERED ______ EMAIL
Counsel for 21st Century Insurance Company	
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
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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
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