

1 Robert W. Hogeboom (061525), rhogeboom@barwol.com  
Suh Choi (217353), schoi@barwol.com  
2 Michael A. S. Newman (205299), mnewman@barwol.com  
BARGER & WOLEN LLP  
3 633 West Fifth Street, 47th Floor  
Los Angeles, California 90071  
4 Telephone: (213) 680-2800  
Facsimile: (213) 614-7399  
5

ORIGINAL FILED  
OCT 01 2007  
LOS ANGELES  
SUPERIOR COURT

6 Attorneys for Plaintiffs  
The Association of California Insurance Companies;  
7 The Personal Insurance Federation of California; The  
American Insurance Association; and The Pacific  
8 Association of Domestic Insurance Companies

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **FOR THE COUNTY OF LOS ANGELES**

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

THE ASSOCIATION OF CALIFORNIA )  
INSURANCE COMPANIES, THE )  
PERSONAL INSURANCE FEDERATION )  
OF CALIFORNIA, THE AMERICAN )  
INSURANCE ASSOCIATION, AND THE )  
PACIFIC ASSOCIATION OF DOMESTIC )  
INSURANCE COMPANIES, )

Petitioners and Plaintiffs, )

vs. )

STEVE POIZNER, Insurance Commissioner )  
of the State of California; and CALIFORNIA )  
DEPARTMENT OF INSURANCE, )

Respondents and Defendants. )

CASE NO.: BS109154

Hon. Dzintra Janavs

**PETITIONER'S OPENING BRIEF**

[Filed concurrently with (1) Declaration of Suh Choi; and (2) Request for Judicial Notice]

Date: January 31, 2008

Time: 9:30 a.m.

Dept: 85

Complaint Filed: May 25, 2007

TABLE OF CONTENTS

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

PAGE

1.	INTRODUCTION .....	1
2.	STATEMENT OF FACTS .....	2
A.	Proposition 103; California Insurance Code §§ 1861.05 and 1861.10 .....	2
B.	Prior Regulations on Consumer Participation and Compensation .....	3
C.	The Amended Regulations .....	4
D.	SCPIE Compensation Case .....	4
3.	STANDARD OF REVIEW .....	6
4.	LEGAL DISCUSSION .....	6
A.	Amended Regulations Conflict with Code §§ 1861.10(a) and 1861.05 as Rate Application Reviews cannot be “Proceedings” .....	7
(1)	The Plain Terms of Code § 1861.10(a) Indicate that an Application cannot be a Proceeding .....	7
(2)	The Plain Terms of Code § 1861.05 Show that Consumer Participation in Rating Matters Must be through a Rate Hearing .....	8
(3)	California Case Law Supports the Conclusion that an Application cannot be a “Proceeding” .....	8
B.	Amended Regulations Conflict with Code § 1861.10(b) because the Code requires a “Decision” on the Merits .....	10
C.	Amended Regulations Conflict with Proposition 103, which Placed Specific Limits on Consumers’ Ability to Obtain Compensation .....	10
5.	CONCLUSION .....	12

TABLE OF AUTHORITIES

PAGE

**Cases**

1

2

3

4 *Ass'n for Retarded Citizens v. Dep't of Developmental Servs.*, 38 Cal. 3d 384 (1985)..... 6

5 *Automotive Funding Group, Inc. v. Garamendi*, 114 Cal. App. 4th 846 (2003) ..... 6

6 *Calfarm Ins. Co. v. Deukmejian*, 48 Cal.3d 805 (1989)..... 9

7 *County of Los Angeles v. State Dep't of Public Health*, 158 Cal. App. 2d 425 (1958) ..... 6

8 *Economic Empowerment Foundation v. Quackenbush*, 57 Cal. App. 4<sup>th</sup> 677 (1997) ..... 9, 10

9 *Farmers Ins. Exchange v. Superior Court*, 137 Cal.App.4th 842 (2006) ..... 6

10 *Henning v. Div. of Occupational Saf. & Health*, 219 Cal.App.3d 747 (1990) ..... 6

11 *State Farm Mut. Auto. Ins. Co. v. Garamendi*, 32 Cal.4<sup>th</sup> 1029 (2004) ..... 9, 11

12 *Walker v. Allstate Indemnity Co.*, 77 Cal. App. 4th 750 (2000) ..... 9

13 *20<sup>th</sup> Century Ins. Co. v. Garamendi*, 8 Cal.4th 216 (1994) ..... 6

14

**Statutes**

15

16 Cal. Gov't Code § 11349.1 ..... 6

17 Cal. Gov't Code § 11342.2 ..... 6

18 Ins. Code § 1861.05 ..... passim

19 Ins. Code § 1861.05(b) ..... 2

20 Ins. Code § 1861.05(c) ..... 2, 8

21 Ins. Code § 1861.07 ..... 9

22 Ins. Code § 1861.10 ..... passim

23 Ins. Code § 1861.10(a) ..... passim

24 Ins. Code § 1861.10(b) ..... passim

25

**Regulations**

26 10 Cal. Code Regs. § 2651.1 ..... 1

27 10 Cal. Code Regs. § 2651.1(f) ..... 4

28

1	10 Cal. Code Regs. § 2653.6 .....	1
2	10 Cal. Code Regs. § 2661.1 .....	1, 4
3	10 Cal. Code Regs. § 2661.1(a) .....	4
4	10 Cal. Code Regs. § 2661.1(h) .....	4, 7
5	10 Cal. Code Regs. § 2661.1(k) .....	4
6	10 Cal. Code Regs. § 2661.3 .....	1
7	10 Cal. Code Regs. § 2661.1(i) .....	4
8	10 Cal. Code Regs. § 2661.3(e) .....	3, 4
9	10 Cal. Code Regs. § 2661.3(g) .....	4
10	10 Cal. Code Regs. § 2662.1 .....	1
11	10 Cal. Code Regs. § 2662.3 .....	1
12	10 Cal. Code Regs. § 2662.3(a) .....	4
13	10 Cal. Code Regs. § 2662.5 .....	1
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

## 1. INTRODUCTION

Prior to leaving office, California Insurance Commissioner (the "Commissioner") John Garamendi, Commissioner Steve Poizner's predecessor, amended Sections 2651.1, 2661.1, 2661.3, 2662.1, 2662.3, and 2662.5, and adopted a new Section 2653.6, of Subchapter 4.9, Title 10, of the California Code of Regulations (the "Amended Regulations").<sup>1</sup> The Amended Regulations relate to the process of awarding consumer groups compensation for participating in insurance rate proceedings. Petitioners'<sup>2</sup> action challenges the validity of the Amended Regulations.

The Commissioner's stated purpose for adopting the Amended Regulations is to "clarify that consumers, who participate in the rate approval process after having filed a petition for a hearing, may seek an award of reasonable advocacy fees."<sup>3</sup> Contrary to the Commissioner's assertion, however, the Amended Regulations completely reverse the Department of Insurance's (the "Department") long-standing interpretation of, and conflict with, California Insurance Code (the "Code") sections 1861.05 and 1861.10. The prior version of the regulations correctly provided that consumer groups must obtain permission to intervene in a *rate hearing* in order to be eligible for compensation. The Amended Regulations, on the other hand, unlawfully permit consumers to obtain compensation for participating in the informal *rate application review* process.

The Amended Regulations are a reaction to the Los Angeles Superior Court decision in *American Healthcare Indemnity Co, and SCPIE Indemnity Co. v. Garamendi*, Case No. BS 094515, ("SCPIE"), which is discussed further below. In that case, this court held that, under Code § 1861.10, a consumer group was not entitled to an award of compensation where the Commissioner had not granted the consumer's request for hearing.

California law, including Code § 1861.10, the Superior Court ruling in the *SCPIE* case, appellate cases interpreting Proposition 103, and the prior version of the regulations consistently support the following conclusions:

23  
24  
25  
26  
27  
28

---

<sup>1</sup> A true and correct copy of Amended Regulations is attached hereto as **Exhibit 1**. With respect to the exhibits attached to this Memorandum, please see the concurrently filed Request For Judicial Notice and Declaration of Suh Choi. A copy of the Amended Regulations was also attached as Exhibit B to the Verified Petition for a Preemptory Writ of Mandate and Complaint for Declaratory and Injunctive Relief (the "Petition and Complaint").

<sup>2</sup> The term "Petitioners" herein shall refer collectively to the Petitioners and Plaintiffs The Association of California Insurance Companies, The Personal Insurance Federation of California, The American Insurance Association, and The Pacific Association of Domestic Insurance Companies.

<sup>3</sup> A true and correct copy of the Initial Statement of Reasons is attached as **Exhibit 2** hereto (it was also attached as Exhibit C to the Petition and Complaint).

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

- The Amended Regulations conflict with Code §§ 1861.10(a) and 1861.05 because rate application reviews are not “proceedings” to which compensation awards can attach. The rate proceeding is a hearing, and the rate application is just a Department review process.
- The Amended Regulations conflict with Code § 1861.10(b) as the law requires the adoption of an order or decision *on the merits* of an issue before compensation may be awarded to consumer groups.
- The Amended Regulations conflict with the intended scope of Proposition 103, which placed specific limits on consumers’ ability to obtain compensation. There is no public policy under Proposition 103 to encourage consumers to informally participate in agency matters. California courts only describe Proposition 103 as encouraging consumer participation in *public hearings*.
- Public policy, in fact, supports placing reasonable limitations to place a check against potential abuses of the system as well as for efficiency and clarity in the review process.

For all of the above reasons, it is clear that the Amended Regulations are in violation of California law, and are therefore invalid.

2. **STATEMENT OF FACTS**

A. **Proposition 103; California Insurance Code §§ 1861.05 and 1861.10**

In November of 1988, California enacted Proposition 103, which made a number of changes in the regulation of most property and casualty lines of insurance in order to ensure that insurance is fair, available, and affordable for all Californians. In addition to requiring an elected insurance commissioner and rolling back certain insurance rates by 20 percent, Proposition 103 established a system for the prior approval of insurer rate changes. *See Cal. Ins. Code § 1861.05.*

Proposition 103 enacted Code §§ 1861.05 and 1861.10. Under Code § 1861.05(b), certain insurers are required to file an application with the Commissioner before instituting a rate increase.<sup>4</sup> The Code permits interested consumers to request a hearing to challenge the requested rate increase and, if granted permission by the Commissioner, to intervene in such hearing. In that regard, Code § 1861.05(c) states, in its entirety:

<sup>4</sup> Specifically, Code section 1861.05(b) states, in relevant part: “Every insurer which desires to change any rate shall file a complete rate application with the commissioner. ... The applicant shall have the burden of proving that the requested rate change is justified and meets the requirements of this article.”

1 “The commissioner shall notify the public of any application by an insurer for a rate  
2 change. The application ***shall be deemed approved*** sixty days after public notice  
3 ***unless (1) a consumer or his or her representative requests a hearing*** within forty-  
4 five days of public notice and the commissioner grants the hearing, or determines not  
5 to grant the hearing and issues written findings in support of that decision, or (2) the  
6 commissioner on his or her own motion determines to hold a hearing, or (3) the  
7 proposed rate adjustment exceeds 7% of the then applicable rate for personal lines or  
8 15% for commercial lines, in which case the commissioner must hold a hearing upon  
9 a timely request. In any event, a rate change application shall be deemed approved  
10 180 days after the rate application is received by the commissioner (A) unless that  
11 application has been disapproved by a final order of the commissioner subsequent to  
12 a hearing, or (B) extraordinary circumstances exist. For purposes of this section,  
13 ‘received’ means the date delivered to the department.” (Emphasis added).

14 A consumer’s right to request and intervene in rate hearings is also governed by Code §  
15 1861.10. As relevant here, subdivisions (a) and (b) of that statute state:

16 “(a) Any person may initiate or intervene in any ***proceeding permitted or established***  
17 ***pursuant to this chapter***, challenge any action of the commissioner under this  
18 article, and enforce any provision of this article.

19 (b) The commissioner or a court ***shall award reasonable advocacy and witness fees***  
20 ***and expenses*** to any person who demonstrates that (1) the person represents the  
21 interests of consumers, and, (2) that he or she has made a substantial contribution to  
22 the adoption of any ***order, regulation or decision*** by the commissioner or a court.  
23 Where such advocacy occurs in response to a rate application, the award shall be  
24 paid by the applicant.” (Emphasis added).

### 25 **B. Prior Regulations on Consumer Participation and Compensation**

26 The Amended Regulations are in direct conflict with the prior version of the regulations  
27 governing the practice and procedure for rate proceedings (the “Prior Regulations”)<sup>5</sup> and represent a  
28 complete and improper reversal of the Department’s previously held interpretation of the Code.  
The Prior Regulations stated that, in connection with rate applications, compensation can only be  
awarded to a consumer pursuant to a rate *hearing*. Former § 2661.3(e) stated that a “person desiring  
to intervene and become a party ***to a rate hearing*** shall file a petition to intervene,” which must  
state whether the consumer intends to seek compensation. That petition to intervene “***shall be filed***  
***with the Administrative Hearing Bureau.***” (Emphases added). In order to be eligible for  
compensation, a petition to intervene must have been granted by an administrative law judge  
 (“ALJ”):

“An intervenor or participant ***whose Petition to Intervene or Participate has been***  
***granted*** and who has been found eligible to seek compensation may submit to the

<sup>5</sup> Subchapter 4.9, Sections 2649.1-2662.8, Title X, California Administrative Code. A true and correct copy of the Prior Regulations is attached as **Exhibit 3** hereto. (A copy of the regulations was also attached as Exhibit A to the Petition and Complaint).

1 Public Advisor ... a request for an award of compensation.” (Emphasis added).  
2 *Prior Regulation* § 2662.3(a)

3 “The *administrative law judge* shall rule on the Petition to Intervene within 20 days.”  
4 (Emphasis added). *Prior Regulation* § 2661.3(g).

5 If the consumer’s petition to intervene was granted by the ALJ, the consumer then became a  
6 party to the rate hearing and was eligible to seek compensation for advocacy and witness fees. In  
7 that vein, the term “advocacy fees” only referred to “costs, incurred or billed, *by a party* for the  
8 services of an advocate in the proceeding.” (Emphasis added). *Prior Regulation* § 2661.1(a). *See*  
9 *also Prior Regulation* § 2651.1(f).

10 **C. The Amended Regulations**

11 A copy of the Prior Regulations, with the Amended Regulations marked in  
12 “redline” is attached hereto as **Exhibit 4**.<sup>6</sup> As the redlined changes show, the definition of “Rate  
13 Proceeding,” has been amended to include a proceeding “established upon the submission of a  
14 petition for hearing ...” *CCR* § 2661.1(h). The term “Rate Hearing” is now a separately defined  
15 term meaning “a hearing noticed by the Commissioner on his own motion or in response to a  
16 petition for hearing pursuant to Insurance Code section 1861.05 ...” *CCR* § 2661.1(i).

17 Section 2661.1 was further amended to define “substantial contribution,” which the  
18 consumer must make to warrant an award of compensation, to include the following sentence:

19 “A substantial contribution may be demonstrated without regard to whether a  
20 petition for hearing is granted or denied.” (Emphasis added). *CCR* § 2661.1(k).

21 Section 2661.3(e) was amended to permit a consumer to file a petition to intervene with the  
22 Rate Enforcement Bureau of the Department. Prior to this amendment, petitioners were required to  
23 file their petitions with the Administrative Hearing Bureau, to be ruled on by the judge assigned for  
24 the rate hearing. Other conforming changes were made to the regulations.

25 **D. SCPIE Compensation Case**

26 As noted, the genesis of the Amended Regulations is the aforementioned Los Angeles  
27 Superior Court’s decision, dated September 25, 2005, granting a petition for writ of mandate filed  
28 by American Healthcare Indemnity Company and SCPIE Indemnity Company (collectively,  
29 “SCPIE”). SCPIE filed a Writ Petition seeking to invalidate an award of compensation issued by  
30 the Commissioner to the Foundation for Taxpayer and Consumer Rights (the “Foundation”), who

<sup>6</sup> A copy of the redlined regulations was also attached as Exhibit D to the Petition and Complaint.



1 are intervenors in the present case. This court granted SCPIE's writ on the grounds that the  
2 Foundation had no standing under California law to seek such compensation as there was no  
3 "proceeding" and no "decision" in that case.<sup>7</sup>

4 In that action, SCPIE filed a rate application with the Commissioner seeking permission to  
5 charge higher rates. The Foundation requested a hearing on the rate application by filing a Petition  
6 for Hearing and Petition to Intervene and/or Participate with the Commissioner. In support of its  
7 Petition for Hearing, the Foundation submitted a detailed declaration of its expert witness  
8 discussing why the requested rate should not be approved. SCPIE eventually withdrew its rate  
9 application, desiring to avoid a lengthy and expensive hearing. The Commissioner then issued his  
10 Decision Denying the Foundation's Request for Hearing stating that SCPIE's withdrawal of the rate  
11 applications rendered the basis for a hearing moot. **Exh. 5, ¶ 1.**

12 The Foundation then filed a Request for Compensation pursuant to Code § 1861.10(b)  
13 seeking \$41,433.05 from SCPIE for its expenses relating to its objections to the rate applications  
14 and filing its Petition for Hearing. The Commissioner initially denied the Foundation's Request for  
15 Compensation, but later changed his decision pursuant to the Foundation's Request for  
16 Reconsideration. The Commissioner issued a Decision Awarding Compensation payable by SCPIE  
17 to the Foundation on December 14, 2004 (the "Award"). **Exh. 5, ¶¶ 2-3.**

18 SCPIE filed a Writ of Mandate requesting the court to invalidate the Award. SCPIE argued  
19 that the Commissioner's original decision denying the award was the legally correct decision and  
20 that the Commissioner acted arbitrarily and outside of his authority in reversing that decision.  
21 Specifically, SCPIE argued, among other things, that Code § 1861.10 and the regulations  
22 promulgated thereunder do not permit an award of compensation to consumers where (1) there has  
23 been no formal "proceeding" or (2) the Commissioner has not rendered an order or decision on the  
24 merits of the rate application. **Exh. 5, at p.3.**

25 The court agreed with SCPIE based on the language in both the Code and the regulations.  
26 *See Decision of the Court*, at p.4. The court held that:

27 "... the Foundation failed to establish the elements for an award of advocacy and  
28 witness fees and expenses pursuant to § 1861.10(b). The Commissioner never  
adopted an order, regulation or decision *on the merits* with respect to Petitioners'  
rate increase applications. *Given that there was no hearing granted* and the  
Foundation was not even a party to the proceeding as its Petition to Intervene was  
not granted, there was no, and could not be a, substantial contribution made by the  
Foundation." (Emphasis added).

<sup>7</sup> A copy of the Decision of the Court in the SCPIE matter ("Decision of the Court") is attached  
hereto as **Exhibit 5**.

1 **Exh. 5, at p. 4.** The court issued a writ commanding the Commissioner to vacate the Award.

2  
3 **3. STANDARD OF REVIEW**

4 This case solely involves issues of law. When the primary question involves a legal issue –  
5 statutory interpretation – the court conducts a de novo review. *Automotive Funding Group, Inc. v.*  
6 *Garamendi*, 114 Cal. App. 4th 846, 851 (2003). It has been held, in fact, that “the construction of §  
7 1861.10, subdivision (a) [a key statute at issue in the present matter] asserted by the Department of  
8 Insurance ... ***is entitled to no deference.***” (Emphasis added). *Farmers Ins. Exchange v. Superior*  
*Court*, 137 Cal.App.4th 842, 858-859 (2006).

9 **4. LEGAL DISCUSSION**

10 In order for a regulation to be valid, it must meet the Government Code’s tests of necessity,  
11 authority, clarity, consistency, reference and nonduplication. *See* Cal. Gov’t Code § 11349.1. Most  
12 relevant here, the Commissioner has *no* authority to adopt regulations that are inconsistent with  
13 existing law. Government Code § 11342.2 states:

14 “Whenever by the express or implied terms of any statute a state agency has  
15 authority to adopt regulations to implement, interpret, make specific or  
16 otherwise carry out the provisions of the statute, ***no regulation adopted is valid***  
***or effective unless consistent and not in conflict with the statute and***  
***reasonably necessary to effectuate the purpose of the statute.***” (Emphasis  
added).

17 *See also* 20<sup>th</sup> *Century Ins. Co. v. Garamendi*, 8 Cal.4th 216, 264 (1994).

18 Administrative regulations that “alter or amend the statute or enlarge or impair its scope are  
19 void ... and no protestation that they are merely an exercise of administrative discretion can sanctify  
20 them.” *Henning v. Div. of Occupational Saf. & Health*, 219 Cal.App.3d 747, 758-59 (1990). In  
21 addition, the agency “must confine itself to reasonable interpretation in adopting regulations for  
22 administration of its governing statute; if it goes beyond that, the legislative area has been invaded  
23 and the regulation counts for nought.” *County of Los Angeles v. State Dep’t of Public Health*, 158  
24 Cal. App. 2d 425, 437 (1958). “If the court concludes that the administrative action transgresses the  
25 agency’s statutory authority, it need not proceed to review the action for abuse of discretion; in such  
26 a case, there is simply no discretion to abuse.” *Ass’n for Retarded Citizens v. Dep’t of*  
*Developmental Servs.*, 38 Cal. 3d 384, 390 (1985).

27 As set forth below, the Commissioner has no authority to promulgate the Amended  
28 Regulations as the regulations conflict with Code §§ 1861.10 and 1861.05.

1           A.     **Amended Regulations Conflict with Code §§ 1861.10(a) and 1861.05 as Rate**  
2                     **Application Reviews cannot be “Proceedings”**

3           Under Code § 1861.10(a), in order to be eligible for an award of compensation, consumers  
4 must initiate or intervene in a “proceeding.” As noted, that statute states:

5                     “Any person may initiate or intervene in any *proceeding* permitted or established  
6 pursuant to this chapter, challenge any action of the commissioner under this article,  
and enforce any provision of this article.” (Emphasis added).

7           The Prior Regulations acknowledged that, within the meaning of Code § 1861.10(a), a proceeding  
8 in connection with a rate application is a rate hearing. The Amended Regulations have changed the  
9 definition of “Rate Proceeding,” however, to add a new concept – that the proceeding is  
10 “established upon the submission of a petition for hearing ...” **Exh. 4, at p. 3** (*Amended Regulation*  
11 § 2661.1(h)). In other words, a “proceeding” is automatically established by the mere filing of a  
12 petition for hearing even if the requested hearing is never granted. The Commissioner is, without  
13 clearly stating as much, making the *rate application review* a “proceeding” in which consumers are  
14 eligible for compensation. This is in conflict with Code § 1861.10, which does not contemplate that  
15 an informal rate application review is a proceeding which consumers can “initiate” or in which they  
16 can “intervene.”

16                     (1)     **The Plain Terms of Code § 1861.10(a) Indicate that an Application cannot**  
17                             **be a Proceeding**

18           In the Foundation’s Complaint in Intervention, the Foundation alleges that these  
19 amendments were necessary to bring the regulations into compliance with Code § 1861.10 because  
20 that statute places *no limits* on the ability of consumers to obtain compensation as long as they have  
21 “substantially contributed” to some decision of the Commissioner’s. *See Complaint in Intervention,*  
22 2:7-13. The Foundation believes that it is meaningful that Code § 1861.10(a) uses the term  
“proceeding” and not “hearing.” *See Complaint in Intervention,* 9:9-10.

23           Contrary to the Foundation’s assertion, there are clear limits placed on a consumer group’s  
24 ability to obtain compensation for participating in agency matters. First, regardless of whether there  
25 is any material difference between the terms “proceeding” and “hearing,” the plain meaning of  
26 “proceeding” itself denotes a more formal process than is afforded in the administrative review of  
27 an application. This interpretation is supported by subdivision (b) of Code § 1861.10, which states  
28 that the Commissioner may award reasonable “*advocacy* and *witness* fees and expenses” to a person  
who represents the interests of consumers and “substantially contributes to the adoption of *any*

1 **order, regulation or decision** by the commissioner or court.” (Emphasis added). The voters’  
2 choice of the terms advocacy, witness, order and decision all indicate that the “proceeding,” in  
3 which a consumer may intervene, is an adjudicatory process and is not intended to include the  
4 review of an application.

5 By the Foundation’s own description, its participation in the rate application review process  
6 amounts to “informal discussions with the Department and the applicant” and the submission of  
7 comments of the Foundation’s expert. *Complaint in Intervention*, 12:10-12. The Foundation claims  
8 that such informal discussions constitute a “proceeding” involving advocacy within the meaning of  
9 Code § 1861.10.

10 Another clear limitation under § 1861.10 is that a person seeking advocacy and witness fees  
11 must “initiate or intervene” in a “proceeding.” The Amended Regulations render this requirement a  
12 nullity by allowing for fees where a consumer group applies for, but does not in fact secure, a  
13 hearing. We note that the consumer group cannot claim to have *initiated* the rate application as  
14 such is only initiated by the insurer requesting the rate change. The consumer group also cannot be  
15 *intervening* in such rate application since, under the Amended Regulations, it never requests  
16 permission nor is granted leave to intervene in such application.

17 (2) **The Plain Terms of Code § 1861.05 Show that Consumer Participation in**  
18 **Rating Matters Must be through a Rate Hearing**

19 There is no need to guess at the voters’ intent with respect to how rate applications should be  
20 reviewed because the Department’s review of a rate application is expressly governed by Code §  
21 1861.05. Under § 1861.05(c), a rate application is *deemed approved* in 60 days *unless* a consumer  
22 requests a *hearing* within 45 days of public notice (or the Commissioner initiates a hearing on his  
23 own motion). The statute requires the Commissioner to notify the public of a rate application to  
24 give interested persons an opportunity to request such a hearing. Section 1861.05 clearly  
25 contemplates that the appropriate avenue for consumer participation on rating matters is a rate  
26 hearing.

27 (3) **California Case Law Supports the Conclusion that an Application cannot**  
28 **be a “Proceeding”**

None of the California cases cited by the Commissioner in support of the Amended  
Regulations, nor in the Foundation’s Complaint in Intervention, contradict the conclusion that a  
proceeding is a hearing. In fact, those cases further show that Proposition 103’s intent was only to

1 permit consumer groups to participate in rating matters through a *hearing*. In *Calfarm Ins. Co. v.*  
2 *Deukmejian*, 48 Cal.3d 805, 836 (1989), the court stated “[voters for Prop. 103] favored a measure  
3 that provided for public regulatory *hearings* with consumer participation.” (Emphasis added). In  
4 *State Farm Mut. Auto. Ins. Co. v. Garamendi*, 32 Cal.4<sup>th</sup> 1029, 1045 (2004), the court stated:

5 “... the drafters [of Proposition 103] established a *public hearing process* for  
6 reviewing insurance rate changes [citation omitted]. In doing so, the drafters sought  
7 to ‘enable consumers to permanently unite to fight against insurance abuse ...’  
8 [citation omitted]. ... our construction of [Code section 1861.07]<sup>8</sup> is wholly  
9 consistent with Proposition 103’s goal of fostering consumer participation in the  
10 rate-setting process.” (Emphasis added).

11 Similarly, in *Walker v. Allstate Indemnity Co.*, 77 Cal. App. 4th 750, 756 (2000), the court noted  
12 that under “[t]he statutory scheme enacted by the voters in Proposition 103 ... the *commissioner* is  
13 charged with setting rates after an extensive hearing process in which consumers and interested  
14 parties are encouraged to participate.” (Italics in original, underline added). *See also Economic*  
15 *Empowerment Foundation v. Quackenbush*, 57 Cal. App. 4<sup>th</sup> 677, 689 (1997)(discussed further  
16 below).

17 Finally, the conclusion that Code § 1861.10(a) permits consumer participation in a rate  
18 hearing (as opposed to a rate application) is supported by this Superior Court’s statements in the  
19 aforementioned *SCPIE* action. It is clear from both the judge’s written ruling and the comments  
20 during oral argument that the decision to deny compensation to the Foundation (because a hearing  
21 was not granted in that case and the Foundation was not a party to a proceeding) was based on the  
22 language of Code § 1861.10 itself. During oral arguments, this court stated that if the Foundation  
23 desires to be compensated for participation in informal discussions with the Department, then it  
24 should “go to the [Legislature] and have them change it [the law]. Have them *change the law and*  
25 *say that in these situations ... even if there’s no hearing ordered, you’re still entitled to fees* if  
26 such and such occurs.” (Emphasis added). *See Hearing Transcript (“H.T.”)* at 13:1-6.<sup>9</sup> The court  
27 did not say, that in order to receive compensation where there is no hearing, consumers could  
28 simply go to the Commissioner and have him change the regulations.

Also, when the Foundation argued to permit consumers to receive compensation for fees  
incurred prior to a hearing and the granting of intervenor party status, the court stated “you’re  
asking me to expand it [the statute] and to read stuff into it that isn’t there.” **Exh. 6** (*H.T.* at 13:1-

<sup>8</sup> Code section 1861.07 permits public inspection of rating information submitting to the Commissioner.

<sup>9</sup> A true and correct copy of the Hearing Transcript is attached hereto as **Exhibit 6**.

1 17). The Commissioner has chosen to forgo the required process of having the statutes amended,  
2 however, and has taken it upon himself to legislate the result desired by the Foundation. In doing  
3 so, he has done what this court refused to do in *SCPIE* – expanded the statute and read things into it  
4 that simply are not there.

5 **B. Amended Regulations Conflict with Code § 1861.10(b) because the Code**  
6 **requires a “Decision” on the Merits**

7 Code § 1861.10(b) places another clear limitation on the consumer’s right to compensation.  
8 That section states that consumers must “substantially contribute” to “an order, regulation or  
9 decision by the commissioner or a court” in order to receive compensation. That language has been  
10 interpreted by the court in *Economic Empowerment Foundation v. Quackenbush, supra*, 57 Cal.  
11 App. 4<sup>th</sup> at 689, as requiring a final decision “on the merits.” That court stated that rather than  
12 interpreting the words “order” or “decision” as meaning *any* order or decision along the way in a  
13 proceeding, the “more ‘sensible’ result would obtain if the words ‘order’ and ‘decision’ in section  
14 1861.10 are seen as referring only to *final orders or decisions on the merits.*” *Id.* (emphasis  
15 added; citation omitted).

16 No “decision” or “order” can reasonably result from informal discussions during the rate  
17 review process. The term “decision on the merits” clearly refers to a determination made after an  
18 adversarial proceeding commences in which each side is able to present arguments and evidence in  
19 support of its position. This does not occur in a rate application review in which consumers do not  
20 even have party status. Thus, a rate approval or disapproval made by the Department staff outside  
21 of a rate hearing is not a “decision on the merits” as required under *Economic Empowerment*  
22 *Foundation, supra.*

23 **C. Amended Regulations Conflict with Proposition 103, which Placed Specific**  
24 **Limits on Consumers’ Ability to Obtain Compensation**

25 In his Initial Statement of Reasons, the Commissioner states that the Amended Regulations  
26 are necessitated by Proposition 103. The Commissioner states:

27 “An insurer’s attempt to withdraw its application in order to avoid paying  
28 compensation defeats the purpose of the statutes. ... Denying compensation for  
advocacy performed by a petitioner prior to an insurer’s withdrawal of its application  
would thwart the statute’s plain language and its underlying purpose of encouraging  
consumers to enforce Proposition 103 ...”

These arguments were presented to and rejected by the Superior Court in the *SCPIE* action. **Exh. 5**  
( *Decision of the Court*, at p. 3). For example, the Decision of the Court notes that the

1 Commissioner and the Foundation argued that “the statute’s underlying purpose of encouraging  
2 consumers to enforce Proposition 103 would be thwarted by placing the determination of whether  
3 intervenors are compensated within the sole control of insurers” – *i.e.* by allowing insurers to avoid  
4 paying compensation by withdrawing their applications. Yet the court ruled that the Foundation  
5 was not entitled to compensation because there was no hearing. At the hearing, the court’s specific  
6 response to this argument was “What’s wrong with that [with the insurer controlling whether a  
hearing is held]? That’s part of our jurisprudence.” **Exh. 7** (*H.T.* at 11:14-19).

7 Furthermore, there is no public policy in Proposition 103 to encourage consumers to  
8 informally participate in agency matters. California cases, discussed above, only described  
9 Proposition 103 as encouraging consumer participation in *public hearings*.

10 In *State Farm Mut. Auto. Ins., supra*, 32 Cal.4<sup>th</sup> at 1045, the court noted that the stated  
11 purpose of Proposition 103 was to “ensure that insurance is fair, available, and affordable for all  
12 Californians.” The court further noted that “[t]o achieve this goal, the drafters established a public  
13 hearing process for reviewing insurance rate changes [citation omitted].” *Id.* at 1045. This  
14 language explains that encouraging consumer participation is not, in and of itself, an end goal of  
15 Proposition 103 such that any and all participation must be encouraged. Rather, consumer  
16 participation is a tool – one of many established by Proposition 103 – and is to be encouraged to the  
17 extent that it achieves the goal of fair and affordable insurance. As set forth below, restricting the  
18 ability of consumer groups to participate in the rating matter to the rate hearing is entirely consistent  
19 with this underlying goal.

20 The Amended Regulations ignore the proper role of the Department/Commissioner versus  
21 that of consumers in reviewing rate applications. The Commissioner is elected by the people of  
22 California to protect their interests in insurance. The Commissioner employs competent actuarial  
23 and rating staff experts whose sole function it is to monitor the insurance market in California.  
24 Consumer groups, on the other hand, do not represent the people of California at large. They are  
25 supported by member donations and, thus, only represent their membership. These facts evidence  
26 the need for the Commissioner to circumscribe consumer intervention in rate application reviews.

27 In light of the above, no public policy is violated by limiting consumer participation to  
28 formal rate hearings. To the contrary, such limitations are imbedded in the statutory scheme.  
Proposition 103, in enacting Code § 1861.10, placed inherent limits on a consumer group’s ability  
to require another person, such as the insurer, to pay the costs of its voluntary participation in a rate  
proceeding. Those limits are implemented by (1) providing that consumers may only intervene in a



1 “proceeding” in which “advocacy” and “witness” fees are incurred, and (2) requiring that the  
2 consumers substantially contributed to a “decision” or “order” made pursuant to that proceeding.  
3 Rather than respecting and giving meaning to these limits, the Commissioner has drafted  
4 regulations expressly intended to avoid them.

5 The Code recognizes that a balance must be struck between the desire to encourage  
6 consumer participation and the need to place a check against potential abuses of the system as well  
7 as the need for efficiency and clarity in the review process. When consumer groups are given broad  
8 authority to participate and seek compensation without being subject to any meaningful limitation,  
9 the Commissioner is not encouraging *legitimate* participation by consumers, but is only encouraging  
10 the filing of frivolous challenges by opportunistic persons.

11 While the Amended Regulations purport to avoid costly and time consuming rate hearings,  
12 they will actually add significantly to the cost and time associated with reviewing rate applications.  
13 The Amended Regulations will replace an informal process controlled by the Department with a  
14 much more adversarial process in which insurers will be required not only to respond to and  
15 negotiate with the Department staff, but with consumer groups.

16 Finally, the commissioner, consumers, insurers, and the general public will benefit from a  
17 clear line of demarcation establishing the time/date at which any consumer representative can  
18 become eligible for advocacy fees. The line existed in the prior regulations, which stated  
19 consumers must be granted permission to intervene in a rate hearing and substantially contribute to  
20 a decision or order in that proceeding. The Amended Regulations delete this requirement.

## 21 **5. CONCLUSION**

22 Based on the foregoing, Petitioners respectfully request that the court invalidate the  
23 Amended Regulations and enjoin the Respondents from enforcing the same.

24 RESPECTFULLY SUBMITTED,  
25  
26  
27  
28



1 Dated: October 1, 2007

BARGER & WOLEN LLP

2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

By: *Robert W. Hogesboom*  
ROBERT W. HOGESBOOM  
SUH CHOI  
MICHAEL A.S. NEWMAN  
Attorneys for Plaintiffs The Association  
of California Insurance Companies; The  
Personal Insurance Federation of  
California; The American Insurance  
Association; and The Pacific Association  
of Domestic Insurance Companies

# **EXHIBIT 1**

**INSource on the Web**

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS...TITLE 10. -- INVESTMENT...Chapter 5. -- Insurance Commissioner...Subchapter 4.9 -- RULES OF PRACTICE AND PROCEDURE FOR RATE PROCEEDINGS...Article 3. Definitions

**T. 10 s 2651.1****Definitions**

The following definitions shall apply to Subchapter 4.9.

(a) " Administrative Hearing Bureau " means that office within the office of the Commissioner at 45 Fremont Street, 22nd Floor, San Francisco, CA 94105 and, except where otherwise specified in this subchapter, designated for receipt of all pleadings filed pursuant to this subchapter.

(b) " Applicant " means the insurer presenting, on the form prescribed by the Commissioner and specified in section 2648.4, an application to change any rate pursuant to California Insurance Code section 1861.05(b).

(c) " Application " means the form prescribed by the Commissioner and specified in section 2648.4, together with all supporting information included with that form, which every insurer seeking to change any rate pursuant to California Insurance Code section 1861.05(b) must provide.

(d) " Day ", unless otherwise specified in these regulations, means a calendar day. " Business days " include all days except Saturdays, Sundays, and any holiday set forth in California Government Code section 6700.

The time within which any pleading may be filed or served shall exclude the first day and include the last day; however, when the last day falls on a Saturday, Sunday or holiday the time computation shall exclude that day and include the next business day.

(e) " Filing " means the act of delivery of a paper pleading to the Administrative Hearing Bureau. An original and four copies of each pleading shall be filed with the Administrative Hearing Bureau. A specific pleading may be filed by facsimile or electronic transmission only when authorized by the administrative law judge.

(f) " Party " means the insurer whose rates are the subject of the proceeding, any person whose petition to intervene in the proceeding has been granted pursuant to section 2661.3(g), and the Department.

(g) " Pleading " means any petition, notice of hearing, notice of defense, answer, motion, request, response, brief, or other formal document filed with the Administrative Hearing Bureau pursuant to this subchapter. The original of each pleading shall be signed by each party or the party's attorney or representative.

(h) " Proceeding " means any action conducted pursuant to Article 10 of Chapter 9 of Part 2 of Division 1 of the California Insurance Code, entitled "Reduction and Control of Insurance Rates, including a rate proceeding established upon the submission of a petition for hearing pursuant to California Insurance Code section 1861.05 and section 2653.1 of this subchapter.

(i) " Service " means to provide a copy of a pleading to every other party in the proceeding in conformity with California Code of Civil Procedure sections 1011 and 1013. When a party files a pleading, the party shall concurrently serve that pleading on all other parties in the proceeding.

All filed pleadings shall be accompanied by an original declaration of service in conformity with California Code of

Civil Procedure sections 1011 and 1013. All served pleadings shall be accompanied by a copy of the declaration of service. An employee of a party may sign a declaration of service.

A specific pleading may be served by facsimile or electronic transmission when authorized by the receiving party.

A sample declaration of service form can be found in section 2623.9.

(j) " Settlement " means an agreement among some or all of the parties to a proceeding on a mutually acceptable outcome to the proceeding.

(k) " Stipulation " means an agreement among some or all of the parties to a proceeding on the resolution of any issue of fact or the applicability of any provision of law material to the proceeding.

(l) " Submit " means the act of delivery of a pleading to the Rate Enforcement Bureau.

Authority - Sections 1861.05 and 1861.055, Insurance Code, CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805, 824 (1989), 20th Century Insurance Company v. John Garamendi, 8 Cal.4th 216, 281, 32 Cal.Rptr.2d 807, 847 (1994).  
Reference: Sections 1861.05(c), 1861.055 and 1861.08, Insurance Code, CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805 (1989), 20th Century Insurance Company v. John Garamendi, 8 Cal.4th 216, 281, 32 Cal.Rptr.2d 807, 847 (1994).

©2007 CCH INCORPORATED A WoltersKluwer Company

\*\*\*\*\* END DOCUMENT \*\*\*\*\*

**INSource on the Web**

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS...TITLE 10. -- INVESTMENT...Chapter 5. -- Insurance Commissioner...Subchapter 4.9 -- RULES OF PRACTICE AND PROCEDURE FOR RATE PROCEEDINGS...Article 13. Intervention

**T. 10 s 2661.1****Definitions**

**Former Citations** T. 10 s 2616.1

The following definitions shall apply to Articles 13 and 14 of this subchapter.

- (a) " Advocacy Fees " means costs, incurred or billed, by a party for the services of an advocate in the proceeding. An advocate need not be an attorney. Advocacy fees shall not exceed market rates as defined in this section.
- (b) " Compensation " means payment for all or part of advocacy fees, witness fees, and other expenses of participation and intervention in any rate hearing or proceeding other than a rate hearing.
- (c) " Market Rate " means, with respect to advocacy and witness fees, the prevailing rate for comparable services in the private sector in the Los Angeles and San Francisco Bay Areas at the time of the Commissioner's decision awarding compensation for attorney advocates, non-attorney advocates, or experts with similar experience, skill and ability. Billing rates shall not exceed the market rate.
- (d) " Other Expenses " means reasonable, actual out-of-pocket costs of an intervenor or petitioner . Out-of-pocket costs include but are not limited to expenses such as travel costs, transcript charges, postage charges, overnight delivery charges, telephone charges and copying expenses. Out-of-pocket costs also include the costs incurred in preparing a request or amended request for award, defined in sections 2662.3 and 2662.4. The intervenor or petitioner has the burden of substantiating any costs incurred, including providing supporting documentation as requested by the Public Advisor.
- (e) "Proceeding" includes those proceedings set forth in Insurance Code Section 1861.10(a).
- (f) " Proceeding Other Than a Rate Proceeding " means any proceeding, including those described in subdivision (e) above, conducted pursuant to Chapter 9 of Part 2 of Division 1 of the Insurance Code which is not a rate proceeding as defined in this section.
- (g) " Public Advisor " means that official of the Department of Insurance who monitors and assists participation by members of the public in the Department of Insurance's proceedings. The Public Advisor shall not represent any member of the public and shall not advocate any substantive position on behalf of the public on any issues before the Commissioner.
- (h) " Rate Proceeding " means any proceeding conducted pursuant to Insurance Code Sections 1861.01 and 1861.05. For purposes of section 1861.05, a "rate proceeding" is established upon the submission of a petition for hearing in accordance with section 2653.1 of this subchapter, or if no petition for hearing is filed, upon notice of hearing.
- (i) " Rate Hearing " means a hearing noticed by the Commissioner on his own motion or in response to a petition for hearing pursuant to Insurance Code section 1861.05, which is conducted pursuant to the applicable procedural requirements of Insurance Code section 1861.08, and subchapters 4.8 and 4.9 of this chapter.

(j) " Represents the Interests of Consumers " means that the intervenor represents the interests of individual insurance consumer[s], or the intervenor is a group organized for the purpose of consumer protection as demonstrated by, but is not limited to, a history of representing consumers in administrative, legislative or judicial proceedings.

A party which represents, in whole or in part, any entity regulated by the Commissioner shall not be eligible for compensation. However, nothing in this subsection shall be construed to prohibit any person from intervening or participating if that person is not seeking compensation.

(k) " Substantial Contribution " means that the intervenor substantially contributed, as a whole, to a decision, order, regulation, or other action of the Commissioner by presenting relevant issues, evidence, or arguments which were separate and distinct from those emphasized by the Department of Insurance staff or any other party, such that the intervenor's participation resulted in more relevant, credible, and non-frivolous information being available for the Commissioner to make his or her decision than would have been available to a Commissioner had the intervenor not participated. A substantial contribution may be demonstrated without regard to whether a petition for hearing is granted or denied.

(l) " Witness Fees " means recorded or billed costs for a witness, together with associated expenses. Costs and expenses for a witness shall not exceed market rate as defined in this section.

Authority - Section 1861.10, Insurance Code; and CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805, 824 (1989), 20th Century Insurance Company v. John Garamendi, 8 Cal.4th 216, 281, 32 Cal. Rptr. 2d 807, 847 (1994). Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code; and CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805 (1989), 20th Century Insurance Company et al. v. John Garamendi 8 Cal. 4th 216, 32 Cal. Rptr. 2d 807 (1994).

©2007 CCH INCORPORATED A WoltersKluwer Company

\*\*\*\*\* END DOCUMENT \*\*\*\*\*

**INSource on the Web**

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS...TITLE 10. -- INVESTMENT...Chapter 5. -- Insurance Commissioner...Subchapter 4.9 -- RULES OF PRACTICE AND PROCEDURE FOR RATE PROCEEDINGS...Article 13. Intervention

**T. 10 s 2661.2**

**Intervention of right**

Any person shall be permitted to intervene in any proceeding on any rate application or in any proceeding subject to Chapter 9 of Part 2 of Division 1 of the California Insurance Code if the issues to be raised by the intervenor or participant are relevant to the issues of the proceeding. A person desiring to intervene or participate in any proceeding shall use the forms set forth in sections 2623.1 through 2623.9 of this subchapter.

Authority - Section 1861.10, Insurance Code. Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code.

©2007 CCH INCORPORATED A WoltersKluwer Company

\*\*\*\*\* END DOCUMENT \*\*\*\*\*

**INSource on the Web**

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS...TITLE 10. -- INVESTMENT...Chapter 5. -- Insurance Commissioner...Subchapter 4.9 -- RULES OF PRACTICE AND PROCEDURE FOR RATE PROCEEDINGS...Article 13. Intervention

**T. 10 s 2661.3****Procedure for intervention in a rate or class plan proceeding**

(a) A person desiring to intervene and become a party to a rate or class plan proceeding shall file a petition to intervene which shall be drafted in compliance with sections 2652.1 — 2652.4 of this subchapter. A person who petitions for a hearing may combine a petition to intervene with a petition for hearing in one pleading.

(b) The Petition shall cite the law authorizing the proposed intervention and shall contain the petitioner's interest in the proceeding, the specific issues to be raised and the positions to be taken on each issue to the extent then known, and the name, address, and telephone number of the petitioner. The verified petition shall include a statement that the intervenor or advocate will be able to attend and participate in the proceeding without delaying the proceeding or any other proceedings before the Commissioner.

(c) The Petition shall also state whether the petitioner intends to seek compensation in the proceeding, and, if so, contain an itemized estimated budget for the participation in the proceeding, which shall set forth the following:

(1) separate listings of the rates for each attorney advocate or non-attorney advocate, including:

(A) the names of each attorney advocate or non-attorney advocate,

(B) the rates to be claimed for each attorney advocate or non-attorney advocate,

(C) a description of the work to be performed by each attorney advocate or non-attorney advocate, an estimate of the time to be spent to perform that work and the rates, fees and costs associated with that work; and,

(2) separate listings of the rates for each witness, including:

(A) the names of each witness and their areas of expertise,

(B) the rates to be claimed for each witness,

(C) a description of the work to be performed by each witness, an estimate of the time to be spent to perform that work and the rates, fees and costs associated with that work;

Rates contained in the estimated budget shall not exceed market rates. Submission of the budget shall not guarantee the payment of the dollar amounts set forth in the budget. The lack of objection to any item in the budget shall not imply approval of the budget.

(d) An amended budget shall be submitted as soon as possible when the intervenor learns that the total estimated budget amount increases by \$10,000 or more.

(e) A Petition to Intervene in a rate or class plan proceeding may be submitted to the Rate Enforcement Bureau concurrently with a petition for hearing submitted pursuant to section 2653.1 of this subchapter or filed with the Administrative Hearing Bureau after a hearing is granted, and shall be considered an "additional pleading" within

the meaning of Government Code Section 11507.6. A copy of the Petition to Intervene shall be served on the Public Advisor and all of the parties to the proceeding. A Petition to Participate shall be submitted to the contact person for the proceeding, and served on the Public Advisor.

(f) Within five (5) days after filing of the Petition to Intervene, any other party may file a response to the Petition to Intervene. Any party claiming that the petitioner does not represent the interests of consumers shall so state in the response, which shall include any supporting documentation. The petitioner may reply to any allegation in the response and may reply to the allegation that it does not represent the interests of consumers within three (3) days of filing of the response.

(g) If a person who petitions for a hearing meets the requirements of this section, represents the interests of consumers and is otherwise eligible to seek compensation in proceedings before the Department pursuant to Insurance Code section 1861.10(b) and section 2662.2 of this subchapter, that person's Petition to Intervene shall be granted within fifteen (15) days of its submission. If a petition for a hearing is granted, the administrative law judge shall rule on any Petition to Intervene subsequently filed by any person within 20 days of its filing with the Administrative Hearing Bureau.

(h) No person whose petition has been granted shall be permitted to reopen matters decided before the petition is granted without a showing of good cause.

Authority - Section 1861.10, Insurance Code; and CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805, 824 (1989), 20th Century Insurance Company v. John Garamendi, 8 Cal.4th 216, 281, 32 Cal. Rptr. 2d 807, 847 (1994). Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code; and CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805 (1989), 20th Century Insurance Company et al. v. John Garamendi 8 Cal. 4th 216, 32 Cal. Rptr. 2d 807 (1994).

©2007 CCH INCORPORATED A WoltersKluwer Company

\*\*\*\*\* END DOCUMENT \*\*\*\*\*

**INSource on the Web**

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS...TITLE 10. -- INVESTMENT...Chapter 5. -- Insurance Commissioner...Subchapter 4.9 -- RULES OF PRACTICE AND PROCEDURE FOR RATE PROCEEDINGS...Article 13. Intervention

**T. 10 s 2661.4**

**Procedure for participation in a proceeding other than a rate hearing**

(a) A person desiring to participate in a proceeding other than a rate hearing shall file a petition to participate which shall be drafted in compliance with sections 2652.1-2652.4 and 2661.3(b) through (e) of this subchapter. The petition to participate shall be provided to the contact person for the proceeding.

(b) A ruling on a Petition to Participate shall be made within 15 days of its submission to the contact person for the proceeding.

(c) No person whose petition has been granted shall be permitted to reopen matters decided before the petition is granted without a showing of good cause.

(d) Nothing in this section shall be construed to prohibit any person from providing relevant comments in a proceeding other than a rate hearing if that person is not seeking compensation.



Authority - Section 1861.10, Insurance Code. Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code.

©2007 CCH INCORPORATED A WoltersKluwer Company

\*\*\*\*\* END DOCUMENT \*\*\*\*\*

**INSource on the Web**

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS...TITLE 10. -- INVESTMENT...Chapter 5. -- Insurance Commissioner...Subchapter 4.9 -- RULES OF PRACTICE AND PROCEDURE FOR RATE PROCEEDINGS...Article 14. Intervenor's and Participant's Fees and Expenses

**T. 10 s 2662.1**

**Purpose**

The purpose of this Article is to establish procedures for awarding advocacy fees, witness fees and other expenses to petitioners, intervenors and participants in proceedings, including proceedings other than rate proceedings, before the Insurance Commissioner in accordance with Section 1861.10(b) of the Insurance Code.

The definitions set forth in section 2666.1 apply to Article 14 of this subchapter.

Authority - Section 1861.10, Insurance Code; and CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805, 824 (1989), 20th Century Insurance Company v. John Garamendi, 8 Cal.4th 216, 281, 32 Cal. Rptr. 2d 807, 847 (1994). Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code; and CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805 (1989), 20th Century Insurance Company et al. v. John Garamendi 8 Cal. 4th 216, 32 Cal. Rptr. 2d 807 (1994).

©2007 CCH INCORPORATED A WoltersKluwer Company

\*\*\*\*\* END DOCUMENT \*\*\*\*\*

**INSource on the Web**

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS...TITLE 10. -- INVESTMENT...Chapter 5. -- Insurance Commissioner...Subchapter 4.9 -- RULES OF PRACTICE AND PROCEDURE FOR RATE PROCEEDINGS...Article 14. Intervenor's and Participant's Fees and Expenses

**T. 10 s 2662.2**

**Request for finding of eligibility; time; contents; effective for two years**

(a) A person or group representing the interests of consumers may provide to the Public Advisor a request for finding of eligibility to seek compensation. The request shall be verified and may be verified by the intervenor's or participant's attorney and shall be submitted, at any time, in conjunction with an ongoing proceeding in which the individual or organization seeks to intervene. The request shall comply with sections 2652.1-2652.4 of this subchapter and shall include:

- (1) a showing by the intervenor or participant that it represents the interests of consumers, including a description

of the previous work of the intervenor or participant; and,

(2) in the case of groups representing the interests of consumers, the request shall include a copy of the group's articles of incorporation, bylaws, or other organizational documents, information about its membership structure, composition of the group's current Board of Directors — including the name and address of each director and/or the name and address of the principals of the group if it is not a corporation, and newsletter circulation, if any, along with a description of the previous work of the consumer group. In order to allow a determination whether the group actually does represent the interests of consumers, the request shall list the group's funding sources for the prior twenty-four (24) months. The petition shall also include as an exhibit all newsletters and/or any other publications issued by the intervenor in California during the previous twelve (12) months, including any annual or year-end report for the prior year. The request shall indicate whether or not the group has been granted nonprofit status under Internal Revenue Code Section 501(c).

The Public Advisor may require additional information regarding the request at any time, but not more than twice during any one calendar year from a given intervenor or participant.

(b) Within 10 days of receipt of a request for finding of eligibility to seek compensation, the Public Advisor shall review the request for completeness. If the request includes all of the information required by subdivision (a) above, it is complete. If the Public Advisor determines that the request is not complete because it does not include all of the information required by subdivision (a), notice stating the grounds for incompleteness will be given to the person or group who submitted the request within the 10 day period and the request will be rejected.

(c) The Commissioner shall rule on the request for a finding of eligibility to seek compensation not later than 15 days from the receipt of a complete request.

(d) A Finding of Eligibility to Seek Compensation shall be valid in any proceeding in which the participant's or intervenor's participation commences within two years of the Finding of Eligibility so long as the intervenor or participant still meets the requirements of subdivision (a). A Finding of Eligibility to Seek Compensation in no way ensures compensation.

(e) Nothing in the Finding of Eligibility shall prohibit or limit any person or group from making any presentation or advocating any position which is otherwise admissible.

Authority - Section 1861.10, Insurance Code. Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code.

©2007 CCH INCORPORATED A WoltersKluwer Company

\*\*\*\*\* END DOCUMENT \*\*\*\*\*

**INSource on the Web**

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS...TITLE 10. -- INVESTMENT...Chapter 5. -- Insurance Commissioner...Subchapter 4.9 -- RULES OF PRACTICE AND PROCEDURE FOR RATE PROCEEDINGS...Article 14. Intervenor's and Participant's Fees and Expenses

**T. 10 s 2662.3**

**Request for award**

(a) A petitioner, intervenor or participant whose Petition to Intervene or Participate has been granted and who has been found eligible to seek compensation may submit to the Public Advisor, within 30 days after the service of the

order, decision, regulation or other action of the Commissioner in the proceeding for which intervention was sought, or at the requesting petitioner's, intervenor's or participant's option, within 30 days after the conclusion of the entire proceeding, a request for an award of compensation. A petitioner, intervenor or participant requesting that any award ordered be made payable to a specific person or entity, other than the petitioner, intervenor or participant, that represented or advocated on behalf of the intervenor or participant during the proceeding shall include verified authorization to that effect in the request.

(b) The request shall be verified and shall be in compliance with sections 2652.1-2652.4 of this subchapter and shall include, at a minimum:

(1) a detailed description of services and expenditures;

(2) legible time and/or billing records, created as soon as possible after the work was performed, which show the date and the exact amount of time spent on each specific task; and

(3) a description of the petitioner's, intervenor's or participant's substantial contribution citing to the record, including, but not limited to, documents such as: declarations by advocates and/or witnesses, written or oral comments of the petitioner or intervenor or its witnesses regarding a rate application provided to the Department, correspondence with the parties, stipulations or settlement agreements regarding the outcome or material issues in the proceeding, and decision or order by the Department or Commissioner concerning a petition for hearing or rate or class plan application issued without a formal hearing, transcripts, proposed decisions of the Administrative Law Judge and orders demonstrating that a substantial contribution was made for the purpose of complying with section 2661.1(j). Notwithstanding section 2656.4, any confidential correspondence, documents, or declarations referencing confidential information, including but not limited to confidential settlement communications, may be submitted to the Public Advisor with a request for an award of compensation. Any such confidential material submitted to the Public Advisor will retain its confidential status. Nothing in this subsection shall require disclosure of privileged information.

The phrase "exact amount of time spent" as used in this subdivision refers either to five (5) minute or tenth (10th) of an hour increments.

(c) While parties may stipulate to a person's status as an intervenor who is eligible to seek compensation, nothing herein is intended to allow parties to enter into a stipulation regarding whether a person has made a substantial contribution for the purpose of complying with section 2661 of this subchapter.

(d) The phrase "each specific task," as used in this subdivision refers to activities including, but is not limited to: (A) telephone calls or meetings/conferences, identifying the parties participating in the telephone call, meeting or conference and the subject matter discussed; (B) legal pleadings or research, identifying the pleading or research and the subject matter; (C) letters, correspondence or memoranda, identifying the parties and the subject matter; and, (D) attendance at hearings, specifying when the hearing occurred, the subject matter of the hearing and the names of witnesses who appeared at the hearing, if any.

(e) Within 15 days after service of the request, any other party may submit a response to the request. The response shall be submitted to the Public Advisor and a copy shall also be provided to all parties to the proceeding. The intervenor or participant may reply to any such response within 15 days after service of the response. The reply shall be submitted to the Public Advisor and a copy shall also be provided to all parties to the proceeding.

(f) The Public Advisor shall require an audit and/or may inspect the books and records of the intervenor or participant to the extent necessary to verify the basis for the award.

The Public Advisor shall maintain the confidentiality of the intervenor's books and records to the extent allowed by law.

(g) Any party questioning the market rate or reasonableness of any amount set forth in the request shall, at the

time of questioning the market rate or reasonableness of that amount, provide a statement setting forth the fees, rates, and costs it expects to expend in the proceeding.

Authority - Section 1861.10, Insurance Code; and CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805, 824 (1989), 20th Century Insurance Company v. John Garamendi, 8 Cal.4th 216, 281, 32 Cal. Rptr. 2d 807, 847 (1994). Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code; and CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805 (1989), 20th Century Insurance Company et al. v. John Garamendi 8 Cal. 4th 216, 32 Cal. Rptr. 2d 807 (1994).

©2007 CCH INCORPORATED A WoltersKluwer Company

\*\*\*\*\* END DOCUMENT \*\*\*\*\*

**INSource on the Web**

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS...TITLE 10. -- INVESTMENT...Chapter 5. -- Insurance Commissioner...Subchapter 4.9 -- RULES OF PRACTICE AND PROCEDURE FOR RATE PROCEEDINGS...Article 14. Intervenor's and Participant's Fees and Expenses

**T. 10 s 2662.4**

**Amended request for award**

An intervenor or participant may submit amended requests for an award whenever it incurs additional fees or costs subsequent to the submission of a previous request for award. Any amended request shall meet the requirements of Section 2662.3 of this subchapter. Responses to an amended request, if any, shall meet the requirements of section 2662.3.

Authority - Section 1861.10, Insurance Code. Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code.

©2007 CCH INCORPORATED A WoltersKluwer Company

\*\*\*\*\* END DOCUMENT \*\*\*\*\*

**INSource on the Web**

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS...TITLE 10. -- INVESTMENT...Chapter 5. -- Insurance Commissioner...Subchapter 4.9 -- RULES OF PRACTICE AND PROCEDURE FOR RATE PROCEEDINGS...Article 14. Intervenor's and Participant's Fees and Expenses

**T. 10 s 2662.5**

**Requirements for awards**

(a) Subject to subdivision (b) herein, advocacy fees, witness fees, and other expenses of participation in a proceeding shall be awarded to any petitioner, intervenor or participant who complies with section 2662.3 and satisfies both of the following requirements:

- (1) The petitioner, intervenor or participant's presentation makes a substantial contribution as evidenced by

specific citations to the petitioner's, intervenor's or participant's direct testimony, cross-examination, legal arguments, briefs, motions, discovery, declarations by advocates and/or witnesses, written or oral comments of the intervenor or its witnesses regarding a rate application provided to the Department, correspondence with the parties, stipulations or settlement agreements, and decision or order by the Department or the Commissioner on a petition for hearing or rate or class plan application issued without a formal hearing, or any other appropriate evidence; and,

(2) The petitioner, intervenor or participant represents the interests of consumers.

(b) To the extent the substantial contribution claimed by a petitioner, intervenor or participant duplicates the substantial contribution of another party to the proceeding and was not authorized in the ruling on the Petition to Intervene or Participate, the petitioner's, intervenor's or participant's compensation may be reduced. Participation by the Department of Insurance staff does not preclude an award of compensation, so long as the petitioner's, intervenor's, or participant's substantial contribution to the proceeding does not merely duplicate the participation by the Department of Insurance's staff. In assessing whether there was duplication, the Commissioner will consider whether or not the petitioner, intervenor or participant presented relevant issues, evidence, or arguments which were separate and distinct from those presented by any party or the Department of Insurance staff.

Authority - Section 1861.10, Insurance Code; and CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805, 824 (1989), 20th Century Insurance Company v. John Garamendi, 8 Cal.4th 216, 281, 32 Cal. Rptr. 2d 807, 847 (1994). Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code; and CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805 (1989), 20th Century Insurance Company et al. v. John Garamendi 8 Cal. 4th 216, 32 Cal. Rptr. 2d 807 (1994).

©2007 CCH INCORPORATED A WoltersKluwer Company

\*\*\*\*\* END DOCUMENT \*\*\*\*\*

**INSource on the Web**

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS...TITLE 10. -- INVESTMENT...Chapter 5. -- Insurance Commissioner...Subchapter 4.9 -- RULES OF PRACTICE AND PROCEDURE FOR RATE PROCEEDINGS...Article 14. Intervenor's and Participant's Fees and Expenses

**T. 10 s 2662.6**

**Decision awarding compensation; allowance of award**

(a) In a written decision, the Commissioner shall determine whether or not the intervenor or participant has made a substantial contribution. The decision shall be issued within 90 days of receipt of all information required by Section 2662.3.

(b) If the Commissioner determines that the intervenor or participant has made a substantial contribution, the Commissioner shall set forth this substantial contribution and shall set forth the amount of compensation to be paid. The compensation awarded shall equal the market rate of the services provided.

(c) The Commissioner's decision shall be served on all parties to the proceeding.

(d) Any award paid by an applicant pursuant to this Article shall be allowed by the Insurance Commissioner as an expense for the purpose of establishing rates of the applicant as a dollar-for-dollar adjustment to rates approved by the Insurance Commissioner immediately on the determination of the amount of the award, so that the amount of the award shall be fully recovered within two years from the date of the award.

Authority - Section 1861.10, Insurance Code. Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code.

©2007 CCH INCORPORATED A WoltersKluwer Company

\*\*\*\*\* END DOCUMENT \*\*\*\*\*

**INSource on the Web**

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS...TITLE 10. -- INVESTMENT...Chapter 5. -- Insurance Commissioner...Subchapter 4.9 -- RULES OF PRACTICE AND PROCEDURE FOR RATE PROCEEDINGS...Article 14. Intervenor's and Participant's Fees and Expenses

**T. 10 s 2662.7**

**Time for payment**

(a) Any award payable by an applicant shall be paid within 30 days of the decision awarding compensation. If an insurance company fails to pay an award within 30 days, the insurance company shall also pay interest on the amount awarded, at the legal rate, until the date on which the award is paid.

(b) For the purpose of this section, the phrase " within 30 days " shall mean within 30 days after the Insurance Commissioner issues a decision awarding compensation, unless the insurance company submits a timely petition for reconsideration or judicial challenge of the decision or any part for which compensation is sought by the intervenor, in which case no payment shall be required until 30 days after a decision on reconsideration or judicial challenge.

Authority - Section 1861.10, Insurance Code. Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code.

©2007 CCH INCORPORATED A WoltersKluwer Company

\*\*\*\*\* END DOCUMENT \*\*\*\*\*

**INSource on the Web**

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS...TITLE 10. -- INVESTMENT...Chapter 5. -- Insurance Commissioner...Subchapter 4.9 -- RULES OF PRACTICE AND PROCEDURE FOR RATE PROCEEDINGS...Article 14. Intervenor's and Participant's Fees and Expenses

**T. 10 s 2662.8**

**Securing payment**

The Commissioner shall make every reasonable effort to secure payment of award, including cooperating with other agencies of the state.

Authority - Section 1861.10, Insurance Code. Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code.

# **EXHIBIT 2**

**STATE OF CALIFORNIA  
DEPARTMENT OF INSURANCE  
300 Capitol Mall, 16<sup>th</sup> Floor  
Sacramento, California 95814**

**RH06092874**

**September 22, 2006**

**INITIAL STATEMENT OF REASONS**

California Insurance Commissioner John Garamendi will consider adoption of Section 2653.6 and amendment of Sections 2651.1, 2661.1, 2661.3, 2662.1, 2662.3, and 2662.5 of Subchapter 4.9, Title 10, of the California Code of Regulations.

**SPECIFIC PURPOSE OF THE REGULATION**

Proposition 103, approved by California voters in 1988, established the requirement that all property-casualty insurers obtain the prior approval of the Insurance Commissioner for proposed rate changes. (Insurance Code §1861.05). Proposition 103 permits consumer participation in the approval process. (Insurance Code §1861.10(a)). It further requires the Commissioner to award reasonable advocacy and witness fees to a consumer when the consumer makes a "substantial contribution" to the adoption of any order, regulation, or decision by the Commissioner or a court. (Insurance Code §1861.10(b)).

As required by Insurance Code §1861.055, the Department has promulgated regulations under Title 10, Chapter 5 of the Code of Regulations (CCR) governing the prior approval process, including regulations governing consumer participation. The Department wishes to amend Subchapter 4.9 (Rules of Practice and Procedure for Rate Proceedings) to clarify that consumers, who participate in the approval process after having filed a petition for a hearing, may seek an award of reasonable advocacy fees.

**NECESSITY**

The Commissioner has determined that amendment of certain regulations in Subchapter 4.9 is necessary in order to properly implement the requirements, purposes and intent of the statutes. Specifically, the regulations must be amended to make clear that advocacy performed by a consumer representative (whether a "petitioner," "intervenor," or "participant") prior to a decision by the Commissioner to grant or deny a petition for hearing pursuant to Section 1861.05(c) is to be compensated so long as a consumer has made a "substantial contribution" to a decision or order ending the proceeding.

As noted above, section 1861.05(a) authorizes consumers and their representatives to request a hearing to, among other things, review applications for rate changes, or to review a rate presently in effect. Subdivision 1861.05(c) specifies that upon a timely request, a hearing must be granted when the challenged rate application seeks an adjustment in rates for personal lines (for example, private passenger automobile and homeowners multi-peril insurance) that exceeds 7%, and for an adjustment that exceeds 15% for commercial lines. It is within the Commissioner's



discretion whether to grant requests for hearings on applications for changes of less than 7% and 15% respectively.

It has been the Department's practice to encourage consumer representatives and applicants to resolve rate challenges informally so as to avoid engaging in lengthy formal hearings that benefit no one. Often during negotiations, insurers seek to withdraw their rate applications. In some instances, applicants have withdrawn their applications after a petition for a hearing has been filed and after the petitioner has expended substantial time and effort advocating its position through its advocates and experts. In these instances, the result of the informal process has been either no rate change, or a substantial alteration in the rate ultimately approved by the Commissioner. Such results benefit the public without the necessity of conducting a formal hearing.

In several of these instances, either the challenge was settled by the parties or the case was dismissed as moot when the applicant chose to withdraw rather than proceed with its application and potentially be subject to a hearing. After extensive and careful consideration, the Commissioner determined that the petitioner made a "substantial contribution" to his decision concerning the rate applications even though no hearing was held. Recently, several insurers have objected to the Commissioner's authority to award compensation to petitioners who make a substantial contribution in these circumstances. Responding to certain insurer's arguments, the Commissioner found and determined in awarding fees that

"With respect to the construction of CIC 1861.10, the Commissioner has determined that in fairness to consumers who desire to participate in the public ratemaking process as provided for by Proposition 103, and in furtherance of the purposes of Proposition 103, that a "proceeding" has been "initiated," within the meaning of CIC 1861.10(a) once a Petition for Hearing has been filed pursuant to CCR section 2661.2 and 2661.3(a)."

Despite the statutory requirement of Proposition 103 that the Commissioner *shall* award compensation to any person representing the interests of consumers who make a substantial contribution to his orders of decision, a Superior Court recently ruled that the Commissioner was not authorized to award a petitioner a fee award. Without agreeing with the reasoning and analysis of the Superior Court in that instance, the Commissioner believes that the intervenor regulations should be amended to reflect the fact that once a petition for hearing has been filed, a proceeding has been established and that an insurer may not thereafter withdraw its rate application without approval of the Commissioner. Consumer representatives who make a substantial contribution to the outcome of that proceeding are entitled to compensation for their work, even if the proceeding concludes without a hearing.

The Commissioner believes that the proposed adoption and amendments are not only authorized by, but also necessitated by Proposition 103. Section 1861.10(b) contains only two prerequisites: (1) that the person seeking advocacy and witness fees "represents the interests of consumers"; and (2) that the person has "made a substantial contribution to the adoption of any order, regulation, or decision by the commissioner or a court." (Insurance Code §1861.10(b).) Subsection (b) further provides that "where advocacy occurs in response to a rate application, the award shall be paid by the applicant." (*Ibid.*) When these two statutory conditions are met, the Commissioner "shall award reasonable advocacy and witness fees and expenses." (*Ibid.*)

The Commissioner's view is that the statute plainly mandates that "any person" who "represents the interests of consumers" and who "made a substantial contribution to the adoption of any order, regulation, or decision by the commissioner" is entitled to an award of compensation for reasonable advocacy fees and expenses. An insurer's attempt to withdraw its application in order to avoid paying compensation defeats the purpose of the statutes. Therefore, the Commissioner proposes to adopt a regulation, allowing insurers, in some circumstances, to withdraw rate applications following the filing of a petition by a consumer. The Commissioner's order allowing an insurer to withdraw its application clearly constitutes an "order" or "decision" within the meaning of Section 1861.10(b).

Denying compensation for advocacy performed by a petitioner prior to an insurer's withdrawal of its application would thwart the statute's plain language and its underlying purpose of encouraging consumers to enforce Proposition 103, and disrupt the framework of public participation established by the Department through its regulations, in the following ways:

- It would discourage consumer representatives from challenging rate applications if the consumer representatives faced the risk that its substantial investigation and participation in the informal review process might result in no compensation, even if the outcome was the very outcome sought by the consumer representative. Without the potential for an award of compensation, few if any consumer representatives would be able to afford the resource expenditures needed to participate in a professional manner in the review of such applications.
- Conversely, if the only way to obtain compensation would be to insist upon a hearing – where a hearing is mandatory – consumer representatives will eschew the informal process. This would discourage efficient resolution of challenges.
- It could effectively place the determination of whether intervenors are compensated within the sole control of an insurer, who may unilaterally withdraw, rather than with the Commissioner.

In summary, the Commissioner believes that, as the voters intended, the scrutiny of consumer representatives is an important tool to ensure that applicants comply with the statutory and regulatory prohibition on "excessive, inadequate, and unfairly discriminatory" rates, or rates that otherwise violate the law, and that if consumer representatives are denied the ability to seek compensation when they make a substantial contribution in pre-hearing proceedings, such scrutiny would be discouraged and curtailed.

Such a result contravenes the public policy underlying section 1861.10 and analogous intervenor compensation statutes of encouraging consumer participation in administrative and court proceedings, and thereby aiding regulators and courts in their decisions. (See *Calfarm Ins. Co. v. Deukmaejian* (1989) 48 Cal.3d 805, 836 [voters for Prop. 103 "favored a measure that provides for public regulatory hearings with consumer participation"]; *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4<sup>th</sup> 677, 686 [courts "should seek an interpretation of the statute which best facilitates compensation"]; *State Farm Mut. Auto. Ins. Co. v. Garamendi* (2004) 32 Cal.4<sup>th</sup> 1029, 1045 [interpreting section 1861.07 in a manner consistent with Proposition 103's goal of fostering consumer participation in the rate-setting process"].)

The Commissioner therefore proposes to adopt and amend regulations to change the definitions related to "proceedings" and to establish an application withdrawal procedure following the filing of a petition for a hearing, so as to ensure that consumer representatives are eligible to seek compensation when they make a substantial contribution to any "order, regulation, or decision by the commissioner" prior to a formal hearing being granted or denied. The balance of the proposed amendments conform various provisions of existing regulations regarding compensation to intervenors in such proceedings to those changes.

Because the amendments do not alter the requirement that the Commissioner determine that a petitioner or intervenor made a "substantial contribution," the Commissioner is confident that the amendments will not infringe upon the Department's ability to police the integrity of the intervenor process.

#### **TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS**

The Commissioner did not rely upon any technical, theoretical, or empirical studies, reports or documents in proposing the adoption and amendment of these regulations.

#### **REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES**

No other alternatives to the regulation (including alternatives to lessen any adverse impact on small business) were presented to or considered by the Commissioner. The Commissioner has determined that the proposed amendment will only affect insurance companies and will therefore not affect or impact small business. Pursuant to Government Code section 11342.610(b)(2), insurers are not small businesses.

#### **EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT ADVERSE ECONOMIC IMPACT ON ANY BUSINESS**

The Commissioner has made an initial determination that adoption of the proposed amendment will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

# **EXHIBIT 3**

## INSource on the Web - Document Delivery

**Archive Document: amd. filed 10-16-2002, eff. 11-15-2002 (Register 2002, No. 42).**

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS ... TITLE 10. -- INVESTMENTS ... Chapter 5. -- Insurance Commissioner ... Subchapter 4.9 RULES OF PRACTICE AND PROCEDURE FOR RATE PROCEEDINGS ... Article 3. Definitions

### T. 10 s 2651.1

#### Definitions

The following definitions shall apply to Subchapter 4.9.

(a) "Administrative Hearing Bureau" means that office within the office of the Commissioner at 45 Fremont Street, 22nd Floor, San Francisco, CA 94105 and, except where otherwise specified in this subchapter, designated for receipt of all pleadings filed pursuant to this subchapter.

(b) "Applicant" means the insurer presenting, on the form prescribed by the Commissioner and specified in section 2648.4, an application to change any rate pursuant to California Insurance Code section 1861.05(b).

(c) "Application" means the form prescribed by the Commissioner and specified in section 2648.4, together with all supporting information included with that form, which every insurer seeking to change any rate pursuant to California Insurance Code section 1861.05(b) must provide.

(d) "Day," unless otherwise specified in these regulations, means a calendar day. "Business days" include all days except Saturdays, Sundays, and any holiday set forth in California Government Code section 6700.

The time within which any pleading may be filed or served shall exclude the first day and include the last day; however, when the last day falls on a Saturday, Sunday or holiday the time computation shall include that day and include the next business day.

(e) "Filing" means the act of delivery of a paper pleading to the Administrative Hearing Bureau. An original and four copies of each pleading shall be filed with the Administrative Hearing Bureau. A specific pleading may be filed by facsimile or electronic transmission only when authorized by the administrative law judge.

(f) "Party" means the insurer whose rates are the subject of the proceeding, any person whose petition to intervene in the proceeding has been granted pursuant to section 2661.3(g), and the Department.

(g) "Pleading" means any petition, notice of hearing, notice of defense, answer, motion, request, response, brief, or other formal document filed with the Administrative Hearing Bureau pursuant to this subchapter. The original of each pleading shall be signed by each party or the party's attorney or representative.

(h) "Proceeding" means any action conducted pursuant to Article 10 of Chapter 9 of Part 2 of Division 1 of the California Insurance Code, entitled "Reduction and Control of Insurance Rates."

(i) "Service" means to provide a copy of a pleading to every other party in the proceeding in conformity with California Code of Civil Procedure sections 1011 and 1013. When a party files a pleading, the party shall concurrently serve that pleading on all other parties in the proceeding.

All filed pleadings shall be accompanied by an original declaration of service in conformity with California Code of

Civil Procedure sections 1011 and 1013. All served pleadings shall be accompanied by a copy of the declaration of service. An employee of a party may sign a declaration of service.

A specific pleading may be served by facsimile or electronic transmission when authorized by the receiving party.

A sample declaration of service form can be found in section 2623.9.

(j) "Settlement" means an agreement among some or all of the parties to a proceeding on a mutually acceptable outcome to the proceeding.

(k) "Stipulation" means an agreement among some or all of the parties to a proceeding on the resolution of any issue of fact or the applicability of any provision of law material to the proceeding.

(l) "Submit" means the act of delivery of a pleading to the Rate Enforcement Bureau.

Authority — Sections 1861.05 and 1861.055, Insurance Code. Reference: Sections 1861.05(c), 1861.055, 1861.08, Insurance Code.

## INSource on the Web - Document Delivery

**Archive Document: renumbered from section 2616.1, filed and eff. 11-5-96 (Register 96, No. 45).**

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS ... TITLE 10. -- INVESTMENTS ... Chapter 5. -- Insurance Commissioner ... Subchapter 4.9 RULES OF PRACTICE AND PROCEDURE FOR RATE PROCEEDINGS ... Article 13. Intervention

### T. 10 s 2661.1

#### Definitions

**Former Citations** T. 10 s 2616.1

The following definitions shall apply to Articles 13 and 14 of this subchapter.

- (a) "Advocacy Fees" means costs, incurred or billed, by a party for the services of an advocate in the proceeding. An advocate need not be a attorney. Advocacy fees shall not exceed market rates as defined in this section.
- (b) "Compensation" means payment for all or part of advocacy fees, witness fees, and other expenses of participation and intervention in any rate hearing or proceeding other than a rate hearing.
- (c) "Market Rate" means, with respect to advocacy fees, the prevailing rate for comparable services in the private sector in the Los Angeles and San Francisco Bay Areas at the time of the Commissioner's decision awarding compensation for attorney advocates, non-attorney advocates, or experts with similar experience, skill and ability. Billing rates shall not exceed the market rate.
- (d) "Other Expenses" means reasonable, actual out-of-pocket costs of an intervenor. Out-of-pocket costs include but are not limited to expenses such as travel costs, transcript charges, postage charges, overnight delivery charges, telephone charges and copying expenses. Out-of-pocket costs also includes the costs incurred in preparing a request or amended request for award, defined in sections 2662.3 and 2662.4. The intervenor has the burden of substantiating any costs incurred, including providing supporting documentation as requested by the Public Advisor.
- (e) "Proceeding" includes those proceedings set forth in Insurance Code Section 1861.10(a).
- (f) "Proceeding Other Than a Rate Hearing" means any proceeding, including those described in subdivision (e) above, conducted pursuant to Chapter 9 of Part 2 of Division 1 of the Insurance Code which is not a rate hearing as defined in this section.
- (g) "Public Advisor" means that official of the Department of Insurance who monitors and assists participation by members of the public in the Department of Insurance's proceedings. The Public Advisor shall not represent any member of the public and shall not advocate any substantive position on behalf of the public on any issues before the Commissioner.
- (h) "Rate Hearing" means any proceeding conducted pursuant to Insurance Code Sections 1861.01 and 1861.05.
- (i) "Represents the Interests of Consumers" means that the intervenor represents the interests of individual insurance consumer [s], or the intervenor is a group organized for the purpose of consumer protection as demonstrated by, but is not limited to, a history of representing consumers in administrative, legislative or judiciary proceedings.

A party which represents, in whole or in part, any entity regulated by the Commissioner shall not be eligible for compensation. However, nothing in this subsection shall be construed to prohibit any person from intervening or participating if that person is not seeking compensation.

(j) "Substantial Contribution" means that the intervenor substantially contributed, as a whole, to a decision, order, regulation, or other action of the Commissioner by presenting relevant issues, evidence, or arguments which were separate and distinct from those emphasized by the Department of Insurance staff or any other party, such that the intervenor's participation resulted in more relevant, credible, and non-frivolous information being available for the Commissioner to make his or her decision than would have been available to a Commissioner had the intervenor not participated.

(k) "Witness Fees" means recorded or billed costs for a witness, together with associated expenses. Costs and expenses for a witness shall not exceed market rate as defined in this section.

Authority — Section 1861.10, Insurance Code. Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code.

©2007 CCH INCORPORATED A WoltersKluwer Company



**INSource on the Web**

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS...TITLE 10. -- INVESTMENT...Chapter 5. -- Insurance Commissioner...Subchapter 4.9 -- RULES OF PRACTICE AND PROCEDURE FOR RATE PROCEEDINGS...Article 13. Intervention

**T. 10 s 2661.2**

**Intervention of right**

Any person shall be permitted to intervene in any proceeding on any rate application or in any proceeding subject to Chapter 9 of Part 2 of Division 1 of the California Insurance Code if the issues to be raised by the intervenor or participant are relevant to the issues of the proceeding. A person desiring to intervene or participate in any proceeding shall use the forms set forth in sections 2623.1 through 2623.9 of this subchapter.

Authority - Section 1861.10, Insurance Code. Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code.

©2007 CCH INCORPORATED A WoltersKluwer Company

\*\*\*\*\* END DOCUMENT \*\*\*\*\*

INSource on the Web - Document Delivery

**Archive Document: amd. filed 10-16-2002, eff. 11-15-2002 (Register 2002, No. 42).**

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS ... TITLE 10. -- INVESTMENTS ... Chapter 5. -- Insurance Commissioner ... Subchapter 4.9 RULES OF PRACTICE AND PROCEDURE FOR RATE PROCEEDINGS ... Article 13. Intervention

**T. 10 s 2661.3**

**Procedure for intervention in a rate hearing**

(a) A person desiring to intervene and become a party to a rate hearing shall file a petition to intervene which shall be drafted in compliance with sections 2652.1 — 2652.4 of this subchapter.

(b) The Petition shall cite the law authorizing the proposed intervention and shall contain the petitioner's interest in the proceeding, the specific issues to be raised and the positions to be taken on each issue to the extent then known, and the name, address, and telephone number of the petitioner. The verified petition shall include a statement that the intervenor or advocate will be able to attend and participate in the proceeding without delaying the proceeding or any other proceedings before the Commissioner.

(c) The Petition shall also state whether the petitioner intends to seek compensation in the proceeding, and, if so, contain an itemized estimated budget for the participation in the proceeding, which shall set forth the following:

(1) separate listings of the rates for each attorney advocate or non-attorney advocate, including:

(A) the names of each attorney advocate or non-attorney advocate,

(B) the rates to be claimed for each attorney advocate or non-attorney advocate,

(C) a description of the work to be performed by each attorney advocate or non-attorney advocate, an estimate of the time to be spent to perform that work and the rates, fees and costs associated with that work; and,

(2) separate listings of the rates for each witness, including:

(A) the names of each witness and their areas of expertise,

(B) the rates to be claimed for each witness,

(C) a description of the work to be performed by each witness, an estimate of the time to be spent to perform that work and the rates, fees and costs associated with that work;

Rates contained in the estimated budget shall not exceed market rates. Submission of the budget shall not guarantee the payment of the dollar amounts set forth in the budget. The lack of objection to any item in the budget shall not imply approval of the budget.

(d) An amended budget shall be submitted as soon as possible when the intervenor learns that the total estimated budget amount increases by \$10,000 or more.

(e) A Petition to Intervene shall be filed with the Administrative Hearing Bureau, and shall be considered an "additional pleading" within the meaning of Government Code Section 11507.6. A copy of the Petition to Intervene

shall be served on the Public Advisor and all of the parties to the proceeding. A Petition to Participate shall be submitted to the contact person for the proceeding, and served on the Public Advisor.

(f) Within ten (10) days after filing of the Petition to Intervene, any other party may file a response to the Petition to Intervene. Any party claiming that the petitioner does not represent the interests of consumers shall so state in the response, which shall include any supporting documentation. The petitioner may reply to any allegation in the response and may reply to the allegation that it does not represent the interests of consumers within eight (8) days of filing of the response.

(g) The administrative law judge shall rule on the Petition to Intervene within 20 days of its filing with the Administrative Hearing Bureau.

(h) No person whose petition has been granted shall be permitted to reopen matters decided before the petition is granted without a showing of good cause.

Authority — Section 1861.10, Insurance Code. Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code.

©2007 CCH INCORPORATED A WoltersKluwer Company

**INSource on the Web**

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS...TITLE 10. -- INVESTMENT...Chapter 5. -- Insurance Commissioner...Subchapter 4.9 -- RULES OF PRACTICE AND PROCEDURE FOR RATE PROCEEDINGS...Article 13. Intervention

**T. 10 s 2661.4**

**Procedure for participation in a proceeding other than a rate hearing**

(a) A person desiring to participate in a proceeding other than a rate hearing shall file a petition to participate which shall be drafted in compliance with sections 2652.1-2652.4 and 2661.3(b) through (e) of this subchapter. The petition to participate shall be provided to the contact person for the proceeding.

(b) A ruling on a Petition to Participate shall be made within 15 days of its submission to the contact person for the proceeding.

(c) No person whose petition has been granted shall be permitted to reopen matters decided before the petition is granted without a showing of good cause.

(d) Nothing in this section shall be construed to prohibit any person from providing relevant comments in a proceeding other than a rate hearing if that person is not seeking compensation.

Authority - Section 1861.10, Insurance Code. Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code.

©2007 CCH INCORPORATED A WoltersKluwer Company

\*\*\*\*\* END DOCUMENT \*\*\*\*\*

## INSource on the Web - Document Delivery

**Archive Document: filed and eff. 11-5-96 (Register 96, No. 45).**

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS ... TITLE 10. -- INVESTMENTS ... Chapter 5. -- Insurance Commissioner ... Subchapter 4.9 RULES OF PRACTICE AND PROCEDURE FOR RATE PROCEEDINGS ... Article 14. Intervenor's and Participant's Fees and Expenses

### **T. 10 s 2662.1**

#### **Purpose**

The purpose of this Article is to establish procedures for awarding advocacy fees, witness fees and other expenses to intervenors and participants in proceedings, including proceedings other than rate hearings, before the Insurance Commissioner in accordance with Section 1861.10(b) of the Insurance Code.

Authority — Section 1861.10, Insurance Code. Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code.

©2007 CCH INCORPORATED A WoltersKluwer Company

**INSource on the Web**

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS...TITLE 10. -- INVESTMENT...Chapter 5. -- Insurance Commissioner...Subchapter 4.9 -- RULES OF PRACTICE AND PROCEDURE FOR RATE PROCEEDINGS...Article 14. Intervenor's and Participant's Fees and Expenses

**T. 10 s 2662.2**

**Request for finding of eligibility; time; contents; effective for two years**

(a) A person or group representing the interests of consumers may provide to the Public Advisor a request for finding of eligibility to seek compensation. The request shall be verified and may be verified by the intervenor's or participant's attorney and shall be submitted, at any time, in conjunction with an ongoing proceeding in which the individual or organization seeks to intervene. The request shall comply with sections 2652.1-2652.4 of this subchapter and shall include:

(1) a showing by the intervenor or participant that it represents the interests of consumers, including a description of the previous work of the intervenor or participant; and,

(2) in the case of groups representing the interests of consumers, the request shall include a copy of the group's articles of incorporation, bylaws, or other organizational documents, information about its membership structure, composition of the group's current Board of Directors — including the name and address of each director and/or the name and address of the principals of the group if it is not a corporation, and newsletter circulation, if any, along with a description of the previous work of the consumer group. In order to allow a determination whether the group actually does represent the interests of consumers, the request shall list the group's funding sources for the prior twenty-four (24) months. The petition shall also include as an exhibit all newsletters and/or any other publications issued by the intervenor in California during the previous twelve (12) months, including any annual or year-end report for the prior year. The request shall indicate whether or not the group has been granted nonprofit status under Internal Revenue Code Section 501(c).

The Public Advisor may require additional information regarding the request at any time, but not more than twice during any one calendar year from a given intervenor or participant.

(b) Within 10 days of receipt of a request for finding of eligibility to seek compensation, the Public Advisor shall review the request for completeness. If the request includes all of the information required by subdivision (a) above, it is complete. If the Public Advisor determines that the request is not complete because it does not include all of the information required by subdivision (a), notice stating the grounds for incompleteness will be given to the person or group who submitted the request within the 10 day period and the request will be rejected.

(c) The Commissioner shall rule on the request for a finding of eligibility to seek compensation not later than 15 days from the receipt of a complete request.

(d) A Finding of Eligibility to Seek Compensation shall be valid in any proceeding in which the participant's or intervenor's participation commences within two years of the Finding of Eligibility so long as the intervenor or participant still meets the requirements of subdivision (a). A Finding of Eligibility to Seek Compensation in no way ensures compensation.

(e) Nothing in the Finding of Eligibility shall prohibit or limit any person or group from making any presentation or advocating any position which is otherwise admissible.

## INSource on the Web - Document Delivery

**Archive Document: filed and eff. 11-5-96 (Register 96, No. 45).**

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS ... TITLE 10. -- INVESTMENTS ... Chapter 5. -- Insurance Commissioner ... Subchapter 4.9 RULES OF PRACTICE AND PROCEDURE FOR RATE PROCEEDINGS ... Article 14. Intervenor's and Participant's Fees and Expenses

### **T. 10 s 2662.3**

#### **Request for award**

(a) An intervenor or participant whose Petition to Intervene or Participate has been granted and who has been found eligible to seek compensation may submit to the Public Advisor, within 30 days after the service of the order, decision, regulation or other action of the Commissioner in the proceeding for which intervention was sought, or at the requesting of the entire proceeding, a request for an award of compensation. An intervenor or participant requesting that any award ordered be made payable to a specific person or entity, other than the intervenor or participant, that represented or advocated on behalf of the intervenor or participant during the proceeding shall include verified authorization to that effect in the request.

(b) The request shall be verified and shall be in compliance with sections 2652.1-2652.4 of this subchapter and shall include, at a minimum:

(1) a detailed description of services and expenditures;

(2) legible time and/or billing records, created as soon as possible after the work was performed, which show the date and the exact amount of time spent on each specific task and a description of the intervenor's substantial contribution citing to the record, including documents such as: transcripts, proposed decisions of the Administrative Law Judge and orders demonstrating that a substantial contribution was made.

The phrase "exact amount of time spent" as used in this subdivision refers either to five (5) minute or tenth (10th) of an hour increments.

(c) The phrase "each specific task," as used in this subdivision refers to activities including, but is not limited to: (A) telephone calls or meetings/conferences, identifying the parties participating in the telephone call, meeting or conference and the subject matter discussed; (B) legal pleadings or research, identifying the pleading or research and the subject matter; (C) letters, correspondence or memoranda, identifying the parties and the subject matter; and, (D) attendance at hearings, specifying when the hearing occurred, the subject matter of the hearing and the names of witnesses who appeared at the hearing, if any.

Nothing in this subsection shall require disclosure of privileged information.

(d) Within 15 days after service of the request, any other party may submit a response to the request. The response shall be submitted to the Public Advisor and a copy shall also be provided to all parties to the proceeding. The intervenor or participant may reply to any such response within 15 days after service of the response. The reply shall be submitted to the Public Advisor and a copy shall also be provided to all parties to the proceeding.

(e) The Public Advisor shall require an audit and/or may inspect the books and records of the intervenor or participant to the extent necessary to verify the basis for the award. The Public Advisor shall maintain the confidentiality of the intervenor's books and records to the extent allowed by law.

(f) Any party questioning the market rate or reasonableness of any amount set forth in the request shall, at the time of questioning the market rate or reasonableness of that amount, provide a statement setting forth the fees, rates, and costs it expects to expend in the proceeding.

Authority — Section 1861.10, Insurance Code. Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code.

©2007 CCH INCORPORATED A WoltersKluwer Company



**INSource on the Web**

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS...TITLE 10. -- INVESTMENT...Chapter 5. -- Insurance Commissioner...Subchapter 4.9 -- RULES OF PRACTICE AND PROCEDURE FOR RATE PROCEEDINGS...Article 14. Intervenor's and Participant's Fees and Expenses

**T. 10 s 2662.4**

**Amended request for award**

An intervenor or participant may submit amended requests for an award whenever it incurs additional fees or costs subsequent to the submission of a previous request for award. Any amended request shall meet the requirements of Section 2662.3 of this subchapter. Responses to an amended request, if any, shall meet the requirements of section 2662.3.

Authority - Section 1861.10, Insurance Code. Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code.

©2007 CCH INCORPORATED A WoltersKluwer Company

\*\*\*\*\* END DOCUMENT \*\*\*\*\*

## INSource on the Web - Document Delivery

**Archive Document: filed and eff. 11-5-96 (Register 96, No. 45).**

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS ... TITLE 10. -- INVESTMENTS ... Chapter 5. -- Insurance Commissioner ... Subchapter 4.9 RULES OF PRACTICE AND PROCEDURE FOR RATE PROCEEDINGS ... Article 14. Intervenor's and Participant's Fees and Expenses

### **T. 10 s 2662.5**

#### **Requirements for awards**

(a) Subject to subdivision (b) herein, advocacy fees, witness fees, and other expenses of participation in a proceeding shall be awarded to any intervenor or participant who complies with section 2662.3 and satisfies both of the following requirements:

(1) The intervenor or participant's presentation makes a substantial contribution as evidenced by specific citations to the intervenor's direct testimony, cross-examination, legal arguments, briefs, motions, discovery, or any other appropriate evidence; and,

(2) The intervenor or participant represents the interests of consumers.

(b) To the extent the substantial contribution claimed by an intervenor or participants duplicates the substantial contribution of any other party to the proceeding and was not authorized in the ruling on the Petition to Intervene or Participate, the intervenor's or participant's compensation may be reduced. Participation by the Department of Insurance staff does not preclude an award of compensation, so long as the intervenor's substantial contribution to the proceeding does not merely duplicate the participation by the Department of Insurance's staff. In assessing whether there was duplication, the Commissioner will consider whether or not the intervenor or participant presented relevant issues, evidence, or arguments which were separate and distinct from those presented by any party or the Department of Insurance staff.

Authority — Section 1861.10, Insurance Code. Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code.

**INSource on the Web**

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS...TITLE 10. -- INVESTMENT...Chapter 5. -- Insurance Commissioner...Subchapter 4.9 -- RULES OF PRACTICE AND PROCEDURE FOR RATE PROCEEDINGS...Article 14. Intervenor's and Participant's Fees and Expenses

**T. 10 s 2662.6**

**Decision awarding compensation; allowance of award**

- (a) In a written decision, the Commissioner shall determine whether or not the intervenor or participant has made a substantial contribution. The decision shall be issued within 90 days of receipt of all information required by Section 2662.3.
- (b) If the Commissioner determines that the intervenor or participant has made a substantial contribution, the Commissioner shall set forth this substantial contribution and shall set forth the amount of compensation to be paid. The compensation awarded shall equal the market rate of the services provided.
- (c) The Commissioner's decision shall be served on all parties to the proceeding.
- (d) Any award paid by an applicant pursuant to this Article shall be allowed by the Insurance Commissioner as an expense for the purpose of establishing rates of the applicant as a dollar-for-dollar adjustment to rates approved by the Insurance Commissioner immediately on the determination of the amount of the award, so that the amount of the award shall be fully recovered within two years from the date of the award.

Authority - Section 1861.10, Insurance Code. Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code.

©2007 CCH INCORPORATED A WoltersKluwer Company

\*\*\*\*\* END DOCUMENT \*\*\*\*\*

**INSource on the Web**

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS...TITLE 10. -- INVESTMENT...Chapter 5. -- Insurance Commissioner...Subchapter 4.9 -- RULES OF PRACTICE AND PROCEDURE FOR RATE PROCEEDINGS...Article 14. Intervenor's and Participant's Fees and Expenses

**T. 10 s 2662.7**

**Time for payment**

- (a) Any award payable by an applicant shall be paid within 30 days of the decision awarding compensation. If an insurance company fails to pay an award within 30 days, the insurance company shall also pay interest on the amount awarded, at the legal rate, until the date on which the award is paid.
- (b) For the purpose of this section, the phrase " within 30 days " shall mean within 30 days after the Insurance Commissioner issues a decision awarding compensation, unless the insurance company submits a timely petition for reconsideration or judicial challenge of the decision or any part for which compensation is sought by the intervenor, in which case no payment shall be required until 30 days after a decision on reconsideration or judicial

challenge.

Authority - Section 1861.10, Insurance Code. Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code.

©2007 CCH INCORPORATED A WoltersKluwer Company

\*\*\*\*\* END DOCUMENT \*\*\*\*\*

**INSource on the Web**

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS...TITLE 10. -- INVESTMENT...Chapter 5. -- Insurance Commissioner...Subchapter 4.9 -- RULES OF PRACTICE AND PROCEDURE FOR RATE PROCEEDINGS...Article 14. Intervenor's and Participant's Fees and Expenses

**T. 10 s 2662.8**

**Securing payment**

The Commissioner shall make every reasonable effort to secure payment of award, including cooperating with other agencies of the state.

Authority - Section 1861.10, Insurance Code. Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code.

©2007 CCH INCORPORATED A WoltersKluwer Company

\*\*\*\*\* END DOCUMENT \*\*\*\*\*

# **EXHIBIT 4**

## INSource on the Web - Document Delivery

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS ... ~~TITLE REGULATIONS...TITLE~~ 10. -- INVESTMENTS ... Chapter  
**INVESTMENT...Chapter** 5. -- Insurance Commissioner ... ~~Subchapter 4.9...~~ **Subchapter 4.9** -- RULES OF PRACTICE AND  
PROCEDURE FOR RATE PROCEEDINGS ... ~~...~~ **Article 3. Definitions**

**T. 10 s 2651.1****Definitions**

The following definitions shall apply to Subchapter 4.9.

(a) "Administrative Hearing Bureau" means that office within the office of the Commissioner at 45 Fremont Street, 22nd Floor, San Francisco, CA 94105 and, except where otherwise specified in this subchapter, designated for receipt of all pleadings filed pursuant to this subchapter.

(b) "Applicant" means the insurer presenting, on the form prescribed by the Commissioner and specified in section 2648.4, an application to change any rate pursuant to California Insurance Code section 1861.05(b).

(c) "Application" means the form prescribed by the Commissioner and specified in section 2648.4, together with all supporting information included with that form, which every insurer seeking to change any rate pursuant to California Insurance Code section 1861.05(b) must provide.

(d) ~~"Day,"~~ **" Day "**, unless otherwise specified in these regulations, means a calendar day. ~~"Business days"~~  
**Business days** include all days except Saturdays, Sundays, and any holiday set forth in California Government Code section 6700.

The time within which any pleading may be filed or served shall ~~exclude the first day and include the last day;~~ however, when the last day falls on ~~a~~ **Saturday, Sunday or holiday** the time computation shall **exclude that day and** include ~~that day and include~~ the next business day.

(e) "Filing" means the act of delivery of a paper pleading to the Administrative Hearing Bureau. An original and four copies of each pleading shall be filed with the Administrative Hearing Bureau. A specific pleading may be filed by facsimile or electronic transmission only when authorized by the administrative law judge.

(f) "Party" means the insurer whose rates are the subject of the proceeding, any person whose petition to intervene in the proceeding has been granted pursuant to section 2661.3(g), and the Department.

(g) "Pleading" means any petition, notice of hearing, notice of defense, answer, motion, request, response, brief, or other formal document filed with the Administrative Hearing Bureau pursuant to this subchapter. The original of each pleading shall be signed by each party or the party's attorney or representative.

(h) ~~"Proceeding"~~ **" Proceeding "** means any action conducted pursuant to Article 10 of Chapter 9 of Part 2 of Division 1 of the California Insurance Code, entitled "Reduction and Control of Insurance Rates" ~~Rates,~~ **including a rate proceeding established upon the submission of a petition for hearing pursuant to California Insurance Code section 1861.05 and section 2653.1 of this subchapter.**

(i) "Service" means to provide a copy of a pleading to every other party in the proceeding in conformity with California Code of Civil Procedure sections 1011 and 1013. When a party files a pleading, the party shall concurrently serve that pleading on all other parties in the proceeding.

All filed pleadings shall be accompanied by an original declaration of service in conformity with California Code of Civil Procedure sections 1011 and 1013. All served pleadings shall be accompanied by a copy of the declaration of service. An employee of a party may sign a declaration of service.

A specific pleading may be served by facsimile or electronic transmission when authorized by the receiving party.

A sample declaration of service form can be found in section 2623.9.

(j) "Settlement" means an agreement among some or all of the parties to a proceeding on a mutually acceptable outcome to the proceeding.

(k) "Stipulation" means an agreement among some or all of the parties to a proceeding on the resolution of any issue of fact or the applicability of any provision of law material to the proceeding.

(l) "Submit" means the act of delivery of a pleading to the Rate Enforcement Bureau.

Authority — Sections 1861.05 and 1861.055, Insurance Code. **Code, CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805, 824 (1989), 20th Century Insurance Company v. John Garamendi, 8 Cal.4th 216, 281, 32 Cal.Rptr.2d 807, 847 (1994).** Reference: Sections 1861.05(c), ~~1861.055, 1861.055 and~~ 1861.08, Insurance Code. **Code, CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805 (1989), 20th Century Insurance Company v. John Garamendi, 8 Cal.4th 216, 281, 32 Cal.Rptr.2d 807, 847 (1994).**

## INSource on the Web - Document Delivery

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS ... ~~TITLE~~ **REGULATIONS...TITLE** 10. -- ~~INVESTMENTS ... Chapter~~  
**INVESTMENT...Chapter** 5. -- Insurance Commissioner ... ~~Subchapter 4.9~~ ... **Subchapter 4.9** -- RULES OF PRACTICE AND  
PROCEDURE FOR RATE PROCEEDINGS ... ~~...~~ **Article 13. Intervention**

**T. 10 s 2661.1****Definitions**

**Former Citations** T. 10 s 2616.1

The following definitions shall apply to Articles 13 and 14 of this subchapter.

- (a) ~~"Advocacy Fees"~~ **" Advocacy Fees "** means costs, incurred or billed, by a party for the services of an advocate in the proceeding. An advocate need not be an attorney. Advocacy fees shall not exceed market rates as defined in this section.
- (b) "Compensation" means payment for all or part of advocacy fees, witness fees, and other expenses of participation and intervention in any rate hearing or proceeding other than a rate hearing.
- (c) ~~"Market Rate"~~ **" Market Rate "** means, with respect to advocacy and witness fees, the prevailing rate for comparable services in the private sector in the Los Angeles and San Francisco Bay Areas at the time of the Commissioner's decision awarding compensation for attorney advocates, non-attorney advocates, or experts with similar experience, skill and ability. Billing rates shall not exceed the market rate.
- (d) ~~"Other Expenses"~~ **" Other Expenses "** means reasonable, actual out-of-pocket costs of an ~~intervenor,~~ **intervenor or petitioner** . Out-of-pocket costs include but are not limited to expenses such as travel costs, transcript charges, postage charges, overnight delivery charges, telephone charges and copying expenses. Out-of-pocket costs also ~~includes~~ **include** the costs incurred in preparing a request or amended request for award, defined in sections 2662.3 and 2662.4. The intervenor or petitioner has the burden of substantiating any costs incurred, including providing supporting documentation as requested by the Public Advisor.
- (e) "Proceeding" includes those proceedings set forth in Insurance Code Section 1861.10(a).
- (f) ~~"Proceeding"~~ **Proceeding Other Than a Rate Hearing"** **Proceeding "** means any proceeding, including those described in subdivision (e) above, conducted pursuant to Chapter 9 of Part 2 of Division 1 of the Insurance Code which is not a rate ~~hearing~~ **proceeding** as defined in this section.
- (g) "Public Advisor" means that official of the Department of Insurance who monitors and assists participation by members of the public in the Department of Insurance's proceedings. The Public Advisor shall not represent any member of the public and shall not advocate any substantive position on behalf of the public on any issues before the Commissioner.
- (h) ~~"Rate Hearing"~~ **" Rate Proceeding "** means any proceeding conducted pursuant to Insurance Code Sections 1861.01 and 1861.05. **For purposes of section 1861.05, a "rate proceeding" is established upon the submission of a petition for hearing in accordance with section 2653.1 of this subchapter, or if no petition for hearing is filed, upon notice of hearing.**
- (i) " Rate Hearing " means a hearing noticed by the Commissioner on his own motion or in response to**



a petition for hearing pursuant to Insurance Code section 1861.05, which is conducted pursuant to the applicable procedural requirements of Insurance Code section 1861.08, and subchapters 4.8 and 4.9 of this chapter.

~~(i) "Represents"~~ **(j) "Represents"** the Interests of ~~Consumers~~ **"Consumers"** means that the intervenor represents the interests of individual insurance consumer-[s], or the intervenor is a group organized for the purpose of consumer protection as demonstrated by, but is not limited to, a history of representing consumers in administrative, legislative or judicial proceedings.

A party which represents, in whole or in part, any entity regulated by the Commissioner shall not be eligible for compensation. However, nothing in this subsection shall be construed to prohibit any person from intervening or participating if that person is not seeking compensation.

~~(j) "Substantial Contribution"~~ **(k) "Substantial Contribution"** means that the intervenor substantially contributed, as a whole, to a decision, order, regulation, or other action of the Commissioner by presenting relevant issues, evidence, or arguments which were separate and distinct from those emphasized by the Department of Insurance staff or any other party, such that the intervenor's participation resulted in more relevant, credible, and non-frivolous information being available for the Commissioner to make his or her decision than would have been available to a Commissioner had the intervenor not participated. **A substantial contribution may be demonstrated without regard to whether a petition for hearing is granted or denied.**

~~(k) "Witness Fees"~~ **(l) "Witness Fees"** means recorded or billed costs for a witness, together with associated expenses. Costs and expenses for a witness shall not exceed market rate as defined in this section.

Authority — Section 1861.10, Insurance Code. ~~Reference: Code;~~ **and CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805, 824 (1989), 20th Century Insurance Company v. John Garamendi, 8 Cal.4th 216, 281, 32 Cal. Rptr. 2d 807, 847 (1994). Reference: Sections 1861.10 (a) and 1861.10(b), Insurance Code;** **and CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805 (1989), 20th Century Insurance Company et al. v. John Garamendi 8 Cal. 4th 216, 32 Cal. Rptr. 2d 807 (1994).**

## INSource on the Web - Document Delivery

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS ... ~~TITLE REGULATIONS...TITLE~~ 10. -- INVESTMENTS ... Chapter  
~~INVESTMENT...Chapter~~ 5. -- Insurance Commissioner ... ~~Subchapter 4.9...~~ **Subchapter 4.9** -- RULES OF PRACTICE AND  
PROCEDURE FOR RATE PROCEEDINGS ... ~~...~~ Article 13. Intervention

**T. 10 s 2661.3****Procedure for intervention in a rate ~~hearing~~ or class plan proceeding**

(a) A person desiring to intervene and become a party to a rate ~~hearing~~ or class plan proceeding shall file a petition to intervene which shall be drafted in compliance with sections 2652.1 — 2652.4 of this subchapter. **A person who petitions for a hearing may combine a petition to intervene with a petition for hearing in one pleading.**

(b) The Petition shall cite the law authorizing the proposed intervention and shall contain the petitioner's interest in the proceeding, the specific issues to be raised and the positions to be taken on each issue to the extent then known, and the name, address, and telephone number of the petitioner. The verified petition shall include a statement that the intervenor or advocate will be able to attend and participate in the proceeding without delaying the proceeding or any other proceedings before the Commissioner.

(c) The Petition shall also state whether the petitioner intends to seek compensation in the proceeding, and, if so, contain an itemized estimated budget for the participation in the proceeding, which shall set forth the following:

(1) separate listings of the rates for each attorney advocate or non-attorney advocate, including:

(A) the names of each attorney advocate or non-attorney advocate,

(B) the rates to be claimed for each attorney advocate or non-attorney advocate,

(C) a description of the work to be performed by each attorney advocate or non-attorney advocate, an estimate of the time to be spent to perform that work and the rates, fees and costs associated with that work; and,

(2) separate listings of the rates for each witness, including:

(A) the names of each witness and their areas of expertise,

(B) the rates to be claimed for each witness,

(C) a description of the work to be performed by each witness, an estimate of the time to be spent to perform that work and the rates, fees and costs associated with that work;

Rates contained in the estimated budget shall not exceed market rates. Submission of the budget shall not guarantee the payment of the dollar amounts set forth in the budget. The lack of objection to any item in the budget shall not imply approval of the budget.

(d) An amended budget shall be submitted as soon as possible when the intervenor learns that the total estimated budget amount increases by \$10,000 or more.

(e) A Petition to Intervene ~~shall be~~ **in a rate or class plan proceeding may be submitted to the Rate**

**Enforcement Bureau concurrently with a petition for hearing submitted pursuant to section 2653.1 of this subchapter or filed with the Administrative Hearing Bureau, Bureau after a hearing is granted**, and shall be considered an ~~"additional pleading"~~ **"additional pleading"** within the meaning of Government Code Section 11507.6. A copy of the Petition to Intervene shall be served on the Public Advisor and all of the parties to the proceeding. A Petition to Participate shall be submitted to the contact person for the proceeding, and served on the Public Advisor.

(f) Within ~~ten (10)~~ **five (5)** days after filing of the Petition to Intervene, any other party may file a response to the Petition to Intervene. Any party claiming that the petitioner does not represent the interests of consumers shall so state in the response, which shall include any supporting documentation. The petitioner may reply to any allegation in the response and may reply to the allegation that it does not represent the interests of consumers within ~~eight (8)~~ **three (3)** days of filing of the response.

(g) ~~The~~ **If a person who petitions for a hearing meets the requirements of this section, represents the interests of consumers and is otherwise eligible to seek compensation in proceedings before the Department pursuant to Insurance Code section 1861.10(b) and section 2662.2 of this subchapter, that person's Petition to Intervene shall be granted within fifteen (15) days of its submission. If a petition for a hearing is granted, the** administrative law judge shall rule on ~~the any~~ Petition to Intervene **subsequently filed by any person** within 20 days of its filing with the Administrative Hearing Bureau.

(h) No person whose petition has been granted shall be permitted to reopen matters decided before the petition is granted without a showing of good cause.

Authority ~~---~~ **Section 1861.10, Insurance Code; and CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805, 824 (1989), 20th Century Insurance Company v. John Garamendi, 8 Cal.4th 216, 281, 32 Cal. Rptr. 2d 807, 847 (1994).** Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code; **and CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805 (1989), 20th Century Insurance Company et al. v. John Garamendi 8 Cal. 4th 216, 32 Cal. Rptr. 2d 807 (1994).**

## INSource on the Web - Document Delivery

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS ~~... TITLE REGULATIONS... TITLE~~ 10. -- INVESTMENTS ... Chapter  
**INVESTMENT...Chapter 5.** -- Insurance Commissioner ~~... Subchapter 4.9...Subchapter 4.9~~ -- RULES OF PRACTICE AND  
PROCEDURE FOR RATE PROCEEDINGS ~~... Article 14.~~ Intervenor's and Participant's Fees and Expenses

**T. 10 s 2662.1****Purpose**

The purpose of this Article is to establish procedures for awarding advocacy fees, witness fees and other expenses to **petitioners**, intervenors and participants in proceedings, including proceedings other than rate hearings, **proceedings**, before the Insurance Commissioner in accordance with Section 1861.10(b) of the Insurance Code.

**The definitions set forth in section 2666.1 apply to Article 14 of this subchapter.**

Authority ~~---~~ Section 1861.10, Insurance Code ~~Code;~~ and **CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805, 824 (1989), 20th Century Insurance Company v. John Garamendi, 8 Cal.4th 216, 281, 32 Cal. Rptr. 2d 807, 847 (1994).** Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code ~~Code;~~ and **CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805 (1989), 20th Century Insurance Company et al. v. John Garamendi 8 Cal. 4th 216, 32 Cal. Rptr. 2d 807 (1994).**

## INSource on the Web - Document Delivery

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS ... ~~TITLE REGULATIONS...~~ ~~TITLE~~ 10. -- INVESTMENTS ... Chapter  
~~INVESTMENT...~~ **Chapter 5.** -- Insurance Commissioner ... ~~Subchapter 4.9...~~ **Subchapter 4.9** -- RULES OF PRACTICE AND  
PROCEDURE FOR RATE PROCEEDINGS ... ~~...~~ Article 14. Intervenor's and Participant's Fees and Expenses

**T. 10 s 2662.3****Request for award**

(a) ~~As a petitioner,~~ **intervenor or participant whose Petition to Intervene or Participate has been granted and who has been found eligible to seek compensation may submit to the Public Advisor, within 30 days after the service of the order, decision, regulation or other action of the Commissioner in the proceeding for which intervention was sought, or at the requesting petitioner's, intervenor's or participant's option, within 30 days after the conclusion of the entire proceeding, a request for an award of compensation. ~~As a petitioner,~~ intervenor or participant requesting that any award ordered be made payable to a specific person or entity, other than the petitioner, intervenor or participant, that represented or advocated on behalf of the intervenor or participant during the proceeding shall include verified authorization to that effect in the request.**

(b) The request shall be verified and shall be in compliance with sections 2652.1-2652.4 of this subchapter and shall include, at a minimum:

(1) a detailed description of services and expenditures;

(2) legible time and/or billing records, created as soon as possible after the work was performed, which show the date and the exact amount of time spent on each specific task and a description of the intervenor's substantial contribution citing to the record, including documents such as: transcripts, proposed decisions of the Administrative Law Judge and orders demonstrating that a substantial contribution was made. **task; and**

**(3) a description of the petitioner's, intervenor's or participant's substantial contribution citing to the record, including, but not limited to, documents such as: declarations by advocates and/or witnesses, written or oral comments of the petitioner or intervenor or its witnesses regarding a rate application provided to the Department, correspondence with the parties, stipulations or settlement agreements regarding the outcome or material issues in the proceeding, and decision or order by the Department or Commissioner concerning a petition for hearing or rate or class plan application issued without a formal hearing, transcripts, proposed decisions of the Administrative Law Judge and orders demonstrating that a substantial contribution was made for the purpose of complying with section 2661.1(j) . Notwithstanding section 2656.4, any confidential correspondence, documents, or declarations referencing confidential information, including but not limited to confidential settlement communications, may be submitted to the Public Advisor with a request for an award of compensation. Any such confidential material submitted to the Public Advisor will retain its confidential status. Nothing in this subsection shall require disclosure of privileged information.**

The phrase "exact amount of time spent" as used in this subdivision refers either to five (5) minute or tenth (10th) of an hour increments.

**(c) While parties may stipulate to a person's status as an intervenor who is eligible to seek compensation, nothing herein is intended to allow parties to enter into a stipulation regarding whether a person has made a substantial contribution for the purpose of complying with section 2661 of this subchapter.**

~~(e)~~ **(d)** The phrase "each specific task," as used in this subdivision refers to activities including, but is not limited to: (A) telephone calls or meetings/conferences, identifying the parties participating in the telephone call, meeting or conference and the subject matter discussed; (B) legal pleadings or research, identifying the pleading or research and the subject matter; (C) letters, correspondence or memoranda, identifying the parties and the subject matter; and, (D) attendance at hearings, specifying when the hearing occurred, the subject matter of the hearing and the names of witnesses who appeared at the hearing, if any.

~~Nothing in this subsection shall require disclosure of privileged information.~~ **(e) Within 15 days after service of the request, any other party may submit a response to the request. The response shall be submitted to the Public Advisor and a copy shall also be provided to all parties to the proceeding. The intervenor or participant may reply to any such response within 15 days after service of the response. The reply shall be submitted to the Public Advisor and a copy shall also be provided to all parties to the proceeding.**

~~(d) Within 15 days after service of the request, any other party may submit a response to the request. The response shall be submitted to the (f) The Public Advisor and a copy shall also be provided to all parties to the proceeding. The shall require an audit and/or may inspect the books and records of the intervenor or participant may reply to any such response within 15 days after service of the response. The reply shall be submitted to the Public Advisor and a copy shall also be provided to all parties to the proceeding. to the extent necessary to verify the basis for the award.~~

~~(e) The Public Advisor shall require an audit and/or may inspect the maintain the confidentiality of the intervenor's books and records of the intervenor or participant to the extent necessary to verify the basis for the award. The Public Advisor shall maintain the confidentiality of the intervenor's books and records to the extent allowed by law.~~

~~(f)~~ **(g)** Any party questioning the market rate or reasonableness of any amount set forth in the request shall, at the time of questioning the market rate or reasonableness of that amount, provide a statement setting forth the fees, rates, and costs it expects to expend in the proceeding.

Authority — ~~Section 1861.10, Insurance Code.~~ **Code; and CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805, 824 (1989), 20th Century Insurance Company v. John Garamendi, 8 Cal.4th 216, 281, 32 Cal. Rptr. 2d 807, 847 (1994).** Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code. **Code; and CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805 (1989), 20th Century Insurance Company et al. v. John Garamendi 8 Cal. 4th 216, 32 Cal. Rptr. 2d 807 (1994).**

## INSource on the Web - Document Delivery

California  
Insurance Regulations

CALIFORNIA CODE OF REGULATIONS ... ~~TITLE REGULATIONS...~~ TITLE 10. -- INVESTMENTS ... Chapter  
**INVESTMENT...Chapter 5.** -- Insurance Commissioner... ~~Subchapter 4.9~~ ... **Subchapter 4.9** -- RULES OF PRACTICE AND  
PROCEDURE FOR RATE PROCEEDINGS... ~~...~~ Article 14. Intervenor's and Participant's Fees and Expenses

**T. 10 s 2662.5****Requirements for awards**

(a) Subject to subdivision (b) herein, advocacy fees, witness fees, and other expenses of participation in a proceeding shall be awarded to any petitioner, intervenor or participant who complies with section 2662.3 and satisfies both of the following requirements:

(1) The petitioner, intervenor or participant's presentation makes a substantial contribution as evidenced by specific citations to the petitioner's, intervenor's or participant's direct testimony, cross-examination, legal arguments, briefs, motions, discovery, ~~or declarations by advocates and/or witnesses, written or oral comments of the intervenor or its witnesses regarding a rate application provided to the Department, correspondence with the parties, stipulations or settlement agreements, and decision or order by the Department or the Commissioner on a petition for hearing or rate or class plan application issued without a formal hearing, or~~ any other appropriate evidence; and,

(2) The petitioner, intervenor or participant represents the interests of consumers.

(b) To the extent the substantial contribution claimed by ~~on a petitioner~~, intervenor or ~~participants~~ participant duplicates the substantial contribution of ~~any other~~ another party to the proceeding and was not authorized in the ruling on the Petition to Intervene or Participate, the petitioner's, intervenor's or participant's compensation may be reduced. Participation by the Department of Insurance staff does not preclude an award of compensation, so long as the ~~intervenor's~~ petitioner's, intervenor's, or participant's substantial contribution to the proceeding does not merely duplicate the participation by the Department of Insurance's staff. In assessing whether there was duplication, the Commissioner will consider whether or not the petitioner, intervenor or participant presented relevant issues, evidence, or arguments which were separate and distinct from those presented by any party or the Department of Insurance staff.

Authority ~~---~~ Section 1861.10, Insurance Code; Code; and CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805, 824 (1989), 20th Century Insurance Company v. John Garamendi, 8 Cal.4th 216, 281, 32 Cal. Rptr. 2d 807, 847 (1994). Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code; Code; and CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805 (1989), 20th Century Insurance Company et al. v. John Garamendi 8 Cal. 4th 216, 32 Cal. Rptr. 2d 807 (1994).

# **EXHIBIT 5**



TENTATIVE DECISION

*[Signature]*  
**FILED**  
LOS ANGELES SUPERIOR COURT  
OCT 25 2005  
JOHN A. CLARKE, CLERK  
*[Signature]*  
BY *[Signature]* DEPUTY

CASE: American Healthcare Indemnity Company et al. v. John Garamendi  
CASE No.: BS 094515  
DATE: Tuesday, October 25, 2005  
JUDGE: Dzintra Janavs  
EVENT: Hearing on Petition for Writ of Mandate

TIME: 9:30 a.m.  
DEPT.: 85

On 9/24/03, Petitioners submitted rate applications requesting a rate increase of +8.9% for their commercial lines of medical malpractice and professional liability insurance with the Commissioner for approval pursuant to Ins. Code § 1861.10. (Petition, ¶ 6, 3:24-25; Resp. Opp., 1:18-20; Int. Opp., pp. 2-3.) On 11/24/03, Intervenor Foundation for Taxpayer and Consumer Rights ("Foundation") petitioned the Commissioner for a public hearing on Petitioners' rate applications on the ground that the rates requested were not justified and/or excessive. (Petition, ¶ 6, 3:25-27; Resp. Opp., 1:20-22; Int. Opp., 3:3-5.) Additionally, the Foundation petitioned for Intervenor status with regards to any proceeding relating to Petitioners' rate increase applications. (Petition, ¶ 6, 3:26-27; Resp. Opp., 1:23-24; Int. Opp., 3:10-12.) After initially opposing the Foundation's petitions for hearing and intervention, Petitioners withdrew their rate applications on 12/17/03. (Petition, ¶ 7, 4:1-2; Resp. Opp., 1:24-26.) On 12/17/03, the Commissioner issued a decision denying the Foundation's Request for Hearing on the ground that Petitioners' "withdrawal of [their] applications renders the basis for hearing in this matter moot." (Foundation's RJN, Exh. D.)

On 1/23/04, the Foundation filed a Request for Compensation pursuant to Ins. Code § 1861.10(b), seeking \$41,433.05 from Petitioners for its expenses relating to its objections to the rate application and filing its Petition for Hearing. (Petitioners' RJN, Exh. C, Resp. RJN, Exh. 3; Int. RJN, Exh. E-1.) Petitioners opposed the request on the ground that the Foundation did not have the right to seek compensation where a hearing, or other formal proceeding, was not held on the rate applications. (Petitioners' RJN, Exh. D, Resp. RJN, Exh. 3.) On 6/10/04, the Commissioner denied the Foundation's Request for Compensation on the ground that it had no standing to seek reimbursement of its expenses. (Petitioners' RJN, Exh. E, Resp. RJN, Exh. 5, Int. RJN, Exh. G.) The decision specified that it was effective as of 6/10/04.

On 7/1/04, the Foundation filed a Request for Reconsideration pursuant to Gov. Code § 11521. Petitioners objected by filing a response on 7/6/04. (Petitioners' RJN, Exhs. F & G; Resp. Opp., Exh. 6 & 7, Int. RJN, Exh. H.) On 7/9/04, the Commissioner extended the time for consideration of the Request for Reconsideration and, on 7/20/04, granted the Request for Reconsideration. (Petitioners' RJN, Exhs. H, I, Resp. RJN, Exh. 9, Int. RJN, Exh. J.) On 12/14/04, the Commissioner issued a decision awarding compensation to the Foundation. (Petitioners' RJN, Exh. B, Resp. RJN, Exh. 2, Int. RJN, Exh. A.)

**Timeliness of Petitioners' Petition for Writ of Mandate**

The Foundation argues that Petitioners' Petition for Writ of Mandate is untimely because the Commissioner's decision awarding the Foundation compensation was mailed on 12/16/04, and under Insurance Code § 1858.6, the Commissioner's decision became effective 20 days later, or on 1/5/05. Therefore, the petition for review had to be filed on or before that date, but it was not filed until 1/12/05. (Int. Opp., p. 6.)

Petitioners contend, citing Economic Empowerment Foundation v. Quackenbush (1998) 65 Cal.App.4<sup>th</sup> 1297, that § 1858.6 is a *permissive* statute and was not intended to set any limitations on a person's right to seek judicial review. (Reply 2, 9:10-11.)

Insurance Code § 1858.6 provides in pertinent part:

Any finding, determination, rule, ruling or order made by the commissioner this chapter shall be subject to review by the courts of the State and proceedings on review shall be in accordance with the provisions of the Code of Civil Procedure....

Notwithstanding any other provision of law to the contrary, a petition for review of any such finding, determination, rule, or order may be filed at any time before the effective date thereof. *No such finding, determination, rule, or order shall become effective before the expiration of 20 days after notice and a copy thereof are mailed or delivered to the person affected, and any finding, determination, rule, or order of the commissioner so submitted for review shall not become effective for a further period of 15 days after the petition for review is filed with the court.*

(Emphasis added).

In Economic Empowerment Foundation v. Quackenbush, the court held that the use of the term "may" in § 1858.6 showed that the "procedure for obtaining review of the Commissioner's decision under this section is *permissive*." (Economic Empowerment Foundation, supra, 65 Cal.App.4<sup>th</sup> at 1402 (Emphasis added).) The court further stated that § 1858.6 "allows a party a *minimum of 20 days* within which to file a petition for review after the Commissioner's decision is mailed or delivered." (Economic Empowerment Foundation, supra, 65 Cal.App.4<sup>th</sup> at 1402.)

Section 1858.6 does not state that the Commissioner's finding, determination, rule, or order becomes effective on the twentieth day after mailing the decision to the affected party; rather, it states that a decision does not become effective until *at least* 20 days have expired since notice and a copy thereof are mailed or delivered to the affected party. (Ins. Code § 1858.6.) As it does not appear that the Commissioner set a specific date when his decision awarding compensation to the Foundation became effective, and the instant Petition for Writ of Mandate was filed within a reasonable time after the Commissioner mailed his decision to the Foundation, Petitioners' Petition for Writ of Mandate is timely.

### **The Commissioner's Authority to Grant Reconsideration**

Petitioners contend that, in general, administrative agencies lack the power to order reconsideration. (Petition, MPA, 2:15-18; Bonnell v. Medical Bd. of California (2003) 31 Cal.4<sup>th</sup> 1255, 1260.) Based on this general rule, Petitioners argue that the Commissioner had no authority to order reconsideration except as permitted by Government Code § 11521, and, pursuant to that section, the Commissioner's authority to order reconsideration *expired* on the effective date of the decision, i.e. 6/10/04. (Petition, MPA, p. 2.)

Respondents and the Foundation argue that the Commissioner has the inherent authority to grant reconsideration of his decisions and that California courts have consistently recognized that an agency may order reconsideration of all or part of a case, either on its own motion or on the motion of a party, and may reconsider the case itself or assign it to an administrative law judge. (Resp. Opp., pp. 5-7; Int. Opp., pp. 7-8; *see, e.g., In re Muszalski* (1975) 52 Cal.App.3d 500, 506, In re Fain (1976) 65 Cal.App.3d 376, 389.) The

Foundation also argues that Government Code § 11521 is inapplicable in the instant matter, and applies only to an adjudicative proceeding under the Administrative Procedures Act ("APA"). (Int. Opp., 6:3-5; Bonnell, supra, 31 Cal.4<sup>th</sup> at 1259.)

It is indisputable, and Petitioners admit, that there was no adjudication of Petitioners' rate applications. (Petition, MPA, 5:18-20 ("the Commissioner never reached the merits of the case since [Petitioners] withdrew [their] application before the Commissioner reached a decision to approve the rate or hold a hearing".)) Section 11521 is, therefore, inapplicable here. (See Bonnell, supra, 31 Cal.4<sup>th</sup> at 1259.) Accordingly, the Commissioner had the authority to reconsider his decision denying the Foundation's Request for Compensation. (In re Muszalski (1975) 52 Cal.App.3d 500, 506, In re Fain (1976) 65 Cal.App.3d 376, 389.)

### **The Commissioner's Authority to Award Compensation**

Petitioners argue that the Commissioner had no authority to grant compensation to the Foundation. (Petition, MPA, 4:10-28/5:1-28/6:1-9.) First, the Foundation did not obtain the Commissioner's approval of its petition to intervene or participate. (Petition, MPA, 4:4-6; Petition, ¶ 7, 4:4-5.) Second, the Foundation did not demonstrate "that [it] has made a substantial contribution to the adoption of any order, regulation or decision by the commissioner or court" as required by § 1861.10(b). (Petition, MPA, 5:7-10.)

Third, only participants in qualifying proceedings are entitled to "advocacy and witness fees and expenses" incurred through such participation; "advocacy fees" are defined as "costs, incurred or billed, *by a party* for the services of an advocate in the proceeding," and the Foundation was not a "party" since its petition to intervene was not granted pursuant to CCR § 2661.3(g). (Petition, MPA, pp. 5-6; Ins. Code § 1861.10(a); 10 CCR §§ 2661.1(a), 2661.3(g), and 2651.1(f).)

Respondents and the Foundation argue that Insurance Code § 1861.10(b) authorizes the Commissioner to award compensation to the Foundation, and just because Petitioners prematurely withdrew their rate applications, which mooted the need for a rate hearing, does not mean that Petitioners' withdrawal divests the Commissioner of his authority to award compensation. (Resp. Opp., pp. 8-13; Int. Opp., pp. 8-11.) The Foundation further argues that nowhere in the statute or regulations is it provided that a party is barred from being "eligible to receive compensation" absent a formal adjudicatory hearing, and that if Petitioners' attack on the Commissioner's authority to award compensation is successful, the statute's underlying purpose of encouraging consumers to enforce Proposition 103 would be thwarted by placing the determination of whether intervenors are compensated within the sole control of insurers. (Int. Opp., 10:5-4, 12:7-14.)

Pursuant to Insurance Code § 1861.05, "Every insurer which desires to change any rate shall filed a complete rate application with the commissioner." (Ins. Code § 1861.05(b).) The Insurance Code permits interested consumers to request a hearing to challenge the requested rate increase "or intervene in any proceeding ... under this article...." (See Ins. Code §§ 1861.05(c) and 1861.10(a).) The Insurance Code also permits consumers to seek reimbursement of expenses incurred in challenging the rate if certain conditions are met. (Ins. Code § 1861.10(b).) Insurance Code § 1861.10(b) provides as follows:

(b) The commissioner or court shall award reasonable advocacy and witness fees and expenses to any person who demonstrates that (1) the person represents the interests of consumers, *and*, (2) that he or she has made a substantial contribution to the *adoption of any order, regulation,*

or decision by the commissioner or a court. Where such advocacy occurs in response to a rate application, the award shall be paid by the applicant. (Emphasis added).

The regulations promulgated under Ins. Code § 1861.10(b), *inter alia*, clarifies some of its language. (See 10 CCR § 2661.1 et seq.) Under those regulations, "proceeding", as used in § 1861.10, "includes those proceedings set forth in Insurance Code Section 1861.10(a)." (10 CCR § 2661.1(e).) "Advocacy fees" means "costs, incurred or billed, by a party for the services of an advocate in the proceeding." (10 CCR § 2661.1(a) (Emphasis added).) "Party" means "the insurer whose rates are the subject of the proceeding, any person whose petition to intervene in the proceeding has been granted pursuant to section 2661.3(g), and the Department." (10 CCR § 2651.1(f) (Emphasis added).) Section 2661.3 of the California Code of Regulations states that any person wishing to intervene and become a party to a rate hearing must file a petition to intervene, and that the petition must be heard within 20 days of filing. (10 CCR §§ 2661.3(a) and (g).) The necessary implication of this section is that if the petition is not granted, then the person wishing to intervene does not and cannot become a party to a rate hearing.

Here, the Foundation failed to establish the elements for an award of advocacy and witness fees and expenses pursuant to § 1861.10(b). The Commissioner never adopted any order, regulation, or decision on the merits with respect to Petitioners' rate increase applications. Given that there was no hearing ~~and no~~ decision on the merits, and the Foundation was not even a party to the proceeding as its Petition to Intervene was not granted, there was no, and could not be a, substantial contribution made by the Foundation. (Economic Empowerment Foundation v. Quackenbush (1997) 57 Cal.App.4th 677, 689.) The Commissioner abused his discretion by awarding advocacy and witness fees and expenses to the Foundation. a)

The Petition for Writ of Mandate is granted. A writ shall issue commanding Respondents to vacate the Commissioner's decision granting compensation to the Foundation, and to take any other action consistent with this decision.

#### **Attorney Fees Under Government Code § 800**

Petitioners seek attorney fees in the sum of \$7,500 pursuant to Government Code § 800 on the ground that the Commissioner's decision awarding compensation to the Foundation was arbitrary and capricious. (Petition, MPA, 6:10-27.)

Government Code § 800 allows an award of reasonable attorney's fees to a prevailing party who shows that the determination of any administrative proceeding was the result of "arbitrary or capricious" conduct.

Whether an agency's action is arbitrary or capricious is one of fact, within the discretion of the court. The phrase "arbitrary or capricious" encompasses conduct not supported by a fair or substantial reason, a stubborn insistence on following unauthorized conduct, or a bad faith legal dispute. Attorney's fees may not be awarded simply because the administrative entity or official's action was erroneous, even if it was clearly erroneous. (Stirling v. Agricultural Labor Relations Bd. (1987) 189 Cal.App.3d 1305; Catalina Car Wash, Inc. v. Dept. of Industrial Relations (2003) 105 Cal.App.4th 162, 170.)

The request for attorney's fees under Government Code § 800 is denied. Petitioners have not shown more than a merely erroneous decision.

# **EXHIBIT 6**

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT 85

HON. DZINTRA JANAVS, JUDGE

AMERICAN HEALTHCARE INDEMNITY,  
PETITIONER,

VS.

JOHN GARAMENDI, ET AL,  
RESPONDENT.

NO. BS 094 515

REPORTER'S TRANSCRIPT OF PROCEEDINGS

TUESDAY, OCTOBER 25, 2005

APPEARANCES:

FOR THE PETITIONER:

BARGER & WOLEN  
BY: ROBERT W. HOGEBOOM, ESQUIRE  
SUH H. CHOI, ESQUIRE  
633 WEST FIFTH STREET  
LOS ANGELES, CALIFORNIA 90071  
(213) 614-7304

FOR THE RESPONDENT:

STATE OF CALIFORNIA  
DEPARTMENT OF JUSTICE  
OFFICE OF THE ATTORNEY GENERAL  
BY: FELIX E. LEATHERWOOD, ESQUIRE  
300 SOUTH SPRING STREET  
LOS ANGELES, CALIFORNIA 90013  
(213) 897-2478

FOR THE INTERVENOR:

THE FOUNDATION FOR TAXPAYER AND  
CONSUMER RIGHTS  
STAFF ATTORNEY  
BY: PAMELA PRESSLEY, ESQUIRE  
1750 OCEAN PARK BOULEVARD #200  
SANTA MONICA, CALIFORNIA 90405  
(310) 392-0522

**COPY**

JEANIE CAMPBELL, CSR NO. 11859  
OFFICIAL REPORTER

1 CASE NUMBER: BS 094 515  
2 CASE NAME: HEALTHCARE VS. GARAMENDI  
3 LOS ANGELES, CALIFORNIA TUESDAY, OCTOBER 25, 2005  
4 DEPARTMENT 85 HON. DZINTRA JANAVS, JUDGE  
5 APPEARANCES: (AS HERETOFORE NOTED.)  
6 REPORTER: JEANIE CAMPBELL, CSR NO. 11859  
7 TIME: 10:12 A.M.

8  
9 ---0---

10  
11 THE COURT: WE WILL TAKE NEXT NUMBER SEVEN ON THE  
12 CALENDAR, AMERICAN HEALTHCARE INDEMNITY VERSUS GARAMENDI.  
13 WE WILL TAKE THE APPEARANCES. LET'S START ON MY RIGHT.  
14 STATE YOUR NAME AND WHO YOU'RE APPEARING FOR.

15 MS. PRESSLEY: GOOD MORNING, YOUR HONOR.  
16 PAMELA PRESSLEY FOR THE INTERVENOR, THE FOUNDATION FOR  
17 TAXPAYER AND CONSUMER RIGHTS.

18 MR. LEATHERWOOD: GOOD MORNING, YOUR HONOR.  
19 DEPUTY ATTORNEY GENERAL FELIX LEATHERWOOD FOR THE  
20 COMMISSION AND DEPARTMENT.

21 MR. HOGEBROOM: ROBERT HOGEBROOM OF BARGER & WOLEN  
22 FOR AMERICAN HEALTHCARE.

23 MS. CHOI: SUH H. CHOI FOR AMERICAN HEALTHCARE.

24 THE COURT: WELL, YOU HAVE ALL HAD PLENTY OF TIME  
25 TO READ THE COURT'S TENTATIVE, I GATHER.

26 THE COURT IS GOING TO GRANT ALL THE REQUESTS  
27 FOR JUDICIAL NOTICE OF THE PARTIES. WE HAVE THREE OF  
28 THEM. I'M NOT GOING TO GO THROUGH EACH ONE SPECIFICALLY.

1 I WILL HEAR THE ARGUMENTS FROM WHOEVER WISHES TO ARGUE.

2 MR. LEATHERWOOD: SINCE WE'RE THE RESPONDENT, I'LL  
3 INITIALLY MAKE A STAB AT IT, BUT FIRST I WANT TO THANK YOU  
4 THE COURT FOR TAKING SO MUCH TIME TO REVIEW THE MATERIALS.

5 THE COURT: INTERESTING CASE.

6 MR. LEATHERWOOD: I THOUGHT ALL PARTIES DID AN  
7 EXCELLENT JOB OF PROBING AND SETTING FORTH THEIR  
8 POSITIONS.

9 WITH RESPECT TO THE COMMISSIONER AND THE  
10 DEPARTMENT OF INSURANCE, WE'RE IN AGREEMENT, OBVIOUSLY,  
11 WITH THE COURT ON TWO POINTS. BUT ON THE THIRD POINT WITH  
12 RESPECT TO THE AUTHORITY TO AWARD COMPENSATION, WE THOUGHT  
13 THAT WE PUT FORTH EVIDENCE THAT THE COMMISSION, ONE, THAT  
14 THE FOUNDATION DID REPRESENT THE INTERESTS OF CONSUMERS,  
15 AND TWO, THAT THE DECISION IN THIS PARTICULAR INSTANCE WAS  
16 THE DECISION NOT TO GO FORWARD ITSELF BY THE COMMISSION.  
17 THAT IN ITSELF WOULD BE WITHIN 1861 10(B).

18 THE COURT DISAGREED. I THINK IT'S WELL  
19 ARTICULATED, BUT I CAN'T GO AGAINST CORPORATE A LOT OF  
20 TIMES AND WE JUST DISAGREE. ON THAT BASIS, WE WOULD ARGUE  
21 AGAINST IT.

22 THE COURT: ANYTHING THE PETITIONERS WISH TO SAY?

23 MR. HOGEBOOM: NOTHING FROM THE PETITIONER'S SIDE.

24 THE COURT: ALL RIGHT. WELL, I DON'T KNOW THAT  
25 THERE IS A TREMENDOUS AMOUNT OF CASE LAW ON THIS SPECIFIC  
26 ISSUE, BUT AT ANY RATE, WE HAVE GOT WHAT WE HAVE GOT.

27 MR. LEATHERWOOD: YOUR HONOR, MAY I SUGGEST ONE  
28 THING?



1 THE COURT: YES.

2 MR. LEATHERWOOD: MY THOUGHT ON IT IS THAT ON ONE  
3 HAND, IT IS REALLY A STRANGE SITUATION. ON ONE HAND YOU  
4 ARE IN THE REGULATIONS; ON THE OTHER HAND, YOU ARE OUT OF  
5 THE REGULATIONS. THE COURT WENT BACK TO THE REGULATIONS  
6 TO DEFINE WHETHER OR NOT THE COMMISSION HAD AUTHORITY OR  
7 WE WERE OPERATING THE AUTHORITY OUTSIDE THE REGULATION,  
8 AND IT'S JUST DIFFICULT. THIS IS A HARD SITUATION FOR US.

9 THE COURT: WELL, I FOUND WHAT I FOUND ON THE BASIS  
10 OF WHAT I BELIEVE TO BE THE APPROPRIATE INTERPRETATION OF  
11 THE LAW, AND I THINK THAT THE STATUTE SAYS WHAT IT SAYS.

12 YOU CAN'T -- IT JUST IS ONE OF THESE  
13 SITUATIONS WHERE THERE REALLY ISN'T AN AWFUL LOT OF  
14 PRECEDENT, AND ONE HAS TO BE INTERPRETING THESE STATUTORY  
15 PROVISIONS IN WHAT AT LEAST TO ME SEEMS TO BE A LOGICAL  
16 AND CONSISTENT MANNER. OTHERWISE, WHERE DO YOU DRAW THE  
17 LINE IF THE PROCEEDING, YOU INTERPRET IT TO MEAN JUST  
18 ABOUT ANYTHING?

19 ALL RIGHT. THE PETITION FOR WRIT OF  
20 MANDAMUS --

21 MS. PRESSLEY: YOUR HONOR, I WOULD LIKE TO MAKE  
22 SOME ARGUMENTS.

23 THE COURT: OH, YOU DID WANT TO. I THOUGHT YOU  
24 WERE --

25 MS. PRESSLEY: NO, I WAS JUST CONCEDING TO LET  
26 RESPONDENT GO FIRST.

27 THE COURT: I BEG YOUR PARDON. I'M SORRY. GO  
28 AHEAD.

1 MS. PRESSLEY: I DON'T WANT TO BELABOR THESE  
2 ISSUES. I ALSO AGREE THAT YOUR TENTATIVE WAS WELL WRITTEN  
3 AND REASONED, AND YOU HAVE OBVIOUSLY GONE THROUGH THE  
4 REGULATIONS. I DO ALSO WANT TO SAY, THOUGH, THAT THIS IS  
5 A SITUATION WHERE WE WERE OPERATING SOMEWHAT OUTSIDE OF  
6 THE NORMAL PROCEDURE. I THINK THE COMMISSIONER'S DECISION  
7 ON RECONSIDERATION RECOGNIZED THAT BY STATING THAT WE  
8 BECAME A PARTY ONCE OUR PETITION FOR HEARING WAS FILED,  
9 AND IN THIS SITUATION, THE PETITIONER HAS A RIGHT TO HAVE  
10 A HEARING -- A DECISION ON THEIR PETITION FOR HEARING  
11 WITHIN A CERTAIN STATUTORY PERIOD, WITHIN SIXTY DAYS OF  
12 WHEN THE RATE APPLICATION IS FILED.

13 INSTEAD OF ISSUING THAT DECISION, THE  
14 DEPARTMENT ASKED BOTH THE APPLICANT AND THE PETITIONER TO  
15 WAIVE THAT STATUTORY DEADLINE AND ALLOW S.C.P.I.E. MORE  
16 TIME TO SUBMIT FURTHER DATA ON THE WRIT APPLICATION.

17 SO AT THAT POINT IN TIME, THE FOUNDATION WAS  
18 ENGAGED IN DISCUSSIONS WITH THE DEPARTMENT AND IN  
19 REVIEWING AND ANALYZING DATA.

20 AND IN ADDITION TO THE TWENTY-TWO PAGE  
21 ANALYSIS THAT OUR EXPERT SUBMITTED WITH THE PETITION TO  
22 ENCOURAGE THE DEPARTMENT TO BELIEVE THAT A HEARING WAS  
23 NECESSARY, AND IN THE END THEY AGREED THAT THE RATE WAS  
24 NOT JUSTIFIED. THE ONLY THING THAT PREVENTED A HEARING  
25 FROM BEING GRANTED WAS THE APPLICANT'S WITHDRAWAL.

26 SO ON THESE FACTS, WE WOULD REQUEST THAT IF  
27 YOUR DECISION STANDS, ESPECIALLY WITH REGARDS TO THE PART  
28 WHERE YOU SAY THAT A PETITION -- A PERSON CAN ONLY SEEK

1 INTERVENTION IF THEIR PETITION FOR INTERVENTION HAS BEEN  
2 GRANTED, WE CAN LIVE WITH THAT. IF THE COMMISSIONER IN  
3 THESE SITUATIONS WHERE THERE IS AN INFORMAL PROCEEDING  
4 UNDERWAY ISSUES A RULING SAYING THAT WE HAVE BEEN GRANTED  
5 INTERVENOR STATUS, PERHAPS THAT WOULD ADDRESS THAT  
6 PROBLEM.

7 I THINK THE MORE TROUBLING ASPECT OF YOUR  
8 DECISION IS THAT THERE -- IT SORT OF IMPLIES THAT THERE  
9 MUST BE A FORMAL HEARING HELD AND A FINAL DECISION ON THE  
10 MERITS OF THE APPLICATION.

11 BUT THERE ARE SEVERAL SITUATIONS LIKE THIS  
12 WHERE THE PETITIONER DOES ENGAGE IN INFORMAL DISCUSSIONS.  
13 THERE IS SOME INFORMAL RESOLUTION EITHER THROUGH  
14 SETTLEMENT OR THE DEPARTMENT AGREES THAT IT'S NOT  
15 JUSTIFIED AND THE COMPANY WITHDRAWS, AND THEN WE HAVE  
16 SPENT A SUBSTANTIAL AMOUNT OF TIME OR EXPERTS WHO, I'M  
17 SURE YOU UNDERSTAND, NOT VERY MANY EXPERTS IN THE COUNTRY  
18 EVEN DO THIS WORK.

19 AND TO BE ABLE TO INTERVENE IN THE FUTURE,  
20 WE HAVE TO BE ABLE TO COMPENSATE THEM, AND THE PURPOSE OF  
21 PROP 103 WAS TO ENCOURAGE THAT TYPE OF PARTICIPATION.

22 SO WE WOULD RESPECTFULLY REQUEST THAT YOUR  
23 DECISION NOT STAND FOR THE PROPOSITION THAT THERE MUST BE  
24 A FORMAL HEARING.

25 THE COURT: WELL, TELL ME WHICH LANGUAGE YOU  
26 SPECIFICALLY OBJECT TO THAT IS IN THERE.

27 MS. PRESSLEY: I WOULD OBJECT TO PAGE 4, THE SECOND  
28 FULL PARAGRAPH REGARDING THAT THE COMMISSIONER NEVER

1 ADOPTED ANY ORDER, REGULATION, OR DECISION ON THE MERITS.  
2 AND GIVEN THAT THERE WAS NO HEARING AND NO DECISION ON THE  
3 MERITS, THE FOUNDATION WAS NOT EVEN A PARTY TO THE  
4 PROCEEDING BECAUSE I THINK THERE WOULD BE SITUATIONS WHERE  
5 WE WERE, INDEED, A PARTY, BUT THERE IS ULTIMATELY NO  
6 HEARING THAT IS HELD.

7 AND THE ECONOMIC EMPOWERMENT FOUNDATION  
8 DECISION, WHILE IT DID DEFINE "DECISION" AS A DECISION ON  
9 MERITS IN THAT CASE, IT WAS DETERMINING WHO ULTIMATELY  
10 ISSUES THIS AWARD, AND IN THAT CASE, THERE WAS A DECISION  
11 ON THE MERITS, SO THEY SAID IT MUST APPLY TO THE  
12 COMMISSIONER'S DECISION, AND HE'S THE ONE WHO MUST ISSUE  
13 THE AWARD.

14 HERE THERE WAS A FINAL DECISION, THE  
15 DECISION THAT WAS ISSUED ON DECEMBER 17TH, AND THAT  
16 DECISION ENDED THE PROCEEDING BY DENYING OUR PETITION BUT  
17 ONLY BECAUSE IT HAD BECOME MOOT AFTER THE COMPANY WITHDREW  
18 THEIR APPLICATION. SO THAT'S THE PART I WOULD DISAGREE  
19 WITH.

20 THE COURT: ACTUALLY, YOU'RE TALKING ABOUT THE  
21 SECOND FULL PARAGRAPH OR ACTUALLY THE THIRD FROM THE TOP:  
22 "HERE THE FOUNDATION FAILED TO ESTABLISH THE ELEMENTS."  
23 IS THAT THE ONE YOU ARE TALKING ABOUT?

24 MS. PRESSLEY: CORRECT, BECAUSE THERE'S NO SUCH  
25 REQUIREMENT IN THE STATUTE THAT EITHER THERE IS A FORMAL  
26 HEARING ON THE MERITS.

27 THE COURT: YOU'RE ONLY OBJECTING TO THE HEARING  
28 PORTION.

1 WELL, I'M NOT REALLY SAYING ANYTHING ABOUT  
2 HEARING. I'M TALKING ONLY ABOUT GIVEN THAT -- OH, YES, I  
3 AM. YOU'RE TALKING ABOUT SPECIFICALLY THE THIRD SENTENCE:  
4 "GIVEN THAT THERE WAS NO HEARING AND NO DECISION ON THE  
5 MERITS AND THE FOUNDATION WAS NOT PART OF THE  
6 PROCEEDINGS."

7 MS. PRESSLEY: YES. I WOULD SUBMIT ON THESE FACTS.  
8 WE WERE ACTUALLY A PARTY, AND THE COMMISSIONER RECOGNIZED  
9 THAT IN THIS FINAL DECISION WHERE HE --

10 THE COURT: WELL, BUT HE WAS WRONG, AS FAR AS I'M  
11 CONCERNED, LEGALLY WRONG ON THAT FOR PURPOSES OF FEES FOR  
12 THIS STATUTE.

13 BUT I CAN SEE AND I CAN UNDERSTAND PERHAPS  
14 WHY I SHOULD NOT GO BEYOND WHAT IS REQUIRED HERE FOR THE  
15 PURPOSES HERE AND SORT OF TALK ABOUT THE SITUATION WHICH  
16 WE DON'T REALLY HAVE HERE, NAMELY, JUST THERE WAS NO  
17 HEARING. I CAN VISUALIZE ARGUABLY -- ARGUABLY SITUATIONS  
18 WHERE YOU POINT OUT MAYBE INTERVENTION IS GRANTED. IT  
19 GOES ON UNTIL THE END OF THE HEARING, AND THEN IT IS  
20 SETTLED.

21 I THINK YOU DO ARGUABLY GET INTO THE  
22 QUESTION OF -- CALIFORNIA NOW RECOGNIZES THE THEORY OF, IF  
23 THE ACTION ACHIEVES THE RESULT, YOU'RE ENTITLED TO  
24 ATTORNEYS FEES. AND OF COURSE, IF YOU LOOK AT THE  
25 SPECIFIC STATUTE HERE, BUT I SUPPOSE THAT'S RATHER DRAB AS  
26 WELL.

27 I'LL HEAR FROM THE PETITIONERS. BASICALLY,  
28 I GUESS WHAT THE RESPONDENTS ARE ASKING IS THAT THE

1 COURT -- I GUESS ELIMINATE THAT ONE SENTENCE FROM THE  
2 TENTATIVE BECAUSE WHAT I NORMALLY DO, AS YOU HEARD BEFORE,  
3 IS I ORDER THAT MY TENTATIVE IS ADOPTED AS THE STATEMENT  
4 OF DECISION, AND THAT'S WHAT I INTEND TO DO HERE AS WELL.

5 WHAT THE RESPONDENTS ARE SAYING IS THAT THEY  
6 ARE OBJECTING TO MY PROPOSED STATEMENT OF DECISION,  
7 SPECIFICALLY THAT SENTENCE I GUESS OR AT LEAST TO THE  
8 EXTENT IT TALKS ABOUT HEARING AND DECISION ON THE MERITS.  
9 AND I WILL HEAR FROM THE PETITIONER ON THAT.

10 MR. HOGEBOOM: THANK YOU, YOUR HONOR. WE BELIEVE  
11 THAT THE PARAGRAPH THAT WE'RE TALKING ABOUT IS AN  
12 IMPORTANT PARAGRAPH BECAUSE IT TRULY DOES FOLLOW WHAT THE  
13 REGULATIONS SAY THAT A CONSUMER GROUP MUST DO TO BECOME A  
14 PARTY AND TO PARTICIPATE --

15 THE COURT: THEY HAVE TO INTERVENE.

16 MR. HOGEBOOM: THEY HAVE TO INTERVENE. NOW, IN  
17 THIS CASE, THEY WERE NOT GRANTED INTERVENTION, AND THERE  
18 WAS NO FINAL DECISION. THE GRANTING OF THE INTERVENTION  
19 IS VERY IMPORTANT IN ALL OF THESE CASES.

20 THE COURT: THAT'S ONE OF THE MOST IMPORTANT  
21 THINGS.

22 MR. HOGEBOOM: AND WHAT HAPPENS WHEN YOU HAVE THIS  
23 RATE APPLICATION, AND UNDER THE STATUTE -- YOU WERE VERY  
24 GOOD. YOU CAUGHT 186105, WHICH IS THE STATUTORY AUTHORITY  
25 BECAUSE IT SAYS, RATE APPLICATIONS ARE FILED WITH THE  
26 COMMISSIONER. THE COMMISSIONER HAS THE DUTY TO REVIEW THE  
27 RATE APPLICATION. THE RIGHTS AND THE COMMISSIONER HAVE  
28 THE DUTY TO DETERMINE UPON A PETITION FOR A HEARING FROM A

1 CONSUMER GROUP, WHICH IS WHAT THEY'RE LIMITED TO DO WHEN  
2 THERE IS A RATE APPLICATION. THEY HAVE A RIGHT TO COME IN  
3 AND PETITION FOR A HEARING AND TO EFFECT, SHOW CASE  
4 THROUGH EVIDENCE THAT'S BEEN SUBMITTED, AS THEY DID IN  
5 THIS CASE, WHY A HEARING SHOULD BE HELD.

6 THEY ARE DOING TWO THINGS: THEY WANT THE  
7 COMMISSIONER TO ORDER A HEARING, AND THEN AT THE SAME TIME  
8 THEY ARE ASKING TO INTERVENE IN THAT PROCEEDING. OKAY.

9 THE RATE APPLICATION PROCESS IS NOT A  
10 PROCEEDING WITHIN 1861 10; IT IS A SEPARATE PROCEEDING FOR  
11 THE DEPARTMENT. IT'S NOT FOR THE CONSUMER GROUPS TO COME  
12 IN WITH SEMI-PARTY STATUS TO BE ABLE TO OBJECT, TO  
13 NEGOTIATE AND DO THINGS. IF THEY WANT TO DO THAT, THEY DO  
14 THAT ON THEIR OWN NICKEL AND NOT HAVE THE COMMISSIONER  
15 CHARGE THE COMPANY FOR THAT.

16 THE COMMISSIONER CAN ORDER A HEARING, AND AT  
17 THAT TIME ONCE THE HEARING IS ORDERED, THEN THE PETITIONER  
18 CAN START HAVING RIGHTS. I DO NOT OBJECT TO PETITIONER  
19 HAVING RIGHTS UPON THE ORDER OF A HEARING STARTING AT THAT  
20 TIME, EVEN BEFORE THE ADMINISTRATIVE LAW JUDGE IN THAT  
21 CASE ACCEPTS THE PETITION FOR INTERVENTION.

22 SO WHAT WE HAVE IS REALLY A MOVEMENT BY THE  
23 CONSUMER GROUPS TO PARTICIPATE IN THE APPLICATION PROCESS  
24 THAT WAS NOT ENVISIONED BY THE COMMISSIONER'S OWN  
25 REGULATIONS. THE COMMISSIONER'S OWN REGULATIONS  
26 ENVISIONED PARTICIPATION IN THE HEARING PROCESS.

27 THE COURT: SO WHAT YOU ARE SAYING IS EVEN THOUGH  
28 THERE MAY NOT BE A HEARING HELD YET, AS LONG AS A HEARING

1 HAS BEEN ORDERED AND THEY HAVE BEEN ALLOWED TO INTERVENE,  
2 AT THAT POINT, THEY MAY BE ENTITLED TO FEES EVEN IF THERE  
3 IS NO ULTIMATE DECISION ON THE MERITS.

4 MR. HOGEBOOM: YES, BECAUSE IF THERE IS A  
5 RESOLUTION LIKE MS. PRESSLEY SUGGESTS, WHICH THERE IS,  
6 THEN AT THAT POINT THAT IS SUBSTANTIAL CONTRIBUTION TO THE  
7 ULTIMATE DECISION IN THE CASE WHICH WOULD BE THE  
8 RESOLUTION OF THE MATTER, I WOULD SAY. SO I THINK THE  
9 PARAGRAPH IS ABSOLUTELY ESSENTIAL --

10 THE COURT: WELL, MAYBE I SHOULD JUST MODIFY IT BY  
11 SAYING, GIVEN THAT THERE WAS NO HEARING SET, AND STRIKING  
12 THE WORDS NO DECISION ON THE MERITS, BECAUSE THEY ARE  
13 CONCERNED THAT SOMEONE MIGHT READ THIS AS SAYING THAT  
14 WITHOUT THE DECISION ON THE MERITS ON SOME THINGS WE JUST  
15 CAN'T DO IT.

16 MR. HOGEBOOM: WELL, I THINK THERE IS NO HEARING ON  
17 THE MATTER, NOT JUST SET. THERE WAS NO HEARING GRANTED.  
18 THERE WAS NO INTERVENTION GRANTED IN THIS CASE. I THINK  
19 BOTH OF THOSE HAVE TO OCCUR.

20 THEN THE OTHER ISSUE, THE TOUGHER ISSUE THAT  
21 YOU MAY WANT TO NOT GET TO IS THE PROCEEDING ISSUE BECAUSE  
22 THERE HAS TO BE A LEGITIMATE PROCEEDING. BUT I THINK THAT  
23 ONCE THE HEARING IS GRANTED, THEN WE'RE INTO PERHAPS  
24 SOMETHING THAT MAY BE A PROCEEDING. I DON'T WANT TO WAIVE  
25 THAT ARGUMENT.

26 THE COURT: AS A PRACTICAL MATTER, I DON'T THINK  
27 THAT THE PROCEEDING IS GOING TO BE A BIG ISSUE IN MOST  
28 CASES WHERE YOU HAVE A HEARING OF SOME TYPE.



1 MR. HOGEBOOM: NO, IT WILL NOT BE. ONCE THERE IS A  
2 HEARING DECLARED, WE THEN ARE IN A PROCEEDING ATMOSPHERE.

3 THE COURT: SO I DON'T WANT TO GO BEYOND WHERE I  
4 HAVE TO GO IN ORDER TO RULE ON THIS CASE BECAUSE I DON'T  
5 WANT TO IN ANY WAY NECESSARILY GIVE SORT OF HYPOTHETICAL  
6 DECISIONS THAT MAY LATER BIND ONE SIDE OR THE OTHER OR IN  
7 SOME WAY IMPEDE THEM.

8 HOW ABOUT IF I JUST CHANGE THAT TO, GIVEN  
9 THAT THERE WAS NO HEARING GRANTED AND THE FOUNDATION WAS  
10 NOT EVEN A PARTY TO THE PROCEEDING, THE PETITION WAS NOT  
11 GRANTED, THERE WAS NOT AND COULD NOT BE A SUBSTANTIAL  
12 [INDISTINCT]. HOW ABOUT THAT? ANYONE HAVE A REAL PROBLEM  
13 WITH THAT?

14 MS. PRESSLEY: I WOULD JUST BRIEFLY RESPOND THAT I  
15 THINK WHAT SITUATION WILL OCCUR IS THAT AND WHAT HAS  
16 EVIDENTLY OCCURRED IS THAT THE APPLICANT WILL CONTROL THE  
17 PROCESS OF WHETHER A HEARING IS EVER GRANTED BECAUSE --

18 THE COURT: WHAT'S WRONG WITH THAT? THAT'S PART OF  
19 OUR JURISPRUDENCE.

20 MS. PRESSLEY: RIGHT. BUT THE PROBLEM WITH THAT IS  
21 THEN YOU HAVE SORT OF THIS INFORMAL PROCESS THAT DRAGS ON  
22 SOMETIMES FOR THREE MONTHS, SIX MONTHS BEFORE ANY DECISION  
23 IS MADE ON WHETHER TO GRANT THE HEARING, AND DURING THAT  
24 TIME THERE COULD BE DISCUSSIONS, THERE COULD BE FURTHER  
25 ANALYSES, THERE COULD BE SUBSTANTIAL TIME THAT'S EXPENDED  
26 BY THE PETITIONER TO PERSUADE THE DEPARTMENT THAT ITS  
27 PETITION IS MERITORIOUS.

28 THE COURT: WELL, THEY COULD DO THAT, BUT UNDER THE

1 LAW, THEY DON'T GET PAID FOR IT UNLESS YOU CAN SOMEHOW,  
2 LET'S SAY, FIT INTO THE CATALYST THEORY AND SHOW THAT YOU  
3 WERE A CATALYST OF SOME KIND. BUT AGAIN, THAT WOULD HAVE  
4 TO -- YOU WOULD HAVE TO -- I SUPPOSE THE ISSUE IS, IS A  
5 CATALYST THEORY CONSISTENT WITH 1861.10(B) BECAUSE  
6 1861.10(B) IS THE MORE SPECIFIC SECTION THAT SPECIFICALLY  
7 GOVERNS HERE.

8 THE QUESTION I SUPPOSE WOULD BE WHETHER IN  
9 SOME WAY THE CATALYST THEORY COMES INTO PLAY IN THIS  
10 CONTEXT AND SO ON, BUT --

11 MS. PRESSLEY: AND THAT WOULD INEVITABLY LEAD TO  
12 FURTHER -- WASTE OF THE DEPARTMENT RESOURCES --

13 THE COURT: BUT WHAT IS WRONG WITH THAT?

14 MS. PRESSLEY: -- BECAUSE WHAT GENERALLY HAPPENS IS  
15 THAT ONCE IT GOES TO THE ADMINISTRATIVE HEARING BUREAU,  
16 THERE IS A WHOLE OTHER SET OF PERSONNEL, ADMINISTRATIVE  
17 LAW JUDGE THAT GETS INVOLVED, AND THE DEPARTMENT IN AN  
18 EFFORT TO CONSERVE THAT PROCESS AND NOT GIVE EVERY -- NOT  
19 GRANT EVERY SINGLE PETITION THAT'S MERITORIOUS HAS  
20 ENCOURAGED THIS SORT OF INFORMAL PROCEEDING.

21 THE COURT: THAT'S WONDERFUL. THAT'S WHAT IT'S  
22 SUPPOSED TO BE. THAT'S EXACTLY WHAT WE'RE TALKING ABOUT  
23 IN THE COURTS AS WELL WHEN WE ARE TALKING SETTling CASES.  
24 IF ANYONE WANTS TO DISMISS A CASE AT ANY TIME JUST ABOUT,  
25 YOU CAN DO THAT, AND THE WHOLE POINT IS TO AVOID  
26 LITIGATION, TO AVOID FURTHER DISPUTES. WHAT'S WRONG WITH  
27 THAT?

28 MS. PRESSLEY: NOTHING.

1 THE COURT: WELL, THEN GO TO THE CONGRESS AND HAVE  
2 THEM CHANGE IT. HAVE THEM CHANGE THE LAW AND SAY THAT IN  
3 THESE SITUATIONS, THERE WILL BE A SECTION NUMBER THREE  
4 DOWN HERE. EVEN IF THERE'S NO INTERVENTION, EVEN IF  
5 THERE'S NO HEARING ORDERED, YOU'RE STILL ENTITLED TO FEES  
6 IF SUCH AND SUCH OCCURS.

7 BUT THAT'S NOT FOR ME TO CHANGE THE LAW AND  
8 MAKE IT BROADER THAN WHAT IT APPEARS TO BE JUST BECAUSE,  
9 YOU KNOW, OF THESE SORT OF -- THEY CAN DISMISS IT OR THEY  
10 CAN RESOLVE IT AND THEN WE'RE OUT. THAT'S EXACTLY PART OF  
11 THE SYSTEM. THAT'S EXACTLY PART OF THE SYSTEM TO  
12 ENCOURAGE AMICABLE RESOLUTION.

13 MS. PRESSLEY: RIGHT. AND ALL WE ARE ASKING IS  
14 THAT THE STATUTE NOT BE NARROWLY INTERPRETED THROUGH --

15 THE COURT: WELL, YOU'RE ASKING ME TO EXPAND IT AND  
16 TO READ STUFF INTO IT THAT ISN'T THERE. I'M NOT GOING TO  
17 DO THAT. THAT IS ONE THING THAT I JUST DO NOT DO.

18 IF YOU BELIEVE THAT MY INTERPRETATION IS  
19 WRONG, YOU CAN CERTAINLY GO TO THE COURT OF APPEALS AND  
20 THEY WILL TELL ME WHETHER I'M WRONG OR NOT. BUT I DO NOT  
21 SEE SAYING WHAT YOU WOULD WANT ME TO HOLD.

22 ALL RIGHT. I'M GOING TO CHANGE THIS ONE  
23 SENTENCE TO SIMPLY, GIVEN THAT THERE WAS NO HEARING  
24 GRANTED --

25 MR. LEATHERWOOD: IS THAT THE THIRD SENTENCE, YOUR  
26 HONOR?

27 THE COURT: I'M DOING THIS BY INTERLINEATION. YES,  
28 ON PAGE 4. AND I'M STRIKING, NO DECISION ON THE MERITS.

1 AND THE FOUNDATION WAS NOT EVEN A PARTY TO THE  
2 PROCEEDINGS -- ITS PETITION TO INTERVENE DENIED. THERE  
3 WAS NOT AND COULD NOT BE A SUBSTANTIAL CONTRIBUTION MADE  
4 BY THE FOUNDATION.

5 AND I HAVE ALREADY COVERED OTHER THINGS IN  
6 OTHER PARAGRAPHS.

7 I THINK THAT TAKES CARE OF YOUR MOST ACUTE  
8 PROBLEM OF HAVING TO HAVE A DECISION ON THE MERITS. AND  
9 BY STRIKING THAT, I'M ALSO NOT SAYING THAT YOU DON'T HAVE  
10 TO HAVE A DECISION ON THE MERITS; I'M JUST NOT GOING THERE  
11 BECAUSE I DON'T NEED TO GO THERE TODAY.

12 ECONOMIC EMPOWERMENT CERTAINLY TALKED ABOUT  
13 DECISION ON THE MERITS, AND I'M SUPPOSED TO DO WHAT THE  
14 COURT OF APPEALS TELL ME TO DO, BUT I DON'T THINK I NEED  
15 TO GET THERE TODAY.

16 ALL RIGHT. THE PETITION FOR WRIT OF  
17 MANDAMUS THEN IS GRANTED. THE TENTATIVE AS MODIFIED BY  
18 THE COURT'S INTERLINEATION IS ORDERED FILED AND SHALL BE  
19 DEEMED THE COURT'S STATEMENTS OF DECISION.

20 PETITIONER'S REQUEST FOR CCP EIGHT HUNDRED  
21 IN ATTORNEY FEES IS DENIED FOR THE REASONS INDICATED IN  
22 THE COURT'S TENTATIVE WHICH HAS BEEN ORDERED FILED.

23 COUNSEL FOR THE PETITIONER SHALL PREPARE,  
24 SERVE, AND LODGE IN DEPARTMENT 85 A PROPOSED JUDGMENT  
25 GRANTING THE PETITION FOR WRIT ON OR BEFORE -- ANY  
26 PROBLEMS BY FRIDAY?

27 MR. HOGEBOOM: NO, YOUR HONOR. THAT WILL BE FINE.

28 THE COURT: AND OBJECTIONS, IF ANY, BY NOVEMBER 1?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IS THAT OKAY?

MS. PRESSLEY: YES, YOUR HONOR.

THE COURT: SO FRIDAY IS THE 25TH AND NOVEMBER 1.  
TRY TO COORDINATE ON THE PROPOSED JUDGMENT SO YOU DON'T  
NEED TO FILE ANY OBJECTIONS.

MR. HOGEBOOM: YOUR HONOR, LET'S GO OVER OUR DATES?  
THE JUDGMENT, BEFORE FRIDAY, 28TH.

THE COURT: YES, THAT IS THE 28TH, FOUR P.M.

MR. HOGEBOOM: THAT WOULD BE THEN -- FRIDAY IS  
FINE.

THE COURT: OBJECTIONS, AS I SAY, PLEASE COORDINATE  
AND SEE IF YOU CAN GET AGREEMENT; IF SO, INDICATE THAT  
THERE IS NO OBJECTION. OTHERWISE, I WILL HOLD IT FOR  
OBJECTIONS UNTIL THE NOVEMBER 4TH, FOUR P.M.

(THE PROCEEDINGS IN THE ABOVE-ENTITLED  
MATTER WERE CONCLUDED AT 10:40 A.M.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT 85

HON. DZINTRA JANAVS, JUDGE

AMERICAN HEALTHCARE INDEMNITY,  
PETITIONER,

VS.

JOHN GARAMENDI, ET AL,  
RESPONDENT,

NO. BS 094 515

STATE OF CALIFORNIA  
COUNTY OF LOS ANGELES

REPORTER'S CERTIFICATE

I, JEANIE CAMPBELL, OFFICIAL REPORTER OF THE  
SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS  
ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING PAGES 1 THROUGH  
15, INCLUSIVE, COMPRISE A FULL, TRUE, AND CORRECT TRANSCRIPT  
OF THE PROCEEDINGS TAKEN IN THE MATTER OF THE ABOVE-ENTITLED  
CAUSE ON TUESDAY, OCTOBER 25, 2005.

DATED THIS 18TH DAY OF NOVEMBER, 2005.

  
\_\_\_\_\_  
JEANIE CAMPBELL, CSR NO. 11859  
OFFICIAL REPORTER

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**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 **October 1, 2007**, I served the foregoing document(s) described as **PETITIONERS' OPENING BRIEF** on the interested parties in this action by placing [ ] the original [X] a true copy thereof enclosed in sealed envelope addressed as stated below:

**SEE ATTACHED SERVICE LIST**

**BY MAIL**

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.

**EXPRESS MAIL**

I am "readily familiar" with the firm's practice of collection and processing correspondence for Express Mail delivery. Under that practice it would be deposited in the post office, mail box, subpost office, substation, or mail chute, or other like facility regularly maintained by the US Postal Service for receipt of Express Mail in a sealed envelope, with Express Mail postage paid, addressed to the person on whom it is to be served, at the office address as last given by that person on any document filed in the cause and served on the party making service by Express Mail; otherwise at that party's place of residence.

**BY PERSONAL SERVICE**

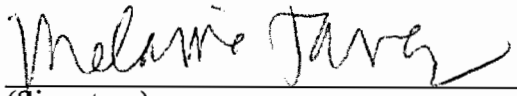
I caused such envelope to be delivered to a commercial messenger service with instructions to personally deliver same to the offices of the addressee on this date.

**BY FACSIMILE**

By transmitting an accurate copy via facsimile to the person and telephone number as follows: **Christine Zarifian (Fax No. 213-897-5775);**  
**Pamela Pressley (Fax No. 310-392-8874)**

**(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 **October 1, 2007.**

MELANIE A. TAVERA  
(Name)

  
(Signature)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**SERVICE LIST**

*The Association of California Insurance Companies, et al. v. Steve Poizner, et al.*  
Los Angeles Superior Court; Case No. BS 109154

<p>Mark P. Richelson (SBN 58121) Christine Zarifian (SBN 212810) Deputy Attorneys General OFFICE OF THE ATTORNEY GENERAL 300 South Spring Street, Suite 1702 Los Angeles, California 90013 Telephone No.: (213) 897-2479 Facsimile No.: (213) 897-5775</p>	<p>Attorneys for Respondents and Defendants STEVE POIZNER, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA; and CALIFORNIA DEPARTMENT OF INSURANCE</p>
<p>Harvey Rosenfield (SBN 123082) Pamela M. Pressley (SBN 180362) Todd Foreman (SBN 229536) THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS 1750 Ocean Park Boulevard, Suite 200 Santa Monica, California 90405 Telephone No.: (310) 392-0522 Facsimile No.: (310) 392-8874</p>	<p>Attorneys for THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS</p>



1 Robert W. Hogeboom (061525)  
 Suh Choi (217353)  
 2 Michael A. S. Newman (205299)  
 BARGER & WOLEN LLP  
 3 633 West Fifth Street, 47th Floor  
 Los Angeles, California 90071  
 4 Telephone: (213) 680-2800  
 Facsimile: (213) 614-7399  
 5  
 Attorneys for Plaintiffs  
 6 The Association of California Insurance Companies;  
 The Personal Insurance Federation of California;  
 7 The American Insurance Association; and  
 The Pacific Association of Domestic Insurance Companies  
 8

ORIGINAL FILED  
 OCT 01 2007  
 LOS ANGELES  
 SUPERIOR COURT

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
 10 **FOR THE COUNTY OF LOS ANGELES**  
 11

12	<b>THE ASSOCIATION OF CALIFORNIA</b>	)	CASE NO: BS 109154
	<b>INSURANCE COMPANIES, THE</b>	)	
13	<b>PERSONAL INSURANCE FEDERATION</b>	)	<b>DECLARATION OF SUH H. CHOI IN</b>
	<b>OF CALIFORNIA, THE AMERICAN</b>	)	<b>SUPPORT OF PETITIONERS' OPENING</b>
14	<b>INSURANCE ASSOCIATION, AND THE</b>	)	<b>BRIEF</b>
	<b>PACIFIC ASSOCIATION OF DOMESTIC</b>	)	
15	<b>INSURANCE COMPANIES</b>	)	[Filed concurrently with: (1) Declaration of Su
		)	Choi; (2) Request For Judicial Notice]
16	Petitioners and Plaintiffs,	)	
		)	Writ Filed: March 25, 2007
17	vs.	)	
		)	Date: January 31, 2008
18	<b>STEVE POIZNER, Insurance Commissioner</b>	)	Time: 9:30 a.m.
	<b>of the State of California; and CALIFORNIA</b>	)	Department: 85
19	<b>DEPARTMENT OF INSURANCE,</b>	)	
		)	
20	Respondents and Defendants.	)	

1 **DECLARATION OF SUH H. CHOI**

2

3 I, Suh H. Choi, declare as follows:

4

5 1. I am an attorney licensed to practice in this Court and all the courts in the State of  
6 California, and I am an associate of Barger & Wolen, LLP, counsel of record for The Association of  
7 California Insurance Companies, The Personal Insurance Federation of California, The American  
8 Insurance Association, and The Pacific Association of Domestic Insurance Companies (collectively,  
9 "Petitioners"), plaintiffs in this action. I am one of the attorneys with primary responsibility for the  
10 handling of this matter on behalf of Petitioners.

11 2. I have personal knowledge of the matters set forth below and, if called as a witness,  
12 could and would competently testify as to such matters.

13 3. Attached to Petitioners' Opening Brief as Exhibit "1" is a true and correct copy of  
14 current version of Title 10, California Code of Regulations sections 2651.1, 2661.1, 2661.3, 2662.1,  
15 2662.3, and 2662.5, and adopted new Section 2653.6, which we refer to in the brief as the  
16 "Amended Regulations."

17 4. Attached to Petitioners' Opening Brief as Exhibit "2" is a true and correct copy of the  
18 Initial Statement of Reasons, dated September 22, 2006, issued by the Commissioner of Insurance  
19 (then John Garamendi), regarding the Amended Regulations.

20 5. Attached to Petitioners' Opening Brief as Exhibit "3" is a true and correct copy of  
21 California Code of Regulations, Title 10, sections 2649.1 – 2662.8 as those regulations appeared  
22 prior to the adoption of the Amended Regulations ("Prior Regulations").

23 6. Attached to Petitioners' Opening Brief as Exhibit "4" is a true and correct copy of the  
24 Prior Regulations and Amended Regulations merged onto a single document in "redline" form (i.e,  
25 with the changes reflecting the Amended Regulations underlined, and with language from the Prior  
26 Regulations stricken out where it no longer appears in the Amended Regulations).

27

28

1 7. Attached to Petitioners' Opening Brief as Exhibit "5" is a true and correct copy of the  
2 October 25, 2005 Tentative Decision of the Court, ultimately adopted as the final decision, in  
3 *American Healthcare Indemnity Company v. John Garamendi*, Case No. BS 094515.

4 8. Attached to Petitioners' Opening Brief as Exhibit "6" is a true and correct copy of the  
5 October 25, 2005 Reporter's Transcript of Proceedings before the Court in *American Healthcare*  
6 *Indemnity Company v. John Garamendi*, Case No. BS 094515.

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

9  
10 Executed this 1<sup>st</sup> day of October 2007, at Los Angeles, California.

11  
12   
13 \_\_\_\_\_  
14 Suh H. Choi

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**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 **October 1, 2007**, I served the foregoing document(s) described as **DECLARATION OF SUH H. CHOI IN SUPPORT OF PETITIONERS' OPENING BRIEF** on the interested parties in this action by placing  the original  a true copy thereof enclosed in sealed envelope addressed as stated below:

**SEE ATTACHED SERVICE LIST**

**BY MAIL**

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.

**EXPRESS MAIL**

I am "readily familiar" with the firm's practice of collection and processing correspondence for Express Mail delivery. Under that practice it would be deposited in the post office, mail box, subpost office, substation, or mail chute, or other like facility regularly maintained by the US Postal Service for receipt of Express Mail in a sealed envelope, with Express Mail postage paid, addressed to the person on whom it is to be served, at the office address as last given by that person on any document filed in the cause and served on the party making service by Express Mail; otherwise at that party's place of residence.

**BY PERSONAL SERVICE**

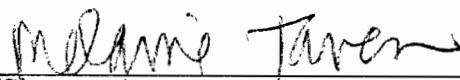
I caused such envelope to be delivered to a commercial messenger service with instructions to personally deliver same to the offices of the addressee on this date.

**BY FACSIMILE**

By transmitting an accurate copy via facsimile to the person and telephone number as follows: **Christine Zarifian (Fax No. 213-897-5775);**  
**Pamela Pressley (Fax No. 310-392-8874)**

(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 **October 1, 2007.**

MELANIE A. TAVERA  
(Name)

  
(Signature)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**SERVICE LIST**

*The Association of California Insurance Companies, et al. v. Steve Poizner, et al.*  
Los Angeles Superior Court; Case No. BS 109154

<p>Mark P. Richelson (SBN 58121) Christine Zarifian (SBN 212810) Deputy Attorneys General OFFICE OF THE ATTORNEY GENERAL 300 South Spring Street, Suite 1702 Los Angeles, California 90013 Telephone No.: (213) 897-2479 Facsimile No.: (213) 897-5775</p>	<p>Attorneys for Respondents and Defendants STEVE POIZNER, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA; and CALIFORNIA DEPARTMENT OF INSURANCE</p>
<p>Harvey Rosenfield (SBN 123082) Pamela M. Pressley (SBN 180362) Todd Foreman (SBN 229536) THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS 1750 Ocean Park Boulevard, Suite 200 Santa Monica, California 90405 Telephone No.: (310) 392-0522 Facsimile No.: (310) 392-8874</p>	<p>Attorneys for THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS</p>

1 Robert W. Hogeboom (061525)  
Suh Choi (217353)  
2 Michael A. S. Newman (205299)  
BARGER & WOLEN LLP  
3 633 West Fifth Street, 47th Floor  
Los Angeles, California 90071  
4 Telephone: (213) 680-2800  
Facsimile: (213) 614-7399

5 Attorneys for Plaintiffs  
6 The Association of California Insurance Companies;  
The Personal Insurance Federation of California;  
7 The American Insurance Association; and  
The Pacific Association of Domestic Insurance Companies  
8

ORIGINAL FILED  
OCT 01 2007  
LOS ANGELES  
SUPERIOR COURT

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
10 **FOR THE COUNTY OF LOS ANGELES**  
11

12 **THE ASSOCIATION OF CALIFORNIA** )  
**INSURANCE COMPANIES, THE** )  
13 **PERSONAL INSURANCE FEDERATION** )  
**OF CALIFORNIA, THE AMERICAN** )  
14 **INSURANCE ASSOCIATION, AND THE** )  
**PACIFIC ASSOCIATION OF DOMESTIC** )  
15 **INSURANCE COMPANIES** )

16 Petitioners and Plaintiffs, )

17 vs. )

18 **STEVE POIZNER, Insurance Commissioner** )  
**of the State of California; and CALIFORNIA** )  
19 **DEPARTMENT OF INSURANCE,** )

20 Respondents and Defendants. )  
21

CASE NO: BS 109154

**REQUEST FOR JUDICIAL NOTICE**

[Filed concurrently with: (1) Opening Brief;  
(2) Declaration of Suh Choi]

Writ Filed: March 25, 2007

Date: January 31, 2008

Time: 9:30 a.m.

Department: 85

1 REQUEST FOR JUDICIAL NOTICE

2  
3 Pursuant to Evidence Code sections 452 and 453 and in support of the Opening Brief of  
4 Petitioners The Association of California Insurance Companies, The Personal Insurance Federation  
5 of California, The American Insurance Association, and The Pacific Association of Domestic  
6 Insurance Companies (collectively, "Petitioners"), Petitioners respectfully request that the Court  
7 take judicial notice of the following documents:  
8

9 1. **Exhibit "1" to Petitioner's Opening Brief:** California Code of Regulations, Title 10,  
10 sections 2651.1, 2661.1, 2661.3, 2662.1, 2662.3, and 2662.5, and adopted new Section 2653.6  
11 ("Amended Regulations").

12 2. **Exhibit "2" to Petitioner's Opening Brief:** The Initial Statement of Reasons, dated  
13 September 22, 2006, issued by the Commissioner of Insurance (then John Garamendi), regarding  
14 the Amended Regulations.

15 3. **Exhibit "3" to Petitioner's Opening Brief:** California Code of Regulations, Title 10,  
16 sections 2649.1 – 2662.8, as those regulations appeared prior to the adoption of the Amended  
17 Regulations ("Prior Regulations").

18 4. **Exhibit "4" to Petitioner's Opening Brief:** The Prior Regulations and Amended  
19 Regulations merged onto a single document in "redline" form (i.e, with the changes reflecting the  
20 Amended Regulations underlined, and with language from the Prior Regulations stricken out where  
21 it no longer appears in the Amended Regulations).

22 5. **Exhibit "5" to Petitioner's Opening Brief:** The October 25, 2005 Tentative Decision  
23 of the Court, ultimately adopted as the final decision, in *American Healthcare Indemnity Company*  
24 *v. John Garamendi*, Case No. BS 094515.

25 6. **Exhibit "6" to Petitioner's Opening Brief:** October 25, 2005 Reporter's Transcript of  
26 Proceedings before the Court in *American Healthcare Indemnity Company v. John Garamendi*,  
27 Case No. BS 094515.  
28

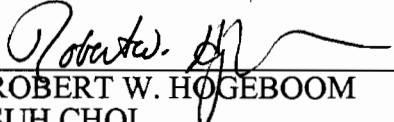
1           The Court may appropriately take judicial notice of Exhibits 1, 3 and 4 pursuant to  
2 Evidence Code section 452(b), which provides that the regulations issued under the authority of any  
3 public entity in the United States may be judicially noticed. The Court may appropriately take  
4 judicial notice of Exhibit 2 pursuant to Evidence Code 452(c), which provides that the official acts  
5 of the executive department of any state are properly subject to judicial notice. Finally, the Court  
6 may appropriately take judicial notice of exhibits 5 and 6 pursuant to Evidence Code 452(d), which  
7 provides that the records of any court of this state are properly subject to judicial notice.

8  
9 RESPECTFULLY SUBMITTED,

10 Dated: October 1, 2007

BARGER & WOLEN LLP

11  
12 By:

  
ROBERT W. HOGEBOOM  
SUH CHOI  
MICHAEL A. S. NEWMAN  
Attorneys for Petitioners



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**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 **October 1, 2007**, I served the foregoing document(s) described as **REQUEST FOR JUDICIAL NOTICE** on the interested parties in this action by placing  the original  a true copy thereof enclosed in sealed envelope addressed as stated below:

**SEE ATTACHED SERVICE LIST**

**BY MAIL**

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.

**EXPRESS MAIL**

I am "readily familiar" with the firm's practice of collection and processing correspondence for Express Mail delivery. Under that practice it would be deposited in the post office, mail box, subpost office, substation, or mail chute, or other like facility regularly maintained by the US Postal Service for receipt of Express Mail in a sealed envelope, with Express Mail postage paid, addressed to the person on whom it is to be served, at the office address as last given by that person on any document filed in the cause and served on the party making service by Express Mail; otherwise at that party's place of residence.

**BY PERSONAL SERVICE**

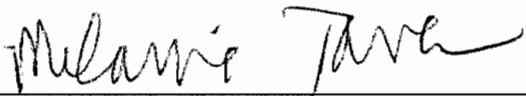
I caused such envelope to be delivered to a commercial messenger service with instructions to personally deliver same to the offices of the addressee on this date.

**BY FACSIMILE**

By transmitting an accurate copy via facsimile to the person and telephone number as follows: **Christine Zarifian (Fax No. 213-897-5775);**  
**Pamela Pressley (Fax No. 310-392-8874)**

**(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 **October 1, 2007.**

MELANIE A. TAVERA  
(Name)

  
(Signature)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**SERVICE LIST**

*The Association of California Insurance Companies, et al. v. Steve Poizner, et al.*  
Los Angeles Superior Court; Case No. BS 109154

<p>Mark P. Richelson (SBN 58121) Christine Zarifian (SBN 212810) Deputy Attorneys General OFFICE OF THE ATTORNEY GENERAL 300 South Spring Street, Suite 1702 Los Angeles, California 90013 Telephone No.: (213) 897-2479 Facsimile No.: (213) 897-5775</p>	<p>Attorneys for Respondents and Defendants STEVE POIZNER, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA; and CALIFORNIA DEPARTMENT OF INSURANCE</p>
<p>Harvey Rosenfield (SBN 123082) Pamela M. Pressley (SBN 180362) Todd Foreman (SBN 229536) THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS 1750 Ocean Park Boulevard, Suite 200 Santa Monica, California 90405 Telephone No.: (310) 392-0522 Facsimile No.: (310) 392-8874</p>	<p>Attorneys for THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS</p>