2ND CIVIL NO. B220469/223772 LASC CASE NO. BC297438 RELATED CASES BC297437/BC266219 HON. JOHN S. WILEY, JR. HON. ANTHONY J. MOHR

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION THREE

AMBER MACKAY, an Individual, On Behalf of the General Public; and JACQUELINE LEACY, an Individual, on Behalf of the General Public Petitioners,

v.

Superior Court of the State of California, County of Los Angeles Respondent.

21st Century Insurance Company

Real Party in Interest

PETITIONERS/PLAINTIFFS' ANSWER TO AMICI CURIAE BRIEF OF PERSONAL INSURANCE FEDERATION OF CALIFORNIA, ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES AND AMERICAN INSURANCE ASSOCIATION

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I.

INTRODUCTION

The amicus brief of Personal Insurance Federation of California,

Association of California Insurance Companies, and American Insurance

Association ("Insurance Associations"), attempts to put a new spin on 21st

Century's "ratemaking" argument. The insurers argue that the Department of

Insurance's ("DOI") approval of 21st Century's class plan is a "quasi-legislative"

act which the courts cannot review without engaging in judicial ratemaking. That

argument is without merit. Plaintiffs do not seek to have the court engage in

ratemaking. Rather, plaintiffs simply seek to have the court determine whether 21st

Century engaged in conduct which violated Ins. Code Sec. 1861.02(c).

The California authorities on point universally hold that a civil action such as this is authorized by Proposition 103. See e.g., Farmers Ins. Exch. v. Superior Court, 2 Cal.4th 377 (1992); Donabedian v. Mercury Ins. Co., 116 Cal.App.4th 968 (2004). The primary authority relied upon by the Insurance Associations, 20th Century Ins. Co. v. Garamendi, 8 Cal.4th 216 (1994), is distinguishable and does not support their position. 20th Century was a constitutional challenge by a group of insurers to price controls established by rate regulations enacted by the DOI under Proposition 103. Although the Supreme Court ruled on the merits for the DOI, the Court held that the insurers had the right to challenge the legality of the rate regulations enacted by the DOI. The Court made it clear that insurers who

challenged the validity of the DOI's ratemaking activities were not engaged in ratemaking. Rather, the insurers were pursuing their legitimate right to have the court determine whether there had been a violation of law.

Unlike 20th Century, the plaintiffs here are not suing the DOI or challenging the constitutionality of rate regulations. Rather, plaintiffs simply seek to establish that 21st Century engaged in conduct which violated Ins. Code Sec. 1861.02(c). Suits such as this were specifically authorized in Farmers Ins. Exch. v. Superior Court, supra, 2 Cal.4th 377, where the Supreme Court held that courts have original jurisdiction over civil actions for violations of Ins. Code Sec. 1861.02(c). The Court held that because cases such as this may involve questions of insurance ratemaking, the courts should initially stay such actions to give the DOI an opportunity to provide specialized insight and expertise. Id. at 397. Ultimately, however, the court and not the DOI must decide whether there has been a violation of Ins. Code Sec. 1861.02(c). Id.

The Insurance Associations attempt to distinguish Farmers by arguing that this case involves a challenge to rates approved by the DOI. That argument holds no weight. First, unlike Walker v. Allstate, 77 Cal.App.4th 750 (2000), plaintiffs are not challenging the reasonableness of rates approved by the DOI. Rather, plaintiffs seek to establish that 21st Century engaged in conduct that violated Ins. Code Sec. 1861.02(c). Second, the Farmers decision necessarily involved an approved plan or else the insurer would not have been able to sell insurance in this State. Third, the DOI does not have the power to make legal that which is illegal.

Fourth, courts clearly have the power to review any ratemaking activities of the DOI that purport to authorize insurers to engage in illegal conduct. As such, mere approval of a class plan by the DOI cannot immunize an insurer's illegal conduct.

II.

REGARDLESS OF WHETHER THE DOI'S APPROVAL OF 21ST CENTURY'S CLASS PLAN WAS "QUASI-LEGISLATIVE", IT WILL NOT BAR THE COURT FROM DETERMINING WHETHER 21ST CENTURY VIOLATED THE LAW

The Insurance Associations argue that the DOI's approval of 21st Century's class plan is a "quasi-legislative" act which cannot be reviewed by the courts without engaging in ratemaking. That argument is baseless. The argument is principally based on 20th Century Ins. Co. v. Garamendi, supra, 8 Cal.4th 216, which is inapposite. 20th Century was an action filed by a group of insurers, including 21st Century, which attacked the constitutionality of rate regulations enacted by the DOI under authority conferred by statute pursuant to Proposition 103. The insurers argued that the DOI's rate regulations were illegal price controls which constituted a "taking" under the Fifth Amendment and Fourteenth Amendment of the Constitution. The Supreme Court rejected the insurers' argument based on the well-established Constitutional test which holds that price controls can only be deemed a governmental "taking" if they are "arbitrary, discriminatory, or demonstrably irrelevant to legitimate policy". Id. at 291.

The present situation is entirely different. Plaintiffs are not attacking the constitutionality of regulations enacted by the DOI. Rather, plaintiffs allege that 21st Century engaged in conduct which violated Ins. Code Sec. 1861.02(c). 21st Century is not relying on any regulation enacted by the DOI. Rather, 21st Century has raised the DOI's approval of its class plan as an affirmative defense. The DOI's approval of 21st Century's class plan was not a "quasi-legislative" act, like the enactment of a regulation. Rather, the approval of the class plan was a "quasi-adjudicative" act.

The Court in 20th Century recognized that a distinction can be drawn between situations where the DOI acts in a legislative capacity as opposed to those where it does not:

As a general matter, an "administrative action is quasi-legislative" when the "administrative agency is creating a new rule for future application...."

(..."[g]enerally speaking, a legislative action is the formulation of a rule to be applied to all future cases"]...

By contrast, an "administrative action is ...

quasi-adjudicative" when the "administrative agency
... is applying an existing rule to existing facts."

Id. at 275.

The conduct of the DOI in approving a class plan is not "quasi-legislative"

because it does not involve enacting regulations. At most, when the DOI approves a class plan it is acting in a "quasi-adjudicative" capacity. However, it is doubtful that the DOI's approval of 21st Century's class plan rises even to the level of "quasi-adjudicative" conduct. That is so because there is no evidence that the DOI applied any specific rule to any specific set of facts when it approved 21st Century's class plan. All we know from the record is that the DOI approved the class plan. Furthermore, there is no regulation or statute which could possibly support the DOI authorizing the challenged conduct which undeniably violates Ins. Code Sec. 1861.02(c).

Even if the DOI's approval of the class plan was "quasi-legislative", as the Insurance Associations argue, it would not provide 21st Century with immunity. The DOI cannot make legal that which is illegal. In *Samantha C. v. State Dept. of Developmental Services*, --- Cal.Rptr.3d ----, 2010 WL 2542214 (June 25, 2010), the court of appeal summarized the standard of review for determining the validity of administrative regulations:

"Government Code section 11342.2 provides
the general standard of review for determining the
validity of administrative regulations. That section
states that '[w]henever by the express or implied terms
of any statute a state agency has authority to adopt
regulations to implement, interpret, make specific or
otherwise carry out the provisions of the statute, no

regulation adopted is valid or effective unless [1] consistent and not in conflict with the statute and [2] reasonably necessary to effectuate the purpose of the statute.' "(Communities for a Better Environment v. California Resources Agency (2002) 103 Cal.App.4th 98, 108, fn. omitted (Communities).)

The standard of consistency in Government

Code section 11342.2 means "being in harmony with,
and not in conflict with or contradictory to, existing
statutes, court decisions, or other provisions of law."

(Gov.Code, § 11349, subd. (d).)

With respect to the consistency requirement,

"the judiciary independently reviews the
administrative regulation for consistency with
controlling law. The question is whether the
regulation alters or amends the governing statute or
case law, or enlarges or impairs its scope. In short, the
question is whether the regulation is within the scope
of the authority conferred; if it is not, it is void. This is
a question particularly suited for the judiciary as the
final arbiter of the law, and does not invade the
technical expertise of the agency."

The Insurance Associations argue that the DOI's approval of 21st Century's class plan should nevertheless clothe the insurer with immunity because it supposedly involves rate making. That argument is without merit. The Court in 20th Century Ins. Co. v. Garamendi, supra, 8 Cal.4th 216, never even hinted that the approval of a class plan would immunize an insurer from liability for violations of law. The Court denied the insurers' constitutional challenge to rate regulations based on the standard test followed when a plaintiff challenges the constitutionality of price controls. In so doing, the Court made it clear that ratemaking is subject to judicial review:

Of course, confiscation is always implicated, at least potentially, whenever rates are set. In spite of that fact, it is established beyond peradventure that ratemaking is not a judicial function...Obviously, ratemaking is subject to judicial review. But that is another matter. (emphasis added.)

 20^{th} Century, supra, 8 Cal.4th. at 278.

In other words, courts always have the ability to review the ratemaking activities of an administrative agency. This does not mean that courts which review the ratemaking activities of an administrative body are themselves engaged in ratemaking. Only the legislature and duly appointed administrative bodies engage in ratemaking. But, courts have the authority and duty to review the conduct of the legislature and the DOI to ensure that their ratemaking activities

comply with the law. Farmers Ins. Exch. v. Superior Court, 2 Cal.4th 377 (1992).

Farmers is directly on point. The Supreme Court there held that courts have original jurisdiction over civil actions such as this for violations of Ins. Code Sec. 1861.02 under Bus. & Prof. Code Sec. 17200. The Court held that because such cases involved issues of ratemaking in which the DOI has an expertise, as a preliminary matter "a court would benefit immensely…by having an expert administrative analysis" provided by the DOI. *Id.* at 400. In the end, though, the courts, and not the DOI, decide the issues of insurance law underlying actions such as this. That is precisely what plaintiffs seek here. It is astounding that 18 years after *Farmers*, the insurers continue to ignore the ruling of the Supreme Court.

FTCR v. Garamendi, 132 Cal.App.4th 1354 (2005), provides another excellent example of how courts are empowered to review ratemaking activities. The court of appeal there affirmed a trial court ruling that declared unconstitutional Senate Bill 841- which was an amendment to Insurance Code §1861.02(c) that would have made legal the use of prior insurance as a factor in determining persistency. The court held that SB 841 was unconstitutional because it did not further the purpose of Proposition 103.

We hold that Senate Bill 841 does not further the purpose of Proposition 103 and hence is an invalid exercise of the power granted the legislature by the initiative.

Id. at 1366.

Senate Bill 841 was clearly ratemaking legislation. Nevertheless, the court had the constitutional right and duty to strike down that legislation because it violated Ins. Code Sec. 1861.02(c). Given that courts have the power to strike down ratemaking legislation enacted by the legislature, mere approval of a class plan by an individual DOI rate analyst who is not even a licensed California lawyer could not possibly immunize an insurer from illegal conduct. Common sense dictates that a rate analyst's conduct could never be quasi legislative or quasi adjudicative as the Amicus suggests; instead it is merely conduct of an individual at the DOI that is reviewable by the courts. To suggest otherwise would bring about irrational results. Under the Insurance Associations' approach each individual rate analyst throughout the state would have the same power and authority as the Commissioner of Insurance irrespective of whether the Commissioner had any knowledge of the rate analyst's interpretation of Proposition 103 in general and Ins. Code Sec. 1861.02 (c) in particular. Thus, according to the Insurance Associations, each insurer who submits a class plan necessarily creates its own body of law once the class plan is approved by the individual rate analyst since according to the Insurance Association each rate analyst's approval provides immunity. Taken to its logical conclusion, under the Insurance Association's approach, there could be dozens of contradictory and conflicting class plans among the many different insurers, each of which would be

¹ As previously discussed, even if this conduct were quasi legislative or quasi adjudicative, it would not provide immunity.

operating under a separate body of law as interpreted by each individual rate analyst.

Obviously, the approach argued by the Insurance Association could never be adopted in California. Insurers in California would no longer be governed by Proposition 103; instead they would each be governed by their respective class plan, regardless of its compliance with Proposition 103. There would not be a uniform system of insurance law that insurers would be required to follow, but rather insurers would be governed by what they could slip through the cracks of the DOI. Each insurance rate analyst would be operating as an individual fiefdom making up his/her own law without answering to anyone. In short, if the Insurance Associations position is correct, the system envisioned and required by Proposition 103 would never come to pass since approval by a rate analyst would trump the requirements set forth in the very proposition sought to be upheld.

It is axiomatic that a regulation cannot supersede a statute, and any administrative regulation that is inconsistent with a statute is void. Association for Retarded Citizens v. Department of Developmental Service, 38 Cal.3d 384, 391 (1985). Thus, the DOI cannot enact a regulation which violates Ins. Code Sec. 1861.02(c). Since courts are empowered to strike down DOI regulations which violate Ins. Code Sec. 1861.02(c), mere DOI approval of a class plan cannot possibly immunize an insurer from such illegal conduct. In short, that which is in violation of Ins. Code Sec. 1861.02(c) can never be made legal.

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III.

THIS CASE WILL NOT CAUSE THE COURT TO ENGAGE IN RATEMAKING

A central theme of the Insurance Associations brief is that plaintiffs' case will usurp the quasi-legislative function of the DOI and cause the courts to engage in ratemaking. Nothing could be further from the truth. This is not a ratemaking case. It is a BPC Sec. 17200 case premised on violations of Ins. Code Sec. 1861.02(c). Plaintiffs are not asking the court to engage in ratemaking. Rather, plaintiffs seek to have the court determine whether 21st Century violated the law. Courts make the final determination with respect to the law, and do not defer to administrative rulings by the DOI. Farmers Ins. Exch. v. Superior Court, supra, 2 Cal.4th 377; Samantha C. v. State Dept. of Developmental Services, supra, 2010 WL 2542214.

The Insurance Associations blatantly "ask this Court to align California with the rest of the nation by confirming that the elected regulatory has exclusive original jurisdiction" over this matter. (Amicus brief, p. 1.) This Court does not have the discretion to do what the Insurance Associations ask. California is unique among all states in that we are governed by Proposition 103 whereas these other states are not. See e.g., 20th Century Ins. Co. v. Garamendi, 8 Cal.4th 216, at 288, 289 (1994). Thus, this Court cannot simply follow what the Insurance Association claims is the national trend, as the insurers would like. Proposition 103 makes insurers subject to the laws of this state just like any other business,

including BPC Sec. 17200. This Court is duty bound to follow Proposition 103, and the Supreme Court's holding in *Farmers Ins. Exch. v. Superior Court*, supra, 2 Cal.4th 377, which holds that the courts have original jurisdiction over civil proceedings under BPC Sec. 17200 which are premised on violations of Ins. Code Sec. 1861.02(c).

IV.

PLAINTIFFS DO NOT SEEK TO ESTABLISH A DUAL SYSTEM OF RATE REGULATION. RATHER, PROPOSITION 103 AUTHORIZES A DUAL SYSTEM OF ADJUDICATION

The Insurance Associations contend that: "Plaintiffs argue for a dual system of rate regulation whereby rates may be regulated through ordinary civil actions as well as through the comprehensive system specifically constructed for that purpose." (Amicus brief, p. 1.) That is false. Plaintiffs do not seek a dual system of rate regulation. Only the legislature and duly authorized administrative agencies may engage in rate regulation. Rather, plaintiffs simply ask this Court to follow the plain language of the statutes and the California authorities directly on point which hold that Proposition 103 authorizes plaintiffs to bring a civil lawsuit under BPC Sec. 17200 for violations of Ins. Code Sec. 1861.02(c). See e.g., Farmers Ins. Exch. v. Superior Court, supra, 2 Cal.4th 377; Donabedian v. Mercury Ins. Co., supra, 116 Cal.App.4th 968.

The Insurance Associations assert that: "The genre of litigation Plaintiffs

hope to establish through this case is peculiar to the insurance industry." (Amicus brief, p. 2.) That argument is based on a false premise. Plaintiffs do not seek to establish anything *new* here. It has been almost 20 years since the Supreme Court in *Farmers Ins. Exch. v. Superior Court*, supra, 2 Cal.4th 377, held that the courts have original jurisdiction over a civil action such as this premised on violations of Ins. Code Sec. 1861.02(c). The complaint in *Farmers* was essentially identical to the present action, with the plaintiff asserting a cause of action under BCP Sec. 17200 premised on violations of Ins. Code Sec. 1861.02(c). The insurers demurred on the ground that the complaint was subject to the exclusive jurisdiction of the Insurance Commissioner and that the plaintiff failed to exhaust its administrative remedies. The Supreme Court rejected the insurers' argument, and held that a BPC Sec. 17200 action may be brought in court without first seeking to involve the administrative process.

We agree that Sec. 1861.03 does not condition a suit under Business & Professions Code Sec. 17200 on prior resort to the administrative process under the Insurance Code. Indeed, it does not speak to that issue at all. It merely modifies pre-existing law, to provide, in essence, that insurers are subject to the unfair business practices laws *in addition to* pre-existing regulations under the McBride Act, as amended. (emphasis in original.)

2 Cal.4th at 394.

The holding in *Farmers* has been consistently followed in subsequent appellate decisions. In *Donabedian v. Mercury Ins. Co.*, supra, 116 Cal.App.4th 968, the court of appeal concluded that the Supreme Court's analysis in *Farmers* was consistent with the plain meaning of Proposition 103 in general and Ins. Code Sec. 1861.03(a) in particular, stating:

In sum, as Mercury would have it, a violation of Proposition 103 would always fall within the exclusive jurisdiction of the Insurance Commissioner and would never give rise to a civil action in the first instance.

But that interpretation is contrary to the Proposition's plain language and the analysis in *Farmers*...It would make little sense if Proposition 103 – which subjects insurers to the UCL – were interpreted to preclude a civil action alleging a violation of that very Proposition.

116 Cal.App.4th at 991.

More recently, while holding that an insured does not have a private right of action under Ins. Code Sec. 1861.02(c), the court of appeal in *Farmers Ins.*Exch. v. Superior Court, 137 Cal.App.4th 842, 856-857, reaffirmed that courts have original jurisdiction over BPC Sec. 17200 claims premised on Ins. Code Sec. 1861.02(c). The court there stated:

Donabedian held that the complaint stated a cause of action for violation of the unfair competition law based on an illegal act or practice. (Id. at pp. 977, 987, 11 Cal. Rptr.3d 45.) The court explained that the plain language of sections 1861.03, subdivision (a) and 1861.10, subdivision (a) compelled the conclusion that the defendant was subject to the unfair competition law and that the plaintiff could enforce section 1861.02, subdivision (c) in an unfair competition law proceeding. (Donabedian, supra, at p. 977, 11 Cal.Rptr.3d 45.) The court explained further that the unfair competition law count was originally cognizable in the courts and was not within the Commissioner's exclusive jurisdiction, citing Farmers, supra, 2 Cal.4th at page 391...

Id. at 856-857.

Thus, it is crystal clear that Proposition 103 authorizes plaintiffs to bring the present action. The fact that some other states <u>may</u> not authorize an action such as this is irrelevant, particularly since these other states do not have a system of insurance laws similar to Proposition 103. Since the courts have original jurisdiction over this case under Ins. Code Sec. 1861.03, the insurers' attempt to convince this Court to follow the laws of other states is misguided at best.

THE INSURANCE ASSOCIATIONS' ARGUMENT THAT PLAINTIFFS' CASE IS INCONSISTENT WITH CHAPTER 9 WAS RESOLVED AGAINST THE INSURERS ALMOST 20 YEARS AGO IN FARMERS V. SUPERIOR COURT

The Insurance Associations spend a great deal of time arguing that plaintiffs' interpretation of the Chapter 9 statutes is incorrect and that Ins. Code Sec. 1861.03(a) does not create a dual system of adjudication. (Amicus brief, pp. 22-30.) The Insurance Associations are simply re-raising an old argument that was rejected by the Supreme Court almost 20 years ago in *Farmers Ins. Exch. v. Superior Court*, supra, 2 Cal.4th 377, and by every subsequent appellate decision on point.

In rejecting the exact same argument, the court of appeal in *Donabedian v*.

Mercury Insurance Co., supra, 116 Cal.App.4th at 987, stated:

Mercury argues that plaintiff's sole means of redress was to file a complaint with the Insurance Commissioner pursuant to the formal administrative process (§§ 1858-1858.7). We disagree. *Farmers* indicates that a claim under the UCL, though predicated on a violation of the Insurance Code, is not so restricted. (See Farmers, supra, 2 Cal.4th at pp. 382, fn. 1, 391, 6 Cal.Rptr.2d 487, 826 P.2d 730.) This

conclusion follows from Proposition 103's plain language.

Proposition 103 prohibits insurers from using the absence of prior insurance as a rating criterion (§ 1861.02, subd. (c)) and subjects insurers to the UCL (§ 1861.03, subd. (a)). The Proposition further provides: "Any person may initiate or intervene in any proceeding permitted or established pursuant to ... chapter [9]." (§ 1861.10, subd. (a).) The formal administrative process is found in chapter 9. "Any person may [also] ... enforce any provision of ... article [10 of chapter 9]." (§ 1861.10, subd. (a).) The prohibition against using the lack of prior insurance as a rating criterion is found in article 10. Giving effect to all of these provisions, "[a]ny person" may initiate or intervene in the formal administrative process (established in chapter 9) and may enforce the ban on using the lack of prior insurance as a rating criterion (contained in article 10, chapter 9) by bringing a civil action under the UCL.

Thus, the trial court should have permitted this action to proceed on the merits.

The Insurance Associations attempt to distinguish Farmers and Donabedian by arguing that this case involves an approved rate plan. That argument is without merit. Neither Proposition 103 nor any statute enacted thereunder state that access to the courts is conditioned on an insurer not having an approved plan. It would be nonsensical to infer such a condition since insurers are prohibited from selling insurance in California until a plan is approved. If the Insurance Associations' interpretation of Chapter 9 was followed, insureds would be denied the ability of ever filing a court action against an insurer for violations of Proposition 103. As the court in Donabedian stated: "It would make little sense if Proposition 103-which subjects insurers to the UCL-were interpreted to preclude a civil action alleging a violation of that very Proposition." 116 Cal.App.4th at 991.

VI.

THE INSURANCE ASSOCIATIONS' RELIANCE ON THE WALKER DECISION IS MISPLACED

The Insurance Associations argue that under separation of powers principles, plaintiffs cannot use a civil action to interfere with the rate setting function of the DOI. (Amicus brief, pp. 11-22.) The insurers' argument is primarily based on *Walker v. Allstate Indem. Co.*, 77 Cal.App.4th 750 (2000), which is readily distinguishable and does not apply.

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A. Unlike Walker, This Case Is Not About Ratemaking.

In Walker, the plaintiffs sued over 70 insurers seeking damages or disgorgement of allegedly excessive premiums the insurers had been authorized to collect since 1994. *Id.* at 752. The causes of action were each premised on the insurers charging approved rates alleged nevertheless to be "excessive." *Id.* at 753. The court of appeal held the action was barred by section 1860.1. The court in *Donabedian* explained that *Walker* has no application in a case such as this which is directed toward violations of Sec. 1861.02(c), rather than "excessive" premiums. The Court explained:

Mercury's reliance on *Walker*, supra, 77

Cal.App.4th 750, 92 Cal.Rptr.2d 132, is misplaced.

There, "[t]he [insureds'] causes of action were each bottomed on the insurers' charging approved rates alleged nevertheless to be 'excessive'....The complaint[, filed in February 1998,] supported [the] claim of 'excessive' premiums with numerous factual allegations regarding industry trends and rates of return earned by individual insurers...

Walker is inapposite. Here, plaintiff alleges that Mercury violated a specific prohibition of Proposition 103: An insurer may not use the absence of prior insurance, in and of itself, as a criterion in determining

eligibility for the Good Driver Discount, generally for automobile premiums and insurability, or in applying a persistency discount (§ 1861.02, subd. (c)). In contrast, the challenge in *Walker* rested on amorphous concepts such as "industry trends," "rates of return earned by individual insurers," and "generic factors." (*Walker*, supra, 77 Cal.App.4th at p. 753, 92 Cal.Rptr.2d 132.) *Walker* involved a challenge to approved rates. (Id. at pp. 753, 756 757, 759, 92 Cal.Rptr.2d 132.) This case does not.

Id. at 991-992.

21st Century assumes that merely because the DOI approved its class plan that the DOI necessarily approved all of 21st Century's conduct in implementing the class plan. As explained in *Donabedian*, that assumption is not correct:

"[Plaintiff's] claim does not involve any of these ratemaking steps. A separate concern is whether the optional rating factors, as applied, comply with the Insurance Code. This is a critical distinction, and it is the issue that was before the trial court in the present case. It is possible for an insurance carrier to file with the Department a rate filing and class plan that satisf[y] all of the ratemaking components of the

regulations, and still result in a violation of the Insurance Code as applied. Such a [situation] would not involve a question of rates, but rather, it could easily involve the very separate, factual question of how the components of the class plan are applied toward members of the public." (Italics in original.)

Id. at 993.

Similarly, this is not a situation such as *Walker* where the plaintiffs are attacking approved rates because they are "excessive". Rather, as in *Donabedian*, 21st Century has engaged in conduct which discriminated against plaintiffs based on a lack of prior insurance in violation of Sec. 1861.02(c).

B. The Insurance Code Sections On Which The Court In Walker Relied To Grant Immunity Do Not Apply Here.

The court in *Walker* based its decision to grant the insurers immunity on Ins. Code Sec. 1860.1. The *Walker* Court stated: "If §1860.1 has any meaning whatsoever (which under the accepted rules of statutory construction it must), the section must bar claims based upon an insurer's charging a rate that has been approved by the commissioner pursuant to the amended McBride Act." 77 Cal.App.4th at 756.

As discussed at length in plaintiffs' Petition at pp. 24-29, Ins. Code Sec. 1860.1 is a vestigial provision that pre-dates Proposition 103 and has no present application except with respect to concerted action between insurers. Two

subsequent decisions – one from our Supreme Court – confirm that §1860.1 does not immunize the illegal actions of a single carrier. That statute is intended only to provide immunity for joint or concerted action. In *State Compensation Insurance Fund v. Superior Court*, 24 Cal.4th 930 (2001), the Supreme Court had to decide whether a workers' compensation statute virtually identical to §1860.1 provided immunity for the misconduct of a workers' compensation carrier in the manner in which it allocated and reported certain loss expenses to the rating bureau.

In determining the meaning and scope of *Insurance Code* §11758 (the workers' compensation law that is identical to §1860.1), the Supreme Court examined the legislative history of the McBride-Grunsky Act, and specifically the meaning of §1860.1. The court quoted at length a letter from the Deputy Insurance Commissioner to then Governor Earl Warren, indicating that the legislation was to be enacted "to affirmatively authorize such concert of action in the making of insurance rates to the extent consistent with the public interest and to regulate such concert of action." *SCIF*, *supra*, 24 Cal.4th at 939.

The Supreme Court also quoted at length the amicus brief of the DOI, which confirms that these "immunity" statutes are solely "for the purpose of acting in concert." *Id.* at 940.

Following the Supreme Court's decision in *SCIF*, the court of appeal in *Donabedian v. Mercury* was presented with the exact issue presented here by plaintiffs – whether a policyholder may bring a civil suit against a carrier for using the absence of prior insurance as a factor in charging premiums. Like 21st Century,

Mercury argued that the two vestigial provisions of the old McBride Act - \$\\$1860.1 and 1860.2 – provided immunity. *Donabedian* carefully analyzed those statutes in conjunction with the provisions of Proposition 103, as well as the Supreme Court's decision in *SCIF*. *Donabedian* concluded that there could be no immunity.

Donabedian pointed out that by its express language, Sec. 1860.1 cannot immunize violations of Proposition 103. The statute says in pertinent part: "No act done...pursuant to the authority conferred by this Chapter shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this state..." The important language is "any other law", for as Donabedian instructs, the applicable Insurance Code sections that authorize a civil lawsuit here are not "other law"; rather "they are part of the same chapter as §1860.1".

Donabedian, supra, 116 Cal.App.4th at 977.

Similarly, the language in §1860.2 that "the administration and enforcement of this chapter shall be governed solely by the provisions of this chapter..." cannot preclude a civil lawsuit, because "once again, the statutory sections that permit this suit are part of the same chapter as §1860.2 and are not other law." *Id.* at 978.

In addition to analyzing the plain meaning of §§1860.1 and 1860.2, Donabedian discussed at length the Supreme Court's decision in SCIF. After carefully considering that Court's discussion of the legislative history of the McBride-Grunsky Act, Donabedian held consistent with the Supreme Court, that §§1860.1 and 1860.2 immunize only concerted action. 116 Cal.App.4th at 990991.

Obviously, the Supreme Court's interpretation of the scope of §1860.1 must prevail over that of *Walker*. Thus, §1860.1 <u>cannot</u> immunize 21st Century for its illegal conduct.

VII.

CONCLUSION

The arguments of the Insurance Associations are clearly without merit.

Plaintiffs do not seek to have the court engage in ratemaking. Rather, plaintiffs simply seek to have the court determine whether 21st Century engaged in conduct which violated Ins. Code Sec. 1861.02(c). Such lawsuits have been authorized since the passage of Proposition 103 in 1988, as affirmed by the Supreme Court in Farmers Ins. Exch. v. Superior Court, 2 Cal.4th 377 (1992). Every subsequent court of appeals decision on point has agreed that actions such as this are originally cognizable in court. The out of state authorities cited by the Insurance Associations are clearly irrelevant.

The Insurance Associations attempt to distinguish *Farmers* by arguing that this case involves a challenge to rates *approved* by the DOI is without merit. First, unlike *Walker v. Allstate*, 77 Cal.App.4th 750 (2000), plaintiffs are not challenging the *reasonableness* of rates approved by the DOI. Rather, plaintiffs seek to establish that 21st Century engaged in conduct which violated a specific statute, Ins. Code Sec. 1861.02(c). Second, the *Farmers* decision necessarily involved an

approved plan or else the insurer would not have been able to sell insurance in this State. Third, the DOI does not have the power to make legal that which is illegal. Fourth, courts clearly have the power to review any ratemaking activities of the DOI that purport to authorize insurers to engage in illegal conduct. As such, approval of a class plan by the DOI cannot immunize an insurer's illegal conduct.

Dated: July 16, 2010

Respectfully submitted,

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Dated: July 1(, 2010

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(c) of the California Rules of Court, I hereby certify that the total word count of Plaintiffs' Reply to Amici Curiae Brief of Personal Insurance Federation of California, Association of California Insurance Companies, and American Insurance Association, excluding the cover, Table of Contents, Table of Authorities and Certificate of Compliance, is 5,673.

Dated: July <u>16</u>, 2010

Respectfully submitted,

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3y:____

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PROOF OF SERVICE

I, the undersigned, declare as follows:

I am over the age of 18 years and employed in the County of Los Angeles, State of California. I am employed at the office of Goshgarian & Marshall, PLC, members of the Bar of the above-entitled court and made the service referred to below at their direction. My business address is 23901 Calabasas Road, Suite 2073, Calabasas, California 91302-1542.

On July 19, 2010, I served the foregoing document described as:

PETITIONERS/PLAINTIFFS' ANSWER TO AMICI CURIAE BRIEF OF PERSONAL INSURANCE FEDERATION OF CALIFORNIA, ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES AND AMERICAN INSURANCE ASSOCIATION

[] <u>VIA OVERNIGHT COURIER</u>: I caused the above-referenced document(s) to be delivered to FEDERAL EXPRESS for delivery to the below-named individual(s).

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

Executed on July 19, 2010, at Los Angeles, California,

Nelva Rodriguez

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