

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT**

MERCURY CASUALTY COMPANY,

Plaintiff and Appellant

v.

**DAVE JONES, as Insurance Commissioner of
the State of California,**

Defendant and Respondent;

CONSUMER WATCHDOG,

Intervener and Respondent;

**PERSONAL INSURANCE FEDERATION OF
CALIFORNIA et al.,**

Intervenors and Appellants.

Case Nos. C077116 &
C078667

Appeal from Judgment of Sacramento County Superior Court,
Case No. 34201380001426CUWMGDS (Hon. Shellyanne W.L. Chang, Judge)

**RESPONDENT INSURANCE COMMISSIONER'S OBJECTIONS TO
APPELLANTS TRADES' REQUEST FOR JUDICIAL NOTICE**

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State of California*

**TO THE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF
THE COURT OF APPEAL, THIRD APPELLATE DISTRICT:**

Defendant and respondent Dave Jones, sued here in his official capacity as the Insurance Commissioner of the State of California (the “Commissioner”) hereby objects the Request for Judicial Notice (the “Trades’ RJN”) filed by intervenors and appellants Personal Insurance Federation of California, Property Casualty Insurers Association of America dba Association of California Insurance Companies, and National Association of Mutual Insurance Companies (the “Trades”) in its entirety.

The Trades seek judicial notice of excerpts from three documents issued by the California Department of Insurance (the “Department”) that the Trades say became effective September 1, 2015, over two and half years after the Commissioner issued his Rate Order that is the subject of these appeals. The documents are: (1) an excerpt from the Department’s Prior Approval Rate Filing Instructions, 09/01/2015 Edition; (2) an excerpt from The New Prior Approval Rate Application Process –A Tutorial, Edition dated September 01, 2015, and (3) pages 4.1 and 4.2 entitled “Excluded Expense Ratio” from the Department’s Prior Approval Rate Template, 9/1/2015 Edition.

The Trades seek judicial notice of the foregoing documents to support their argument that the provision of the Commissioner’s rate regulations that exclude an insurer’s “institutional advertising” expenses in

computing rates under the regulations (Cal. Code Regs., tit. 10, § 2644.10, subd. (f)) violate First Amendment Free Speech. The documents, however, are not, and cannot, be pertinent to that issue.

The Trades contend that these materials, which are indisputably not part of the administrative record of the rate-making proceedings in this case, are intended to “show that the Commissioner is requiring insurers to submit samples of advertising for [the Department’s] review as part of the rate application process.” (Trades’ RJN Mem. p. 7.) But, these documents are not required to establish that unremarkable point – the advertising must be looked at to determine if it falls within the regulation’s definition.

The Trades go on to argue that “these new records illustrate that what the Commissioner is planning to do through this regulation is chill speech based on content.” (*Ibid.*) This is pure argument, speculation and conjecture. There is no evidence in the record regarding what are the Commissioner’s or the Department’s plans and intent in the issuance of the new template and instructions and the requested document excerpts cannot be probative of any plan or intent posited by the Trades.

For the foregoing reasons, the Trades’ request for judicial notice should be denied in its entirety.

Dated: April 4, 2016

Respectfully Submitted,

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