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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF LOS ANGELES
12

13 **THE ASSOCIATION OF CALIFORNIA**
14 **INSURANCE COMPANIES, THE PERSONAL**
15 **INSURANCE FEDERATION OF CALIFORNIA,**
16 **THE AMERICAN INSURANCE ASSOCIATION,**
and THE PACIFIC ASSOCIATION OF
DOMESTIC INSURANCE COMPANIES,

17 Petitioners and Plaintiffs,

18 v.

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

21 Respondents and Defendants.
22

Case No. BS109154

RESPONDENTS'
OPPOSITION TO PETITION
FOR A PEREMPTORY WRIT
OF MANDATE AND
COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

Date: January 31, 2008
Time: 9:30 a.m.
Dept: 85

Judge: The Honorable
Dzintra I. Janavs
Action Filed: May 25, 2007

23 **I.**

24 **INTRODUCTION**

25 Petitioners, The Association of California Insurance Companies, et al. (Petitioners")
26 proceed on the faulty premise that the amended regulations found in California Code of
27 Regulations, title 10, sections 2651.1, 2661.1, 2661.3, 2662.1, 2662.3, and 2662.5 ("Amended
28 Regulations") are invalid because they "conflict" with the prior 1995 Regulations, promulgated

1 by the Insurance Commissioner of the State of California ("Commissioner"). Petitioners,
2 however, argue against a straw man. The limitation on the Commissioner's ability to promulgate
3 regulations under Government Code section 11342.2 is that the proposed regulation be
4 "consistent and not in conflict" with the *governing statute* or *case law*. Petitioners conflate
5 issues and seek to invalidate the Amended Regulations because they purportedly conflict with
6 the 1995 Regulations at issue in the Superior Court's decision in *American Healthcare Indemnity*
7 *Company and SCPIE Indemnity Company v. Garamendi*, Case No. BS094515 ("SCPIE"). If
8 Petitioners were correct, the Commissioner is handcuffed by prior regulations he promulgated
9 and can never amend regulations as such amendments conflict with prior regulations. That is not
10 the standard and it should not be the standard here. The Amended Regulations are wholly
11 consistent with the governing statutes and are reasonably necessary to effectuate their purpose.

12 First, there is no conflict between the Amended Regulations and the governing statutes
13 in the Insurance Code. Insurance Code section 1861.10 contemplates consumer participation in
14 "any proceeding." This broad language – which does not limit participation to "hearings" as
15 Petitioners suggest – is consistent with the underlying purpose of Proposition 103, which seeks
16 to inject some level of control and consumer participation over insurance rate increases. The
17 Amended Regulations simply clarify the language of section 1861.10.

18 Second, the Amended Regulations are absolutely necessary to effectuate the purpose of
19 Proposition 103. As Petitioners readily acknowledge, not all rate change applications are
20 resolved in a hearing. This is consistent with the Department's practice of encouraging informal
21 resolutions between insurers seeking a rate change and consumers. The Amended Regulations
22 clarify that consumer participation in pre-hearing negotiations is both encouraged and welcome.
23 Petitioners' claim that the Amended Regulations will encourage frivolous challenges is utterly
24 without merit. If a challenge is frivolous, there is no "substantial contribution" and thus no basis
25 for an award of advocacy fees. Petitioner's second attack, therefore, also lacks merit.

26 In short, the Amended Regulations are both consistent with the governing statutes and
27 reasonably necessary to effectuate their purpose. Thus, Petitioners' petition for writ of mandate
28 must be denied.

1 II.

2 STATEMENT OF THE CASE AND FACTUAL BACKGROUND

3 On November 8, 1988 California voters passed the Insurance Rate Reduction and Reform
4 Act, better known as Proposition 103, which added article 10 (Ins. Code, §§ 1861.01-1861.14) to
5 chapter 9 of the Insurance Code ("chapter 9") dealing with insurance rates and rating.

6 Proposition 103's purpose was simple: reduce and control insurance rates. (Prop. 103 § 2.)

7 Prior to Proposition 103's passage, California was an "open rate" state, permitting insurers to set
8 insurance rates without the Commissioner's prior or subsequent approval. (*California Auto.*

9 *Assigned Risk Plan v. Garamendi* (1991) 232 Cal.App.3d 904, 909-910.) Under the open rate

10 system, the Commissioner could prohibit an insurance rate *only if* a reasonable degree of

11 competition did not exist in the area, and the rate was found to be excessive, inadequate or

12 unfairly discriminatory. (*Ibid.*) This system brought about enormous increases in the cost of

13 insurance, making it both unaffordable and unavailable to millions of Californians. (Prop. 103 §

14 1.) Thus, the voters' message under Proposition 103 was clear – Californians wanted insurance

15 reform because existing laws did not protect consumers. (*Ibid.*) Proposition 103 changed this

16 open rate system by mandating control over insurers seeking to increase insurance rates.

17 Specifically, Proposition 103 intended "to protect consumers from arbitrary insurance rates and

18 practices, to encourage a competitive insurance marketplace, to provide for an accountable

19 Insurance Commissioner, and to ensure that insurance is fair, available, and affordable for all

20 Californians." (Prop. 103, §2.)

21 Proposition 103 protects California residents from excessive insurance rates to this day

22 by (1) mandating that all insurers seeking to raise insurance rates *must* obtain approval from the

23 Commissioner and (2) prohibiting the Commissioner from approving any rates that are

24 "excessive, inadequate, unfairly discriminatory or otherwise in violation of this chapter." (Ins.

25 Code, § 1861.05(a), (b).) Proposition 103 requires insurers to file a rate application with the

26 Commissioner who reviews the application to determine if the insurer meets its "burden of

27 proving that the requested rate change is justified and meets the requirements of this article."

28 (Ins. Code, § 1861.05(b).)

1 The rate review process is as follows. Upon receipt of the application, the Commissioner
2 is required to notify the public of the insurer's application for a rate change. (Ins. Code,
3 §1861.05(b).) Following this notice, the Commissioner may on his own motion, or upon the
4 request of a consumer or his or her representative, set a hearing to review the application. (Ins.
5 Code, § 1861.05(c).) But if the proposed rate increase exceeds a certain percentage^{1/}, the
6 Commissioner *must* schedule a hearing upon a timely request. (*Ibid.*) The hearings are
7 conducted under the Administrative Procedures Act and heard by an administrative law judge.
8 (Ins. Code, §1861.08.)

9 Proposition 103 further protects consumers by encouraging consumer participation in the
10 Commissioner's rate review process. Aside from petitioning for and participating in a hearing, a
11 consumer or consumer representative, "may initiate or intervene in *any proceeding* permitted or
12 established pursuant to this chapter, challenge any action of the commissioner under this article,
13 and enforce any provision of this article." (Emphasis added.) (Ins. Code, § 1861.10(a).)
14 Furthermore, any person who demonstrates that he or she represents the interest of consumers
15 and makes a substantial contribution to the Commissioner's order, regulation or decision is
16 awarded reasonable advocacy fees. (Ins. Code, § 1861.10(b).)

17 Proposition 103 only provides a framework to regulate insurance rates and delegates to
18 the Commissioner the authority to regulate the rate review process by promulgating necessary
19 regulations. (*20th Century Insurance Co. v. Garamendi* (1994) 8 Cal.4th 216, 245.) Effective
20 January 28, 2007, the Commissioner adopted the Amended Regulations to "clarify that
21 consumers, who participate in the approval process after filing a petition for a hearing, may seek
22 an award of reasonable advocacy fees." (Declaration of Elizabeth Mohr ("Mohr Dec.") ¶s 3, 5,
23 13, Ex. A 0031-0034, 0067-0068.) The Commissioner determined that the amendments were
24 necessary "in order to properly implement the requirements, purposes and intent of the statutes."
25 (Mohr Dec. ¶ 11, 14, Ex. A 0031-0033, 0067-0068.)

26 The reasoning for the Amended Regulations is simple. While hearings may be set to

27
28 1. Proposed rate adjustment exceeding 7% of the applicable rate for personal lines or 15%
for commercial lines.

1 constitutional mandate." (Emphasis added.) (*Ford Dealers Assn. v. Dept. of Motor Vehicles*
2 (1982) 32 Cal.3d 347, 356.) Thus, while the ". . . final responsibility for the interpretation of the
3 law rests with the courts . . ." (*Yamaha Corporation of America v. State Board of Equalization,*
4 *supra*, 19 Cal.4th 1, 12), ". . . the appropriate mode of review in such a case is one in which the
5 judiciary . . . accords great weight and respect to the administrative construction." (*Ibid.*)

6 The Amended Regulations at issue here have the same presumption of regularity. The
7 Court's review is limited to whether the Amended Regulations are clearly unauthorized. "A
8 regulation, like a statute, is presumed valid and a challenger bears the burden of pleading and
9 proof of invalidity." (*Bell v. Board of Supervisors* (1994) 23 Cal.App.4th 1695, 1710.)

10 Therefore, Petitioners have the burden to show that the Amended Regulations are invalid.

11 In reviewing the Amended Regulations, the Court is guided by the standard of review set
12 forth in Government Code section 11342.2, which provides:

13 "Whenever by the express or implied terms of any statute a state agency has
14 authority to adopt regulations to implement, interpret, make specific or otherwise
15 carry out the provisions of the statute, ***no regulation adopted is valid or effective***
16 ***unless (1) consistent and not in conflict with the statute and (2) reasonably***
necessary to effectuate the purpose of the statute." (Emphasis added.)

17 Under the first part of this standard requiring that a regulation be "consistent and not in
18 conflict with the statute", the court must independently review the administrative regulation for
19 consistency with the controlling law. (*Communities for a Better Environment v. California*
20 *Resources Agency* (2002) 103 Cal.App.4th 98, 108-109.) The question to consider is whether the
21 regulation alters or amends the governing statute or case law, or enlarges or impairs its scope and
22 is within the scope of the authority conferred. (*Ibid.*) Of course, an administrative agency's view
23 of its governing legal authority is entitled to great weight and will be followed unless it is clearly
24 erroneous or unauthorized." (*Ibid.*)

25 The second part of this standard requiring that a regulation be "reasonably necessary to
26 effectuate the purpose of the statute" implicates the agency's expertise and therefore receives a
27 much more deferential standard of review. (*Ibid.*) The question to consider is whether the
28 agency's action was arbitrary, capricious, or without reasonable or rational basis. (*Ibid.*)

1 **B. Insurance Code Section 1861.10 Provides a Broad Scope of Proceedings in Which**
2 **Consumer Representatives Can Participate Within the Rate Review Process.**

3 The statutory authority governing consumer participation in the rate review process is
4 found in Insurance Code section 1861.10(a) which provides,

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
7 article, and enforce any provision of this article." (Emphasis added.)

8 The plain language of the statute creates a broad standing for consumer participation in
9 proceedings permitted or established pursuant to chapter 9, which includes the Department's rate
10 review process under Insurance Code section 1861.05. (*Farmers Ins. Exchange v. Superior*
11 *Court* (2006) 137 Cal.App.4th 842, 854.)

12 In interpreting statutes, courts must adopt a literal interpretation unless it is repugnant to
13 the obvious purpose of the statute. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) "If the
14 meaning is without ambiguity, doubt, or uncertainty, then the language controls....There is
15 nothing to 'interpret' or 'construe'." (*Halbert's Lumber v. Lucky Stores* (1992) 6 Cal.App.4th
16 1233, 1239.) Here, the drafters' use of the terms "any proceeding" is significant because it
17 provides broad standing for consumer participation. Although no section in chapter 9 defines the
18 term "proceeding" the term is usually quite broad in scope. Indeed, Blacks Law Dictionary
19 defines "proceeding" as "[a]ny procedural means for seeking redress from a tribunal or agency;
20 [a]n act or step that is part of a larger action." (Black's Law Dict. (8th ed. 2004).) Thus, the term
21 "proceeding" is extensive and in terms of 1861.10(a), can encompass any act or step in the rate
22 review process. Moreover, the statute broadens a consumer's reach by providing that consumers
23 can participate in "any" proceeding. No limit is placed on the type of proceeding in which
24 consumers can participate, other than the proceeding must be permitted pursuant to chapter 9.
25 Thus, the statute governing consumer participation provides a broad spectrum in which consumer
26 representatives can participate in the rate review process.

27 The California Supreme Court has similarly recognized the broad scope of the rate review
28 process. The Supreme Court noted that the drafters "did not establish a detailed method of

1 processing and deciding rate applications" and that, "[m]uch is necessarily left to the Insurance
2 Commissioner, who has broad discretion to adopt rules and regulations as necessary to promote
3 the public welfare." (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 824)

4 Petitioners' extremely narrow reading of "proceeding" undercuts the broad remedial
5 purpose of Proposition 103. Petitioners contend that a proceeding for purposes of 1861.10(a)
6 only includes a formal hearing provided for under 1861.05. However, if the drafters intended to
7 limit the scope of consumer participation to formal hearings, they would have used the term
8 "hearing" to define when and where a consumer can participate in the rate review process. But
9 the drafters used the terms "any proceeding," which encompasses any act or step within the rate
10 review process. The Commissioner interpreted this broad reach in promulgating regulations to
11 carry out the rate review process. As will be discussed, such an interpretation is vital to
12 encourage consumer participation in the rate review process.

13
14 **C. The Amended Regulations are Consistent with Insurance Code Sections 1861.05 and**
15 **1861.10 and are Reasonably Necessary to Effectuate the Purpose of the Statutes.**

16 The Amended Regulations clarify that a rate proceeding, "is established upon the
17 submission of a petition for hearing . . . or if no petition of hearing is filed, upon notice of
18 hearing." (Cal. Code Regs., tit. 10, §§ 2651.1, 2661.1.) Thus, upon the submission of a petition
19 for hearing or notice of hearing, a consumer representative is considered a party to the action and
20 is able to participate in the rate review process.

21 **1. The Amended Regulations are Consistent with Insurance Code Sections**
22 **1861.05 and 1861.10.**

23 For a regulation to be valid, the Court must find that it is consistent and not in conflict
24 with the governing statute. (Gov. Code, §11342.2.) The question to be considered on review is
25 whether the regulation is within the scope of the authority conferred. (*Communities for a Better*
26 *Environment v. California Resources Agency, supra*, 103 Cal.App.4th 98, 108-109.) Of course,
27 an administrative agency's view of its governing legal authority is entitled to great weight and
28 will be followed unless it is clearly erroneous or unauthorized. (*Ibid.*)

1 Here, Insurance Code section 1861.10(a) broadly allows consumer participation in "any
2 proceeding" within the rate review process. This far-reaching statute had two significant effects.
3 First, it gave the Commissioner significant latitude to define "proceedings" to carry out
4 consumer representatives' participation in the rate review process. Second, it furthered
5 Proposition 103's purpose to encourage consumer participation in the rate review process.

6 The Amended Regulations fall squarely within 1861.10(a)'s comprehensive scope by
7 allowing consumer representatives to participate in the rate review process upon the submission
8 of a petition for hearing. Participation during this time is vital because a significant part of the
9 rate review process occurs after a rate application is filed but before a hearing is had or even
10 granted. (Mohr Dec. ¶ 6, 14, Ex. A 0031-0032, 0067-0068.) During this time, the Department's
11 practice is to encourage insurers and consumer representatives to revolve rate applications to
12 avoid expending substantial resources in pursuing a hearing. (Mohr Dec. ¶ 6, 9, 14, Ex. A 0032,
13 0067-0068.)

14 Insurance Code section 1861.05 provides that a consumer can petition for a hearing on a
15 rate application. The hearing is a formal process held before an administrative law judge and
16 conducted much like a civil trial. (Ins. Code, §1861.08; Mohr Dec. ¶ 9.) However, just as in any
17 civil case, substantial advocacy takes place during pre-hearing, settlement negotiations. The
18 Amended Regulations simply allow consumer representatives to participate in the negotiations.

19 Petitioners argue that a "proceeding" refers only to a formal hearing under 1861.05.
20 First, this narrow interpretation of "proceeding" is contrary to the broad scope of review
21 expressly provided for under Proposition 103, which states, "[t]his act shall be liberally construed
22 and applied in order to *fully* promote its underlying purposes." (Prop. 103 § 8.) Further, a central
23 purpose of Proposition 103 is to foster consumer participation in the rate review process. (*State*
24 *Farm Mut. Auto. Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1045.) Thus, any interpretation
25 of the statute that cuts short this purpose is contrary to the desired effect of the statute.

26
27 Second, if this narrow definition of proceeding was intended, the statute would have
28 expressly limited consumer participation to formal hearings. The statute, however, did not do so.

1 Instead, the statute utilized the broad term "proceeding" (not hearing) to define the setting in
2 which consumers can participate. The Commissioner reasonably interpreted this statutory
3 mandate by adopting the Amended Regulations designed to aid the objective of Proposition 103.
4 "We must be mindful of 'the consequences that will flow from a particular interpretation' . . . and
5 look for a 'sensibl[e]' and 'practical' construction of the law." (*Economic Empowerment*
6 *Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 686.) Again, the liberal interpretation
7 of "proceeding" makes perfect sense because it advances Proposition 103's objective of
8 encouraging consumer participation in the rate review process, and not just in formal hearings.

9 **2. The Amended Regulations are Reasonably Necessary to Effectuate the**
10 **Purpose of Proposition 103 and Comport with the Department's Practice.**

11 For a regulation to be valid, the Court must also find that it is reasonably necessary to
12 effectuate the purpose of the statute. (Gov. Code, §11342.2.) Here, the question to be
13 considered is whether the agency's action was arbitrary, capricious, or without reasonable or
14 rational basis. (*Communities for a Better Environment v. California Resources Agency, supra,*
15 *103 Cal.App.4th 98, 109.*)

16 **a. The Amended Regulations are Reasonably Necessary to Effectuate the**
17 **Purpose of Proposition 103.**

18 Proposition 103's stated purpose is "to protect consumers from arbitrary insurance rates
19 and practices, to encourage a competitive insurance marketplace, to provide for an accountable
20 Insurance Commissioner, and to ensure that insurance is fair, available, and affordable for all
21 Californians." (Prop. 103, §2.) Central to this purpose is to allow consumer participation in the
22 rate review process. (*State Farm Mut. Auto. Ins. Co. v. Garamendi, supra,* 32 Cal.4th 1029,
23 1045.) In explaining the purpose of consumer participation in the rate setting process, the
24 California Supreme Court stated,

25 "the drafters established a public hearing process for reviewing insurance rate
26 changes . . . In doing so, the drafters sought to 'enable consumers to permanently
27 unite to fight against insurance abuse....' (Ballot Pamp., Gen. Elec. (Nov. 8, 1988)
28 . . . giving the public access to all information provided to the Commissioner
pursuant to article 10 . . . is wholly consistent with Proposition 103's goal of
fostering consumer participation in the rate-setting process." (*Ibid.*)

1 Proposition 103 didn't stop there. "Indeed, one express purpose of Proposition 103 was
2 to make the Commissioner 'accountable' to consumers. (Prop.103, § 2.)" (*Economic*
3 *Empowerment Foundation v. Quackenbush, supra*, 57 Cal.App.4th 677, 690-691.) Thus,
4 consumers can challenge any action of the Commissioner under this article and enforce any
5 provision of this article. (Ins. Code, § 1861.10(a).) The drafters, therefore, opened the door to
6 consumer participation in the rate review process, in general, to foster consumer participation.

7 **b. The Amended Regulations are Reasonably Necessary to Comport**
8 **with the Department's Practice.**

9 Challenges to rate applications are often resolved informally in settlement conferences
10 before a hearing is heard, or even set. (Mohr Dec. ¶ 6, Ex. A 0031, 0067-0068.) The
11 Department's practice is to encourage such resolution because it is both time and cost effective.
12 (Mohr Dec. ¶ 6, 9, Ex. A 0031-0032, 0067-0068.) Formal hearings require the Department to
13 incur both court reporter fees as well as fees associated with the Administrative Hearing Bureau.
14 (Mohr Dec. ¶ 9.) Additionally, it is estimated that the Department will expend approximately
15 1,465 hours on "discovery matters, the hearing itself, pre and post hearing briefs and motions."
16 (*Ibid.*) Finally, the Department must retain economic and actuarial consultants to testify at
17 hearing. (*Ibid.*) Settlements, in turn, conserve the Department's resources by obviating the need
18 to incur such costs associated with the formal hearings. (Mohr Dec. ¶ 6, 9, Ex. A 0031-0032,
19 0067-0068.) The Amended Regulations comport with the Department's practice because the
20 Amended Regulations allow consumer representatives to participate in settlement negotiations
21 and, if successful, preclude the need for a formal hearing. (*Ibid.*)

22 Petitioners' claim that the statute only provides for consumer participation in a formal
23 hearing, however, does not comport with the Department's practice of encouraging settlement
24 because such an interpretation disallows consumer participation in negotiations. Indeed, this
25 interpretation directly contradicts Proposition 103's objective to allow consumer participation in
26 the rate review process. If no negotiations take place and the Department is forced to seek a
27 hearing with each and every filed application to ensure consumer participation, the Department's
28 limited resources will be strapped. In short, Petitioners' proposed interpretation will save

1 insurers money at the expense of California consumers.

2 **D. The Amended Regulations Are Consistent with Insurance Code Section 1861.10(b),**
3 **Which Allows Consumer Representatives to Collect Advocacy Fees.**

4 Proposition 103 encourages consumer participation by allowing the Commissioner to
5 award advocacy fees to consumer representatives. Insurance Code section 1861.10(b) provides,

6 "The commissioner or a court shall award reasonable advocacy and witness fees
7 and expenses to any person who demonstrates that (1) the person represents the
8 interests of consumers, and, (2) that *he or she has made a substantial*
9 *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.)

10 The Amended Regulations clarify that "[a] substantial contribution may be demonstrated without
11 regard to whether a petition for hearing is granted or denied." (Cal. Code Regs., tit. 10, §
12 2661.1.)

13 The Amended Regulations are consistent with this statutory provision because the
14 Amended Regulations allow consumer representatives to collect advocacy fees for work
15 performed during the rate review process, specifically during pre-hearing negotiations. (Mohr
16 Dec. ¶ 5, 11, Ex. A 0032-0033.) This provision, however, is not without limitation. The statute
17 requires that only "a substantial contribution" will be compensated. This significant qualifier is
18 intended to protect against the "frivolous" challenges Petitioners claim the Amended Regulations
19 encourage. If the challenge is truly frivolous, there is no "substantial contribution" and thus no
20 award of fees.

21 As discussed earlier, the Department's practice is to encourage insurers who have filed
22 rate applications and interested consumer representatives to resolve rate challenges informally so
23 as to avoid engaging in lengthy formal hearings. (Mohr Dec. ¶ 6, 9, Ex. A 0031-0032, 0067-
24 0068.) This process often yields substantial public benefits without the necessity of a formal
25 hearing. (*Ibid.*) It makes no sense in these circumstances to deny fees simply because there was
26 no formal hearing. The net result was the same – a public benefit. The Amended Regulations
27 facilitate consumer representatives to participate in settlement discussions without fear that they
28 do so at their own expense. (Mohr Dec. ¶ 14, Ex. A 0033.) Thus, the Commissioner has

1 determined that in fairness to consumers who desire to participate in the public ratemaking
2 process as provided for by Proposition 103 and in furtherance of the purposes of Proposition 103,
3 that a "proceeding" is established upon submission of a petition for hearing, which triggers a
4 consumer representatives ability to recover advocacy fees, and that a fee award is not dependent
5 upon a ruling on the petition for hearing to remedy circumstances where a settlement is reached
6 before a ruling on the petition for hearing is made. (Mohr. Dec. ¶ 10, 14, Ex. 0031-0034.)

7 Petitioners claim that an advocacy fee award is limited to a decision on the merits
8 because the Court of Appeal in *Economic Empowerment* defined an "order" or "decision" as a
9 final decision on the merits. (*Economic Empowerment Foundation v. Quackenbush, supra*, 57
10 Cal.App.4th 677, 684-690.) In light of this definition, Petitioners argue that a formal hearing is
11 contemplated by 1861.10(b) since a hearing is the only setting in which a final decision on the
12 merits can be made. However, the *Economic Empowerment* case is limited to its facts. The case
13 dealt with a narrow jurisdictional issue concerning whether the court or the commissioner has
14 jurisdiction to award advocacy fees. (*Ibid.*) In analyzing Insurance Code section 1861.10(b) to
15 reconcile competing interpretations, the Court of Appeal stated that, "[a] statute is to be
16 interpreted so as to effectuate its apparent purpose." (*Ibid.*) The Court of Appeal further stated
17 that,

18 "The purpose of intervener fees is evidently to encourage consumers to participate
19 in insurance rate proceedings by compensating them for their contribution . . .
20 ***Thus we should see an interpretation of the statute which best facilitates
 compensation.***" (Emphasis added.) (*Id* at 686.)

21 In *Economic Empowerment*, however, the Court found that this general consideration was of no
22 assistance because it was not apparent that either statutory interpretation pertaining to jurisdiction
23 furthered the aim of intervener compensation. (*Id.* at 686-687.)

24 The facts in the instant case are distinguishable from those in *Economic Empowerment*
25 because Petitioners' interpretation of 1861.10(b) infringes upon the Commissioner's ability to
26 award advocacy fees to consumer representatives for their substantial contribution made during
27 pre-hearing negotiations. During pre-hearing negotiations, insurers often will seek to withdraw
28 their rate applications after a settlement has been reached. (Mohr Dec. ¶ 5, Ex. A 0032.)

1 Thereafter, the Commissioner will issue a decision denying the petition for hearing because the
2 withdrawal of the application makes the petition for hearing moot. (Mohr Dec. ¶ 10, Ex. A
3 0032.) This decision constitutes an "order" or "decision" for purposes of Insurance Code section
4 1861.10(b) because the merits of the challenge to the application were contemplated by insurers
5 and interested consumer advocates and ultimately settled. Therefore, an advocacy fee award for
6 consumer advocates is appropriate for their work performed to achieve the settlement and
7 resulting order denying petition for hearing. Indeed, this decision is much like an order of
8 dismissal with prejudice, which is considered a decision on the merits. (*Rice v. Crow* (2000) 81
9 Cal.App.4th 725, 733-734.)

10 Lastly, consumer participation plays a vital role in the rate review process. The work
11 done by consumer representatives does not duplicate that of the Departments. (Mohr Dec. ¶ 7-8.)
12 Even the Court of Appeal in *Economic Empowerment* recognized this critical role by stating that
13 consumer representatives,

14 "speak for a substantial segment of the population that otherwise may go unheard
15 the commission staff cannot fully and adequately represent all facets of the
16 public interest, and in some instances ... it may fail to discern the ratepayers'
rights. Public interest interveners therefore fill a gap in the ratemaking process."

17 (*Economic Empowerment Foundation v. Quackenbush, supra*, 57 Cal.App.4th 677, 686.) Thus,
18 the advocacy fee statute should be interpreted liberally to encourage consumer participation and
19 the Amended Regulations comply with this interpretation.

20 **E. Petitioners' Reference to the 1995 Regulations and Reliance on the SCPIE Decision
Are Misplaced.**

21 Petitioners devote substantial effort in discussing 1995 Regulations. But the validity of
22 the 1995 Regulations are not at issue here. Petitioners conflate issues and seek to invalidate the
23 Amended Regulations because they purportedly conflict with the 1995 Regulations, but this is
24 not the standard. The standard is to determine if the Amended Regulations are consistent with
25 the governing statutes. Moreover, if it were, the Commissioner could never amend regulations
26 since any amendment could conflict with prior regulations. This is particularly troublesome
27 where, as here, the prior regulations do not comport with the objectives of Proposition 103.

28 Furthermore, Petitioner's reliance on the SCPIE decision is misplaced for two significant

1 reasons. First, the decision was made before the Amended Regulations were adopted and only
2 considered the 1995 Regulations, which did not comport with the objectives of Proposition 103.
3 Second, the decision is limited to its facts. In SCPIE, consumer advocates filed a petition for
4 hearing, but the insurer's application was withdrawn and the petition for hearing denied as moot.
5 Under the former regulations, no decision on the merits was issued, the consumer advocates were
6 never a party and the court found no authority to allow advocacy fees. In response to the Court's
7 ruling, the Commissioner adopted the Amended Regulations to comport with the current
8 practices concerning the rate review process and the objectives of Proposition 103.

9 **IV.**

10 **CONCLUSION**

11 For the foregoing reasons, the court should deny the instant petition for a peremptory writ
12 of mandate by finding that the Amended Regulations are consistent with Insurance Code section
13 1861.05 and 1861.10 and reasonably necessary to effectuate the purpose of Proposition 103 – to
14 allow consumer participation in the rate review process.

15 Dated: December 7, 2007

16 Respectfully submitted,

17 EDMUND G. BROWN JR.

18 Attorney General of the State of California

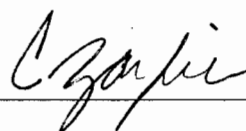
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28 Steve Poizner, Insurance Commissioner of the
State of California; and California Department
of Insurance

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **The Association of California Insurance Companies et al. v. Steve Poizner et al.**

No.: **BS109154**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On December 7, 2007, I served the attached **RESPONDENTS' OPPOSITION TO PETITION FOR A PEREMPTORY WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Michael A.S. Newman
Barger & Wolden LLP
633 West Fifth Street
47th Floor
Los Angeles, California 90071

Harvey Rosenfield
The Foundation for Taxpayer and Consumer Rights
1750 Ocean Park Boulevard, Suite 200
Santa Monica, CA 90405

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 7, 2007, at Los Angeles, California.

John R. Huetteman
Declarant

John R. Huetteman
Signature

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DEC 10 2007

BARGER & WOLDEN LLP