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## MEMORANDUM

**Date:** April 20, 2011

**To:** The Ron Calderon, Chair  
The Honorable Ted Gaines, Vice Chair  
Members, Senate Insurance Committee

**From:** Rex D. Frazier, President  
Michael A. Gunning, Vice President  
Kimberley Dellinger Dunn, General Counsel  
Manolo P. Platin, Legislative Advocate

**Re:** SB 631 (Evans): Insurance Commissioner: violations: remedies  
As Amended, March 24, 2011

### Senate Insurance Committee – Hearing April 27, 2011

#### PIFC Position: Oppose

The Personal Insurance Federation of California, representing six of the nation's largest insurance companies (State Farm, Farmers, Liberty Mutual Group, Progressive, Allstate and Mercury) and one national trade association (National Association of Mutual Insurance Companies) who collectively write a majority of the personal line auto and home insurance in California, **opposes SB 631 by Senator Evans.**

SB 631 provides that the Insurance Commissioner may order an insurer to pay "restitution." Restitution *"shall mean quantifiable monetary sums that an insurer, licensee, or other entity or person owes to a person, but did not pay, in violation of a law or regulation enforced by the Commissioner."* Restitution is also broadly defined to include *"...out of pocket expenses incurred or economic harm suffered by a person because of an insurer's, licensee's, or other entity's or person's violation of a law or regulation enforced by the commissioner."* SB 631 raises numerous questions and concerns:

**Vesting the Commissioner with the authority to award restitution, as broadly defined, invokes constitutional questions of both due process and separation of powers.** The "Fact Sheet" provided by the author describes situations presumably intended to be addressed by this bill: *"For example, they (consumers) may be charged a higher premium that is allowed or receive less money than to which they are entitled on a claim..."* As to the second example, interpretation of an insurance policy contract and any accompanying order to pay damages and restitution are judicial functions that the legislature may not confer on an administrative agency. The California Constitution vests the courts, not administrative agencies, with jurisdiction over breach of contract disputes that require application of common law.

The "Fact Sheet" and discussions with the Department of Insurance ("Department") suggests that other California agencies currently have the ability to order restitution in their enforcement actions (citing the Public Utilities Commission "PUC", the Department of Fair Employment and Housing "DFEH" and Workers' Compensation Appeals Board). These agencies, however, are distinguishable by the fact that they

were established under the California Constitution and its powers thereby conferred. Additionally, even in these examples, quasi-judicial due process proceedings are specified and provided. Procedural due process safeguards are in place, such as notice, (or verified complaint in the case of DFEH), witness and evidence provisions, findings of fact and conclusions of law. In the case of DFEH, the respondent has the option to remove the action to court. Due process is, at a minimum, not clearly defined in this bill, though it appears to be entirely lacking.

As to the example of a consumer “...charged a higher premium that is allowed...” (“Fact Sheet”), case law on this issue is well established - a fact of which the Department and the author’s office must be acutely aware – as the “Fact Sheet” and press releases cited the recent case as the poster child for needing the powers conferred by SB 631. Subsequent fact sheets have dropped the reference to the case and it remains unclear to insurers whether the author and Department intend or believe that this legislation would alter the holding in *MacKay v. Superior Court* (2010) 188 Cal.App.4th 1427. In that decision Judge Crosky observed:

“Plaintiff’s concern is not that insurers will be left free to charge illegal rates, but, rather that they will be unable to collect damages or obtain disgorgement of any illegal premium collected. **There is no injustice in exempting an insurance company from disgorging premiums collected pursuant to a rate which has been approved in advance by the commissioner.**” (*California Insurance Code Section 1858.07 [providing no civil penalties may be imposed for use of an approved rate]*) **FN19.**

We would appreciate a clarification by the author that SB 631 is not intended, as suggested by the “Fact Sheet,” to overturn established case law.

The sweeping language of the bill allows the Commissioner to impose upon an insurer subject to the Commissioner’s authority, the remedies provided. Insurers subject to Proposition 103 are within the authority of the Commissioner and therefore, subject to these new powers by the Commissioner. The Department claims, in the revised “Fact Sheet” (3-14-11), that the bill “Provides the express authority for the Insurance Commissioner to order restitution as part of an enforcement action to compensate a consumer for economic harm arising from a violation of insurance law, **except for cases under Proposition 103**” (emphasis added). This statement suggests the bill is not intended to apply to cases under Proposition 103 – in which case, this bill would not be attempting to *amend* Proposition 103 and would not need a two-thirds vote of the legislature. In contrast, the actual legislative language clearly does not provide any exemptions to its provisions.

However, if, as the Department suggests by the examples provided and has asserted during discussions regarding the bill, it has existing authority to order restitution and, therefore, SB 631 simply does not impact cases under Proposition 103. We strongly disagree. When asked to provide citations to authority for ordering restitution, the Department replied with Insurance Code sections that do not provide any authority for the Commissioner to order restitution, nor has the Commissioner relied upon these sections in the past to effectively order restitution. The Department claims power and authority it does not currently have – and for which its own “Fact Sheet” claims it needs SB 631 in order to wield.

In addition, the Department’s citing of *20<sup>th</sup> Century v. Garamendi* as authority for its claim that the Commissioner has the power to order “restitution” in the rate context, is misplaced. The opinion is actually to the contrary. The case dealt with the rate rollback provision of Proposition 103. A key point left out of the Department’s reference to the case as authority is the fact that the “rollback” as adopted was a requirement that insurers *prospectively* reduce rates. That concept has no place applied to proposed rebates of *pre-approved* rates and premiums. As explained in the very passage cited by the Department in their response to our request for their

asserted authority: after November 8, 1989, an insurer can only charge the rate approved by the Commissioner. The insurer cannot be required to retroactively reduce approved premiums.

**SB 631 couples the lack of due process with a lack of any notion of res judicata.** On the contrary, the bill specifically references “...a subsequent judgment obtained by that person in a civil action arising from the same facts and circumstances...” and goes on to provide, “Nothing in this section is intended to limit or restrict actions, remedies, or procedures otherwise available to the department or any person pursuant to any other provision of law.” So the insurer is hit twice – though on the flip side, the bill provides that, “It shall not be a defense in an administrative or private civil action that the commissioner did not order an insurer, licensee or other entity or person to pay restitution.”

The “Fact Sheet” references concern for the consumer who has “...no other recourse than to sue the insurer in court, which is time-consuming, expensive and stressful.” Yet the bill seems to anticipate and set up subsequent court action, although with no protections for the insurer.

The bill provides no explanation of the procedural due process. There is no adjudicatory process outlined, no reference to the Administrative Procedures Act and no explanation of how this quasi-judicial process will be separate from other functions within the Department or who will have authority to make awards and under what specific circumstances.

**The authority to order restitution is not necessary given the substantial, enumerated statutory authority in current law.** The Commissioner already has authority to commence administrative proceedings, to impose large fines, and to revoke the license of the insurer. The Commissioner has often leveraged this authority to achieve voluntary restitution within a settlement. Provisions in current statute at least provide some protections under a settlement agreement, whereas this bill would provide additional authority to order restitution, “notwithstanding” those provisions.

**The terms in SB 631 are overly broad.** “Restitution” itself is not defined for purposes of the proposed statute and references further undefined terms, including “economic harm.” In addition, the proposed legislation provides that the Commissioner may order an insurer to pay “attorney’s fees and costs of the department and all future costs of the department...” Again, these provisions propose an unprecedented grant of authority for a state agency – and one that tramples on the separation of powers and due process provisions of the Constitution.

If there is truly an interest in judicial efficiency, perhaps the Department and the author would like to engage in a discussion of how to provide a legitimate exercise of agency authority in a way that provides procedural due process, finality and certainty, as a more consumer-friendly and less expensive system for resolving disputes. SB 631, as currently proposed, does not meet that criteria.

For the foregoing reasons, **PIFC opposes SB 631** and urges your “**nay**” vote. If you have any questions regarding PIFC’s position, please contact Kimberley Dellinger Dunn at (916) 442-6646.

cc: Senator Noreen Evans, Author  
Kenneth Cooley, Senate Insurance Committee  
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