Putting an End to the Game of Chance in Insurance Rate Making

By Sam Sorich and Kimberly Dellinger Dunn

In yesterday's first part commentary on the recent MacKay v. Superior Court ruling, we underscored the fact that Proposition 103 subjects auto and home insurers to intense scrutiny by the California Department of Insurance and that companies face harsh sanctions for any violation of rating laws — and that the MacKay ruling does not impact Proposition 103, but merely shuts off the attorney fee spigot. Today's commentary highlights the MacKay ruling as being a reasoned and fair opinion, which should stand as a valuable precedent.

FIRST IN A TWO PART SERIES

Part one appeared on Dec. 7

Some contend that *Farmers Insurance Exchange v. Superior Court*, 2 Cal. 4th 377 (1992) addresses the issue, but that is not the case. That was an action brought by the attorney general against unapproved rating practices, not a private civil action challenging approved rates. Even so, the state Supreme Court held it was an abuse of discretion not to defer the action to the Insurance Commissioner, under the "primary jurisdiction" doctrine.

Others underscore the importance of *Donabedian v. Mercury Insurance Co.*, 116 Cal. App. 4th 968 (2004). But, as Justice Walter Croskey explains in the *MacKay* opinion, there was no evidentiary record before the court in *Donabedian*. It was not possible to determine whether the rating factor at issue there had been approved, as the insurer used it, or, as the plaintiff alleged in the complaint, had been an unapproved use.

MacKay, in contrast, went to the Court of Appeal on a fully-developed evidentiary record. The court held that there was no genuine issue of material fact regarding approval: the Department had approved the rating factors challenged in the civil action. The court held that the insurer could not be sued in a private civil action and required to disgorge premiums it collected pursuant to approved rates.

Intervenors have challenged several rate filings over the course of a year, petitioning to intervene and for the Commissioner to hold a hearing. In many cases, the Commissioner will deny the petition for hearing, issuing an opinion disagreeing with contentions regarding the application of the rate statutes and regulations in that case. In each case, the intervenor has an absolute right to seek court review of the Commissioner's decision. The decision must be supported. If it is not, the court can send it back to the Commissioner. The *MacKay* opinion does not affect that right. What the intervenors cannot do is to wait for the rates to be implemented, then sponsor a class action against the insurer in Superior Court, making all of the same contentions as in the petition for hearing, and seeking disgorgement of premiums charged pursuant to the approval decision. Is the *McKay* decision somehow counter to the Proposition 103 ballot pamphlet argument? We don't think so, because the portion of the ballot pamphlet argument to which critics refer states: "[Proposition 103] specifies that a permanent, independent consumer watchdog system will champion the interests of consumers" The Proposition 103 provision that "specifies" the creation of a permanent, independent consumer advocacy organization is Insurance Code Section 1861.10(c) — a provision that has never been operative, as the state Supreme Court held it unconstitutional within a year of the initiative's passage (*Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805 (1989)).

During the 1988 Propostion 103 campaign, proponents argued that the Proposition 103 rate regulatory system was "based on [a] tested system in effect in 19 states." The *MacKay* opinion is likewise consistent with the law of numerous other states interpreting similar or less stringent rate regulatory systems. The case law from sister states all across the country recognizes that insurance companies who must submit their rates to a regulator and who are bound to charge only the filed or approved rate cannot be sued in a civil action for charging the rates they are required to charge. This uniform doctrine is bottomed on the principle — recognized by the state Supreme Court in *20th Century Insurance Co. v. Garamendi,* 8 Cal. App. 4th 216, 277 (1994) — that rate-making is an exercise of economic policy falling within the executive or legislative sphere, it is not a judicial function. Justice Croskey appropriately noted that the *MacKay* opinion was consistent with the uniform rule adopted by "'every court to have considered the question.'"

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In 1988, Proposition 103 proponents invoked the law of other states as an appeal to authority to urge passage of the proposition. However, some of those very same proponents now fault the 2nd District Court of Appeal for construing Proposition 103 consistently with the law of every other state.

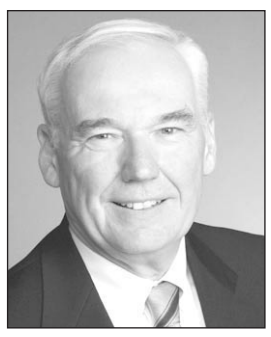
Does the *MacKay* opinion raise some questions about the role of every branch of government? We believe the opinion actually resolves those questions, and resolves them consistently with our Supreme Court's opinion in *20th Century*, and the uniform views of the courts of sister states. Rate-making inherently involves questions of economic policy, which courts are not designed or equipped to resolve. Moreover, rate regulation cannot, as a practical matter, be accomplished by 51 Superior Courts through individual litigations presenting only such data and considerations as are selected by the litigants in that particular case. The entire regulatory system cannot be made completely unmanageable just so private plaintiffs' attorneys can continue to bring Proposition 103 class actions.

Is rate regulation too big of a job for the Department of Insurance? Some say yes and urge the need for what they term are "private attorneys general." Our position is that the system already does allow for "private attorneys general" — since "any person" can intervene or initiate an administrative rate action. However, the system does not permit private regulators, operating outside the system through private civil actions. As to the enormity of the task, it is no doubt an enormous task to regulate the California insurance market. That is why there is a separate, standalone, self-funded bureaucracy — itself enormous — set up to do so.

The *MacKay* opinion does not encourage insurers to bury a description of some nefarious practice somewhere in the rate application, and then claim "approval." In fact, a key element of the *MacKay* opinion was the solid evidence that the rating practices at issue were actually approved as part of the insurer's class plan. Our courts are certainly up to the task of applying this helpful and much-needed opinion to bar civil actions challenging rates, while distinguishing attempts at an overbroad application.

Finally, those who have contended that the *MacKay* opinion will allow insurers to operate under "illegal" approvals are simply spreading misinformation. First, that is a tautology disguised by an inflammatory label. Every time one disagrees with an approval decision, the decision can be characterized as "illegal." To file the lawsuit is to apply the label. Second, courts have never volunteered to usurp the roles of other branches because another branch might do something "illegal." To borrow from the state Supreme Court, writing 150 years ago: "We must trust to the good faith and integrity of all the departments. Power must be placed somewhere, and confidence reposed in someone."

The *MacKay* opinion correctly applies this longstanding principle. It is a well-reasoned and fair opinion, and should stand as a valuable precedent guiding the distinction between litigation (which belongs in the courts) and regulation (which belongs with the regulator.)



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Vision 2020: Democracy And Women's Equality

By Mary-Christine (M.C.) Sungaila

Last month voters issued a midterm referendum on the economy and governmental policies by replacing a majority of Congress with members of the Republican party. The new Congress will begin its work next year. But another congress of delegates has already begun its work to improve this country's economic and democratic future. In late October, women delegates, ambassadors, and visionary leaders converged on Philadelphia's National Constitution Center to work toward gender equality. Their mission: to accelerate the progress of shared leadership by women and men across all aspects of society, and to encourage women and men to work together to accomplish this plan.

The inaugural Vision 2020 conference provided a platform for leaders to craft specific and concrete steps to measurably advance equality for women across all segments of society by 2020. Over three days, delegates engaged in discussions in eight areas, including arts and culture, politics and government, and science and technology, with a goal of advancing women leaders across society by the 100th anniversary of women's suffrage in the United States. The delegates will reconvene annually over the next decade, with the goal of gathering again in 2020 to mark the fulfillment of the project's mission to make women dramatically more visible and influential in the top tiers of society.

These leaders will need to roll up their sleeves. There is a lot of work still to do.

According to the 2008 Catalyst Census of Women Board Directors at Fortune 500 companies, only 3 percent of Fortune 500 CEOs are women, while 7 percent of CFOs are female. Of the 16,950 state court judges in the United States, only 26 percent (4,325) are women, the National Association of Women Judges reports. While women make up nearly one of every two law firm associates, only one out of six are equity partners, according to Catalyst. The numbers for women of color are even worse, the ABA Commission on Women in the Profession reports: women of color comprise only 3 percent of income partners and 1.4 percent of equity partners in law firms and tend to remain in the lowest rung of partnership compensation.

Lowering these gender gaps is one way to make the American economy more competitive. The World Economic Forum has determined that higher economic competitiveness correlates directly with lower gender gaps in the workforce. Weeks before the Vision 2020 conference, the Forum ranked the United States 19th in terms of a gender gap. This was an improvement from the United States' prior 31st ranking. But shouldn't one of the world's premier democracies be able to do better than 19th?

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Indeed, a measure of a democracy is the extent to which equality prevails. Democratic participation is the first essential step toward social, economic, educational and political equality. The Declaration of Equality signed by the delegates at the conclusion of their meeting last month echoes this: "Without equality we cannot truly claim that we the people, are fairly self-governed and free to pursue happiness. Equality is both a measure of our democracy and its hallmark. It is the foremost feature of justice and it is descriptive of our common humanity. There is an urgency to this matter because equality delayed is opportunity denied."

Women and men need to work together — as partners in the Vision 2020 initiative and individually — to move the nation toward meaningful equality. Not only is it about time to have more women in decisionmaking positions in America, but it is the right thing to do for our democracy. Equality is, after all, a measure of our humanity, the cornerstone of our government, and an important way to ensure our country's economic competitiveness.

Mary-Christine (M.C.) Sungaila is an appellate partner at Snell & Wilmer in Orange County. She serves as one of California's ambassadors to Vision 2020. For more information on Vision 2020: http://www.drexel.edu/vision2020/get_involved/