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2 LEGAL DIVISION
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10 BEFORE THE INSURANCE COMMISSIONER
11 OF THE STATE OF CALIFORNIA

12 In the Matter of

13 MERCURY INSURANCE COMPANY,
14 MERCURY CASUALTY COMPANY,
15 AND
16 CALIFORNIA AUTOMOBILE
17 INSURANCE COMPANY,

18 Respondents.

19 DEPARTMENT'S OPPOSITION TO
20 RESPONDENTS' MOTION IN LIMINE

21 OAH Case No.: 2006040185

22 CDI File No.: NC-03027545

23 ALJ ASSIGNED: Steven C. Owyang

24 HEARING DATE: March 16-20, 23-26,
25 30-31, and April 1-3, 2009

26 MSC DATE: February 23, 2009

HEARING LOCATION: Oakland

18 I. INTRODUCTION

19 A. Respondents' Motion Is Vague

20 On February 6, Respondents filed a "Motion-In-Limine Requesting That All Evidence of
21 Conduct Beyond The Scope Of The Allegations Be Excluded" ("Motion"). Other than referring
22 to a "FRUB" report,¹ Respondents' do not mention any particular witness or document they seek
23 to exclude as being "beyond the scope of the allegations." Without knowing which specific
24 witnesses or other documents Respondents seek to exclude, and how their arguments for
25 exclusion apply to that particular witness or document, it is difficult for the Department to
26 respond to their motion.

¹ A FRUB report is a written report issued by the Department's Field Rating and Underwriting Bureau reciting the nature, timing, impetus, scope and results of an examination into an insurer's rating and underwriting practices.

1 B. Respondents' Motion Is Premature; A Similar, New Motion Should Be Precluded
2 The Department respectfully suggests that Respondents' entire motion is premature;
3 Respondents could have waited until the exchange of exhibit and witness lists without any
4 prejudice. They then could have argued with respect to specific items of evidence, and the
5 Department could have responded accordingly. If the pending motion is denied, Respondents
6 will no doubt wish to file a new motion in limine before the hearing, thus creating double work
7 for O.A.H. and the Department. The Department suggests that Respondents be admonished for
8 their premature filing, and advised that no additional written motion in limine based on the same
9 arguments will be entertained. Respondents had their "at-bat," swung too soon, and struck out.
10 They should not receive another chance at the plate. The admissibility of the Department's
11 evidence could and should be determined at hearing upon oral motions.

12 C. Respondents' Authority Is Non-Applicable and Ignores the A.P.A. Rule
13 Respondents base their motion on the Evidence Code and cases applying the Evidence
14 Code. They ignore the provision of Government Code section 11513(c) that: "The hearing need
15 not be conducted according to technical rules relating to evidence and witnesses, except as
16 hereafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which
17 responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the
18 existence of any common law or statutory rule which might make improper the admission of the
19 evidence over objection in civil actions." As discussed below, Respondents fail to even argue, let
20 along carry their burden to prove, that the Department's evidence to which they object should be
21 excluded under the standard recited in the second sentence of section 11513(c).

22
23 II. THE EVIDENCE THE DEPARTMENT MAY PRESENT WILL NOT BE BEYOND THE SCOPE OF THE
24 ALLEGATIONS, WILL BE RELEVANT AND NECESSARY TO DETERMINE THE PROPER PENALTY,
25 AND WILL BE ADMISSIBLE UNDER THE EVIDENCE CODE AND A.P.A.

26

1 A. The Department's Evidence Will Not Be Outside the Scope of the Pleading; It
2 Will Relate to Allegations Expressly Contained in the Pleading

3 1. The evidence will prove that Respondents' violations were willful.

4 Respondents assert that evidence of Mercury's past conduct that is outside the pleading
5 must be excluded. However, past conduct Respondents consider to be "outside the pleading"
6 may be relevant to allegations within the pleading.

7 Throughout the Pleading, the Department alleges that Respondents' conduct and
8 violations were willful.² Any "past conduct and attitude" evidence the Department might present
9 would be probative that Respondents intended to commit the acts that violated the Code, and
10 knew the acts violated the Code. Consequently, such evidence would not be "outside the scope of
11 the pleading," but instead probative of allegations expressly recited in the pleading.

12 2. The evidence is necessary to justify the penalty.

13 At issue at the hearing will not only be the existence of Mercury's violations, but the
14 appropriate penalty for those violations. The Code sections that recite the possible monetary
15 penalties for Mercury's rating and advertising violations prescribe that the fine not exceed \$5,000
16 per act, or \$10,000 if the act was willful. (See sections 790.035 and 1858.07(a).) The A.L.J. and
17 Commissioner must have an evidentiary record to justify whatever penalty they impose. Absent

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19 ² "Respondents *willfully* permitted their insurance agents to charge "broker fees" to Respondents' policyholders." (P.
20 2, L 20)

21 "Respondents *willfully* permitted the rate discrimination to occur." (P. 3, L. 6)

22 "The facts alleged in paragraphs 1 - 4 establish that Respondents *willfully* used a rate, rating plan or rating system in
23 violation of Chapter...." (P. 3, L. 8)

24 "Respondents *willfully* failed to disclose that broker fees might be charged in addition to the premium. By not
25 mentioning the broker fees in the advertisements, Respondents *willfully* misrepresented the actual price insurance
26 consumers could expect to pay...." (P. 3, L. 20)

27 "By not mentioning the broker fees in the advertisements, Respondents have *willfully* misrepresented the actual price
28 insurance consumers could expect to pay for insurance from Respondents, and thus deceived and misled consumers."
29 (P. 4, L. 10)

30 "The facts alleged in paragraphs 6 and 7 establish that Respondents *willfully* engaged in unfair or deceptive acts or
31 practices defined in sections 790.03, and constitute grounds to impose a civil penalty of \$10,000 for each act." (P. 4,
32 L. 18)

1 such a record, any penalty levied by the Commissioner will be vulnerable to a challenge that it is
2 arbitrary. Mercury's lengthy history of serious misconduct, and its attitude - contempt towards
3 and/or abuse of its customers, the Commissioner, its competition, and the Superior Court - are all
4 relevant to determining the penalty needed to best ensure the protection of the public from future
5 violations and wrongdoing.

6 B. The Department Does Not Seek To Introduce Mere Allegations.

7 Mercury attempts to limit evidence that is "unproven" and "unadjudicated." (Motion: P.
8 6, L. 19) Since the Department does not know what specific evidence Mercury is referring to, it
9 cannot properly argue its relevance and admissibility.

10 Among Department staff, consumer attorneys, and consumer victims of its bad faith,
11 Mercury has a deserved reputation for abusing its customers and intentionally violating the law
12 with arrogance and indifference. Opinion and reputation testimony regarding Mercury's past
13 conduct, and the foundation for that opinion and reputation, is relevant to intent, knowledge,
14 absence of mistake, and penalty, and admissible under Ev. Code sections 1100 and 1101(b).

15 C. Previously Settled Matters May be Admissible.

16 Respondents seek blanket exclusion of all evidence of prior settlements by Mercury as
17 being *per se* prejudicial, confusing and irrelevant. The Department trusts that the A.L.J. in this
18 matter is highly unlikely to be prejudiced or confused by evidence of a settlement, and will not
19 admit evidence of a specific settlement when the consumption of hearing time needed for its
20 discussion outweighs its relevance. Ev. Code section 352.

21 D. The Department Does Not Seek to Introduce Inadmissible Character Evidence.

22 Mercury seeks to exclude all character evidence that falls within Ev. Code section
23 1101(a). The Department does not intend to introduce such evidence.
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1 E. Respondents' Objection To The FRUB Report Is Premature.

2 Mercury asserts that the FRUB report is inadmissible hearsay. This objection, as is the
3 rest of the Motion, is premature. The Department has not yet preferred the document, attempted
4 to provide its foundation, nor explained its intended use. It may or may not be offered to prove
5 the truth of the matters stated therein, and if it is, it may be subject to various exceptions to the
6 hearsay rule. Even if not subject to an exception, it may be considered as administrative hearsay
7 per Government Code section 11513(d).

8 III. RESPONDENTS' OBJECTION BASED ON EV. CODE SECTION 352 IS PREMATURE.

9 Mercury seeks a blanket prohibition of "evidence beyond the scope of the allegations"
10 under Ev. Code section 352. As discussed above, Respondents have an erroneously narrow view
11 of the "scope of the allegations." Respondents have failed to allege, let alone carry their burden
12 of proving, which specific Department evidence falls within section 352, or how the evidence
13 falls within that section.

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15 IV. RESPONDENTS' HAVE FAILED TO MEET THEIR BURDEN UNDER GOVERNMENT CODE SECTION
16 11513(c).

17 A. Respondents Have Failed To Meet Their Burden With Respect To The FRUB
18 Report.

19 Pursuant to C.G.C. § 11513(c), Respondents must establish that the Department's
20 proffered evidence is not "the sort of evidence on which responsible persons are accustomed to
21 rely in the conduct of serious affairs." Respondents provided no argument in this regard. With
22 respect to the FRUB report, a formal government report prepared by an examiner in accordance
23 with detailed, time-tested, protocols, which report was carefully reviewed and approved by a
24 supervisor and that supervisor's supervisor and addressed to the government agency's highest
25 official, is precisely the kind of evidence on which responsible people rely. It is hard to imagine a
26 better example of what the Legislature might have been contemplating in drafting subdivision (c).

1 Respondents are free to contest the report's methodology and findings, and argue that the report
2 should be given minimal weight, but they have not established that it should be excluded.

3 B. Respondents Have Failed To Meet Their Burden With Respect To The
4 Department's Other Evidence.

5 Respondents fail to even argue, let alone carry their burden to prove, that the
6 Department's evidence other than the FRUB report to which they object should be excluded
7 under the standard recited in the second sentence of section 11513(c).

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9 V. CONCLUSION

10 For the foregoing reasons, Respondents' Motion in Limine should be denied *in toto*.

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12 DATED: February 20, 2009

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JON A. TOMASHOFF