Case No. B159982

IN THE COURT OF APPEAL
FOR THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

SAM DONABEDIAN,
Individually and on behalf of the general public
Plaintiff and Appellant;
v.
MERCURY INSURANCE COMPANY,
A Corporation, and DOES 1 through 100, inclusive
Defendants and Respondents.

Appeal from the Superior Court of the State of California in and for the County of Los Angeles, Case No. BC249019

(The Honorable Ann Carolyn Kuhl, Judge)

THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS' REVISED AMICUS CURIAE BRIEF[1]

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[1] As directed by the Court's Nov. 5, 2003 order, this revised brief supersedes The Foundation's previously-served oversized amicus curiae brief dated Nov. 4, 2003.

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STATEMENT OF INTEREST OF AMICUS

This case raises extremely important issues concerning the interpretation and enforcement of Proposition 103, the insurance reform measure approved by the voters in 1988. The Foundation for Taxpayer and Consumer Rights (The Foundation) is a non-profit corporation founded in 1985 by the author and proponent of Proposition 103. A core mission of The Foundation is to defend, enforce and monitor the implementation of the initiative. The Foundation's attorneys have participated in every major lawsuit concerning Proposition 103's constitutionality and scope, as well as in dozens of proceedings initiated pursuant to the initiative's provisions.[2]

The Foundation has played a principal role in regulatory and judicial proceedings to enforce the statute at issue here: Insurance Code section 1861.02(c).[3] The Foundation's focus on this subdivision began in 1996, when it and other consumer groups brought suit to prevent several insurers from violating subdivision (c).[4] The Foundation also initiated the 2002 regulatory proceeding before the California Department of Insurance (CDI) that led to promulgation of a regulation expressly prohibiting the violation

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[2] For example, *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal. 3d 805, *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216; *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243; *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal. App. 4th 1473.

[3] All statutory references are to the Insurance Code, except as otherwise stated.

[4] In 1996, Commissioner Quackenbush approved, as a part of some insurers' class plans, a "financial responsibility rating factor." Several insurers began surcharging those who could not show proof of prior insurance as evidence of compliance with the Financial Responsibility Law. (Veh. Code §§ 16020, et seq.) The San Francisco Superior Court directed Mr. Quackenbush to not approve any insurer's class plan that contained a "financial responsibility" rating factor. (*See* accompanying Motion for Judicial Notice ["MJN"], Exh. A (Writ of Mandate, *Proposition 103 Enforcement Project v. Quackenbush* (Super. Ct. S.F. County, Feb. 10, 1997, No. 982646).)

of the statute in the manner Mercury is charged with here. Recently, The Foundation successfully objected to a class action settlement that would have allowed an insurance company to continue to violate § 1861.02(c) in the same manner in which Mercury is alleged to engage.[5]

Mercury has advanced arguments that would eviscerate key enforcement provisions of Proposition 103. In support of its contentions, Mercury has presumed to assert that "Proposition 103's drafters" agree with its misreading of the statute. (RB 32.) In the court below, Mercury went so far as to imply that it had The Foundation's support, when it asked the court to take judicial notice of the fact that its conduct "has not been challenged as a valid means of rating automobile insurance by the author of Proposition 103, Harvey Rosenfield, even though he has vigorously challenged all kinds of other actions the Insurance Commissioner has taken in implementing Proposition 103." (CT 65.)

The Foundation, with leave granted by this Court's order dated November 5, 2003, appears as amicus curiae to provide this Court with its views on the application of the statutes at issue here. In doing so, we are particularly mindful of what happened when such assistance was absent in *Walker v Allstate Indemnity Co.* (2000) 77 Cal.App.4th 750, upon which Mercury relies so heavily. There, the appellate court criticized – correctly – "[a]ppellants' inability to craft a cohesive argument taking cognizance of [the interplay between 103 and other provisions of the insurance code]." (*Id*. at 755.) The Foundation respectfully believes that the appellate briefs filed by the parties do not fully inform the court on the proper construction of the statutes, and that The Foundation can provide the court with a unique

[5] *Mitchell, et al. v. Allstate Insurance Company*, et al., (L.A. Super. Ct., 2003) Case No. 212492.

and valuable perspective, based on years of experience in Proposition 103 matters, on the statutory and regulatory issues raised in this litigation.

INTRODUCTION

This is a straightforward case concerning the statutory construction of four provisions of the Insurance Code.

For fifteen years, Insurance Code §§ 1861.10(a) and 1861.03(a), enacted by the voters with the passage of Proposition 103, have expressly conferred on consumers an unqualified private right of action to bring lawsuits against insurance companies for violation of Chapter 9 [of Div. I, Part 2 ("Chapter 9")] of the Insurance Code. The California Supreme Court unequivocally affirmed that statutory authority in *Farmers Insurance Exchange v. Superior Court* (1992) 2 Cal.4th 377 (*Farmers*). Exercising that authority, Donabedian sued Mercury under the Unfair Competition Law (Business and Professions Code §§ 17200, et seq.) ("UCL") for a violation of Chapter 9.

The court below effectively invalidated the two voter-approved provisions. Mercury asserts, and the court below agreed, that two vestigial provisions of 1947 insurance law – §§ 1860.1 and 1860.2 – override the later-enacted provisions of Proposition 103. The lower court construed the two 1947 statutes as immunizing Mercury's illegal conduct because it erroneously believed that the Insurance Commissioner had approved that conduct. Mercury goes further: it contends that, whether or not its conduct was approved, the 1947 provisions bar this lawsuit.

The trial court's ruling, and Mercury's effort to extend it, ignore the plain language of the four statutory provisions at issue,[6] the express

[6] For convenience, the four statutory provisions are reproduced together in Attachment 1.

purposes and mandates of Proposition 103, and the voter's intent. This brief will demonstrate that the two 1947 statutes do not bar Proposition 103's private right of action – which is why the voters did not repeal them – and that the trial court's ruling conflicts with *Farmers*.

Should Mercury prevail here, the consequences will be profound. First, insurers will be encouraged to deceive or mislead the Commissioner, destroying the integrity of the regulatory process established by Proposition 103. Second, and more fundamentally, the right that the voters reserved to themselves to prevent violations of the Insurance Code, and to remedy such violations when they occur, will be nullified.

SUMMARY OF DISCUSSION

Proposition 103 made "numerous fundamental changes in the regulation of automobile and other forms of insurance in California." (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 812.) Section 1861.02(a) requires automobile insurers, when determining a motorist's premium, to utilize only expressly-authorized "rating factors." One rating factor – and only one – is specifically prohibited: "the absence of prior automobile insurance." (§ 1861.02(c)).

Mercury offers a premium discount to anyone who has had prior insurance with any company. The only individuals who do not qualify for this discount are those who lack prior insurance.[7] Mercury thus uses the "absence of prior insurance" to determine premiums. This is a violation of § 1861.02 and regulations promulgated by the Insurance Commissioner for the express purpose of interdicting Mercury's misconduct.

Who is overcharged by Mercury's unlawful practice? Those who did not previously own or operate a car; military reservists serving overseas

[7] Mercury defines the class of persons ineligible for this discount to include those who have let their policy lapse for a period of more than thirty days.

who chose to cancel their insurance; people who let their coverage lapse while hospitalized; and those who simply cannot afford insurance. These drivers have three choices: buy Mercury's policy at the inflated price; try to locate another carrier that is complying with the law; or choose not to buy insurance at all. Mercury thus thwarts the purpose of § 1861.02(c) – to reduce the number of uninsured motorists by making insurance more affordable.

Recognizing that the CDI has insufficient resources to ensure compliance by each of the approximately eight hundred insurers doing business in California, Proposition 103 gave the public the unqualified private right to enforce both the provisions of the measure and the state's civil rights and consumer protection statutes (§ 1861.10(a)), which it made applicable to insurers for the first time (§ 1861.03(a)). Appellant Donabedian filed suit under one of those statutes – the UCL.

Mercury does not deny that it offers a discount to applicants with prior insurance.

Rather, Mercury insists that its violation of § 1861.02(c)[8] is "insulated from civil action" by two vestigial provisions of the pre-Proposition 103 regulatory regime, §§ 1860.1 and 1860.2 (Respondent's Brief ("RB") at 2). This brief will demonstrate that, by their own terms, and construed in the context of the later-enacted provisions of Proposition 103 (§§ 1861.03(a) and 1861.10(a)), as confirmed by the California Supreme Court in *Farmers*, neither provision immunizes Mercury from suit. Were they to conflict with the voter's authorization of a private right of action, they would have to be considered repealed by implication. (Discussion, Section I.)

[8] Inexplicably, Donabedian did not allege, nor does Mercury discuss, the use of an unauthorized rating factor in violation of § 1861.02(a).

In a closely-related argument, Mercury contends that the Insurance Commissioner *approved* Mercury's conduct and that, under the First District Court of Appeal's decision in *Walker v. Allstate Indemnity Co.* (2000) 77 Cal.App.4th 750) (*Walker*), this purported approval insulates it from liability for its violation of § 1861.02(c). (RB 1, 26.) The trial court agreed. (May 1, 2002 Reporter's Transcript ("RT"), at 11.)

It erred.

This brief will demonstrate that *Walker* is bad law and should not be followed by this Court. Like the trial court and Mercury here, the First District misconstrued vestigial §§ 1860.1 and 1860.2. It then gave them precedence over superseding provisions of the later-enacted Proposition 103. When the statutes are properly construed, it is clear that the *Walker* decision conflicts with §§ 1861.10(a), 1861.03(a) and the California Supreme Court's decision in *Farmers*. (Discussion, Section IIA.)

In any case, by its own terms, *Walker* is inapposite to this case.

First, *Walker* does not apply to *unapproved* conduct. The record demonstrates that Mercury did not disclose, and the Commissioner did not approve, Mercury's use of an illegal rating factor. The trial court erroneously assumed Mercury's conduct had been approved.

Second, an administrative agency has no authority to approve the violation of a statute. Even if the Commissioner had purported to approve Mercury's use of an illegal rating factor, its approval would be *ultra vires*. The trial court erred in deferring to the Commissioner's supposed approval.

Third, *Walker* rejected a lawsuit seeking damages from insurers for charging excessive *rates*. This case is not about Mercury's *rates*, but rather whether it is using an unlawful rating factor to determine an individual's *premium*. The superior court did not recognize this crucial difference. (Discussion, Section IIB.)

Confronted with *Walker's* fatal flaws, Mercury asks this Court to go beyond the trial court's ruling and declare that the Insurance Commissioner has "exclusive jurisdiction" over all challenges to an insurer's rates, premiums and practices, *approved or unapproved*, and that therefore violations of Proposition 103 can never be challenged in court. (RB 26). The California Supreme Court expressly rejected this contention in *Farmers*. Undaunted, Mercury advocates that this Court overrule *Farmers*.

Perhaps anticipating that its invitation to judicial excess would not be well-received here, Mercury hedged its position. It sponsored, and last August Governor Davis signed, legislation that purports to *prospectively* legalize Mercury's use of the "length of prior coverage with any carrier" rating factor. The company offers S.B. 841 to this Court as "evidence" that what it was doing was legal all along. (RB at 20.) The legislation is irrelevant to this proceeding, however: it does not purport to clarify existing law, or to have retroactive application. Moreover, S.B. 841 is void as an unconstitutional amendment to Proposition 103. (*See Amwest Surety Ins. Co. v. Wilson* (1995)11 Cal.4th 1243; *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473.) The issue of its constitutionality is pending for decision before the Los Angeles Superior Court. (*The Foundation for Taxpayer and Consumer Rights, et al. v. Garamendi, et al*., Los Angeles Super. Court No. BS086235.) It is not at issue in this proceeding. (Discussion, Section III.)

BACKGROUND

The changes wrought by Proposition 103, and the meaning of the vestigial provisions of prior law that Proposition 103 did not repeal, are at the heart of this case. We therefore provide a history of the two relevant statutory regimes, the McBride-Grunsky Insurance Regulatory Act of 1947 ("McBride-Grunsky") and Proposition 103, which replaced it in 1988.

A. McBride-Grunsky Immunized Insurers and Denied Consumers the Right to Challenge Insurer Misconduct in the Courts.

McBride-Grunsky was the product of the insurance industry's determination to limit governmental regulation of its conduct.

The initial impetus was a series of judicial decisions subjecting insurers to the antitrust laws. The industry turned to Congress for relief, and, in 1947, Congress enacted the McCarran-Ferguson Act (McCarran), which exempted insurers from federal antitrust law *to the extent that state laws "regulated" insurance*. (15 U.S.C. §§ 1011-1015).[9] At the behest of the insurance lobby, every state legislature proceeded to enact laws to meet the standard for exemption.

California's enactment was McBride-Grunsky. MJN Exh. B sets forth the text of McBride-Grunsky Act as enacted and amended through the passage of Proposition 103 on November 8, 1988. It explicitly authorized insurance companies, in setting their rates, to engage in conduct which would otherwise have been a violation of antitrust laws,[10] including

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[9] For a thorough history of McCarran, *see Smith v. Pacificare Behavioral Health of California* (2001) 93 Cal.App.4th 139, 149-152. *See also* Sidney L. Weinstock and John R. Maloney, *History and Development of Insurance Law in California*, West's Insurance Code Annotated LXVI (1971).

[10] Its principal purpose was to "authorize cooperation between insurers in rate making and other related matters." (*See* former Cal. Ins. Code § 1853, added by Stats. 1947, c. 805, § 1, p. 1896, *repealed by* Proposition 103; *accord* MJN Exh. C [Letter from J.R. Maloney, Deputy Insurance Commissioner, on behalf of Wallace K. Downey, Insurance Commissioner, to Gov. Earl Warren, June 10, 1947, pp. 1-2].)

In setting rates, insurers traditionally relied on insurer-controlled "rating" organizations that collected loss data, projected that data into the future, and then disseminated proposed rates to insurers. This activity would have violated the antitrust laws if not expressly authorized by state insurance law and exempted from federal antitrust prosecution by the McCarran-Ferguson Act. (*See, e.g.,* Angoff, "Insurance Against Competition: How the McCarran-Ferguson Act Raises Prices and Profits in the Property/Casualty Insurance Industry," 5 Yale Journal on Regulation 397 (1988).)

"[c]oncerted action" (§ 1853); "[a]greements to adhere to rates" (§ 1853.6); and the "[e]xchange of information and experience data" (§ 1853.7).[11]

But McBride-Grunsky reached beyond antitrust issues to erect a statutory framework under which the property-casualty insurance industry would be subject to sharply limited oversight by the executive or judicial branch.

The "regulation" it provided was nominal. McBride-Grunsky prohibited affirmative regulation of insurers' rates and practices.[12] As the California Supreme Court has noted, under McBride-Grunsky, "'rates [were] set by insurers without prior or subsequent approval by the Insurance Commissioner . . . .'" (*20th Century Ins. Co. v. Garamendi*, *supra*, 8 Cal.4th 216, at 240, *quoting King v. Meese* (1987) 43 Cal.3d 1217, 1221.) "Such control of rates as may be said to have existed under the 'open competition' system was essentially through market forces alone . . . ." (*Id*. at 300.) Insurers were not even required to *file* their rates or underwriting plans with the Insurance Commissioner. Even if a rate was excessive, the Commissioner was prohibited from taking any action so long as there was "competition" in the marketplace.[13] The Court concluded: "[u]nder [McBride-Grunsky], 'California ha[d] less regulation of insurance than any other state, and in California automobile liability insurance [was] less regulated than most other forms of insurance.'" (*20th Century Ins. Co. v. Garamendi*, *supra*, 8 Cal.4th 216, 240, *quoting King v. Meese, supra,* 43 Cal.3d 1217, 1221.)

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[11] All three sections were added by Stats. 1947, c. 805, § 1, p. 1896, and repealed by Proposition 103.

[12] §1850, added by Stats. 1947, c. 805, § 1, p. 1896, *repealed* by Proposition 103.

[13] § 1852, added by Stats. 1947, c. 805, § 1, p. 1897, *repealed* by Proposition 103.

In accord with McBride-Grunsky's determination to isolate insurers from accountability, §§ 1858-1859.1 provided the Insurance Commissioner with "exclusive jurisdiction" over objections to an insurer's rates, premiums or practices. These provisions established an administrative complaint process under which an aggrieved consumer's *sole* recourse was to file a complaint *with the insurance company* itself. If the complaint was rejected, the consumer could appeal to the Insurance Commissioner, who could summarily deny a hearing in his sole discretion. Should a hearing substantiate misconduct, the Commissioner could provide prospective relief only. The Commissioner had no authority to order refunds, restitution or disgorgement.[14] Judicial review was available only by way of Code of Civil Procedure § 1094.5. (§ 1858.6.) This miserly process was rarely invoked and, according to state records, never resulted in a successful challenge to an insurer's rates.[15]

To reinforce its severe constraints upon government regulation and the public accountability of insurers, McBride-Grunsky erected two further jurisdictional shields, §§ 1860.1 and 1860.2. The residual scope of these

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[14] Sections 1858 – 1859.1 (amended 1977, 1979, 1984, 1987 and 1989). It was noted that the absence of such authority "puts a premium upon stalling and delay in the Commissioner's proceedings." (*See* MJN Exh. D [Letter from Harold B. Haas, Deputy Attorney General, California Dept. of Justice, to Gov. Earl Warren, June 11, 1947], p. 6.) These sections were amended in 1987 to enable a consumer to file a complaint directly with the Commissioner.

[15] An investigation "was unable to find a single formal determination made by the Department in the past 25 years that a rate is excessive." (Commission on California State Government Organization and Economy, *A Report on the Liability Insurance Crisis in the State of California*, July 1986, p. 29.)

statutes under the Proposition 103 regime is at the core of this case. In language that closely parallels McCarran,[16] § 1860.1 reads:

> No act done, action taken or agreement made *pursuant to the authority conferred by this chapter* [Chapter 9] shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this State heretofore or hereafter enacted which does not specifically refer to insurance.
>
> (§1860.1, emphasis added.)

The phrase "authority conferred by this chapter" referred specifically to the statutory authority conferred *on insurance companies* to engage in concerted activities that might otherwise violate the antitrust laws, but which were expressly authorized by §§ 1853, 1853.6 and 1853.7. In an analysis of the legislation, the California Attorney General explained the breadth of the immunity:

> [a]ll such acts in concert authorized by the bill are expressly exempted from prosecution or civil proceedings under any law of this State which does not expressly refer to insurance. This, obviously, includes the Cartwright Act concerning combinations in restraint of trade. If other business regulations such as the Fair Trade Act are applicable to insurance, the exemption applies to them also.[17]

A companion provision, § 1860.2, required that "[t]he administration and enforcement of this chapter shall be governed solely by the provisions of this chapter."

Together, in the context of Chapter 9 as it existed before Proposition 103, §§ 1860.1 and 1860.2 operated to insulate insurers from the application of any rights or remedies outside those found within McBride-Grunsky. Section 1860.1 provided immunity for the specified activities

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[16] McCarran provides that no federal law shall "invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance unless such Act *specifically relates to the business of insurance*." (15 U.S.C. §1012(b), emphasis added.)

[17] MJN Exh. D (Letter from Haas, *supra* note 13, at 3, citation omitted.)

from antitrust and other state police-power statutes (such as the UCL's precursor) that, at the time, did not "refer to insurance." And § 1860.2 sheltered insurance companies from enforcement actions not authorized by Chapter 9 itself: as enacted in 1947, Chapter 9 contained no judicial remedies. Instead, the only remedy was that of §§ 1858 et seq., which required that all challenges to insurers' rates, premiums and practices be brought only – "exclusively" – before the Commissioner. Thus, § 1860.2 foreclosed any judicial remedy except administrative mandamus pursuant to § 1858.6.

Collectively, these provisions constructed a self-contained fortress within which insurers were impervious. Under McBride-Grunsky, therefore, insurers faced no public accountability or liability. The courts consistently applied McBride-Grunsky's provisions to dismiss suits against insurers alleging improper rates or practices, on the dual grounds that the plaintiffs had failed to exhaust their exclusive administrative remedy under § 1858, and because the challenged conduct was immunized.

Karlin v. Zalta (1984)154 Cal.App.3d 953, is the oft-cited example from that era. A consumer brought suit, alleging a conspiracy among insurers and others to set rates for medical malpractice insurance at excessive levels during the "malpractice crisis" of the 1970s, in violation of § 1852 of McBride-Grunsky and the Unfair Insurance Practices Act (UIPA) Insurance Code, §§ 790, et seq. The Court of Appeal ruled that § 1853 of McBride-Grunsky expressly sanctioned rate-setting collusion. (*Id*. at 970.) It also held that, to the extent that insurance rates were challenged, the UIPA was completely preempted by §§ 1860.1 and 1860.2. (*Id*. at 969–975.) Finally, the court held that objections to insurance rates could only be raised in the form of an administrative complaint under § 1858, and that the plaintiff had failed to exhaust that "exclusive" remedy. Having instructed the petitioner to exhaust, however, the court predicted the

ultimate futility of the process: "A finding that the activities complained of were authorized under the McBride Act might call into play the immunities of sections 1860.1 and 1860.2 against any civil claim." (*Id.* at 986, fn. 23.)[18]

B. Proposition 103 Replaced McBride-Grunsky with a Regulatory Framework to Hold Insurance Companies Accountable in the Courts.

During the liability insurance "crisis" of the 1980's,[19] the failure of the McBride-Grunsky regime became a matter of great public concern. Numerous highly-critical reports pointed out that state law accorded the CDI too little authority to effectively address the crisis.[20] A legislative analysis published at the time concluded that, "[t]he McBride-Grunsky Act must be judged a failure."[21] Other inquiries faulted the Insurance Commissioner – an appointed official – for failing to utilize even the limited authority he had.[22]

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[18] *Accord County of L.A. v. Farmers Ins. Exchange* (1982) 132 Cal. App. 3d 77, 82-88.

[19] *See The Manufactured Crisis*, Consumer Rep. 51 (Aug. 1986) p. 544; *Premium Increases and Refusals to Deal in the Property/Casualty Insurance Industry: Hearing Before the Judiciary Comm*., 99th Cong. 5 (1986) (statement of Jay Angoff, Counsel, National Insurance Consumer Organization).

[20] *See, e.g*., Commission on California State Government Organization and Economy, *A Report on the Liability Insurance Crisis in the State of California* (Jul. 1986) pp. 24-30 (Commissioner's powers more limited than in other states, particularly over rates); National Insurance Consumer Organization, *Insurance in California: A 1986 Status Report for the Assembly* (Oct. 1986).

[21] MJN Exh. E (Sen. Claims and Corporations Com., Analysis of Assem. Bill 1687 (1987-1988 Reg. Sess.) July 15, 1987, p. 4 [analyzing legislation amending the McBride-Grunsky complaint process].) (Emphasis in original.)

[22] *See, e.g.,* Consumers Union, *"Sorry We Could Not Be of More Help": How the California Department of Insurance Regulates a Trillion Dollar Industry*, May, 1986 (chronicling ongoing failure to use regulatory authority); Auditor General of California, *The Department of Insurance*

In 1988, the voters replaced the discredited McBride-Grunsky system with Proposition 103, a completely new regime under which the voters imposed substantive requirements upon insurers and retained for themselves the authority to enforce those requirements in the courts.

Proposition 103's findings clause stated that "the existing laws [McBride-Grunsky] inadequately protect consumers and allow insurance companies to charge excessive, unjustified and arbitrary rates." MJN Exh. F sets forth the text of Proposition 103 as enacted by the voters on November 8, 1988. Because McBride-Grunsky was incompatible with the purposes and specific provisions of Proposition 103's pervasive reach and goals, Proposition 103 ***explicitly repealed every provision of McBride-Grunsky that was inconsistent with the initiative statute.***[23] Sections 1858, 1860.1 and 1860.2 were not expressly repealed; as discussed below (Discussion, Section I), however, these vestiges of the ruins of McBride-Grunsky took on very limited functions in the new edifice of Proposition 103.

The voters imposed broad reforms in five categories:

(1) Immediate rate reductions (§ 1861.01).

(2) Regulation of insurance rates (§§ 1861.05-1861.09).

(3) Regulation of automobile insurance premium-setting practices (§ 1861.02).

Needs to Further Improve and Increase Its Regulatory Efforts, June, 1987; Consumers Union, *Bark But No Bite: Toothless Regulation by the Department of Insurance Has Left California Consumers Unprotected*, July, 1987.

[23] Section 7 ["Repeal of Existing Law"] repealed the following sections of McBride-Grunsky: §§ 1850, 1850.1, 1850.2, 1850.3, 1852, 1853, 1853.6, 1853.7, 1857.5, 1854.1, 1854.2, 1854.25, 1854.3, 1854.4, 1854.5 (*See* MJN Exh. F [text of Prop. 103].) Exhibit B displays these repealed provisions as redlined.

(4) Elimination of barriers to competition in the marketplace (§§ 1861.03, 1861.12).

(5) Creation of a private right of action permitting consumers to enforce Proposition 103 and other state consumer protection statutes against insurers (§§ 1861.10 and 1861.03).

Only two of these categories are at issue in this case: (3) regulation of auto premium-setting practices, and (5) private enforcement rights.

1. Proposition 103 Established a New Mechanism for Determining Auto *Premiums*, Distinct from its *Rate*-Setting Procedures.

In imposing new requirements upon insurers, Proposition 103 distinguished between "rates" and "premiums," mandating separate procedures for the regulation of insurance rates and the premium-setting practices employed by insurers. The distinction – which the trial court failed to make – is of major importance in this case.

A "rate" is the amount of revenue an insurance company may collect from *all* its policyholders for a given line of insurance (automobile, homeowner, etc). Under §§ 1861.05 et seq., Proposition 103 requires that rates for *all lines* of property-casualty insurance[24] be submitted to the Commissioner for approval prior to their use. In submitting such applications, insurers must comply with a technical formula to ensure that the proposed rates are *within a range of reasonableness* bounded by the "excessive" and "inadequate" standards.[25]

This case is not about rates.

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[24] *See* § 1861.13.

[25] *See* Cal. Code Regs., tit. 10, §§ 2644.1 et seq. To justify an appropriate rate an insurer must, *inter alia*, estimate its current losses, project future losses and investment income, and determine a reasonable rate of return. *See Calfarm*, *supra*, 48 Cal.3d 805; *20th Century Ins. Co. v. Garamendi*, *supra*, 8 Cal.4th 216; *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473.

Under a separate procedure specified by Proposition 103, and *applicable only to automobile insurance*, a company selling such insurance to individuals must also obtain approval for the method by which it allocates its total revenue requirement (rate) among its policyholders, i.e., how much *premium* it can collect from each insured motorist. The criteria that an insurer uses to establish a specific person's premium are known as "rating factors."[26]

Section 1861.02 sets forth the special rules governing the use of automobile rating factors. Section 1861.02(a) requires that "[r]ates and premiums for an automobile insurance policy . . . shall be determined" principally by three specified rating factors (known as "mandatory" factors)[27] and by other rating factors (known as "optional" factors) that "the commissioner may adopt by regulation and that have a substantial relationship to the risk of loss" (§ 1861.02(a)(4)).

Regulations adopted by the Commissioner set forth the optional rating factors an insurer may use, and address the approval and "weighting" of these factors for purposes of determining a person's premium. (Cal. Code Regs., tit. 10, § 2632.5.)[28] Each insurer must obtain the Commissioner's approval of its "class plan," a typically lengthy filing which contains a form, prescribed by the Commissioner, listing the rating

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[26] The distinction between rates and the determination of premiums was discussed in *Spanish Speaking Citizens' Foundation, et al. v. Low* (2000) 85 Cal.App.4th 1179, 1186; *see also* the pre-103 case of *Karlin v. Zalta*, *supra*, 154 Cal.App.3d 953, 970, fn. 12.

[27] The three mandatory rating factors are "the insured's driving safety record," "annual mileage," and "years of driving experience." (§ 1861.02(a)(1)-(3).)

[28] The currently approved optional rating factors include vehicle characteristics and use; driver's gender, marital status, academic standing and driver training; as well as persistency. (*See* MJN Exh. L [Cal. Code Regs., tit. 10, § 2632.5].)

factors the company proposes to use.[29] The determination of whether an insurance company is using an approved rating factor requires only a review of the list of authorized factors. That task involves none of the technical expertise required for ratemaking.

Proposition 103 specifically bars one – and only one – rating factor: "the absence of prior automobile insurance." This factor had been the source of major abuse under McBride-Grunsky, when many insurers offered policies "only [to] those who already had insurance" (*King v. Meese*, *supra*, 43 Cal. 3d 1217, 1225).[30] To promote their purpose of making insurance "available and affordable to all" (MJN Exh. F [Prop. 103], § 2 [Purpose]), the voters expressly prohibited this exclusionary practice:

> The absence of prior automobile insurance coverage, in and of itself, *shall not be a criterion* for determining . . . automobile rates, premiums, or insurability.
>
> (§ 1861.02(c), emphasis added.)

Henceforth, drivers excluded from the insurance marketplace would have access to coverage on an equal footing with other drivers.

2. Proposition 103 Created a Private Right of Action to Permit Consumers to Challenge Insurers and the Insurance Commissioner in Alternative Forums.

The voters manifested in plain terms their intent to retain an active role in ensuring the proper implementation and enforcement of the provisions of Proposition 103. The measure emphasizes full disclosure, public accountability and the opportunity for public participation. (*See*

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[29] *See* Cal. Code Regs., tit. 10, § 2632.11(b).

[30] In *King v. Meese*, *supra*, 43 Cal.3d 1217, the Court noted that insurers in some parts of the State "often impose[d] so many restrictions (e.g., no prior insurance precludes application) that . . . insurance… [was] inaccessible." (*Id.* at 1239.)

§§1861.05 et seq.) It also makes the Insurance Commissioner an elected official, accountable directly to the voters. (§ 12900.)

While under Proposition 103, "much is necessarily left to the Insurance Commissioner[,]"[31] the voters chose not to leave *everything* to the Commissioner. Thus they established, in § 1861.10(a), an independent check upon the conduct of insurance companies and the Commissioner:

> Any person may [1] initiate or intervene in any proceeding permitted or established pursuant to this *chapter*, [2] challenge any action of the commissioner under this *article*, and [3] enforce any provision of this *article*.
>
> (§ 1861.10(a), clause numbers and emphasis added.)

Section 1861.10(a) confers on members of the public an *unqualified* right to enforce the Insurance Code themselves. The three clauses of this subdivision leave no doubt of the authority of a private citizen to seek administrative *or* judicial redress against any insurer and against the Commissioner. In particular, anyone may "initiate . . . any proceeding" that Chapter 9 "permit[s] or establishe[s]"; and anyone may "enforce any provision of" Proposition 103.[32]

Under McBride-Grunsky, Chapter 9 did not "permit[] or establish[]" any proceeding other than the often-futile grievance proceeding allowed by §§ 1858 et seq. A key provision of Proposition 103 – § 1861.03(a) – changed that decisively:

> The business of insurance shall be subject to the laws of California applicable to any other business, including, but not limited to, the Unruh Civil Rights Act (Civil Code Sections 51 through 53), and the antitrust and unfair business practices laws (Parts 2 and 3, commencing with section 16600 of Division 7, of the Business and Professions Code).

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[31] *Calfarm*, *supra*, 48 Cal.3d 805, 824.

[32] No court has methodically reviewed subdivision (a)'s three clauses.

By this provision, the voters eliminated the broad immunities of the McBride-Grunsky era, granting themselves the protection of all of California's laws. Section 1861.03(a) subjects the insurance industry to all state-law remedies, without exception. One of those remedies is the UCL, under which Donabedian brought his suit.

Sections 1861.10(a) and 1861.03(a) of Proposition 103 changed the entire landscape of the Insurance Code, demolishing the Mc-Bride-Grunsky fortress. Gone is the general immunity for concerted activities formerly provided by § 1860.1. And no longer does § 1860.2 have a broad preclusive effect. Now, the phrase "[t]he administration and enforcement of this chapter [is] governed solely by the provisions of this chapter" means that Chapter 9 is governed by Proposition 103's provisions. The Commissioner's formerly "exclusive jurisdiction" under § 1858 now gives way to § 1861.03(a) and § 1861.10(a)'s alternative remedies for consumers, who can elect between administrative and judicial forums – the latter without any requirement of exhausting administrative remedies. (Section 1858 now offers consumers the option of the administrative process for the resolution of minor individual grievances, as a less complicated alternative to the more costly but more powerful litigation process.)

The voters' decision to establish the broadest possible private right of action in place of McBride-Grunsky's impoverished scheme recognized three realities:

- Ensuring insurer compliance with Proposition 103's substantive requirements would require far greater oversight than did McBride-Grunsky;

- Practical considerations would limit the CDI's ability to effectively police the entire marketplace;[33]
- Independent enforcement would be necessary in the event that the Commissioner failed to protect consumers' rights.

3. *Farmers* Construes and Upholds Proposition 103's Private Right of Action.

Proposition 103's private right of action was first construed in *Farmers*, *supra*, 2 Cal.4th 377, 390-391, in which the California Supreme Court addressed a challenge to the private right of action under § 1861.10(a) and the application of the UCL under § 1861.03(a). The Attorney General, acting under the authority of those provisions, filed suit against Farmers Insurance Exchange, alleging numerous violations of Proposition 103, including violations of § 1861.02(c), the statutory proscription Mercury violated here. (*Id.* at 381-382.) The People also alleged that Farmers' *rates* were "unfairly discriminatory" under § 1861.05.

Farmers argued that McBride-Grunsky's immunities and jurisdictional bars applied to immunize it from suit. The Supreme Court rejected the insurer's "exclusive jurisdiction" argument (*Id.* at 394). Noting that § 1861.10(a) provides "'alternative' or 'cumulative' administrative

[33] The CDI oversees roughly 800 property-casualty insurance companies with $38 billion in premium volume in 2001 (National Association of Insurance Commissioners, *2000 Insurance Department Resources Report* (2001) pp. 33, 40-41). To regulate this market, CDI in 2000 had only four actuaries on staff (*id*. at 5), and 27 market conduct examiners (*id*. at 6). CDI's 140 complaint analysts contended with over 30,000 complaints and 422,000 inquiries in 2000 (*id*. at 57). CDI initiated 424 market conduct and 62 financial examinations that year (*id*. at 43-44). Between 1991 and 2001, the CDI brought a total of 159 enforcement actions. (*See* www.insurance.ca.gov/Consumer-Alert/Insurer.htm, visited May 27, 2002.) Finally, although Proposition 103 provides that insurers pay fees to cover the cost of regulating them (§ 12979 [added by Prop. 103, § 5]), the CDI has contended with budget deficiencies. (Liedtke, *Need to Cut Insurance Agency Challenged*, Contra Costa Times, Aug. 14, 1996, p. 1C.)

and civil remedies" (*id.* at 393-394), and that Section 1861.03(a) "provides that the insurance industry is subject to, inter alia, Bus. & Prof. Code §§ 17200 et seq." (*id*. at 394), the Court endorsed the application of the "primary jurisdiction" doctrine, under which courts have it within their discretion to *temporarily abstain* from deciding a matter in order to avail themselves of the technical "expertise presumably possessed by the Insurance Commissioner." (*Id*. at 398.)

4. The First District *Walker* Carve-Out.

Eight years later, in *Walker,* the First District carved out an exemption from § 1861.10(a) to bar a suit seeking damages for *rates* that had been *approved*. In December 1997, the plaintiffs in *Walker* filed a class-action lawsuit against 78 insurance companies, as well as then-Commissioner Chuck Quackenbush, challenging as "excessive" auto insurance rates that had been approved by the Commissioner over the preceding three years. The plaintiffs demanded $1 billion in disgorgement and punitive damages. The insurers demurred, arguing that under §§ 1860.1 and 1860.2, they could not be sued for using approved rates. The superior court agreed, and the First District affirmed on the basis that "explicit statutory authority [– §§1860.1 and 1860.2 –] bar[s] the suit." (*Id.* at 754.)

C. The Persistency Optional Rating Factor.

As originally adopted in 1996, the Commissioner's regulations included "persistency" as one of sixteen optional rating factors. (MJN Exh. K [Cal. Dept. of Ins., Initial Statement of Reasons, RH-402, Dec. 21, 2001], p. 1.)

The regulations did not define persistency, because it was – and remains – a well-known, long-established term of art within the industry. It means the *length of time a person has been insured by the company writing the coverage.* State Farm, California's largest auto insurer, defines

persistency in the traditional way: "number of years the policy has been in force with the State Farm Insurance Companies."[34] (*Accord Spanish Speaking Citizens' Foundation*, *supra*, 85 Cal.App. 4th 1179, 1187 [defining persistency as "years insured by the company"].) MJN Exhibit H contains a sampling of insurance industry web sites confirming this definition of persistency. In effect, persistency is used to reward a customer's loyalty.

1. Mercury's Clandestine Redefinition of "Persistency" to Evade § 1861.02(c).

Mercury asserts that it has used the same "persistency discount" since 1996. (CT 209.) However, the first Mercury Insurance Group filing in the record is dated August 14, 1998. (CT 545 et seq.) By that filing, Mercury requested approval for its class plan, which contained the list of automobile rating factors Mercury proposed to utilize (CT 554-556).

Next to the rating factor designated "persistency," Mercury placed a large "X." Thus, ***all that appeared on the face of Mercury's class plan was that it planned to use the "persistency" rating factor previously adopted by the Commissioner by regulation.***

In a separate attachment to its class plan, designated "Exhibit 13," Mercury attached its "Underwriting Guidelines." (CT 573 et seq.) On page 22 of Exhibit 13 (CT 595) of its Underwriting Guidelines, Mercury described "persistency" as follows:

> PERSISTENCY. The Persistency discount is based on loss experience and the number of years the Named Insured has been continuously insured and no lapse of coverage in excess of 30 days.
>
> (CT 595.)

[34] MJN Exh. G (Decl. of Curtis Stewart Re State Farm's Definition of Persistency, Feb. 12, 2002, *Poirer v. State Farm Mutual Automobile Ins. Co.* (Super. Ct. L.A. County, No. BC 249205).)

In no other place in its submission did Mercury describe "persistency."

Because "persistency" had been universally recognized as referring to the length of time a person has been insured by the company writing the coverage, nothing in the language of Mercury's submitted definition would cause the Commissioner to believe that it referred to anything other than a discount reflecting the number of years an insured was continuously insured *by Mercury*.

In practice, however, Mercury's so-called "persistency" rating factor turned out to be quite different from what it had disclosed to the Commissioner. As Donabedian alleged (CT 2233-4 [FAC ¶7]), Mercury applied its persistency discount in a unique manner, at odds with industry practice: it used "persistency" to mean "length of prior coverage with *any* carrier."[35] Donabedian alleged – *and Mercury has not denied* – that under Mercury's definition, a driver who has been insured by *any* company gets a discount, while a person who had no prior insurance for a period of more than thirty days is surcharged. This clear violation of § 1861.02(c) formed the basis of Donabedian's claim.[36]

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[35] Mercury has recently described this as "*portable* persistency," an oxymoron that purports to legitimize Mercury's conduct. The appellation reveals the logical absurdity of Mercury's position, as it suggests that you can take your discount for *staying with one company* and get credit for it with another.

[36] Mercury claims that the Commissioner "dictated" that Mercury use its redefinition of persistency. (RB 1.) In support of this allegation, Mercury refers to two pages from a document (CT 2255-2256) that Mercury characterizes as a final order by CDI issued after a "Market Conduct Exam." (CT 1902-1903.) In fact, as Mercury is well aware, these pages are from an *"early draft"* prepared by CDI staff. Because they are not from the final signed report, the Commissioner recently admonished Mercury not to disseminate these pages (*See* MJN Exh. I [Letter from Bryant Henley,

In pre-103 California,[37] the rating factor actually applied by Mercury was known as "prior insurance." Mercury understandably does not denominate it as such, because "prior insurance" is not only *not* an approved rating factor, but, as Commissioners Low and Garamendi have both confirmed, it is *expressly prohibited* by § 1861.02(c).

2. The CDI Rulemaking on the Misuse of "Persistency".

In response to Mercury's conduct, and to efforts by other carriers to employ Mercury's improper redefinition of persistency, The Foundation for Taxpayer and Consumer Rights (amicus) petitioned the Insurance Commissioner on May 4, 2001 to adopt a rule specifically forbidding it.

In issuing a hearing notice, Commissioner Low observed that "some" unnamed insurers "may have impermissibly required consumers to provide evidence of prior insurance" under the rubric of "persistency," in violation of § 1861.02 (c). (CT 1851.)

In the proceeding, the Commissioner made several factual findings that equated Mercury's definition of persistency with a violation of § 1861.02(c). He found that "[t]he costs of a discount to a person previously insured is borne by those who do not have prior insurance," creating, "in effect[,] a surcharge to those without prior insurance." (MJN Exh. K at 10 [Cal. Dep't of Ins., Final Statement of Reasons, RH-402 (July 26, 2002)].) Further, he found that enforcing the traditional application of "persistency" would "encourage[ ] the uninsured to join the pool of insured drivers," and that "[i]ncreasing the pool of insured drivers will ultimately benefit all insured persons, by lowering the cost of uninsured/under insured motorist

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Staff Counsel, California Department of Insurance, to Douglas Hallett, Mercury Insurance Group, November 3, 2003].)

[37] *See, e.g.*, MJN Exh. J (California Dep't. of Ins., Bulletin 85-11, Jul. 31, 1985). The Foundation is aware of no state in which "length of prior coverage with any carrier" is defined as "persistency."

coverage." (*Id.* at 9.) No insurer sought judicial review of, or otherwise challenged, these findings.

On September 26, 2002, Commissioner Low amended his regulations to define "persistency" as it has traditionally been understood, expressly rejecting the redefinition Mercury utilized, in order to ensure that insurers would not violate the prohibition of § 1861.02(c). (Cal. Code Regs., tit. 10, § 2632.5(d)(11).)[38] Commissioner Garamendi concurs with his predecessor.[39]

D. Plaintiff and the Court Below Failed to Properly Invoke the Commissioner's Primary Jurisdiction in Order to Determine Whether the Commissioner Had in Fact Approved Mercury's Rating Factor.

Donabedian and the court below failed to correctly follow the process by which this dispute should have been adjudicated, an error that is directly responsible for this appeal.

Section 1861.10(a) of Proposition 103 leaves no doubt that a private plaintiff may challenge insurer conduct in superior court and is not required to file an administrative complaint under § 1858. In certain instances, however, the *superior court* may invoke the Commissioner's primary jurisdiction to obtain the agency's views on technical matters. Once the Commissioner responds to the court's referral, the case returns to the superior court for disposition on the merits. (*Farmers Ins. Exchange v. Superior Court*, *supra*, 2 Cal. 4th 377, 398.)

Alternatively, a consumer may elect to file a § 1858 complaint. If he does so, however, he must follow that process, which requires a complainant dissatisfied with the Commissioner's decision to seek judicial review by petitioning for a writ of administrative mandate. (§ 1858.6.)

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[38] MJN Exh. L (Cal. Code Regs., tit. 10, §2632.5).

[39] MJN Exh. M at 2 [John Garamendi, Insurance Commissioner, letter to Gray Davis, Governor re Sen. Bill 841 (2002-2003 Reg. Sess.) July 18, 2003].

Should the petitioner prevail in that appeal, the superior court is limited to setting aside the agency's action or a remand to the Commissioner. The court has no jurisdiction to award damages.

Here, the plaintiffs and the superior court conflated the two distinct procedures.

Donabedian first filed his complaint in superior court. (CT 7.) Mercury demurred. (CT 848). Before the court ruled, however, Donabedian filed a *second* complaint, under § 1858, before the Commissioner (CT 1826), requesting that the Commissioner review the allegations of the lawsuit. Donabedian mischaracterized his administrative complaint as a request for the Commissioner to exercise its "primary jurisdiction" pursuant to the *Farmers* case. (*Id.*; AOB 13.) As noted, a "primary jurisdiction" referral must be *ordered by the court*, after a plaintiff has brought suit pursuant to §1861.10(a). (*See Farmers v. Superior Court*, *supra*, 2 Cal. 4th 377, 398 [primary jurisdiction "*applies where a claim is originally cognizable in the courts*…; in such a case, the judicial process is suspended pending referral of such issues to the administrative body for its views"].) Here, however, the court stayed its proceedings two months *after* Donabedian filed the § 1858 complaint, under the impression that Donabedian had properly invoked the primary jurisdiction process. It also sustained the demurrer with leave to amend. (CT 1807.)

Several months later, the Commissioner declined jurisdiction, stating that he intended to address the issue by way of the rulemaking proceeding requested by The Foundation. The declination letter implied that Donabedian's allegations were meritorious although it expressly states that it is not "addressing the merits" of the complaint.[40] (CT 2225-2226.)

[40] The Commissioner also appears to have treated the § 1858 complaint as a referral under § 1861.10(a).

Here is where the procedural errors made by Donabedian and the trial court sent the case awry. Having invoked the § 1858 process by filing an administrative complaint, Donabedian's only recourse was to seek a writ of administrative mandate from a superior court pursuant to § 1858.6. (Although, plainly, that could not provide Donabedian the relief he sought under his UCL complaint). Instead, Donabedian treated the administrative complaint as if it were the UCL complaint.

Similarly, had the superior court properly invoked the primary jurisdiction process in the first instance, it could have requested that the Commissioner address a principle factual issue here: whether Mercury's inclusion of a prohibited rating factor in its class plan was approved by the Commissioner.

Instead, the trial court erroneously treated the Commissioner's response as a substantive rejection of the merits of Donabedian's § 1858 complaint and concluded that Mercury's "persistency discount was approved." (May 1, 2002 RT 12, line 9.) Citing *Walker*, the trial court sustained Mercury's demurrer without leave to amend. (RT 14-15.)

DISCUSSION

I.

UCL Suits Challenging an Insurer's Violation of Chapter 9 are Expressly Authorized By Proposition 103, and Vestigial §§ 1860.1 and 1860.2 Neither Bar Such Lawsuits Nor Immunize Insurers.

Mercury maintains that regardless of whether the Commissioner approved its violation of § 1861.02(c), members of the public do not have the right to bring suits under the UCL for violations of Chapter 9, despite Proposition 103's express authorization of such suits in §§ 1861.10(a) and 1861.03(a). (RB at 23.) It contends that the vestigial provisions of the McBride-Grunsky Act, §§ 1860.1 and 1860.2 of the Insurance Code,

preclude such suits because they provide that the Commissioner has "exclusive jurisdiction" over any such challenges. (RB 26, 32, 38-39.) *The trial court below made no such ruling, and Mercury offers not one citation for its proposal* – because it is utterly insupportable. Mercury further contends that these sections immunize insurers from liability.

The task here is principally one of careful statutory construction. This court must, of course, "give significance to every part of a statute to achieve its legislative purpose" (*Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 274), reading "every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness . . . so as to promote rather than defeat the statute's purpose and policy." (*Spanish Speaking Citizens' Foundation v. Low* (2000) 85 Cal.App.4th 1179, 1214.)

The process begins by "examining the statute and giving the words their ordinary meanings." (*Torres v. Automobile Club of So. California* (1997) 15 Cal. 4th 771, 777.) "If there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs." (*Allen v. Sully-Miller Contracting Co*. (2002) 28 Cal.4th 222, 227.) Particular deference is accorded to statutes enacted by the voters as an exercise of their "precious" initiative powers. (*Rossi v. Brown* (1995) 9 Cal 4th 688.) That means, above all else, that the court must reject any interpretation that would defeat the voters' plain purposes.

When properly construed under Proposition 103, McBride-Grunsky's §§ 1860.1 and 1860.2 retain clear, but limited, meaning. They provide neither the immunity nor the jurisdictional bar that Mercury claims to find in them. (*See* Sections A and B, below.) Those vestigial provisions must, and can easily, be interpreted so as not to conflict with the voters' purpose in adopting §§ 1861.03(a) and 1861.10(a); to the extent that they cannot, they must be deemed repealed by implication. (*See* Section C.)

Finally, the Supreme Court's ruling in *Farmers*, recognizing that Proposition 103 eliminated the Commissioner's "exclusive jurisdiction" in favor of "concurrent jurisdiction," is dispositive of the issue here. (*See* Section D.)

A. By Its Own Terms, § 1860.1 Does Not Apply to Immunize Mercury's Conduct.

As enacted in 1947, §1860.1 immunized from liability (and particularly from antitrust liability) only the *joint* activity of insurers. Proposition 103 did not change that; it simply restricted the scope of § 1860.1's immunity sharply.

To avail itself of § 1860.1 today, an insurer must meet two conditions:

1. Its "act," "action" or "agreement" must be "taken or . . . made pursuant to the authority conferred by this chapter" – a chapter which no longer includes former §§ 1853, 1853.6 and 1853.7, but instead a more restrictive § 1861.03(b).
2. The "law[s] of this State" from which the insurer seeks immunity from liability are only those "which do[] not specifically refer to insurance."

Mercury can surmount neither of these hurdles.

1. Chapter 9 does not "confer authority" on Mercury to use a rating factor that Proposition 103 expressly prohibits.

In place of a careful reading of § 1860.1's text, both Mercury and the trial court simply cite to the First District's decision in *Walker*, *supra*, 77 Cal.App.4th 750. (RB at 26.) But the *Walker* court misread § 1860.1. (In Part III, below, we explain further why *Walker* is wrongly decided, and give several additional reasons why it is distinguishable.)

Recall the first clause of § 1860.1: "No act done, action taken or agreement made pursuant to the authority conferred by this chapter shall

constitute a violation . . . ." As noted above, this phrase has always referred to concerted activities that were immunized from antitrust liability by the now-repealed §§ 1853, 1853.6 and 1853.7. The *Walker* court devised an alternate meaning:

> Whatever else the amended McBride Act does, it definitely confers authority *upon the commissioner* to approve rates.
>
> (*Walker, supra,* 77 Cal.App.4th 750, 756, emphasis added.)

> If section 1860.1 has any meaning whatsoever (which under the accepted rules of statutory construction it must), the section must bar claims based upon an insurer's charging a rate that has been approved by the commissioner pursuant to the amended McBride Act.
>
> (*Ibid.*)

McBride-Grunsky, of course, never authorized the Commissioner to approve rates; only Proposition 103 did that. The *Walker* court read § 1860.1 as if it were added by Proposition 103, ignoring its clear reference to former §§ 1853, 1853.6 and 1853.7.

The California Supreme Court rejected this construction of § 1860.1 in a case concerning an *identical* provision in the workers' compensation insurance law. In *State Compensation Insurance Fund v. Superior Court* (*"SCIF"*) (2001) 24 Cal. 4th 930, the Court addressed a challenge to a workers' compensation insurer's "unilateral misconduct" (*id.* at 936), specifically, the insurer's misreporting of financial information to the Workers Compensation Insurance Rating Bureau. Citing *Walker*, SCIF argued that its conduct was immune from suit under § 11758, which the Court explained was directly modeled on § 1860.1 and intended to serve the same purposes in the workers compensation insurance law as § 1860.1 served in McBride-Grunsky. (*SCIF, supra*, 24 Cal. 4th 930, 939-940.)

SCIF's theory was that its reporting of allegedly incorrect data was an "act done" pursuant to article 3, in which section 11758 is found. The Supreme Court rejected that construction, stating that the statute:

> refers to an "act done, action taken or agreement made *pursuant to the authority* conferred by this article ...." It does not refer to an "act done, action taken or agreement made pursuant to this article."
>
> (*Id.* at 936, emphasis in original.)[41]

The Court went on to explain that, as in section 1860.1, the phrase "the authority conferred by this chapter" does not refer to authority conferred on the Insurance Commissioner to approve rates; rather,

> what is authorized … is "cooperation between insurers, rating organizations and advisory organizations in ratemaking and other related matters to the end that the purposes of this chapter may be complied with and carried into effect." Such price-setting activity would arguably otherwise be barred by the antitrust laws.
>
> (*Id.* at 936.)[42]

Just as § 1860.1's cognate provision did not insulate the workers' compensation insurer from liability, § 1860.1 does not insulate Mercury from liability.

In short, Mercury's conduct is not protected by § 1860.1 because the act for which Mercury seeks immunity from liability is not any form of

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[41] Though the Court rejected the very interpretation of the statute made by *Walker*, in dicta the Court also sought to distinguish *Walker* on the ground that it applied to challenges to approved rates. (*Id.* at 942.)

[42] Mercury tries to distinguish SCIF by suggesting it concerned "a completely different statutory scheme and alleged wrongful conduct outside of that scheme." (RB at 30). In fact, the two subdivisions are identical. Moreover, the difference between the workers' compensation regulatory scheme and the property-casualty scheme imposed by Proposition 103 cuts against Mercury: Proposition 103 eliminated all immunities and created a private right of action. The workers' compensation scheme retains all of the former and does not contain the latter. Yet even under that far more restricted scheme, the Supreme Court permitted a lawsuit challenging a carrier's practices.

joint activity. Rather, Mercury seeks immunity for its unilateral violation of § 1861.02(c). Nothing in Chapter 9 – neither in the remnants of McBride-Grunsky nor in Proposition 103 – confers on an insurer the authority to base premiums on the prior-insurance status of a driver. To the contrary, Proposition 103, in § 1861.02(c), expressly *prohibits* an insurer from so doing.

Disregarding the function of § 1860.1 under McBride-Grunsky, the *Walker* court also missed its *continuing* "meaning" under Proposition 103. While Proposition 103 repealed §§ 1853, 1853.6 and 1853.7, it replaced those repealed provisions with a very narrow "safe harbor" provision that authorizes certain joint conduct. Section 1861.03(b) now provides that:

> Nothing in this section shall be construed to prohibit (1) any agreement to collect, compile and disseminate historical data on paid claims or reserves for reported claims, provided such data is contemporaneously transmitted to the commissioner, or (2) participation in any joint arrangement established by statute or the commissioner to assure availability of insurance.[43]

Thus, § 1860.1 *still provides some immunity* for insurers' concerted actions, as it did under McBride-Grunsky; now, however, the scope of that immunity is sharply limited.

Unfortunately, the First District was never presented with an analysis of the proper interpretation of § 1860.1 in the context of later-enacted § 1861.03(b). Indeed, the *Walker* court itself complained that the plaintiffs' lawyers had failed to address, much less harmonize, the vestigial McBride-Grunsky provisions with those added by Proposition 103. (*Walker, supra,* 77 Cal.App.4th 750, 755-756.) Bereft of adequate briefing on the issue, the *Walker* court misread these statutes to reach the result it did. The court below fell prey to the same error.

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[43] To enable the limited activity sanctioned by § 1861.03(b), Proposition 103 retained McBride-Grunsky § 1855.

2. Section 1861.03 (a), which references the UCL, "specifically refer[s] to insurance."

Mercury also fails to meet the second requirement of § 1860.1. If a law "specifically refer[s] to insurance," § 1860.1 is no bar to suit or liability.

The law that imposes the liability Mercury seeks to escape here is Proposition 103, a law that specifically refers to nothing but insurance. "All of the provisions of Proposition 103 relate generally to the cost of insurance or the regulation thereof . . . ." (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal. 3d 805, 842.) One of those provisions in particular, § 1861.03(a), expressly incorporates by reference the provisions of, *inter alia*, the UCL. It provides that "[t]he business of insurance shall be subject to the laws of California applicable to any other business, including…unfair business practices laws…." Section 1861.03(a) specifically refers to insurance within the meaning of § 1860.1, and therefore by the terms of § 1860.1, UCL cases can be brought against insurers. *If they could not, voter-adopted section 1861.03(a) would mean nothing.*

Admitting that "[s]ection 1861.03(a) does refer to the unfair competition laws," Mercury is left to argue that "Section 17200 is not a law relating to insurance." (RB 36.) There is *no* requirement that the laws "referred to" contain within themselves a reference to insurance, or that such laws must be restated within the Insurance Code.

B. By Its Own Terms, § 1860.2 Does Not Apply To Immunize Mercury's Conduct.

The inapplicability of § 1860.2 to Donabedian's lawsuit is just as clear as that of § 1860.1. Section 1860.2 specifies which laws apply in the "enforcement" of the provisions of Chapter 9. Its first sentence reads:

> The administration and enforcement of this chapter [Chapter 9] shall be governed solely by the provisions of this chapter.

Accordingly, if the provision that authorizes Donabedian's enforcement action is found in Chapter 9, then the first sentence of this section is by itself dispositive. That is, in fact, the case. Donabedian's suit against Mercury is based on the express authority of Chapter 9: it is authorized by §§ 1861.03(a) and 1861.10(a) of Proposition 103. Section 1861.03(a) explicitly authorizes enforcement under the UCL. Accordingly, a UCL suit is a proceeding "permitted or established pursuant to this chapter" within the meaning of § 1861.10(a), which authorizes "any person" to "enforce any provision of this article [Proposition 103]." Therefore "any person" has a right to initiate a UCL proceeding in court to enforce the provisions of Proposition 103.

Mercury simply ignores the first sentence of § 1860.2. It focuses entirely on the second sentence (which it paraphrases incorrectly (RB 36)). Even then, Mercury's argument fails.

The second sentence of § 1860.2 addresses the applicability of statutes that are *not included* in Chapter 9:

> *Except as provided in this chapter*, no other law relating to insurance and no other provisions in this code heretofore or hereafter enacted shall apply…. (Emphasis added.)

The second sentence forbids the application of other laws, with the critical exception: "[e]xcept as provided in this chapter." Again, the answer is simple: Proposition 103's provisions are within the chapter.

An attentive analysis of the interplay between the Proposition 103 enactments and those few provisions the voters chose not to repeal reveals a carefully erected statutory framework that is internally consistent and harmonious. By their own terms, neither § 1860.1 nor § 1860.2 operate to immunize Mercury from Proposition 103's private right of action.

C. To the Extent §§ 1860.1 and 1860.2 Are Construed to Conflict With Proposition 103, They Must be Considered Repealed by Implication.

The voters meant what they said in §§ 1861.03(a) and 1861.10(a), and nothing in the vestiges of McBride-Grunsky can nullify those provisions.[44]

Mercury's contrary assertion – that §§ 1860.1 and 1860.2 were "intentionally left intact" (RB at 1) by "Proposition 103's drafters" in order "to incorporate their broad preemptive language into" Proposition 103 (RB 32-33) – would erect an irreconcilable conflict between the provisions. Mercury's construction is not only illogical, but defies the rules of statutory construction, particularly those that safeguard the will of the voters. The voters did not *sub silentio* preserve McBride-Grunsky's immunities and prohibition on private actions at the same time that they expressly repealed those immunities, applied state laws, and authorized private actions.

If, however, the Court were to conclude that the McBride-Grunsky provisions conflicted with the plain meaning of §§ 1861.10(a) and 1861.03(a), as Mercury contends, then the proper result under California law would be to hold the McBride-Grunsky provisions repealed, to that extent, by implication. (*Burlington Northern and Santa Fe Railway Co v. Public Utilities Commission* (2003) 112 Cal.App.4th 881, 890; *accord People v. Bustamante* (1997) 57 Cal.App.4th 693, 700-701.)[45]

D. The California Supreme Court's Decision in *Farmers* Affirms the Right to Bring UCL Challenges for Violations of Proposition 103.

The Supreme Court's decision in *Farmers*, *supra*, unequivocally refutes Mercury's assault on the plain language adopted by the voters.

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[44] It is striking that Mercury *does not mention § 1861.10(a) at all.*

[45] This appears to be the approach adopted by the California Attorney General in an analysis of Proposition 103. (State of California, Department of Justice, *Antitrust Guidelines for the Insurance Industry*, March 1990, at 23.)

In *Farmers*, the insurance company made exactly the same argument Mercury tenders here: that McBride-Grunsky's immunities and jurisdictional bars immunized it from a UCL suit for violating the Insurance Code. The Court rejected that argument:

> [S]ection 1861.03 does not condition a suit under Business and Professions Code section 17200 on prior resort to the administrative process under the Insurance Code.
>
> (*Farmers*, *supra*, 2 Cal.4th 377, 394.)

In applying the "primary jurisdiction" doctrine under Proposition 103, the Court emphatically distinguished it from the McBride-Grunsky-era doctrine of "exclusive jurisdiction," under which challenges to an insurer's rates, premiums or practices could only be brought by "exhaustion" of the administrative remedies provided by the § 1858 complaint process. "Exhaustion applies where an agency alone has *exclusive jurisdiction over a case*; primary jurisdiction where both a court and an agency have the legal capacity to deal with the matter." (*Id*. at 390-391, quoting Schwartz, Administrative Law (1984) § 8.23, p. 485, emphasis added.) Under Proposition 103, the Court continued, "'alternative' or 'cumulative' administrative and civil remedies are made available to a plaintiff." (*Id*. at 393-394.) Primary jurisdiction, it underscored, "applies where a claim is *originally cognizable in the courts.*" (*Id*. at 390, italics in original.)

The availability of a UCL claim against an insurer for violation of Proposition 103's provisions is the same today as it was in *Farmers*: such claims are originally cognizable in the courts and not subject to the "exclusive jurisdiction" of the Commissioner.[46]

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[46] *See* California Forms of Pleading and Practice, Public Administrative Law, Volume 41, Chapter 474A, Timing of Judicial Review of Agency Decisions, pp. 474A-26 to 474A-30. (Professor Gregory Ogden, Contributing Author) (Lexis-Nexis, Matthew Bender) (1997, updated through 2003).

Recognizing that *Farmers* is dispositive, Mercury is forced to argue that it is no longer good law (RB 23):

> *Farmers* arose in the unique and temporary context of a public mandate for a prior approval rate-setting regime without any mechanical implementation of that regime. The court understandably felt the need for administrative guidance when confronted with this vacuum. That condition no longer pertains.
>
> (RB 23.)

In other words, according to this insurance company, there is no longer any need for private civil litigation against insurers. (RB 4, 23 and 37.) Mercury's argument is frivolous.

Contrary to Mercury's premise, regulations *were* in place at the time of the *Farmers* decision, as was noted by the Court (*Farmers*, *supra*, 2 Cal.4th 377, 399), which reasoned that referral under the primary jurisdiction doctrine to the Insurance Commissioner was appropriate to determine whether insurers had violated § 1861.02(c) and "*to determine whether his or her own regulations pertaining to compliance have been faithfully adhered to by an insurer*." (*Ibid*., emphasis added.)

In any case, nothing in Proposition 103 even intimates that §§ 1861.03(a) and 1861.10(a) should no longer apply once the Commissioner promulgates regulations implementing Proposition 103.

Finally, *Farmers* itself refutes the notion that it was a "temporary" decision. The Supreme Court clearly envisioned litigation before the courts pursuant to §§ 1861.03(a) and 1861.10(a) in future years. Its ruling was designed to ensure that the courts would be able to take advantage of the agency's technical expertise in such litigation. Indeed, primary jurisdiction is *most useful* to the courts when the Commissioner has fully implemented necessary regulations and can therefore provide the court with a consistent body of administrative decisions.

When contemplating the ongoing need for a private right of action against insurers, this case is "Exhibit A." The Insurance Commissioner and staff lack the resources to catch every possible violation of the law that might be among the thousands of filings made each year, much less violations, like Mercury's, that are *not disclosed in any filing*. Private enforcement will always be a powerful adjunct to the agency's activities, as the Commissioner emphasized in a letter to the Supreme Court in the *Farmers* case.[47]

E. No Other Case Law Supports Mercury's Position.

Unable to circumvent *Farmers*, Mercury falls back on a smattering of case law: *Karlin v. Zalta* (1984) 154 Cal.App.3d 953; *Wilson v. Fair Employment and Housing Commission* (*FEHC*) (1996) 46 Cal.App.4th 1213; the unpublished decision in *Wilson v. Avemco*, 2002 WL 243633 (N.D.Cal.) (*Avemco*); and *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257. None of it avails.

- *Karlin*, decided before the adoption of Proposition 103, can have no precedential value in construing the rights and remedies enacted by Proposition 103.
- In *FEHC*, the issue was whether the Fair Employment Housing Commission *or* the Department of Insurance had jurisdiction over an *administrative claim*. (*Wilson*, *supra*, 46 Cal.App.4th 1213,1224, fn. 7.) Nothing in the court's decision can remotely be read as limiting a plaintiff's right to proceed in court.
- Like Mercury here, the defendant in *Avemco* argued to the District Court that CDI had exclusive jurisdiction, citing *FEHC* in support of

[47] MJN Exh. N (Janice E. Kerr, General Counsel, California Department of Insurance to the California Supreme Court re *Farmers Insurance Exchange v. Superior Court of Los Angeles County*, Cal. Sup. Ct. No. S017854, December 18, 1991, pp. 1-2).

that contention. The District Court rejected the exclusive jurisdiction argument, rejected the defendant's reading of *FEHC,* and permitted the claim to proceed. (*Wilson v. Avemco*, 2002 WL 243633 (N.D.Cal.)) 2-3.)[48]

In short, Mercury's contention that it is immunized from suit and liability for violating Proposition 103 is inconsistent with the plain meaning of the vestigial provisions it relies on, inconsistent with the broad right of private action bestowed by Proposition 103, and inconsistent with the Supreme Court's controlling ruling in *Farmers*.

All that Mercury is left to rely on is the First District's decision in *Walker*. But, as we show in Section II, *Walker* is bad law.

II.

Walker's Erroneous Construction of §§ 1860.1 and 1860.2 Should Not Be Followed, Much Less Extended, By This Court.

The trial court relied on the First District's decision in *Walker, supra,* in concluding that it lacked jurisdiction over Donabedian's suit. (RT 22.) However, *Walker* was wrongly decided by a court that did not have the benefit of competent briefing by plaintiffs' counsel, and this Court should not accept its faulty reasoning. The *Walker* court, as already noted, misread the vestigial provisions of McBride-Grunsky in such a manner as to render two of Proposition 103's key provisions (§§ 1861.03 and 1861.10) meaningless. The *Walker* court, in effect, imported the unauthorized "filed rate doctrine" into California insurance law. And

[48] The District Court noted that *the CDI itself* had rejected the assertion that it had "exclusive jurisdiction" when it wrote the plaintiff that "*[w]hile this department may have primary jurisdiction we do not have sole jurisdiction*, therefore, you may wish to consult with an attorney or to seek other judicial remedies." (*Id*. at 3, emphasis added.)

Walker conflicts with the Supreme Court's decisions in *Farmers*. (*See* Section A.)

Even if this Court believes that *Walker* was correct on its facts, however, it should decline to extend it to the very different circumstances here. (*See* Section B.)

A. *Walker* Erroneously Permitted the Vestigial McBride-Grunsky Statutes to Nullify Proposition 103's Provisions, in Violation of Controlling Supreme Court Precedent.

The decision in *Walker* is demonstrably erroneous for four reasons:

1. The *Walker* court construed §§ 1860.1 and 1860.2 incorrectly.

As discussed in Section IA above, *Walker* read §§ 1860.1 as if it had no history and meaning prior to Proposition 103. (*Walker* said nothing about § 1860.2 other than to reference it jointly with § 1860.1). In doing so, *Walker* gutted two key voter-enacted provisions, §§ 1861.03(a) and 1861.10(a).[49] *Walker* illustrates perfectly the depth of error into which courts can fall when the parties do not provide competent briefing on the issues. The court in *Walker*, noting "[a]ppellants' inability to craft a cohesive argument taking cognizance of these immunity statutes [§§ 1860.1 and 1860.2]" in the context of Proposition 103 (*id.* at 755), proceeded to resolve the conflict by permitting the older statutes to supersede the newer ones (*id.* at 758). Amicus believes that such an error would have been impossible had the court been informed of the history and meaning of the statutes at issue.

[49] A prime example is *Walker's* astounding conclusion that § 1861.10(a) allows consumers to participate only in *administrative challenges* to rates under § 1861.05, et seq. (*Id.* at 757 (asserting that the plaintiffs' lawsuit was "an obvious attempt to avoid" the administrative process")).

2. The First District failed to follow the California Supreme Court's decision in *Farmers*, which controls.

Farmers expressly rejected the contention that court challenges to rates were barred. The Supreme Court noted that the "primary jurisdiction" doctrine,

> . . . does not operate to remove these issues completely from the sphere of judicial action; its operation is, rather, to determine whether the initial consideration of the matter should be by a court or by an agency.
>
> (*Farmers*, *supra*, 2 Cal.4th 377, 387, fn.7.)

The *Walker* court tried to distinguish *Farmers*, stating:

> [T]he *Farmers* court did not consider whether an Unfair Business Practices Act claim *arising in an exclusively rate-making context* could be brought in the superior court in light of the immunity provided in Insurance Code sections 1860.1 and 1860.2.
>
> (*Walker*, *supra*, 77 Cal.App.4th 750, 759, emphasis added.)

The court misread *Farmers*. There, the Supreme Court specifically stated that the question whether an insurer's *rate* was "unfairly discriminatory" under § 1861.05 was one that could be brought before a court, though if the court found it useful, it could request the Commissioner's guidance under the primary jurisdiction doctrine. (*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal. 4th 377, 399.) Thus the holding in *Farmers* directly undermines *Walker*. *Farmers* also negates Mercury's argument, based on *Walker*, that a *rate* that violates § 1861.05 falls "within the original and exclusive jurisdiction of the Insurance Commissioner" and can never form the basis for civil liability. (RB 27, 42.) If these were issues that were within the "exclusive jurisdiction" of the Commissioner, then the *Farmers* Court would have simply dismissed the case and told the People that their sole remedy was before the Commissioner. It did not do so.

Finally, the *Walker* court was also mistaken when it tried to distinguish *Farmers* on the ground that Farmers had not received regulatory

approval. (*Walker*, *supra*, 77 Cal.App.4th 750, 759.) In fact, like the insurers in *Walker*, Farmers had filed its rates and rating factors with the Commissioner, *and they were approved*.

3. The *Walker* court misapplied other California Supreme Court precedents.

The *Walker* court cited *Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305 and *Karlin v. Zalta* (1984) 154 Cal.App.3d 953, for the proposition that the Insurance Commissioner has "exclusive jurisdiction" over ratemaking. (*Walker*, *supra*, 77 Cal.App.4th 750, 755.) But these pre-Proposition 103 cases construing the McBride-Grunsky Act are irrelevant to questions of the application of Proposition 103.

Walker also mischaracterized two other cases, *Quelimane Co. v. Stewart Title Guaranty Co*. (1998) 19 Cal.4th 26, and *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, as recognizing statutory exceptions to the viability of UCL cases against insurers after Proposition 103 "for rate-making decisions." (*Id.* at 759.)

Quelimane says nothing about the viability of UCL cases against insurers after Proposition 103, because *Quelimane* concerned title insurance, to which Proposition 103 does not apply (*see* § 1861.13).

And *Manufacturers Life* concerned an antitrust suit brought against a life insurance company. The insurer argued that California's antitrust law (Bus. & Prof. Code §§ 16720-16770, et seq.), was preempted by the Unfair Insurance Practices Act (UIPA), §§ 790, et seq., "*except to the extent Proposition 103 applies.*" (*Manufacturers Life Ins. Co. v. Superior Court*, *supra*, 10 Cal.4th 257, 268, emphasis added.) The Supreme Court concluded that Proposition 103 did *not* apply to life insurers. (*Id.* at 282, fns. 14-15.) But it nevertheless permitted the suit to proceed.

4. *Walker* improperly attempted to establish a "filed rate doctrine" with respect to insurance rates.

As discussed previously at Background, Section B1, revenue needs are estimated within a range. There is no one "correct" rate. Because the reasonableness of a rate is a mixed question of law and fact,[50] requiring expertise and judgment, courts are often reluctant to substitute their judgment for those of rate regulators. Some courts have therefore imposed the "filed rate doctrine" to immunize from private challenge rates previously approved as not excessive by an administrative agency. (*See, e.g., Wegoland Ltd. v. Nynex Corp* (2003) 27 F.3d 17, 19.) Clearly offended by the prospect that insurance companies could face liability for damages for charging rates that had been approved by the CDI years before, the First District imposed the equivalent of the "filed rate doctrine."[51] Citing "filed rate doctrine" cases, Mercury asks this Court to do the same. (RB at 26, footnote 3).

However, the doctrine is inconsistent with the statutory scheme approved by the voters. The voters authorized new rights and remedies because they understood that the CDI's limited resources could not possibly provide the depth and breadth of regulation assumed by the court in *Walker*. When each of the hundreds of property-casualty insurers doing business in California wish to change their rates, they must submit an application *for each line of insurance*. (§ 1861.05.)[52] Most of these filings

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[50] *See, e.g., Interstate Commerce Commission v. Union Pacific Railroad Co.* (1912) 222 U.S. 541, 547.

[51] The *Walker* court rejected the contention that it was invoking a filed rate doctrine – but, rather coyly, considered it "consistent with our interpretation of the statutory provisions at issue in this case." (*Walker, supra,* 77 Cal.App.4th 750, 757, fn. 4.)

[52] *See, e.g.,* MJN Exh. O, [a typical weekly public notice, published by the CDI, of various applications made by insurers pursuant to Proposition 103].

receive only a cursory check, and the vast majority of applications are automatically "deemed approved" after sixty days. (§ 1861.05(c).) No statute, therefore, can guarantee that the Commissioner will review every filing and catch every mistake, omission or other violation of the law. A "catch me if you can" rule that immunizes anything that can get past the necessarily limited review provided by the CDI is guaranteed to lead to exactly the abuses Proposition 103 intended to prevent.

Confirming this analysis, the Attorney General of California has opined that "the filed rate doctrine does not apply to insurance rates in California," citing § 1861.03(a).[53]

Moreover, in establishing the "primary jurisdiction doctrine" in *Farmers*, the California Supreme Court considered cases from other jurisdictions applying the "filed rate doctrine." (*Farmers*, *supra*, 2 Cal.4th 377, 386-387.) Thus the Court was well aware of the doctrine, but recognized that it would not be compatible with Proposition 103. Indeed, the primary jurisdiction doctrine articulated by *Farmers* provides more than adequate protection for insurers. There is no need, nor any authority, to import a "filed rate doctrine" into California insurance law.

B. *Walker* Does Not Apply To This Case, And The Trial Court Erred In Expanding It To Immunize Mercury's Conduct From Court Challenge.

Although *Walker* is erroneous, this Court need not disavow it in order to conclude that the trial court erred in applying it here. By its own terms, *Walker* is inapposite to this case. There is no legitimate basis for expanding *Walker* – which precludes only those private suits that challenge *approved rates* – to also preclude private suits challenging (1) unapproved conduct, (2) violations of explicit state statutes, or (3) or premium "rating factors," whether approved or unapproved.

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[53] Antitrust Guidelines, *supra* fn 44, at 22.

1. *Walker* does not apply because Mercury's rating factor was *not approved*.

Even accepting the *Walker* court's erroneous interpretation of §§ 1860.1 and 1860.2 as immunizing conduct approved by the Commissioner, these sections could not possibly immunize *unapproved* conduct. Throughout its opinion, the *Walker* court emphasizes that its holding is based on the fact that the rates being challenged were *approved*.[54] Neither *Walker* nor any other California authority provides support for immunizing challenges to *unapproved* conduct.

Mercury persuaded the lower court that, because the Commissioner had approved Mercury's violation of Section 1861.02 (c), it had no jurisdiction to reach the merits of Donabedian's claims. But there is *no evidence* in the record that Mercury's unique definition of persistency was *disclosed to, understood or knowingly approved* by the Commissioner.

Mercury secured the Commissioner's approval only for the use of persistency as it was traditionally understood. The definition of persistency Mercury included in the underwriting guidelines submitted with its rating plan also reads as the traditional definition of persistency.[55]

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[54] *E.g.*, "The causes of action were each bottomed on the insurers' charging *approved* rates,'" (*Walker*, *supra*, 77 Cal.App.4th at 753); § 1860.1 "must bar claims based upon an insurer's charging a rate that has been *approved*" (*id*. at 756); "the charging of an *approved* rate cannot be deemed 'illegal' or 'unfair,'" (*ibid*.); "collecting premiums consistent with an approved *rate* is certainly done pursuant to the authority conferred on the Commissioner" (*id*. at 757); "the insurers then charged the *rates* approved by the commissioner" (*id*. at 759, emphasis added).

[55] Mercury can hardly contend that it obtained approval of its underwriting guidelines when in another case now pending in another forum, Mercury has argued that the Commissioner has no jurisdiction over the approval of its underwriting guidelines. (*See* Appellant's Op. Br., *Mercury Casualty Co. v. Low*, 1st Dist. Ct. App., Case No. A102532.)

Mercury implemented something different, however: "length of prior coverage with any carrier," which is unapproved and violates the law. *See* Background, Section B1 above. Nothing in Mercury's submissions alerted the Commissioner to understand that Mercury intended to offer the discount only to drivers with prior insurance from any insurer.

Were Mercury's unilateral action to be immunized here, it would reward Mercury for practicing a fraud upon the Commissioner and undermine the integrity of the regulatory process by encouraging other insurers to do the same.

2. Mercury's rating factor violates a state statutory proscription and *cannot be approved.*

Walker, by its own terms, applies only to *rates*. Here, by contrast, Appellant's complaint charges Mercury with violating an *explicit statutory proscription*, § 1861.02(c), which forbids insurers from using the "absence of prior insurance" to set premiums.[56]

Walker's theory of immunity based on approval of rates as "reasonable," even if correct, cannot immunize a practice that is prohibited by statute. This is because an administrative agency simply does not have the authority to approve an action that violates a state law; such an approval would be *ultra vires*. (*See, e.g., Assoc. for Retarded Citizens v. Dept. of Development Svcs.*(1985) 38 Cal.3d 384, 391; *AICCO v. Insurance Company of North America* (2001) 90 Cal.App.4th 579; *Wegoland Ltd. v. Nynex Corp* (2003) 27 F.3d 17.)

[56] Reading the phrase "in and of itself" in a manner that deprives the subdivision of any meaning, Mercury contends that it has not violated § 1861.02(c) (RB 42-46). Mercury's arguments are demonstrably incorrect, but are not properly raised here. The only issue before this court is whether the trial court erred in sustaining the demurrer on the ground that it had no jurisdiction to hear the lawsuit. However, The Foundation would be pleased to provide further briefing on the issue if the court desires.

According to *Walker*, as long as the Commissioner follows the proper process in determining that a rate is not excessive, a challenge to the Commissioner's determination cannot be heard by a court in a subsequent *de novo* challenge seeking damages. But no administrative process can transform the very rating factor that the voters specifically prohibited – the absence of prior coverage – into a rating factor that Proposition 103 permits.

Therefore, even if Mercury is correct that the Commissioner "approved" its "length of prior coverage with any carrier" under the rubric of "persistency," that approval could not insulate Mercury's violation of the statutory proscription from private challenge, just as the Commissioner's approval could not immunize an insurer from liability for basing premiums on race or religion, a clear violation of California law. Holding otherwise would be to authorize the Commissioner to ignore both governing statutes and its own regulations.

3. Because Mercury's challenged rating factor is not a "rate," *Walker* does not apply, *whether or not the rating factor was approved.*

Walker involved a challenge to the *rates* of insurers as "excessive" under § 1861.05. (*See* footnote 53 above.) Here the challenge is to the use of a *rating factor* to determine an individual's *premiums*.

Determining whether a revenue request (i.e., a rate) is reasonable requires the expertise and judgment of the Commissioner, as noted previously. By contrast, the question of whether a proper rating factor is being used is simply a question of law. Determining whether Mercury is complying with the law in this instance is a simple matter of comparing its rating factor to the language of § 1861.02(c) and to the Commissioner's list of authorized rating factors, a task that requires no technical expertise. Even if *Walker* were good law as to approved rates, it does not apply to rating factors. The *Walker* court itself expressly acknowledged this

limitation when it described the matter before it as an "*exclusively rate-making*" case. (*Walker, supra,* at 759, emphasis added.) This case, by contrast, is a challenge to *premium-setting* practices.

III.

Mercury's Conduct Has Not Been Retroactively Immunized By S.B. 841, Which is Irrelevant to the Issue on Appeal.

On August 2, 2003, after a two-year lobbying campaign by Mercury, Governor Davis signed legislation that purports to *prospectively* legalize Mercury's use of the "length of prior insurance coverage with any carrier" rating factor. The company offers the result of its efforts, S.B. 841, as "evidence" that what it was doing was legal all along. (RB at 20.) *The fact that Mercury had to secure a legislative override of the explicit mandates of §§ 1861.02(a) and 1861.02(c) to impose a new rating factor is eloquent proof of exactly the opposite.*

However, the enactment of S.B. 841 has no bearing on this case, as it does not purport to clarify existing law, has no retroactive application and did not take effect until this case was already on appeal. Most importantly, S.B. 841 does not "further [the] purposes" of Proposition 103 and therefore is void as an unconstitutional act. (*See Amwest Surety Ins. Co. v. Wilson* (1995)11 Cal.4th 1243; *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal. App. 4th 1473.) The issue of its constitutionality has been squarely raised, and is presently pending for decision, before the Los Angeles Superior Court. (*The Foundation for Taxpayer and Consumer Rights, et al. v. Garamendi,* et al., Los Angeles Super. Court case no. BS086235.) It is not at issue in this case, which challenges Mercury's conduct prior to the purported adoption of S.B. 841 on August 2, 2003.

CONCLUSION

No matter how hard it tries, Mercury cannot undo the results of the 1988 election. Proposition 103's private right of action, and its concomitant authority to bring suits under California law, have been in force for fifteen years. Mercury asks this Court to judicially annul those consumer protections, opening the door to fraud and misrepresentation by insurers in their filings to the CDI and to other abuses. This court should decline that invitation and reverse the trial court's decision with directions.

Dated: December 5, 2003

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