SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

DATE/TIME:	**January 9, 2015 10:00 a.m.**	**DEPT. NO.:**	**24**
JUDGE:	**HON. SHELLEYANNE W. L. CHANG**	**CLERK:**	**E. HIGGINBOTHAM**
MERCURY CASUALTY COMPANY, **Petitioner and Plaintiff,** **vs.** **DAVE JONES, IN HIS OFFICIAL CAPACITY AS THE INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,** **Respondent and Defendant.** **CONSUMER WATCHDOG,** **Intervenor.** **PERSONAL INSURANCE FEDERATION OF CALIFORNIA, et al.** **Intervenors.**		**Case No.: 34-2013-80001426**	
Nature of Proceedings:	**Trades' Motion for Leave to Amend Petition; Ruling on Merits of Trades' Remaining Claims**		

The following is the Court's tentative ruling to the above entitled matters, set for hearing in Department 24, on Friday, January 9, 2015, at 10:00 a.m. The tentative ruling shall become the final ruling of the Court, unless a party wishing to be heard so advises the clerk of this Department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear.

Oral argument, if requested, shall not exceed 25 minutes per side.

I. BACKGROUND

This proceeding originated when Mercury Casualty Company (Mercury) filed a petition for writ of mandate and complaint for declaratory and injunctive relief challenging a February 2013 order of Respondent State Insurance Commissioner (Respondent or Commissioner) following Mercury's 2009 application for a rate increase.

Thereafter, two parties moved to intervene: (1) Consumer Watchdog, whose interests are aligned with Respondent, and (2) Personal Insurance Federation of California, American Insurance Association, Property Casualty Insurers Association of America, doing business as Association of California Insurance Companies, National Association of Mutual Insurance Companies, and Pacific Association of Domestic Insurance Companies

(collectively, Trades), whose interests are aligned with Mercury's. Notably, no party opposed these motions to intervene, and in fact, the parties even filed statements indicating that they would *not* oppose the motions. Accordingly, the Court granted leave to intervene to Consumer Watchdog and the Trades. Pertinent here, the Trades filed a Petition and Complaint in Intervention (Petition), asserting claims that largely duplicated those raised by Petitioner.

After hearings on several motions and reviewing extensive briefing from all four parties, the Court considered the merits of both Petitions. The parties appeared for oral argument on May 2, 2014.

On June, 11, 2014, the Court issued a ruling after hearing (Ruling). The Ruling denied all writ claims Mercury's Petition and all but one writ claim raised in the Trades' Petition. The Ruling also dismissed all of Mercury's causes of action in Mercury's Petition and Complaint. The Ruling did not dispose of the Trades' ancillary claims for declaratory relief.

Thereafter, the parties requested a status conference. Specifically, the Trades requested that the Court's Ruling address two claims that it had raised in its briefing, one of which was not raised in its Petition.

At a status conference, held on July 18, 2014, the Court set the following matters for hearing on July 9, 2014: (1) the additional claims by the Trades that were not disposed of in the Court's Ruling, and (2) the Trades' motion to file a first amended Complaint.

The two additional claims that the Trades wishes the Court to consider on the merits are: (1) the Trades' claim that 10 C.C.R. § 2644.10(f) violates the First Amendment by imposing a financial penalty on speech based on content ("First Amendment Claim")[1]; and (2) the claim that the regulatory scheme requiring an applicant for a variance to undergo a "fullblown" hearing denies insurers due process ("Due Process Claim").

The Court specifically declined to address these two claims in its Ruling.

The Court has reconsidered its Ruling, as stated at the status conference: the Court concludes that because Insurance Code section 1861.10 allows the Trades to intervene, the Trades may raise and the Court may consider claims not raised by Petitioner Mercury, provided that the Trades complies with other rules of Civil Procedure. However, the Court also concluded at the status conference that it was not proper to consider the Trades' "Due Process" claim, because it did not appear in the Trades' Petition. Accordingly, the Trades filed this motion seeking leave to amend the Petition so that the Court could consider this argument on the merits.

The Trades, the Insurance Commissioner, and Consumer Watchdog have stipulated that if the Court grants the Trades' motion for leave to amend, a further hearing on the merits

[1] The Trades' constitutional challenges to 10 C.C.R. § 2644.10(f) are raised in the Petitions' Ninth and Tenth Causes of Action.

of the "new issue" (Due Process Claim) in the amended pleading shall be on March 13, 2015, and the parties may "meet and confer" about any further briefing. (See Stipulation filed November 21, 2014.)

II. DISCUSSION

a. The Trades' Motion for Leave to Amend Petition

The Trades seek leave to amend to add new Eleventh and Twelfth causes of action: a Code of Civil Procedure section 1085 "writ" cause of action directing the Commissioner to cease applying 10 C.C.R § 2644.27(f)(9) [requiring a hearing for the confiscation variance], "in tandem" with a cause of action requesting a declaration that 10 C.C.R. § 2644.27(f)(9) is unconstitutional. The Court collectively refers to these causes of action as the "Due Process" Cause of Action.

The Trades argue that the Court should allow it leave to amend because (1) the amendment would conform its Petition to the argument it already raised in its briefs on the merits, to which Consumer Watchdog (but not the Commissioner) responded, (2) and the standard for allowing leave to amend is liberal. Respondent and Consumer Watchdog oppose the Trades' motion. Respondent and Consumer Watchdog have the better argument. The Trades' motion for leave to amend is **DENIED**.

Code of Civil Procedure section 473(a)(1) provides that the court may "in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect…. The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars…."

However, "amendment may not be permitted where the effect of such amendment is to state 'another and distinct cause of action'… [that] give[s] rise to a wholly distinct and different legal obligation against the defendant." (*Klopstock v. Superior Court* (1941) 17 Cal.2d 13, 20.) The "Due Process" Claim would impose a new theory of liability on the Commissioner each time it required a variance applicant to undergo a hearing under 10 C.C.R. § 2644.27(f)(9).

The Trades reply that the "Due Process" Cause of Action is not a "wholly new claim" but rather an "extension" of their Fifth and Sixth Causes of Action challenging the entire "rate regulatory scheme" governing the Commissioner as unconstitutional. The Court disagrees. The Fifth and Sixth Causes of Action challenge the "rate regulatory scheme," but on the grounds that "the system contains no mechanism to accommodate an adjustment that may be necessary to avoid confiscation"—not on the ground that the "fullblown" hearing requirement deprives due process to an applicant seeking a confiscation variance.

Additionally "[t]he trial court has wide discretion where the amendment raises new issues after the pleadings have been settled and the trial has begun." (*Stockton v. Ortiz* (1975)

47 Cal.App.3d 183, 194.) "[T]ime and knowledge are important factors to be considered when granting or denying a motion to amend." (*Ibid*.) The Commissioner did not respond to the Trades' arguments and requested additional briefing on the "Due Process" cause of action, which claim is scheduled to be heard in March 2015. To allow the Trades to amend their Petition to add the due process claims would put the Commissioner in a position of defending against a theory and cause of action not raised in the Petition, after the Court considered and disposed of the majority of Mercury's and the Trades' claims on the merits. (*See Ibid.*)

Accordingly, the Trades' motion to amend is **DENIED**. The Court now will dispose of the Trades' remaining claims.

b. Disposition of Trades' Claims

a. First Amendment Claim

The Trades also claim that 10 C.C.R. § 2644.10(f) (Regulation 2644.10(f)) violates the First Amendment[2] by imposing a financial penalty on speech based on content. This claim is **DENIED**, and the Trades' "tandem" declaratory relief claim is **DISMISSED**.

Regulation 2644.10(f) provides that "'Institutional advertising' means advertising not aimed at obtaining business for a specific insurer and not providing consumers with information pertinent to the decision whether to buy the insurer's product." Accordingly, that type of advertising is an excluded "expense item[, which] shall not be allowed for ratemaking purposes." (10 C.C.R., § 2644.10.)

The Trades argue that Regulation 2644.10(f) impermissibly burdens speech by calling out disfavored content or "institutional advertising" by attaching a financial penalty in the form of reducing allowable insurance rates.

Regulation 2644.10(f) applies to "commercial speech, that is, expression related solely to the economic interests of the speaker and its audience." (*Central Hudson Gas & Elec. Co. v. New York Pub. Svcs Comm'n (Central Hudson)* (1980) 447 U.S. 557, 561.)[3] "The First Amendment, as applied to the States through the Fourteenth Amendment [of the U.S. Constitution], protects commercial speech from unwarranted governmental regulation." (*Ibid*.) However, "[t]he Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." (*Id*. at p. 563.)

To determine whether commercial speech is protected by the First Amendment, the Court must apply a four-part test: (1) The commercial speech must concern lawful activity and

[2] The Trades' Opening Brief references only the "First Amendment," and does not distinguish between the federal and state constitutions. Accordingly, the Court assumes that the Trades' claim applies to the United States Constitution only.

[3] The Court rejects the Trades' argument articulated on reply that the regulation does *not* apply to "commercial speech." Regulation 2644.10(f) excludes certain advertising expenses; such advertising is speech "proposing a commercial transaction" a

not be misleading; (2) The asserted governmental interest must be substantial; (3) The regulation must directly advance the governmental interest asserted; and (4) the regulation must not be more extensive than is necessary to serve that interest.[4] (*Central Hudson, supra,* 447 U.S. at p. 566.)

First, no party disputes that the claimed advertising is unlawful or misleading.

Second, the governmental interest in the regulation excluding certain advertising expenses is compelling—the regulation's purpose is part of the process "to establish the process and policies the Commissioner shall employ to determine whether the proposed [insurance] rates are excessive or inadequate." (10 C.C.R. § 2641.3.) Additionally, the Court notes that the California Supreme Court in *20th Century Insurance v. Garamendi* (1994) 8 Cal.4th 216, 289, considered the regulations governing rollbacks and concluded that it was not "constitutionally improper" for "rate regulations as to rollbacks to recognize as the insurer's cost of service only the *reasonable* cost of providing insurance" to consumers. Similarly, the government has an interest in ensuring that regulations governing rate setting, such as 10 C.C.R. § 2644.10(f), recognize the "reasonable cost of providing insurance."

Third, Regulation 10 C.C.R. § 2644.10(f) advances the government's interest in determining whether the rates are excessive or inadequate.

Fourth, the Court does not find that Regulation 10 C.C.R. § 2644.10(f) is "more extensive than is necessary to serve that [government] interest." Although the Trades do not apply this test, they appear to suggest that Regulation 10 C.C.R. § 2644.10(f) is more extensive than necessary, because it could exclude some advertising that highlights event sponsorship, or advertising for other "worthy causes." However, such advertising would not necessarily be excluded under Regulation 10 C.C.R. § 2644.10(f). Rather, that Regulation excludes advertising that is "not aimed at obtaining business for a specific insurer and not providing consumers with information pertinent to the decision whether to buy the insurer's product." Additionally, the Court finds that although some types of advertising could be excluded under the regulation (such as event sponsorship unrelated to a specific insurer), this potential exclusion does not render Regulation 10 C.C.R. § 2644.10(f) more extensive than necessary to serve the government's interest in ensuring that insurance rates are neither excessive nor inadequate.

Accordingly, the Trades have not shown that Regulation 10 C.C.R. § 2644.10(f) is an impermissible restriction on commercial speech in violation of the First Amendment.

The Trades liken Regulation 10 C.C.R. § 2644.10(f) to cases interpreting "Son of Sam" laws, which required that proceeds from an accused or convicted criminal's works describing the crime be deposited into an escrow account available to crime victims. (*Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.,* (1991) 502

[4] Trades do not apply the test for commercial speech in their Opening Brief, likely because they claim that advertising is not commercial speech at all. However, the Court finds that the advertising is commercial speech, applies the test therfor, and rejects the Trades' claim.

U.S. 105; *see also Keenan v. Superior Court* (20020 27 Cal.4th 413 [holding similar California law to be unconstitutional violation of First Amendment].) These cases are distinguishable, as they do not involve "commercial speech," such as advertising.

The Trades also dispute Consumer Watchdog's argument that Regulation 10 C.C.R. § 2644.10(f) does not restrict the content of advertising, but only requires that the cost of certain advertising not be passed to the ratepayer. The Trades argue that Regulation10 C.C.R. § 2644.10(f) *does* restrict the content of advertising by excluding certain types of advertising expenses. The Trades argue that although public utility cases may allow public utility companies to pass through to consumers only costs necessarily incurred for the consumers' benefit, the "public utility model" is inapplicable, because it requires both a "shareholder" and "consumer" account, and there is no "shareholder" account in the insurance regulatory context. The Court need not decide this issue, as it holds that the regulation affects advertising or commercial speech, and the Trades have demonstrated no First Amendment violation under the applicable test.

b. "Tandem" Declaratory Relief Claims

The Trades have also asserted "tandem" claims for declaratory relief that accompany each writ claim. Because these claims essentially duplicate the writ claims, and the Court denies each of the Trades' writ claims, the declaratory relief claims are **DISMISSED**.

III. DISPOSITION

The Trades' motion to amend the Petition is **DENIED**.

Each of the Trades' "writ" claims, and in particular, the Ninth Cause of Action, are **DENIED**. All of the Trades' "declaratory relief" claims, and in particular, the Tenth Causes of Action for declaratory relief, are **DISMISSED**.

This ruling shall constitute the Court's final ruling on all of the claims raised by the Trades in the Petition.

In the event this tentative ruling becomes the final ruling of the Court, Counsel for the Commissioner is directed to prepare a formal order, incorporating this ruling and the June 11, 2014 Ruling as exhibits thereto, and a separate judgment incorporating both aforementioned rulings as exhibits thereto, submit them to the parties for approval as to form, and thereafter submit them to the Court for signature, in accordance with California Rules of Court, Rule 3.1312.