THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS

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October 26, 2007

VIA OVERNIGHT MAIL

The Honorable Ronald M. George
Chief Justice, and Associate Justices
Supreme Court of the State of California
350 McAllister Street
San Francisco, California 94102-3600

Re: *Fairbanks, et al. v. Superior Court of Los Angeles County*
(2007) 154 Cal.App.4th 435
Case No. B198538
California Supreme Court Case No. S157001

Honorable Justices:

The Foundation for Taxpayer and Consumer Rights (FTCR) respectfully urges this court to grant the Petition for Review filed by Pauline Fairbanks and Michael Bobb, the Real Parties in Interest in *Fairbanks, et al. v. Superior Court of Los Angeles Count* (*Fairbanks*).

The court below held that insurance is neither a "good" nor a "service." Thus, conduct that is otherwise unlawful cannot be redressed under the Consumers Legal Remedies Act (CLRA) simply because the defendants are insurance companies. Review is *urgently needed* because this holding (1) flouts the Legislature's intent to protect the public against sharp practices that are a growing problem in California's $120 billion insurance marketplace; (2) ignores the express direction of the voters set forth in insurance reform Proposition 103 – *statutory provisions not raised by the parties or the court below*; and (3) conflicts with other court decisions.

Review is imperative to correct a second error of law that will have repercussions that reach far beyond the issue of the application of the CLRA. The Court of Appeal decision reasons that where insurance companies are subject to

concurrent private and administrative enforcement mechanisms, the right of private enforcement, though expressly established by statute, must give way on "policy" grounds. This new *rule of judicial nullification* conflicts with a panoply of statutes and decades of California's jurisprudence, and is sure to sow confusion and error unless corrected.

The Interest of FTCR in This Litigation

FTCR is a non-profit citizen education and advocacy organization incorporated in California in 1985. FTCR's core mission is to protect Californians against unfair and abusive insurance practices, principally through the enforcement of Proposition 103, the insurance reform measure (Ins. Code § 1861 et seq.). FTCR and its attorneys have initiated or intervened in dozens of judicial and administrative proceedings addressing violations of the Insurance Code, and have participated in virtually every lawsuit concerning Proposition 103's constitutionality and scope, including many before this court.[1] FTCR submits this letter pursuant to California Rules of Court, Rule 8.500(g). FTCR, and the public on whose behalf FTCR advocates, are vitally interested in the question of whether the CLRA's remedies are available to redress wrongs committed by insurance companies.

I. Whether the CLRA Applies to the Marketing and Sale of Insurance Is A Legal Question of Enormous Importance to Consumer and Insurers

Insurance is an integral component of California's economy. Insurance companies doing business in California collected $116 billion in premiums in 2004, including $12.7 billion in life insurance premiums, the subject of the instant case.[2] These figures understate the actual size of the marketplace. Congress's decision in 1999 to dismantle the wall between insurance and other financial

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[1] For example, *Calfarm Insurance Co. v. Deukmejian* (1989) 48 Cal.3d 805; *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216; *Amwest Surety Insurance Co. v. Wilson* (1995) 11 Cal.4th 1243; *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473; *Spanish Speaking Citizens' Foundation, Inc. v. Low* (2000) 85 Cal.App.4th 1179.

[2] 2006 market data from California Department of Insurance web site http://www.insurance.ca.gov/0400-news/0200-studies-reports/0100-market-share/ (accessed October 26, 2007).

activities under the *Gramm-Leach-Bliley Financial Services Modernization Act* (Pub. L. No. 106-102 (November 12, 1999) 113 Stat. 1338) has both energized the marketplace and blurred beyond recognition distinction between insurance companies, banks and investment firms. Insurance companies now routinely provide loans, investment brokerage services and other financial products.[3] The combined financial services sector is a $115 billion industry in this state.[4]

To suggest that there are serious problems in this enormous marketplace is to understate the matter significantly. The grossly unlawful practices alleged here – the sale of worthless life insurance policies – are replicated in many if not most lines of insurance, and, as here, are not confined to marginal players.[5]

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[3] See Insurance Information Institute, Facts and Statistics: Financial Services, at http://www.iii.org/media/facts/statsbyissue/financialserv/ (accessed October 25, 2007).

[4] Gross Domestic Product – California 2006 data for "Finance and Insurance" sector from Bureau of Economic Analysis, Department of Commerce, U.S. Government, http://www.bea.gov/regional/gsp/ (accessed October 25, 2007).

[5] *Annuities*: See, e.g., Levitz and Greene, *Marketers Use Trickery to Evade No-Call Lists*, Wall Street Journal (October 26, 2007) p. A1 ("Older Americans around the country are getting duped by a seemingly innocuous tactic that can expose them to hard-sell pitches from the insurance industry" for living trusts). *Health insurance*: Girion, *Blue Cross Cancellations Called Illegal*, Los Angeles Times (March 23, 2007) p. A1; Girion, *Health Insurers Deny Policies In Some Jobs*, Los Angeles Times (January 8, 2007) p. A1. *Auto insurance*: Vartabedian, *Car Smashed? Insurers Say, 'Go Here,'* Los Angeles Times (October 17, 2007) p. H1 ("Scandals with directed repair programs may shake up auto body industry practices."). *Disability*: Hamilton and Mulligan, *Insurance Fees Were Inflated, Spitzer Alleges*, Los Angeles Times (November 13, 2004) p. C1. *Long term care*: Morain, *Nursing Home Scrutiny Lagging; Enforcement Of Tough Laws Is On The Wane Despite Increase In Complaints About Care*, Los Angeles Times (July 31, 2005) p. B1.

The Court of Appeal's decision, placing the insurance industry[6] beyond the reach of one of California's two key consumer protection statutes, is manifestly a legal question of enormous importance – and not just to consumers who must rely upon access to the judicial branch for protection. Like the Unfair Competition Law (Bus. & Prof. Code § 17200 et seq. [UCL]), the CLRA is concerned about "unfair methods of competition." (Civ. Code § 1770, sub. (a).) Law-abiding insurance companies necessarily have an interest in assuring that their competitors obey the law.

II. The Court of Appeal's Decision Ignores the Directive of the Voters that California's Consumer Protection Laws Apply to the Insurance Industry

FTCR believes that the plain language of the CLRA answers the question of whether the insurance industry is subject to its provisions: to determine that insurance is a "service" requires no more than a dictionary and common sense. (To suggest that insurance is neither a "good" nor a "service," by contrast, requires the suspension of common sense in favor of a belief that there is some "twilight zone" in which insurance resides.) Certainly nothing in the language of the CLRA expressly excludes "insurance," and under accepted principles of statutory construction, that should be the end of the inquiry. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [where "the language is clear an unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature..."].)

However, there is another explicit statutory directive that the parties below did not raise, and the Court of Appeal did not mention. Insurance Code section 1861.03(a), enacted by the Proposition 103 voters in 1988, states:

> **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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> (Emphasis added.)

[6] The opinion does not make any distinction between the various products and services provided by an insurance company, thus subsuming sales and marketing practices, underwriting, and claims handling conduct within its holding.

The CLRA is one of the "laws of California" that are "applicable to any other business," and the voters' directive should put to rest the question here. However, even if the plain language of Proposition 103 were not read to *require* the application of the CLRA to insurance companies, the Court of Appeal should have turned to Insurance Code section 1861.03(a) for guidance as soon as it concluded that recourse to the legislative history was necessary. (*Fairbanks, supra,* 154 Cal.App.4th at 443.)

Not only does the Court of Appeal opinion fail to address Insurance Code section 1861.03(a), the opinion endorses, based solely on the court's policy views, a jurisdictional theory that Proposition 103 relegated to history. It is to that discredited and dangerous theory that we now turn.

III. Statutes Authorizing Concurrent Enforcement Cannot Be Judicially Nullified by Unsubstantiated "Policy Considerations" of "Havoc"

In support of its ruling, the panel below proffered "policy considerations" that extend far beyond the CLRA issue here. The court's analysis would grant the insurance industry a broad shield to judicial accountability in defiance of statutes and case law. This is so profound and dangerous a deviation from the law – *and the proper role of the courts* - that this Court's review is compelled.

The panel's "policy" analysis begins with the assertion that "[in] a practical sense, allowing for a CLRA remedy for insurance fraud would wreak havoc on the established code and decades of case history." (*Fairbanks, supra,* 154 Cal.App.4th at 446.) According to the opinion, this is because "if insurance were considered a 'service' under the CLRA, many of the unfair and deceptive practices prohibited by the UIPA [Ins. Code § 790 et seq.] would also constitute 'proscribed practices' under the CLRA." (*Id.* at 446.) Conflating a CLRA action against insurance companies with an action to enforce UIPA, the court concludes that the application of the CLRA to insurance would subvert this Court's decision in *Moradi-Shalal v. Fireman's Fund Insurance Cos.* (1988) 46 Cal.3d 287 (*Moradi-Shalal*) and other cases holding that a private right of action may not be implied from Insurance Code section 790 et seq. (*Fairbanks, supra,* 154 Cal.App.4th at 446-447.)

Untangling the Court of Appeal's unstated assumptions, policy predilections, and misapplication of case law quickly reveals not just the error of its analysis but its radical implications.

1. The Department of Insurance and Private Parties Have Shared Concurrent Enforcement Powers over Property-Casualty Insurance for Nearly 20 Years and There Has Been No "Havoc." (But There Have Been Plenty of *Threats* of Havoc From the Insurance Industry).

While the panel below never explains the nature of the "havoc" it fears, the court's view becomes easy to discern as it unveils its "policy" analysis: the panel believes that the existence of two parallel enforcement mechanisms – one available to administrative agencies, the other to private parties – would somehow disrupt or undermine the authority of the Department of Insurance.

Once upon a time, that view was broadly reflected in California insurance law. Under the McBride-Grunsky Regulatory Act of 1947, the property-casualty insurance industry was insulated from judicial accountability through a combination of the "exhaustion" doctrine and various statutory immunities that precluded application of the antitrust and consumer protection laws to the industry's rates and practices. Collectively, these statutes granted the Department of Insurance "exclusive jurisdiction." (See e.g., *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 981 [citing the pre-Proposition 103 case *Karlin v. Zalta* (1984) 154 Cal.App.3d 953], 983, 991.)

However, in 1988, Proposition 103 eliminated the industry's broad immunities and established the right of individual citizens to challenge, in court, violations of Proposition 103 through the UCL and other laws. This Court recognized that right in *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, which established the *primary jurisdiction* doctrine. It was confirmed, in an extensive statutory analysis, by the Court of Appeal in *Donabedian*, *supra*. These cases unequivocally hold that the McBride-Grunsky era, during which the Department of Insurance had "exclusive jurisdiction" over insurance rates and practices, ended nearly two decades ago. For nearly twenty years, a parallel system of enforcement – administrative and private – has governed the property-casualty insurance industry. And, contrary to the Court of Appeal's assertion, it has been "havoc"-free.

Not that that matters, of course; the "policy considerations" professed by the court below have been considered and rejected by the electorate. But it's worth noting that there is absolutely nothing in the record that substantiates the predicted "havoc." The court's comments are rank speculation, perhaps from a source the opinion neglects to cite. FTCR observes from long experience before this and other courts that the threat of financial catastrophe has been a recurrent theme in

every one of the dozens of lawsuits insurance companies have brought to challenge Proposition 103 and regulations promulgated thereunder. (See Reich, *Van De Kamp Says Insurance Firms Engaged in Collusion*, Los Angeles Times (January 3, 1991) p. A3 [reporting on an investigation by the California Attorney General which concluded that insurance firms had organized an economic boycott in order to influence this Court to issue a stay in *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal. 3d 805]; see also *Fireman's Fund Ins. Co. v. Garamendi* (1992) 790 F.Supp. 938; *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216; *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243; *State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029.)

And lest there be any doubt, the Insurance Commissioner – the official whose responsibilities are allegedly threatened by this concurrent system of enforcement – has submitted *three* briefs as amicus curiae in recent years emphatically embracing private enforcement. (See *Donabedian*, *supra*, 116 Cal.App.4th at 983 [quoting the Department's amicus curiae brief: "[I]n adopting Insurance Code sections 1861.03 and 1861.10, the voters envisioned that the Commissioner's ability to enforce the [specified] provisions of the Insurance Code would be supplemented by the use of private attorneys general."] See also 2003 WL 23280980 [Commissioner's entire *Donabedian* brief].)[7]

The views of the Department of Insurance, which have been consistent since 1991 (see *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 400, fn. 19; *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 275, fn. 8) ought to have reassured the Court of Appeal that the voters intended to establish parallel private and regulatory enforcement systems.[8]

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[7] The Commissioner also expressed his vigorous support for private enforcement in amicus briefs filed in *Farmers Insurance Exchange v. Superior Court* (2006) 137 Cal.App.4th 842 [brief at 2005 WL 3487115] and in *Poirer v. State Farm Mutual Automobile Insurance Company* (unpublished) (1 App. 139-141) (B165389), 2004 WL 2325837.

[8] Disturbingly, two appellate courts have recently refused to give the Commissioner any deference on matters within his expertise. (See *Interinsurance Exchange of the Automobile Club v. Superior Court* (2007) 148 Cal.App.4th 1218, 1235-1237, *review den.* June 27, 2007; *Farmers Insurance Exchange v. Superior Court* (2006) 137 Cal.App. 4th 842, 858-859, *review den.* June 14, 2006.)

2. Moradi-Shalal and Other Cases Rejecting an *Implied* Private Right of Action Have No Bearing on This Case and Do Not Support the Panel's "Policy Considerations"

To support its "policy considerations," the panel below argues that concurrent enforcement is barred by this Court's seminal decision in *Moradi-Shalal* and its progeny. (*Fairbanks, supra,* 154 Cal.App.4th at 447.) Those cases are utterly inapposite, however, and the opinion's assertion that that case extends to the circumstances here will lead to confusion and error. The court below relied on the same tortured extension of *Moradi-Shalal* in an insurance case last year; the argument ought to be nipped in the bud right now before more damage is done.

In *Moradi-Shalal*, the parties sued under UIPA. That statute is silent on whether private parties can enforce it. This Court held that a private right of action to enforce the UIPA could not be *implied* from that statute. Here, by contrast, the parties did not sue under, or even invoke, the UIPA. Rather, they sued under the CLRA, which *expressly* provides a private right of action.

The new rule articulated by the court below is astounding: so long as the Commissioner *could have* prosecuted the conduct alleged here through an administrative action under UIPA, there can be no private right of action to redress the conduct under the CLRA. *Moradi-Shalal* itself is to the contrary. As this Court has stressed, "'*Moradi-Shalal* marks a return to the fundamental principal'" that a statute "'is to be applied according to its terms.'" (*Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 279.) Nothing in UIPA or the CLRA supports the Court of Appeal's policy preferences.

In fact, this Court addressed the issue in *Manufacturers Life,* where it confirmed that UIPA did not supersede a suit under the UCL and the Cartwright Act (Bus. & Prof. Code §§ 16720-16770), and explicitly held that *Moradi-Shalal* did not say otherwise. (*Manufacturers Life*, *supra*, 10 Cal.4th at 284.) The CLRA contains the same explicit statutory declaration that its rights are "cumulative" to other laws (Civ. Code § 1752) that is found in the UCL (Bus. & Prof. Code § 17205), and that this Court found determinative in *Manufacturers Life.* (*Id.* at 263 ["the Legislature intended that rights and remedies available under those statutes were to be cumulative to the powers the Legislature granted to the Insurance Commissioner...."], 284.)

The opinion below attempts to distinguish *Manufacturers Life*, noting that there the Cartwright Act preceded the UIPA, while the CLRA postdated the UIPA. (*Fairbanks, supra,* 154 Cal.App.4th at 447.) That consideration is irrelevant. No case holds that a narrow law like the UIPA supersedes the later enactment of a general law such as the CLRA. Even if the two were in conflict (here they are complementary), the later enacted law prevails. (See, e.g., *People v. Bustamante* (1997) 57 Cal.App.4th 693, 699, citing *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.* (1968) 263 Cal.App.2d 41, 54-55.)

More tellingly, the opinion below observes that the plaintiffs in *Manufacturers Life* were seeking only equitable relief, while here, the CLRA makes damages available. (*Fairbanks, supra,* 154 Cal.App.4th at 447, fn. 10.) The court of appeal's barely disguised disdain for that stronger remedy leads it to conclude that the distinction weighs against the application of the CLRA. However, this Court found that consideration an important distinction *in favor of* private enforcement in *Manufacturers Life*:

> The Insurance Commissioner has no power to initiate a criminal proceeding against, or an action to impose civil liability on, a person who engages in unfair trade practices. The authority of the commissioner is limited to enjoining future unlawful conduct and suspending or revoking a license or certificate.
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> (*Manufacturers' Life, supra,* 10 Cal.4th at 274.)

Manufacturers' Life could not have been more emphatic that civil liability was not barred by UIPA: "That part of [UIPA] which preserves civil and criminal liability would be meaningless if defendants' proposed construction of the section were accepted." (*Ibid.*)

Finally, FTCR notes with grave concern that the court of appeal's policy analysis has no intrinsic tether to the issue here of whether insurance is a "service." That is, the reasoning of the opinion below – that parallel statutory enforcement schemes cannot be permitted – would apply to bar CLRA suits against insurance companies even if the CLRA expressly stated that "insurance is a service." Last year, the panel below presented the same misstatement of *Moradi-Shalal* as justification to strip a direct enforcement right enacted by Proposition 103 out of that measure. (*Farmers Insurance Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 850 *review den.* June 27, 2007.) *Fairbanks* accords the

insurance industry a wholesale judicial dispensation from California's consumer protection laws that comports only with the panel's policy preferences, and nothing else.

This Court has often emphasized that "[i]t is not our function to 'inquire into the "wisdom" of underlying policy choices.' [Citation] 'Our task here is confined to statutory construction.'" (*Bonnell v. Medical Bd. of California* (2003) 31 Cal.4th 1255, 1263.) Such vigilant respect for the separation of powers has protected the integrity of the judicial branch for hundreds of years. The panel below has failed to abide by its proper role. It has entered into the forbidden territory of making the law, and for that reason alone its decision must be reversed.

IV. Review Is Necessary to Secure Uniformity in Case Law

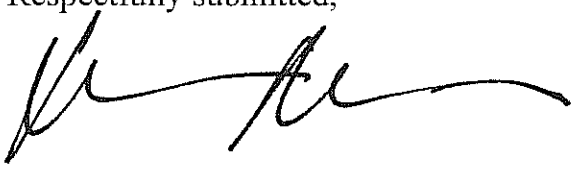
Shorn of the "policy considerations" inappropriately proffered by the Court of Appeal, the opinion below rests in large part on a *dictum* in this Court's opinion in *Civil Service Employees v. Superior Court* (1978) 22 Cal.3d 362, 376. This Court's own precedents emphasize that dicta like this is not authoritative. "An appellate decision is not authority for everything said in the court's opinion but only 'for the points actually involved and actually decided.'" (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620.) "As we have said many times, the language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts." (*Trope v. Katz* (1995) 11 Cal.4th 274, 284, internal quotation marks omitted.)

Unfortunately, a number of courts have been forced to grapple with that dictum. One recent analysis concluded that the CLRA applies to financial services. *Jefferson v. Chase Home Financial* (N.D. Cal.2007) 2007 WL 1302984. Other cases, such as *Berry v. American Express* (2007) 147 Cal.App.4th 224, *review den.* May 16, 2007, have gone the other way.

FTCR respectively suggests that if California consumers are to be deprived of the protection of the CLRA when it comes to the misconduct of insurance companies, the deed ought to be done by *this Court, in this case* after full briefing – not by a casual aside.

Thank you for the consideration of our views.

Respectfully submitted,



Harvey Rosenfield