

1 Harvey Rosenfield, SBN 123082  
Pamela Pressley, SBN 180362  
2 CONSUMER WATCHDOG  
1750 Ocean Park Blvd., Suite 200  
3 Santa Monica, CA 90405  
Tel. (310) 392-0522

4 Arthur D. Levy, SBN 95659  
Erica L. Craven-Green, SBN 199918  
5 LEVY RAM & OLSON LLP  
639 Front Street  
6 Fourth Floor  
San Francisco, California 94111  
7 Tel. (415) 433-4949

8 Norman Goldman, SBN 119763  
LAW OFFICES OF NORMAN GOLDMAN  
9 3575 Cahuenga Blvd. West Suite 500  
Los Angeles, CA 90068  
10 Tel. (323) 850-0506

11 Attorneys for Intervenor  
12 CONSUMER WATCHDOG  
13 formerly known as THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS

14 BEFORE THE INSURANCE COMMISSIONER  
15 OF THE STATE OF CALIFORNIA

16 In the Matter of:

17 MERCURY INSURANCE COMPANY;  
18 MERCURY CASUALTY COMPANY; and  
19 CALIFORNIA AUTOMOBILE INSURANCE  
COMPANY,

20 Respondents.

) OAH No.: N2006040185

) CDI Case No.: NC03027545

) **INTERVENOR CONSUMER  
WATCHDOG'S OPPOSITION TO  
RESPONDENTS' MOTION IN LIMINE**

) ALJ Assigned: Steven C. Owyang  
) Hearing Dates: March 16-20, 23-26, 30-31,  
) and April 1-3, 2009

) Pre-Hearing  
) Conference: February 23, 2009

) Hearing Location: Oakland

1 **I. INTRODUCTION.**

2 Respondents' (hereafter "Mercury") *in limine* motion is, at best, premature and, at worst, wholly  
3 speculative. Other than the "FRUB Report" materials – which are directly relevant to multiple issues in  
4 this proceeding – Mercury seeks broadly to exclude "all evidence" that is "beyond the scope" of the  
5 Amended Notice. (Mercury Motion in Limine (MIL) at 2.) Whatever Mercury intends by this obscure  
6 statement, Mercury's motion should be denied for two basic reasons:

7  
8 *First*, Mercury's failure to describe the evidence it seeks to exclude – other than the FRUB  
9 Report – makes this motion fatally premature and speculative.

10 *Second*, the FRUB materials are readily admissible in this administrative proceeding where the  
11 "technical" rules of evidence do not apply under Government Code section 11513, which makes  
12 the Report's admissibility all the more clear.

13 As shown below, all evidence that is relevant to prove that Mercury violated Insurance Code  
14 sections 1861.01(c) and 1861.05(a) and/or the amount of the penalties under section 1858.07 comes in.  
15 It cannot be excluded unless Mercury shows a valid statutory basis for doing so (*i.e.*, the application of a  
16 specific privilege) or that the probative value of a specific piece of evidence is "substantially outweighed  
17 by the probability that its admission will necessitate undue consumption of time." (*See* Govt. Code §§  
18 11513(c), (f).)

19 At base, the ALJ cannot decide admissibility of evidence in the abstract, as Mercury presents it  
20 — the "scope" of the pleading. To make out a justiciable *in limine* motion, Mercury must point to  
21 specific evidence it seeks to exclude. Mercury's motion to exclude all evidence "outside the scope"  
22 simply begs the basic relevancy question and invites ongoing controversy throughout the hearing. The  
23 motion must, therefore, be denied.

24 **II. ARGUMENT.**

25 **A. Mercury's Speculative and Premature Motion Should be Denied**

26 Mercury's speculative motion should be denied outright. As California courts recognize,  
27 motions *in limine* are improper where, "events in the trial may change the context in which the  
28 evidence" is introduced. (*See, e.g., Kelly v. New West Federal Savings* (1996) 49 Cal. App. 4th 659,

1 671.) Here, we do not even know what exact evidence Mercury will object to, much less, in what  
2 context it will be offered at trial.

3 Mercury's motion is likewise premature. The only evidence that Mercury specifically identifies  
4 in its Motion in Limine is "the FRUB Report," which covers all or some of the material that is the  
5 subject of Mercury's Motion for a Protective Order seeking to prevent Consumer Watchdog from even  
6 seeing certain FRUB materials. Consumer Watchdog is unable to assess and respond to the relevancy of  
7 the unknown FRUB materials. Mercury's motion should therefore be denied as to the withheld FRUB  
8 materials until such time as Consumer Watchdog can assess and respond to its relevancy.

9  
10 **B. Mercury Fails to Recognize the Lenient Standard of Admission of Evidence in  
Administrative Proceedings.**

11 Throughout its motion *in limine* Mercury fails to acknowledge that, with limited exceptions, the  
12 "technical" rules of evidence that govern civil court proceedings do not apply in administrative  
13 proceedings. Instead, under Government Code section 11513, the rule is that: "[a]ny relevant evidence  
14 shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the  
15 conduct of serious affairs, regardless of the existence of any common law or statutory rule which might  
16 make improper the admission of the evidence over objection in civil actions." (Govt. Code § 11513(c).)  
17 Indeed, all relevant evidence – unless its "probative value is substantially outweighed by the probability  
18 that its admission necessitates undue consumption of time" – is admissible. (Govt. Code § 11513(d).)

19 Therefore, Mercury's repeated protestations that evidence should be excluded because it is  
20 "unproven", "unadjudicated", "undefended", "prejudicial" or "confusing" (see, e.g., MIL at 6:22; 8:26),  
21 are without merit.

22 **C. The FRUB Materials Are Admissible Because They Are Relevant to Prove  
23 Mercury's Knowledge, Notice, and Willfulness, and to Rebut Mercury's Estoppel  
24 Defense.**

25 As an initial matter, it is unclear which specific FRUB materials Mercury wants to exclude.  
26 Mercury describes the FRUB Report as consisting of "approximately 150 pages of documents collected  
27 and created by FRUB in connection with an examination of Mercury's underwriting practices from 1996  
28 to 2004." (MIL at 4:22-24.) As Consumer Watchdog understands it, there are essentially three

1 components to the FRUB materials produced by the Department to Mercury: a 2004 referral  
2 memorandum with exhibits; a 2000 Addendum to a FRUB Report, dated October 20, 2000; and the  
3 underlying FRUB Report, dated July 2, 1998. Mercury may be arguing that only the 2004 FRUB  
4 referral memorandum and materials should be excluded. Consumer Watchdog cannot tell. However,  
5 Consumer Watchdog believes, based on its general understanding of the type of documents at issue, that  
6 all of the FRUB materials are admissible.

7 Mercury contends that “mere allegations” of wrongdoing included in the FRUB materials are  
8 inadmissible “unadjudicated contentions” that are irrelevant to these proceedings. The FRUB materials  
9 – which include official reports that were generated as the result of detailed investigations by department  
10 employees, reviewed by high level supervisors, and “officially filed” only after Mercury was provided  
11 an opportunity to clarify its position and advise the department whether the report contains any errors or  
12 omissions – are plainly the types of evidence “responsible persons are accustomed to rely on in the  
13 conduct of serious affairs,” and thus admissible here. (Govt. Code § 11513(c).)

14 Moreover, Consumer Watchdog is aware that, at least with respect to the FRUB Report from  
15 1998 and the 2000 Addendum thereto, substantial portions of those documents discuss Mercury’s  
16 “Method of Doing Business” by permitting the undisclosed so-called “broker fees” that are at the heart  
17 of this case. This “mere allegation” is clearly relevant not only to whether Mercury’s conduct was  
18 knowing and willful – in order to determine the appropriate penalty for Mercury’s conduct – it is also  
19 directly relevant to the “estoppel defense” Mercury makes in its Motion for Summary Judgment or  
20 Adjudication. The Report and Addendum (and, presumably, some of the other FRUB materials),  
21 demonstrate that the Department considered Mercury’s broker fee practice to be impermissible.  
22 Therefore, those FRUB materials will be admissible not only to show that Mercury violated the law, but  
23 to rebut Mercury’s estoppel claim that it relied on representations by the Department that its broker fee  
24 practices were legal.

25 Mercury’s argument that the FRUB materials are inadmissible because “many of the issues  
26 raised in the FRUB report were later resolved by way of settlement” (MIL 8:20) is inapposite. Probative  
27 evidence as to Mercury’s knowledge and willfulness does not become inadmissible simply because  
28 Mercury agreed to resolve some unknown number of unspecified issues identified by the Department in

1 the FRUB materials at some later date.<sup>1</sup>

2 Mercury's arguments that the unspecified FRUB materials contain "inadmissible hearsay" fare  
3 no better. That is because, as noted above, the FRUB materials may be introduced not for the truth of  
4 the matters asserted (*i.e.*, that Mercury broke the law), but to demonstrate Mercury's knowledge that the  
5 Department did *not* acquiesce in Mercury's conduct and that Mercury willfully continued its practice  
6 nonetheless. Moreover, all or part of the FRUB materials may fall within any number of hearsay  
7 exemptions (*e.g.*, party admission, official documents). Without knowing the exact contents of the  
8 specific FRUB materials Mercury objects to, Consumer Watch cannot demonstrate why such material  
9 may fall within a hearsay exemption.<sup>2</sup> Finally, even if the FRUB materials are submitted for a hearsay  
10 purpose during the proceedings (that is, submitted to prove the truth of the matter asserted) and they do  
11 not fall within a hearsay exemption, the FRUB materials are still admissible in this administrative  
12 proceeding "for the purpose of supplementing or explaining other evidence." (Govt Code § 11513.)

13 **C. Evidence Is Freely Admissible to Prove Mercury's Willfulness, Regardless of**  
14 **Whether it Relates to the Period Before, During or After the 1996-2003 Violation**  
15 **Period Covered by the Notice of Noncompliance.**

16 Mercury's arguments based on Evidence Code sections 1101 are likewise wide of the mark.  
17 Section 1101(a) prohibits the introduction of evidence of character or trait "when offered to prove his or  
18 her conduct on a specified occasion." Section 1101(b) makes clear that section 1101(a) means what it

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19 <sup>1</sup> Not only is Mercury's motion as to "previously settled matters" entirely hypothetical, as it does not  
20 identify any specific "matter," it is also fanciful. Mercury states that it "is currently unaware of any  
21 fully adjudicated matter that could possibly be probative of any matter in dispute in this action or may be  
22 attempted to be offered into evidence against them in the instant hearing." (MIL at 7:7-9.) Mercury's  
23 statement overlooks the Findings of Fact and Conclusions of Law in *Krumme v. Mercury*, which  
24 Mercury attached as Exhibit 1 to its Request for Official Notice in Support of Motion for Summary  
25 Judgment or Adjudication. If, as Consumer Watchdog advocates in its opposition to Mercury's  
26 summary judgment motion, the ALJ denies that motion, the *Krumme* Findings and Conclusions establish  
27 Mercury's violations of the rate statutes and Mercury's liability under section 1858.07 in this  
28 proceeding.

<sup>2</sup> For this reason, Consumer Watchdog cannot respond to Mercury's position that "the FRUB report"  
does not fall within the "official notice" hearsay exception because "the FRUB report" did not record an  
act at or near the time of the event. For example, if the specific document Mercury objects to is a report  
of a recently concluded investigation – that *is* a document created "at or near the time" of the conclusion  
of the investigation.

1 says; the exclusion applies only to proving that a party acted in a certain way on a given occasion, and  
2 not to proving state of mind:

3       Nothing in this section prohibits the admission of evidence that a person committed a  
4 crime, civil wrong, or other act when relevant to prove some fact (such as motive,  
5 opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or  
6 accident...) other than his or her disposition to commit such an act.

7       Mercury acknowledges this limitation, arguing that, "It is not easy - if not impossible - to  
8 conceive of a situation where evidence that prior civil wrongs by Mercury could be used to establish that  
9 Mercury planned, prepared, or had the opportunity to violate Sections 790.03 (a)-(b) and 1861.05(a)." (MIL at 9:24-26.) Mercury misconceives what the FRUB materials and other evidence of Mercury's  
10 pre-July 1996 and post-April 2003 conduct will be offered to prove. It will not be offered to prove  
11 violations of sections 1861.01(c) and 1861.05(a); it will be offered to prove Mercury's *willfulness* in  
12 committing these violations.

13       In this noncompliance action, the Department seeks to impose penalties under Insurance Code  
14 section 1858.07(a). "Any person who uses any rate, rating plan, or rating system in violation of this  
15 chapter is liable to the state for a civil penalty not to exceed five thousand dollars (\$5,000) for each act,  
16 or, *if the act or practice was willful*, a civil penalty not to exceed ten thousand dollars (\$10,000) for each  
17 act..." (Emphasis added.)

18       There is scarcely a triable issue — Consumer Watchdog submits there is none — that Mercury  
19 used an illegal rate and is subject to penalty under section 1858.07(a). As Consumer Watchdog's  
20 opposition to Mercury's Motion for Summary Judgment makes clear, Mercury is collaterally estopped to  
21 contest the findings in *Krumme v. Mercury*. The Superior Court found that during the period 1996 to  
22 2003, Mercury harbored a system of *de facto* agents who systematically charged illegal fees. (It is a  
23 misnomer to call these "broker fees" because these producers were agents, not brokers.) As Consumer  
24 Watchdog also establishes in its summary judgment opposition, illegal agent fees constitute part of the  
25 rate, and therefore violate the pre-market rate approval requirements of section 1861.01(c) and the anti-  
26 discrimination ban of section 1861.05(a).

27       There is no reason to "bifurcate" liability. Collateral estoppel moots all triable issues as to  
28 Mercury's violations. Insofar as the Department's illegal rate claim is concerned, the sole triable issue is

1 the amount of the penalty.

2 The key evidence in aggravation of the penalty amount is the proof that Mercury's violations  
3 were not innocent or inadvertent, but willful. Consumer Watchdog stands ready to make that proof at  
4 trial. Because the Department has alleged willful violations, the question of Mercury's willfulness falls  
5 squarely within the "scope of the pleading." (First Amended Notice of Noncompliance ¶¶ 3-5.) This  
6 proof extends to Mercury's conduct and practices before, during, and after the 1996-2003 violation  
7 period. As the following discussion will establish, the controlling regulation does not confine proof of  
8 willfulness to the 1996-2003 violation period. The regulation expressly invites proof of *prior*  
9 knowledge and *continuing* disregard, both of which are present in this case.

10 The Department's Regulations for Enforcement Actions and Penalties state that "In determining  
11 that an enforcement action should be pursued *and in selecting the appropriate amount of the penalty*  
12 from the applicable range of penalty amounts that could be assessed, the Department shall consider ...

13 (d) The knowledge or willfulness of the non-compliant act.

14 (1) Violations that may be considered willful or knowingly committed include but are not  
15 limited to the following:

16 (A) *When the insurer is aware at the time of the act that it is violating the law;*

17 (B) When the insurer reasonably should have known of the act's unlawfulness when the  
18 non-compliant act occurred;

19 (C) *When the insurer has promulgated express policies or procedures that are in*  
20 *noncompliance with the law;*

21 (D) When the insurer has failed to adopt, communicate and implement reasonable  
22 standards for consistent, compliant activity; or

23 (E) *When the insurer has failed to take effective remedial measures when a violation was*  
24 *identified or discovered."*

25 (10 C.C.R. § 2591.3(d)(1) (emphasis added).)

26 The regulatory willfulness standard renders prior acts and practices relevant to prove Mercury's  
27 knowing or reckless disregard of the violations at the time it was committing them. The scope of this  
28 action therefore includes proof that even before the 1996-2003 period, Mercury knew that it had a sham

1 system, that its “brokers” were really agents, and that it was violating the rate law. (Section  
2 2591.3(d)(1)(A).)

3 Section 2591.3(d)(1)(C) also brings within the scope of this action proof that Mercury’s policies  
4 and procedures — which were longstanding and ingrained well before the inception of the 1996-2003  
5 time period — were illegal.

6 The regulation also authorizes proof of willfulness post-dating the 1996-2003 time period.  
7 Subsection (E) allows proof of Mercury’s failure to cure the violations until long after the Department  
8 identified them to Mercury, they were established through trial in *Krumme v. Mercury*, and an injunction  
9 against them rendered. Thus, Mercury’s stubborn maintenance of the illegal agency system long after  
10 the 2003 injunction was rendered is compelling evidence that its violations were willful and that a higher  
11 penalty should be imposed.

12 **III. CONCLUSION.**

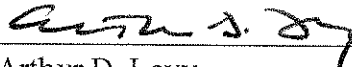
13 For all of the above reasons, Mercury’s motion should be denied.

14  
15 DATED: February 20, 2009

Respectfully submitted,

16 LEVY RAM & OLSON LLP  
17 Arthur D. Levy  
18 Erica L. Craven-Green

19 By:

  
20 Arthur D. Levy

21 CONSUMER WATCHDOG  
22 Harvey Rosenfield  
23 Pamela Pressley

24 LAW OFFICES OF NORMAN GOLDMAN  
Norman Goldman

25 Attorneys for CONSUMER WATCHDOG  
26  
27  
28



**PROOF OF SERVICE**

1 I, Ann Williams, state:

2 I am a citizen of the United States. My business address is 639 Front Street, Fourth Floor,  
3 San Francisco, CA 94111. I am employed in the City and County of San Francisco where this  
4 mailing occurs. I am over the age of eighteen years and not a party to this action. On the date set  
5 forth below, I served the foregoing documents described as:

6 **INTERVENOR CONSUMER WATCHDOG'S**  
7 **OPPOSITION TO RESPONDENTS' MOTION IN LIMINE**

8 on the following person(s) in this action addressed as follows:

9 Steven H. Weinstein, Esq.  
10 Spencer Kook, Esq.  
11 Barger & Wolen LLP  
12 633 West Fifth Street  
13 Forty-seventh Floor  
14 Los Angeles, CA 90071-2043  
15 Fax: 213-614-7399  
16 *Attorneys for Respondents*

Pamela M. Pressley  
Foundation for Taxpayer and Consumer  
Rights  
1750 Ocean Park Blvd., Suite 200  
Santa Monica, CA 90405  
Fax: 310-392-8874

13 Jon A. Tomashoff, CPCU  
14 Senior Staff Counsel  
15 Department of Insurance  
16 Legal Division, Compliance Bureau  
17 45 Fremont Street, 23<sup>rd</sup> Floor  
San Francisco, CA 94105  
Fax: 415-904-5490  
*Attorney for Department of Insurance*

Norman M. Goldman  
Law Offices of Norman Goldman  
3575 Cahuenga Blvd. West, Suite 500  
Los Angeles, CA 90068  
Fax: 323-850-0517  
*Attorneys for Intervenor CONSUMER WATCHDOG*

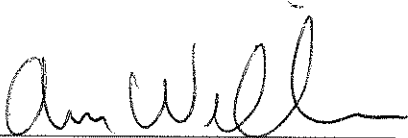
18 X **BY FIRST CLASS MAIL** - I am readily familiar with my firm's practice for collection  
19 and processing of correspondence for mailing with the United States Postal Service, to-  
20 wit, that correspondence will be deposited with the United States Postal Service this  
same day in the ordinary course of business. I sealed said envelope and placed it for  
collection and mailing this date, following ordinary business practices.

21  **BY PERSONAL SERVICE** - I caused such envelope(s) to be delivered by hand this date to  
the offices of the addressee(s).

22  **BY OVERNIGHT MAIL** - I caused such envelope to be delivered by a commercial carrier  
23 service for overnight delivery to the office(s) of the addressee(s).

24  **BY EMAIL** - I caused such document to be delivered by electronic mail to the above  
addressees.

25 I declare under penalty of perjury under the laws of the State of California that the foregoing  
26 is true and correct and that this declaration was executed on February 20, 2009, at San Francisco,  
27 California.

28   
Ann Williams